IN A BROKEN DREAM: LESSONS FROM THE RISE AND DEMISE OF THE SELF-DECLARED CALIPHATE OF THE ISLAMIC STATE IN SYRIA AND IRAQ

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I. INTRODUCTION

The Islamic State in Iraq and Syria ("Islamic State")[1] is a terrorist organization that took over significant territories, in the context of the Syrian civil war,[2] and declared itself a "caliphate" in June 2014.[3] It transformed from a minor terrorist group into an alleged quasi-state, presenting capabilities and wealth like no

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1. This organization is also known as the Islamic State of Iraq and the Levant, ISIS (an acronym for the "Islamic State in Iraq and Greater Syria"), ISIL (an acronym for the "Islamic State in Iraq and the Levant"), Daesh (an abbreviation of the organization's name in Arabic, *al-Dawlah al-Islamiyah fil-Iraq wa al-Sham*), or the Takfiri. For discussion, *see* Xavier Raufer, *The "Islamic State," an Unidentified Terrorist Object*, 25 POL. Q. INT'L AFF. 45, 45 (2016); COLE BUNZEL, FROM PAPER STATE TO CALIPHATE: THE IDEOLOGY OF THE ISLAMIC STATE 3 (2015), https://www.brookings.edu/wp-content/uploads/2016/06/The-ideology-of-the-Islamic-State-1.pdf.

2. During which millions of people were forced to leave their home and hundreds of thousands of people have died. For updated data, see *Syria Regional Refugee Response*, UNHCR: OPERATIONAL DATA PORTAL, http://data.unhcr.org/syrianrefugees/regional.php (last visited Nov. 29, 2019).

3. For a historical survey of the evolution of the Islamic State, see Johan D. van der Vyver, *The ISIS Crisis and the Development of International Humanitarian Law*, 30 EMORY INT'L L. REV. 531, 535–38 (2016); BUNZEL, *supra* note 1, at 13.

other terrorist group before it, while embracing a religious identity with a potential appeal to hundreds of millions of people around the world.[4]

Although during 2014-2017 the Islamic State demonstrated to some extent the ability to function as a state, it did not seek the recognition of other states, nor did it receive it. Rather, it presented itself as a religious alternative to the essentially secular legal and social system underlying the international order.[5]

This Article examines how the attempt to establish a caliphate challenged basic principles of the international legal order during 2014-2017 and, in particular, whether the project impacted the discourse and norms regulating statehood in international law. I first set the stage for the presentation of the case study by describing the rise of the principle of state sovereignty, and its key role in establishing and maintaining the state-centered international legal system which the self-proclaimed Caliphate attempted to challenge. Then, I introduce the case study of the Islamic State and its dream of establishing a caliphate. I later explain why the Caliphate failed to meet the traditional legal criteria for statehood and eventually faced universal nonrecognition. Subsequently, and finally, I discuss how the failed attempt to establish the Caliphate corresponds to several trends in international law and what can be learned from looking at this case study in the light of those trends.

This Article engages with and complements existing literature relating to the principle of sovereignty, statehood, and nonstate actors ("NSAs"), three topics that are inherently intertwined. This Article shows the importance for NSAs to derive their authority from international law and attempt to adhere to it if they wish to find their place in the international plane. Further, it highlights how the failed attempt of the Islamic State to establish a caliphate reaffirms the resilience of the international legal order and the principle of sovereignty underlying it. Finally, this article demonstrates the growing tendency to give preference to *legality* over *effectiveness* in the discourse on statehood and recognition.

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4. ALI A. ALLAWI, THE CRISIS OF ISLAMIC CIVILIZATION 163 (2010). In the view of the Islamic State, it constitutes the world's center for Muslims, and it has called all Muslims in the world to join it as nationals of the only "true" Islamic State. *See also* BUNZEL, *supra* note 1, at 41; Robert J. Delahunty, *An Epitaph for ISIS: The Idea of a Caliphate and the Westphalian Order*, 35 ARIZ. J. INT'L & COMP. L. 1, 2 (2018); S. SAYYID, RECALLING THE CALIPHATE: DECOLONIZATION AND WORLD ORDER 121–32 (2014).

5. Gábor Kajtár, *The Use of Force Against ISIL in Iraq and Syria - A Legal Battlefield*, 34 WIS. INT'L L.J. 535, 548 (2017); Jessica Stern, *Radicalization to Extremism and Mobilization to Violence: What Have We Learned and What Can We Do About It?*, 668 ANNALS AM. ACAD. POL. & SOC. SCI. 102, 106 (2016).

II. THE PRINCIPLE OF SOVEREIGNTY AND THE INTERNATIONAL LEGAL ORDER

The international system is a decentralized one, in which the central development and enforcement of the law is the exception and not the rule.[6] Two main pillars of the international legal order are the principle of sovereignty, as an organizing idea,[7] and statehood.[8] The Islamic State demanded independence and authority over the territory of its self-proclaimed Caliphate, but at the same time, it failed to demonstrate respect, or mere acceptance, of the sovereign rights of existing states, principally Iraq and Syria. The intent to demonstrate the Islamic State's status as a sovereign state and a center for Muslims can be seen, for example, from an invitation sent on behalf of the group to all Muslims, wherever they are, during the July 2014 month of the Ramadan, a month after the declaration of establishing the Caliphate: "O Muslims in all places, rejoice, take heart, and hold your heads high! For today you have, by God's bounty, a state and caliphate that will renew your dignity and strength, that will recover your rights and your sovereignty . . .."[9]

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6. Andreas Paulus, *Whether Universal Values Can Prevail over Bilateralism and Reciprocity*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 90 (Antonio Cassese ed., 2012). One of the anxieties underpinning the discussion on fragmentation of international law is that there may be no unitary conceptual and institutional framework which can rationalize, regulate, and integrate the multifarious roles NSAs play on the international plane. *See also* Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law Postmodern Anxieties?*, 15 LEIDEN J. INT'L L. 553, 556–57 (2002); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1001–02 (2004).

7. The principle of sovereignty is the foundation of state independence, their authority over their territory and their equality amongst other states. While the legal structure within most societies is hierarchical, and the authority is vertical, the international system is horizontal since it consists of almost 200 states, all equal in theory and without authority over each other. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 4 (7th ed. 2014). And, still, as observed by Acquaviva, the formal equality of states, like the formal equality of human beings, does not prevent significant differences in wealth, size, or other characteristics. *See* Guido Acquaviva, *Subjects of International Law: A Power-Based Analysis*, 38 VAND. J. TRANSNAT'L L. 345, 387 (2005).

8. Karen Knop, *Statehood: Territory, People, Government*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 95, 95 (James Crawford & Martti Koskenniemi eds., 2012); Joel P. Trachtman, *The Crisis of International Law*, 44 CASE W. RES. J. INT'L L. 407, 409 (2011). *See also* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 20 (1999); JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 156 (1998).

9. Abū Bakr al-Baghdādī, *Risāla ilā 'l-mujāhidīn wa'l-umma al-Islamiyya fī shahr Ramadān*, MU'ASSASAT AL-FURQĀN (July 1, 2014), https://ia902508.us.archive.org/11/items/K_R_abubkr/et34.pdf, *translated in* BUNZEL, *supra* note 1, at 41.

The concept of sovereignty was first introduced in 1576 by Bodin[10] and later affirmed in the Treaty of Westphalia of 1648, which recognized the right of (Western) states to establish a domestic governmental system without outside interference from other states.[11] Koskenniemi noted that the need for absolute noninterference derived from the fact that the main forces behind the peace in Europe at the time—Austria, Prussia, and Russia—were governed by absolutist monarchs with a shared desire to curb any proposal for representative government.[12]

Notwithstanding earlier challenges to state sovereignty, by other forms of nonterritorial modes of an organization like the Latin Church or the Holy Roman Empire,[13] the strength of the principle of sovereignty grew alongside the modern nation-state system, and it became a foundational principle in the international system in which states were, and still are, the predominant actors.[14] Hamid and Wouters,[15] as well as Cismaş,[16] believe that in the international realm, designed under a Westphalian model, sovereignty is devised to safeguard the state-centered nature of the international system. Accordingly, it is common to refer to the international legal order as a Westphalian legal order.

This international Westphalian legal order consciously distances itself from religious grounding, since it was designed to bridge over states with different dominant religions.[17] By

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10. Lyndsey Kelly, *The Downfall of the Responsibility to Protect: How the Libyan and Syrian Crises Secured the Fate of the Once-Emerging Norm*, 43 SYRACUSE J. INT'L L. & COM. 381, 391 (2016). For further discussion, see generally Theodor Meron, *The Authority to Make Treaties in the Late Middle Ages*, 89 AM. J. INT'L L. 1 (1995).

11. Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 868–69 (Perm. Ct. Arb. 1928). For further discussion, see Ronald A. Brand, *External Sovereignty and International Law*, 18 FORDHAM INT'L L.J. 1685, 1686 (1995); Jianming Shen, *The Non-Intervention Principle and Humanitarian Interventions Under International Law*, 7 INT'L LEGAL THEORY 1, 2 (2001); Matt Evans, *Reterritorialization or Deterritorialization? Israel's Gaza Withdrawal*, 42 J. POL. SCI. 27, 29 (2014).

12. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, at 11 (2001).

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

14. Frédéric Mégret, *International Law as Law*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW, *supra* note 8, at 64, 66; Duncan French, *Introduction*, *in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 1 (Duncan French ed., 2013); Yaël Ronen, *Entities that Can Be States but Do Not Claim to Be*, *in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW, *supra* note 8., at 23. *See also* John Alan Cohan, *Sovereignty in a Postsovereign World*, 18 FLA. J. INT'L L. 907, 911–13 (2006).

15. Jan Wouters & Linda Hamid, *We the People: Self-Determination v. Sovereignty in the Case of De Facto States*, 1 INTER GENTES 53, 56 (2016).

16. Ioana Cismaş, *Secession in Theory and Practice: The Case of Kosovo and Beyond*, 2 GOETTINGEN J. INT'L L. 531, 548 (2010).

17. For discussion on the secular basis of the current international order, see MARK LILLA, THE STILLBORN GOD: RELIGION, POLITICS, AND THE MODERN WEST 7 (2008).

contrast, as will be elaborated on in the next Part, the Islamic State's self-proclaimed Caliphate rests on to the theological-political basis, and its aim was to establish its political organization as a monotheistic religious state.[18]

Shaw explains that the strengthening of the principle of sovereignty signaled the rise of the positivist philosophy of international law.[19] In contrast to the school of natural law,[20] which is based on the existence of a perception of justice from which normative rules can be derived,[21] the positivist school focuses on the consent of states to accept obligations as the basis of legitimacy of international law.[22] The positivist school hence promotes voluntarism, namely that the rules of international law emanate from states' own free will.[23]

Jackson asserted that sovereignty is divided into two aspects: negative and positive.[24] The negative aspect is the freedom of the

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18. Fouad al-Ibrahim, *Why ISIS Is a Threat to Saudi Arabia: Wahhabism's Deferred Promise*, ALAKHBAR ENG. (Aug. 22, 2014), http://english.al-akhbar.com/node/21234; WILLIAM MCCANTS, THE ISIS APOCALYPSE 121 (2016); Hassan Hassan, The *Sectarianism of the Islamic State: Ideological Roots and Political Context*, CARNEGIE MIDDLE E. CTR. (June 13, 2016), http://carnegie-mec.org/2016/06/13/sectarianism-of-islamic-state-ideological-roots-and-political-context/j1sf.

19. SHAW, *supra* note 7, at 18. For a historical account on positivism in international law, see generally Alexander Orakhelashvili, *The Origins of Consensual Positivism – Pufendorf, Wolff and Vattel*, *in* RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW 93 (Alexander Orakhelashvili ed., 2011).

20. For discussion on this school of thought, see generally Patrick Capps, *Natural Law and the Law of Nations, in* RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW, *supra* note 19, at 61.

21. From the perspective of sovereignty, natural law school envisages a universal international law, namely that the principle of sovereignty will benefit humanity on a global scale. In practice, it has been claimed that the rise of positivism allowed for making a differentiation between civilized and non-civilized societies, and throughout the period of European expansion and colonization, international law doctrines, such as sovereignty, were invoked and applied for the benefit of the colonizers. *See* David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 136 (1997); Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 843, 849–50 (2000); Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 742 (2006); Maria Grahn-Farley, *Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of The U.N. Convention on the Rights of the Child*, 34 BROOK. J. INT'L L. 1, 29 (2008). *Cf.* Alexander Orakhelashvili, *The 19th-Century Life of International Law*, *in* RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW, *supra* note 19, at 441.

22. In the beginning of the twentieth- century international law has moved away from mid-nineteenth-century ideals of justice and equality. *See* KOSKENNIEMI, *supra* note 12, at 98; *see also* Hans Kelsen, *Sovereignty and International Law,* 48 GEO. L.J. 627, 637 (1960); Carlo Focarelli, *International Law in the 20th Century*, *in* RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW, *supra* note 19, at 478; SHAW, *supra* note 7, at 18.

23. Accordingly, restrictions upon the independence of states cannot be presumed. *See* S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 3, at 44 (Sept. 7); Brand, *supra* note 11, at 1685–86.

24. ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 26 (1990). These terms were inspired by the writing of Berlin,

state from outside interference, and it is manifested by the principle of nonintervention, a customary norm of international law.[25] Regarding the positive aspect of sovereignty, it is the freedom of the state to master its affairs, be it domestic utilization and distribution of resources, or be it the decision to engage in international cooperation with one state over another.[26]

While sovereignty is a foundational principle in the international system in which states were, and still are, the predominant actors,[27] recent decades brought about an erosion of this principle. A significant transformation was witnessed at the end of World War II with the establishment of the United Nations, which introduced the prohibition against the use of force against other states,[28] and the collective security system under

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relating to the liberty of the individual. In the view of Berlin, negative liberty is the freedom to act unobstructed by others, while positive liberty is the desire to be a master of my own life, namely, to be a subject rather than an object, and to realize the goals one chooses in the manner one prefers. *See* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 122 (1970). In comparison, Koskenniemi suggested that sovereignty has an analogous role to individual liberty in domestic discourse, since it explains what it means to be a subject and sets conditions to organize legal relations. MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW 45 (2011). As can be seen from these writings, comparing between the legal rights of states and individuals is not uncommon. *See also* CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 71 (2d ed. 1979); Rafael Domingo, *The Crisis of International Law*, 42 VAND. J. TRANSNAT'L L. 1543, 1549 (2009).

25. SHAW, *supra* note 7, at 832; Michael N. Schmitt & Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT'L SECURITY J. 349, 353–54 (2014). In order for an intervention to be considered illegal, two elements must be examined. First, illegal intervention deals with matters regarding which the state is free to decide, such as its political or economic system. Second, illegal intervention must involve coercion. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, 108, 124, ¶¶ 205, 242 (June 27); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, 227, ¶ 165 (Dec. 19). For an updated discussion of this principle, in light of new challenges such as the cyberspace, see MICHAEL SCHMITT, THE TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 17 (2013).

26. In other words, it is the freedom of decision making, and effectively implementing meaningful discretionary choices on institutional, political, socioeconomic, and foreign policy matters. *See* Miriam Ronzoni, *Two Conceptions of State Sovereignty and Their Implications for Global Institutional Design*, 15 CRITICAL REV. INT'L SOC. & POL. PHIL. 573, 578 (2012); *see also* Kathryn Sturman, *New Norms, Old Boundaries: The African Union's Approach to Secession and State Sovereignty*, *in* ON THE WAY TO STATEHOOD: SECESSION AND GLOBALISATION 70 (Aleksandar Pavaković & Peter Radan eds., 2008).

27. Mégret, *supra* note 14, at 66; French, *supra* note 14, at 1; Ronen, *supra* note 14, at 23. *See also* Cohan, *supra* note 14, at 911–19.

28. U.N. Charter art. 2, ¶ 4. For discussion concerning this prohibition, see Christine Gray, *The Use of Force and the International Legal Order*, *in* INTERNATIONAL LAW 617 (Malcolm D. Evans ed., 2010); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 166, ¶ 74 (July 9). *See also* Nicar. v. U.S., 1986 I.C.J. Rep. at 100–01, ¶ 190. For an historical account of the process in which war was outlawed in the international sphere, see generally OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017).

the stewardship of the Security Council, which was entrusted with the duty of maintaining international peace and order.[29] As noted by Henkin, the fact that states agreed to declare war illegal and to delegate significant authority to the Security Council was quite remarkable at the time.[30]

This collective security system was tested in the face of the threats the Islamic State presented, both the infringement on the sovereignty of Iraq and Syria,[31] and the concern given the harsh human rights abuses in the territories under its control.[32] Yet, the effort to lead through the Security Council military intervention against the Islamic State was blocked by a threat of a veto by Russia and China, two of the five permanent members of the Council.[33] Eventually, two coalitions were formed against the Islamic State[34]: the first was the Islamic Military Alliance, and the second had the United States at its forefront ("U.S.-led coalition").[35]

As noted, the Islamic State vision of statehood rests on a theological-political basis, in contrast to the Westphalian legal order that rests fundamentally on human consent and without attachment to religion.[36] Against this backdrop, the battle against

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29. For critical discussion on the structure of the Council, see Inocencio Arias, *Humanitarian Intervention: Could the Security Council Kill the United Nations?*, 23 FORDHAM INT'L L.J. 1005, 1010–12 (2000); Jessica Elbaz, *International Stalemate: The Need for a Structural Revamp of the U.N. Security Council*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 209, 211–14 (2016).

30. Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 3 (1999).

31. S.C. Res. 2170, ¶¶ 4, 9 (Aug. 15, 2014); S.C. Res. 2249, ¶¶ 3, 5–7 (Nov. 20, 2015).

32. Gerald Waltman III, *Prosecuting ISIS*, 85 MISS. L.J. 817, 830–34 (2016); Hassan, *supra* note 18, at 3; Haroon Siddique, *20,000 Iraqis Besieged by Isis Escape from Mountain After US Air Strikes*, GUARDIAN (Aug. 10, 2014, 9:12 AM), http://www.theguardian.com/world/2014/aug/10/iraq-yazidi-isis-jihadists-islamic-state-kurds.

33. Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RES. J. INT'L L. 1, 9, 18, 23 (2016).

34. Aaron L. Jackson, *Hunting Down Terrorists "Wherever They Exist": ISIL in Syria and the Legal Argument for United States Military Operations Within the Territory of a Non-Consenting Nation-State*, 74 A.F. L. REV. 133, 140 (2015).

