

**AN EPITAPH FOR ISIS?
THE IDEA OF A CALIPHATE AND THE WESTPHALIAN ORDER**

Robert J. Delahunty*

TABLE OF CONTENTS

ABSTRACT.....	2
I. INTRODUCTION.....	2
II. TWO QUESTIONS.....	11
A. The Westphalian Order and the Great Separation.....	13
B. The Contingency of the Westphalian Order.....	16
C. Earlier Challenges: Two Revolutionary States.....	17
1. The Russian Revolution.....	17
2. The Iranian Revolution.....	19
III. OUTLINE.....	22
A. States.....	23
B. Para-States.....	24
C. Major Islamic States.....	26
IV. ISLAM AND ISLAMISM.....	27
A. What is Islam?.....	27
B. What Is Islamism?.....	31
V. HOW THE PROCLAMATION OF THE ISIS CALIPHATE CHALLENGED THE WESTPHALIAN ORDER.....	35
A. The “Classical” Islamic Vision of the World Order.....	38
B. Differing Evaluations of the Challenge of the ISIS Caliphate.....	42
VI. THE ORIGINS AND MEANING OF THE ISLAMIC CALIPHATE.....	44
A. Al-Baghdadi’s Accession Speech.....	48
B. Other Caliphal Models.....	50
VII. WOULD AN ISLAMIST CALIPHATE BE A THREAT TO THE WESTPHALIAN ORDER?	53
A. <i>De Jure</i> States, <i>De Facto</i> States and Para-States.....	54
1. Warfare and Welfare in the ISIS Caliphate.....	56
2. Why the Westphalian Order Could Not Have Recognized the ISIS Caliphate as <i>De Jure</i>	60
3. The ISIS Caliphate as a <i>De Facto</i> State.....	64
4. The ISIS Caliphate as a “‘State’ Within a State”.....	65
B. Establishing a “‘Great Power’” Caliphate in an Existing Muslim State.....	66

ABSTRACT

The project of restoring the Islamic caliphate has attracted considerable attention and caused both hope and anxiety ever since the Islamic State of Iraq and Syria (ISIS) proclaimed a caliphate in 2014. The idea of a caliphate has a powerful attraction for many millions of the world's Muslims, including those who emphatically disapprove of ISIS, and is viewed as a remedy for the marginalization and humiliation that the Muslim world has endured at the hands of the West. Thus, although the military defeat of ISIS seems certain at this point, a widespread desire for a restored caliphate would undoubtedly persist.

On the other hand, prominent Western political leaders, diplomats, and scholars have expressed severe forebodings about such a restoration. Among other causes for such concern is the fear that a restored caliphate would challenge, and might eventually overturn, the Westphalian system of state sovereignty, which is the legal basis of the current world order. From this perspective, a restored caliphate could pose a revolutionary challenge to a state-centric system of international law. Indeed, it might pose a more substantial threat to the Westphalian system than those that the Soviet Union or the Islamic Republic of Iran presented in their early phases.

This paper explores whether the project of restoring a caliphate, if successful, would indeed have such a destabilizing effect. First, it considers the origins and self-understanding of the ISIS caliphate, examines ISIS's historiographic narrative of Islamic expansion, greatness, decline, and eventual renewal, and identifies structural reasons for ISIS's probable failure. Then, it examines the possibility of what has been called a "Great Power" caliphate, *i.e.*, a restored caliphate in a major Muslim state, such as Turkey, Egypt, Pakistan, or Indonesia. Here too, it is argued, the Westphalian order would probably prove to be resilient enough to withstand a challenge.

The restorationist project of radical Islam suffers from a serious, perhaps even incurable, flaw. That flaw arises from the project's inherent dependence on a meta-historical narrative of the rise, decline, and re-emergence of Islam. The restoration of Islam, which the project promises to bring about, assumes a geopolitical environment similar to that in which Islam arose. That assumption is false. Worse still, in order to provide a political and economic model that could compellingly attract large numbers of Muslims throughout the Islamic world, the ISIS caliphate (or one like it) would have to accommodate, and even increasingly assimilate into, the Westphalian order. By assimilating to the Westphalian order, the caliphate would no longer threaten that order. A similar dilemma appears to confront the project of a Great Power caliphate as well.

I. INTRODUCTION

On June 29, 2014, the Islamic State of Iraq and Syria (ISIS) announced that it had established a "caliphate" with a population of some 1.2 million people

over a territory approximately the size of Belgium.¹ The news was reported in the first issue of *Dabiq*, a stylishly produced publication that displayed ISIS's sophisticated use of contemporary media and communication.² Soon after the caliphate had been offered to him, the new Caliph, abu-Bakr al-Baghdadi,³ in a carefully staged, filmed, and publicized ceremony, delivered the Friday sermon in the Nuri Mosque of Mosul, where he acceded to the office.⁴ Al-Baghdadi was dressed in a black robe and turban, perhaps to signify his descent from Muhammed or perhaps in emulation of the black turban that the Prophet wore when conquering Mecca.⁵

The proclamation of the new caliphate triggered an outburst of anger and dismay in the West. President Obama, who had earlier dismissed ISIS as a "JV team,"⁶ said that the United States would not tolerate the purported caliphate's claims.⁷ Thereafter, the United States ramped up its military activities against ISIS

* LeJeune Chair and Professor of Law, University of St. Thomas School of Law, Minneapolis, Minnesota. I would like to thank Afsheen John Radsan and John C. Yoo for their comments; my faculty colleagues, especially Rob Kahn, for their suggestions about a draft of this paper presented on October 24, 2016; and my Research Assistant Andrew Carballo, for his hard work.

¹ Chelsea J. Carter, *Iraq Developments: ISIS establishes 'caliphate,' changes name*, CNN (June 30, 2014 12:00 AM), <http://www.cnn.com/2014/06/29/world/meast/iraq-developments-roundup/>. On another estimate, one year after the declaration of the caliphate, ISIS controlled a territory the size of the United Kingdom and a population of over five million. FAWAZ A. GERGES, *ISIS: A HISTORY* 226 (2016).

² Islamic State of Iraq and the Levant, *The Return of the Khilafah*, 1 DABIQ 1, 7–9 (July 5, 2014), <http://www.ieproject.org/projects/dabiq1.pdf>. The name "*Dabiq*" refers to a Syrian town that has been invested with apocalyptic significance. GRAEME WOOD, *THE WAY OF STRANGERS: ENCOUNTERS WITH THE ISLAMIC STATE* 62 (2017).

³ "Al-Baghdadi" is a *nom de guerre*—an assumed name for combat purposes. His real name was Ibrahim bin Awwad bin Ibrahim al-Badri al-Qurayshi. See GERGES, *supra* note 1, at 130–43; ABDEL BARI ATWAN, *ISLAMIC STATE: THE DIGITAL CALIPHATE* 110–21 (2015).

⁴ Jihadist News, *Abu Bakr al-Baghdadi Appears in Video, Delivers Sermon in Mosul*, SITE INTELLIGENCE GROUP (July 5, 2014), <https://news.siteintelgroup.com/Jihadist-News/abu-bakr-al-baghdadi-appears-in-video-delivers-sermon-in-mosul.html>.

⁵ WILLIAM MCCANTS, *THE ISIS APOCALYPSE: THE HISTORY, STRATEGY, AND DOOMSDAY VISION OF THE ISLAMIC STATE* 123 (2015). Al-Baghdadi may even have used a "cleaning twig" before delivering his sermon in emulation of Muhammed's reported practice. See ATWAN, *supra* note 3, at 111; Charles R. Lister, *The Syrian Jihad: Al-Qaeda, the Islamic State and the Evolution of an Insurgency* 240 (2015).

⁶ Shreeya Sinha, *Obama's Evolution on ISIS*, N.Y. TIMES (June 9, 2015), <http://www.nytimes.com/interactive/2015/06/09/world/middleeast/obama-isis-strategy.html>.

⁷ Thomas L. Friedman, *Obama on the World: President Obama Talks to Thomas L. Friedman About Iraq, Putin and Israel*, N.Y. TIMES (Aug. 8, 2014), <http://www.nytimes.com/2014/08/09/opinion/president-obama-thomas-l-friedman-iraq-and-world-affairs.html?action=click&contentCollection=Middle%20East&module=RelatedCoverage®ion=Marginalia&pgtype=article>; Roberta Rampton, *Obama says won't let Islamic militants create caliphate: NYT*, REUTERS (Aug. 8, 2014) <http://www.reuters.com/>

or, as it now called itself, the “Islamic State” (IS).⁸ On August 7, 2014,⁹ President Obama told the nation that he had resumed US military operations in Iraq in an effort to halt ISIS’s advance on the Iraqi city of Erbil (where there was a US diplomatic and consular presence) and to rescue several thousand Yazidis¹⁰ that ISIS forces had trapped on a mountain without food or water.¹¹ Subsequently, the United States struck cities in Syria as well as in Iraq.¹²

article/us-iraq-crisis-obama-interview-idUSKBN0G905E20140809 (quoting former President Obama saying “We’re not going to let them create some caliphate through Syria and Iraq.”).

⁸ See generally ATWAN, *supra* note 3; Cole Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State*, CENTER FOR MIDDLE EAST POLICY AT BROOKINGS (Mar. 2015), <https://www.brookings.edu/wp-content/uploads/2016/06/The-ideology-of-the-Islamic-State.pdf>; PATRICK COCKBURN, *THE RISE OF ISLAMIC STATE: ISIS AND THE NEW SUNNI REVOLUTION* (2014); GERGES, *supra* note 1; Ahmed S. Hashim, *The Islamic State: From Al-Qaeda Affiliate to Caliphate*, 21 MIDDLE EAST POL’Y 69 (Winter 2014); Robert Manne, *The Mind of the Islamic State* (2016); Loretta Napoleoni, *ISIS: The Terror Nation* (2014); McCANTS, *supra* note 5; OLIVIER ROY, *JIHAD AND DEATH: THE GLOBAL APPEAL OF ISLAMIC STATE* (2017); MARK SILINSKY, *JIHAD AND THE WEST: BLACK FLAG OVER BABYLON* (2016); Philippe-Joseph Salazar, *Words Are Weapons: Inside ISIS’s Rhetoric of Terror* (Doma Khazeni trans. 2017). See also SHADI HAMID, *ISLAMIC EXCEPTIONALISM: HOW THE STRUGGLE OVER ISLAM IS RESHAPING THE WORLD* ch. 7 (2016); PANKAJ MISHRA, *AGE OF ANGER: A HISTORY OF THE PRESENT* ch. 4 (2017). In addition to such scholarship, the UN Secretary General issues periodical reports that monitor ISIS and its activities, including those of its affiliates. See U.N. Secretary-General, *Fifth Rep. on the Threat Posed by ISIL (Da’esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat*, U.N. Doc. S/2017/467 (May 31, 2017); U.N. Secretary-General, *Fourth Rep. on the Threat Posed by ISIL (Da’esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat*, U.N. Doc. S/2017/97 (Feb. 2, 2017); *Threat Posed by ISIL (Da’esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat*, Rep. of the S.C. U.N. Doc. S/2016/501 (May 31, 2016).

⁹ Press Release, The White House Office of the Press Secretary, President of the United States (Aug. 7, 2014) (on file at <https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president>).

¹⁰ The Yazidis or Yezidis are a Kurdish religious community of about 200,000 to 300,000 that ISIS considers heretical. BIRGIL ACIKYILDIZ, *THE YEZIDIS: THE HISTORY OF A COMMUNITY, CULTURE AND RELIGION* (2014). A UN panel has found that ISIS has committed and is committing genocide against the Yazidis. Nick Cumming-Bruce, *ISIS Committed Genocide Against Yazidis in Syria and Iraq, U.N. Panel Says*, N.Y. TIMES (June 16, 2016), http://www.nytimes.com/2016/06/17/world/middleeast/isis-genocide-yazidi-un.html?_r=0.

¹¹ Barack Obama, 44th President of the United States, Statement by the President (Aug. 7, 2014) (transcript available at <https://www.whitehouse.gov/the-press-office/2014/08/07/statement-president>).

¹² *Id.*; Helene Cooper et al., *Obama Allows Limited Airstrikes on ISIS*, N.Y. TIMES (Aug. 7, 2014), <https://www.nytimes.com/2014/08/08/world/middleeast/obama-weighs-military-strikes-to-aid-trapped-iraqis-officials-say.html>.

The announcement of an ISIS caliphate seems to have prompted the United States to intervene far more intensively in the Syrian Civil War, something that neither the use of chemical weapons¹³ in that war (which the UN Secretary General had denounced in 2013 as a war crime¹⁴) nor ISIS's many previous atrocities¹⁵ had led it to do.¹⁶ Coupled with ISIS's startling victories earlier in 2014 over the Iraqi military, the proclamation of the caliphate also seems to have been cause for the re-

¹³ United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013, Rep. of S.C., U.N. Doc. A/67/997 (Sept. 16, 2013) [hereinafter UN Mission to Investigate Allegations of the Use of Chemical Weapons]; David Martin, *The Chemical Weapons Convention: Hollow Idealism or Capable Mechanism? The Syrian Intervention as a Test Case*, 37 LOY. L.A. INT'L & COMP. L. REV. 31, 51–53 (2015). In 2012, President Obama was understood to have implied that the United States would intervene militarily in the Syrian conflict, drawing a “red line” on the use of chemical weapons. Glenn Kessler, *President Obama and the 'red line' on Syria's chemical weapons*, WASH. POST (Sept. 6, 2013), <https://www.washingtonpost.com/news/fact-checker/wp/2013/09/06/president-obama-and-the-red-line-on-syrias-chemical-weapons/>. Thereafter, White House staff amplified but did not retract his comments. *Id.*; John R. Crook, *Contemporary Practice of United States Relating to International Law*, 107 AM. J. INT'L L. 900 (2013). After Syrian President Assad's troops appeared to have launched a chemical attack on the inhabitants of Ghouta in August 2013, however, the President (in his critics' view) “blinked,” and the Administration accepted a Russian-brokered agreement with the Assad regime. Eric Sterner, *Dictators and Deterrence: Syria's Assad, Chemical Weapons, and the Threat of U.S. Military Action*, 33 Comp. Strategy 407, 408–13 (2014); ATWAN, *supra* note 3, at 96; It was in any case debatable whether international law would have supported a US-led military intervention because of Syria's alleged conduct. See generally Jillian Blake & Aqsa Mahmud, *A Legal “Red Line”? Syria and the Use of Chemical Weapons in Civil Conflict*, 61 UCLA L. REV. DISC. 244 (2013). By the end of the Obama Administration, it appeared that Russia, along with the Assad régime that it was supporting, was deploying chemical weapons against Syrian civilians. *British ambassador to UN accuses Russia of war crimes in Syria*, SKY NEWS (Sept. 26, 2016), <http://news.sky.com/story/rebels-say-push-for-peace-in-syria-is-futile-as-russian-backed-bombing-intensifies-10592957>.

¹⁴ UN Mission to Investigate Allegations of the Use of Chemical Weapons, *supra* note 13.

¹⁵ ISIS began streaming grisly images of its atrocities in May, 2014. ATWAN, *supra* note 3, at 125. Non-governmental organizations like Amnesty International also documented ISIS's atrocities well before the caliphate was proclaimed. Amnesty International, *Rule of Fear: ISIS Abuses in Detention in Northern Syria*, MDE 24/063/2013 (Dec. 19, 2013), <http://reliefweb.int/sites/reliefweb.int/files/resources/Rule%20of%20Fear%20ISIS%20abuses%20in%20detention%20in%20northern%20Syria.pdf>.

¹⁶ Barack Obama, 44th President of the United States, Commencement Address at West Point (May 28, 2014) (transcript available at <http://www.nytimes.com/2014/05/29/us/politics/transcript-of-president-obamas-commencement-address-at-west-point.html>). This speech was roughly a month before ISIS announced the caliphate, and the President defended his decision not to intervene militarily in the Syrian Civil War. *Id.* (“As president, I made a decision that we should not put American troops into the middle of this increasingly sectarian civil war, and I believe that is the right decision.”).

introduction of US armed forces into Iraq—something the Obama Administration had been plainly reluctant to do.¹⁷

In the period after the announcement of the caliphate, the international community mobilized powerfully against it—owing, in large part, to the ISIS caliphate’s harrowing record of atrocities, including genocide¹⁸ and other savageries.¹⁹ On August 12, 2014, the UN Security Council, invoking its Chapter VII authority, unanimously adopted Resolution 2170 (2014), condemning ISIS and other extremist groups and placing sanctions on named individuals associated with them. More significantly, on November 20, 2015, the UN Security Council, in Resolution 2249,²⁰ denounced ISIS as “a global and unprecedented threat to international peace and security.”²¹ In operative paragraph 5 of Resolution 2249, the Council:

[c]alls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the

¹⁷ Paul Williams, *President Obama’s Approach to the Middle East and North Africa: Strategic Absence*, 48 CASE W. RES. J. INT’L L. 83 (2016).

¹⁸ “*They Came to Destroy*”: *ISIS Crimes Against the Yazidis*, U.N. Human Right’s Council, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016). The panel found that ISIS forces had committed and were continuing to commit genocide, crimes against humanity and war crimes against the Yazidi community in Syria and Iraq. *Id.*

¹⁹ See generally Abu Bakr Naji, *The Management of Savagery: The Most Critical Stage through which the Umma Will Pass* (2004) (translated by William McCants), <https://azelin.files.wordpress.com/2010/08/abu-bakr-naji-the-management-of-savagery-the-most-critical-stage-through-which-the-umma-will-pass.pdf>; ATWAN, *supra* note 3, at 159–63; Manne, *supra* note 8, at 129–39; Jeff Sole, “*Management of Savagery*”—*A Model for Establishing the Islamic State*, Mackenzie Inst. (June 2, 2016), <http://mackenzieinstitute.com/management-of-savagery-a-model-for-establishing-the-islamic-state/>.

²⁰ S.C. Res. 2249 (Nov. 20, 2015). Earlier, governmental bodies including the European Parliament, the Council of Europe, the UK Parliament, the US Congress, and the US State Department, had condemned ISIS for genocidal acts against Yazids and Christians. Joint Motion for a Resolution, EUR. PARL. DOC. (RC\1085712) (2016); Patrick Wintour, *MPs unanimously declare Yazidis and Christians victims of ISIS genocide*, GUARDIAN (Apr. 20, 2016), <http://www.theguardian.com/politics/2016/apr/20/mps-unanimously-declare-yazidis-victims-of-isis-genocide>. ISIS has been open and unapologetic about its genocidal intentions towards Shi’ites, Alawites, Yazids, Druze, Christians and Jews. See Manne, *supra* note 8, at 168.

²¹ S.C. Res. 2249 (Nov. 20, 2015) (“[B]y its violent extremist ideology, its terrorist acts, its continued gross systematic and widespread attacks directed against civilians, abuses of human rights and violations of international humanitarian law, including those driven on religious or ethnic ground, its eradication of cultural heritage and trafficking of cultural property, but also its control over significant parts and natural resources across Iraq and Syria and its recruitment and training of foreign terrorist fighters whose threat affects all regions and Member States, even those far from conflict zones, the Islamic State in Iraq and the Levant (ISIL, also known as Da’esh), constitutes a global and unprecedented threat to international peace and security.”).

territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh.

That language arguably provided US, Iraqi, and other forces with legal authority to engage in military action against ISIS in Syrian territory, even without the consent (and in the face of disapproval) of the Syrian government.²² On December 17, 2015, the Security Council expanded its existing sanctions against ISIS by adopting Resolution 2253 (2015), redoubling its efforts to suppress terrorist financing.

These UN actions were matched by military activity in the air and on the ground. As this paper was being finalized, the combined efforts of the US, several of its NATO allies and other allies, the Iraqi military, and Kurdish forces seemed to have brought the ISIS caliphate close to extinction.²³ An allied offensive to retake the Iraqi city of Mosul, which ISIS captured early in June 2014, succeeded in July 2017.²⁴ There are reports that Russian forces may have killed caliph al-Baghdadi in June 2017.²⁵ Other senior ISIS figures, including Abu Muhammed al-Adnani, who in 2014 had announced the caliphate, are known to have been killed.²⁶ ISIS itself seemed to acknowledge its downward spiral.²⁷ At this point, one might readily have agreed with Aszal Ashraf, an *al-Jazeera* writer who dismissed the ISIS caliphate as the work of “a theo-pop boy band.”²⁸

²² Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE WESTERN RES. J. INT'L L. 16, 64–65 (2016). The dilution of the norms of non-intervention and the equality of sovereign states, as evidenced in Resolution 2249, is a consequence of the combination of fragile peripheral states and jihadist terrorism. See Andrew Phillips, *The Protestant Ethic and the Spirit Of Jihadism – Transnational Religious Insurgencies and the Transformation of International Orders*, 36 REV. INT'L STUD. 257, 259 (2010).

²³ *End of ISIS Approaching as Caliphate Loses Money and Land*, SYRIAN OBSERVATORY HUM. RTS. (July 10, 2017), <http://www.syriaahr.com/en/?p=69753>.

²⁴ Tim Arango & Michael R. Gordon, *Iraqi Prime Minister Arrives in Mosul to Declare Victory over ISIS*, N.Y. TIMES (July 9, 2017), <https://www.nytimes.com/2017/07/09/world/middleeast/mosul-isis-liberated.html>.

²⁵ Andrew E. Kramer & Eric Schmitt, *Russian Military Says It Might Have Killed ISIS Leader*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/world/middleeast/baghdadi-russia-isis.html>.

²⁶ Lizzie Dearden, *ISIS Dealt 'Major Blow' by Death of Spokesman Abu Muhammad al-Adnani in Air Strike Claimed by US and Russia*, INDEPENDENT (Aug. 31, 2016), <http://www.independent.co.uk/news/world/middle-east/isis-abu-muhammad-al-adnani-killed-dead-us-air-strike-syria-intelligence-aleppo-victory-impact-a7218061.html>.

²⁷ See Aron Lund, *Why Islamic State is Losing, and Why It Still Hopes to Win*, CENTURY FOUND (June 17, 2016), <https://tcf.org/content/report/islamic-state-losing-still-hopes-win/>.

²⁸ Afzal Ashraf, *The Myth of the Caliphate and the Islamic State*, ALJAZEERA (July 10, 2014), <http://www.aljazeera.com/indepth/opinion/2014/07/myth-caliphate-islamic-state-20147912425476113.html>.

Nonetheless, the ISIS caliphate, even if short-lived, warrants careful study by international lawyers. The idea of reviving the caliphate is common to much of political Islam, and even the destruction of the ISIS caliphate²⁹ would not extinguish the idea.³⁰ Indeed, even in a weakened condition, ISIS commanded a significant amount of support in the Arab world.³¹ As *Washington Post* columnist David Ignatius wrote, “[e]ven if ISIS is crushed, this idea of ‘our caliphate’ is likely to persist, and return.”³²

Writing even before the dramatic events of the attempted 2016 military coup in Turkey, Michael Rubin of the American Enterprise Institute raised the question of whether Turkish President Recep Tayyip Erdogan was entertaining the long-range goal of re-establishing a caliphate, perhaps to mark the centenary of Turkey’s creation in 1923.³³ Erdogan is, of course, a prominent Islamist.³⁴ The extent and severity of Erdogan’s measures to reshape Turkey in an Islamist image after the attempted coup failed can only lend support to Rubin’s hypothesis. And within the Islamic world, the most prominent cleric in the Muslim Brotherhood, Sheik Yousef Qaradawi, has declared that if any living Muslim deserves to be recognized as caliph, it is not al-Baghdadi but Erdogan.³⁵

Even if Turkey does not take that path, other Islamist governments or movements might do so. A caliphate might conceivably emerge in another major Muslim state and thereafter form the nucleus of an “Islamicate great power,” as the

²⁹ Even after ISIS is defeated, some experts predict that it will regroup or assume a new form, as it has done in the recent past. Ali H. Soufan, *Can You Kill the Islamic State?* N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/opinion/isis-abu-bakr-al-baghdadi.html>; William McCants & Craig Whiteside, *The Islamic State’s coming rural revival*, BROOKINGS INSTITUTE (Oct. 25, 2016), <https://www.brookings.edu/blog/markaz/2016/10/25/the-islamic-states-coming-rural-revival/>.

³⁰ Soufan, *supra* note 29.

³¹ Rami G. Khouri, *9/11 then and now: Terror, militarism, war and fear*, AL JAZEERA (Sept. 11, 2016), <http://www.aljazeera.com/indepth/opinion/2016/09/911-terror-militarism-war-fear-160911055050615.html> (“[A]ccording to respected local and international pollsters, five to eight percent of the populations in the Arab world express favourable views of al-Qaeda or ISIL – this reaches 15 percent in some cases.”); SILINSKY, *supra* note 8, at 24.

³² David Ignatius, *How ISIS Spread in the Middle East: And how to stop it*, ATLANTIC (Oct. 29, 2015), <http://www.theatlantic.com/international/archive/2015/10/how-isis-started-syria-iraq/412042/>. Furthermore, through its sophisticated use of the media, ISIS has created “a caliph archive on a grand scale” that could ensure the perpetuation of its vision. Salazar, *supra* note 8, at 201.

³³ Michael Rubin, *Is Erdogan’s End Goal a Caliphate?*, AELDEAS (Mar. 9, 2016), <http://www.aei.org/publication/is-erdogans-end-goal-a-caliphate/>.

³⁴ HAMID, *supra* note 8, at ch. 5 (discussing that it would by no means be impossible for a “secular” figure like Erdogan to become accepted as a caliph, and after the abolition of the Ottoman caliphate in 1924 by Mustapha Kemal, the leader of the new Turkey, there were calls for Kemal himself to be made caliph – and he might well have been accepted as one, had he been willing to take the role.); S. SAYYID, *A FUNDAMENTAL FEAR: EUROCENTRISM AND THE EMERGENCE OF ISLAMISM* 58–59 (3d ed. 2015).

³⁵ Shmuel Bar, *The Implications of the Caliphate*, 35 COMP. STRATEGY 1, 8 (2016) (noting that the Muslim Brotherhood is a large, Egyptian-based, Islamist movement).

