Comment

Beginning with the present issue, the ZaöRV/HJIL introduces a new feature, which will hopefully become permanent in the future. The "Comment" has the ambition to be a forum of critical engagement with the public debates of our times, by showcasing ideas generated by academics and researchers socialized within the broader cultural environment of the Institute for Comparative Public Law and International Law in Heidelberg. The Comments do not necessarily arise out of specific projects, but express the ideas, proposals, perceptions and worldviews of their authors. Legal scholars have the social responsibility to get involved in the "big questions" affecting the contemporary world, to frame the debates with their own means and methods, to rationalize controversial issues, to discover "blind spots", and to propose solutions.

The Comments are to be attributed exclusively to the authors, and not to the Institute, to the Journal, or to the Editorial Board.

A Westphalia for the Islamic World?

I. The Westphalia Project

Can the colossal forces unleashed by the violence that has engulfed the Islamic world be tamed by an all-inclusive international congress? In my opinion, the answer is a conditional "no". Whereas concerted diplomatic efforts are an indispensable part of any pacification process, a General Congress for the Middle East (or the Islamic world) would have few chances to succeed, and, if materialized, it would probably lead to a setback for the liberal international order. However, prominent scholars in the field of history and international relations have expressed support for such an idea.

Patrick Milton, *Michael Axworthy*, and *Brendan Simms*, historians from the University of Cambridge, in cooperation with the Körber Foundation, and decision-makers from Europe and the Middle East, including the then-Minister of Foreign Affairs *Frank-Walter Steinmeier*, raised this question in

2016.[1] The Westphalia project focuses on the analogy between the current state of affairs in the Middle East and the developments and processes that put an end to the Thirty-Years War through the Treaties of Münster and Osnabrück in 1648.[2]

The Westphalia project strikes a positive tone on the possibility of peace, based on some similarities of the features of the two conflicts (confessionalism and sectarianism, Great Power competition, participation of violent non-state actors, need of new constitutional arrangements). An all-inclusive congress would offer the opportunity for a new model of governance in the Middle East. From the complexity of the conflicts, a new synthesis could be achieved, creating a regional system of peace. These arguments should be taken seriously, in particular when the authors argue that the agreement should "be reached by the regional actors themselves, before it is guaranteed internationally".[3]

The study of history offers a privileged observation post. If time is the "moving image of eternity" (*Plato*),[4] then the interpretation of the past can be constitutive for present meanings and future actions – so would be the argument. The chronopolitics of the proposal,[5] however, and the flight to the distant past in search of an "old, good Congress" is also the signal of a certain resignation on the current and future prospects of pacification in the region. In history, we know how the story ends, and in the case of Westphalia, it was, more or less, a "happy end".

Arguably, the timing of this proposal appears good: From Afghanistan to Algeria, and from Libya to Syria, Yemen, and Sudan, a third wave of change is coming, but still with indefinite contours. Whilst the previous two waves were relatively homogeneous ("war on terror and regime change", "Arab Spring"), this time it is different. There is no clear path for the direction of events, but there exists a widespread sense of fatigue for the incessant wars across the region. The picture becomes much more ambivalent, though, if we consider the perennial Israeli-Palestinian conflict, the Russian involvement in Syria, the strategic conflict between Saudi Arabia and Iran, and the

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[1] For the project and its results, see *P. Milton/M. Axworthy/B. Simms*, Towards a Westphalia for the Middle East, 2018. See also the cautious views of *F.-W. Steinmeier*, Der Westfälische Frieden als Denkmodell für den Mittleren Osten, available at <https://www.auswaertiges-amt.de>.

[2] See also *H. Münkler*, Der Dreißigjährige Krieg – Europäische Katastrophe, Deutsches Trauma 1618-1648, 2017, 817 et seq.

[3] *P. Milton/M. Axworthy/B. Simms* (note 1), 110 et seq.

[4] *Timaios 37d*: εικώ δ'επενόει κινητόν τινα αιώνος ποιήσαι [...] τούτον ον δη χρόνον ωνομάκαμεν, in: G. Eigler (ed.), Platon Werke, Vol. 7, WGB, 7th ed. 2016, 52 et seq.

[5] On the term see *C. Clark*, Time and Power, 2019, 14 et seq.

recurring dramas in the US-Iran-Israel triangle. These conflicts are here to stay, at least for now.

The timing for the restoration of peace across the Islamic world is neither good nor bad; the conflicts evolve and there is always a necessity to manage them through the tools of diplomacy, unless the tide turns decisively in favor of one side and against the other(s). Diplomacy is necessary even to manage the orderly defeat; the 1973 Paris Agreement on Vietnam and the 1988 Geneva Agreements on Afghanistan are notable examples. The shadow of these agreements is looming large over the Doha negotiations between the United States and the Taliban.