35. Press Release, U.S. Dep't of Def., Statement by Pentagon Press Sec'y Rear Admiral John Kirby on Airstrikes in Iraq (Aug. 8, 2014), http://www.defense.gov/Releases/Release.aspx?ReleaseID=16878 [hereinafter Press Release, U.S. Dep't of Def.]. In September 2014, sixty-two countries voiced their support to a U.S.-led coalition to work together against the Islamic State. *See* Annalise Lekas, *#ISIS: The Largest Threat to World Peace Trending Now*, 30 EMORY INT'L L. REV. 313, 324 (2015). While significant support was expressed to these coalitions, some states did not support them. In particular, Russia was not willing to support any operations without authorization, and additional criticism was raised by Ecuador, Iran, and Argentina. *See also* Paulina Starski, *Right to Self-Defense, Attribution and the Non-State Actor—Birth of the "Unable or Unwilling" Standard?*, 75 HEIDELBERG J. INT'L L. 455, 488 (2015).

36. Delahunty, *supra* note 4, at 12, 36.

the Islamic State can be viewed, at least in part, as a battle for the protection of the core values of the international state system. Even though the collective security system was delegated with some authority, it did not deprive states of their capacity to make a sovereign decision to create coalitions against the Islamic State, in a desire to safeguard international peace and security.[37]

Another evolution that has eroded the principle of sovereignty occurred with the strengthening of legal fields focusing on the individual, and particularly international human rights law and international criminal law.[38] These fields have pierced the veil of sovereignty by regulating the rights and duties of states *within* their territory and by introducing institutions and mechanisms with authority over the state.[39] The recognition and strengthening of the individual in international law as a bearer of rights and obligations[40] was accompanied by the success of regional frameworks and their increasing involvement in principal fields like security and health,[41] and strengthening of international judicial and quasi-judicial bodies.[42]

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37. *See* Scharf, *supra* note 33, at 23–24; Karine Bannelier-Christakis, *Military Interventions Against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent*, 29 LEIDEN J. INT'L L. 743, 743 (2016); Olivier Corten, *The 'Unwilling or Unable' Test: Has It Been, and Could It Be, Accepted?*, 29 LEIDEN J. INT'L L. 777, 777 (2016); Kajtar, *supra* note 5, at 556.

38. Erosion of state sovereignty is also witnessed in other fields, like of state immunity, where the absolute immunity doctrine has been declining. *See, e.g.*, Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, 123–24, ¶ 57 (Feb. 3).

39. Henkin, *supra* note 30, at 4. For reading on international human rights and its institutions, see generally ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW (Nigel Rodley & Scott Sheeran eds., 2012) [hereinafter ROUTLEDGE HANDBOOK]; CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM (2008). For reading about international criminal law and its institutions, see generally ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2d ed. 2008); ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (2007).

40. This development is evident particularly in two legal fields—international human rights law and international criminal law. For reading concerning the evolution of international human rights, see generally Nary Subramanian & Lawrence Chung, *Legal Personality: Measuring the Evolvability of Legal Personality*, 11 IUS GENTIUM 79 (2005); Catherine Turner, *Human Rights and the Empire of (International) Law*, 29 LAW & INEQ. 313 (2011). For discussion of the possible demise of human rights, see generally Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279 (2017). For reading relating to international criminal law, see generally Christopher "Kip" Hale, *Does the Evolution of International Criminal Law End with the ICC? The "Roaming ICC": A Model International Criminal Court for a State-Centric World of International Law*, 35 DENV. J. INT'L L. & POL'Y 429 (2007); Neha Jain, *Judicial Lawmaking and General Principles of Law in International Criminal Law*, 57 HARV. INT'L L.J. 111 (2016).

41. *See generally* James E. Hickey, *Challenges to Security Council Monopoly Power over the Use of Force in Enforcement Actions: The Case of Regional Organization*, 10 INT'L LEGAL THEORY 69 (2004); William Onzivu, *Globalism, Regionalism, or Both: Health Policy and Regional Economic Integration in Developing Countries, an Evolution of a Legal Regime?*, 15 MINN. J. INT'L L. 111 (2006); Suyash Paliwal, *The Primacy of Regional*

In the eyes of Condorelli and Cassese, Globalization is also considered a driving force[43] which promotes international cooperation, sometimes at the expense of the sovereignty of states.[44] It has been stated by Domingo that this era of globalization created a web of human interdependence and this indispensable pluralism of a global society renders the current Westphalian order outdated.[45] Accordingly, scholars like Franck, Henkin, Slaughter, and Burke-White assert that important decisions of our day—relating to global security, economic issues, and environmental protection—can be more effectively dealt with by structures transcending the material and conceptual borders of the state; hence, states should yield part of their decision making powers and concede part of their sovereignty to international institutions.[46]

Alvarez, in comparison, suggests that to invoke absolute sovereignty as the starting point measuring the decline of the modern state is to deploy an old myth and to propagate a new one, since even Bodin never suggested that sovereigns were absolutely

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Organizations in International Peacekeeping: The African Example, 51 VA. J. INT'L L. 185 (2010).

42. For discussion on the rise and the role of international judicial bodies, see generally Cesare P. R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999); Shane Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 COLUM. J. TRANSNAT'L L. 143 (2001); Dinah Shelton, *Form, Function, and the Powers of International Courts*, 9 CHI. J. INT'L L. 537 (2009); Kenneth S. Gallant, *International Criminal Courts and the Making of Public International Law: New Roles for International Organizations and Individuals*, 43 J. MARSHALL L. REV. 603 (2010); YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS (2014).

43. Luigi Condorelli & Antonio Cassese, *Is Leviathan Still Holding Sway over International Dealings?*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW, *supra* note 6, at 14, 15.

44. *See* John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 784 (2003); ASHRAF GHANI & CLARE LOCKHART, FIXING FAILED STATES: A FRAMEWORK FOR REBUILDING A FRACTURED WORLD 128 (2008).

45. Domingo, *supra* note 24, at 1557.

46. Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 360 (1996); Henkin, *supra* note 30, at 3; Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 328 (2006). For discussion on such concessions in the field of international economic law, see generally Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 AM. J. INT'L L. 421 (2008). Trachtman asserts, in stronger terms, that the Westphalian paradigm renders international law unsuitable to address important international problems. *See* Trachtman, *supra* note 8, at 412. Similarly, Jackson claims that there is a need to rethink, or reshape, the core concept and roles of sovereignty, and for a new phrase to differentiate these directions from the old and outmoded Westphalian model. *See* Jackson, *supra* note 44, at 785. The threat of global terrorism is naturally of particular relevance in the context of the Islamic State. *See* Paulus, *supra* note 6, at 90.

in control (as they were bound by divine and natural law).[47] In other words, sovereignty was never *absolute* but was a bestowal of powers *subject to degrees* of sovereign control. Similarly, Boutros-Ghali, a former United Nations secretary-general, stated that the theory behind this principle was never matched by reality.[48] Henkin, in this regard, believes that the mythology of absolute sovereignty hinders the ability of states to cooperate, even during the era of globalization, as this principle raises its head against inquiry and monitoring of domestic affairs, either by other states or international institutions.[49]

Another source of tension was created by the rise of international organizations ("IGOs") and supra-state structures. For example, we have witnessed in recent years a rise in nationalism around the world, fueled, inter alia, by the fear that supra-state structures will erode domestic sovereignty and decision-making capabilities on the domestic level relating to issues like immigration and safeguarding local traditions and values.[50] In fact, and as will be elaborated on in the next Part, this wave of nationalism served the efforts of the Islamic State to establish a caliphate. This is since it recruited frustrated Sunni people based on sentiments of despair and inferiority by framing the group's efforts as one of a nationalist Sunni movement battling against oppression from the outside (Western states intervening in Iraq and Syria) and the inside (the governments of Iraq and Syria, and the religious groups which oppose Sunnis).[51]

Alvarez suggested that Western states, or the North, defend global institutions, while developing states, or the South, lose their hard-won sovereignty, after being colonized, to global tools of the

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47. José E. Alvarez, *State Sovereignty Is Not Withering Away: A Few Lessons for the Future*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW, *supra* note 6, at 30, 31. For elaboration, see generally JEAN BODIN, ON SOVEREIGNTY (Julian H. Franklin ed., 1992).

48. U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peace-Keeping*, ¶ 17, U.N. Doc. A/47/277-S/24111 (June 17, 1992). A comparable view was expressed in 1999 by the successor of Boutros-Ghali, Kofi A. Annan. *See* Press Release, U.N. Secretary-General, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release SG/SM/7136 (Sept. 20, 1999).

49. Henkin, *supra* note 30, at 7.

50. For elaboration, see generally Eric A. Posner, *Liberal Internationalism and the Populist Backlash*, 49 ARIZ. ST. L.J. 795 (2017); Daniel W. Drezner, *The Angry Populist as Foreign Policy Leader: Real Change or Just Hot Air?*, 41 FLETCHER F. WORLD AFF. 23 (2017). In the view of Cox, not only did nationalism flourished in the age of globalization, but it seems that the two concepts share an elective affinity, in the Weberian sense of the term. *See* Lloyd Cox, *Neo-Liberal Globalisation, Nationalism, and Changed "Conditions of Possibility" for Secessionist Mobilisation*, *in* ON THE WAY TO STATEHOOD: SECESSION AND GLOBALISATION, *supra* note 26, at 33, 36.

51. *See* Burak Kadercan, *What the ISIS Crisis Means for the Future of the Middle East*, 18 INSIGHT TURKEY 63, 64–67 (2016); Stern, *supra* note 5, at 108.

institutionalized hegemony.[52] However, as evidenced by the rise of states like Brazil, Russia, India, and China (also known as the "BRICs"), which have stimulated a shift of power on the international plane,[53] a binary distinction between North and South or Western and non-Western states no longer presents the full picture.[54] And still, the Islamic State made use of this narrative as well by presenting its struggle as one against Western religious, cultural and territorial oppression, by suggesting its ideological alternative to the existing international order,[55] and by physically destroying parts of the border between Iraq and Syria in order to send the message that the international community, and in particular the West, will no longer be able to intervene in the affairs of the territories under Islamic State control.[56]

While states were, and still are, the predominant actors in the international system,[57] additional forms of organization have gained significance during recent decades. Chief among these increasingly influential actors are: (1) IGOs;[58] (2) nongovernmental Organizations ("NGOs");[59] (3) multinational corporations;[60] and (4)

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52. Alvarez, *supra* note 47, at 26.

53. *See generally* William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT'L L.J. 1 (2015); David P. Fidler, *Eastphalia Emerging?: Asia, International Law, and Global Governance*, 17 IND. J. GLOBAL LEGIS. STUD. 1 (2010).

54. For discussion about colonialism, post-colonialism, and international law in what has been termed as the "Third World Approaches to International Law" movement, see generally B. S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (2d ed. 2017); Anghie, *supra* note 21; Grahn-Farley, *supra* note 21; Kennedy, *supra* note 21.

55. Delahunty, *supra* note 4, at 36.

56. This resentment is not new. When the predecessor of the Islamic State, the Islamic State of Iraq, attempted to declare a state for the first time during 2006 in Iraq, it was stated explicitly by the group that they are not the followers of Sykes-Picot; rather, they are the followers and sons of Islam. *See* BUNZEL, *supra* note 1, at 18.

57. Mégret, *supra* note 14, at 66; French, *supra* note 14, at 1; Ronen, *supra* note 14, at 23. *See also* Cohan, *supra* note 14, at 907.

58. *See* Kristina Daugirdas, *How and Why International Law Binds International Organizations*, 57 HARV. INT'L L.J. 325 *passim* (2016); Michael Wood, *International Organizations and Customary International Law*, 48 VAND. J. TRANSNAT'L L. 609 *passim* (2015); Andrew Stumer, *Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections*, 48 HARV. INT'L L.J. 553 *passim* (2007); GHANI & LOCKHART, *supra* note 44, at 225.

59. NGOs were referred to as "indispensable partners" by former U.N. Secretary-General, Kofi Annan. *See NGOs and the United Nations: Comments for the Report of the Secretary General*, GLOBAL POL'Y F. (June 1999), http://www.globalpolicy.org/component/content/article/176/31440.html; Samantha Besson, *Theorizing the Sources of International Law, in* THE PHILOSOPHY OF INTERNATIONAL LAW 168 (Samantha Besson & John Tasioulas eds., 2010); Stephan Hobe, *The Era of Globalisation as a Challenge to International Law*, 40 DUQ. L. REV. 655, 660 (2002); G.A. Res. 53/144 (Mar. 8, 1999).

60. *See generally* Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. J. INT'L HUM. RTS. 222 (2008); John Gerard Ruggie, Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed

nonstate armed groups.[61] This led some to contend that state sovereignty should be reconsidered and reappraised, in the sense that the sovereignty of the state should harmonize with other interests such as protection of the individual,[62] or international economic cooperation.[63]

For example, Besson,[64] and prior to her, Henkin,[65] opined that the principle of sovereignty consists of two dimensions—internal and external.

> In its internal dimension, the state . . . is the outcome of organising certain rules of public life in a particular way[,] . . . for the benefit of those whose internal interests it protects. In its external dimension, the sovereignty and the sovereign autonomy of the individual state are equally artefacts of international law.[66]

According to Besson:

> What a state's sovereignty is and what it amounts to is . . . determined by the rules of the international legal order[, and these] rules define state sovereignty so as to protect the internal and external interests of the political community[, the state], but also to protect the interests of other subjects of international law[, such as individuals].[67]

Treaty on Business and Human Rights (Jan. 23, 2015) (unpublished manuscript), https://ssrn.com/abstract=2554726; MENNO T. KAMMINGA, MULTINATIONAL CORPORATIONS IN INTERNATIONAL LAW (2001).

61. *See* Emanuel Gross, *The Laws of War Waged Between Democratic States and Terrorist Organizations: Real or Illusive?*, 15 FLA. J. INT'L L. 389, 392 (2003); Jonathan Ulrich, *The Gloves Were Never on: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029 *passim* (2005).

62. Brand, *supra* note 11, at 1696; Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 33 (1996).

63. Jackson, *supra* note 44, at 789; *see also* John King Gamble et al., *International Law and Globalization: Allies, Antagonists, or Irrelevance?,* 30 SYRACUSE J. INT'L L. & COM. 1 *passim* (2003); Nehal Bhuta, *The Role International Actors Other than States Can Play in the New World Order*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW, *supra* note 6, at 61, 66.

64. *See generally* Samantha Besson, *The Authority of International Law—Lifting the State Veil*, 31 SYDNEY L. REV. 343 (2009).

65. Henkin, *supra* note 62, at 31.

66. Besson, *supra* note 64, at 373 (citing Jeremy Waldron, *The Rule of International Law*, 30 HARV. J. INT'L & PUB. POL'Y 15, 21–22 (2006)).

67. Besson, *supra* note 64, at 373. For additional discussion about these aspect of sovereignty, see Brand, *supra* note 11, at 1689–90.

The growing role of NSAs led to the promotion of theories which seek to accommodate these players in the international plane. Legal pluralists, for example, argued that globalization is decentralizing the law-making process;[68] hence global progress should be measured by the extent to which state sovereignty yields to international rules designed to enhance community values.[69] Additional theories include cosmopolitan democracy,[70] with its origins from the writings of Kant,[71] constitutionalization of international law, promoted by Klabbers, Peters and Ulfstein,[72] which focuses on participation, transparency, accountability, and the rule of law, and the related theory of global administrative law, with Kingsbury as its main architect.[73]

Koskenniemi casts a general doubt on such theories, as he believes that those advocating for pluralism in the face of globalism fail to question their own conception of good, since the objectives of global institutions, like peace and security, are highly contestable and subject to political assessments that cannot be reduced to mere technocratic or juridical determinations.[74] Another problem with these theories is that they focus on state-empowered bodies, in particular IGOs, and in the context of global administrative law, on regulatory power of private actors. As such, they cannot be applied to entities that operate separately from a sovereign state, like NSAs which seek independence and particularly the Islamic State. Pursuantly, this Article shows that the failure of the project of the Caliphate demonstrates the resilience of the principle of sovereignty and the level of

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68. *See generally* Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

69. *See, e.g.*, Antonio Cassese, *Introduction* to REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW, *supra* note 6, at xvii; Alvarez, *supra* note 47, at 26.

70. *See generally* DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE (1995).

71. IMMANUEL KANT, TO PERPETUAL PEACE, A PHILOSOPHICAL SKETCH (Hackett Publ'g Co. U.K. ed. 2003) (c. 1795). *See* Franck, *supra* note 46, at 376; PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD *passim* (1990).

72. *See generally* JAN KLABBERS ET AL., THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009).

73. Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 25 (2009). *Cf.* Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9, 13 (2007) (asserting that international law is formed by a network of national technocrats, who operate under legal and political conditions advancing the objectives of a single dominant actor, usually the state). For a historical perspective, see Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. INT'L J.L. 977, 983 (2011).

74. Martti Koskenniemi, *The Wonderful Artificiality of States*, AM. SOC'Y INT'L L. PROC. 88 *passim* (1994). *See also* Alvarez, *supra* note 47, at 26.

commitment of the international community to it and that the state-centered system stands strong notwithstanding the existence of other models for sociopolitical association.

Several explanations have been suggested to describe the resilience of the principle of sovereignty and the international Westphalian order, in the face of various challenges throughout the years.[75] Koskenniemi observed[76] that the principle of sovereignty persists since it allows entities which have reached the luxurious status of statehood to fulfill their aspirations, by protecting themselves from outside interference.[77] Hence, in a paradox which was noted by Mégret,[78] it has often been the case that forces excluded from sovereignty in the past have become some of the most ardent defenders of sovereignty and the international system based thereon after they have attained statehood. Domingo, by comparison, explained the resilience in what he terms as a vicious cycle, in which "[i]f sovereignty is surrendered, the State is weakened," while "if the State decays, international law will lose its main actors."[79]

In conclusion, the principle of sovereignty is both an anchor in the international legal system and, at times, a source of tension. In the case of the Islamic State, it is of interest to examine two

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75. For example, it was suggested that this system works since states enjoy reciprocal relationships, and as the Westphalian character of the system incentivizes states to accept limitations in order to enjoy legitimacy, as discussed by Morrow, Hirsch, and Franck. *See* James Morrow, *A Rational Choice Approach to International Conflict*, *in* DECISIONMAKING ON WAR AND PEACE: THE COGNITIVE-RATIONAL DEBATE 11 (Nehemia Geva & Alex Mintz eds., 1997); Moshe Hirsch, *Compliance with International Norms in the Age of Globalization: Two Theoretical Perspectives*, *in* THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 166 (Eyal Benvenisti & Moshe Hirsch eds., 2004); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995). Such reasoning is less relevant for NSAs. For discussion about reciprocity, see Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93 *passim* (2003).