British analyst S. Sayyid envisages.³⁶ The head of the Egyptian Muslim Brotherhood, Muhammed Badie, has stated that the goals of his party included the re-establishment of the caliphate and the *sharia*.³⁷ An Islamist movement based in Pakistan, the *Mohajirun*, has called for the formation of a caliphate in that country on the grounds that Pakistan is a nuclear-armed state whose transformation into a caliphate would be a force-multiplier.³⁸ The Australian Attorney General, George Brandis, has spoken of the danger that ISIS might seek to establish a “distant caliphate” in Indonesia.³⁹ After the announcement of the ISIS caliphate, al-Qaeda intimated that the late Taliban leader Mullah Omar was in fact the rightful caliph.⁴⁰ ISIS-affiliated states known as “statelets”—three of which are in Libya—or Islamist movements elsewhere such as Boko Haram in Nigeria might proclaim caliphates.⁴¹ The ISIS caliphate itself might also retreat to a location like Afghanistan and form a “fallback caliphate” there.⁴²

Restoration of the caliphate is also a favored topic in contemporary political discourse in Muslim societies.⁴³ Polling data indicated even before the rise of ISIS that a clear majority of Muslims globally favored the restoration of a

³⁶ S. SAYYID, RECALLING THE CALIPHATE: DECOLONIZATION AND WORLD ORDER 121–32 (2014) (“[T]he caliphate [in such a form] does not need to represent the entirety of the *ummah* or the exclusivity of a solitary Islamic polity; but it does, at the minimum, need to have the capability of a great power.”). Sayyid believes that if a “great power” caliphate were to emerge, it would be from one of the world’s ten leading Muslim countries—Indonesia, Turkey, Iran, Saudi Arabia, Pakistan, Egypt, Bangladesh, Malaysia, Algeria, or Nigeria. *Id.* at 129.

³⁷ REZA PANKHURST, THE INEVITABLE CALIPHATE? A HISTORY OF THE STRUGGLE FOR GLOBAL ISLAMIC UNION, 1924 TO THE PRESENT 4 (2013).

³⁸ See Bar, *supra* note 35, at 4.

³⁹ Adam Brereton, *ISIS Seeking to Set Up 'Distant Caliphate' in Indonesia*, *George Brandis Warns*, *GUARDIAN* (Dec. 21, 2015), <https://www.theguardian.com/world/2015/dec/22/isis-seeking-to-set-up-distant-caliphate-in-indonesia-george-brandis-warns>.

⁴⁰ MCCANTS, *supra* note 5, at 129–30 (noting that the al-Qaeda stopped short of declaring Mullah Omar to be the caliph).

⁴¹ Karen Leigh et al., *Islamic State and Its Affiliates*, *WALL ST. J.*, <http://graphics.wsj.com/islamic-state-and-its-affiliates/> (last visited Oct. 12, 2017).

⁴² Lund, *supra* note 27, at 4.

⁴³ PANKHURST, *supra* note 37, at 1–2; Mahan Abedin, *Islam: the Caliphate debate-Interview with Reza Pankhurst*, *RELIGISCOPE* (July 29, 2014), http://religion.info/english/interviews/article_646.shtml#.V8nqDnITF9A.

caliphate.⁴⁴ ISIS's proclamation of its caliphate drew a surge of new recruits, not only from the Muslim world, but from Western states.⁴⁵

The project of restoration has broad and undeniable appeal to millions of Muslims, not limited to the Islamists among them.⁴⁶ Sayyid notes that the idea of a caliphate may not be an "administrative blueprint," but that it can exert compelling force as a "political vision":

The caliphate may well only be an ideal, but that is precisely what makes its articulation a political act. . . . The growing prominence of the idea of the caliphate among Muslims can be seen as a dawning recognition that the institution of the caliphate may provide an escape for Muslims from a world of constant subjugation and marginalization.⁴⁷

Other experts agree. The distinguished Iraqi scholar and former Cabinet member Ali Allawi writes:

The institution of the caliphate symbolizes the former world power of Islam. The yearning for its reinstatement has been a constant theme for radical Islamists, while the possibility of its regeneration has also created an opposite feeling—one of gnawing anxiety that, in spite of all the odds, the caliphate might re-emerge and assert itself as a vehicle for pan-Islamic unity. . . . The idea of the caliphate continues to exert a powerful pull on Muslims, and its restitution has been skillfully employed by

⁴⁴ Blake Hounshell, *Muslims and the Caliphate*, FOREIGN POL'Y (Dec. 30, 2009), <http://foreignpolicy.com/2009/12/30/muslims-and-the-caliphate/>; Inayat Bunglawala, *Bringing back the caliphate*, GUARDIAN (July 16, 2007), <https://www.theguardian.com/commentisfree/2007/jul/16/bringingbackthecaliphateA> ("[T]he caliphate clearly has an enormous emotional pull on Muslims and for understandable reasons as it aspires to break down national/tribal borders and unify Muslim countries under a just government as opposed to their current crop of mainly unelected and dishonest rulers."). Note, however, that other polls have found little support for the idea. *ICM poll of British Muslims*, UK POLLING REP. (Apr. 11, 2016), <http://ukpollingreport.co.uk/blog/archives/9666>.

⁴⁵ McCANTS, *supra* note 5, at 131.

⁴⁶ HUGH KENNEDY, *CALIPHATE: THE HISTORY OF AN IDEA* xvii (2016) ("There are those who see caliphate as a vehicle for imposing their particular and often very narrow view of Islam on the *umma*; there are others who see caliphate as a justification for aiming at world conquest; but there are equally those who see caliphate as simply providing a framework in which Muslims can strive to live a godly life and make up their own minds about the best way to do this."). The desire for a restored caliphate, even if considered unfeasible, has deep roots in Islamic sensibility. MONA HASSAN, *LONGING FOR THE LOST CALIPHATE: A TRANSREGIONAL HISTORY* 13–14 (2016). That an Islamist caliphate might bear little resemblance to the cosmopolitan caliphal empires of the past does not preclude the nostalgia to create one. CEMIL AYDIN, *THE IDEA OF THE MUSLIM WORLD: A GLOBAL INTELLECTUAL SURVEY* 233 (2017).

⁴⁷ SAYYID, *supra* note 36, at 117–18.

Islamists of all hues as a shorthand for the emergence of a Muslim super-state able to bestride the world stage. Even non-radical Islamists are attracted to the ideal, seeing in it the assertion of a global Islamic identity that must be reckoned with, as well as a way out of the perceived powerlessness and marginalization of Muslims.⁴⁸

Likewise, the Princeton scholar, Michael Cook, writes:

The sources of the appeal of such a restoration are not far to seek. The caliphate is a uniquely Islamic conception; it provides an emotionally powerful antidote to the sense of geopolitical deprivation arising from the current distribution of global power; it furthers a sense of Muslim unity across the globe; and it invokes a component of the religious tradition that is associated with a glorious past. And if the idea of creating a giant state out of nothing seems overly ambitious, the fact is that the Prophet and his successors did just that in the seventh century.⁴⁹

II. TWO QUESTIONS

This paper will analyze two related questions. The first is whether the ISIS caliphate, or a future caliphate that may be proclaimed by an “Islamist” government or group, presents a threat to the Westphalian order of international society and, specifically, to the state-centric system of international law regulating that order.⁵⁰

⁴⁸ ALI A. ALLAWI, *THE CRISIS OF ISLAMIC CIVILIZATION* 163 (2009).

⁴⁹ MICHAEL COOK, *ANCIENT RELIGIONS, MODERN POLITICS: THE ISLAMIC CASE IN COMPARATIVE PERSPECTIVE* 326 (2014).

⁵⁰ The origins of the “Westphalian” order are almost certainly not to be found in the actual Peace of Westphalia of 1648, but rather in the European system of state sovereignty that gradually evolved afterwards. Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 *INT’L HIST. REV.* 569, 584 (1999). In particular, the Peace of Westphalia did not codify the principles of non-intervention or of the formal legal equality of states. Historians have concluded that “the peace of Westphalia contributed little to the theory or practice of sovereignty, either explicitly or implicitly.” *Id.* See also Peter M. R. Stirk, *The Westphalian Model and Sovereign Equality*, 38 *REV. INT’L STUD.* 641 (2012) (arguing that the Peace of Westphalia did not introduce the idea of sovereignty “equality,” but rather presupposed a normatively hierarchical order, and that the linkage between Westphalia and sovereign equality was only forged in the late nineteenth century); Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 *INT’L ORG.* 251 (2001). Others have argued that the origins of the modern concept of sovereignty are to be found, not *after* Westphalia, but *before* it. CASPAR HIRSCHI, *THE ORIGINS OF NATIONALISM: AN ALTERNATIVE HISTORY FROM ANCIENT ROME TO EARLY MODERN GERMANY 81–87* (2012) (discussing the concept of nationhood at Council of Constance of 1414–18). Indeed, it has been maintained that the idea of territorial sovereignty should be traced back to the Concordat of Worms, which took place five centuries before Westphalia.

The second is whether, even if ISIS's project fails, the creation of a caliphate by another Islamist group, or by an existing government controlled by Islamists, would present such a threat.

Note that this formulation presupposes a distinction between a "first-order" threat to the interests and security of a state or group of states and a "second-order" threat to the international legal order as such. ISIS undoubtedly presents, or at least once presented, a threat to the national security of many states, including the United States, France, Iraq, Syria, Saudi Arabia, and Turkey. However, that is not the *kind* of threat under consideration here. The question is not whether ISIS is or was a threat (which can be conceded), but whether it is a threat because it is a caliphate.

What is at issue, then, are the existence and the gravity of a threat to the global legal order of states—a foundational threat.⁵¹ By its nature, such a threat affects all states more or less equally, insofar as they have (or may be thought to have) an interest in the maintenance of the current state-centric international system, as distinct from other possible world orders.⁵²

In other words, the challenge we are assessing here is as legal or ideational in nature as it is anything else. Indeed, it is better to say that the challenge is religious in nature, insofar as it rests upon the divinely mandated and prophetically revealed idea of the sharia.⁵³ In stark contrast, the Westphalian legal order, like other liberal forms of political order, rests fundamentally on human consent.⁵⁴

Bruce Bueno de Mesquita, *Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty*, 2 INT'L STUD. REV. 93 (2000).

⁵¹ Speaking of terrorist groups like al-Qaeda (and ISIS) that operate transnationally, Barak Mendelsohn writes that they may "seek to transform the whole system by creating a new world order based on their religion. Such groups challenge the foundations of [the international society of states]." Barak Mendelsohn, *Sovereignty under Attack: The International Society Meets the Al Qaeda Network*, 31 REV. INT'L STUD. 45, 56 (2005).

⁵² HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1997) (discussing the especially influential work of the group of International Relations theorists known as "the English School" in evaluating whether states have a general interest in maintaining the current order); *but cf.* Steve Smith, *Is the Truth Out There? Eight Questions about International Order*, in INTERNATIONAL ORDER AND THE FUTURE OF WORLD POLITICS 99 (T.V. Paul & John A. Hall eds., 1999).

⁵³ *Sharia* literally means "a path to water." David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT'L L. 819, 823 (1993) ("*Shari'a* is a difficult concept, quite different from Western notions about law. . . . Abstractly, *shari'a* is the path revealed by God through the Prophets which God intends humanity to follow. *Shari'a* both articulates the transcendent will of God, and provides an opportunity for righteous action in every occasion faced by humans. Not merely a framework in which life is conducted, not solely a bound for permissible action, the *shari'a* itself is an expression of divine truth. Sovereignty is divine, and therefore the will of God, even regarding daily matters, is what lends legal authority to power. Submission to *shari'a*—following the path of God—is Islam. The law sets forth the integuments of belief and so defines the righteous life and makes salvation possible.").

⁵⁴ *Id.* at 863 ("As with all liberal structures, consent is the central source of authority in public international law. The substance of public international law is the accretion of institutional consent, and the vital activity in international law is the structuring of consensual

One of the most penetrating writers on these subjects has emphasized the religious dimensions of the threat that the caliphate project, and more generally the revival of Islam, pose to Western secular liberalism:

The idea that the Islamic resurgence represents a return of the repressed does not take only a political form. At a more diffuse level, the Islamic revival signals a cultural anxiety in the West. The West sees in Islam the distorted mirror of its own past. It marks the rebirth of the God they killed so that Man [*sic*] could live. The Islamic resurgence marks the revenge of God; it signals the return of faith, the return to all that puts into question the idea of a progressive liberation of humanity.⁵⁵

A. The Westphalian Order and the Great Separation

The Westphalian order emerged from what Mark Lilla of Columbia University has called “The Great Separation”—the displacement of political theology by modern political philosophy, which “disengage[es] reflection about the human political realm from theological speculations about what might be beyond it.”⁵⁶ By contrast, the ISIS caliphate, along with other similar movements, rests on a theological-political basis. The ISIS caliphate resolutely affirms that the political order, including relations between states, must be constructed on “higher appeals to [divine] revelation.”⁵⁷ Uninfluential though it may be in the West, political theology⁵⁸ remains vital elsewhere, especially in the Islamic world, and “stands as a perennial alternative to the kind of thinking that inspired the modern [Western] institutions we now take for granted.”⁵⁹

The Westphalian idea assumes that peace arises not from shared beliefs (which could only be brought about and maintained through an intolerable degree

processes—processes which will give rise to law. Public international law thus derives its legitimacy, its quality as legal, not from its concordance with the right order of things, but from its production by appropriate processes.”).

⁵⁵ SAYYID, *supra* note 34, at 4.

⁵⁶ MARK LILLA, *THE STILLBORN GOD: RELIGION, POLITICS, AND THE MODERN WEST* 7 (2008). More fully, the wars of religion in Europe in the sixteenth and seventeenth centuries galvanized certain leading thinkers, above all Thomas Hobbes, to seek to supplant political theology as the foundation of the political order. *Id.* at 57–58. (“Not just Christian political theology, but the basic assumptions upon which all political theology had rested. . . . It was replaced by a new approach to politics focused exclusively on human nature and human needs. A Great Separation took place, severing Western political philosophy decisively from cosmology and theology. It remains the most distinctive feature of the modern West to this day.”).

⁵⁷ *Id.* at 7.

⁵⁸ See generally PAUL KAHN, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2012).

⁵⁹ LILLA, *supra* note 56, at 8.

of coercion), but from procedures that seek to accommodate an ineradicable plurality of beliefs.⁶⁰ States of all political forms and ideological varieties—kingdoms, democracies, dictatorships; communist, socialist or capitalist; theocracies or secularist states—can co-exist within the Westphalian order. Peace among them is to be achieved through processes that enable debate, negotiation, bargaining, and the resolution of disputes to take place.⁶¹ By contrast, a sharia-based order (in the form of interest to us here) assumes that peace is attainable only through beliefs that are held in common, and that the persistence of fundamental disagreement over truth entails the inevitability of violent conflict.⁶² Diplomacy, negotiation, arbitration, judicial rulings, treaty-making, and other such processes might suspend or postpone such conflict, but they cannot eliminate it. To put it starkly, the Westphalian order is secular, pluralistic, and procedural in nature; it is directed towards the end of peace, but is not guided by a robust, substantive

⁶⁰ LAUREN APFEL, *THE ADVENT OF PLURALISM: DIVERSITY AND CONFLICT IN THE AGE OF SOPHOCLES* (2011) (tracing the defense of pluralism back to Greek figures including Protagoras, Herodotus and Sophocles). Although the Westphalian order emerged historically from the inability to impose uniformity of religious belief by compulsion rather than from the acknowledgement of the positive merits of pluralism, it has eventually become an implicit expression of the idea that pluralism is not merely unavoidable, but salutary. The belief that pluralism as to moral values, ways of life, political orders and religious views is desirable despite (or because of) the tensions that must accompany it has a long and distinguished career in Western thought. *Id.* Leading contemporary Western thinkers have also argued that a general consensus over moral and political questions, even when it is not the product of coercion, is not to be preferred normatively to a social order in which dissension is accepted and accommodated. NICHOLAS RESCHER, *PUBLIC CONCERNS: PHILOSOPHICAL STUDIES OF SOCIAL ISSUES* 4–5 (1993) (“a benign social order need not be committed to the quest for consensus, but can be constituted along very different, irreducibly *pluralistic* lines.”).

⁶¹ U.N. Charter art. 33, ¶ 1 (“[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”).

⁶² See Westbrook, *supra* note 53, at 828–29; Salazar, *supra* note 8, at 186–87. The eighteenth-century philosopher Jean-Jacques Rousseau stated this point of view memorably when he wrote, “It is impossible to live at peace with those we regard as damned; to love them would be to hate God who punishes them: we positively must either reclaim or torment them.” J.J. Rousseau, *The Social Contract or the Principles of Political Right*, Book IV, ch. VIII (“Civil Religion”) (G.D.H. Cole trans., 1782), http://www.constitution.org/jjt/socon_04.htm.

conception of justice.⁶³ A sharia-based world order would be sacralized, monistic, and directed to the fulfillment of divine mandates prescribing righteous conduct.⁶⁴

⁶³ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, ICISS 13 (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. Of course, that statement, as it stands, is too stark. The Westphalian order, in its contemporary form, is by no means purely procedural and value-free; on the contrary, it is heavily infused with human rights norms, and some would further argue that sovereignty has become conditional, entailing obligations on the part of states to uphold human rights norms and inviting outside intervention when they do not. Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992). On any account, a succession of major post-1945 human rights treaties, including the Genocide Convention, has caused attrition in the traditional Westphalian idea of state sovereignty, e.g., not only by prohibiting states from engaging in genocide themselves, but also by imposing some degree of responsibility on all state parties for preventing violations by others. Andrea Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment*, 18 EURO. J. INT'L L. 695, 697–706 (2007). Indeed, in recent decades, the international enforcement of human rights goals has been thought to be so imperative that it took priority over respect for state sovereignty, to the point of justifying (in the 1999 NATO war in Kosovo) a violation of the Charter's use of force rules. Richard Falk, *Kosovo, World Order, and the Future of International Law*, 93 AMER. J. INT'L L. 847 (1999); Fernando R. Tesón, *Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention*, AMSTERDAM LAW FORUM, <http://amsterdamlawforum.org/article/view/62/119> (last visited Oct. 12, 2017); Bruno Simma, *NATO, the UN, and the Use of Force: Legal Aspects*, 10 EURO. J. INT'L L. 1 (1999). These post-1945 developments had been foreshadowed at an earlier stage. Even the United Nations Charter, which axiomatized sovereignty in Article 2(4), and which gave precedence to the preservation of peace over all other goals, also emphasized the importance of human rights. U.N. Charter Preamble. Indeed, even before the outbreak of the Second World War, publicists were teaching that international agreements that had been adopted through procedurally valid processes might nonetheless be void because their content was normatively objectionable. Pure process, in other words, could not repair a substantive deficit. Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AMER. J. INT'L L. 571 (1937). That early view was ratified in post-1945 international law, including through its codification in Article 53 of the Vienna Convention on the Law of Treaties. At most, then, one can say that the international law of the Westphalian order remains primarily procedural, and that its conception of state sovereignty remains largely intact. Of most relevance here, however, one should note that general international law regarding *the recognition of new states* seems now to be influenced by human rights concerns. Christian Hillgruber, *The Admission of New States to the International Community*, 9 EUR. J. INT'L L. 491 (1998). Thus, entrance into membership in the Westphalian order of states now appears to be regulated by normative requirements. See *infra*, at 56–60 (discussing how the ISIS caliphate could not be assimilated into the Westphalian order for this reason alone).

⁶⁴ Jason Farr, *Point: The Westphalia Legacy and the Modern Nation-State*, 80 INT'L SOC. SCI. REV. 156 (2005). This is not to deny that a pluralistic and proceduralist world order, like the Westphalian one, might be founded on religious rather than secular premises. Indeed, early modern European thinkers like Hugo Grotius arguably assumed a Christian basis for the rules of international law. *Id.* Analogously, the domestic constitutions of particular liberal societies, say nineteenth century Britain, have provided for religious establishments. *Id.* Nonetheless, the Westphalian order originated in irresolvable confessional disagreements and repudiated the religious and doctrinal premises on which the

B. The Contingency of the Westphalian Order

There is nothing inevitable or unchangeable about the existing foundations of the Westphalian legal order. To begin with, even the basic unit of that order—the “state”—is not a “natural” phenomenon, although for us it may have become a *naturalized* one.⁶⁵

Further, the centrality of “sovereign” states in the current order is a historical contingency. That form of political organization took hold in early modern European history against competing forms, including non-territorial modes of organization that included the Latin Church and the Holy Roman Empire.⁶⁶ During the period of European expansion throughout the rest of the world, but especially during the nineteenth century, the state-centric order also managed to establish itself globally, in spite of the existence of powerful and attractive regional alternatives, such as the (so-called) “tribute system” (the term is a Western construct) of the Chinese Empire.⁶⁷ However, the current state-centric system has

earlier European order had rested: the Westphalian settlement greatly weakened both the political and the spiritual power of the Roman Catholic Church. *Id.* Moreover, the existing form of the Westphalian order is in fact pervasively secularized. *Id.*

⁶⁵ JAMES C. SCOTT, *THE ART OF NOT BEING GOVERNED: AN ANARCHIST HISTORY OF UPLAND SOUTHEAST ASIA*, 1–13, 32–39 (2009); ANDREAS OSIANDER, *BEFORE THE STATE: SYSTEMIC POLITICAL CHANGE IN THE WEST FROM THE GREEKS TO THE FRENCH REVOLUTION* 5–10 (2007).

⁶⁶ *See generally* HENDRIK SPRUYT, *THE SOVEREIGN STATE AND ITS COMPETITORS: AN ANALYSIS OF SYSTEMS CHANGE* (1994).

⁶⁷ *See, e.g.*, CHRISTOPHER A. FORD, *THE MIND OF EMPIRE: CHINA’S HISTORY AND MODERN FOREIGN RELATIONS* 94–100 (2010); ANDREW PHILLIPS, *WAR, RELIGION AND EMPIRE: THE TRANSFORMATION OF INTERNATIONAL ORDERS* 149–260 (2011); Zhang Yongjin & Barry Buzan, *The Tributary System as International Society in Theory and Practice*, 5 *CHINESE J. INT’L POL.* 1 (2012); Zhang Feng, *Rethinking the ‘Tribute System’: Broadening the Conceptual Horizon of Historical East Asian Politics*, 2 *CHINESE J. INT’L POL.* 545 (2009). *Compare* YUAN-KANG WANG, *HARMONY AND WAR: CONFUCIAN CULTURE AND CHINESE POWER POLITICS* 145–51, 179–80 (2011) (discussing that the threat or use of Chinese military force was crucial to maintaining and enforcing tributary system), *with* DAVID C. KANG, *EAST ASIA BEFORE THE WEST: FIVE CENTURIES OF TRADE AND TRIBUTE* 54–106 (2010), *and* DAVID C. KANG, *CHINA RISING: PEACE, POWER AND ORDER IN EAST ASIA* 23–49 (2007) (arguing that the Chinese-dominated early modern East Asian system before Western ascendancy in the region was prevaillingly stable and peaceful, that “tribute” consisted primarily of trade, that unlike the European system, East Asia did not see smaller states balancing against the hegemonic power, and that periods of Chinese weakness were more prone to lead to international conflict than its periods of strength). The traditional Chinese vision of world order had no place for the concept of the “state.” Adda Bozeman, *On the Relevance of Hugo Grotius and De Jure Belli Ac Pacis for our Times*, 1 *Grotiana* n.s. 65, 75 (1980). Rather, “the Chinese always thought of the space they occupied as the exclusive abode of ‘Civilization’ writ large” at once “an empire whose contours had to be indeterminate” and “a family on nations on the analogy of the classical Confucian model of the natural family: for just as the father, the elder brother or the younger brother had assigned roles to play in the nuclear association, so did each inferior people have its special tasks, privileges, and tribute relations.” *Id.*

been and remains an object of intense debate and contestation.⁶⁸ In particular, the Westphalian state's claim to "sovereignty," and its consequent assumption of the power to legislate, places it in fundamental opposition to the claim, arguably founded on the Qur'an,⁶⁹ that the sharia, as the expression of the divine law-making authority, is *alone* sovereign.⁷⁰

The primary question then is how far the ISIS caliphate, which designedly incorporates this alternative, pre-modern model, or a post-ISIS caliphate in some other form, might destabilize the current Westphalian order, and perhaps contribute to its eventual dissolution.

C. Earlier Challenges: Two Revolutionary States

ISIS is by no means the first political and ideological movement both to have challenged the Westphalian order but also to have come to power as a (kind of) state itself. Two other twentieth century revolutions resulted in similar outcomes: the Russian Revolution and the Iranian Revolution.

1. The Russian Revolution

For a period beginning with the October Revolution in Russia in 1917 to the early 1920s, Soviet Communism propagated the idea that the international legal order was illegitimate and had to be supplanted by a non-state-centered one.⁷¹ Only

⁶⁸ William A. Callahan, *Chinese Visions of World Order: Post-hegemonic or a New Hegemony?*, 10 INT'L STUD. REV. 749 (2008); FORD, *supra* note 67, at 245–47, 273. Some contemporary Chinese thinkers may even be attempting to create the intellectual framework for a restoration of the Sinosphere.

⁶⁹ PANKHURST, *supra* note 37, at 16. There are numerous verses from the Qur'an which indicate that revelation is the basis of legislation, and that it is the law as ordained by God that should be used to judge between men. *Id.* The sharia might in practice be implemented in a variety of different ways. KNUT S. VIKØR, *BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW* 257–63 (2005). But the difficulties in implementing it, at least without comprehensive transformation of the modern state, are severe. Wael Hallaq, *Can the Shari'a be Restored?*, in *LAW AND THE CHALLENGES OF MODERNITY* 21 (Yvonne F. Haddad & Barbara F. Stowasser eds., 2004).

⁷⁰ Wael B. Halleq, *THE IMPOSSIBLE STATE: ISLAM, POLITICS, AND MODERNITY'S MORAL PREDICAMENT* 51 (2013) ("the modern state can no more be Islamic than Islam can come to possess a modern state (unless, of course, the modern state is entirely reinvented).").