76. Martti Koskenniemi, *International Law in the World of Ideas*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW, *supra* note 8, at 47, 58.

77. The role of international law, under a classic Westphalian view, is to serve states and to regulate relations between them, as a means for coexistence between states. *See* Douglas M. Johnston, *Consent and Commitment in the World Community: The Classification and Analysis of International Instruments*, *in* 22 PROCEDURAL ASPECTS OF INTERNATIONAL LAW BOOK SERIES *passim* (Burns H. Weston & Richard B. Lillich eds., 1997); James Crawford, *Sovereignty as a Legal Value*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW, *supra* note 8, at 117, 124. *See generally* Krasner, *supra* note 8 (discussing consent); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993) (discussing consent); Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485 (1988) (providing a realist view); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (providing a critical view).

78. Mégret, *supra* note 14, at 87.

79. Domingo, *supra* note 24, at 1580.

questions: (1) Who decides who is entitled to this right of sovereignty, and is it a legal determination or a factual one? (2) Is this principle rigid or flexible?

The first question revolves around the legal criteria for statehood, and it is of interest in the case of the Islamic State since each perspective—legal or factual—would have brought about two different conclusions. If, indeed, statehood is only a factual determination, then the Islamic State had a claim, for a short while, that it was operating as a state and hence should have been considered as one. If, however, this question entails a legal determination, then the illegal way in which the Islamic State established its self-proclaimed Caliphate, and maintained it temporarily, debunks any possible claim for statehood. As shown below, this case study illustrates that, while statehood was traditionally considered as a factual determination, in recent decades there has been a constant move toward legal demands as the main obstacle for the ability actually become a state.

The second question refers to the application of sovereignty. Namely, is it a rigid principle of an absolute nature which is only reserved to states and can only be applied in a binary fashion, i.e., "all or nothing"? Or can it apply more flexibly and gradually both in the sense of the players which may be entitled to it and in the sense that it can apply progressively in the process of establishing statehood, as was done during the decolonization process in the 1960s?[80]

As will be shown, the project of the Caliphate failed since the Islamic State did not frame its claims in terms of international law, rather it violated it bluntly and went as far as to directly challenge the legitimacy of the existing legal order. In contrast, other NSAs, like NGOs or IGOs, which derive their status from the state system, have growingly accommodated themselves in the international realm and have enjoyed increasing participation in the international stage. This demonstrates that a sociopolitical unit, be that in the form of a state or in another one, cannot find its place in the international plane while ignoring the international legal order, infringing on it, or opting out from it.

80. *See generally* Jure Vidmar, *Explaining the Legal Effects of Recognition*, 61 INT'L & COMP. L.Q. 361 (2012).

III. THE CASE STUDY—THE ISLAMIC STATE BETWEEN 2014 AND 2017

The Islamic State is a terrorist organization that grew out of al-Qaeda.[81] After taking over a significant amount of territory in Iraq and Syria,[82] the Islamic State proclaimed itself a caliphate in June 2014.[83] The rise of the group was facilitated by its ability to develop powerful social media capabilities and to use it in an unprecedented fashion in order to recruit, plot, and radicalize.[84]

During 2014-2017, the Islamic State attempted to establish its authority over the territories under its control and to govern the territory as if it was the sovereign in the territory.[85] In order to establish its authority and enforce its ideology, the Islamic State employed brutal methods, resulting in systematic violations of international law.[86]

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81. The organization was originally created in 2003 by Abu Musab al-Zarqawi, under the name of *Jama'at al-Tawhid w'al-Jihad*, and it was later commissioned by Osama bin Laden as Al Qaeda in Iraq ("AQI"). After the death of al-Zarqawi in 2006, AQI renamed itself as the Islamic State in Iraq ("ISI"), and Zarqawi was succeeded by a military chief, Abu Ayoub al-Masri, and a political chief, Abu Omar al Baghdadi. Both were killed in April 2010 in Iraq, and they were succeeded by the current leader—Abu Bakr al-Baghdadi. *See* Raufer, *supra* note 1, at 46; Kadercan, *supra* note 51, at 64–67. Al Qaeda and the Islamic State share sympathy to Jihadi-Salafism (Salafism is a theological movement in Sunni Islam concerned with purifying the faith), but they differ relating to the proper strategy to execute their political ambitions. In the view of the Islamic State, the worst enemies are the enemies within – contrary to the approach of Al Qaeda. The Islamic State argues that focusing on the far enemy (Western states) and ignoring the near enemy (Muslims) is ineffective, unlike Al-Qaeda which focused its efforts on the far enemy. Under the Islamic State's vision, the far enemy will be dragged into the region only by attacking the near enemy. This scenario has, in fact, played out in reality. *See* Hassan, *supra* note 18.

82. Hassan, *supra* note 18.

83. Antonio Coco & Jean-Baptiste Maillart, *The Conflict with Islamic State: A Critical Review of International Legal Issues*, *in* THE WAR REPORT: ARMED CONFLICT IN 2014 388, 389 (Annyssa Bellal ed., 2015); Kajtar, *supra* note 5, at 543. The desire of the Islamic State to establish a caliphate is linked historically to the ambition which arose after the dissolution of the Ottoman Caliphate in 1924, with the rise of the Muslim Brotherhood as a counter movement. *See* BUNZEL, *supra* note 1, at 7–8.

84. An illustration is Dabiq, a stylishly publication demonstrating sophisticated use of media. *See* Delahunty, *supra* note 4, at 3; *see also* Morgan Stacey, *Americans, ISIS, and Social Media: How the Material Support Statute Can Help Combat Against Their Collision*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y 201 *passim* (2016); Karen J. Greenberg, *Counter-Radicalization via the Internet*, 668 ANNALS AM. ACAD. POL. & SOC. SCI. 165 *passim* (2016); Ariel Victoria Lieberman, Note, *Terrorism, the Internet, and Propaganda: A Deadly Combination*, 9 J. NAT'L SECURITY L. & POL'Y 95 *passim* (2017); Susan Klein & Crystal Flinn, *Social Media Compliance Programs and the War Against Terrorism*, 8 HARV. NAT'L SECURITY J. 53 *passim* (2017). For elaboration on ways to respond to the propaganda of the Islamic State and its mobilization capacities, see Stern, *supra* note 5, at 111.

85. For elaboration, see Jackson, *supra* note 34, at 142; Raufer, *supra* note 1, at 46; Waltman, *supra* note 32, at 826–27. For elaborated accounts of the Caliphate project, see generally MCCANTS, *supra* note 18; JOBY WARRICK, BLACK FLAGS: THE RISE OF ISIS (2016).

86. *See, e.g.*, Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated

The proclamation of the establishment of the Caliphate was made by the leader of the group at the time, Abu Bakr al-Baghdadi, at the well-known Nuri mosque in the Iraqi city of Mosul.[87] While he was speaking from Mosul, al-Baghdadi announced that the capital city of the Islamic State will be Raqqa, located in Syria, which was also under the control of the group.[88]

The Islamic State allowed for the documentation by Western journalists of the moment in which parts of the border between Syria and Iraq were demolished and then opened. This symbolic move sent two important messages.[89] First, the Islamic State has no regard for the territorial integrity of Iraq and Syria or for international law norms which safeguard it.[90] Second, since the border destroyed was drawn as part of the division of territories in the Middle East pursuant to the Sykes-Picot Agreement (enacted by the United Kingdom and France), the Islamic State sent the message that the international community, and in particular the West, will no longer be able to intervene in the affairs of the territories under Islamic State control.[91] From a wider point of view, this action symbolized the general approach of the Islamic State: a lack of interest in integration into the international community and a challenge to the existing international legal order.[92]

Groups, U.N. Doc. A/HRC/28/18 (Mar. 13, 2015); Coco & Maillart, *supra* note 83, at 388; Waltman, *supra* note 32, at 830–34; Thomas R. McCabe, *Jihad in the West: Are Returning Jihadists a Major Threat?*, MIDDLE E.Q., Fall 2017, at 1, 2.

87. Alissa J. Rubin, *Militant Leader in Rare Appearance in Iraq*, N.Y. TIMES (July 5, 2014), https://www.nytimes.com/2014/07/06/world/asia/iraq-abu-bakr-al-baghdadi-sermon-video.html?_r=0; Delahunty, *supra* note 4, at 3.

88. Kadercan, *supra* note 51, at 66–67. This declaration came five days after a long and detailed audio address by Abu Muhammad al-Adnani, who served as the spokesperson of the group, also dealing with the establishment of the Caliphate. *See* BUNZEL, *supra* note 1, at 31.

89. For documentation of the destruction of the border between Iraq and Syria, and of the early days of the establishment of the new Caliphate, see *The Islamic State (Full Length)*, VICE NEWS (Dec. 26, 2014, 11:30 AM), https://news.vice.com/video/the-islamic-state-full-length.

90. At the heart of the Islamic State's philosophy lies deep resentment toward all un-Islamic systems: Muslims who voluntarily join a parliament are infidels; Muslims who swear loyalty to a constitution, even under duress, are considered apostates; and Muslims who oppose a constitution through democratic means are sinners. Against this backdrop, it is hardly surprising to see that the Islamic State rejects international law rules and the system which established them. *See* Hassan, *supra* note 18; BUNZEL, *supra* note 1, at 18.

91. This resentment also existed when the predecessor of the Islamic State, the Islamic State of Iraq, attempted to declare a state for the first time during 2006 in Iraq, as the group stated that they are not the followers of Sykes-Picot; rather, they are the followers and sons of Islam. *See* BUNZEL, *supra* note 1, at 18.

92. Kajtar, *supra* note 5, at 548; *see generally* HATHAWAY & SHAPIRO, *supra* note 28. For discussion on the philosophical and theological doctrines adopted and employed by the Islamic State, see BUNZEL, *supra* note 1, *passim*.

The challenge to the international order by the Islamic State was preceded by two previous modern ones. The first was the 1917 October Revolution of Russia, and the second was the 1979 revolution in Iran.[93]

Under the Russian communist tradition, the state is conceived as a repressive apparatus to ensure domination of the ruling class over the working class in what was termed by Lenin as the dictatorship of the bourgeois.[94] While the 1917 revolution did not lead to the disintegration of the Russian State, the ultimate goals of the Marxist theory were, first, to seize power in the existing state and, in a later stage, to set in motion the process of destruction of the state apparatus.[95] Accordingly, Lenin noted himself that destruction of state power is the aim set by all socialists, and hence liberty and equality are unrealizable unless this aim is achieved.[96] In practice, however, the revolution in Russia did not reach that final goal, and the Soviet Union foreign policy led to a gradual assimilation back in the Westphalian system.[97]

Relating to the 1979 revolution in Iran, it was noted by Khelghat-Doost, Prakash, and Jegatesen that the foreign policy of the Islamic Republic of Iran was constructed on the concept of Islamic supra-nationalism, which places its emphasis on the unity of the global Muslim community (*Ummah*) in a way which challenges the international Westphalian in three respects: (1) it places its emphasis on ideological boundaries rather than national borders; (2) it denies current sources of legitimacy with regard to international laws and regulations; and (3) it calls for the elimination of cultural, ethnic, and geographical boundaries among Muslims regardless of their nationalities.[98] In practice, while Iran voiced skeptical voices against international law and its institutions, it did integrate into the international system

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93. *See* DAVID ARMSTRONG, REVOLUTION AND WORLD ORDER: THE REVOLUTIONARY STATE IN INTERNATIONAL SOCIETY 112, 158 (1993). *See generally* Delahunty, *supra* note 4.

94. As was presented by Lenin, for example, in the First Congress of the Communist International. *See* 28 V. I. LENIN, *Thesis and Report on Bourgeois Democracy and the Dictatorship of the Proletariat*, *in* LENIN COLLECTED WORKS 457, 457 (2011).

95. LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses: (Notes Towards an Investigation)*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS 85 (Ben Brewster trans., 2001).

96. LENIN, *supra* note 94, *passim*.

97. *See* Delahunty, *supra* note 4, at 19. *See generally* ARMSTRONG, *supra* note 93.

98. Hamoon Khelghat-Doost et al., Islamic Supra-Nationalism vs. Westphalian Sovereignty: The Foreign Policy of the Islamic Republic of Iran 1 (2015) (unpublished manuscript), http://web.isanet.org/Web/Conferences/GSCIS%20Singapore%202015/Archive/eb599a20-cfe6-4360-b234-e22c67718000.pdf.

through, for example, international agreements and acceptance of jurisdiction of international judicial and quasi-judicial bodies.[99]

Concerning the Islamic State's vision of statehood, the group has been drawing inspiration from Wahhabism, a doctrine that promotes political organization as a monotheistic religious state.[100] This doctrine is based on "the intellectual legacy of the thirteenth-century Islamic scholar Taqi al-Din Ibn Taymiyyah,as interpreted and enforced by Ibn Abd al-Wahhab and his successors."[101] Based on that doctrine, the group sought to monopolize Sunni global political representation and disseminate monotheism in an attempt to restore or revert to a *pre-Westphalian* order.[102] Delahunty suggested that the Islamic State rejected two axioms of the international order: first, it claimed that the basis of the international legal order must be founded on the sacred, not the secular; and second, it claimed the authority to represent the entire global community of Muslims while disregarding other existing sovereign Muslim states.[103]

This political approach of the Islamic State is indeed unique, however not unprecedented. Wahhabism was wedded to Saudi Arabia's political establishment and is applied there up until today.[104] Accordingly, the Islamic State largely borrowed from the penal code that is already institutionalized in Saudi Arabia.[105]

At its height, the Islamic State was considered to be the richest terror group in history, as it gained wealth by virtue of oil smuggling, theft, sale of antiquities, and significant taxation of many fields of life in the wide territories under its control.[106] While

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99. Delahunty, *supra* note 4, at 22.

100. al-Ibrahim, *supra* note 18.

101. Hassan, *supra* note 18, at 4; *see also* MCCANTS, *supra* note 18, at 121.

102. Delahunty, *supra* note 4, at 36. This approach is based on the concept of *bidah*, an Islamic term that forbids inventing religious practices unsanctioned by the religion, which is used to label practices—largely, Sufi and Shia—as polytheistic. *See* Hassan, *supra* note 18; *see also* Chelsea Elizabeth Bellew, Comment, *Secession in International Law: Could ISIS Become a Legally Recognized State?*, 42 OHIO N.U. L. REV. 239, 259 (2015); Stern, *supra* note 5, at 107.

103. Delahunty, *supra* note 4, at 12, 36–37. The Islamic State rests on a theological-political basis, in contrast to the Westphalian legal order that rests fundamentally on human consent, namely without attachment to religion. For discussion on the secular basis of the current international order, see LILLA, *supra* note 17, at 7.

104. BUNZEL, *supra* note 1, at 8.

105. Hassan, *supra* note 18. The difference is, of course, that the Islamic State disregards the sovereign rights of other states, contrary to Saudi Arabia. For discussion on the similarities and differences between the two, see Kamel Daoud, *Saudi Arabia, an ISIS that Has Made It*, N.Y. TIMES (Nov. 20, 2015), https://www.nytimes.com/2015/11/21/opinion/saudi-arabia-an-isis-that-has-made-it.html.

106. Helen Lock, *How Isis Became the Wealthiest Terror Group in History*, INDEPENDENT (Sept. 15, 2014, 12:30 PM), http://www.independent.co.uk/news/world/middle-east/how-isis-became-the-wealthiest-terror-group-in-history-9732750.html; Nadan Feldman, *How ISIS Became the World's Richest Terror Group*, HAARETZ (Nov. 10, 2015, 10:16 PM),

it used to be concentrated in specific areas in Syria and Iraq in the beginning,[107] as the group's reputation and capabilities developed, the geographical scope of the threat it posed became vast given the Islamic State's appeal to foreigners who chose to join the group and act on its behalf in different parts of the world.[108]

One of the turning points in the attention afforded to the Islamic State by the international community occurred when the Islamic State was accused of committing acts of murder, abduction, expulsion, rape, and other human rights violations against the Yazidi minority in Iraq.[109] In response, two coalitions were formed to join military forces against the Islamic State[110]: the first was an Islamic Military Alliance, and the second was the U.S.-led coalition.[111]

The U.S.-led coalition operated in the territories under the group's control both in Iraq[112] and Syria.[113] In addition to taking

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http://www.haaretz.com/middle-east-news/isis/1.686287. The organization was also very well equipped militarily; for example, it had more tanks than the French army. *See* Raufer, *supra* note 1, at 46. For an elaboration on at the economic capabilities of the Islamic State, from a historical perspective, see generally PATRICK B. JOHNSTON ET AL., FOUNDATIONS OF THE ISLAMIC STATE: MANAGEMENT, MONEY, AND TERROR IN IRAQ, 2005–2010 (2016); BEN SMITH & ROB PAGE, ISIS AND THE SECTARIAN CONFLICT IN THE MIDDLE EAST (2015), http://researchbriefings.files.parliament.uk/documents/RP15-16/RP15-16.pdf.

107. At the time of the declaration of the establishment of the Caliphate, the Islamic State-controlled territory stretching from Mosul to the outskirts of Aleppo in Syria, which is more or less the distance between Washington, D.C., and Cleveland, Ohio. *See* MCCANTS, *supra* note 18, at 121.

108. During 2014, reports by the U.S. Central Intelligence Agency estimated that the Islamic State recruited 31,500 fighters in Iraq and Syria, originating from over than eighty different states. *See* Lekas, *supra* note 35, at 321; Jackson, *supra* note 34, at 145. For discussion on the spreading of ISIS into other states, see SMITH & PAGE, *supra* note 106, *passim*. For a look at the economic capabilities of the Islamic State, see JOHNSTON ET AL., *supra* note 106, at 2005–10. For data on the number of foreign fighters in the Islamic State, see THE SOUFAN GROUP, FOREIGN FIGHTERS: AN UPDATED ASSESSMENT OF THE FLOW OF FOREIGN FIGHTERS INTO SYRIA AND IRAQ *passim* (2015), https://wb-iisg.com/wp-content/uploads/bp-attachments/4826/TSG_ForeignFightersUpflow.pdf.

109. Waltman, *supra* note 32, at 826–27; Hassan, *supra* note 18; Siddique, *supra* note 32.

110. Jackson, *supra* note 34, at 134.

111. *See* Press Release, U.S. Dep't of Def., *supra* note 35. In September 2014, sixty-two countries voiced their support to a U.S.-led coalition to work together against the Islamic State. *See* Lekas, *supra* note 35, at 324. While significant support was expressed to these coalitions, some states did not support them. In particular, Russia was not willing to support any operations without authorization, and additional criticisms were raised by Ecuador, Iran, and Argentina. *See* Starski, *supra* note 35, at 488.

112. *See* Press Release, U.S. Dep't of Def., *supra* note 35. As previously mentioned, in September 2014, sixty-two countries voiced their support to a U.S.-led coalition to work together against the Islamic State. *See* Lekas, *supra* note 35, at 324.

113. Air strikes in Syria focused on significant strongholds as well as strategic targets, like oil fields. *See* Jackson, *supra* note 34, at 136; Claudette Roulo, *U.S. Begins Airstrikes Against ISIL in Syria*, U.S. DEP'T DEF. (Sept. 22, 2014), http://www.defense.gov/news/newsArticle.aspx?id=123233. In response to the American attacks, the Islamic State released a video clip documenting the beheading of American journalist James Foley. In the last moments before his execution, Foley was forced to denounce the U.S. actions and to

direct military action,[114] training and equipment was provided by the U.S.-led coalition to groups perceived as moderate in their ideological orientation that participated in the fight,[115] such as the Kurdish Peshmerga.[116] Other measures have also been taken by the international community; for example, the employment of individual sanctions against members of the Islamic State by the Security Council.[117]

The international intervention against the Islamic State on its own "turf" incentivized the latter to operate outside Iraq and Syria. An illustrative example is the chain of attacks that took place on November 13, 2015, in which operatives of the group simultaneously attacked six locations in Paris, France, taking the lives of 126 persons.[118] This deadly attack drew significant attention since it was the most substantial attack on French soil since World War II. Yet, it was far from being the only major attack outside Iraq and Syria.[119]

During three years of intense military operations, the Islamic State has lost around seventy percent of the territory in Iraq and Syria it used to control.[120] In addition, the income of the Islamic State has declined significantly, mainly due to the territorial losses, bringing about a dramatic reduction of eighty percent from 2015 to 2017 in the average monthly revenue in the declared

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even accuse his brother, a pilot in the U.S. Army, of being directly responsible for his impending death. *See* Steven T. Zech & Zane M. Kelly, *Off with Their Heads: The Islamic State and Civilian Beheadings*, J. TERRORISM RES., May 2015, at 83 *passim*; Waltman, *supra* note 32, at 826–27.

114. From August 2014 to March 2015, the coalition conducted 1,700 air strikes in Iraq, and the United States conducted 946 air strikes in Syria. *See* Lekas, *supra* note 35, at 325–26.

115. Jackson, *supra* note 34, at 156.

116. Kadercan, *supra* note 51, at 79.

117. Press Release, Security Council, Security Council Al-Qaida Sanctions Committee Amends Three Entries on Its Sanctions List, U.N. Press Release SC/11424 (June 2, 2014).

118. The Islamic State justified the attack as a response to French participation in the U.S.-led coalition operating against the group. *See* Marko Milanovic, *France Derogates from ECHR in the Wake of the Paris Attacks*, EJIL: TALK! (Dec. 13, 2015), http://www.ejiltalk.org/france-derogates-from-echr-in-the-wake-of-the-paris-attacks/; Marc Weller, *Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups*, EJIL: TALK! (Nov. 25, 2015), http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/.

119. During 2015-2019, more than 2,000 people lost their lives in Islamic State related attacks *outside* Iraq and Syria, with two notable ones being the shooting in Sousse, Tunisia (38 people died), and the bombing of a Russian airplane in Sinai, Egypt (224 people died). For elaboration, see Karen Yourish et al., *How Many People Have Been Killed in ISIS Attacks Around the World*, N.Y. TIMES (July 16, 2016), https://www.nytimes.com/interactive/2016/03/25/world/map-isis-attacks-around-the-world-DE.html.

120. SETH G. JONES ET AL., ROLLING BACK THE ISLAMIC STATE 20 (2017), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1900/RR1912/RAND_RR1912.pdf.

capital of the Islamic State.[121] The coalition-backed forces on the ground captured Raqqa during October 2017.[122] This move symbolized, in the view of some states, including Iraq, Russia, and Iran, the end of the Islamic State, or at the least the end of the Caliphate project.[123]

By 2018, the Islamic State held only a small percentage of the territory it took over in 2014, and around 1,000 members of the group have remained in Iraq and Syria.[124] As time moved on and the territory under the control of the group dwindled, the Islamic State shifted its focus from attempting to govern the territory back to its old tactics. The once self-proclaimed Caliphate has transformed back into a more traditional terrorist group with a clandestine network of cells engaged in guerrilla attacks, bombings, and targeted assassinations.[125] By March 2019, the Islamic State had lost all the territories it previously held in Iraq and Syria.[126] On October 27, 2019, the leader of the group, Abu Bakr al-Baghdadi, was killed during a raid led by the United States.[127]

And, still, it is too soon to declare the end of the Islamic State. This is since the group still poses a threat in two main respects.

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121. *See generally* STEFAN HEIßNER ET AL., THE INT'L CTR. FOR THE STUDY OF RADICALISATION & POL. VIOLENCE, CALIPHATE IN DECLINE: AN ESTIMATE OF ISLAMIC STATE'S FINANCIAL FORTUNES (2017), http://icsr.info/wp-content/uploads/2017/02/ICSR-Report-Caliphate-in-Decline-An-Estimate-of-Islamic-States-Financial-Fortunes.pdf.

122. Margaret Coker et al., *With Loss of Its Caliphate, ISIS May Return to Guerrilla Roots*, N.Y. TIMES (Oct. 18, 2017), https://www.nytimes.com/2017/10/18/world/middleeast/islamic-state-territory-attacks.html?rref=collection%2Ftimestopic%2FIslamic%20State%20in%20Iraq%20and%20Syria%20(ISIS)&_r=0.

123. Emma Graham-Harrison, *Iraq Formally Declares End to Fight Against Islamic State*, GUARDIAN (Dec. 9, 2017, 9:10 AM), https://www.theguardian.com/world/2017/dec/09/iraq-formally-declares-end-to-fight-against-islamic-state; Babak Dehghanpisheh, *Iran's President Declares End of Islamic State*, REUTERS (Nov. 21, 2017, 2:10 AM), https://www.reuters.com/article/us-mideast-crisis-rouhani-islamic-state/irans-president-declares-end-of-islamic-state-idUSKBN1DL0J5; Alec Luhn, *Russia Declares 'Mission Accomplished' Against Islamic State in Syria,* TELEGRAPH (Dec. 7, 2017, 4:05 PM), http://www.telegraph.co.uk/news/2017/12/07/russia-declares-mission-accomplished-against-islamic-state-syria/.

124. Reuters, *U.S.-Led Coalition Strikes Kill 150 Islamic State Militants in Syria*, GUARDIAN (Jan. 23, 2018, 7:30 PM), https://www.theguardian.com/us-news/2018/jan/24/us-led-coalition-strikes-kill-150-islamic-state-militants-in-syria.

125. Eric Schmitt et al., *Its Territory May Be Gone, but the U.S. Fight Against ISIS Is Far from over*, N.Y. TIMES (Mar. 24, 2019), https://www.nytimes.com/2019/03/24/us/politics/us-isis-fight.html?rref=collection%2Ftimestopic%2FIslamic%20State%20in%20Iraq%20and%20Syria%20(ISIS). *See also* Coker et al., *supra* note 122.

126. Jin Wu et al., *ISIS Lost Its Last Territory in Syria. But the Attacks Continue*, N.Y. TIMES (Mar. 23, 2019), https://www.nytimes.com/interactive/2019/03/23/world/middleeast/isis-syria-defeated.html?rref=collection%2Ftimestopic%2FIslamic%20State%20in%20Iraq%20and%20Syria%20(ISIS).

127. Martin Chulov, *Nowhere Left to Run: How the US Finally Caught up with Isis Leader Baghdadi*, GUARDIAN (Oct. 27, 2019, 3:00 PM), https://www.theguardian.com/world/2019/oct/27/nowhere-left-to-run-how-the-us-finally-caught-up-with-isis-leader-baghdadi.

First, it still has affiliates in different states around the world, such as Algeria, Afghanistan, Egypt, Libya, Malaysia, Nigeria, the Philippines, and Somalia.[128] Hence, it is still possible that the Islamic State will pursue the establishment of a caliphate in a different part of the world under its control,[129] as the group already demonstrated its ability to make use to its benefit of political resentments of disenfranchised Sunni Muslims in Shia-dominated Iraq in order to regroup and resurrect in a new and improved form.[130]

Second, many fighters of the Islamic State have made their way to other states, including Western ones, and in particular in Europe.[131] Accordingly, sleeper cells may have been put in place in the United States, Europe, and other Western states long before the battlefield losses mounted.[132] Returning fighters may decide to engage in terror attacks or promote radicalization, sectarian tensions, and maybe even some form of a political renaissance for the idea the Islamic State symbolizes.[133]

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128. *See* JONES ET AL., *supra* note 120, at 3; MCCANTS, *supra* note 18, at 140; WARRICK, *supra* note 85, *passim*; William McCants & Craig Whiteside, *The Islamic State's Coming Rural Revival*, BROOKINGS (Oct. 25, 2016), https://www.brookings.edu/blog/markaz/2016/10/25/the-islamic-states-coming-rural-revival/.

129. For example, the Australian Attorney General referred to the possibility that the Islamic State might seek to establish a caliphate in Indonesia. *See* Adam Brereton, *ISIS Seeking to Set up 'Distant Caliphate' in Indonesia, George Brandis Warns*, GUARDIAN (Dec. 21, 2015, 9:08 PM), https://www.theguardian.com/world/2015/dec/22/isis-seeking-to-set-up-distant-caliphate-in-indonesia-george-brandis-warns. Another possible effect of the Islamic State is that the resurgence of the idea of a caliphate will have spillover effects for the evolution of radical Islamic movements across the Muslim world. *See* Shmuel Bar, *The Implications of the Caliphate*, 35 COMP. STRATEGY 1, 8 (2016).

130. When American-led forces withdrew from Iraq in 2011, it was estimated that the Islamic State's predecessor, the Islamic State of Iraq, was down to a few hundred soldiers. Within three years, however, the group of diminished insurgents was able to regroup and roar across Iraq and Syria, declaring an Islamic caliphate from the Mediterranean coast of Syria nearly to the Iraqi capital, Baghdad. *See* Coker et al., *supra* note 122; Kadercan, *supra* note 51, at 64–67.

131. Foreign fighters move around with their passports, so long as no personal sanctions exist against them, and other fighters also tried to use the wave of refugees from Syria and Iraq into Europe and enter under the pretense of escaping the hostilities. *See generally* McCabe, *supra* note 86.

132. Coker et al., *supra* note 122.

133. Another danger arises from cases involving "lone-wolf" assaults which are inspired or enabled by Islamic State propaganda online. For discussion on the phenomenon, see generally Haider Ala Hamoudi, *"Lone Wolf" Terrorism and the Classical Jihad: On the Contingencies of Violent Islamic Extremism*, 11 F.I.U. L. REV. 19 (2015); Alexander Tsesis, *Social Media Accountability for Terrorist Propaganda*, 86 FORDHAM L. REV. 605 (2017).

IV. THE DREAM OF THE CALIPHATE AND STATEHOOD

A. The Criteria for Statehood

The four requirements for statehood are stipulated in the 1933 Montevideo Convention on the Rights and Duties of States ("Montevideo Convention")[134]: permanent population,[135] defined territory,[136] effective government,[137] and capacity to enter into relations with other states.[138] Beyond that criteria, it is common to discuss the recognition of the entity in question, particularly in controversial cases.[139]

The principle underlying the Montevideo criteria is that of effectiveness, as observed by Shaw[140] and Higgins.[141] The discussion throughout the remainder of this Article will focus on the time period during which the Islamic State attempted to effectively operate as a state, from the declaration of the

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134. Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19; *see also* OPPENHEIM'S INTERNATIONAL LAW 717–18 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). *See generally* Noel Cox, *The Acquisition of Sovereignty by Quasi-States: The Case of the Order of Malta*, 6 MOUNTBATTEN J. LEGAL STUD. 26 (2002).

135. There is no minimal threshold of nationals necessary for establishing a state. *See* In re Duchy of Sealand, 80 I.L.R. 683, 687 (Admin. Ct. Cologne 1978); SHAW, *supra* note 7, at 4–5. Relating to the need for a population to be homogeneous, there are very few states that actually consist of a single culture or ethnicity. *See* Franck, *supra* note 46, at 360; Manfred Zuleeg, *What Holds a Nation Together? Cohesion and Democracy in the United States of America and in the European Union*, 45 AM. J. COMP. L. 505, 510 (1997).

136. The principal requirement is the exercise of effective governmental control over a particular piece of land. Permanent borders are not necessary, e.g., while some of the borders of the State of Israel remain in dispute until this very day, this did not prevent its admission to the United Nations and the broad recognition of its statehood. *See* Cox, *supra* note 134, *passim*; JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 46 (2d ed. 2006).

137. International law does not dictate a preferred form of governance; that is, a democracy and a dictatorship may equally meet the requirement, so long as they exercise governmental authority within the territory. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, 131, ¶ 259 (June 27); Charter of the Organization of American States arts. 12, 16, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

138. While the three previous elements are interdependent, this criterion pertains to the entity's *ability* to conduct foreign relations, regardless of whether other states agree to maintain relations with it. *See* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 129 (8th ed. 2012); Customs Regime Between Germany and Austria, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41, at 57 (Sept. 5).

139. Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 EUR. J. INT'L L. 3, 64 (1993); Theodore Christakis & Aristoteles Constantinides, *Territorial Disputes in the Context of Secessionist Conflicts*, *in* RESEARCH HANDBOOK ON TERRITORIAL DISPUTES IN INTERNATIONAL LAW 343 *passim* (Marcelo G. Kohen & Mamadou Hébié eds., 2018).

140. SHAW, *supra* note 7, at 144.

141. ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 25 (1963).

establishment of a caliphate in June 2014, until October 2017, when the Islamic State lost its self-declared capital in Raqqa. After discussing the Montevideo criteria, I will move to the issue of recognition in a shift of focus from a factual determination to a legal one, and particularly the significance of the illegal acquisition of territory by the Islamic State.

1. Permanent Population

The territory controlled by the Islamic State was inhabited by millions of people, generally nationals of Iraq and Syria, which could be considered as the group's population.[142] In addition, members of the group can also be taken into consideration.[143] The fact that some persons in the territory under the control of the Islamic State did not have allegiance to it, whereas persons in other states decided to join the group,[144] indicates the confluence of the elements of the first two demands under the Montevideo Criteria—territory and population.[145]

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142. While these persons did not choose to tie their fate to that of the Islamic State, they can still be considered a population in the sense of the Montevideo Convention. For example, the Arab population in the territory of the newly established Israel in 1948 did not choose to be national of the State of Israel, yet they remain nationals of the state. *See generally* Mark Tessler & Audra K. Grant, *Israel's Arab Citizens: The Continuing Struggle*, 555 ANNALS AM. ACAD. POL. & SOC. SCI. 97 (1998); Marc Zell & Sonia Shnyder, *Palestinian Right of Return or Strategic Weapon?: A Historical, Legal and Moral-Political Analysis*, 8 NEXUS J. OPINION 77 (2003); Bobbette Deborah Abraham, *From Mandate to Mineshaft: The Long Rocky Road to the Modern State of Israel,* 5 REGENT J. INT'L L. 123 (2007). These people could have also been considered as protected persons, since they were under the control of a hostile power which is in fact military occupation, yet the *lex lata* as of today, reflecting an international legal system that is state-centered, seems to only recognize occupation by an NSA if the latter is operating on behalf of a state and the act is indeed attributable to the state. For discussion about the law of occupation, see generally YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION (2009); YUTAKA ARAI-TAKAHASHI, THE LAW OF OCCUPATION: CONTINUITY AND CHANGES OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW (2009). For discussion on occupations by NSAs, see generally Tom Gal, *Unexplored Outcomes of* Tadić*: Applicability of the Law of Occupation to War by Proxy*, 12 J. INT'L CRIM. JUST. 59 (2014).

143. The depth of identification was visible from acts such as burning the passports of their states of origin and pledging their allegiance to the leader of the group, Abu Bakr al-Baghdadi. In addition, they participated in activities of the groups and even sacrificed their lives for the common cause. In the case of the Islamic State, the membership had a political dimension that would qualify it as political membership. *See* WARRICK, *supra* note 85, at 306–07; MCCANTS, *supra* note 18, at 136; McCabe, *supra* note 86, at 3. Their lack of homogenous nature does not seem to be problematic given the experience of states like the United States and Israel which have absorbed into them significant number of immigrants. *See* Franck, *supra* note 46, at 360.

144. BUNZEL, *supra* note 1, at 41.

145. Judge Read stated in his dissenting opinion on the *Nottebohm* case that the "state" is a broad concept that included nationals who reside abroad but have a link of allegiance to the state. *See* Nottebohm (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, 44 (Apr. 6) (Read, J., dissenting). This is in contrast to the majority view in that case, which held that

2. Defined Territory

During 2014-2017, the Islamic State exercised control over a broad swath of land in Iraq and Syria.[146] However, it acquired territory while violating the territorial integrity of Iraq and Syria[147] and the customary rule which prohibits the acquisition of territory through the use of force.[148] In response, two coalitions of states joined forces to drive the Islamic State out of the territories it controlled, and by 2017 the Islamic State indeed lost most of the territories it controlled. As a result, the Islamic State shifted its focus back to its old guerrilla tactics,[149] rather than attempting to manage and regulate the self-declared Caliphate.

3. Effective Government

The Islamic State exercised governmental authority during 2014-2017 over varied facets of life in the territory it controlled, ranging from collecting taxes to regulating fields of life like sanitation, maintenance of roads, public gardens and infrastructure, education, commerce, and personal status, through a sophisticated, quasi-bureaucratic revenue-generating structure.[150] However, as the income of the group declined exponentially during the international military campaign against it,[151] it has shifted its focus into military efforts in Iraq and Syria

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Liechtenstein cannot bring a claim against Guatemala on behalf of Nottebohm, a naturalized national of Lichtenstein, since his nationality was not based on a genuine or effective link. *Id.* at 26.

146. The Islamic State controlled, during its declaration of independence, Aleppo, Idlib, and Raqqa provinces in Syria; Anbar; and the provinces of Kurdistan, Nanawa, Mosul, Baiji, and Babil in Iraq. *See* Bellew, *supra* note 102, at 258.