⁷¹ See generally DAVID ARMSTRONG, *REVOLUTION AND WORLD ORDER: THE REVOLUTIONARY STATE IN INTERNATIONAL SOCIETY* 120–54 (1993); Leon S. Lipson, *The Soviet View on International Law*, 61 U.S. NAVAL WAR C. INT'L L. STUD. 101 (1980); Earl Snyder, *The Communist Theory of International Law*, 2 VA. J. INT'L L. 80 (1962); John N. Hazard, *The Soviet Conception of International Law*, 33 PROC. AMER. SOC. INT'L L. 33, 34 (1939) [hereinafter Hazard, *Soviet Conception*]; John N. Hazard, *Cleansing Soviet International Law of Anti-Marxist Theories*, 32 PROC. AMER. SOC. INT'L L. 244 (1938);

four years into their revolutionary régime, the Soviets began to seek an accommodation with other major states. The Economic Agreement of 1921 between Great Britain and the Russian Republic not only established commercial relations between the two countries, but also included clauses requiring each party to refrain from hostile actions and from fostering propaganda against the other outside its borders.⁷² At a diplomatic conference in Genoa in 1922, the Soviets, seeking to normalize their diplomatic relations with foreign governments, invited foreign trade and investment, and discouraged the renewal of outside intervention. The Soviets also announced their support for a policy of accommodation, or what came to be called “peaceful co-existence,” with the liberal, capitalist states.⁷³

To be sure, the process was a halting one. For example, the Soviets refused to agree to appear before the Permanent Court of International Justice in its 1923 *Eastern Carelia* case, which involved a dispute over the Soviet-Finnish border. In doing so, the Soviets declared brusquely that “any attempt on the part of any power to apply to Russia the article of the Covenant of the League relating to disputes between one of its Members and a non-participating State would be regarded by the Russian Government as an act of hostility to the Russian State.”⁷⁴ Gradually, however, the Soviet Union became further enmeshed in the state-centered order, entering into treaties, alliances, and diplomatic and commercial relations with other states.⁷⁵ The Soviets joined the League of Nations in 1934, and thereafter encouraged membership in and loyalty to that organization.⁷⁶ After World War II, the Soviet Union became a founding member of the United Nations, the main international organization to give legal and institutional expression to the state-centered order. In time, the Soviet Union became known as:

[O]ne of the most active participants in international relations and a prominent actor in the stages of international law. . . [It] sent judges to the International Court of Justice; it [took] part in the work of the International Law Commission; its representatives [made] legal arguments in many bodies in the United Nations; it [sent] delegations to nongovernmental bodies like the International Law Association; . . . it [was] party to scores of

TIMOTHY ANDREW TARACOUZIO, *THE SOVIET UNION AND INTERNATIONAL LAW: A STUDY BASED ON THE LEGISLATION, TREATIES, AND FOREIGN RELATIONS OF THE USSR* (1935).

⁷² TARACOUZIO, *supra* note 71, at 258. A similar treaty with Germany soon followed. *Id.* at 259.

⁷³ Evgeny Chossudovsky, *Genoa Revisited: Russia and Coexistence*, 50 FOREIGN AFF. 554 (1972); ARMSTRONG, *supra* note 71, at 143–44.

⁷⁴ Status of Eastern Carelia, Advisory Opinion 1923 P.C.I.J. (ser. B) No. 10 (July 23, 1923).

⁷⁵ ARMSTRONG, *supra* note 71, at 140. The suspicion existed on both sides. *Id.* (“[I]t was never very clear whether peaceful coexistence was to be regarded merely as a tactic to buy time while the real work of the Soviet Union – preparing for world revolution – went on behind the scenes, or whether it implied a long-term commitment to a policy of integrating the Soviet Union within the state system through acceptance of the prevailing norms of Westphalian society.”). This suspicion persisted into the Cold War. *Id.* at 145.

⁷⁶ Hazard, *Soviet Conception*, *supra* note 71, at 36.

bilateral and multilateral agreements; . . . its agents [concluded] many foreign trade agreements.⁷⁷

The Soviet Union's gradual and peaceful assimilation into the Westphalian system was underscored by its ratification of the 1975 "Helsinki Accords,"⁷⁸ a multi-faceted international agreement between the Soviet and Western blocs. The Accords included guarantees of territorial integrity, the definition of borders, peaceful dispute resolution, and the protection of human rights. In effect, the Soviets and the West agreed to accept each other's permanence and legitimacy and to forswear efforts at subversion or forcible alteration of boundaries. Furthermore, the Soviets' pledge to respect human rights—as understood by the liberal, capitalist West—represented a further (if not quite complete) break with their original, revolutionary past.⁷⁹ By the late 1980s, under Gorbachev, the Soviets had largely shed their earlier view of international law. They called for greater reliance on the United Nations, urged collective measures to deal with the problems of terrorism, hunger, pollution, and supported more frequent recourse to the International Court of Justice (ICJ).⁸⁰

2. The Iranian Revolution

More recently, after the Iranian Revolution of 1979, the Islamic Republic of Iran, under the leadership of the Ayatollah Khomeini, proclaimed its hostility to the global state-centered order and announced its intention to subvert it.⁸¹ "Khomeini defined his political project as seeking a state in which '[t]he sole determining principle in a government . . . is divine law, law that is the expression of divine will, not the product of the human mind.'"⁸² Accordingly, Iran disparaged

⁷⁷ Lipson, *supra* note 71, at 104.

⁷⁸ Conference on Security and Co-operation in Europe, *Helsinki Final Act*, OSCE (1975), <http://www.osce.org/helsinki-final-act?download=true>.

⁷⁹ Harold Molineu, *Negotiating Human Rights: The Helsinki Agreement*, 141 *WORLD AFF.* 24, 25, 36 (1978) ("The overriding interest of the USSR was the fixing of the postwar European borders, an act which would, it was assumed, secure Western acceptance of the status quo in Europe and thereby eliminate the major cause of East-West tension. . . . In spite of Soviet assertions that ideological competition would continue even in an era of détente, the West insisted [on] giving attention to humanitarian aspects.")

⁸⁰ John Quigley, *Perestroika and International Law*, 82 *AM. J. INT'L L.* 788, 794–96 (1988).

⁸¹ ARMSTRONG, *supra* note 71, at 188–97 (discussing post-revolutionary Iran as a challenge to Westphalia).

⁸² Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 *AM. U. INT'L L. REV.* 375, 381 (1996). Compare IMAM KHOMEINI, *GOVERNANCE OF THE JURIST* 29 (1970) ("in Islam the legislative power and competence to establish laws belongs exclusively to God almighty. The Sacred Legislator of Islam is the sole legislative power), with Armstrong, *supra* note 71, at 193 (quoting Khomeini saying, "No one has the right to legislate and no law may be executed except the law of the Divine Legislator. Whatever is in accordance with Islam and its laws we will obey

international law, viewing it as an instrument fashioned to serve the interests of the West.⁸³ Khomeini's own public career began with his attacks in the early 1960s on the so-called "capitulation treaties"⁸⁴ that would have given US forces stationed in Iran the equivalent of diplomatic immunity from local law.⁸⁵ During Khomeini's rule, Iran conspicuously violated international law (specifically, the inviolability of diplomatic premises) through its conduct during the takeover of the US Embassy in Tehran.⁸⁶ In its Order in *Tehran Embassy Case* of December 15, 1979,⁸⁷ the ICJ was at some pains to emphasize the seriousness of Iran's (and Khomeini's) breach of fundamental international legal norms.⁸⁸ In response to the downing of Iran Air

with humility. However, whatever contradicts the Qur'an, be it constitutional law or international treaties, we will oppose it.").

⁸³ ALI ANSARI, *CONFRONTING IRAN: THE FAILURE OF AMERICAN FOREIGN POLICY* 203 (2007) (referring to "historical distrust Iranianlillas had for Western legalism"). Other scholars provide a further analysis of the (then) Iranian view of international law. See, e.g., Sarvenaz Bahar, *Khomeinism, The Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology*, 33 HARV. INT'L L.J. 145, 146 (1992) (arguing that "Khomeinism . . . exerts pressure on certain norms, principles, and processes of international law, while it reinforces others. Yet in neither case does it seek a reappraisal of the nation-state system or of the core aspirations of international law: peaceful co-existence, sovereign equality, self-determination of peoples, and human integrity."). Some legal scholars, while acknowledging the centrality of the Westphalian rules protecting embassies and diplomatic personnel, also drew attention to the wrongs that Iran had undoubtedly suffered at American and Western hands, pointing especially to the record of violations of the non-intervention norm. See, e.g., Richard Falk, *The Iran Hostage Crisis: Easy Answers and Hard Questions*, 74 AM. J. INT'L L. 411 (1980).

⁸⁴ Ingrid Detter, *The Problem of Unequal Treaties*, 11 INT'L & COMP. L.Q. 1069, 1073–75, 1078–80 (1962) (surveying unequal treaties between Western powers and China); Denunciation of the Treaty of November 2nd, 1865, between China and Belgium (Belg. v. China), Order, 1927 P.C.I.J. (ser. A) No. 8 (Jan. 8) (describing rights of Belgians in China under treaty). These laws resembled and grew out of the "unequal treaties" that powerful Western nations, including the US, had imposed on (then) weaker non-Western states such as Japan, China, and the Ottoman Empire. One common justification offered for this manifestly unequal practice (which, of course, derogated from the territorial sovereignty of the weaker power) was that they were "essential to the peaceful residence of [Western] Christians within those countries and the successful prosecution of commerce with their people." In re Ross, 140 U.S. 453, 463 (1891).

⁸⁵ See RAY TAKEYH, *GUARDIANS OF THE REVOLUTION* 14 (2009). Iran had denounced other "capitulation" treaties decades earlier. *Anglo-Iranian Oil Co. (U.K. v. Iran)*, Judgement, 1952 I.C.J. Rep. 16, at 93, 105 (July 22).

⁸⁶ *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. Rep. 3 (May 24).

⁸⁷ *U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Order, 1979 I.J.C. 23 (Dec. 24).

⁸⁸ G.A. Res. 45/39, ¶¶ 38–39 (Nov. 28, 1990) (denouncing Iraqi behavior towards foreign diplomatic missions in Kuwait). In effect, the Court saw Iran as inflicting a grave injury, not only on the United States, but (in Hedley Bull's terms) on the society of states as a whole. *Id.* ("[T]here is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that

Flight 655 on July 3, 1988 by a US Navy warship, the *Vincennes*, Khomeini called for a “full-fledged war” against the United States.⁸⁹ This response was clearly disproportionate to the US action, even assuming that the downing of the airplane was intentional.⁹⁰

Yet, even under Khomeini, Iran followed the dispute-resolution procedures favored by international law. Thus, Iran sought legal redress against the United States for its alleged violation of international law in the *Vincennes* incident by filing a complaint with the ICJ,⁹¹ but the case was later removed from the court’s docket.⁹² Iran eventually agreed with the United States to establish an international body, the US-Iran Claims Settlement Tribunal, to resolve claims and counterclaims arising out of the Tehran Embassy situation.⁹³ Moreover, during the Iran-Iraq War, Iran repeatedly, if unavailingly, brought Iraq’s use of illegal chemical weapons to the attention of the UN Security Council, thus seeking the protections of international humanitarian law for itself in the conflict.⁹⁴

In later cases, Iran sought and obtained relief in the ICJ’s 2003 *Oil Platforms Case* for US violations of international use-of-force rules.⁹⁵ More recently, in June 2016, Iran filed a complaint in the ICJ against the United States

purpose; and whereas the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential, unqualified, and inherent in their representative character and their diplomatic function.... [T]he institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means.”).

⁸⁹ Ray Moseley, *Khomeini Calls For 'Full-fledged War'*, CHICAGO TRIBUNE (July 5, 1988), http://articles.chicagotribune.com/1988-07-05/news/8801120830_1_iran-iraq-war-ayatollah-hossein-ali-montazeri-iranian-retaliation.

⁹⁰ Proportionality is a legal requirement even for a defensive war. See *Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 90, at 161 (Nov. 6) [hereinafter *Oil Platforms* (Iran v. U.S.)]; *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. Rep. 116, at 315 (Dec. 19) (separate opinion of Judge Kooijmans); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. Rep. 116, at 338 (separate opinion of Judge Simma); see also Sina Etezazian, *The Nature of the Self-Defense Proportionality Requirement*, 3 J. USE FORCE & INT’L L. 260 (2016); Georg Nolte, *Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer*, 24 EUR. J. INT’L L. 283 (2013); David Kretzmer, *The Inherent Right to Self-Defense and Proportionality in the Jus ad Bellum*, 24 EUR. J. INT’L L. 235 (2013).

⁹¹ The Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. U.S.), Memorial, 19 1990 I.C.J. 1, (July 3).

⁹² The Aerial Incident of 3 July 1988, (Islamic Republic of Iran v. U.S.), Pleadings, 1988, I.C.J. Rep. 9 (Feb. 22).

⁹³ *Dames v. Regan*, 453 U.S. 654 (1981); *U.S. v. Sperry Corp.*, 493 U.S. 52 (1989); David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT’L L. 104, 104 (1990).

⁹⁴ R.P.H. KING, U.N. AND THE IRAN-IRAQ WAR 19–21 (1987) (noting that Iran’s original complaint was filed in 1983).

⁹⁵ *Oil Platforms* (Iran v. U.S.), Judgment, *supra* note 90.

for alleged breaches of the 1955 Treaty of Amity, based on the United States' disposition of Iranian assets inside this country.⁹⁶ The skepticism that Iranian leaders have repeatedly voiced about international law is in some measure a reflection of the international community's (and the United States') failure to enforce legal norms against Iraq, including the prohibition on the use of chemical weapons during the Iran-Iraq War.⁹⁷

In other ways too, Iran may gradually be seeking to "normalize" its international relations. Although Iran's statements about and conduct towards Israel have arguably "violated all prevailing international norms," Iran has carefully sought to avoid direct military confrontation with Israel.⁹⁸ And, as the 2015 agreement between the United States and Iran over the latter's nuclear power program indicates,⁹⁹ Iran has increasingly been integrated into the state-centered global legal order. It is a separate question whether Iran professes to participate in that order, but in fact fails to discharge the responsibilities that membership entails.

III. OUTLINE

The analysis that follows is divided into four parts. Part I will discuss the relationship between "Islam" and "Islamism." Since ISIS claimed unique normative authority because of its conception of early Islamic discourse and practice, Part I will also explore ISIS's use of that authority. Part II will explain why the ISIS caliphate and other forms of Islamism have generally been considered a threat or potential threat to the Westphalian order and will review differing evaluations of the nature and seriousness of that threat. Part III explores the common Sunni understanding of the meaning and origins of the caliphate idea and describes ISIS's appropriation of that idea. Part IV assesses whether the ISIS caliphate, or other Islamist efforts to restore a caliphate, threaten the Westphalian order. Here, it will be necessary to distinguish two cases: (A) that of a violent Islamist group that is not a recognized state, like ISIS, and; (B) that of an existing and established government, like Turkey's, that may proclaim itself a restored caliphate.

I conclude, first, that the ISIS caliphate (or a "caliphate" that came to power in a way like ISIS) is unlikely to present a threat to subvert the Westphalian order. Islamist groups like ISIS are themselves the product, in part, of

⁹⁶ Press Release, International Court of Justice, *Iran Institutes Proceedings Against the United States with Regard to a Dispute Concerning Alleged Violations of the 1955 Treaty of Amity*, (June 15, 2016) (on file at <http://www.icj-cij.org/files/case-related/164/19032.pdf>).

⁹⁷ Colin Dueck & Ray Takeyh, *Iran's Nuclear Challenge*, 122 *POL. SCI. Q.* 189, 196–97 (2007). The Security Council's condemnation of the use of chemical weapons in this conflict had no perceptible effect. S.C. Res. 612 (May 9, 1988); S.C. Res. 620 (Aug. 26, 1988).

⁹⁸ Dueck & Takeyh, *supra* note 97, at 192–93.

⁹⁹ S.C. Res. 2231 (July 9, 2015) (endorsing Joint Comprehensive Plan of Action from 2015). See also Milena Sterio, *President Obama's Legacy: The Iran Nuclear Agreement?*, 48 *CASE W. RES. J. INT'L L.* 69, 69 (2016).

developmental failures in the Islamic and Arab world. They would only attract widespread support for their state-building project—the caliphate—if they seemed able to solve the developmental problems and promote the welfare of the population which they governed. But to achieve that outcome, their state would have to be integrated into the Westphalian system. In other words, their caliphate would have to become something that was, or that approximated to a *de jure* state (in Westphalian terms). To the extent that the caliphate participated in the Westphalian system as a *de jure* member in good standing, however, it would cease to pose a threat to the Westphalian order.

A. States

There are, however, different kinds of *de jure* states. Some are usually in compliance with the fundamental rules of international law, while others are perceived as habitual transgressors against them. In the category of *de jure* but transgressive states are those like North Korea, Iraq under Saddam Hussein, or Serbia under Slobodan Milosevic. Such states enjoy widespread international recognition as states, as reflected in their membership in international organizations like the United Nations and their presence at diplomatic conferences; however, many or most other states view them as chronic violators of international law.¹⁰⁰ As a consequence of that perception, such *de jure* but transgressor states are liable to suffer international legal and extra-legal sanctions; in any case, they are often the objects of the hostility, suspicion, and odium of other *de jure* states. The ISIS caliphate could not have become a *de jure* state, even of that kind.

That does not end the analysis. Not all states are *de jure*; some have minimal or no international recognition, and hence are at best *de facto* states. *De facto* states of this kind are those that enjoy a limited measure of international recognition as states and do not participate actively or at all in the workings of the international state system. Such *de facto* states in the past have included Kosovo (recognized by many but not all states),¹⁰¹ Abkhazia (recognized by a small handful

¹⁰⁰ See, e.g., Security Council Report, *UN Documents for DPRK (North Korea)*, <http://www.securitycouncilreport.org/un-documents/dprk-north-korea/> (last visited Oct. 13, 2017) (exemplifying inventory of UN Security Council Resolutions denouncing North Korea); 43d President George W. Bush, *Saddam Hussein's Defiance of United Nations Resolutions*, THE WHITE HOUSE, <https://georgewbush-whitehouse.archives.gov/infocus/iraq/decade/sect2.html> (last visited Oct. 13, 2017) (providing a list by the United States of Security Council Resolutions violated by Iraq); S.C. Res. 1160 (Mar. 31, 1998); S.C. Res. 1199 (Sept. 23, 1998); S.C. Res. 1203 (Oct. 24, 1998) (regarding Serbia and Kosovo).

¹⁰¹ Republic of Kosovo, *Foreign Missions in Kosovo*, MINISTRY FOREIGN AFF., <http://www.mfa-ks.net/?page=2,50> (last visited Oct. 1, 2017); David I. Efeywerham, *Kosovo's Chances of UN Membership: A Prognosis*, 4 GOETTINGEN J. INT'L L. 93 (2012). Additionally, Kosovo is a member of some international organizations, including the International Monetary Fund. International Monetary Fund, *IMF Members' Quotas and Voting Power, and IMF Board of Governors*, IMF, <http://www.imf.org/external/np/sec/memdir/members.aspx> (last updated Oct. 13, 2017). However, Kosovo is not a member state

of states and Russia),¹⁰² Somaliland (not recognized officially by any state),¹⁰³ and the Turkish Republic of Northern Cyprus.¹⁰⁴ The ISIS caliphate might conceivably have become such a *de facto* state. However, ISIS would have been unlikely to maintain itself in that position without either the sponsorship of another power (as with Kosovo and the West, or Abkhazia and Russia), or becoming a matter of general indifference to the international community (as with Somaliland). Thus, even as a *de facto* state, the ISIS caliphate would not have offered a compelling model for the Muslim world.

B. Para-States

Yet another cluster of possibilities remains to be considered. The ISIS caliphate might continue to exist, but not as a state of any kind whatsoever, whether *de jure* or *de facto*. In that event, several distinct scenarios present themselves.

For one, ISIS might become a de-territorialized terrorist group like al-Qaeda. In that form, it might have a transnational reach and influence, and engage in or promote acts of terrorism across the globe. Some analysts discern signs that this might already be happening.¹⁰⁵ But without a territory of its own to administer, ISIS would not be a true caliphate. It would be a threat to global peace and security, as al-Qaeda is, but not a threat by virtue of being a caliphate.

Alternatively, ISIS might become a sub-state actor controlling a shifting and undefined territory—a “para-state,” as opposed to a “state.”¹⁰⁶ Or it might evolve into what some international relations scholars have begun to call a “black spot.”¹⁰⁷ This could happen, for example, if neither Syria nor Iraq considered it

of the United Nations. See United Nations, *Member States*, UN, <http://www.un.org/en/member-states/#gotoK> (last visited Oct. 13, 2017).

¹⁰² *Abkhazia profile - Overview*, BBC NEWS (Aug. 27, 2015), <http://www.bbc.com/news/world-europe-18175394>.

¹⁰³ T.G., *Why Somaliland is Not a Recognised State*, ECONOMIST, (Nov. 1, 2015), <http://www.economist.com/blogs/economist-explains/2015/11/economist-explains>.

¹⁰⁴ *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 182 (2001).

¹⁰⁵ Julfikar Ali Manik et al., *Bangladesh Attack Is New Evidence That ISIS Has Shifted Its Focus Beyond the Mideast*, N.Y. TIMES (July 2, 2016), http://www.nytimes.com/2016/07/03/world/asia/bangladesh-hostage-standoff.html?_r=1.

¹⁰⁶ NINA CASPERSEN, UNRECOGNIZED STATES 103–04 (2012) (discussing the concept of a “para-state”).

¹⁰⁷ ZACHARIAH CHERIAN MAMPILLY, *REBEL RULERS: INSURGENT GOVERNANCE AND CIVILIAN LIFE DURING WAR* 40–47 (2011); Bartosz H. Stanislawski, *Para-States, Quasi-States, and Black Spots: Perhaps Not States, But Not “Ungoverned Territories,” Either*, 10 INT’L STUD. REV. 366 (2008) (explaining a “black spot” as a self-governing area outside the effective control of the state in which it is located, but also lacking in international recognition, and he associates other characteristics with these, including being undemocratic and under despotic rule).

worth the cost to drive the ISIS caliphate out of their territories altogether,¹⁰⁸ and no other power was able or willing to do so.¹⁰⁹ The withdrawal of the governments of Syria and Iraq to more defensible positions within their countries would potentially mean that the evacuated areas will become anarchical badlands, ungoverned territories and, perhaps, the locus of struggle between infighting factions or warlords.¹¹⁰

But, even if Syria or Iraq evacuated from ISIS-held territories within their boundaries, those areas would not necessarily lapse into “anarchy.” A territory not governed by a central state is not inherently doomed “to become a black hole filled by criminals, terrorists and violence.”¹¹¹ Territories may be “stateless” (in the sense of being within the formal jurisdiction of a state, but outside its powers to control) and yet not be so much *ungoverned* as *alternatively governed*.¹¹² And even when putatively “ungoverned” territories have provided safe havens for terrorists, they have been far more likely to harbor *local* rather than *transnational* terrorist groups.¹¹³ Finally, the states in which “ungoverned” territories have been formed may maintain relationships—even institutionalized and legalized ones—with those who exercise power within them. For instance, in Syria, local truces and ceasefires have offered respite to civilians caught in horrendous humanitarian disasters. Governance within the Middle East has frequently been conducted by local power holders, be they tribal leaders, religious figures, or other embedded societal actors.¹¹⁴

Thus, the ISIS caliphate might conceivably remain in existence while becoming a kind of “‘state’ within a state.” While Syria and Iraq would remain formally sovereign over the relevant areas and population, the ISIS caliphate could functionally govern them.¹¹⁵ “External” and “internal” sovereignty, in this scenario,

¹⁰⁸ The Assad régime, *e.g.*, might content itself with ensuring its control over the coastal region of Syria and decide not to make a sustained effort to recover the landlocked areas of the country where ISIS prevails.

¹⁰⁹ ROY, *supra* note 8, at 88 (“The main reason for ISIS’s resilience is that no regional or international power views it as its principal enemy.”).

¹¹⁰ CASPERSEN, *supra* note 106, at 21 (citing Chechnya between 1996 and 1999 as a “largely anarchic entity dominated by infighting warlords”); Katarzyna Pelczyńska-Nalęcz et al., *Para-States in the Post-Soviet Area from 1991 to 2007*, 10 INT’L STUD. REV. 370, 377–81 (2008) (analyzing the Chechen case).

¹¹¹ Ariel A. Ahram & Ellen Lust, *The Decline and Fall of the Arab State*, 58(2) SURVIVAL GLOBAL POL. & STRATEGY 7, 25 (2016).

¹¹² CASPERSEN, *supra* note 106, at 7–8 (citing cases of Somalia and Pakistan, where central authority did not reach certain areas but where “shadow states” or tribal rule emerged instead). *See also* KIMBERLY MARTEN, WARLORDS: STRONG-ARM BROKERS IN WEAK STATES 25–26, 31–63 (2012) (providing a further analysis of “tribal” rule—warlordism—in the Federally Administered Tribal Areas of Pakistan and the Pakistani government’s longstanding and institutionalized involvement in it).

¹¹³ STEWART PATRICK, WEAK LINKS: FRAGILE STATES, GLOBAL THREATS AND INTERNATIONAL SECURITY 79–82 (2011).

¹¹⁴ Ahram & Lust, *supra* note 111, at 24–25.

¹¹⁵ MARTEN, *supra* note 112, at 3, 25–26 (explaining that para-states like “warlords” arguably exist only through the complicity of state leaders).

would fall apart. In other words, in the eyes of the international community, Syria and Iraq would remain “sovereign” over the region and its inhabitants, but the ISIS caliphate would effectively have control over them.

There have been some precedents for this type of outcome, such as the Islamic Courts Union of Somalia, an Islamist group that imposed sharia-based rule over Mogadishu and other parts of that country after persistent anarchy and warlordism in previous years. Indeed, the Islamic Courts Union fought successfully against local warlords, and some recall its period in power as a “golden age,” at least in comparison with what had preceded it. Its success against the warlords garnered a substantial degree of popular support from those it governed. During the years of its existence, the Islamic Courts Union exerted functional control or “internal sovereignty” over parts of Somalia, even as the international community considered the Transitional Federal Government of Somalia, which could not even hold the nation’s capital, to be the formal government or “external sovereign” of the entire country.¹¹⁶ But the Islamic Courts Union was brought down in 2007 by Ethiopia, apparently with US assistance.¹¹⁷

The fragility of the Islamic Courts Union’s hold, however, illustrates the severity of the risks that the ISIS caliphate would also encounter if it survived in liminal form as a “stateless” but “governed” territory within Syria’s and Iraq’s borders. Outside military intervention by regional powers, perhaps backed by global great powers, would be a permanent threat. Further, it is most unlikely that the ISIS caliphate could survive such a threat for long by figuratively flying under the radar. Indeed, to the extent that ISIS managed to survive because it was both insignificant and inconspicuous, it would also necessarily cease to be a challenge to the Westphalian order. In short, as argued in this article, the Westphalian order is a self-protective system that is sufficiently robust to withstand and defeat a challenge from a group like the ISIS caliphate.