147. S.C. Res. 2170 (Aug. 15, 2014) ("*Reaffirming* the independence, sovereignty, unity and territorial integrity of the Republic of Iraq and Syrian Arab Republic . . . ."); S.C. Res. 2249 (Nov. 20, 2015).

148. *See, e.g.*, S.C. Res. 541, ¶ 6 (Nov. 18, 1983); S.C. Res. 217, ¶ 3 (Nov. 20, 1965); S.C. Res. 407 (May 25, 1977).

149. Schmitt et al., *supra* note 125.

150. MICHAEL WEISS & HASSAN HASSAN, ISIS: INSIDE THE ARMY OF TERROR 169 (2016); U.N. Secretary-General, *Report of the Secretary-General 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*, ¶ 4, U.N. Doc. S/2016/92 (Jan. 29, 2016) [hereinafter *Report of the Secretary-General*]. In certain cases, the organization allowed non-Muslims living under its rule to pay a poll tax (in Arabic: *jizya*) that enables them to continue living in the Caliphate, albeit as second-rate citizens. For an illustration of the structure of the Caliphate, see Aaron Y. Zelin, *New Video Message from the Islamic State: "The Structure of the Caliphate,"* JIHADOLOGY (July 6, 2016), http://jihadology.net/2016/07/06/new-video-message-from-the-islamic-state-the-structure-of-the-caliphate/.

151. The group faced a dramatic reduction of eighty percent from 2015 to 2017 in its average monthly revenue. For elaboration, see generally HEIßNER ET AL., *supra* note 121.

and outside of them, resulting in a growing loss of the ability to maintain an effective government from 2015 onwards and almost completely losing the ability to do so by 2017.

4. Capacity to Enter into Relations with Other States

The Islamic State had the ability to establish the capacity to conduct relations with other states[152] and was independent to do so.[153] Yet, as it broke out of Al Qaeda and was similarly reviled, and as it was defying the interstate system and the sovereignty of states, no international relations with states were established.

In conclusion, the Islamic State met some of the Montevideo criteria in the early days of its alleged existence and during the period of 2014-2017. An entity which does not meet the Montevideo criteria will generally not be able to be recognized as a state, but this is not always the case.[154] Hence, the next section will discuss the issue of recognition in relation to the Islamic State.

B. What's Recognition Got To Do with It?

While recognition is not legally required as part of the Montevideo criteria, it nevertheless has a role in determining statehood.[155] An example is Rhodesia under the governance of Ian Smith, which existed de facto for fourteen years but was never recognized as a state.[156] While recognition was traditionally a unilateral act of a

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152. A main feature of international law subjects—and, in particular, states—is that they are able to assert their authority without subordination to another authority above them. Independence, as such, is a feature which distinguishes states from other entities. For an example in the context of failing to meet the territory demand is the Czech Republic, see Acquaviva, *supra* note 7, at 359, 380.

153. Kajtar, *supra* note 5, at 547; *see also* CRAWFORD, *supra* note 138, at 129; Customs Regime Between Germany and Austria, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41, at 57 (Sept. 5).

154. An example of a state failing to meet the territory demand is the Czech Republic. *See* Acquaviva, *supra* note 7, at 359. Another example of a state not fully meeting the Montevideo criteria prior to international recognition is Bosnia-Herzegovia. *See* Beat Dold, *Concepts and Practicalities of the Recognition of States*, 22 SWISS REV. INT'L & EUR. L. 81, 84 (2012). More examples can be located during the decolonization in Africa during the 1960s and onwards. *See generally* Vidmar, *supra* note 80.

155. *See* Jessica Almqvist, *The Politics of Recognition: The Question About the Final Status of Kosovo*, *in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW, *supra* note 14, at 165, 168; Danilo Türk, *Recognition of States: A Comment*, 4 EUR. J. INT'L L. 66, 68–69 (1993). The importance of recognition increases in borderline cases. *See* Maurizio Ragazzi, Introductory Note, Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 I.L.M. 1488, 1495, 1522 (1992).

156. *See* Kajtar, *supra* note 5, at 549. Somaliland also enjoys partial recognition for certain purposes, but it never joined any international organizations or established official relations with other states. Examples include Ethiopia's use of Hergeysa as a trading port,

state, today, in an increasingly multilateral world, it does have a collective aspect, as states tend to avoid recognizing new entities unless they become United Nations members.[157] Montenegro, for example, only began to enjoy recognition after becoming a United Nations member state in 2006.[158]

In the early days following the adoption of the Montevideo Convention, some scholars envisioned the establishment of an international procedure for matters of recognition.[159] In particular, Jessup,[160] Lauterpacht,[161] and Wright[162] believed that the practice in the organs of the United Nations would define and promote the basic criteria for recognition of new states when appropriate.

In practice, however, there exists a divide between two competing views about the role of recognition in determining statehood.[163] On one hand, lies the constitutive approach, according to which states can only be established if they enjoy recognition.[164] While this approach was initially supported by scholars such as Lauterpacht[165] and Kelsen,[166] the competing view

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South African investments in Somaliland, and some tacit support from the United Kingdom. *See* Sturman, *supra* note 26, at 81–82.

157. Rich identified in the UN's work a trend of constituting new states through recognition, while Hillgruber argued that the act of conferring sovereign status to entities without full control over their territory turns statehood into a legal fiction. *See* Rich, *supra* note 139, at 64; Christian Hillgruber, *The Admission of New States to the International Community*, 9 EUR. J. INT'L L. 491, 493–94 (1998). Some believe that recognition has crystallized into an additional obligation in the process of achieving statehood. *See, e.g.*, Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENV. J. INT'L L. & POL'Y 209 *passim* (2011); Vidmar, *supra* note 80, at 362. Some demands must be met when attempting to recognize a new customary obligation—in particular, that a general recognition that a certain practice is legally binding. *See* Oscar Schachter, *Entangled Treaty and Custom*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 717, 729–30 (Yoran Dinstein ed., 1989); Julio Barboza, *The Customary Rule: From Chrysalis to Butterfly*, *in* LIBER AMICORUM IN MEMORIAM OF JUDGE JOSÉ MARÍA RUDA 1, 6 (Calixto A. Armas Barea et al. eds., 2000).

158. *See generally* Jure Vidmar, *Montenegro's Path to Independence: A Study of Self-Determination, Statehood and Recognition*, 3 HANSE L. REV. 73 (2007).

159. Some have suggested criteria for the recognition of states, e.g., effective control over territory, regime stability, competing territorial claims, self-determination, and more. *See* Jonte van Essen, *De Facto Regimes in International Law*, 28 MERKOURIOS-UTRECHT J. INT'L & EUR. L. 31 *passim* (2012); Xian Liang Yuen, *The Nature of the State*, 3 MANCHESTER REV. L. CRIME & ETHICS 34, 37 (2014).

160. PHILLIP C. JESSUP, A MODERN LAW OF NATIONS 44–51 (1948).

161. HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 402–03 (1947).

162. Quincy Wright, *Some Thoughts About Recognition*, 44 AM. J. INT'L L. 548, 559 (1950). *See generally* JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 49 (1987).

163. *See* Vidmar, *supra* note 80, *passim*; Dold, *supra* note 154, at 82.

164. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 87–88 (7th ed. 2008); CRAWFORD, *supra* note 136, at 219; Ronen, *supra* note 14, at 26. Bull suggested that statehood is not asserted, but rather it is conferred, and it is a right that is enjoyed to the extent that it is recognized to exist by other states. *See* HEDLEY BULL, *The State's Positive Role in the World Affairs*, *in* HEDLEY BULL ON INTERNATIONAL SOCIETY 149 (Kai Alderson & Andrew Hurrell eds., 2000).

165. LAUTERPACHT, *supra* note 161, at 402–03.

became the prevailing one in doctrine.[167] The competing and predominant view is the declarative approach,[168] reflected in Article 3 of the Montevideo Convention,[169] according to which recognition is a political decision which has no bearing on statehood.[170]

When an entity is not recognized by other states, its ability to function as a state becomes difficult,[171] since the acceptance of the international community is crucial, e.g., to establish international relations in relevant fields and join IGOs, to attract investments, and to become a legitimate partner in the international stage.[172] Recognition is also of importance to pursue domestic policy when it has an international dimension.[173]

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166. Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 615 (1941). For a contradicting view from that period, *see* Herbert W. Briggs, Editorial Comment, *Recognition of States: Some Reflections on Doctrine and Practice*, 43 AM. J. INT'L L. 113, 114 (1949).

167. Jure Vidmar, *Unilateral Declarations of Independence in International Law*, *in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW, *supra* note 14, at 60, 64. *See also* THOMAS GRANT, THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION *passim* (1999). For further discussion on the views of Kelsen, see DUGARD, *supra* note 162, at 45.

168. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion), Written Statement of Argentina, ¶¶ 22, 48 (Apr. 17, 2009), https://www.icj-cij.org/files/case-related/141/15666.pdf; Aziz Tuffi Saliba, *Recognition/Non-Recognition in International Law*, 75 INT'L L. ASS'N REP. CONF. 164, 167 (2012); Ragazzi, *supra* note 155, at 1495, 1522; Aguilar-Amory and Royal Bank of Canada Claims (Gr. Brit. v. Costa Rica), 1 R.I.A.A. 369 (1923).

169. Convention on the Rights and Duties of States, *supra* note 134, art. 3.

170. *See* Ronen, *supra* note 14, at 29; D. P. O'Connell, *The Status of Formosa and the Chinese Recognition Problem*, 50 AM. J. INT'L L. 405, 415 (1956). The historical context was the desire of Latin-America states, which led the negotiation process, to avoid the influence of powerful states on their policies. The rationale is that sovereign equality will be infringed upon if one state will be able to deny the existence of another state by refusing to recognize it. *See* Sterio, *supra* note 157, at 216; Dold, *supra* note 154, at 87; Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 449 (1999); Acquaviva, *supra* note 7, at 350. Another rationale is that there is no central authority that can obligate or dictate to grant, or deny, recognition. *See* Vidmar, *supra* note 158, at 80.

171. *See* CRAWFORD, *supra* note 138, at 129; Customs Regime Between Germany and Austria, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41, at 57 (Sept. 5). Examples of an entity which failed to gain recognition, in the attempt at statehood through secession, are Katanga (in the Congo) and Biafra (in Nigeria) during the 1960s. *See* Peter Radan, *Secession: A World in Search of a Meaning*, *in* ON THE WAY TO STATEHOOD: SECESSION AND GLOBALISATION, *supra* note 26, at 17, 20. For discussion on the earlier roots of recognition in international law, see DUGARD, *supra* note 162, at 84–85.

172. Sturman, *supra* note 26, at 82.

173. For example, the attempt to introduce a national currency by Somaliland resulted in the swift erosion of the Somaliland shilling after its first circulation in 1994, and today the United States dollar is more commonly used in Somaliland. For elaboration on this example, see MICHAEL SCHOISWOHL, STATUS AND (HUMAN RIGHTS) OBLIGATIONS OF NON-RECOGNIZED DE FACTO REGIMES IN INTERNATIONAL LAW: THE CASE OF 'SOMALILAND' (2004); Jackson Nyamuya Maogoto, *Somaliland: Scrambled by International Law?*, *in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW, *supra* note 14, at 208, 220. *See generally* UNITED NATIONS DEV. PROGRAM, HUMAN

The tension between the two competing theories is an illustration of two concepts introduced by Koskenniemi[174]: concreteness (apology) and normativity (utopia). As suggested by Koskenniemi, those advocating for the declarative approach seek to rely on pure facts (and, most importantly, effective establishment of authority—*effectivité*—and fulfillment of the Montevideo criteria), while those who support the constitutive approach argue in terms of a criterion external to facts (general recognition).[175]

An argument about concreteness is an argument about the closeness of a particular principle to state practice, which seems like an apology for existing power, while an argument about normativity seeks to demonstrate the rule's distance from state will and practice and from politics.[176] Concreteness can lead to problems when reliance on real life power in international relations trumps considerations of international law, for example, when a group of strong states, like the U.S.-led coalition against the Islamic State, uses military force based on questionable legal justifications, like the claim that Syria is "unwilling [and] unable" to deal with the Islamic State in its territory.[177] Normativity, in comparison, can lead to problems when it brings about the

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DEVELOPMENT REPORT 1998 (1998); Asteris Huliaras, *The Viability of Somaliland: Internal Constraints and Regional Geopolitics*, 20 J. CONTEMP. AFRICAN STUD. 157 (2002).

174. Koskenniemi, supra note 24, at 7.

175. In Koskenniemi's view, neither claim is sustainable alone, since the first is an apology for the exercise of force, when it is used to establish effective control over a territory, while the other is abstract and question begging, e.g., whose application of the external criterion should precede. *Id.* at 15.

176. *Id.* at 39.

177. The claim that Syria is "unwilling or unable" to address the threat of the Islamic State was raised by Australia, Canada, Turkey, the United Kingdom, and the United States. *See* Permanent Representative of the United States of America to the United Nations, Letter Dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014); Permanent Representative of Australia to the United Nations, Letter Dated 9 September 2015 from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015); Chargé d'Affaires a.i. of the Permanent Mission of Canada to the United Nations, Letter Dated 31 March 2015 from the Chargé d'Affaires a.i. of the Permanent Mission of Canada to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015); Chargé d'Affaires a.i. of the Permanent Mission of Turkey to the United Nations, Letter Dated 24 July 2015 from the Chargé d'Affaires a.i. of the Permanent Mission of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015). This doctrine of was raised in the past by the United States in order to justify drone strikes in Yemen, Pakistan, and Somalia, and it provoked discussion regarding its legality. *See generally* James Thuo Gathii, *Failing Failed States: A Response to John Yoo*, 2 CALIF. L. REV. CIR. 40 (2011); Arnulf Becker Lorca, *Rules for the "Global War on Terror": Implying Consent and Presuming Conditions for Intervention*, 45 N.Y.U. J. INT'L L. & POL. 1 (2012); Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483 (2012).

detachment of law from real life power relations and constraints, for example, when an entity is recognized as a state even though it lacks the capacity to exercise effective control over the territory and meet the responsibilities and normative expectations from a state.

In the case of the Islamic State, interestingly, the decision to use force against the Islamic State in Syria by the U.S.-led coalition, can be seen as based on a logic of normativity—namely the protection of a universal rule of territorial integrity of Syria and Iraq and the human rights of the people under the control of the Islamic State.[178] At the same time, it was exercised in an apologetic manner, since main players in the U.S.-led coalition use military force based on the doctrine of unwilling and unable which raises questions as to its status under international law.[179]

As recognition depends more on the legality of the establishment of an entity, rather than on its practical capacity to conduct itself as a state, some entities were recognized as states before they met the Montevideo criteria, and this allowed them to gain strength in the international plane until eventually meeting all of the criteria.[180] As noted by Fabry, the period since the establishment of the United Nations witnessed the abandonment of the requirement of de facto statehood as the main standard for recognizing new states, namely the factual establishment of state capacities, as there has been a growing tendency to the preference of *legality* over *effectiveness* in the field of statehood.[181] This growing trend raises a question about the continued supremacy of the declarative approach. Accordingly, some believe that

178. S.C. Res. 2170 (Aug. 15, 2014) ("*Reaffirming* the independence, sovereignty, unity and territorial integrity of the Republic of Iraq and Syrian Arab Republic.."); S.C. Res. 2249 (Nov. 20, 2015). *See also* Press Release, U.S. Dep't of Def., *supra* note 35; *see also* Coco & Maillart, *supra* note 83, at 389.

179. Bannelier-Christakis, *supra* note 37, at 743; Ali Fuat Bahcavan, *Legal Aspects of Using Force Against the Islamic State in Syria After Russian Intervention*, 224 MIL. L. REV. 639, 660 (2016); Nicholas Tsagourias, *Self-Defence Against Non-State Actors: The Interaction Between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule*, 29 LEIDEN J. INT'L L. 801 *passim* (2016); Christine Longo, Note, *R2P: An Efficient Means for Intervention in Humanitarian Crises—A Case Study of ISIL in Iraq and Syria*, 48 GEO. WASH. INT'L L. REV. 893, 903 (2016); Corten, *supra* note 37, at 777.

180. An example of a state failing to meet the territory demand is the Czech Republic. *See* Acquaviva, *supra* note 7, at 359. Another example of a state not fully meeting the Montevideo criteria prior to international recognition is Bosnia-Herzegovia. *See* Dold, *supra* note 154, at 84. More examples can be located during the decolonization in Africa during the 1960s and onwards. *See generally* Vidmar, *supra* note 80.

181. Mikulas Fabry, *Secession and State Recognition in International Relations and Law*, *in* ON THE WAY TO STATEHOOD: SECESSION AND GLOBALISATION, *supra* note 26, at 51, 57.

recognition has crystallized into an additional obligation in the process of achieving statehood, namely that the constitutive theory became the predominant one.[182]

An example of that trend is the demand of the European Union's member states, in the context of the dissolution of Yugoslavia, that aspiring new states respect international law, and particularly human rights standards, as a prerequisite for recognition.[183] Another example is the view of the Supreme Court of Canada, in the context of the possible secession of Quebec, that the international community is likely to consider the legality of an attempt to establish a new state when determining whether to grant recognition.[184] Fabry suggests that the move to the preference of *legality* over *effectiveness* is parallel to the shift in the understanding of self-determination, from possessing a negative right solely to include a positive right.[185] Accordingly, the main factor in the field of recognition is that the new entity is regarded as the realization of the right to self-determination of the people in its territory and that the realization will be consistent with the territorial integrity of existing states.[186]

The principle of self-determination began as a political idea against the backdrop of the French, American, and Russian revolutions[187] and developed into a legal principle—domestically in the constitutions of states[188] and internationally in the United Nations Charter[189] and, later, several other International Human Rights treaties and documents.[190] Self-determination, in its classic

182. *See, e.g.*, Sterio, *supra* note 157, at 215–16; Vidmar, *supra* note 80, at 362.

183. *See* Sterio, *supra* note 157, at 224; Vidmar, *supra* note 80, at 365.

184. Reference re Secession of Quebec, [1998] S.C.R. 217, 296 (Can.); Vidmar, *supra* note 80, at 375.

185. Fabry, *supra* note 181, at 57.

186. DAVID RAIC, STATEHOOD AND THE LAW OF SELF-DETERMINATION 268 (2002). This task is not simple, to say the least, given the problem in defining which group constitutes a "people." This is since while Common Articles 1(1) of the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights include a right of self-determination for "peoples," neither document explains which "peoples" are entitled to this right. Disagreements exist as to the use of subjective examination, or an objective one, or even a geographic perspective. *See* Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT'L L. 255, 268 (1996); Yuval Shany, *Redrawing Maps, Manipulating Demographics: On Exchange of Populated Territories and Self-Determination*, 2 LAW & ETHICS HUM. RTS. 1 *passim* (2008). For earlier discussion, see Patrick Thornberry, *Self-Determination, Minorities, Human Rights*, 38 INT'L & COMP. L.Q. 867, 867 (1989).

187. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 11 (1995).

188. Examples include the constitutions of the Soviet Union, Czechoslovakia, Ethiopia, Burma, Moldova, and the former Yugoslavia. *See* Vidmar, *supra* note 158, at 77–78.

189. U.N. Charter art. 1, ¶ 2.

190. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (Dec. 14, 1960); Declaration on Principles of International Law Concerning

sense, stipulated that governments must be based on the consent of the people,[191] and it prescribed on behalf of the oppressed, either nation or a people, to object and, if needed, disengage from any oppressor body or nation.[192] This principle flourished during the decolonization process since the 1960s, as it promoted the liberation of people from the outside rule of colonialist states.[193]

However, in cases of secession from existing states, it was usually only after the state from which the entity seceded recognized the new entity as a state that statehood was crystallized de jure and de facto.[194] In other words, the realization of the right of self-determination needs to be consistent with the territorial integrity of existing states.[195] Hence, while this principle was developed as a challenge to the existing order—in reaction to autocracy and colonialism—French observes that, today, self-determination was accommodated to reflect, and even undergird, the Westphalian order.[196]

In the present case, two main goals of the Islamic State are to unite Sunnis in the Levant region in the Middle East and to free Sunnis from Shia oppression.[197] Indeed, the Islamic State took

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Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (Oct. 24, 1970); East Timor (Port. v. Austl.), 1995 I.C.J. Rep. 90, 102 (June 30); South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. Rep. 4, 47 (July 18); Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1 (1994).

191. CASSESE, *supra* note 187, at 19.

192. RAIC, *supra* note 186, at 185.

193. For elaboration, see Simpson, *supra* note 186, at 262; Vidmar, *supra* note 80, at 368.

194. This can be learned from the experience of Bangladesh (which seceded from India), Eritrea (which seceded from Ethiopia), and East Timor (which was liberated from unlawful occupation by Indonesia). *See, e.g.*, Wouters & Hamid, *supra* note 15, at 57–58 (relating to Bangladesh and discussing additional examples such as South Ossetia, Chechnya, Nagorno-Karabakh, and Transnistria); Dold, *supra* note 154, at 96 (relating to Bangladesh); Sturman, *supra* note 26, at 75 (regarding Eritrea); Vidmar, *supra* note 80, at 368 (concerning East Timor).

195. Notwithstanding, some claim that, at times, secession can be justified. Examples include situations in which a people is subject to colonial rule, cases in which there is a racist regime, or cases in which a people is suffering from severe and ongoing violations of basic human rights. *See* Shany, *supra* note 186, at 6, 8; James Crawford, *State Practice and International Law in Relation to Secession*, 69 BRIT. Y.B. INT'L L. 85, 85 (1998); CASSESE, *supra* note 188, at 119.

196. *See* French, *supra* note 14, at 5. For a similar view, see Wouters & Hamid, *supra* note 15, at 56.

197. Bellew, *supra* note 102, at 240; Stern, *supra* note 5, at 107. This goal could have been framed as a claim of self-determination, and pursued peacefully, given the desire of the Security Council to facilitate formal negotiations on a political transition process in Syria in order to end the conflict, and allow the Syrian people to decide their future. *See* S.C. Res. 2268, ¶ 2 (Feb. 26, 2016); S.C. Res. 2254, ¶ 2 (Dec. 18, 2015). Another main goal, as discussed above, is to destroy the existing political order and to build new institutions and secure legitimacy to establish its authority. *See* Kadercan, *supra* note 51, at 70. In addition, the Islamic State had a wider strategy of global expansion, starting from the Middle East

advantage of Sunni's discrimination in Iraq and tensions in Syria to draw frustrated Sunnis, some with previous military and combat experience, and to grow stronger exponentially.[198] However, the group avoided raising claims, which could have served it, for the exercise of national self-determination in the form of statehood as prescribed by international law, given their rejection of the international system and their desire to promote Wahhabism, a movement with an intellectual legacy going back to *pre-Westphalian structures*.[199]

Concerning the acquisition of territory by the Islamic State, the group acquired it illegally since it violated the territorial integrity of Iraq and Syria,[200] as well as the customary rule which prohibits the acquisition of territory through the use of force.[201] When NSAs, like the Islamic State, acquire control over territory through illegal use of force, or other *jus cogens* violations,[202] there is a rule of nonrecognition, which rejects the legal competence of the entity and results in invalidity of its acts.[203] It includes abstention from entering into all forms of dealings, cooperation, or relationship with the entity controlling the territory to avoid entrenching the illegal authority over the territory.[204]

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and North Africa, and up to Europe, the United States, and Australia. *See* Jackson, *supra* note 34, at 149.

198. Kadercan, *supra* note 51, at 64–67.

199. *See* MCCANTS, *supra* note 18, at 121; Hassan, *supra* note 18, at 3. At the root of the Islamic State's philosophy lies deep resentment toward all un-Islamic systems. Against this backdrop, it is hardly surprising to see that the Islamic State did not frame its claims in international law terms—specifically, that of self-determination. Even if such a claim would have been raised, it can be assumed that it would have been rejected since sovereignty is a cornerstone of international law, and the territorial integrity of existing states generally prevails over considerations of self-determination. For elaboration, see Hassan, *supra* note 18, at 4; BUNZEL, *supra* note 1, at 18.

200. S.C. Res. 2170 (Aug. 15, 2014) ("*Reaffirming* the independence, sovereignty, unity and territorial integrity of the Republic of Iraq and Syrian Arab Republic . . . ."); S.C. Res. 2249 (Nov. 20, 2015).

201. *See, e.g.*, S.C. Res. 541, ¶ 6 (Nov. 18, 1983); S.C. Res. 217, ¶ 3 (Nov. 20, 1965); S.C. Res. 407 (May 25, 1977).

202. G.A. Res. 56/83, art. 41 (Jan. 28, 2002). For the definition of *jus cogens*, see Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. For discussion relating to this concept, see Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 85 (2001).

203. DUGARD, *supra* note 162, at 135; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 166, ¶ 74 (July 9). For elaboration on the practice of this principle in several instances, see Salvatore Zappalà, *Can Legality Trump Effectiveness in Today's International Law*?, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW, *supra* note 6, at 109–10. Acts that are in contravention of peremptory norms are invalid *ab initio*, and this principle seeks to uphold the illegality and invalidity of the alleged territorial regime. For discussion on transition from illegal regimes into states, see YAËL RONEN, TRANSITION FROM ILLEGAL REGIMES UNDER INTERNATIONAL LAW 312 (2013).

204. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),

The rule of nonrecognition has its roots in the Stimson doctrine enunciated in 1932, during the Japanese invasion of Manchuria, and in the international response to this act.[205] It is a manifestation of the general principle of *ex injuria jus non oritur*, according to which illegal acts cannot create law.[206] The goal of nonrecognition is to ensure that the illegal entity cannot consolidate itself in the territory it controls.[207] This principle promotes a normative standard, in comparison to the objective standards of the Montevideo Convention.[208] As such, it is also an important layer in the tendency to prefer *legality* over *effectiveness* in the field of statehood.[209]

In accordance with this principle, during 2014-2017 no state recognized the self-proclaimed Caliphate established by the Islamic State on the territories of Iraq and Syria.[210] While some states engaged at first unofficially or indirectly with the Islamic State, this principle, alongside the sanctions placed against the group and the public opinion concerning its threat, prevented any formal ties with the Caliphate. For example, while there are some reports of the purchase of oil from the group in 2014-2015—for example, by Turkey[211] and even some states from the European

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Advisory Opinion, 1971 I.C.J. Rep. 16, 55–56, ¶ 124 (June 21); RONEN, *supra* note 203, at 78.

205. This invasion included an attempt to establish a new puppet state, Manchukuo, during 1931-1932. *See* DUGARD, *supra* note 162, at 29.

206. Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. Rep. 7, 76, ¶ 133 (Sept. 25); Factory at Chorzów (Ger. v. Pol.), 1925 P.C.I.J. (ser. A) No. 9, 31 (July 26). Lauterpacht maintained that nonrecognition aims at vindicating the legal character of international law against the law-creating effect of facts. *See* LAUTERPACHT, *supra* note 161, at 430. *See generally* DUGARD, *supra* note 162. An exception to nonrecognition was laid down by the ICJ, and later applied by the European Court of Human Rights, under which nonrecognition cannot be to the detriment of the local population. For example, there is still room to recognize official documents issues by the Islamic State, like birth certificates, in order to safeguard basic human rights of the population which found itself under the control of the group. *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. at 56, ¶ 125; Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) at 13–14 (1995); *see also* CRAWFORD, *supra* note 138, at 164; RONEN, *supra* note 203, at 83.

207. RONEN, *supra* note 203, at 312.

208. At the same time, this principle is found in the Montevideo Convention, as Article 11 of the Convention creates an obligation not to recognize territorial acquisitions which have been obtained by force, since the territory of a state is inviolable. *See* Convention on the Rights and Duties of States, *supra* note 134, art. 11. For discussion relating to the recent incident in Crimea, see Christakis & Constantinides, *supra* note 139, at 8–9.

209. For elaboration on this trend, see Fabry, *supra* note 182, at 57.

210. Kajtar, *supra* note 5, at 549.

211. Ahmet S. Yayla & Colin P. Clarke, *Turkey's Double ISIS Standard*, FOREIGN POL'Y (Apr. 12, 2018, 4:43 PM), https://foreignpolicy.com/2018/04/12/turkeys-double-isis-standard/.

Union[212]—the international campaign against the group put a stop to this practice. Another layer of complication arose concerning dealing with the Islamic State for humanitarian access, as aid organizations feared being prosecuted if they are found to be engaging with the group, leading United Nations agencies to call on states to find a way to negotiate the facilitation of critical aid access.[213]

Instead, while parts of the territory of Iraq and Syria were under the control of the Islamic State, the international community persisted in recognizing the continued territorial integrity and the political independence of Iraq and Syria.[214] This principle also came into play after the fall of the self-proclaimed Caliphate, since the international community refused to recognize the Kurdish Regional Government in Iraq, despite the fact that it attempted to establish a functioning governing body, which has proven to be an invaluable ally in the fight against the Islamic State.[215]

V. FUNCTIONALISM, DETERRITORIALIZATION, AND THE ISLAMIC STATE IN THE AGE OF THE RISE OF NSAS

This Part will discuss how the failed attempt to establish the Caliphate in an international legal system which is state-centered and generally secular correlates to current trends in international

212. In 2014, the Ambassador for the European Union in Iraq, Jana Hybaskova, acknowledged that several member states have bought oil from the Islamic State. *See* Ari Yashar, *EU States Buying Islamic State Oil*, ISR. NAT'L NEWS (Sept. 9, 2014, 11:33 AM), https://www.israelnationalnews.com/News/News.aspx/184823.

213. Liz Fields, *UNICEF Wants State Officials to Negotiate with Islamic State to Help Aid Delivery*, VICE NEWS (Mar. 13, 2015, 11:25 AM), https://news.vice.com/article/unicef-wants-state-officials-to-negotiate-with-islamic-state-to-help-aid-delivery.

214. S.C. Res. 2170 (Aug. 15, 2014); S.C. Res. 2249 (Nov. 20, 2015); Kajtar, *supra* note 5, at 548. From the perspective of Iraq and Syria, their sovereignty benefits from a presumption of continuity, hence their temporary loss or partial loss of one of the criteria for statehood, in this case territory, does not affect their legal status. Relating to the presumption of continuity in international law, see U.N. Secretary-General, *Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States*, at 41, U.N. Doc. A/CN.4/2 (Dec. 15, 1948); Acquaviva, *supra* note 7, at 387; KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 548 (1968); CRAWFORD, *supra* note 136, at 694, 701. For its application, see S.C. Res. 733 (Jan. 23, 1992); Secretary-General, Letter Dated 29 November 1992 from the Secretary-General Addressed to the President of the Security Council, at 1, U.N. Doc. S/24868 (Nov. 29, 1992); Sheekh v. Netherlands, App. No. 1948/04, Eur. Ct. H.R. at 6 (2007); Republic of Somalia v. Woodhouse Drake & Carey, [1993] QB 54 (Eng.).

215. Delahunty, *supra* note 4, at 63. There are many other examples, such as Nagorno-Karabakh, which is part of Azerbaijan, or South Ossetia in Georgia. *See* Wouters & Hamid, *supra* note 15, at 56.

law. Looking at the case study of the Islamic State in light of these trends helps to better understand them and the significance of the failed attempt of the group.

Deciding who the candidates for entitlement to international legal personality are has always been a pivotal decision in the international system.[216] The need to examine this issue resurfaces in times of crisis, like the one in Syria, or renewal of the system or its foundations.[217] A term which illustrates such times of crisis or renewal is an "epochal change,"[218] namely a moment which requires to reconsider fundamental questions about the nature and composition of the international legal order, such as the content of state sovereignty and the boundaries for membership in the international community.[219]

An example of an epochal change is the aftermath of World War I, which included revision and reform of basic concepts, including sovereignty and statehood.[220] Another epochal change, of particular relevance in the context of the Islamic State, arrived after the end of the Cold War,[221] setting in motion dramatic changes in the accepted role of the state, signaling a new era of internationalization in trade and liberal prescriptions, and resulting in the current era of globalization, which in turn fueled the current rise in nationalism from which the Islamic State, among others, benefited.[222]

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216. For a historical survey, see generally JANNE ELISABETH NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW (2004).

217. Bhuta, *supra* note 63, at 62. Some tried to coin the proper term to reflect such a time. An example is a "paradigm shift," a term coined by Kuhn, or an "international constitutional moment," invoked by Martinez, Sadat, and Slaughter together with Burke-White. *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 150 (2d ed. 1970); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 463 (2003); Leila Nadya Sadat, *Enemy Combatants after* Hamdan v. Rumsfeld*: Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1206–07 (2007); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 18 (2002).

218. ANTONIO CASSESE, *The Diffusion of Revolutionary Ideas and the Evolution of International Law*, *in* THE HUMAN DIMENSION OF INTERNATIONAL LAW 70 (2008).

219. Bhuta, *supra* note 63, at 62.

220. *See id.* at 66.

221. For discussion on international law in the post-Cold War era, see Philip C. Aka & Gloria J. Browne, *Education, Human Rights, and the Post-Cold War Era*, 15 N.Y.L. SCH. J. HUM. RTS. 421, 428–30 (1999); Julie Mertus, *The State and the Post-Cold War Refugee Regime: New Models, New Questions*, 20 MICH. J. INT'L L. 59, 72–73 (1998); Matthew H. Adler, *International Law's Contribution to Security in the Post-Cold War Era: From Functional to Political and Beyond*, 19 FORDHAM INT'L L.J. 1955, 1958 (1996).

222. For discussion about globalization and statehood, under international law, see Sterio, *supra* note 157, 215–17; Evans, *supra* note 11, at 29. For general discussion about globalization and international law, see Gamble et al., *supra* note 63, at 5–7. For an inquiry into an earlier form of globalization, in the context of western imperialism and colonialism,

This Part will show that both the epochal change after World War I and the one which began in the aftermath of the Cold War included an invocation of a *functional* approach toward the state. On both occasions, this invocation comes to promote the acceptance of a new candidate for international legal status—first the *individual*, during the 1920s, and in this day and age *quasi-states*—political entities with significant state-like features.[223]

During the 1920s, two main themes at the time were the power of states as epitomized in the concept of sovereignty and the entertainment of the notion that the individual is *also* worthy of being a subject of international rights and obligations.[224] Brierly suggested that sovereignty was simply the term used to describe the fact that states successfully exercise power and authority over territory and peoples.[225] He opined that states maintain a legal personality only insofar as they represent wills of individuals, as a

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see Carl Landauer, *Regionalism, Geography, and the International Legal Imagination*, 11 CHI. J. INT'L L. 557, 576 (2011).

223. Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen*, 8 J. INT'L CRIM. JUST. 329, 334 (2010). Other terms occasionally used, which are parallel to quasi-states, are de facto states or de facto regimes. *See* Sterio, *supra* note 157, at 225; van Essen, *supra* note 159, at 32.

224. Bhuta, *supra* note 63, at 64–65. During that era, individuals did not hold international rights or obligations. Instead, injuries inflicted upon them could have been pursued under the international claim by a state, based on the doctrine of diplomatic protection. These avenues were, however, subject to the discretion of the national's state. A notable exception was the principle of universal jurisdiction, recognized since the seventeenth century, which allows states to prosecute nationals of other states, even without a direct link to the prosecuting state, when such individuals committed international crimes. This principle seeks to avoid impunity and promote punishment for the heinous international crimes, like genocide, torture, slavery, and more. For discussion on the doctrine of diplomatic protection, see CHITTHARANJAN F. AMERASINGHE, DIPLOMATIC PROTECTION 150 (2008); Mohamed Bennouna (Special Rapporteur on Diplomatic Protection), *Preliminary Report on Diplomatic Protection*, U.N. Doc. A/CN.4/484 (Feb. 4, 1998); Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), Judgment, 1924 P.C.I.J. (ser. B) No. 3, at 21 (Aug. 30, 1924) ("It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels."). For discussion on the historical evolution and current state of universal jurisdiction, see generally Monica Hans, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish this Goal?*, 15 TRANSNAT'L LAW. 357 (2002); Karinne Coombes, *Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?*, 43 GEO. WASH. INT'L L. REV. 419 (2011); M. Cherif Bassiouni, *The Duty to Prosecute and/or Extradite: Aut Dedere Aut Judicare*, *in* 2 INTERNATIONAL CRIMINAL LAW 35 (M. Cherif Bassiouni ed., 3d ed. 2008); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81 (2002).

225. JAMES LESLIE BRIERLY, BASIS OF OBLIGATION IN INTERNATIONAL LAW 1–67 (Hersch Lauterpacht & C. H. M. Waldock eds., 1958).

form of expression.[226] Likewise, Politis suggested that a state is merely the system of relationships among the men of which it is composed.[227]

Both Brierly and Politis advocated for disaggregation and functionalization of the state concept, with the intent to promote the proposition that the *individual* should also be considered as a subject of rights and obligations in the international plane.[228] As noted by Bhuta, these views indicate that states are a *functional* convenience, reflecting not ontological priority but expediency.[229] What may have been considered at the time as more theoretical than normative[230] is now integrated into positive international law in fields like international human rights law and international criminal law.[231]

As part of the current epochal change, in the context of globalization, functionalism is reintroduced in the application of the statehood criteria toward *quasi-states*.[232] This approach seeks to substitute *sovereignty* for *authority* and allocates responsibility *according to function*.[233] It is based on instances where quasi-states have been treated as states for certain purposes since they were considered to possess features of a state in the relevant aspects. Shany, Roberts, and Sivakumaran provided the examples of Taiwan, Puerto Rico, and Palestine, which were allowed to

226. *Id.* at 49.