C. Major Islamic States

That leaves the second question: whether the creation or restoration of a caliphate in an existing state, particularly one as powerful and established as Turkey, Egypt, Indonesia, Nigeria, or Saudi Arabia, would threaten the Westphalian order. That question is an appreciably more difficult one, and this article’s answer to it is correspondingly less certain. However, the precedents of the Islamic Republic of Iran and the early Soviet Union suggest that even powerful states governed by leaders who reject the Westphalian order will gradually shed their revolutionary hostility and join it. In other words, they will remain or become *de jure* states. Granted, they may seek to maintain their *de jure* status while also transgressing fundamental international legal norms—but that is an inherently unstable position. Eventually, they are likely either to be treated as “pariahs” by

¹¹⁶ S.C. Res. 1725, ¶¶ 2–3 (Dec. 6, 2006).

¹¹⁷ Cedric Barnes & Harun Hassan, *The Rise and Fall of Mogadishu’s Islamic Courts*, CHATHAM HOUSE, 5–6 (April 2007), <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/bpsomalia0407.pdf>.

other states, thus losing the privileges of *de jure* status, or they will reform themselves by conforming to international legal rules. In either case, the chances of ISIS posing a genuine threat to the Westphalian order would diminish.

IV. ISLAM AND ISLAMISM

A. What is Islam?

Framing the questions as we have done presupposes the commonly accepted distinction between “Islam” and “Islamism.” But that distinction raises complex and controversial questions, and its use here must be evaluated and justified.

Bassam Tibi, a prominent scholarly proponent of the distinction,¹¹⁸ has attempted to negotiate a path between collapsing “Islam” (understood as a “faith”) into “Islamism” (a political position, or in Tibi’s term a “religionized” form of politics), and collapsing “Islamism” into “Islam.”

For Tibi, to equate Islam with Islamism invites either of two ensuing errors. Either: (1) it is Islamists alone who hold that they alone represent the “true” Islam, and that their Islamic opponents are heretics to be placed under excommunication or *takfir*; or (2) on the contrary, as argued by the most extreme critics of Islam, *all* of Islam should be viewed as “Islamist” and, therefore, essentially *jihadist* and violent.¹¹⁹

The alternative conflation—that of collapsing “Islamism” into “Islam”—is, Tibi argues, effectively to deny that contemporary jihadism, as practiced by groups like al-Qaeda or ISIS, has anything much to do with Islam. At worst, it is to assume that such jihadism represents a highly marginal, deviant, and minority strain within Islam. Tibi considers this error to be characteristic of non-Muslim scholars who seek to disassociate the practitioners of radical violence from the great faith whose sanction they invoke.¹²⁰

To speak of “Islamism” as distinct from “Islam,” then, is to acknowledge a true and indispensable distinction between the two things—the former being a “religionized” politics, the latter being a “religion.” But it is also to insist that there is a substantial relationship between the two.¹²¹ For Tibi, “Islamism is not Islam, [but it] is a political interpretation of this religion; in other words, it is based in Islam and does not lie outside of it.”¹²²

Tibi’s analysis, although persuasive, rests on a distinction between “religion” and “politics” that is exposed to serious challenge. Some scholars have argued that concepts such as “religion” and “politics,” as used here, are not neutral, analytical categories. Instead, they tacitly incorporate assumptions that reflect the

¹¹⁸ BASSAM TIBI, ISLAM AND ISLAMISM ch. 1 (2012).

¹¹⁹ *Id.* at 11–12.

¹²⁰ *Id.* at 12–13.

¹²¹ *Id.* at 11–15.

¹²² *Id.* at 7.

specific historical experience of Latin Christianity, and are inapplicable to the Muslim world.¹²³ Thus, what to contemporary liberal-Western eyes appears to be a self-evident distinction is in fact merely an artifact of a Christian (and particularly a Protestant) vision.¹²⁴

Most recently, in a deep, rich, and searching discussion, the Harvard scholar Shahah Ahmed has assailed the validity—for purposes of studying Islam—of an array of common conceptual distinctions, including those between the “religious” and the “political” or “cultural,” and between the “sacred” and the “secular,” or the “profane.”¹²⁵ Ahmed argues that these categories not only fail to illuminate Islam, but actually falsify it, requiring us to understand Islam in terms that incorrectly assume that it has an underlying, structural resemblance to Western Christianity. Ahmed maintains that although scholars of Islam frequently start by recognizing that “church” and “state” had no counterparts in historic Islam, they have characteristically failed to think through the radical consequences of that acknowledgement.¹²⁶ International law, like other disciplines, has arguably

¹²³ See SAYYID, *supra* note 34, at 14–15; ELIZABETH SHAKMAN HURD, *THE POLITICS OF SECULARISM IN INTERNATIONAL RELATIONS* ch. 7 (2008). The argument can indeed be carried even further and has been by other scholars. William Cavanaugh has powerfully contended that the very category of “religion” is itself an artifact created by the rise of the modern, liberal nation state as it developed in the West, and that until (at the earliest) the Renaissance, Christians did not conceive Christianity as (in the modern sense) a “religion.” WILLIAM T. CAVANAUGH, *THE MYTH OF RELIGIOUS VIOLENCE* 69–70 (2009) (“With the dawn of modernity . . . a new concept with a much wider and different significance [from religion] came to operate under the term religion. Religion in modernity indicates a universal genus of which the various religions are species; each religion comes to be demarcated by a system of propositions; religion is identified with an essentially interior, private impulse; and religion comes to be seen as essentially distinct from secular pursuits such as politics, economics, and the like. The rise of the concept of religion thus establishes Christianity’s proper sphere as the interior life, without direct access to the political.”). See also BRENT NONGBRI, *BEFORE RELIGION: A HISTORY OF A MODERN CONCEPT* (2013).

¹²⁴ The distinction between religion and politics, and the related distinction between Church and State, were emphasized by leading early modern liberal thinkers, above all by John Locke. Locke’s understanding was rooted in a specifically Protestant conception of Christianity. John Locke, *A Letter Concerning Toleration*, in *THE WORKS OF JOHN LOCKE* 1, 37–38 (1824) (“[T]he commonwealth of the Jews, different in that from all others, was an absolute theocracy: nor was there, or could there be, any difference between that commonwealth and the church. The laws established there concerning the worship of one invisible deity, were the civil laws of that people, and a part of their political government, in which God himself was the legislator.... But there is absolutely no such thing, under the gospel, as a christian commonwealth.”). Locke’s remarks here are illuminating, for they acknowledge that within a non-Christian religious system—here, ancient Judaism—the “commonwealth” and the “church” may be one. *Id.* In such a system, “religion” and “politics” overlap or coincide.

¹²⁵ SHAHAH AHMED, *WHAT IS ISLAM? THE IMPORTANCE OF BEING ISLAMIC* 183–97, 216–23 (2016).

¹²⁶ *Id.* at 189–93. As early as the 1920s, the great historian Arnold Toynbee had recognized that “the distinction between ‘religious’ and ‘political’, ‘sacred’ and ‘profane’, ‘ecclesiastical’ and ‘secular’, ‘spiritual’ and ‘temporal’ . . . was so characteristic of Western thought that it was difficult for Westerners not to read it unconsciously into the thought of

suffered from its insistence on interpreting Muslim political institutions through categories derived from Christianity.¹²⁷

Despite Ahmed's massively learned and powerfully argued critique, the Islam/Islamist distinction is not untenable if handled carefully. First, it is not essential for our discussion to decide exactly how best to understand the relationship between "Islam" and the movements, such as ISIS, that invoke a version of it for their political purposes.¹²⁸ Our objective here is to analyze the relationship between one such movement and the international legal order, not between that movement and Islam itself. Moreover, even if ISIS (or Islamism generally) has only a spurious, eccentric, or attenuated relationship to the doctrines, rites, and historic practices of Islam, it is still regarded by its followers and sympathizers, who are overwhelming Muslim themselves, as a tenable—indeed, the *true*—interpretation

other civilizations." Arnold J. Toynbee, *The Islamic World Since the Peace Settlement*, 1 SURV. INT'L AFF. 1, 26 (1927).

¹²⁷ See e.g., *Western Sahara, Advisory Opinion*, 1975 I.C.J. Rep. 61, at 12 (dealing with questions involving "sovereignty" over the nomadic peoples of the western Sahara, which raised the issue whether the ties between the Sultanate of Morocco or the Emir of Adrar and the chiefs of the nomadic tribes were "legal" in nature). The thoughtful individual opinion of Judge Dillard noted the argument that "a concept of law and hence of 'legal' ties [might be] misconceived if patterned on the kind of sense of obligation which now prevails in post-Reformation western oriented societies." *Id.* at 125–26 (quoting the individual opinion of Judge Dillard). On that argument, "ever since the Reformation, the sense of obligation to the sovereign has been sharply focused on his secular authority which is not only paramount but permits a dissociation between obligation owed to the State and those owed to religious authority." *Id.* But such a concept of "law," Dillard observed, might simply be inapplicable to a society in which distinctions like that between secular and religious *modes* of obligation "are not sharply delineated and are not part of the consciousness of people." *Id.* Hence the ties between the Saharan tribes and the Sultan or Emir might indeed be characterized as "legal" "once we rid ourselves of the preconceptions which identify 'legal' with deference to a mere secular authority." *Id.*

¹²⁸ See ROY, *supra* note 8, at 43 (arguing that the radicalism of what is called "Islamic radicalism" is its generative core, and that radicalism is subsequently "Islamized;" in his view, ISIS provides a theological "rationalization" for "the radical imaginary").

of Islam.¹²⁹ ISIS may embody an extreme, legalistic, text-driven¹³⁰ and *Salafist*¹³¹ understanding of Islam, unlike Ahmed's more humanistic, civilizational, polyphonic and *Sufist* one.¹³² Even so, that would not negate the existence of plausible ties between Islam, as many Muslims understand it, and ISIS.

Indeed, Ahmed himself observes that a "prominent and permanent thread of the history of Muslims has been the struggle to arrive at a coherent working

¹²⁹ ROXANNE L. EUBEN, ENEMY IN THE MIRROR: ISLAMIC FUNDAMENTALISM AND THE LIMITS OF MODERN Rationalism 22–36 (1999). It bears emphasis that Islamist movements generally, and ISIS in particular, do not use Islam merely instrumentally—though some of their leaders may do so. *Id.* The genuineness of Islamists' commitment to Islam *as a religion*, and not merely as a means to mobilize support for a social, economic and political agenda, cannot be doubted. *Id.* Even ISIS's horrifying atrocities stem from religious beliefs. *Id.* Western "rationalism" to the contrary, religious motivations are *not* intrinsically epiphenomenal on "truer" causes. *Id.*

¹³⁰ William McCants & Sohaira Siddiqui, *Experts Weigh In (Part 2): How Does ISIS Approach Islamic Scripture?*, BROOKINGS (Mar. 26, 2015), <https://www.brookings.edu/blog/markaz/2015/03/26/experts-weigh-in-part-2-how-does-isis-approach-islamic-scripture/> (noting that ISIS does not, however, invariably follow the literal meaning of the text in its scriptural or legal interpretation).

¹³¹ Peter Layton, *Bringing the Transnational into 'New Wars': The Case of Islamic State*, 5 INT'L REV. SOC. SCI. RESEARCH 191, 193 (2015) ("ISIS stakes its claim to power on a particular religious identity loosely derived from the Salafist teachings of the Sunni writer Abu Muhammed al-Maqdidi, perhaps the most influential Jihadist ideologue alive today. . . . ISIS taps into Maqdidi's Salafist Jihadist's notion that Muslims should return to the simplicity and unity of early Islam and blends with it a hardline takfirism that considers those who oppose Islamic rule are either apostates or infidels and must be eradicated."). However, the contrast between *Salafism* and *Sufism* at which referred to here is highly problematic and should not be pressed too hard, but it deserves a brief explanation. "Salafism" is often associated with both radical Islamist violence and with a universalizing, legalistic and "puritanical" Wahhabism; "Sufism" on the other hand is often assumed to be tolerant, peaceful, ecumenical, and inclined to mysticism. ASMA AFSARUDDIN, THE FIRST MUSLIMS: HISTORY AND MEMORY 157 (2008). But the term "*salafi*" "by no means implies adherence to a predictable, consistent set of beliefs. As used specifically in the nineteenth and twentieth centuries, it refers to a wide gamut of views that developed in this period. It further reflects an ongoing process of connecting and disconnecting with the past in various projects of renewal (*tajdid*) and reform (*islah*) through the period." *Id.* Salafism includes both an "integrist or conservative" wing and a "reformist" wing. *Id.* at 151. Indeed, some scholars discern markedly "sufi" characteristics even in supposedly "salafist" groups like Taliban and al-Qaeda. FAISAL DEVI, LANDSCAPES OF THE JIHAD: MILITANCY, MORALITY, MODERNITY 22–23, 42–45 (2005); Mark Woodward et al., *Salafi Violence and Sufi Tolerance? Rethinking Conventional Wisdom*, 7 PERSPECTIVES ON TERROR 58 (2013); Henri Lauzière, *The Construction of Salafiyya: Reconsidering Salafism from the Perspective of Conceptual History*, 42 INT'L J. MIDDLE EAST STUD. 369, 374, 384–85 (2010). Equally, the common understanding of "Wahhabism" is not accurate. See generally SAMIRA HAJ, RECONFIGURING ISLAMIC TRADITION: REFORM, RATIONALITY, AND MODERNITY ch. 2 (2009); NATANA J. DELONG-BAS, WAHHABI ISLAM: FROM REVIVAL AND REFORM TO GLOBAL JIHAD (2004).

¹³² ANNEMARIE SCHIMMEL, MYSTICAL DIMENSION OF ISLAM 3–23 (2d ed. 2001) (discussing Sufism).

relationship in society between the respective truth claims of law and of Sufism.”¹³³ And while his erudite rendition of Islam is overtly hostile to (what we are calling) the legalist/textualist *Salafisti* tendency in it¹³⁴ and is deeply appreciative of (what we are calling) the philosophical/cultural *Sufist* one,¹³⁵ he also acknowledges the powerful trend among modern Muslims to marginalize and devalue the practices and discourse associated with traditional *Sufism*, and to gravitate instead towards *Salafist* neo-traditionalism, especially by locating the sources of theological and political authority in law and sacred text.¹³⁶ Thus, speaking of the modernizers, he writes that “for something to possess a value or meaning in terms of Islam today, that value or meaning must, by and large, be validated in terms of the reasoning of projects of hermeneutical engagement with the Text.”¹³⁷ In other words, contemporary Muslims are drawn in large numbers to an archaizing, legalistic, and arguably “re-imagined” version of Islam that emphasizes the centrality of Law, as formed principally through a particular understanding of “the modular period of the Prophet, the Rightly-Guided Caliphs (the Rashidun) and the Salaf,” and of “the Prophetic Hadith—the Textual corpus collected in the first centuries of Islam by a sector of the community of Muslims.”¹³⁸ The result may well be, as Ahmed argues, a truncated, unhistorical, impoverished, and fundamentally untrue version of “Islam”—but even he concedes that it is an increasingly widespread one among Muslims.¹³⁹ Thus, the distinction which Tibi draws does indeed point to an underlying reality: there *is* a historic (and contemporary) difference between a (broadly) *Salafist* interpretation of Islam—one form of which might be designated as “Islamism”—and on the other hand a (broadly) *Sufist* one.

B. What Is Islamism?

Let us then attempt to characterize Islamism in terms of broad themes or tendencies that flow from its conception of Islam. Thus, the French scholar Olivier Roy characterized Islamism (or what he called “political Islam”) in terms of “themes” that have recurrently appeared in Islamic political thought:

The nonseparation of the religious, legal, and political spheres is affirmed. The *sharia* should be the sole source of law as well as

¹³³ AHMED, *supra* note 125, at 24.

¹³⁴ *Id.* at 171–72.

¹³⁵ *Id.* at 93–94.

¹³⁶ *Id.* at 517–18.

¹³⁷ *Id.* at 518.

¹³⁸ AHMED, *supra* note 125, at 529.

¹³⁹ *Id.* Ironically, although Islamist groups like ISIS claim to derive their legitimacy from Islamic tradition, their success evidences the *disintegration* of the traditional “juridical authority that had for centuries been located in a clerical class known as the *ulama*,” and the consequent *democratization* of that authority. DEVJI, *supra* note 131, at 112. ISIS’s skill at appealing to a largely youthful Muslim audience through its mastery of social media is indicative of this “flattening” of the structures of Islamic authority.

the norm for individual behavior, both for the sovereign and for the simple believer. The definition of an autonomous political space, with its own rules, its positive laws, and its own values, is prohibited. Finally, the state is never considered in terms of a territorialized nation-state; the ideal is to have a power that would rule over the entirety of the *umma*, the community of the faithful, while actual power is exercised over a segment of the *umma* whose borders are contingent, provisional, and incomplete ... Th[e] idea [that no distinction is made between the religious and the political orders] is one of the deep convictions of the political actors in contemporary Islam.¹⁴⁰

A certain political project, it seems safe to say, is central to Islamism, regardless of whether it is central to the historically dominant form of Islam. That project calls for the establishment, whether by legal or revolutionary means, of a pervasively Islamic government, whether on a local, regional, or global scale, that is comprehensively directed by and centered on *sharia* law,¹⁴¹ or at any rate, by what is taken to be *sharia* law.¹⁴² Though Islamism may have goals other than this, that objective is at its core.¹⁴³

Moreover, “Islamism,” in at least some of its forms (including ISIS), tends to have a specific and selective conception of what the constitutionalization of the *sharia* would entail. Islamism (and ISIS) accord a uniquely privileged and authoritative place to (their depiction of) the period of Muhammed and its

¹⁴⁰ OLIVIER ROY, *THE FAILURE OF POLITICAL ISLAM* 13 (Carol Volk trans. 1994). Likewise, Graham Fuller characterizes Islamism, not as an ideology comparable to nationalism, liberalism or communism, but as “a cultural variant, an alternative vocabulary in which to address any of these ideological trends” that includes “certain predispositions such as a conservative social agenda, a call for political change, a defensive cultural/nationalist bent, and a rhetorical call for adoption of Islamic law that means many different things in practice.” GRAHAM E. FULLER, *THE FUTURE OF POLITICAL ISLAM* 193 (2003).

¹⁴¹ TIBI, *supra* note 118, at 3 (“The major creed of Islamism is *din-na-dawla* (unity of state and religion) under a system of constitutionally mandated shari’a law.”).

¹⁴² *Id.* at 24–25; AFSARUDDIN, *supra* note 131, at 157 (“Hard-line Islamists adhere to the notion of a practically immutable religious law, the *shari’a*, regarding whose scope and interpretation all right-thinking Muslims are in perfect accord. The two principal sources of the *shari’a*, the Qur’an and the *sunna*, are held by many of them to admit of a single and uniform, often literal, interpretation, authoritatively established by the Prophet and upheld by his Companions, and thus valid for all times and places. While there still may be room for interpretation in limited cases, reasoned interpretation (*ijtihad*) is the province of only a few, preferably of those who subscribe to their particularist views and share their ideological orientation. Hard-line Islamists reject the possibility of multiple, equally valid interpretations of the religious law. . . . Nowhere is the hard-line Islamist perception of the *shari’a* more manifest as absolute and unchanging than in their construction of religious and political authority.”).

¹⁴³ AFSARUDDIN, *supra* note 131, at 153 (discussing that the “primary wish” of Islamists is “to govern and be governed politically only be Islamic principles, “understood by them to be immutably enshrined in the *shari’a*”).

immediate aftermath¹⁴⁴—a period that, Roy says, “offers the militants of political Islam an ideal for Muslim society” and that has become the object of their “nostalgia.”¹⁴⁵ But that constellation of views regarding the political order depends on a highly questionable understanding of early Muslim history—a version that “modernist” Muslim scholars have attacked.¹⁴⁶ Moreover, it is not held by the majority of contemporary Muslims or their religious teachers; nor are they afflicted with the same “nostalgia”—at least not to the extent that the militants are.¹⁴⁷ On this analysis, ISIS (like other Islamist movements) plainly has a relationship to Islam, but represents a minority, archaizing and legalistic interpretation of it.¹⁴⁸

The cruel fate of 26-year-old First Lieutenant Moaz al-Kasasbeh, a Jordanian pilot whom ISIS captured in late 2014 when his F-16 jet crashed in Syria, illustrates ISIS’s relationship to Islamic teachings. ISIS produced and publicized a horrifying video, showing the pilot being burned alive in a metal cage. The video provoked outrage and condemnation throughout the Muslim world. Ahmed al-Tayeb, the head of al-Azhar, the most respected seat of Islamic learning in the Sunni community, condemned the ISIS militants, saying that they deserved the Quranic punishment of death, crucifixion, or mutilation as enemies of God and the Prophet. “Islam prohibits the taking of an innocent life,” wrote al-Tayeb. He further observed that ISIS had violated an Islamic prohibition on wartime mutilation.¹⁴⁹

¹⁴⁴ AFSARUDDIN, *supra* note 131, at 148–51.

¹⁴⁵ ROY, *supra* note 140, at 12–13. Yet, even that statement requires qualification, because Islamist thought has inevitably been infused with Western cultural forms and post-colonial concerns. *Id.* at 22–23; EUBEN, *supra* note 129, at 84–85.

¹⁴⁶ AFSARUDDIN, *supra* note 131, at 184, 186 (“There is no evidence at all in the early sources that the Companions invoked a supposedly divinely mandated blueprint for an ‘Islamic Government’ or an ‘Islamic State’ in the election of the Prophet’s first successor.”).

¹⁴⁷ ROY, *supra* note 140, at 12–13. The importance of a sense of “nostalgia” for a lost but largely imaginary past is a defining feature of what Jeffrey Herf has called “reactionary modernist” movements. See generally JEFFEREY HERF, *REACTIONARY MODERNISM: TECHNOLOGY, CULTURE, AND POLITICS IN WEIMAR AND THE THIRD REICH* (1986). So too is the willingness to make full and adroit use of modern technology (including now social media) for neo-traditionalist purposes. *Id.* In these respects, ISIS surely is a form of reactionary modernism.

¹⁴⁸ TIBI, *supra* note 118, at 7–8 (“Islamism is a political interpretation of the religion.”). See also Graeme Woods, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> (ascribing a “medieval religious nature” to ISIS in an influential but controversial discussion of ISIS’s relationship to Islam). But see Raymond William Baker, *We Are at War with and Imaginary Islam: Lies, Propaganda and the Real Story of America and the Muslim World*, SALON (Sept. 26, 2015), http://www.salon.com/2015/09/26/we_are_at_war_with_an_imaginary_islam_lies_propaganda_and_the_real_story_of_america_and_the_muslim_world/.

¹⁴⁹ Rod Nordland & Anne Barnard, *Militants’ Killing of Jordanian Pilot Unites the Arab World in Anger*, N.Y. TIMES (Feb. 4, 2015), <http://www.nytimes.com/2015/02/05/world/middleeast/arab-world-unites-in-anger-after-burning-of-jordanian-pilot.html>; *Jordanian Pilot’s “Obscene” Burning Death by ISIS Sparks Outrage in Mideast*, CBS NEWS (Feb. 4, 2015), <http://www.cbsnews.com/news/jordanian-pilots-obscene-burning-death-by-isis-sparks-outrage-in-mideast/>.

Likewise, Sheik Salman al-Oudah, a prominent Saudi cleric, denounced ISIS's action, citing Islamic teaching that God alone has the right to punish by fire.¹⁵⁰ Other distinguished Muslim religious scholars, Sunni and Shiite alike, joined these condemnations.¹⁵¹

ISIS, however, offered a legal-theological defense of its action. In an article in volume 7 of *Dabiq*, entitled *The Burning of the Murtado Pilot*, ISIS claimed to have "carried out a just form of retaliation for his involvement in the crusader bombing campaign which continues to result in the killing of countless Muslims who, as a result of these airstrikes, are burned alive and buried under mountains of debris."¹⁵² Acknowledging the *hadith* that reported Muhammed's statement that "[n]o one should punish with fire except Allah," ISIS counter-cited two Quranic verses.¹⁵³ The first verse (An-Nahl:126) reads: "And if you punish [an enemy, O believers], punish with an equivalent of that with which you were harmed."¹⁵⁴ The second verse (Al-Baqarah: 194) reads: "So whoever has assaulted you, then assault him in the same way that he has assaulted you."¹⁵⁵ ISIS also referred to a *hadith* that reported that Muhammed had ordered the eyes of some men of the Uraynah clan to be branded with hot iron and then gouged out as punishment for their murder of an innocent Muslim herdsman.¹⁵⁶ Finally, ISIS cited five precedents from early Muslim history, including episodes during the first caliphate of Abu Bakr, in which burning alive was considered a fitting and permissible form of punishment.

ISIS's defense of the burning of the Jordanian pilot is of course utterly unconvincing as a legal and theological matter to the vast majority of Muslim jurists and other Muslim believers. But the crucial point is that ISIS's defense is presented in terms of a traditional and recognizably "Islamic" juridical and theological discourse. It relies on a reading of sources that Muslims generally accept as authoritative, including both scripture and *hadith*, and it responds in detail to the legal arguments made by ISIS's critics. ISIS's interpretation of Islamic teaching

¹⁵⁰ *Jordanian Pilot's "Obscene" Burning Death*, *supra* note 149.

¹⁵¹ Associated Press in Baghdad, *Muslim Clerics Denounce 'Savage' ISIS Murder of Jordanian Pilot*, *GUARDIAN* (Feb. 6, 2015), <https://www.theguardian.com/world/2015/feb/06/muslim-clerics-denounce-jordanian-pilot-execution-kasasbeh>.

¹⁵² Islamic State of Iraq and the Levant, *The Burning of the Murdered Pilot*, 7 *DABIQ* 1, 5–8 (Feb. 12, 2015), <https://clarionproject.org/docs/islamic-state-dabiq-magazine-issue-7-from-hypocrisy-to-apostasy.pdf>.

¹⁵³ *The Immolation by Islamic State of the Jordanian Pilot Revives a Theological Debate*, *CHRONICLE MIDDLE EAST & NORTH AFRICA* (Dec. 12, 2016), <https://chronicle.fanack.com/jordan/history-past-to-present/immolation-islamic-state-jordanian-pilot-revives-theological-debate/>.

¹⁵⁴ *An-Nahl: Sahih International*, QURAN 16:126, <https://quran.com/16/126> (last visited Oct. 13, 2017).

¹⁵⁵ *Al-Baqarah: Sahih International*, QURAN 2:194, <https://quran.com/2/194> (last visited Oct. 13, 2017).

¹⁵⁶ *Muhammad and the Muslims for Uraynah*, Answering Islam, <http://www.answering-islam.org/Muhammad/Enemies/urayna2.html> (last visited Oct. 13, 2017).

may well be deviant, twisted and decontextualized, but it *is* textually and religiously grounded.¹⁵⁷

V. HOW THE PROCLAMATION OF THE ISIS CALIPHATE CHALLENGED THE WESTPHALIAN ORDER

The idea that an Islamist caliphate might threaten the basis of the international legal order arises from the fact that the current order is Westphalian and presupposes that the central actors in international affairs are “sovereign” states or nation-states. This presupposition is the basis of the UN Charter, which, as is assumed in Article 103,¹⁵⁸ can be viewed as a kind of “Constitution” for international society.¹⁵⁹ Moreover, it was affirmed in the 1969 Charter of the Organization of the Islamic Conference (OIC), which declares a purpose “to respect, safeguard and defend the national sovereignty, independence and territorial integrity of all Member States.”¹⁶⁰ This was also reaffirmed in the 1999 OIC Convention on Combating Terrorism.¹⁶¹

The ISIS “caliphate” challenges that state-centered international legal order, not so much because the caliphate is not a state of some kind itself (the very

¹⁵⁷ See ROY, *supra* note 8, at 58–61.

¹⁵⁸ U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

¹⁵⁹ See generally Michael W. Doyle, *A Global Constitution? The Struggle Over the UN Charter*, NYU Symposium (Sept. 2010), <http://www.iilj.org/wp-content/uploads/2016/11/Doyle-A-Global-Constitution-2010.pdf>; Robert J. Delahunty & Antonio F. Perez, *The Kosovo Crisis: A Dostoevskian Dialogue on International Law, Statecraft, and Soulcraft*, 42 VANDERBILT J. TRANSNAT’L L. 15, 108–15 (2009); Bardo Fassbender, *The United Nations Charter as Constitution of The International Community*, 36 COLUM. J. TRANSNAT’L L. 529 (1998). The Charter assigns a cardinal role to the Westphalian idea of “sovereignty,” codifying core elements of the doctrine. U.N. Charter art. 2(4) (laying down a principle prohibiting forcible intervention by one state against another: “All Members shall refrain in their international relations from 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 also declares that “matters” that are “essentially within the domestic jurisdiction” of a state lie outside the scope of permissible intervention even on the part of the Security Council or other UN organs. U.N. Charter art. 2(7) (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter”).

¹⁶⁰ Charter of the Organization of the Islamic Conference, Organisation of the Islamic Conference (OIC) (Sept. 25, 1969), http://www.oic-iphrc.org/en/data/docs/legal_instruments/OIC%20Instruments/OIC%20Charter-%20AEFV/OIC%20Charter-EV.pdf (the Organization is now known as the Organization of Islamic Cooperation).

¹⁶¹ Convention on Combating International Terrorism, Organization of the Islamic Conference (OIC) (1999), file:///C:/Users/amandadick/Downloads/OIC_Convention_En%20(2).pdf.

names “ISIS” and “IS” make a claim to be one),¹⁶² but because it represents an attempted reversion to or restoration of a pre-Westphalian order in certain fundamental respects. The proclamation of the ISIS caliphate, displayed in a dramatic and vivid form, rejected what the international relations theorist Andrew Phillips has identified as the two crucial aspects of the contemporary world order that “most emphatically distinguish it from its historical predecessors”:

First, unlike [pre-Westphalian orders], the global state system lacks overt cosmological foundations. From the Axial Age onwards, a recognition of the existence of a tension between the transcendent and the immanent realms had historically been central in informing the diverse conceptions of the good underpinning international orders. Conversely, the global state system powerfully reflects Enlightenment legacies in its constitutional norms, with the goals of human emancipation and material progress in the temporal world entirely replacing religious imperatives as the basis for international order. Secondly, and relatedly, whereas imperial hierarchy formed a natural and unproblematic feature of past international orders, the global state system conversely grew out of a repudiation of empire as a legitimate form of political association.¹⁶³

In re-establishing the caliphate, ISIS in effect rejected both axioms of the contemporary world order. First, it claimed in substance that the basis of the international legal order must be founded on the sacred, not the secular. Second, it claimed for itself the authority to represent and lead the entire global community of

¹⁶² William McCants, *How the Islamic State Declared War on the World*, BROOKINGS (Nov. 17, 2015), <https://www.brookings.edu/blog/markaz/2015/11/17/how-the-islamic-state-declared-war-on-the-world/>. The ISIS caliphate has had a functioning justice system that may well have been an improvement over the Iraqi and Syrian ones. Andrew F. March & Mara Revkin, *Caliphate of Law: ISIS' Ground Rules*, FOREIGN AFF. (April 15, 2015), <https://www.foreignaffairs.com/articles/syria/2015-04-15/caliphate-law>. And by regional standards, ISIS, at least before its capabilities were degraded by outside military forces, maintained a normal welfare system. Ahrām & Lust, *supra* note 111, at 19–20; HAMID, *supra* note 8, at 224–32. In a document announcing the caliphate entitled *This is the Promise of Allah*, ISIS boasted: “The people in the lands of the [Islamic] State move about for their livelihood and journeys, feeling safe regarding their lives and wealth. Wulat [governors] and judges have been appointed. Jizyah (a tax imposed on kuffar [unbelievers]) has been enforced. Fay’ (money taken from the kuffar without dispute) and zakat (obligatory alms) have been collected. Courts have been established to resolve disputes and complaints. Evil has been removed. Lessons and classes have been held in the masajid . . . and . . . the religion has become completely for Allah.” Abu Muhammed Al ‘Adnani Al-Shami, Prior Spokesperson of the Islamic State of Iraq and the Levant, *This is the Promise of Allah* 4 (June 19, 2014) (transcript available at <https://scholarship.tricolib.brynmawr.edu/bitstream/handle/10066/14242/ADN20140629.pdf>).

¹⁶³ ANDREW PHILLIPS, *WAR, RELIGION AND EMPIRE: THE TRANSFORMATION OF INTERNATIONAL ORDERS* 263 (2011).

Muslims (the *umma*), and so to occupy a uniquely privileged position within the hierarchy of the international order. The ISIS caliphate would therefore override and eventually displace the nation-state.¹⁶⁴ At the most general level, the proclamation of a caliphate sought to displace “politics” by “religion” as the basis of the global legal order.¹⁶⁵

In more detailed terms, the proclamation of the caliphate affirmed that there must be a divine basis in Islamic law (the *sharia*) for any valid legal regulations regarding the relations between the caliphate and other states. ISIS thus denied that international law was derived from the consent, actual or implied, of formally equal sovereign states.¹⁶⁶ Divine imperatives, not secular consent, undergird the legal order. Rather, within that divinely sanctioned legal order, the caliphate was to occupy a uniquely privileged position. States were not formally and legally equals; rather, insofar as the existence of states other than the caliphate were legitimate at all, they ranked below it, legally, in the international order.

As the occupant of the central, privileged position in a global legal order, the caliphate peremptorily laid claim to the overriding loyalty of all Muslims (the *umma*) wherever situated, including those in non-Muslim-majority states. Thus, in the event of a legal conflict between their obligations to the state of which they were nationals and the caliphate, Muslims were obliged to conform to the caliphate’s mandates, even as to “political” and “non-religious” matters. Further, the proclamation of the caliphate denied the legal validity of existing international boundaries, or at least to the extent they separated one majority-Muslim state from another.

¹⁶⁴ ROY, *supra* note 8, at 82 (“[I]t is out of the question for ISIS to accept the concept of a nation-state with the attendant boundaries and rules of diplomacy. . . . The caliphate exists only to expand, and so to wage war, for it cannot brook any sort of negotiation.”).

¹⁶⁵ There is nothing specifically *Muslim* about such a civilizational understanding of the world order. On the contrary, very similar understandings can be found in pre-modern civilizations such as medieval Christendom. In both medieval Christendom and Islam, it was not conceptually possible “to fathom a ‘world order’ in which relations between politically independent units were regulated by universally valid norms. Indeed, such an idea would have been entirely incongruous with the normative principles by which each of the separate realms was held together. . . . The same could also be said of the empires built by European nations, for each of them, too, was permeated by the convictions of its own supremacy.” Bozeman, *supra* note 67, at 67. Even some modern Christian thinkers still argue that the state and the international order alike rest on sacred foundations. See Stephen R.L. Clark, *Civil Peace and Sacred Order: Limits and Renewals I* at 88, 93–97 (1989).

¹⁶⁶ See Manne, *supra* note 8, at 121 (a core element of the “Salafi jihadism” represented by ISIS is the belief that “[a] single Islamic world community, the *umma*, had to triumph over the nation-state, the grotesque formation that had divided human beings since the Treaty of Westphalia, and replace that collectivity of grotesqueries, the United Nations. Sovereignty, *hakimmiyya*, in the *umma*, had to rest exclusively with God”). See also Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Judgment, 2016 I.C.J. 159, ¶¶ 126–29 (Oct. 2) (affirming the foundational nature of the principle of formal equality to international law).

The proclamation of the caliphate was also tantamount to a declaration of war on both other Muslim-majority states and non-Muslim states. For the ISIS caliphate, the existing governments of Muslim-majority states, including that of Saudi Arabia, are illegitimate.¹⁶⁷ Moreover, because the caliphate claims to represent the global *umma*, it is in a state of permanent war with the non-Muslim world, although that conflict can be suspended on occasion by treaties or truces.

A. The “Classical” Islamic Vision of the World Order

To understand these consequences more fully, we must consider the pre-modern, “classic” Islamic conception of the law of nations, which the ISIS caliphate has sought to appropriate. Although that body of law was only a rough approximation of the reality it sought to map, it had and continues to have considerable force as a paradigm. For our purposes, two features of that paradigm are crucial: first, the assumption that the Muslim world formed a certain unity, and second, that the relations between the Muslim and non-Muslim worlds would be fundamentally hostile.

Classically, Islamic thought distinguished between two “worlds”—the *dar al-islam* and the *dar al-harb*. As Patricia Crone, an eminent British scholar of classical Islam, explained, the *dar al-islam* world is conceived of as “the abode of Islam, or what one might more idiomatically call the Muslim world.”¹⁶⁸ This was the world in which Islamic law held sway and in which there were rights and duties, human warmth, peace, and brotherhood.¹⁶⁹ The *dar al-harb* world (also known as the *dar al-kufr* or “abode of unbelief”) was “the abode of war, or what we might more fashionably call the realm of ‘The Other’; this was the world in which there was no legal (as opposed to de facto) order.”¹⁷⁰ For much of Islamic history, the *dar al-harb* was, to a great extent, Christendom, or the civilization shaped by the Christian religion.¹⁷¹ While an antagonistic relation existed between the two

¹⁶⁷ See Richard Falk, *ISIS's Challenge to the Statist World Order*, MIDDLE EAST EYE (Dec. 11, 2015), <http://www.middleeasteye.net/columns/isis-and-world-order-139021644> (“by discrediting those states that were imposed on the region after World War I, ISIS is claiming a superior political legitimacy to that conferred by international diplomatic procedures or through admission to the United Nations.”); Al-Shami, *supra* note 162, at 4, 6 (“[W]ith this declaration of khilafah [caliphate], it is incumbent upon all Muslims to pledge allegiance to the khalifah [al Baghdadi] and support him. . . . The legality of all emirates, groups, states, and organizations, becomes null by expansion of the khilafah’s authority and arrival of its troops to their areas. . . . As for you, O soldiers of the platoons and organizations, know that after this consolidation and the establishment of the khilafah, the legality of your groups and organizations has become invalid.”).

¹⁶⁸ PATRICIA CRONE, *GOD’S RULE: GOVERNMENT AND ISLAM: SIX CENTURIES OF MEDIEVAL ISLAMIC POLITICAL THOUGHT* 359 (2004).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See generally TOMAŽ MASTNAK, *CRUSADING PEACE: CHRISTENDOM, THE MUSLIM WORLD AND THE WESTERN POLITICAL ORDER*, 96–117 (2002); R.W. SOUTHERN, *WESTERN VIEWS OF ISLAM IN THE MIDDLE AGES* (1962) (for medieval Christian understandings of

“abodes” or “worlds,” the relationship could be and often was softened in many ways.¹⁷² Even during the two-hundred year period of the Crusades, some 120 treaties between Christian and Muslim forces were signed.¹⁷³ Indeed, it has been argued that in practice “[t]here was no effective binary of Muslim and non-Muslim lands.”¹⁷⁴

Nonetheless, the *dar al-harb* was, in the final analysis, considered illegitimate. As explained by Crone:

[The *dar al-harb* world] had no right to exist, like states denied diplomatic recognition in modern times. Though truces could temporarily suspend hostilities between it and the abode of Islam, the relationship between them could never be one of real peace. Muslims were legally obliged to wage holy war against *dar al-*

Islam); JAMES MULDOON, *POPES, LAWYERS, AND INFIDELS: THE CHURCH AND THE NON-CHRISTIAN WORLD 1250-1550* 38–41 (1979) (discussing that Christian states, including the Papacy, had frequent diplomatic dealings with Muslim rulers during the Middle Ages). In 1076, Pope Gregory VII wrote to the Muslim Emir of Mauretania, saying that Christianity and Islam had a common heritage, and emphasizing the Abrahamic origins of both. See NORMAN HOUSLEY, *CONTESTING THE CRUSADES* 157 (2006).

¹⁷² See TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* 163–64 (2003) (discussing a substantial legal question for pre-modern Christian states whether they could enter into treaties with Muslim ones). But many Christian states in fact did make such treaties. Thus, Byzantium made a treaty in 969–70 with the Prince of Aleppo to bring about free traffic of Greek caravans, limit customs duties, and guarantee the security of persons. *Id.* The treaty of 1154 between Pisa and the Fatimid caliphate of Egypt guaranteed protection for peaceful merchants and authorized the Pisans to set up a commercial settlement. *Id.* Pisa ratified a similar trade treaty with the King of Tunis in 1157. *Id.* Likewise, Genoa, Venice, Florence, Sicily, Aragon and Majorca all signed trade treaties with Muslim kingdoms. See FRANÇOIS L. GANSHOF, *THE MIDDLE AGES: A HISTORY OF INTERNATIONAL RELATIONS* 142–44, 304–05 (Rémy Inglis Hall trans. 1970). Early modern practice often followed a similar pattern. A Dutch-Persian Treaty of 1631 guaranteed merchants from either country sojourning in the other country parity of rights, and specifically protected Persian merchants’ Muslim form of worship in the Netherlands. See C.H. ALEXANDROWICZ, *THE LAW OF NATIONS IN GLOBAL HISTORY* 153 ET SEQ. (David Armitage ed. 2017). The great seventeenth century Dutch jurist Hugo Grotius argued on the basis of the New Testament for the legitimacy of treaty-making between Christian and Muslim states. See Peter Borschberg, *Hugo Grotius, the Portuguese and Free Trade in the Indies* 52 (2011). Even the Portuguese, despite their traditional hostility towards Islam, formed alliances and trade relations with Muslims during the age of European exploration. See Jeremy Prestholdt, *Portuguese Conceptual Categories and the “Other” Encounter on the Swahili Coast*, 36 J. ASIAN & AFRICAN STUD. 383 (2001). See also Giuseppe Marcocci, *Trading with the Muslim World: Religious Limits and Proscriptions in the Portuguese Empire (ca. 1480-1570)* in FRANCESCA TRIVELLATO, LEOR HALEVI AND CATIA ANTUNES (EDS.), *RELIGION AND TRADE: CROSS-CULTURAL EXCHANGES IN WORLD HISTORY, 1000-1900* (2014).

¹⁷³ Yvonne Friedman, *How to End Holy War: Negotiations between Muslims and Crusaders in the Latin East*, 21 COMMON KNOWLEDGE 83, 83–84 (2015).

¹⁷⁴ AYDIN, *supra* note 46, at 18.

harb until it ceased to exist or the world came to an end, whichever would be sooner.¹⁷⁵

From this conception it followed that diplomatic relations between the Islamic state and the *dar al-harb* world could not be regularized and institutionalized—even though the prophet Muhammed himself had sent emissaries abroad and corresponded with foreign rulers, including the Emperor of Byzantium.¹⁷⁶ “In early Islam, diplomacy was resorted to as an auxiliary to or as a substitute for war: it served either as a herald to deliver the message of Islam before fighting began or as a means to exchange prisoners of war after the termination of fighting.”¹⁷⁷

One need hardly say that the “classic” Muslim discourse and practice of interstate relations have not survived intact, and both Muslim states and leading Muslim lawyers nowadays would emphatically reject it.¹⁷⁸ The Quran itself holds treaties to be binding and encourages exchanges of diplomatic envoys.¹⁷⁹ As just noted, the prophet Muhammed sent and received envoys.¹⁸⁰ He also formed treaties, including the so-called “Constitution of Medina,” which regulated the relations between the *Muhajirun* (Muhammed’s followers who had migrated from Mecca to Medina), the *Ansar* (literally “helpers,” i.e., Muhammed’s followers at Medina) and the Jews of Medina,¹⁸¹ and the “Treaty of Al-Hudaybiyya” with the Meccans, who permitted Muhammed’s followers to make pilgrimages to their city.¹⁸² Although the latter treaty was limited to a fixed term and Muhammed arguably breached it, legal scholars have pointed out that it “offered a juridical mechanism to regulate peaceful relationships between peoples who would otherwise be in a state of violent conflict.”¹⁸³ Furthermore, from a very early stage onwards, the contest

¹⁷⁵ CRONE, *supra* note 168, at 362.

¹⁷⁶ MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 241–42 (1955).

¹⁷⁷ *Id.* at 239.

¹⁷⁸ Adam Brereton, *ISIS Seeking to Set Up 'Distant Caliphate' in Indonesia*, *George Brandis Warns*, *GUARDIAN* (Dec. 21, 2015), <https://www.theguardian.com/world/2015/dec/22/isis-seeking-to-set-up-distant-caliphate-in-indonesia-george-brandis-warns>; Afzal Ashraf, *The Myth of the Caliphate and the Islamic State*, *ALJAZEERA* (July 10, 2014), <http://www.aljazeera.com/indepth/opinion/2014/07/myth-caliphate-islamic-state-20147912425476113.html>; Boko Haram, *As Caliphates Compete, Radical Islam Will Eventually Weaken*, *STRATFOR* (Sept. 7, 2014), <https://www.stratfor.com/analysis/caliphates-compete-radical-islam-will-eventually-weaken>; Thomas Joscelyn, *Al Qaeda Renews its Oath of Allegiance to Taliban Leader Mullah Omar*, *LONG WAR J.* (July 21, 2014), http://www.longwarjournal.org/archives/2014/07/al_qaeda_renews_its.php.

¹⁷⁹ See Perry S. Smith, *Of War and Peace: The Hudaibiya Model of Islamic Diplomacy*, 18 *FLA. J. INT’L L.* 135, 139–40, 144 (2005).

¹⁸⁰ *Id.* at 143–44.

¹⁸¹ AFSARUDDIN, *supra* note 131, 4–7.

¹⁸² *Id.* at 10–11.

¹⁸³ Anver M. Emon, *On Sovereignties in Islamic Legal History*, 4 *MIDDLE EAST L. & GOVERNANCE* 265, 300 (2012).

between Islam and the world of war was far from a continuous and unrelenting state of actual hostilities; instead, as one leading scholar explained, “it was rather equivalent to what is called in Western legal terminology non-recognition; that is, the incompetence of the world of war to possess a legal status under Muslim law so long as it lacked the essential doctrinal prerequisite of the true faith.”¹⁸⁴

Indeed, even in the medieval period, Muslim scholars sought to align legal doctrine more closely with political realities, and accordingly argued for recognizing the existence of a third global “grey” zone: the *dar al-suhl* or the *dar al-‘ahd*, in which non-Muslim states had subjected themselves to a degree of Islamic rule without having entered the *dar al-islam*.¹⁸⁵ Some also argued that the “unity” of the *dar al-islam* was fictitious, and admitted the existence of a plurality of political régimes within it.¹⁸⁶ And even the *dar al-harb*, “though regarded as in the state of nature, was not treated as a no-man’s land.”¹⁸⁷ Muhammed al-Shaybani (d. 805), perhaps the leading Muslim jurist to write on the *siyar* (very roughly, the Law of Nations), expressly allows Muslims to make peace treaties with the “Inhabitants of the Territory of War,” even if the Muslims cannot exact tribute payments from them, although only on restrictive conditions such as the treaty lasting for a specified number of years.¹⁸⁸ Such treaties were often, from the jurists’ point of view, “designed as stopgap measures that would allow Muslims to gather sufficient forces to conquer the non-Muslim party,” and hence did not represent efforts to create a lasting peace based on the recognition of the parties’ equal legitimacy.¹⁸⁹ But the practice shows a measure of acceptance, however grudging or provisional, of the reality of a pluralistic world order.

Nonetheless, ISIS and other Islamist movements seek to revive the essentials of the “classical” conception.¹⁹⁰ For instance, the October 2014 issue of *Dabiq* denied the existence of the “gray zone” and reiterated that the world is starkly divided into the “two encampments” of War and Islam.¹⁹¹

¹⁸⁴ KHADDURI, *supra* note 176, at 144.

¹⁸⁵ See AYDIN, *supra* note 46, at 18.

¹⁸⁶ JAMES P. PISCATORI, ISLAM IN A WORLD OF NATION-STATES 47 (1986); KHADDURI, *supra* note 176, at 144–45.

¹⁸⁷ MAJID KHADDURI, THE ISLAMIC LAW OF NATIONS: SHAYBANI’S SIYAR 24 (2001).

¹⁸⁸ *Id.* at 154–56

¹⁸⁹ Emon, *supra* note 183, at 294.

¹⁹⁰ See SAYYID QUTB, MILESTONES 123–24 (2002) (finding the opposition between the *dar al-harb* and the *dar-al-islam* restated by the influential Egyptian Islamist Sayyid Qutb); William McCants & Mohammad Fadel, *Experts Weigh in (part 4): How Does ISIS Approach Islamic Scripture*, BROOKINGS (May. 7, 2015), <https://www.brookings.edu/blog/markaz/2015/05/07/experts-weigh-in-part-4-how-does-isis-approach-islamic-scripture/>.

¹⁹¹ HAMID, *supra* note 8, at 229.

B. Differing Evaluations of the Challenge of the ISIS Caliphate

Plainly, the “classic” Islamic conception of the international order is irreconcilable with the Westphalian order, in which the right of states to exist does not depend at all on their religious or ideological character, and which tends to encourage peaceful, diplomatic interactions between states rather than belligerency.¹⁹² Yet the ISIS caliphate holds essentially that conception and wishes to propagate it; indeed, the proclamation of the caliphate was a vivid and arresting exhibition of that idea. Hence arises the fear that the caliphate might undermine the Westphalian international legal order. Both governmental officials¹⁹³ and scholars alike¹⁹⁴ have suggested this possibility.

To take one example, the Israeli scholar Shmuel Bar has written that the establishment of the ISIS caliphate:

[I]s a watershed event in the annals of Islamic radicalism . . . and will reverberate for the near and medium terms not only in the Middle East but also in far-flung reaches of the Muslim world and parts of the West. . . [ISIS’s paradigm] is based on the universality of the Caliphate, total war with any other Muslim entities until subjugation of all the Muslim world (*Dar al-Islam*) under its sway, and confrontation with the non-Muslim world (*dar al-harb*). The Caliphate paradigm, therefore, precludes a “Westphalian” regional or world order. The resurgence of the idea of a Caliphate will have spillover effects regardless of the immediate outcome of the current war against the “Islamic State.” It has implication for the evolution of radical Islamic movements across the Muslim world and in Muslim communities in non-Muslim countries. The very idea of the Caliphate carries a

¹⁹² HENRY KISSINGER, *WORLD ORDER* 4 (2015) (explaining that the Westphalian system “reserved judgment on the absolute in favor of the practical and ecumenical”).

¹⁹³ David Wroe, *Islamic State Bigger Threat to World Order Than Cold War Communism: Julie Bishop*, SYDNEY MORNING HERALD (Apr. 27, 2015), <http://www.smh.com.au/federal-politics/political-news/islamic-state-bigger-threat-to-world-order-than-cold-war-communism-julie-bishop-20150427-1mujvf.html> (detailing Australian Foreign Minister Julie Bishop warning in April 2015 that ISIS presented a greater threat to the Westphalian order than Communism had during the Cold War); Dennis Ross, *The Islamists are not our friends*, N.Y. TIMES (Sept. 11, 2014), http://www.nytimes.com/2014/09/12/opinion/islamists-are-not-our-friends.html?_r=0 (viewing the caliphate as a threat to sovereignty).

¹⁹⁴ Andrew Phillips, *The Islamic State’s Challenge to International Order*, 68(5) *AUSTL. J. INT’L AFF.* 495, 495–98 (2014); Richard A. Nielsen, *Does the Islamic State Believe in Sovereignty?*, WASH. POST (Feb. 6, 2015), https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/02/06/does-the-islamic-state-believe-in-sovereignty/?tid=a_inl; Barak Mendelsohn, *The Jihadi Threat to International Order*, BELFER CENTER (May 15, 2015), http://belfercenter.hks.harvard.edu/publication/25362/jihadi_threat_to_international_order.html; Daphne Richemond-Barak, *Why ISIS Does Not Weaken Our World Order*, INT’L INST. COUNTER-TERRORISM (Nov. 11, 2015), <https://www.ict.org.il/Article/1522/Why-ISIS-Does-Not-Weaken-Our-World-Order>.

message that will contribute to radicalization of those communities and will influence the direction of Islamist terrorism.¹⁹⁵

Even before the proclamation of the ISIS caliphate, prominent Westerners had discerned in Islamism, and more especially in the Islamist project of a restoration of a caliphate, a threat to the current world legal order. The distinguished American scholar and diplomat, Charles Hill, argued that Islamists held a doctrine that precluded them from accepting or participating in that order.¹⁹⁶ In September 2004, then Vice President Dick Cheney spoke of those who “want[ed] to re-establish . . . the seventh-century caliphate. . . . governed by shari’a law.”¹⁹⁷ A 2004 study by the National Intelligence Council entitled *Mapping the Global Future*, which was commissioned by the US Defense Department, envisaged a scenario in which the world of 2020 included a new caliphate ruled by the grandson of Osama bin Laden.¹⁹⁸ In a speech marking the fifth anniversary of the 9/11 attacks, then President George W. Bush warned that al-Qaeda and other “violent Sunni extremists” did:

hope to establish a violent political utopia across the Middle East, which they call caliphate, where all would be ruled according to their hateful ideology. . . . This caliphate would be a totalitarian Islamic empire encompassing all current and former Muslim lands, stretching from Europe to North Africa, the Middle East and Southeast Asia.¹⁹⁹

On the other hand, Ali Allawi has deprecated the “bogeyman of an Islamic caliphate.”²⁰⁰ Allawi writes:

A universal empire which might be territorially contiguous with the reach of Islam would be an incredible prospect. In fact no such empire could ever be stable except for very short periods of time; it would probably crumble as the peripheral parts pulled away. Although it’s an unrealistic fantasy, the fear of such a state

¹⁹⁵ Bar, *supra* note 35, at 1.