227. NICOLAS POLITIS, THE NEW ASPECTS OF INTERNATIONAL LAW 25 (1928).

228. Bhuta, *supra* note 63, at 65.

229. *See id.* at 64.

230. This is because individuals did not hold in that time international rights or obligations, with the exception of the doctrine of diplomatic protection, which was subject to the discretion of the national's state. As for international criminal law, in that period the only principle from this field was the principle of universal jurisdiction, recognized since the seventeenth century. For discussion on the doctrine of diplomatic protection, see AMERASINGHE, *supra* note 224, at 150; Bennouna, *supra* note 224, *passim*. Relating to the historical evolution and current state of international criminal law, see generally INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY (Larry May & Zachary Hoskins eds., 2010).

231. For reading relating to international human rights and its institutions, see generally ROUTLEDGE HANDBOOK, *supra* note 39; TOMUSCHAT, *supra* note 39. For reading relating to international criminal law and its institutions, see generally CASSESE, *supra* note 39.

232. Shany, *supra* note 223, at 334. As previously stated, other terms occasionally used, which are parallel to quasi-states, are de facto states or de facto regimes. *See* Sterio, *supra* note 157, at 225; van Essen, *supra* note 159, at 32.

233. Ronen, *supra* note 14, at 28.

participate in the work of several IGOs.[234] An earlier example, suggested by Gowlland-Debbas, is the membership of India in the United Nations before its independence.[235]

The manifestations of the functional approach include, inter alia[236]: the acceptance of Puerto Rico as an associate member of and Palestine and Taiwan with observer status in the World Health Organization; the acceptance of Taiwan, Puerto Rico, and Palestine as members of the International Olympic Committee and the International Trade Union Confederation; the acceptance of Puerto Rico as an associate member of and Palestine as an observer to the World Tourism Organization; the signing of several investment treaties by Taiwan; the participation of Palestine and Kosovo as independent authorities in an advisory proceeding before the International Court of Justice ("ICJ"); the joining of Palestine to numerous international treaties and in particular to the Rome Statute which established the International Criminal Court ("ICC"); and more. Generally speaking, Shany suggested that quasi-states tend to be regarded functionally as a state if and when the differences between them and states are viewed as irrelevant for the purposes of the institution or treaty at hand and that the decision should be done in light of the nature and function of the legal arrangement in question.[237]

For example, when Palestine declared that it accepts the jurisdiction of the ICC, first in 2009 and later again in 2015, the prosecutor of the Court faced the dilemma if to treat Palestine as a state for the purposes of the Rome Statute establishing the ICC.[238]

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234. Shany, *supra* note 223, at 334; Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 120 (2012). For additional discussion relating to Taiwan, *see* Jure Vidmar, *States, Governments, and Collective Recognition*, 31 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 136 *passim* (2017); Dold, *supra* note 154, at 88–89.

235. Vera Gowlland-Debbas, *Note on the Legal Effects of Palestine's Declaration Under Article 12(3) of the ICC Statute*, *in* IS THERE A COURT FOR GAZA? A TEST BENCH FOR INTERNATIONAL JUSTICE 513 *passim* (Chantal Meloni & Gianni Tognoni eds., 2012).

236. For elaboration, see Shany, *supra* note 223, at 334; *see also* Allain Pellet, *The Effects of Palestine's Recognition of the International Criminal Court's Jurisdiction*, *in* IS THERE A COURT FOR GAZA? A TEST BENCH FOR INTERNATIONAL JUSTICE, *supra* note 235, at 409 (relating to Palestine); Chun Hung Lin, *The International Telecommunication Union and the Republic of China (Taiwan): Prospect of Taiwan's Participation*, 10 ANN. SURV. INT'L & COMP. L. 133, 149–55 (2004) (relating to Taiwan).

237. Shany, *supra* note 223, at 334. *See also* William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L.J. 115 (2009). Relating to Palestine, see generally Michael G. Kearney, *Why Statehood Now: A Reflection on the ICC's Impact on Palestine's Engagement with International Law*, *in* IS THERE A COURT FOR GAZA? A TEST BENCH FOR INTERNATIONAL JUSTICE, *supra* note 235, at 391.

238. *See* Amichai Cohen & Tal Mimran, *The Palestinian Authority and the International Criminal Court*, ISR. DEMOCRACY INST. (Feb. 10, 2015), https://en.idi.org.il/articles/5216.

In the view of Shany, if the Rome Statute's main goal is to end impunity through the exercise of complementary international jurisdiction by the ICC, then the object and purpose of the Statute pull in favor of a broad reading of its jurisdiction that would contribute to the fulfillment of the Court's mandate to end impunity.[239] In particular, acceptance of its declaration will promote the main goal of the Court by exercising jurisdiction over a situation where serious crimes may have occurred (the Israeli-Palestinian conflict), avoiding the option of legal black holes (territories over which no state exercises sovereignty), and since no other state would be able to delegate jurisdiction to the International Court of Justice over the situation in the Gaza strip as Israel does not claim sovereignty or effective control over it.[240] A main difference Shany notes between Palestine and other quasi-states that might approach the ICC, such as Kosovo or Saharawi, is that many of the Palestinian territories, and especially the Gaza strip, are not the object of a competing sovereignty claim by Israel or any other state.[241] Similarly, it was suggested by Hamid and Wouters that international responses toward quasi-states were characterized generally by support for the preservation of the territorial integrity of existing states.[242]

In practice, while the first declaration of Palestine in 2009 was not accepted, in its second attempt in 2015, the ICC prosecutor accepted the Palestinian declaration and recognized its jurisdiction relating to the Palestinian territories.[243] There are two main developments between the first attempt and the second one: (1) on September 23, 2011, the status of the Palestinian Authority in the United Nations was upgraded to that of a non-member state; and (2) during the time between the two declarations, Palestine joined numerous international conventions, e.g., the Geneva Conventions which regulate the laws of war. Indeed, the prosecutor stated in her decision that the willingness of other states to recognize Palestine as a state, even if functionally for certain purposes, signals its acceptance as a state by the international community.[244]

The incidents presented above are quite different from the case of the Islamic State. If we continue with the example of Palestine, then two main differences must be stressed: (1) the right of self-determination of Palestinian people is internationally and

239. Shany, *supra* note 223, at 336; *see also* Worster, *supra* note 237.
240. Shany, *supra* note 223, at 337.
241. *Id.* at 338.
242. Wouters & Hamid, *supra* note 15, at 56.
243. Cohen & Mimran, *supra* note 238.
244. *Id.*

consistently recognize,[245] while the Islamic State avoided raising claims based on international law given their desire to return to *pre-Westphalian structures*;[246] and (2) unlike most of the Palestinian territories, which are not subject to a competing sovereignty claim, all of the territories that the Islamic State controlled form part of the uncontested sovereignty of Iraq and Syria. Pursuantly, Palestine enjoys significant recognition, and it is a non-state member of the United Nations and a member of the ICC.[247] In contrast, the principle of nonrecognition and the sanctions placed against the Islamic State prevented any formal ties with the self-proclaimed Caliphate. The Islamic State was also ignored when attempts were made to negotiate the end of the hostilities in Syria or at least the establishment of a ceasefire, notwithstanding the fact that these negotiations included other opposing NSAs in Syria.[248] This demonstrates the significant role of self-determination and recognition in the quest for statehood, notwithstanding the fact that neither of them is required under the classical formula of the Montevideo Convention.

The modern invocation of functionalism emphesizes *governance*, namely the provision of services by the state and the execution of its policy, rather than on traditional *effectiveness* in the sense of the Montevideo Criteria, namely the Westphalian notion of the sovereign state which enjoys effective control over

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245. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 181, ¶ 115 (July 9); Kajtar, *supra* note 5, at 547.

246. For elaboration, see Hassan, *supra* note 18; *see also* BUNZEL, *supra* note 1, at 18.

247. Currently, more than half of the international community has recognized Palestine. In addition, it has been admitted as a member to the League of Arab States, the Organization of the Islamic Conference, the Arab League Educational Cultural and Scientific Organization, among others, the International Criminal Court and even as a non-member state at the United Nations. Palestine has also signed several international conventions, some of which were accepted for deposit by the Secretary-General of the United Nations. Palestinian athletes have participated under the Palestine flag in the Olympics since 1996 and with the International Federation of Football Association since 1998, and more. For elaboration, see William Thomas Worster, *The Exercise of Jurisdiction by the International Criminal Court over Palestine*, 26 AM. U. INT'L L. REV. 1153, 1169 (2011).

248. Examples include the Muslim Brotherhood, the National Bloc, the Local Coordination Committee, the Kurdish Bloc, the Assyrian Bloc, and Independents. For elaboration, see Amanda Pitrof, *Too Many Cooks in the Kitchen: Examining the Major Obstacles to Achieving Peace in Syria's Civil War*, 15 PEPP. DISP. RESOL. L.J. 157, 171 (2015). For discussion from a gender-based perspective, *see generally* Lisa Davis, *ISIL, the Syrian Conflict, Sexual Violence, and the Way Forward: Syrian Women's Inclusion in the Peace Processes*, 48 N.Y.U. J. INT'L L. & POL. 1157 (2016). For elaboration on the experience in other conflicts, see generally David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801 (1996); Brian R. Farrell, *The Security Council and Kashmir*, 22 TRANSNAT'L L. & CONTEMP. PROBS. 343 (2013); Andrej Lang, *"Modus Operandi" and the ICJ's Appraisal of the Lusaka Ceasefire Agreement in the* Armed Activities *Case: The Role of Peace Agreements in International Conflict Resolution*, 40 N.Y.U. J. INT'L L. & POL. 107 (2008).

the territory and particularly the monopoly over the use of force.[249] In other words, governance focuses on the modes of social coordination, which allow the production and implementation of binding rules and the provision of collective goods, either by the state or by different players with a better capacity to do it.[250]

A functional approach is appropriate in areas of limited statehood where states, like Syria and Iraq, lack the capacity to provide services in the fields of health, education, maintenance of peace and order, and more.[251] The Islamic State regulated in the territories it controlled several fields of life like education, commerce, and personal status through a sophisticated, quasi-bureaucratic revenue-generating structure.[252] And, still, as the functional approach was generally applied to quasi-states that accept the authority of international law and act in accordance with it, the self-proclaimed Caliphate of the Islamic State never benefited from the trend.[253]

On the theoretical level, the application of a functional approach in this day and age has its roots in the views of Brierly and Politis, who advocated for disaggregation and functionalization of the state concept.[254] Brierly suggested that states maintain a legal personality only insofar as they represent wills of individuals, as a form of expression,[255] while Politis suggested that a state is merely the system of relationships among the men of which it is composed.[256] Both the earlier invocation of a functional view as well as the current one promote the acceptance of a new candidate into the international community, which was allegedly entitled to international legal status—first, the *individual* and, later, *quasi-states*.

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249. *See generally* Thomas Risse, *Governance Under Limited Sovereignty*, *in* BACK TO BASICS: STATE POWER IN A CONTEMPORARY WORLD 78 (Martha Finnemore & Judith Goldstein eds., 2013). For an example in the context of failing to meet the territory demand is the Czech Republic, see Acquaviva, *supra* note 7, at 394. For discussion on the two components of statehood in this regard—authority and effective control, see Krasner, *supra* note 8, at 4.

250. For discussion relating to governance in the international level, see JAMES ROSENAU, ALONG THE DOMESTIC-FOREIGN FRONTIER: EXPLORING GOVERNANCE IN A TURBULENT WORLD 80 (1997); HELD, *supra* note 70, *passim*.

251. Risse, *supra* note 249, *passim*.

252. *Report of the Secretary-General*, *supra* note 150, ¶ 4.

253. On the practical level, no state, or international body, were willing to support the group, in contrast to other quasi-states which are sustained by an existing sovereign state such as Taiwan under the protection of the United States, Kosovo which enjoys the sponsorship of the North Atlantic Treaty Organization, Nagorno-Karabakh which is sustained by Armenia, and more. For discussion, see Delahunty, *supra* note 4, at 64.

254. *See* Bhuta, *supra* note 63, at 65.

255. BRIERLY, *supra* note 225, at 49.

256. POLITIS, *supra* note 227, at 25.

The functional approach is also related to the process of deterritorialization, during which, as noted by Khan, the traditional and categorical symbiosis between territory, power, and identity no longer maintains exclusivity.[257] Deterritorialization was described by Brölmann and Ortiz as the detachment of regulatory authority from a specific territory, in the sense that territoriality increasingly gives way to functionality as a dominant organizing principle.[258] This process has several catalysts, such as the rise in the number of people with dual, or more, nationalities,[259] and geographical reasons, like the fact that, by the end of this century, some island states might lose their territory and new forms of associations for these populations will need to be considered, maybe even as *ex-situ* states.[260]

This process is perceived as reducing the significance of the state and its control over territory, and it challenges the international Westphalian order.[261] An interesting example, in the context of NSAs, is al-Qaeda, a *deterritorialized terrorist group* with a transnational reach and influence.[262]

Another accelerating factor is the emergence of new spaces which compete with that of the state, given developments in technology, transportation, and communications, and which are formed on the basis of ethnic affiliation, economic status, political interest, and other social or other connecting factors.[263] As noted above, the rise of the Islamic State was facilitated, inter alia, by the ability to develop powerful social media capabilities and to use it in an unprecedented fashion in order to recruit, plot, and radicalize, while relying on the common basis of Sunni-Muslim identity and ignoring borders and nationalities.[264]

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257. Daniel-Erasmus Khan, *Territory and Boundaries*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 225 *passim* (Bardo Fassbender & Anne Peters eds., 2012); John Agnew, *The Territorial Trap: The Geographical Assumptions of International Relations Theory*, 1 REV. INT'L POL. ECON. 53, 53 (1994).

258. Catherine Brölmann, *Deterritorializing International Law: Moving Away from the Divide Between National and International Law*, *in* NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 84, 86 (Janne Nijman & Andre Nollkaemper eds., 2007); Daniel R. Ortiz, Reterritorializing Deterritorialization 1 (Oct. 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2859599.

259. Franck, *supra* note 46, at 378.

260. *See* Maxine Burkett, *The Nation* Ex-Situ*: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345 *passim* (2011).

261. Evans, *supra* note 11, at 29.

262. Delahunty, *supra* note 4, at 24.

263. Evans, *supra* note 11, at 29. Another factor is the rise of IGOs and their dominance. *See generally* Ortiz, *supra* note 258.

264. *See generally* Stacey, *supra* note 84; Greenberg, *supra* note 84; Lieberman, *supra* note 84; Klein & Flinn, *supra* note 84.

The rationale behind the process of deterritorialization is that international law might risk being ineffective if it challenges the validity of effective situations by creating a conflict between *law* and *fact*.[265] Accordingly, state-centrism in international law has been tempered by the notion of *ex factis jus oritur*, namely that effective power cannot be ignored, at the risk of rendering redundant legal rules in the face of a new reality.[266] This principle, *ex factis jus oritur*, is fundamental, as the international legal order, absent a centralized structure, demands strong and concrete impact on reality in order to solidify its foundations.[267]

There is a limit, though, to the importance granted to effective power and its ability to impact the legal status of a territory. This limit is encapsulated in the rule of nonrecognition, which rejects the legal competence of an illegally created entity[268] based on the general principle of *ex injuria jus non oritur*.[269] As we can learn from the case of the Islamic State, effective power cannot justify infringing on basic pillars of the international system, most notably state sovereignty.

While the attempt to establish the Caliphate failed, the idea of the Islamic State served nevertheless as a platform for people to unite based on their belief that this group promotes the kind of Islam they wanted to believe in.[270] This connection has proven stronger than the national affiliation of people from around the world who chose to leave their life behind and join the group and later the self-proclaimed Caliphate established by it.[271] Now, after the Islamic State was driven out of the territory it controlled, the

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265. For discussion on this rationale, see generally CHARLES DE VISSCHER, LES EFFECTIVITÉS DU DROIT INTERNATIONAL PUBLIC (1967); Christakis & Constantinides, *supra* note 139.

266. Bhuta, *supra* note 63, at 70.

267. Zappalà, *supra* note 203, at 106.

268. DUGARD, *supra* note 162, at 135; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 166, ¶ 74 (July 9). For elaboration on the practice of this principle in several instances, see Zappalà, *supra* note 203, at 109. Acts that are in contravention of peremptory norms are invalid *ab initio*, and this principle seeks to uphold the illegality and invalidity of the alleged territorial regime. For discussion on transition from illegal regimes into states, see RONEN, *supra* note 203, at 312.

269. Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. Rep. 7, 76, ¶ 133 (Sept. 25); Factory at Chorzów (Ger. v. Pol.), Jurisdiction, 1925 P.C.I.J. (ser. A) No. 9, at 31 (July 26). Lauterpacht maintained that nonrecognition aims at vindicating the legal character of international law against the law-creating effect of facts. *See* LAUTERPACHT, *supra* note 161, at 402; *see also* DUGARD, *supra* note 162, at 49.

270. David Gilbert, *Facebook Is Connecting People All over the World—Especially ISIS Supporters*, VICE NEWS (May 8, 2018, 7:30 AM), https://news.vice.com/en_us/article/qvnd4x/facebook-connecting-islamic-state-supporters; BUNZEL, *supra* note 1, *passim*.