¹⁹⁶ CHARLES HILL, TRIAL OF A THOUSAND YEARS: WORLD ORDER AND ISLAMISM 116–17 (2011).

¹⁹⁷ Vernie Liebl, *The Caliphate*, 45 *Middle Eastern Studies* 373, 375 (2009).

¹⁹⁸ National Intelligence Council, *Mapping the Global Future: Report of the National Intelligence Council’s 2020 Project*, FUTURE BRIEF 9, 83–91 (Dec. 2004), <http://www.futurebrief.com/project2020.pdf>.

¹⁹⁹ George W. Bush, 43d President of the United States of America, Remarks on the War on Terror (Sept. 5, 2006), (transcript available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/05/AR2006090500656.html>).

²⁰⁰ ALLAWI, *supra* note 48, at 139.

ever emerging has had a powerful hold on the imagination of people, both on its proponents and its detractors.²⁰¹

Further, Allawi argued against those who:

[p]lace Islam at odds with a coherent state structure through which other civilizations appeared to function. Islam [for them] was the perpetual ‘outsider’, whose political manifestation would be disruptive and destabilizing to the prevailing world order. On the one hand, the prospects of Islamic ‘unity’ would be dangerous if unity were to lead to the formation of large political entities which might be widely spread geographically or might dispose of considerable resources. On the other hand, it was assumed that Muslims were alienated from the very countries in which they lived because their consciousness as Muslims did not square with the demands of loyalty to the nation-state.²⁰²

VI. THE ORIGINS AND MEANING OF THE ISLAMIC CALIPHATE

We have seen that the discourse and practice of early Islam, above all the teachings and practices of the Prophet Muhammed himself, his Companions, and the original Muslim community, hold controlling normative authority for ISIS and for Islamists generally.²⁰³ Indeed, the ISIS caliphate is purposely modeled on the original institution, which arose immediately after the death of Muhammed. In his speech on acceding to the ISIS caliphate, al-Baghdadi consciously emulated the accession of Abu Bakr, the very first caliph, on the occasion of his accession.²⁰⁴ Hence, it is essential to recount the origins of the caliphate—or rather, what the Sunni tradition has generally accepted as its origins.²⁰⁵ The dominant Sunni

²⁰¹ ALLAWI, *supra* note 48, at 139.

²⁰² *Id.* at 139–40.

²⁰³ KENNEDY, *supra* note 46, at xiv (“[I]n order to understand the Islamic State’s idea of caliphate, and why it should prove relevant and important to many, we have to understand its roots deep in the Muslim tradition. Islamic State has made the revival of the caliphate a centrepiece, a keystone of its project for Islamic renewal, and the response this has generated shows the potency of the idea almost fourteen centuries since it first emerged.”).

²⁰⁴ See *supra* text at n. 5 and *infra*, text at n. 227–35.

²⁰⁵ See generally AFSARUDDIN, *supra* note 131, at ch. 2; THOMAS W. ARNOLD, *THE CALIPHATE* (1924); JONATHAN P. BERKEY, *THE FORMATION OF ISLAM: RELIGION AND SOCIETY IN THE NEAR EAST, 600-1800* ch. 7 (2003); PATRICIA CRONE & MARTIN HINDS, *GOD’S CALIPH: RELIGIOUS AUTHORITY IN THE FIRST CENTURIES OF ISLAM* (1986); MARSHALL G.S. HODGSON, *THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION 187–497* (1974); HUGH KENNEDY, *CALIPHATE: THE HISTORY OF AN IDEA* (2016); BERTOLD SPULER, *THE AGE OF THE CALIPHS: HISTORY OF THE MUSLIM WORLD* (F.R.C. Bagley trans. 1969). See Wilferd Madelung, *The succession to Muhammed: A study of the early Caliphate* 16–27, 39–43 (1997) (providing the Shi’ite perspective). See also KEGIA ALI, *THE LIVES OF MUHAMMED* 9–18 (2014) (noting the difficulties in reading early

narrative is relevant because ISIS is a Sunni movement, the Shi'ite understanding of the rightful succession to Muhammed is fundamentally different.²⁰⁶

The death of Muhammed in Medina in 632 (or 634²⁰⁷) plunged the early Muslim community into a crisis.²⁰⁸ Muhammed had been both a religious and a political leader: a prophet with unique and charismatic authority; the supreme lawgiver; the court of last resort; the highest war lord; the personage who appointed officials and received ambassadors.²⁰⁹ But, it is reported that he died without leaving a provision for his successor.²¹⁰ Indeed, there was a question upon his death of whether any state or polity should survive at all.²¹¹ In that critical moment, Umar, later to become the second caliph, summoned an assembly of the notables of the Muslim community.²¹² The meeting took place at a portico (*saqifa*) in Medina. One group of those present—the *Ansar* or “helpers” at Medina—reportedly suggested that the Muslims should select one leader (*amir*) from their members and another from among the “Meccan Migrants,” or *Muhajirun*.²¹³

Led by Umar, some of Muhammed’s Companions took the position that the Muslim community in both cities was and should remain unified. Umar took Abu Bakr by the hand and invited the assembly to recall the Quranic scriptures (4:90)—the “verses of the cave”—which spoke of Abu Bakr’s sojourn with the Prophet on their way to Medina in 622. Umar then pledged his own loyalty to Abu Bakr and urged the others to do the same, which they did.²¹⁴ The process was obviously a consultative (if confined) one.²¹⁵

Abu Bakr, the chosen leader of the unified Muslim community, was a highly regarded merchant who had been a close friend of Muhammed’s and whose daughter Aisha had been Muhammed’s favorite wife. In the dominant Sunni

sources); IBN KHALDUN, *THE MUQADIMMAH: AN INTRODUCTION TO HISTORY* (Franz Rosenthal trans., N.J. Dawood abridged ed. 1967).

²⁰⁶ AFSARUDDIN, *supra* note 131, at 18.

²⁰⁷ ALI, *supra* note 205, at 7, 12–23.

²⁰⁸ AFSARUDDIN, *supra* note 131, at 18.

²⁰⁹ ARNOLD, *supra* note 205, at 30.

²¹⁰ AFSARUDDIN, *supra* note 131, at 15 (discussing that in the Shiite view, Muhammed had designated Ali as his successor).

²¹¹ HODGSON, *supra* note 205, at 197.

²¹² *The Rightly-Guided Caliphs*, ISLAMIC WEB, http://islamicweb.com/history/bio_caliphs.htm#umar (last visited Oct. 13, 2017); Majid Fakhry, *The Theocratic Idea of the Islamic State in Recent Controversies*, 30 INT’L AFF. 450, 455 (1954) (“The electors of the caliph, according to the traditional view, were the so-called people of authority (Ahl al-Hall wa’l-’Aqd), who consisted of the chieftains of the Arab tribes, the governors of the provinces, the dignitaries of the State, etc.”).

²¹³ See KENNEDY, *supra* note 205, at 3–4 (discussing that the *ansar* of Medina had inhabited the oasis city before the arrival of Muhammed and his Meccan followers and were not a Qurayshi group, but they were predominantly peasants, and the Qurayshi by contrast were great merchants who were prestigious throughout Arabia and likely considered themselves entitled to be the leaders of a unified Muslim community).

²¹⁴ See AFSARUDDIN, *supra* note 131, at 20.

²¹⁵ SPULER, *supra* note 205, at 18.

narrative, there was no thought given to selecting a successor solely on the basis of descent from or blood ties to Muhammed.

Although there is no explicit evidence,²¹⁶ Abu Bakr is said to have assumed the title of *caliph*,²¹⁷ which is usually translated either as “deputy” or “successor.” The meaning of the title “caliph” is a matter of some significance and controversy. Michael Cook explains:

[I]f it meant “deputy,” then it identified the ruler of the Islamic polity as the deputy of God (*khalifat Allah*), and if it meant “successor,” then he was the successor of the Prophet (*kaliphat rasul Allah*).... Either way, the concept of the caliphate was unique: there could be no question of seeing rulers across the globe as successors of God, let alone as successors of the Muslim prophet.²¹⁸

Two other titles were thereafter added to that of *caliph*. Abu Bakr’s successor Umar added the title of *Commander of the Faithful* (designating, in effect, the function of supreme war-lord).²¹⁹ The title *Imam* (a spiritual or religious guide, charged with leading prayers and performing other duties relating to the communal worship) also became joined to that of *caliph*.²²⁰ The great medieval Muslim thinker Ibn Khaldun (1332-1406) summarized the various powers and responsibilities of the caliph as follows:

To be caliph in reality means acting as substitute for the Lawgiver (Muhammed) with regard to the preservation of the religion and

²¹⁶ KENNEDY, *supra* note 205, at 5, 10.

²¹⁷ KHALDUN, *supra* note 205, at 180 (“the men around Muhammad and all the other early Muslims called Abu Bakr, when he received the oath of allegiance, ‘representative’ (*khalifa*, caliph) of the Messenger of God.”).

²¹⁸ COOK, *supra* note 49, at 309. Sunni tradition seems to support the idea that Abu Bakr’s original title was that of “deputy of *the Prophet* of God,” and that the Umayyad dynasty changed the title to “Deputy of God.” CRONE & HINDS, *supra* note 205, at 4, 19–20, n. 76, 112–13 (disputing the truth of that Sunni tradition: “[w]hat title [Abu Bakr] held is uncertain,” but accepting that the Umayyad caliphs took the title “Deputy of God”); AFSARUDDIN, *supra* note 131, at 29, 186; KENNEDY, *supra* note 205, at 6–7 (supporting Crone and Hinds assertions).

²¹⁹ ARNOLD, *supra* note 205, at 31–32; HODGSON, *supra* note 205, at 207; AFSARUDDIN, *supra* note 131, at 186. Taliban leader Mullah Omar assumed this title in 1996 in an elaborate public ceremony before some 1500 leaders, including Osama bin Laden, and he donned a venerated cloak, thought to have belonged to Muhammed. Carlotta Gall, *Mullah Muhammad Omar, Enigmatic Leader of Afghan Taliban, Is Dead*, N.Y. TIMES (July 30, 2015), <http://www.nytimes.com/2015/07/31/world/asia/mullah-muhammad-omar-taliban-leader-afghanistan-dies.html>; Mujib Mashal, *The Myth of Mullah Omar*, ALJAZEERA (June 6, 2012), <http://www.aljazeera.com/indepth/features/2012/06/20126665650415526.html>; Norimitsu Onishi, *A Tale of the Mullah and Muhammad's Amazing Cloak*, N.Y. TIMES (Dec. 19, 2001), <http://www.nytimes.com/2001/12/19/international/asia/19CLOA.html>.

²²⁰ ARNOLD, *supra* note 205, at 33–35.

the political leadership of the world. The Lawgiver was concerned with both things, with religion in his capacity as the person commanded to transmit the duties imposed by the religious laws to the people and to cause them to act in accordance with them, and with worldly political leadership in his capacity as the person in charge of the (public) interests of human civilization. . . . Royal authority, if it be Muslim, falls under the caliphate and is one of its concomitants. . . . Even though the institution of the caliphate includes royal authority, its religious character brings with it special functions and ranks peculiar to Muslim caliphs . . . such as prayer, the office of judge, the office of mufti, the holy war, and market supervision. . . . The caliphate is a kind of great mainspring and comprehensive basis. . . . [It has] an active interest in all conditions of the Muslim community, both religious and worldly, and its general power [extends to] execut[ing] the religious laws relative to both (religious and worldly affairs).²²¹

Michael Cook has identified three distinctive elements in the idea of a caliphate. First, the very title signifies that “there is a tight relationship between the conception of rulership and the religious community.” Second, “the caliph is conceived as the single ruler of the entire Muslim community.” This was the ideal, but not the reality, by the tenth century.²²² Third, the caliphal state—ideally, though often in practice as well—“combined political and religious authority.”²²³

Unlike Muhammed, the caliph did not exercise a prophetic authority,²²⁴ and his legislative authority was limited.²²⁵ The caliph’s main responsibilities (as

²²¹ KHALDUN, *supra* note 205, at 171 (providing a recent account of ibn Khaldun’s ideas on kingdoms and caliphates); STEPHEN FREDERIC DALE, *THE ORANGE TREES OF MARRAKESH: IBN KHALDUN AND THE SCIENCE OF MAN* 208–29 (2015).

²²² JANINA M. SAFRAN, *THE SECOND Umayyad Caliphate: The Articulation of Caliphal Legitimacy in al-Andalus* 2–3, 28, 138 (2000) (discussing that although the caliphate is ideally unitary, the political history of Islam reveals the existence of different, competing major caliphates at a single time, and when Abd al-Rahman III proclaimed himself Commander of the Faithful and assumed the prerogatives of caliph in al-Andalus in 929, his Umayyad dynasty denied the legitimacy of the rival Abbasid and Fatimid caliphates that governed in Iraq and Egypt respectively).

²²³ COOK, *supra* note 49, at 310–11.

²²⁴ See KHADDURI, *supra* note 176, at 10–11; SAYYID, *supra* note 34, at 53–54.

²²⁵ WAEL B. HALLAQ, *SHARI’A: THEORY, PRACTICE, TRANSFORMATIONS* 39 (2009) (“[T]he caliphs were the defenders of this [Quranic] Truth and the ones assigned to implement its decrees. Thus, the early caliphs (even until the middle of the second/eighth century) tended to see themselves, and were seen, as God’s direct agents in the mission to enforce His statutes, commands and laws. . . . They also adjudicated – during the first century – issues that required authority-statement solutions, without invoking Prophetic authority. . . . The caliphs and their office . . . were not independent agents of legislation, but integrally dependent upon prior exemplary conduct and precedent”). However, the early caliphs, though not formulating their own codes of law, did “legislate” interstitially. *Id.* For instance,

the institution developed, at any rate) lay in the *enforcement* of Islamic law. But the caliph was not thought to be vested with Muhammed's unique power of prophesy; and at least in the view that came to be held among the *ulama* (Muslim legal scholars), the functions of interpreting the *sharia* and adjudicating cases eventually fell to them rather than to the caliph.²²⁶

Muslim scholars and legal experts over the centuries debated the qualifications for becoming a caliph. It was a widely but not universally held opinion that a caliph should be, like Muhammed, a member of the Arab tribe of the Qurayshi.²²⁷ (This attribute was plainly not satisfied by the Ottoman caliphs, who were Turkish, not Arab.) It also came to be widely accepted that a caliph could designate his successor, thus allowing the principle of dynastic succession to take hold. When succession was not dynastic, the common (and original) method of appointment was through a consultative process involving the notables of the Muslim community.

Ibn Khaldun enumerated five criteria of eligibility for the caliphate: knowledge, probity, competence, the absence of any physical disability that might impair judgment or action, and Qurayshi descent.²²⁸ Acknowledging the existence of contrary authority, Khaldun based his argument on the consensus of opinion among the Companions of Muhammed who had selected Abu Bakr. On the other hand, Khaldun pragmatically recognized that the requirement of Qurayshi descent could not supersede all the other requirements.

A. Al-Baghdadi's Accession Speech

Al-Baghdadi's elevation to the caliphate followed the traditional prescriptions. He was, or claimed to be, of Qurayshi descent, and his claim was

the Quran had proscribed the consumption of alcohol but had not stipulated the penalty for an infraction. *Id.* Reasoning from "analogy" to the case of false accusations of adultery (for which the Quran had fixed a penalty), caliph Umar I set the penalty for inebriation of eighty lashes. *Id.* at 36.

²²⁶ *Id.* at 313; HODGSON, *supra* note 205, at 349. See NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 6 (2008) (suggesting that this division of responsibilities created a kind of system of checks and balances, limiting the scope for arbitrary rule by rulers). But see Christopher A. Ford, *Siyar-ization and Its Discontents: International Law and Islam's Constitutional Crisis*, 30 *TEX. INT'L L. J.* 499, 508 (1995) (arguing that in practice the rise of the *ulama* meant that the secular ruler's authority was buttressed by the justificatory rationalizations of religious scholars). See also Bar, *supra* note 35, at 2.

²²⁷ See generally ABU'L HASAN AL-MAWARDI, *THE ORDINANCES OF GOVERNMENT: A TRANSLATION OF AL-AKHAM AL-SULTANIYYA W' AL-WILLAYAT AL-DINIYYA* (Wafaa H. Wahba trans. 1996) (setting forth seven conditions of eligibility for "supreme leadership," including justice or probity; knowledge conducive to the exercise of good judgment; sound hearing, vision and speech; physical fitness and lack of handicaps; prudence; courage; and "notable Qurayshite descent;" the latter of which he affirms is "a matter indisputably settled by explicit text and general consensus"). See also ANTONY BLACK, *THE HISTORY OF ISLAMIC POLITICAL THOUGHT* 85–90 (2d ed. 2011) (providing an overview and analysis of al-Mawardi's writing).

²²⁸ KHALDUN, *supra* note 205, at 158.

accepted by his followers. His selection emerged, it appears, from a consensus of the ISIS leadership, and the ceremony of his accession was carefully scripted to emulate the accession of Abu Bakr.

In acceding to the position of caliph, Abu Bakr delivered a short speech or sermon. “Abu Bakr’s inaugural address as the first caliph must rank as one of the most important speeches in the annals of Islamic history.”²²⁹ It has also served as a model for other Muslim leaders when assuming office, e.g., the Islamist President Morsi of Egypt.²³⁰ One version of that speech (there are others²³¹) plainly served as the model for al-Baghdadi’s remarks on his accession in 2014.²³² Abu Bakr said:

O people, I have been appointed over you, though I am not the best among you. If I do well, then help me; and if I act wrongly, then correct me. Truthfulness is synonymous with fulfilling the trust, and lying is equivalent to treachery. The weak among you is deemed strong by me, until I return to them that which is rightfully theirs, insha Allah. And the strong among you is deemed weak by me, until I take from them what is rightfully (someone else’s), insha Allah. No group of people abandons military/armed struggle in the path of Allah, except that Allah makes them suffer humiliation. And evil / mischief does not become widespread among a people, except that Allah inflicts them with widespread calamity. Obey me so long as I obey Allah and His Messenger. And if I disobey Allah and His Messenger, then I have no right to your obedience. Stand up now to pray, may Allah have mercy on you” [Al-Bidaayah wan-Nihaayah (6/305,306)].²³³

Al-Baghdadi, like Abu Bakr, also subjected himself to the judgment of those he claimed to lead.²³⁴ He too acknowledged his liability to error. And he too admitted that his right to rule was contingent upon his obedience to Allah and to the teachings of Muhammed, so that he could rightfully be deposed if he were proven disobedient. In following the example of Abu Bakr, al-Baghdadi surely intended to further ISIS’s efforts to appropriate the idea of the caliphate.

²²⁹ AFSARUDDIN, *supra* note 131, at 20.

²³⁰ COOK, *supra* note 49, at 329.

²³¹ AFSARUDDIN, *supra* note 131, at 21.

²³² WOOD, *supra* note 2, at 54–55. See also COOK, *supra* note 49, at 329 (noting that Abu Bakr’s accession speech has also served as a model for other Muslim leaders when assuming office, for example, President Morsi of Egypt).

²³³ Seyed Ibrahim, *Caliph Abu Bakr Siddeeq’s (RA) Inaugural Speech: Text and Lessons*, WORLD PRESS (Feb. 2012), <https://seyedibrahim.wordpress.com/2012/02/>.

²³⁴ See Amirul-Mu’Minin, *A Message to the Mujahidin and the Muslim Ummah in the Month of Ramadan*, ALHAYAT MEDIA CEN. (Jan. 7, 2014), <https://www.gatestoneinstitute.org/documents/baghdadi-caliph.pdf> (providing a translation of al-Baghdadi’s speech).

ISIS's announcement of the caliphate in *This is the Promise of Allah*²³⁵ also models al-Baghdadi's accession on scriptural authority and early precedent. After arguing on the basis of a Quranic verse (Al-Baqarah: 30) that Allah had ordained a caliphate and then explicating that verse through a reference to scholarly exegesis, ISIS attempted to demonstrate that al-Baghdadi's caliphate satisfied the traditional tests.

Therefore, the *shura* (consultation) council of the Islamic State studied this matter after the Islamic State:

gained the essentials necessary for Khilafa [caliphate], which the Muslims are sinful if they do not try to establish. In light of the fact that the Islamic State has no shar'i (legal) constraint or excuse that can justify declaring or neglecting the establishment of the khilafah . . . the Islamic State – represented by ahlul-hall wal-'aqd (its people of authority), consisting of its senior figures, leaders, and the shura council – resolved to announce the establishment of the Islamic khilafah, the appointment of a khalifa for the Muslims, and the pledge of allegiance to the shayk (sheik) [al-Baghdadi], al-Qurashi by lineage. . . And he has accepted the bay'ah (pledge of allegiance). Thus, he is the imam and khalifa for the Muslims everywhere. . . . The khalifa Ibrahim [al-Baghdadi] . . . has fulfilled all the conditions for khalifah mentioned by the scholars. He was given bay'ah in Iraq by the people of authority in the Islamic State. . . .²³⁶

B. Other Caliphal Models

Given the normatively controlling position that ISIS accords to early Islamic practice, we should expect to find that its “caliphate” is intended to recall the first four “righteous” caliphs—Abu Bakr, Umar (also a father-in-law of Muhammed), Uthman, and Muhammed's cousin and son-in-law, Ali.²³⁷ In privileging this period, ISIS reflects a widespread Sunni view:

The thirty years which constitute the era of the ‘Rightly-Guided Caliphs’ . . . have become enshrined in the collective memory of the Muslim polity as a golden, paradigmatic age. The prescriptions, policies, and practices of the four caliphs as remembered and recorded by succeeding generations became normative precedents for the majority of Muslims The Rightly-Guided Caliphs are an integral and, after the Prophet, the

²³⁵ Al-Shami, *supra* note 162.

²³⁶ *Id.* at 4.

²³⁷ ALI, *supra* note 205, at 140 (discussing that for Shiites, the succession to Muhammed had passed directly to Ali, and thereafter to Ali's male descendants; hence, the Shiites do not recognize three of the four “righteous” caliphs).

most significant component of *al-Salaf al-Salih*, the Pious Forbears, a powerful emotive concept. . . .²³⁸

The twenty-four-year period of the “righteous” caliphs, moreover, was marked by spectacular military victories, including the defeat of the Sassanid (Persian) Empire at Qadissiya in 636, and the breathtakingly fast conquest of territories that eventually included Persia, the Levant, Mesopotamia, Egypt, Cyprus, and more. ISIS recalled those stirring events in *This is the Promise of Allah*.²³⁹

In a standard Sunni narrative, the period that ensued after the death of Uthman, that of the dynastic, Umayyid caliphate (661–750), marked the beginning of a spiritual decline, along with further military and political success. However, the Abbasid dynasty, which succeeded the Umayyid, brought Islamic civilization to, perhaps, its highest level of achievement. Despite the unorthodoxy of some Abbasid caliphs, the historical memory of the magnificence of that dynasty led ISIS to invoke it. ISIS’s and al-Baghdadi’s references to overcoming the humiliation that many Muslims feel are allusions to the glory of the Abbasid caliphs.²⁴⁰

The Ottoman caliphate, which the Turkish government brought an end by legislation in 1924 under the secularizing strongman Ataturk (Mustapha Kemal),²⁴¹ is not a model for ISIS—and reasonably so. To begin with, the Ottoman claim to the caliphate was open to question.²⁴² Moreover, the Ottoman caliph’s appeal to

²³⁸ AFSARUDDIN, *supra* note 131, at 54.

²³⁹ Al-Shami, *supra* note 162. The announcement recalled that the Muslim *umma* “succeeded in ending two of the largest empires known to history in just 25 years, and then spent the treasures of those empires on jihad in the path of Allah. They put out the fire of the Magians [an apparent reference to the Zoroastrians of the Persian Empire] and they forced the noses of the cross-worshippers [perhaps a reference to the Byzantine Empire] onto the ground with the most miserable of weapons and the weakest of numbers.” *Id.* at 3.

²⁴⁰ See generally MCCANTS, *supra* note 5, at 131–33.

²⁴¹ See generally M. SUKRU HANIOGLU, ATATURK: AN INTELLECTUAL BIOGRAPHY ch. 6 (2011).

²⁴² See KENNEDY, *supra* note 205, at 248–52; ARNOLD, *supra* note 205, at 89–90, 142–43. Although the Abbasid caliphate in Baghdad had been brought to an end by the Mongol sack of the city in 1258, the Mamluk rulers of Egypt in 1261 or 1262 installed a pretender in Cairo—an uncle of the last Abbasid caliph in Baghdad who had survived the massacre—in order to legitimize their rule. KENNEDY, *supra* note 205, at 248–52; ARNOLD, *supra* note 205, at 89–90, 142–43. The claims of that caliph and his successors were largely ignored outside of Egypt. The Ottoman claim rested on the purported transfer of the caliphate in 1517 to Sultan Selim by al-Mutawakkil, the Abbasid pseudo-caliph in Cairo. KENNEDY, *supra* note 205, at 248–52; ARNOLD, *supra* note 205, at 89–90, 142–43. The legend of that transfer is unfounded. HODGSON, *supra* note 205, at 108, n. 6. The eighteenth-century figure Ahmad al-Damanhuri (d. 1778), the rector of the prestigious al-Azhar Seminary in Cairo (Sunni Islam’s leading center of learning), declared that the “nominal caliphate” had disappeared long before and that by his time nothing remained “except the sultanate and the wazirate.” BRUCE MASTERS, THE ARABS OF THE OTTOMAN EMPIRE, 1516-1918: A SOCIAL AND CULTURAL HISTORY 28 (2013). Indeed, it was not until the end of the eighteenth century that the Ottomans claimed the caliphate in relation to Muslims outside their empire. ALBERT HOURANI, ARABIC THOUGHT IN THE LIBERAL AGE 1798-1939 27, 106 (1962). As a face-saving

the global Muslim community to take up arms against the Western allies during World War I was not only a resounding failure, but also failed to prevent a British-supported Arab revolt against his rule.²⁴³

For all that, a certain aura lingers around the Ottoman caliphate, and the ISIS caliphate may have been seeking to capture it. The end of the Ottoman caliphate provoked dismay in much of the Islamic world,²⁴⁴ but it also stimulated efforts at Islamic renewal.²⁴⁵ Leading Muslim intellectuals, like the Syrian Muhammed Rashid Rida (1865–1935) and the Indian Abul Kalam Azad (1888–1958), argued for the restoration of a caliphate, though they differed sharply in their conceptualizations of it.²⁴⁶ Rida in particular may have exercised an influence on later Arab Islamists, possibly including ISIS, because of his insistence that a future caliph descend from the Qurayshi. Overall, the abolition of the Ottoman caliphate, coupled with the extension of Western colonial rule to parts of the dismembered Ottoman Empire, had powerful, but also contradictory effects in the Muslim world; the abolition promoted both Turkish and Arab nationalism on the one hand, and pan-Arabism and pan-Islamism on the other. This is not the place in which to survey those trends.²⁴⁷ However, ISIS reveals the persisting effects of the Ottoman caliphate's demise over ninety years later.²⁴⁸ The debate over the end of the

measure (to cover the loss of Ottoman Crimea to Catherine the Great of Russia), the Treaty of Kucuk Kaynarca of 1774 described Sultan Abd al-Hamid I as “the caliph of all who profess the unity of God [i.e., Muslims].” KENNEDY, *supra* note 205, at 254.