271. For data on the number of foreign fighters in the Islamic State, see THE SOUFAN GROUP, *supra* note 108. For discussion on the spreading of ISIS into other states, see generally Smith, *supra* note 106.

group adopted a deterritorialized character, like al-Qaeda, until it will be able to regain territory and pursue the dream of the Caliphate again.[272]

Since new spaces allow for socializing regardless of state borders and the divisions they create, it has been suggested by Burkett that the Westphalian system fails to capture the experience of contemporary deterritorialized groups and individuals.[273] In the context of cyberspace, for example, Shany suggests that there is a need to develop beside the existing state-centric model a new branch of universal law, which should apply to all stakeholders—*lex cybernetica*.[274] More generally, some have suggested that globalization is, by definition, eroding borders[275] and that national borders are archaic constructs which can and should be reconsidered.[276]

Still, while this proposition might gain strength in the future, it seems that it does not hold a sufficient basis in reality when it comes to state and state-like entities. My view derives from the fact that national borders are still normatively safeguarded by principles like territorial integrity and *uti possidetis*, and in addition we can witness a rise in nationalism around the world that is driven by the importance still attributed to borders.[277]

The existence of numerous independence and secession movements around the world that all aim for the same form of association, indicates the link which still exists between identity, nationality, territory, and governance in the form of a state.[278]

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272. At its height, the Islamic State continuously looked for new fertile grounds to develop their dream of the Caliphate. For example, the Australian Attorney General referred to the possibility that they might seek to establish a caliphate in Indonesia. *See* Brereton, *supra* note 129; *see also* MCCANTS, *supra* note 18, at 140; WARRICK, *supra* note 85, *passim*; McCants & Whiteside, *supra* note 128; JONES ET AL., *supra* note 220, at 20.

273. Burkett, *supra* note 260, at 358.

274. Yuval Shany, *Cyberspace: The Final Frontier of Extra-Territoriality in Human Rights Law*, FEDERMANN CYBER SECURITY RES. CTR. (Sept. 26, 2017), http://csrcl.huji.ac.il/people/cyberspace-final-frontier-extra-territoriality-human-rights-law?ref_tid=3718.

275. ROSENAU, *supra* note 250, *passim*; ANKIE HOOGVELT, GLOBALIZATION AND THE POSTCOLONIAL WORLD: THE NEW POLITICAL ECONOMY OF DEVELOPMENT 67 (1997).

276. *See, e.g.*, John Agnew, *No Borders, No Nations: Making Greece in Macedonia*, 97 ANNALS ASS'N AM. GEOGRAPHERS 398 (2007); Anssi Paasi, *Generations and the 'Development' of Border Studies*, 10 GEOPOLITICS 663 (2005); Neil Brenner, *Beyond State-Centrism? Space, Territoriality, and Geographical Scale in Globalization Studies*, 28 THEORY & SOC'Y 39 (1999).

277. For elaboration, see Posner, *supra* note 50, at 795; Drezner, *supra* note 50, at 23; Cox, *supra* note 50, at 36. Interestingly, the Islamic State recruited frustrated people based on sentiments of despair and inferiority. *See* Kadercan, *supra* note 51, at 64–67; Stern, *supra* note 5, at 108.

278. For elaboration, see generally Edward T. Canuel, *Nationalism, Self-Determination, and Nationalist Movements: Exploring the Palestinian and Quebec Drives for Independence*, 20 B.C. INT'L & COMP. L. REV. 85 (1997); Benjamin Levites, *The Scottish Independence Referendum and the Principles of Democratic Secession*, 41 BROOK. J. INT'L L.

Consequently, while other models for social association exist, like regional integration or diaspora communities,[279] and while theories like deterritorialization are gaining strength, the state still holds strong as a main sociopolitical model which includes important legal benefits, most particularly sovereignty, with its persistent hold on the popular imagination.

Roberts and Sivakumaran have suggested[280] that in assessing whether to grant particular NSAs an international status or role, for example–in the creation of international law–one should examine the *needs* of the international community as a whole.[281] In their view, the interests of the international community are clearly broader than those of states alone and should include interests of NSAs, such as NGOs and armed groups.[282] This suggestion is in line with the view of ICJ, in the Reparations Advisory Opinion, according to which the development of international law has historically been influenced by the *requirements* of international life.[283]

While NSAs do not enjoy similar legal status to that of a state, they nevertheless can bear international obligations, and at times they can have an impact on the development of international law.[284] *Before* the rise in the threat of international terrorism at

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373 (2015); Paul R. Williams et al., *Earned Sovereignty Revisited: Creating a Strategic Framework for Managing Self-Determination Based Conflicts*, 21 ILSA J. INT'L & COMP. L. 425 (2015); Thomas Y. Patrick, *The Zeitgeist of Secession Amidst the March Towards Unification: Scotland, Catalonia, and the Future of the European Union*, 39 B.C. INT'L & COMP. L. REV. 195 (2016).

279. *See generally* Anthony Clark Arend, *The United Nations, Regional Organizations, and Military Operations: The Past and the Present*, 7 DUKE J. COMP. & INT'L L. 3 (1996); Hickey, *supra* note 41; Onzivu, *supra* note 41; Paliwal, *supra* note 41.

280. Based on a rationale laid down by the ICJ, see Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 178 (Apr. 11).

281. Roberts & Sivakumaran, *supra* note 234, at 125. *See generally* van Essen, *supra* note 159.

282. Roberts & Sivakumaran, *supra* note 234, at 125.

283. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. at 178.

284. *See generally* Paust, *supra* note 73. For example, one of the first documents attempting to codify *jus in bello* (international humanitarian law), the 1863 Lieber Code examined the practices and expectations of certain tribes, confederations, and other NSA actors, other than analyzing the practice of states. It should be noted that the modern attempt by the International Committee of the Red Cross to codify this field focuses its evaluation on the practice of states and IGOs. The reason for this focus was that the practice of armed groups does not constitute, in the view of the authors of the study, state practice, and as such, the legal significance of that practice is unclear. *See generally* Jean-Marie Henckaerts & Louise Doswald-Beck, *Introduction* to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, at xxxi (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). For an earlier discussion on customary international humanitarian law, see generally Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348 (1987). For an explanation on the rationale behind the study, see generally Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding*

the beginning of the twenty-first century,[285] confrontations with violent NSAs were mainly based on preventive and repressive law enforcement strategies similar to those employed in relation to other criminal activity.[286] However, when violence between a state and a well-organized NSA crosses a certain threshold of intensity, or when the group exercises effective control over territory, it might be considered an armed conflict,[287] resulting in the attribution of *jus in bello* rights and duties upon the NSAs party to the conflict.[288]

The fact that NSAs can bear international rights, and mostly duties, does not mean that they enjoy an international legal status of comparable normative strength to the sovereign state.[289] They are, in fact, seen as objects of international law, and not subjects.[290] Their vague and uncertain legal status is significantly inferior to that of the state[291] since it is in the interest of sovereign states to maintain wide discretion in dealings with NSAs and, in particular, to hold the last say as to whether to confer a certain

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and Respect for the Rule of Law in Armed Conflict, 87 INT'L REV. RED CROSS, Mar. 2005, at 175 (2005).

285. For elaboration, see generally Alberto Costi, *Review Essay: Human Rights in the 'War on Terror,'* 37 VICT. U. WELLINGTON L. REV. 451, 452 (2006) (reviewing HUMAN RIGHTS IN THE 'WAR ON TERROR' (Richard Ashby Wilson ed., 2005)); C. Raj Kumar, *Global Responses to Terrorism and National Insecurity: Ensuring Security, Development and Human Rights*, 12 ILSA J. INT'L & COMP. L. 99, 105 (2005); Jonathan Grebinar, *Responding to Terrorism: How Must a Democracy Do It? A Comparison of Israeli and American Law*, 31 FORDHAM URB. L.J. 261 (2003); Kevin J. Fandl, *Recalibrating the War on Terror by Enhancing Development Practices in the Middle East*, 16 DUKE J. COMP. & INT'L L. 299 (2006).

286. M. Cherif Bassiouni, *Methodological Options for International Legal Control of Terrorism*, *in* INTERNATIONAL TERRORISM AND POLITICAL CRIMES 485 *passim* (M. Cherif Bassiouni ed., 1974).

287. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 35 I.L.M. 32, ¶¶ 66–67 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). For elaboration, see Yuval Shani, *Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror*, *in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: PAS DE DEUX 13, 22 (Orna Ben-Naftali ed., 2011); Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing* Hamdan *and the Israeli* Targeted Killings *Case*, INT'L REV. RED CROSS, June 2007, at 373, 379–80 (2007).

288. van Essen, *supra* note 159, at 34.

289. Roberts & Sivakumaran, *supra* note 234, at 118.

290. *See id.* For a similar claim, see SCHOISWOHL, *supra* note 173. For discussion about asymmetry in the application of international humanitarian law in conflicts between states and NSAs, see Robert D. Sloane, *Prologue to A Voluntarist War Convention*, 106 MICH. L. REV. 443, *passim* (2007); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145, 145–46 (2010); Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 INT'L REV. RED CROSS, Mar. 2005, at 149 *passim* (2005). For discussion concerning international humanitarian law, see generally INGRID DETTER, THE LAW OF WAR (2013); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (3d ed. 2016); ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR (3d ed. 2000); JUDITH GARDAM, HUMANITARIAN LAW (1999); Meron, *supra* note 284.

291. van Essen, *supra* note 159, at 34.

legal status.[292] As stated by Cassese,[293] though some NSAs are participating in international dealings, their legal status in comparison to states remains inferior.[294]

When applying the Montevideo Criteria, an entity exists as a state, insofar as its authority is exercised effectively on a given population in some territory.[295] In practice, the consequences of NSAs establishing effective control over territory with statehood aspirations led to diverse results, as some NSAs achieved considerable participation rights,[296] while groups that are labeled as terror groups, like the Islamic State, are faced with a limited or no ability to participate on the international stage, and let alone to be entitled to an international legal status.

Similarly to the situataion with recognition by states, as there is no objective criteria to be applied in each case the outcome of parallel or similar situations can be quite different. The fact that there exists uncertainty, and lack of validity, relating to the ability of NSAs to find their place in the international plane serves as a negative incentive for them to adopt and apply legal principles or to embrace the current international system. Bhuta suggested that an incentive-based approach can also be considered as a *complementary* tool, which will attempt to accommodate claims of such group in order to promote moderation, compromise, and

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292. Bhuta, *supra* note 63, at 69; Roberts & Sivakumaran, *supra* note 234, at 108.

293. Cassese, *supra* note 69, at xvii.

294. For discussion on reciprocity between states and armed groups, in the context of *jus in bello*, see generally Sloane, *supra* note 290; Blum & Heymann, *supra* note 290; Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916 (1994); Steven Solomon, *Internal Conflicts: Dilemmas and Developments*, 38 GEO. WASH. INT'L L. REV. 579 (2006).

295. HIGGINS, *supra* note 141, at 25; Zappalà, *supra* note 203, at 108. Another normative level exists during intense hostilities between a state and an armed group: when the group exercises effective control over territory, or if it is significantly organized, its members might enjoy rights and will also be subject to certain obligations under *jus in bello*. Relating to the application of norms in the context of armed conflicts with groups, see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 35 I.L.M. 32, ¶ 137 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Shani, *supra* note 287; Milanovic, *supra* note 287, *passim*. Concerning rights of captured members of such groups, see Protocol I, *supra*, arts. 43–44; Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT'L L. 1025 *passim* (2004); Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* INT'L REV. RED CROSS, Mar. 2003, at 45 *passim*; Tung Yin, *Distinguishing Soldiers and Non-State Actors: Clarifying the Geneva Convention's Regulation of Interrogation of Captured Combatants Through Positive Inducements*, 26 B.U. INT'L L.J. 227 *passim* (2008).

296. *See* Shany, *supra* note 223, at 334–35; Roberts & Sivakumaran, *supra* note 234, at 120.

normalization.[297] This suggestion is *not* suitable for the Islamic State, as the group bluntly refused to demonstrate a desire to integrate into the international community; rather, it presented a direct challenge to the existing legal order and a desire to replace it.[298]

In sum, the attempt of the Islamic State to establish a caliphate presented a challenge to the current international legal order and an attempt to undermine the ideology underlying it. The international community reacted strongly against the group, with coalitions of historic size and strength, and minimized dramatically within three years the capabilities of the group and its ability to pursue its statehood dream. Delahunty asserts that, in order to provide a model that is compellingly attractive to other Muslim states, the Islamic State should have assumed the form and function of a state, and by doing so, it would have ceased to threaten to destabilize or displace the current Westphalian order.[299]

The failure of the Islamic State demonstrates the resilience of the principle of sovereignty, as the decision to use force against the Islamic State in Syria by a U.S.-led coalition was intended, inter alia, to protect the sovereignty and territorial integrity of Syria and Iraq.[300] It reaffirms that, notwithstanding significant developments in the international plane, the state-centered system stands strong in the face of the wind of change. In other words, despite developments in the nature and demands of the

297. Bhuta, *supra* note 63, at 70. This can be achieved through negotiation with the group, as was done in recent years by Colombia with terror organizations in its territory—in particular, the FARC (*Fuerzas Armadas Revolucionarias Colombianas*). *See* Allen S. Weiner, *Ending Wars, Doing Justice: Colombia, Transitional Justice, and the International Criminal Court*, 52 STAN. J. INT'L L. 211, 239–40 (2016); Nelson Camilo Sanchez Leon, *Could the Colombian Peace Accord Trigger an ICC Investigation on Colombia?*, 110 AM. J. INT'L L. UNBOUND 172, 175–76 (2016). For discussion on similar practice in other parts of the world, see generally Morriss, *supra* note 248; Farrell, *supra* note 248; Lang, *supra* note 248. Another possible avenue could be to draft an international agreement. For further discussion on possible solutions, see Roberts & Sivakumaran, *supra* note 234, *passim*.

298. Kajtar, *supra* note 5, at 548. *See generally* HATHAWAY & SHAPIRO, *supra* note 28; For discussion on the philosophical and theological doctrines adopted and employed by the Islamic State, see BUNZEL, *supra* note 1, at 41.

299. Delahunty, *supra* note 4, at 53.

300. S.C. Res. 2170 (Aug. 15, 2014) ("*Reaffirming* the independence, sovereignty, unity and territorial integrity of the Republic of Iraq and Syrian Arab Republic, and *reaffirming further* the purposes and principles of the Charter of the United Nations . . . ."); S.C. Res. 2249 (Nov. 20, 2015); *see also* Coco & Maillart, *supra* note 83, at 389.

international community,[301] the international Westphalian order, and the principle of sovereignty underlying it, demonstrate resilience and maintain their predominance.

VI. CONCLUSION

The Islamic State has transformed itself from a small terrorist group into an alleged quasi-state, presenting capabilities and wealth like no other terrorist group before it, by using the tools of modern life. In doing so, it did not seek the acceptance of other players in the international system; rather, it presented itself as a direct challenger and an alternative to the legal and social system underlying today's global order. As the group rests on a theological-political basis, by contrast to the Westphalian legal order that rests on human consent, without attachment to religion, it attempted to restore or revert to a *pre-Westphalian* order. The international community responded to the Islamic State mostly on a military level and with some legal tools such as personal sanctions against members of the group.

This Article examined two aspects of tension which are of interest in the case of the Islamic State: who decides who is entitled to this right of sovereignty and based on what, and is is this principle rigid or flexible? Regarding the first question, the discussion about who ought to be recognized as an international law subject entails the need to evaluate the normative vision of what purposes international law should promote and serve.[302] The dream of the Caliphate could not have been sustained since embracing it infringes upon a basic and peremptory norm—territorial integrity of sovereign states. Hence, the experience with the Islamic State, other than reaffirming this basic pillar of the international order and the willingness of states to use to military force to defend it, also demonstrated the important role of

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301. *See, e.g.*, Trachtman, *supra* note 8, at 412 ("The Westphalian paradigm thus renders international law unsuitable to address important international problems."); Jackson, *supra* note 44, at 785 ("These considerations suggest the need for further rethinking (or reshaping) of the core concept and roles of sovereignty, and for a new phrase to differentiate these directions from the old and, some argue, outmoded 'Westphalian' model."); Domingo, *supra* note 24, at 1544 ("International law is in its death throes, and with it an outdated order will become extinct, giving way to a new paradigm—globalization."); *see also* Georges Abi-Saab, *General Conclusions*, *in* 1 STANDARD-SETTING AT UNESCO 395, 396–97 (Abdulqawi A. Yusuf ed., 2007); Roberts & Sivakumaran, *supra* note 234, *passim*.

302. Bhuta, *supra* note 63, at 61.

recognition in assessing statehood and the fact that there is a growing tendency to the preference to *legality* over *effectiveness* in the field of statehood.

As for the second question, the rise of the Islamic State was also an indication that traditional symbiosis between territory, power, and identity no longer guarantees exclusivity. The rationale behind this process is that international law might risk being ineffective if it challenges the validity of *effective* situations by creating a conflict between *law* and *fact*. Notwithstanding, as the case of the Islamic State demonstrated, effectiveness has its limits, and one of them is that it cannot justify infringement on basic pillars of the international system and, in particular, the principle of sovereignty.

This process of deterritorialization, also perceived as a challenge to the international Westphalian order, gives way to *functionality* as a dominant *organizing principle* and minimizes the importance of borders and national divisions in a state-based order. In the case of the Islamic State, it served as a platform for people to unite based on their belief that this group promotes the kind of Islam they chose to believe in and brought people together regardless of their different national affiliation based on populism and sentiments of despair and inferiority.

Functionality, in the context of quasi-states and NSAs, places the emphasis on *governance*,[303] namely provision of services by the state and the execution of its policy, rather than on traditional *effectiveness* in the sense of the Montevideo criteria. While this approach is appropriate in areas of limited statehood where states, like Syria and Iraq, and while the Islamic State regulated in the territories it controlled several fields of life like education, commerce, and personal status, the self-proclaimed Caliphate of the Islamic State was never a proper candidate to enjoy it.

The project of the Caliphate was doomed to fail is since the Islamic State did not frame its claims in terms of international law, and particularly self-determination, and since it challenged the legitimacy of the existing legal order. Under such circumstances, there was no relevant player in the international community, either a state or any other player, which was willing to support and embrace the alternative suggested by the Islamic State. By contrast, other actors, like NGOs or IGOs, which derive their status from the state system, have growingly accommodated themselves in the international realm and have enjoyed increasing participation on the international stage. This demonstrates that a

303. Risse, *supra* note 249.

sociopolitical unit, be that in the form of a state or in another one, cannot find its place on the international plane while ignoring the international legal order, infringing on it, or opting out from it.

In conclusion, the nature and norms of international law, a decentralized order which is focused on states and safeguards their sovereignty, are in constant evolution and should accordingly be continuously evaluated. In a world which is changing in the face of globalization, the rise of international terror, and the evolution of the international norms underlying its order, the Islamic State presented itself as a unique challenge to the Westphalian character of the international system.

Nevertheless, the fall of the Caliphate demonstrates that the Islamic State was still far from actually affecting the resilient international Westphalian character of international law. In other words, the failure of the project demonstrates the resilience of the principle of sovereignty, the level of commitment of the international community to it, and that the state-centered system stands strong, notwithstanding the existence of other models for sociopolitical association. As for the faith of the Islamic State, it remains to be seen if and how this challenge might persist, evolve, or be eradicated.