²⁴³ ONDER BAKIRCIOGLU, *ISLAM AND WARFARE: CONTEXT AND COMPATIBILITY WITH INTERNATIONAL LAW* 163 (2014); EUGENE ROGAN, *THE FALL OF THE OTTOMANS: THE GREAT WAR IN THE MIDDLE EAST 70–72* (2011); Mustafa Aksakal, ‘*Holy War Made in Germany?*’ *Ottoman Origins of the 1914 Jihad*, 18 *WAR IN HIST.* 184–85 (2011).

²⁴⁴ CEMIL AYDIN, *THE POLITICS OF ANTI-WESTERNISM IN ASIA: VISIONS OF WORLD ORDER IN PAN-ISLAMIC AND PAN-ASIAN THOUGHT* 137–39 (2009); PANKHURST, *supra* note 37, at 49–62; Toynbee, *supra* note 126, at 25–67 (giving a detailed account of the abolition of, first, the Ottoman sultanate and then, later, the caliphate); HODGSON, *supra* note 205, at 262–66 (providing a succinct overview of the disestablishment of Islam in Kemalist Turkey).

²⁴⁵ John Willis, *Debating the Caliphate: Islam and Nation in the Work of Rashid Rida and Abul Kalam Azad*, 32 *INT’L HIST. REV.* 711, 716 (2010) (“The end of the caliphate created a space of both political possibility and apprehension for many Muslims.”).

²⁴⁶ *Id.*; HOURANI, *supra* note 242, at 224–44 (discussing the views of Rida).

²⁴⁷ HAMID, *supra* note 8, at 68–84 (providing a brief account of the origins of Islamism and its growth after the end of the caliphate); AFSARUDDIN, *supra* note 131, at 153–54. *See also* James Piscatori, *Imagining Pan-Islam: Religious Activism and Political Utopias*, 151 *PROC. BRIT. ACAD.* 421, 426–34 (2005) (providing the specific effects of the demise of the caliphate on Pan-Islamism).

²⁴⁸ For example, in a videotaped address on October 7, 2001 (the day the US began its air campaign in Afghanistan), Osama bin Laden appeared to be dating the misfortunes of the Islamic world to the fall of the Ottoman caliphate in 1924. Osama bin Laden, Founder of al-Qaeda, Videotaped Address (Oct. 7, 2001) (transcript available at <http://www.press.uchicago.edu/Misc/Chicago/481921texts.html>). Specifically, he said: “Our Islamic nation has been tasting the same for more than 80 years of humiliation and disgrace, its sons killed and their blood spilled, its sanctities desecrated.” *Id.* at § 2. However, restoration of the caliphate was not a major objective for al-Qaeda under his leadership. *See* PANKHURST, *supra* note 37, at 158–59. Indeed, when al-Qaeda in the Arabian Peninsula was considering

caliphate, though brief, opened up visions of an imaginable world order that rejected “the European international system and the nation.”²⁴⁹ Indeed, the abolition of the caliphate was a necessary condition for the emergence of contemporary Islamism.²⁵⁰

VII. WOULD AN ISLAMIST CALIPHATE BE A THREAT TO THE WESTPHALIAN ORDER?

Sub-part A of this section will suggest ways in which the emergence of the ISIS caliphate or of a more successful caliphate along similar lines could arguably undercut or destabilize the international legal order. It will conclude that even if a caliphate state under Islamist rule did emerge and could consolidate its hold, it would eventually be integrated more or less successfully into the current state-centric system, or else cease to be a threat to that system.

To put this point paradoxically, but succinctly: in order to provide a political and economic model that is compellingly attractive to large numbers of Muslims throughout the Islamic world, the ISIS caliphate (or one like it) would have to assume the current form and function of a *de jure* state—and in doing so it would cease to threaten to destabilize and displace the Westphalian legal order. Conversely, to the extent that its caliphate model presented an alternative to that of the existing state, ISIS would be unattractive to the overwhelming majority of the global Muslim population, and hence it would *not* pose a threat to the Westphalian order. To be attractive, the caliphate model must be *viable*, and the price of viability is deepening integration into the Westphalian order.

Thereafter, sub-part B will consider the harder question of the threat to the Westphalian order that might be created by an Islamist declaration of a caliphate in a populous and established state like Turkey or Egypt.

It is overwhelming likely that a military force will destroy the ISIS caliphate in the near future. But what if that caliphate were not to be destroyed? The thought experiment is worth conducting. It will reveal both the vulnerabilities and the resilience of the Westphalian order.

In the abstract, there would seem to be three main possibilities for a caliphate’s development, corresponding to three categories within the Westphalian

declaring a caliphate in Yemen, bin Laden emphatically opposed the idea: “It seems to me that being deliberate in this matter is a good thing, and to explain further, establishing the state before the elements necessary for success are put in place most often will lead to aborting the effort wherever it takes place, because establishing a state and then toppling the state represents a burden that exceeds the energy of the people.” MUHAMMED AL-UBAYDI ET AL., *THE GROUP THAT CALLS ITSELF A STATE: UNDERSTANDING THE EVOLUTION AND CHALLENGES OF THE ISLAMIC STATE* 65–66 (2014). Likewise, bin Laden’s successor Ayman al-Zawahiri has warned that the restoration of the Caliphate would be the work of several generations. See Manne, *supra* note 8, at 119.

²⁴⁹ Willis, *supra* note 245, at 728.

²⁵⁰ SAYYID, *supra* note 34, at ch. 3.

system. The categorization is rough and imperfect, and it requires further subdivisions. Nonetheless, it is analytically useful for these purposes.

A. De Jure States, De Facto States and Para-States

To begin with, let us reconsider the idea of a *de jure* state, which we have glanced at above. *De jure* statehood as understood here requires more than the bare control over a population and a territory and the capacity to administer them. An entity with those characteristics (a government) might be a *de facto* state, but not a *de jure* one, as those terms are used here. To be a *de jure* state requires international recognition as a state. International recognition, as understood here, is *constitutive*, not declaratory, of sovereign statehood.

“Recognition” in the fullest sense does not mean merely the existence of diplomatic relations or acceptance as a co-party to treaties. It also includes what can be called the conferral of international “legitimacy,” or more precisely, an acceptance of the validity of the state’s claim to certain rights and a corresponding demand that it satisfy certain obligations. Recognition thus includes the acknowledgment of a state’s authority over the people and territory it governs and a requirement that it be responsible to other states for its actions. To be a *de jure* state in the full sense requires general acceptance by the rest of the community of states—or at least the dominant and most influential part of it—as a member in good standing.

De jure statehood, as understood here, is not a stark either/or condition. Let us assume here that a state that has been accepted as a member of the United Nations and other international organizations meets the minimum conditions for being *de jure*. Thereafter, its claim to be a state under international law would seem to bind other states.²⁵¹ But even such a *de jure* state may be in bad standing with the rest of the international community. Finland, Canada, Japan, and Uruguay are *de jure* states in the full sense. North Korea, albeit a member of the United Nations, is *de jure* in a more attenuated sense. It participates in the activities of the international community of states only to a limited extent, and it has been repeatedly subject to United Nations sanctions for its violations of international law.²⁵²

Other formally *de jure* states are or have been in a situation like that of North Korea—members of the United Nations, but the frequent targets of serious international legal sanctions or other forms of international censure. Iraq under the government of Saddam Hussein was such a case. For decades after the 1979 Iranian Revolution, Iran was also such a *de jure* state, though to a lesser degree now.

In these three cases—North Korea, Iraq, and Iran—the international community recognized an established government as the incontestable representative of the state in question. In addition, however, there are (minimally) *de jure* states, like Afghanistan under Taliban rule, whose governments are

²⁵¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, 1996 I.C.J. Rep. 91, at 595, (July 11) (implying that its claim is binding on other states).

²⁵² See, e.g., S.C. Res. 2356 (June 2, 2017).

generally unrecognized, even while those states retain membership in the United Nations.²⁵³

Kampuchea (Cambodia) in the early 1980s is another, yet different, case of marginal *de jure* statehood. Different sections of the international community were divided over whether to continue to recognize Pol Pot's government as the international representative of Kampuchea, despite that régime's appalling human rights violations and even though it had virtually no actual authority in the country, or instead to recognize the Heng Semrin government, which was in effective control of the country but which had been installed as a result of the allegedly illegal invasion of Kampuchea by Vietnam in 1978.²⁵⁴ However, this international disagreement did not touch on the question of the recognition of Kampuchea's statehood: it remained a member of the United Nations.²⁵⁵ What was at issue only was the question of which government merited international recognition.²⁵⁶

Distinct from *de jure* statehood is *de facto* statehood. Here, a government may be in effective control of a territory and a population. It may even have a measure of international recognition. And typically, it will desire *de jure* status.²⁵⁷ But it is unrecognized internationally, either in general or at least by a significant part of the international community, and it does not belong to the United Nations or other major international organizations. Kosovo is one such example. Though it enjoys widespread international recognition and the support of both the United States and the European Union, an influential bloc of states, led by Serbia and Russia, have deliberately withheld recognition from it, and have prevailed in opposing its admission into the United Nations. Other *de facto* states include Abkhazia, the Turkish Republic of North Cyprus, the former Bosnian Serb Republic, and the "quasi-state" of Iraqi Kurdistan.²⁵⁸ Of course, the ISIS caliphate is in a sense a *de facto* state itself.

Finally, we should distinguish states of all the varieties referenced above from *non-state* entities. This is a diffuse, variegated, and, until recently, understudied category. Included within it are de-territorialized transnational terrorist groups like al-Qaeda, "warlord" groups based on clan affiliation or personal

²⁵³ See Zachary Laub, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELATIONS (July 4, 2014), <http://www.cfr.org/afghanistan/taliban-afghanistan/p10551> (noting that only Saudi Arabia, the United Arab Emirates, and Pakistan recognized the Taliban government of Afghanistan).

²⁵⁴ Colin Warbrick, *Kampuchea: Representation and Recognition*, 30 INT'L & COMP. L.Q. 234, 235 (1981).

²⁵⁵ See Suellen Ratliff, *UN Representation Disputes: A Case Study of Cambodia and a New Accreditation Proposal for the Twenty-First Century*, 87 Cal. L. Rev. 1207, 1243–59 (1999).

²⁵⁶ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 33–35 (2d ed. 2006) (analyzing the distinction between recognition of "states" and of "governments").

²⁵⁷ See CASPERSEN, *supra* note 106, at 9 (discussing the desire for internationally recognized independence is "a central driving force for unrecognized states").

²⁵⁸ Denise Natali, *Stalemate, Not Statehood, for Iraqi Kurdistan*, LAWFARE (Nov. 1, 2015), <https://lawfareblog.com/stalemate-not-statehood-iraqi-kurdistan>.

loyalties like those in Somalia,²⁵⁹ and “states” within states, like the former Islamic Courts Union in Mogadishu. ISIS might conceivably degenerate into some kind of non-state or sub-national actor within this broad category. In particular, it might occupy, control, and effectively govern an area within the formal boundaries of a *de jure* state—in other words, it might evolve into a “state within a state.”

1. Warfare and Welfare in the ISIS Caliphate

Like virtually any contemporary polity, the ISIS caliphate must and did take account of “welfarist” objectives in shaping public policy.²⁶⁰ Despite its apocalyptic discourse,²⁶¹ ISIS’s publicity sought to attract Muslims—especially those with technical skills—as migrants to its territory.²⁶² To draw them there, it advertised an array of prospective benefits, including the prospect of being able to lead an authentically Muslim way of life, the opportunity to participate in the global renewal of the Muslim world, the possibility of satisfying imperative religious duties, the allure of risk and combat and, not least, a chance to improve their life prospects.²⁶³ In these respects, the ISIS caliphate’s appeal to Muslims might recall the appeal that Zionism had for Jews emigrating to Israel in the post-Holocaust period.²⁶⁴

ISIS did not seek to promote material well-being merely to avoid disappointing the expectations of those whom it governs or to present itself in a good light to the Muslim community at large. Welfare is not merely an incidental or secondary goal, a means for accomplishing political or theological ends. Rather, the restorationist project of Islamism and ISIS rests on the core premise that power and prosperity will be the necessary outcomes of a return to true Islamic principles. That is, ISIS assumed a particular historical narrative of Islam’s rise, fall and renewal—a narrative that it holds in common with other forms of Islamist restorationism.

For ISIS, as for Islamists generally, there is an inherent connection between religious truth and material well-being, such that the recovery of true Islam will necessarily bring worldly success with it. Power, respect, and wealth will flow from the renewal of pristine teaching and practice.²⁶⁵ In the Islamist narrative, the

²⁵⁹ Kimberley Marten, *Warlordism in Comparative Perspective*, 31 INT’L SEC. 41, 46–48 (2007) (providing an inductive definition of “warlordism”); Napoleoni, *supra* note 8, at 47–50.

²⁶⁰ AL-UBAYDI ET AL., *supra* note 248, at 65–66.

²⁶¹ See ROY, *supra* note 8, at 54–56 (noting the contradiction between ISIS’s apocalypticism and its restorationist project).

²⁶² GERGES, *supra* note 1, at 268 (“Baghdadi and his associates have repeatedly called on Muslims worldwide with technical expertise to migrate to the Islamic State and serve it.”).

²⁶³ Sadakat Kadri, *Want to Understand the Appeal of ISIS? Think Like a Young Muslim Outsider*, GUARDIAN (June 18, 2015), <https://www.theguardian.com/commentisfree/2015/jun/18/appeal-isis-muslim-outsider-recruits>.

²⁶⁴ Yael Zerubavel, *The “Mythological Sabra” and Jewish Past: Trauma, Memory, and Contested Identities*, 7 ISRAEL STUD. 115, 115 (2002).

²⁶⁵ HOURANI, *supra* note 242, at 228 (describing views of Rashid Rida).

founding age of Islam was marked by the sudden, dazzling enrichment of the warriors who followed its precepts and spread its message. Succeeding Muslim generations achieved unprecedented civilizational greatness by remaining faithful, by and large, to the original paradigm. Correspondingly, civilizational decline, economic backwardness, and subjection to Western colonial rule began to set-in only after faith had been corrupted and weakened. By revitalizing early beliefs and establishing a polity based on original practices, contemporary Muslims will be rewarded with successes comparable to those of the early generations of believers.²⁶⁶ However, if the caliphate should prove unable to achieve such successes, its failure would constitute proof of faithlessness, and the loss of its legitimacy would ensue.

As the actual trajectory of the ISIS caliphate showed, the necessity of creating a record of conspicuous and irresistible successes would drive the caliphate into a program of aggression and expansionism directed against its neighbors, and that program would in turn likely lead to the caliphate's demise. The strategic environment that the ISIS caliphate encountered in the contemporary Middle East is radically unlike that in which the earliest caliphs acted, and far less favorable to rapid conquests like theirs.²⁶⁷ Alternatively, however, the necessity of promoting welfare might conceivably have induced the ISIS caliphate to seek the status of a *de jure* state, even though it exhibited no such interest. The attractions of such recognition would be very powerful for the caliphate (just as they were in the 1920s and 1930s for the former Soviet Union).

First, as a *de jure* state, the caliphate would enjoy international recognition of its government and territorial borders. It would therefore be able to lay claim to the international legal protections that prohibit forcible violations of a state's political and territorial integrity. It could thereby achieve at least a *modus vivendi* with other powers, including its near neighbors, with which it had been more or less actively at war. Thus safeguarded, it would be spared much of the cost of providing for its national security and maintaining contested boundaries—and the resources

²⁶⁶ See AYDIN, *supra* note 46, at 72 (“The Muslim modernist critique of decline was harsh and directed the blame inward. It argued that Sufism and contemporary vernacular Muslim practices were the cause of the decline, and therefore the purity of early Islam was the solution.”). What is here called “the Islamist narrative” of Muslim history seems to have originated in the thought of modernist Islamic movements of the late nineteenth and early twentieth centuries. *Id.*; Ira M. Lapidus, *Islamic Revival and Modernity: The Contemporary Movements and the Historical Paradigms*, 40 J. ECON. & SOC. HIST. ORIENT 444, 445–46 (1997).

²⁶⁷ HUGH KENNEDY, *THE PROPHET AND THE AGE OF THE CALIPHATES: THE ISLAMIC NEAR EAST FROM THE SIXTH TO THE ELEVENTH CENTURY 1–12* (3d ed. 2016) (discussing how the early caliphates operated in a strategic environment in which the two great empires—that they were to weaken or destroy—the Byzantine and the Persian had exhausted themselves in decades of continuous but inconclusive warfare that immediately preceded the rise of Islam, and so were both vulnerable to swift defeat). By contrast, while many of the existing states in the region of the caliphate are fragile, others (Turkey, Iran and Israel in particular) are not. *Id.* And great powers outside the region, including the United States and Russia, intervene actively in its affairs and provide support even for the weaker states in it. *Id.*

that had been dedicated to those purposes could be redeployed to advance economic development. Second, as a *de jure* state, it would be far better positioned to engage in international trade and to attract foreign investment. That too would promote the welfare of its population. Granted, there is a controversy as to how far openness to international trade promotes economic growth in developing countries.²⁶⁸ Yet as the UN General Assembly put it in its Resolution 68/199 on *International trade and development* (2013), the consensus seems to be that “international trade is an engine for development and sustained economic growth . . . [T]rade has an important role in ensuring the sustainable development of the least developed countries” (at operative paras. 2, 6).

ISIS has attempted to deliver on its promises of economic improvement:

Engineers and technocrats oversee the subsidization and distribution of water, electricity, foodstuffs and gasoline. A skeletal welfare system offers healthcare and pensions for mujahideen and their dependents. In fact, polemicists specifically highlight the superiority of the Islamic State’s welfare provision to that of the Gulf regimes.²⁶⁹

Furthermore,

ISIS has set up a rudimentary functioning bureaucracy, administration, and institutions; it improved security and law and order—though harsh—and provided jobs in decimated economies. Residents report that ISIS delivers important services, such as bakeries, policing, a swift, sharia-based justice system, identity cards and birth certificates, consumer protection, garbage collection, day care centers, and clean and well-run hospitals, and it has procured teachers to work in its schools, even though the quality of these services is neither stellar nor free.²⁷⁰

Moreover, ISIS is in part a response to the problem of chronic developmental failure in the Arab world—failure that has been starkly documented over recent years in the United Nations’ series of “Arab Development Reports” that began publication in 2001. In 2009, for example, the relevant Report found that “[i]n the Arab region, human insecurity—pervasive, often intense and with consequences affecting large numbers of people—inhibits human development. It is revealed in the impacts of military occupation and conflict in Iraq, Sudan, Somalia and [the] Palestinian Territory.”²⁷¹

²⁶⁸ See generally Tarlok Singh, *Does International Trade Cause Economic Growth? A Survey*, 10 *WORLD ECON.* 1517 (2010).

²⁶⁹ Ahram & Lust, *supra* note 111, at 20.

²⁷⁰ GERGES, *supra* note 1, at 265.

²⁷¹ Regional Bureau for Arab States, *The Report in Brief: Arab Human Development Report 2009*, DGVN 2 (2009), http://www.dgvn.de/fileadmin/user_upload/PUBLIKATIONEN/UN_Berichte_HDR/AHDR/execsummary-e.pdf.

Anger and frustration were widely felt throughout the Arab world over failures such as these have contributed to the Islamic revival in the area²⁷² and helped to cause the “Arab Spring.” But in the aftermath of the Arab Spring, conditions for young Arabs have not improved; the initial optimism has faded.²⁷³ Currently, the Middle East and North Africa have the highest level of youth unemployment in the world.²⁷⁴ A February 2015 survey found that chronically high rates of unemployment were a source of suffering and despair for young Tunisians and represented their main concern.²⁷⁵ There is evidence that a significant proportion of ISIS fighters were drawn to the movement by desire for money and recognition.²⁷⁶ If an ISIS caliphate were eventually to command the support and loyalty of the mass of the population in Arab and other Muslim states, it would surely have to be able to make a credible case that it could overcome these developmental failures and bring about improved standards of health, education, and welfare. To do that, however, the caliphate would likely have found it necessary to seek and obtain international recognition as a *de jure* state.

Granted, such an attempt might have entailed the renunciation of the caliphate’s core claims regarding its relations with the outside world, including its claim to a uniquely privileged place in a divinely-ordained global legal order. If the caliphate had indeed renounced such claims in order to be accommodated within the Westphalian order, it would by that very action seemingly have ceased to be a challenge to that order. In other words, the caliphate as a project aiming at the radical transformation of the current world order would apparently have been pronouncing itself a failure.

²⁷² See Jean-Paul Carvalho, *A Theory of the Islamic Revival* 35 (Oxford Dept. of Econ., Working Paper No. 424, 2009), https://www.economics.ox.ac.uk/materials/working_papers/paper424.pdf.

²⁷³ John Dubber, *What Is The Appeal of ISIS?*, BRITISH COUNCIL (June 2, 2015), <https://www.britishcouncil.org/voices-magazine/isis-where-appeal-young-people> (“Immediately after the first uprisings, a wave of optimism swept the region. The Arab Youth Survey 2012, which measured the attitudes of 2,500 young people across 12 countries, showed that 72 per cent thought things had improved since the uprisings. It also found that the majority felt positive about their own and their countries’ futures. The results of this year’s survey tell a very different story. In 2015, just 38 per cent of young people agree that the Middle East and North Africa is better off following the Arab Spring, compared to 72 per cent in 2012. As many as 39 per cent of young people agree with the statement that ‘democracy will never work in the region’, while just 36 per cent think it will work and the remaining 25 per cent are unsure.”).

²⁷⁴ ILO, *Youth Unemployment Rate in Selected World Regions in 2014 and 2015*, STATISTA, <https://www.statista.com/statistics/269640/youth-unemployment-rate-in-selected-world-regions/> (last visited Oct. 13, 2017).

²⁷⁵ *Experiences and Perceptions of Young People in Tunisia: The Case of Douar Hicher and Ettadhamen*, INT’L ALERT (Feb. 2015), http://www.international-alert.org/sites/default/files/Tunisia_YoungPeopleSurvey_EN_2015.pdf; Dubber, *supra* note 273.

²⁷⁶ Patrick Tucker, *Why Join ISIS? How Fighters Respond When You Ask Them*, ATLANTIC (Dec. 9, 2015), http://www.realcleardefense.com/articles/2017/01/18/the_iliad_and_the_islamic_state_110653.html.

But is that necessarily so? As a *de jure* state, the ISIS caliphate might have tried to play, so to speak, a double game. It might have sought to secure for itself the privileges and immunities of membership in the Westphalian system, including settled borders, the cessation of hostilities against it, and the opportunities for cross-border trade and investment. But at the same time, it might (more or less openly) have sought to subvert and overthrow that order, refusing to accept and honor its rules when doing so would disadvantage it. Legal scholars have argued that the former Soviet Union pursued, over several decades, exactly such an opportunistic strategy in relation to international law.²⁷⁷ And it is arguable that Iran has followed, and may even still be following, such a course. For the ISIS caliphate, then, recognition as a *de jure* state might seem to have offered the deferral, but not the abandonment, of its universalizing ambitions.

2. Why the Westphalian Order Could Not Have Recognized the ISIS Caliphate as *De Jure*

The chances that the ISIS caliphate might eventually have been recognized as a *de jure* state were always unrealistic, however. Even assuming that the caliphate somehow survives destruction in the near term, there are at least three reasons that impel this conclusion. One might even say that the constitutional logic of the Westphalian order precludes this possibility.

First, it is unthinkable that states whose very right to existence ISIS denies would be willing to recognize it—and those include some Arab and other Muslim states in the caliphate's immediate environment. The caliphate not only denies the right of those states' governments to rule their subjects, but it also refuses to acknowledge the validity of their international borders. It is inconceivable that those states would recognize the caliphate so long as it maintained those views (which are integral to the project of the caliphate). And it is hard to see what the caliphate could do or say to make a credible claim that it had changed its beliefs, or abandoned its intentions, with regard to them.

Second, states in the contemporary Westphalian order have been extremely reluctant to recognize new states that have been formed out of the territories of existing states without the consent of the latter. This reluctance has been manifested repeatedly, and is plainly connected with (though it is distinct from) the "territorial integrity norm."²⁷⁸ As codified in Article 2(4) of the UN

²⁷⁷ O.J. Lissitzyn, *The Soviet View of International Law*, in INTERNATIONAL LAW STUDIES: ROLE OF INTERNATIONAL LAW AND AN EVOLVING OCEAN LAW 90, 90–91 (Richard B. Lillich & John Norton Moore eds. 1980).

²⁷⁸ Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT'L ORG. 215 (2001); Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, 26 SAIS REV. 11 (2006); 458 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment, 2001 I.C.J. Rep. 87, at 40, 458 (Mar. 16) ("The position now prevailing and fully accepted in international law is that the use of force is unlawful and, by itself, ineffective to bring about a change of title."); S.C. Res. 661 (Aug. 2, 1990) (relating to the Iraqi invasion of Kuwait,

Charter, that norm applies specifically to relations *between* States,²⁷⁹ but the international community has also been reluctant in many instances to accept boundary changes brought about by violence *internal to* States.²⁸⁰ For example, this reluctance does much to explain why the US and other nations have been unwilling to recognize *de jure* the Kurdish Regional Government (KRG) in Iraq, despite the fact that the KRG is a functioning, *de facto* state that has holds itself out as a liberal democracy and that has proven to be a valuable ally to the United States in its conflict with ISIS.²⁸¹ For (Iraqi) Kurdistan to achieve *de jure* recognition, the consent of Iraq to its own partial dismemberment would be necessary, and Iraq has refused to consent.

Likewise, despite the backing of influential supporters among Western states, an independent Kosovo is still denied membership in the UN General Assembly, owing in large part to Serbia's continuing opposition. In that case too, a new (claimant) state was created (with the forcible assistance of outside powers) by redrawing the international boundaries of an existing state, and the emergent entity has encountered stiff resistance to its claim for general *de jure* recognition.²⁸² The Turkish Republic of Northern Cyprus, as noted earlier, has been recognized only by Turkey (whose military intervention severed it from Cyprus) and is not a UN member state.²⁸³ To reach back further, Security Resolution 169 (1961) "[s]trongly deprecate[d] the secessionist activities illegally carried out by the provincial administration of Katanga" and "declare[d] that all secessionist activities against the Republic of the Congo are contrary to the *Loi fondamentale* and Security Council decisions."²⁸⁴

exemplify the norm); S.C. Res. 384 (Dec. 22, 1975). The territorial integrity norm is linked to non-recognition in a variety of ways. Of chief relevance here is its bearing on the recognition of new states. But the norm also relates to the question of the non-recognition of international boundaries redrawn by unlawful conquest or annexation. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. Rep. 53, at 16 (June 21). That aspect of the territorial integrity norm was reaffirmed by the General Assembly in 2014 by a 100-11 vote, in which they called upon member states not to recognize the change in Crimea's status brought about by the Russian intervention earlier that year. G.A. Res. 68/262 (Mar. 27, 2014).

²⁷⁹ U.N. Charter art. 2(4). The ICJ has opined that "the scope of the principle of territorial integrity is confined to the sphere of relations *between* States." Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo, Advisory Opinion, 2012 I.C.J. Rep. 141, at 403 (July 22) (emphasis added).

²⁸⁰ An arguable exception is the Western Powers willingness to accept the redrawing of existing international boundaries in the case of the former Yugoslavia. See Delahunty & Perez, *supra* note 159, at 79–84.

²⁸¹ Ahram & Lust, *supra* note 111, at 19.

²⁸² Efevwerham, *supra* note 101, at 112 ("[M]ost States that have not recognized Kosovo do so, on the basis of the inviolability of the principle of territorial integrity.").

²⁸³ See Zacher, *supra* note 278, at 228–29.

²⁸⁴ S.C. Res. 169 (1961); *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 49, at 151, 177 (implying that the ICJ appears to have adopted the opinion of the UN Secretary General that Katanga was not a "state" for purposes of the UN Charter). And

There have, of course, been cases in which a new state has achieved general *de jure* recognition despite having come into existence through the forcible redrawing of pre-existing borders. But those cases have been relatively few;²⁸⁵ and even then, the force of the territorial integrity norm was still felt. For instance, in the case of Bangladesh, which emerged from India's armed intervention and the defeat of Pakistan in 1971, general recognition was withheld and admission into the General Assembly was denied until Pakistan recognized the new state.²⁸⁶

Here, of course, the ISIS caliphate wrenched control of the territory it held from both Iraq and Syria. For the caliphate to have been recognized in accordance with prevailing state practice, therefore, both of those states would have had to accept the permanent loss of substantial amounts of their territories. That acceptance would surely have been unlikely.

But the third and overriding reason why the ISIS caliphate could not be recognized as a *de jure* state is that the admission of new states into the international community is governed by normative criteria that ISIS manifestly did not meet. The "non-recognition" of a prospective new state can be, and sometimes is, a deliberate decision by the consensus of the international community to deny that entity the legal personality of a state under international law. It can be, in other words, a kind of ostracism. But, as the European Commission's 1991 *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*²⁸⁷ show, recognition will be intentionally withheld, even from a *de facto* state with a functioning government that effectively controls a territory and a population, if that state fails to meet certain evaluative standards of conduct.²⁸⁸ As Christian Hillgruber put it:

The reliability of the new entity as a partner in international relations is the decisive criterion of statehood in the sense of international law . . . [T]he ability and willingness of the new state to respect international law constitute the central criteria of statehood in terms of international law; that is, they are decisive for the conferment of legal capacity under international law.²⁸⁹

a later attempt at secession by Katanga was rebuffed. *Katangese Peoples' Congress v. Zaire*, Communication 75/92, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Mar. 22, 2000).

²⁸⁵ CRAWFORD, *supra* note 256, at 391–403.

²⁸⁶ *Id.* at 393.

²⁸⁷ *European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States*, 31 I.L.M. 1485 (1992), <https://www.jstor.org/stable/pdf/20693758.pdf> [hereinafter *EC Guidelines*].

²⁸⁸ Accordance with International Law of the Unilateral Declaration, *supra* note 279, ¶ 81 (noting reluctance of Security Council to give effect to several unilateral declarations of independence that "were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law").

²⁸⁹ Hillgruber, *supra* note 63, at 499, 503; MIKULAS FABRY, *RECOGNIZING STATES: INTERNATIONAL SOCIETY AND THE ESTABLISHMENT OF NEW STATES SINCE 1776* 186–87 (2010) (observing that in implementing the *Guidelines*, "the United States and the EC

Thus, in order to be recognized as *de jure* under the 1991 EC *Guidelines*, new states were required to “have accepted the appropriate international obligations and [to] have committed themselves in good faith to a peaceful process and to negotiations.”²⁹⁰ Further, reflecting the territorial integrity norm, the new states were required to respect existing international boundaries and to provide guarantees of protection of the rights of national and ethnic minorities.²⁹¹ Likewise, no new state would be recognized if it had been created as the result of aggression.²⁹²

The EC *Guidelines* crystallized an emerging norm of state practice: only if a *de facto* state supplied reliable guarantees that it would comply with the basic rules of international law would it be recognized *de jure* as a member of the international society of states.²⁹³ This state practice began to emerge in the early 1930s with the promulgation of the “Stimson Doctrine,” adopted by the League of Nations, which mandated a policy of non-recognition of the “new state” of Manchukuo in conscious opposition to Imperial Japanese aggression against China.²⁹⁴ Under a 1933 Resolution of the League’s Assembly, recognition of Manchukuo would have been “incompatible with the fundamental principles of existing international obligations.”²⁹⁵

The emerging norm was deepened and entrenched with the international community’s deliberate non-recognition of the minority white settler state of Rhodesia, even though the effectiveness of that government was not in doubt. In Security Council Resolution 215 (1965), the Council “[d]ecide[d] to call upon all States not to recognize this illegal authority racist minority régime,” and in the immediately ensuing Resolution 217 (1965) “[c]ondemn[ed] the usurpation of power by a racist settler minority in Southern Rhodesia and regards the declaration of independence by it as having no legal validity.” The obvious basis for the Council’s non-recognition mandate was the new Rhodesian state’s violations of fundamental requirements of international law, including the right of self-determination of colonial peoples expressed in General Assembly Resolution 1514 (XV) (1960), to which the Council explicitly referred. Liberal political theory

countries did not want to see the emergence of countries whose policies would be the source of regional or international security, or contravene international rules and agreements.”).

²⁹⁰ EC *Guidelines*, *supra* note 287.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ Hillgruber, *supra* note 63, at 506 (contending that in the emergence of this rule of non-recognition, “[W]e can see what is known as peremptory international law (*jus cogens*) taking shape.”); *see also* J.D. van der Vyver, *Statehood in International Law*, 5 EMORY INT’L L. REV. 9, 21 (1991).

²⁹⁴ *See* Arnold D. McNair, *The Stimson Doctrine of Non-Recognition*, 14 BRIT. Y.B. INT’L L. 65 (1933); Quincy Wright, *The Legal Foundations of the Stimson Doctrine*, 8 PAC. AFF. 439 (1935).

²⁹⁵ CRAWFORD, *supra* note 256, at 132. To be precise, the objection was directed not at how the new state of Manchukuo originated, but to its lack of genuine independence from Japan. Thus, the pre-War Stimson doctrine differed somewhat from the current norm, which looks at territorial integrity.

strongly supports the emergence of this norm of non-recognition, finding both empirical correlations and theoretical pathways between human rights violations and a propensity to international aggression.²⁹⁶

The ISIS caliphate plainly could not begin to satisfy the normative requirements for *de jure* recognition: its record of intolerable human rights abuses, including genocide and crimes against humanity; the aggression it has directed against its near neighbors; and its sponsorship of transnational terrorism, are all obviously disqualifying. ISIS decided to “reject[] the global codes that have governed or framed politics,” and it could not have been forgiven for that choice.²⁹⁷

3. The ISIS Caliphate as a *De Facto* State

The category of *de facto* states encompasses a range of cases, from stable economic powerhouses like Taiwan to tiny statelets like South Ossetia.²⁹⁸ Might the ISIS caliphate survive, albeit in severely weakened form, as a *de facto* state?

It is characteristic of *de facto* states to seek international recognition as *de jure*, and to conduct their affairs with a view to acquiring the legitimacy needed for such recognition. Indeed, some *de facto* states, like Taiwan and Kosovo, have a fair measure of international recognition. But if aspiring to *de jure* status is a necessary condition or defining element of being a *de facto* state, then the question of whether the ISIS caliphate might evolve into a *de facto* state can be answered swiftly: it will not because it does not aspire to international recognition, and shows no sign that it will seek recognition in the future.

But even if there might be a *de facto* state that did not desire international recognition, the ISIS caliphate would not present a threat of destabilizing the Westphalian order if it achieved that status. Most of the existing *de facto* states survive under the shelter of a larger, protective power. Even Taiwan, the most significant *de facto* state, is nestled under the protection of the United States.²⁹⁹ Kosovo, another large *de facto* state, enjoys the sponsorship of the NATO powers and the European Union; Abkhazia and South Ossetia fall under the protective power of Russia; the Turkish Republic of Northern Cyprus is sustained by Turkey; Nagorno-Karabakh by Armenia. If the ISIS caliphate survived as a *de facto* state only through enjoying the patronage of an outside power, it would be unlikely to become a model polity for the Muslim world at large, or to be able to shake the Westphalian order.

A small handful of *de facto* states seem able to survive without an outside protective power because the international community has generally ignored them. Somaliland is perhaps such a case. But the ISIS caliphate would not be met with such indifference. Its claims have been too sweeping, its conduct too brutal, and its

²⁹⁶ William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249, 264–68 (2004).

²⁹⁷ Salazar, *supra* note 8, at 186.

²⁹⁸ CASPERSEN, *supra* note 106, at 11–12.

²⁹⁹ See Taiwan Relations Act, 22 U.S.C. §§ 3301–16 (1979).

location too strategically sensitive for it to escape attention. It would not survive as a *de facto* state through general lack of interest.

Finally, even when a *de facto* state happens to enjoy the favor of an outside protective power, it may nonetheless come under powerful pressure to abandon its claims to statehood and independence. Here, the case of the Kurdish Regional Government in Iraq is on point: despite its close relationship with the United States and the significant military support it provides for military operations against the ISIS caliphate, the United States has insisted that it remain within Iraq.

4. The ISIS Caliphate as a “‘State’ Within a State”

Finally, the existing ISIS caliphate might contract even further than it has, but still not be utterly ousted from the territories it holds. This situation could happen if, for example, neither Syria, Iraq, or any of the allies of either thought it worth the cost of eradicating ISIS entirely, or found some benefit in permitting ISIS to retain a marginal existence. The ISIS caliphate might then form a kind of governmental entity wielding power within a vicinity outside the areas of effective control by the *de jure* states within whose international boundaries that territory is located. In view of these characteristics, it might be characterized as a “‘state’ within a state”³⁰⁰ or as a “black spot.”

This article has already described a case that illustrates these possibilities: the Islamic Courts Union of Somalia, which exercised a sharia-based rule over parts of Somalia and enjoyed support from the local population for a time. The Islamic Courts Union of Somalia was powerful enough to combat both local warlords and the internationally recognized state of Somalia, and was finally brought down by Ethiopian (and US) military intervention.

Another such case is the “Wahhabi Republic” that existed in the Russian Republic of Dagestan in 1998-1999. This “Republic” was established by local Islamists, who dismantled the structures of Russian rule and introduced the sharia law. In its brief existence, this Islamist government restored order, combated crime, and provided security for the population in what had been an area of extreme lawlessness. This Islamist enclave also established contacts with Chechen Muslim militants and international Islamist terrorists, from the latter of whom it received arms and visits. The Islamist group’s aim was to transform the “Republic” into a sharia-based state independent of Russia. However, the “Republic” was crushed by Russian federal troops in 1999.³⁰¹

³⁰⁰ Cf. CASPERSEN, *supra* note 106, at 10 (using a similar term: the term, “state within a state” is a region “that maintain[s] a very high level of independence *but still recognize[s] the central government.*”) (emphasis added). The ISIS caliphate would surely not recognize the central authorities of Syria or Iraq. Nonetheless, it could have a high level of *de facto* independence and a sufficiently developed form of government to distinguish it from anarchy.

³⁰¹ Pelczyńska-Nałęcz et al., *supra* note 110, at 376–77. See generally Emil Souleimanov, *Chechnya, Wahhabism and the Invasion of Dagestan*, 9 MIDDLE EAST REV. INT’L AFF. (2005).

Like these earlier Islamist experiments, the ISIS caliphate might survive and even manage to govern effectively, albeit in a severely marginalized condition. But even if so, its “caliphate” would hardly provide an attractive model of governance for large masses of the world’s Muslim population. Further, it would remain highly vulnerable, as both the Islamic Courts Union and the Wahhabi Republic were, to outside military intervention by hostile regional or global powers.

Finally, the Islamic caliphate might become nearly or completely de-territorialized as al-Qaeda became after the war in Afghanistan. In that form, the ISIS caliphate might well remain a threat to international peace and security, as al-Qaeda has. Nonetheless, de-territorialization would be tantamount to an admission that ISIS’s caliphate project has been a failure, or at least highly premature. There cannot be a “virtual” caliphate, but only one that presides over a territory and a people.

B. Establishing a “Great Power” Caliphate in an Existing Muslim State

This brief concluding section addresses the question of whether a caliphate in a major existing Sunni Muslim state (*e.g.*, Turkey, Indonesia, Pakistan, Egypt, or Saudi Arabia) would threaten the Westphalian order. As discussed above, the possibility of such a caliphate cannot be dismissed as utterly unrealistic; there are informed observers who welcome or fear such a prospect with regard to each of those states.³⁰²

The short answer to this question is that it is impossible to tell. Much would depend on the circumstances in which such a caliphate arose such as the history, capabilities, and strategic environment of the state in which a caliphate was installed. Much would also depend on the objectives of the Islamist government that installed it, and on the personalities of the leading figures involved. Moreover, the trajectory of such a caliphate, once established, cannot be foreseen. That said, it is possible to engage in educated guesswork based on both the evidence of past practices and on the conditions that an emergent caliphate would likely face.

To simplify, let us assume that the current Islamist government of Turkey restored the Ottoman caliphate, which the (secular) Turkish Republic abolished in 1924. As noted above, some commentators speculate that Turkey might enact such a measure to mark the centenary of the caliphate’s abolition. Turkey is, by any reckoning, a large and important Muslim state, a NATO member, and a significant regional power. Therefore, a restoration of the caliphate in Turkey could be expected to reverberate throughout the international system.

Nonetheless, there are at least three reasons why a restored caliphate in Turkey, even under the auspices of an Islamist government, might not present a challenge to the Westphalian order.

First, restoration would not necessarily signal a desire for world conquest, an ambition to rule over global *umma*, or even an intent to assert regional

³⁰² SAFRAN, *supra* note 222 (explaining that Islamic history clearly demonstrates that there can be different, competing major caliphates at a single time).

ascendancy. It might not be intended as the prelude to overthrowing the Westphalian order or even constitute a breach of it. It might simply be designed to give Turkey a certain preeminence or prestige in Muslim affairs such as it enjoyed under the Ottoman Empire, or to provide it with a useful instrument to advance national policy. It might constitute no more a challenge to the Westphalian order than the assumption of the title “Custodian of the Two Holy Mosques” by King Fahd of Saudi Arabia in 1986—a title that had previously been held by the great warrior Saladin during the Crusades and by Ottoman sultans later.³⁰³

Consider how the Ottoman caliphate functioned in the past. The existence of a caliphate did not preclude the Ottoman Empire from acting as a “normal” state in many ways. Indeed, “[t]he Ottoman Empire was the first non-Christian country to participate in the European state system and the first unconditionally to accept its form of diplomacy. The Ottoman realization of full diplomatic reciprocity with Europe thus constituted a major step in the transformation of the European state system into a world system.”³⁰⁴

For centuries, the Ottoman Empire engaged with European states in diplomacy, trade, treaty making, and military alliances. The Empire sent some 145 envoys to Venice between 1384 and 1600.³⁰⁵ After intensive diplomacy, King Francis I of France concluded a commercial agreement with the Ottoman Sultan Suleiman “the Magnificent” in 1536, and France appointed a permanent diplomatic representative to the Ottomans at the same time.³⁰⁶ The Ottomans did not, however, reciprocate.³⁰⁷ The Treaty of Carlowitz of 1699, which established a procedure for defining the boundaries between the Ottoman Empire and European states, imposed a permanent peace between the treaty parties, not a mere truce in a state of continuing hostilities, as before. The Treaty of Carlowitz can therefore be construed as signifying the acceptance of European international law, as opposed to the “classic” Islamic system.³⁰⁸

³⁰³ Galal Fakkar, *Story Behind the King's Title*, ARAB NEWS (Jan. 27, 2015), <http://www.arabnews.com/saudi-arabia/news/695351>.

³⁰⁴ J.C. Hurewitz, *Ottoman Diplomacy and the European State System*, 15 MIDDLE EAST J. 141, 141 (1961).

³⁰⁵ ADAM WATSON, *THE EVOLUTION OF INTERNATIONAL SOCIETY: A COMPARATIVE HISTORICAL ANALYSIS* (1992).

³⁰⁶ De Lamar Jensen, *The Ottoman Turks in Sixteenth Century French Diplomacy*, 16 SIXTEENTH CENTURY J. 451, 455–56 (1985). Pope Paul III reprimanded King Francis for making a treaty with infidels, but Francis defended himself on the grounds that international law is universal. Alexander Orakhelashvili, *The Idea of European International Law*, 17 EUR. J. INT'L L. 315, 331 (2006).

³⁰⁷ Hurewitz, *supra* note 304, at 146–47.

³⁰⁸ See generally Rifaat A. Abou-el-Haj, *The Formal Closure of the Ottoman Frontier in Europe: 1699-1703*, 89 J. AM. ORIENTAL SOC'Y 467 (1969). This characterization has been controverted by later scholarship, however, which denies that the Ottoman Empire was a sharia state, or that it saw itself on a permanent war footing with the Christian West. See generally A. Nuri Yurdusev, *The Ottoman Attitude toward Diplomacy, in OTTOMAN DIPLOMACY: CONVENTIONAL OR UNCONVENTIONAL?* (2004).

As a result, the Ottomans became even more deeply enmeshed in the European state system during the eighteenth and nineteenth centuries. For example, a resident Ottoman Ambassador was sent to London in 1793.³⁰⁹ The Ottoman Empire was formally admitted into the European states system by Article 7 of the Treaty of Paris of 1856.³¹⁰ Additionally, the Ottoman Empire later entered World War I as an ally of the Central Powers.

Moreover, the Ottomans' later effort to instrumentalize the caliphate for purposes of war was a failure.³¹¹ The caliph's call for a jihad by the Muslims of India against their imperial British masters went largely unheeded. Furthermore, the caliphate was even unable to prevent Arab Muslims from rebelling against the Ottoman Empire. Thus, even when the prestige of the caliphate was invoked to mobilize the *umma* in a global conflict with Western powers, the appeal failed.

To be sure, Ottoman state practice (which itself varied significantly over the centuries) is not necessarily a guide to the future practices of a renewed Turkish caliphate. Nonetheless, the history of the Ottoman caliphate does demonstrate that a caliphate does not, in and of itself, constitute a threat to the Westphalian order.

Second, the gravitational pull of the Westphalian order has been strong enough in the past to draw revolutionary states like the Soviet Union and Iran away from their original trajectories. Membership in the Westphalian order, so to say, has its privileges. The Soviets under Lenin, and the Iranians under Khomeini both voiced vehement objections to the Westphalian order and seemed determined to do everything in their power to overthrow it. Both regimes appealed strongly to vast numbers of actual or putative supporters outside their own national boundaries, and both exerted a compelling ideological fascination. In both cases, the states themselves almost seemed to be mere couriers of a revolutionary message.

Yet, it was not long in either case before the demands of the state collided with the demands of the revolutionary cause—and the demands of the state prevailed. The imperative needs for national security, freedom from foreign intervention, defined boundaries, and international trade and investment took precedence over the violent propagation of revolutionary doctrine. Both states sought a *modus vivendi*, if not a “normal” place, within the Westphalian order. The Soviet and Iranian states did not become mere vehicles for a revolutionary cause; rather, the cause became an instrument in the service of Iranian and Russian statecraft. Given these historical examples, even if an aggressively Islamist caliphate were established in Turkey or in some other large Muslim state, the chances are good that it, too, would be impelled to follow this pattern.

Third, the internal logic of Islamism would probably draw even a revolutionary, big-state caliphate into accommodation with the Westphalian order. Recall that the promise of renewed Muslim greatness—power, prestige, and wealth—is at the core of the Islamist message. It is said that the recovery of the spiritual purity and heroic virtue of the generation of the Righteous Caliphs will

³⁰⁹ Yurdusev, *supra* note 308, at 5.

³¹⁰ EDOUARD GOURDON, HISTOIRE DU CONGRÈS DE PARIS (2010) (providing a French translation of the 1857 treaty text).

³¹¹ AYDIN, *supra* note 46, at 115–22 (giving a summary of events).

lead to material successes comparable to theirs. But in order to make good on that promise, an Islamist caliphate would have to choose between two alternatives.

The first would be to wage successful wars of conquest, like those of the early caliphs. Yet, the strategic environment that a renewed caliphate would encounter would, in all likelihood, be far less propitious for such activity than that in which the early caliphs operated.³¹² The early Muslim conquerors swept over territories ruled by two gravely weakened, exhausted, and internally driven empires. But in the contemporary world, a renewed caliphate would face not only important regional competitors (say, Iran in the case of Turkey), but also Great Powers like the United States, Russia, India, and China, each of which might seek to curb the caliphate's rise.³¹³

The alternative to a policy of conquest is, of course, peaceful participation in the world order, with the aim of achieving prosperity, influence, and prestige primarily through economic development. This is essentially the path that China has taken since the reforms of 1979. The structure of the existing international legal and economic order tends to force the units within it to become functionally and organizationally similar, much as business firms in the marketplace are driven to adopt the practices and innovations of their competitors, or risk destruction; this is known as the "sameness" effect.³¹⁴ If a renewed caliphate were to pursue this course, however, it would have to "normalize" its relations with other states to a great degree. It would have to achieve a *modus vivendi* with the existing international system. And, of course, to the extent that a renewed caliphate became enmeshed in the Westphalian order, its threat to that order would dwindle.

The internal logic of Islamism, therefore, creates an inescapable dilemma for a renewed caliphate, even on the big-state level. It forces a choice between a high-risk policy of aggression, war, and conquest that would likely lead to massive resistance from other powers, or a lower-risk policy of accommodation that over time would tend to moderate and domesticate revolutionary zeal and abate the caliphate's danger to the Westphalian order.

³¹² PETER LIBERMAN, DOES CONQUEST PAY? THE EXPLOITATION OF OCCUPIED INDUSTRIAL SOCIETIES (1996) (discussing how extracting gains from the conquest and occupation of foreign territory is difficult, and to a great extent, gains depend on whether the conquered population chooses to resist or collaborate; such resistance tends to result in withheld revenues, lessened productivity, and higher collection costs). Although it is true that a conqueror can still extract gains from an occupied industrial economy if it is ruthless enough, ruthlessness itself creates an economic drain. *Id.*

³¹³ See SAYYID, *supra* note 36, at 130. See also Ian Lustick, *The Absence of Middle Eastern Great Powers: Political "Backwardness" in Historical Perspective*, 51 INT'L ORG. 653 (1997) (explaining why no "great power" has arisen in the Arab Middle East in modern times and arguing that great powers emerge from series of wars, and that both Western intervention and international norms have precluded such wars from being fought among Arab states).

³¹⁴ Ebrahim Afsah, *Contested Universalities of International Law: Islam's Struggle with Modernity*, 10 J. HIST. INT'L L. 259, 267, 293 (2008).

VIII. CONCLUSION

The ISIS caliphate's rebellion against the Westphalian order is overwhelmingly likely to fail, not merely because it will soon suffer military defeat, but because that order exhibits unusual resilience against revolutionary challenges. To the extent that ISIS posed a genuine revolutionary threat, it became an international outlaw and pariah, mobilizing an array of forces against it. But if it had sought relief by trying to reach an accommodation with those forces, the threat it had posed would correspondingly have diminished. The dilemma the ISIS caliphate encountered grew out of its own meta-narrative of Islamic history as a process of rise, decline, and renewal. That narrative lent it a degree of legitimacy in the eyes of some Muslims because it could claim to be following and restoring the model of the original caliphate. But the narrative also betrayed it, because the strategic environment in which the caliphate arose was fundamentally different from that of the early Islamic polity.

Although certainty on the point is impossible, it seems likely that if a caliphate were to be established by an Islamist movement in a major, existing Muslim state, it would face a similar dilemma. The past pattern of revolutionary states, particularly the Soviet Union and Iran, suggests as much. A permanent posture of defiance of the Westphalian order has proven impossible to sustain. In both cases, when the imperatives of national security came into conflict with revolutionary ideology, the latter was eventually subordinated to the former. Forced to choose whether to behave like a state or like a cause, both post-revolutionary Iran and the USSR elected to behave like states.

Certainly, for many millions of the world's Muslims, the restoration of the caliphate is a heart-felt desire, which may well be fulfilled, perhaps even in the near future. But, again, past practice suggests that such a caliphate would eventually come to terms with the Westphalian order, as the Ottoman Empire once did. The establishment of a caliphate is not inherently an attempt to subvert that order.

The Westphalian order, like other secular-liberal, consent-based régimes, has many deficiencies; spiritual destitution is arguably one.³¹⁵ Nevertheless, it has proven to be sturdy and durable. Escaping from it, while imaginable, is not easy. To borrow from the philosopher Ludwig Wittgenstein, the fly will find it hard to make its way out of the fly bottle.³¹⁶



³¹⁵ Afsah, *supra* note 314, at 294 (“At the heart of political Islam lies the dissatisfaction with the inevitable contradictions of the modernization process and the desire to reclaim authenticity and identity.”).

³¹⁶ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 103 (G.E.M. Anscombe trans., 2d ed. 1953).