A Peace Congress for the Middle East (or the Islamic world) stage-managed by *Putin*, *Trump*, *Erdogan*, the Saudi monarchy, and the Iranian ayatollahs would either fail, or lead to an autocratic and unstable regional order. Such a process would not guarantee peace through self-determination, democracy and the rule of law, but can be expected to create, at the most, a system of satellite States, dependent territories, and spheres of influence. It is highly unlikely that the above Powers would facilitate agreements between the parties to the conflict without securing, in the first place, their own geopolitical interests. The long-awaited United States plan for the settlement of the Palestinian issue exemplifies this dilemma: even though it has not yet been announced (or finalized), reservations and mistrust as to its aims and fairness are justified, considering the US policies in the region since 2017.

We can speculate on whether a general Peace Congress might succeed in a different geopolitical context. This cannot be excluded, but, for the time being, it does not seem probable. Moreover, there are deeper socio-structural reasons that would complicate such efforts. A systemic comparison between the conditions that enabled the Westphalian peace and the current circumstances in the Islamic world can elucidate the problems facing a peace process of large format.

II. The Function

There are profound differences between the two conflicts with regard to their societal function. The Thirty-Years War created the conditions for the relative stabilization of Europe and for the creation of the modern system of international relations. The power relations in Europe remained largely unsettled following the discovery of the New World, the circumnavigation around the globe, and the emergence of the European Empires. In the phase

of transition from the medieval world to modernity, the co-existence of a variety of territorial entities in the geographic middle of Europe, which were governed under the constitutional rules of the Holy Roman Empire, had created an instability that reached a peak as a consequence of the Reformation and the Great Power competition.

The Westphalian process was successful, because the social-structural conditions of the 17th century and the protestant "spirit of capitalism"[6] had created strong constituencies in the Empire including the "peace party", based initially on the evangelical rulers of Northern Germany, which played a major role during the negotiations.[7] These constituencies had much to win from modernity, and everything to lose from the continuation of a catastrophic conflict and a return to the medieval times. The complex process of functional differentiation, modernization and state-building, had already started. The Treaties of Münster and Osnabrück facilitated forms of governance suitable for the modern world.

In contrast, the wars of the 21st century in the Middle East and the Islamic world cement the core/periphery distinction in world society, and accelerate the collapse of the periphery's outer regions towards the sphere of systemic exclusion. The difficulties of the Islamic world to adapt successfully to modernity have been discussed extensively by scholars from a variety of perspectives.[8] The push towards exclusion is generated by the failure of the "routine operations" of function systems locally or regionally, and as a result, individuals are progressively excluded from participating into their activities.[9] Law, economy, education, and mass media, among others, are losing the capacity to function autonomously, and their resources are instrumentalized by the political, military, terrorist, or religious systems;[10] in addition, their codes are increasingly becoming less relevant, a phenomenon

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[6] *M. Weber*, Die protestantische Ethik und der Geist des Kapitalismus, ed. by D. Kaesler, 2004.

[7] *F. Dickmann*, Der Westfälische Frieden, 6th ed. 1972, 424 et seq.

[8] On the complexities of the path of the Arab peoples to modernity, see Arab Human Development Report 2002, *A. Hourani/P. Khouri/M. Wilson* (eds.), The Modern Middle East: A Reader, 2nd ed. 2004; on exclusion, *S. Stetter*, World Society and the Middle East – Reconstructions in Regional Politics, 2008, 105 et seq.; on functional differentiation and Islamic law, *T. Kuran*, The Long Divergence – How Islamic Law Held Back the Middle East, 2011, *passim*; on functional differentiation and the exclusion/inclusion code as meta-difference on a regional basis, but not specifically on the Islamic world, see *N. Luhmann*, Die Gesellschaft der Gesellschaft, 1997, 632.

[9] *N. Luhmann* (note 8), 632 et seq.

[10] On the instrumentalization of the "rest" social systems by the war system, see *B. Kuchler*, Kriege – Eine Gesellschaftstheorie gewaltsamer Konflikte, 2013, 189 et seq. (237 et seq.).

characterized as "allopoiesis".[11] This dynamic leads to the deterioration of the region's comparative position in the international political and economic system, and the downward spiral pulls it further apart.

As the Islamic world fell behind, the forces of "resistance" against modernity created a self-destructive dynamic pulling the periphery of world society further apart, whereas *raison d'état* and balance of power, other than in the Thirty-Years War,[12] have failed to guide the actions of the parties. To take only the example of Syria: According to written evidence submitted to the House of Commons in the context of the United Kingdom policy on Syria inquiry of 2015, more than seventy armed groups and militias, depending on the calculation, had been operating on Syrian territory at the time, in addition to the regular Syrian armed forces.[13]

These groups were interlinked in various ways, and subdivided in pro-regime and opposition forces with very different objectives and various degrees of autonomy and interdependence with each other and outside powers. If we were to assess the number of insurgent groups, including jihadist, nationalist, sectarian, ethnic and tribal groups operating from Afghanistan to Nigeria (or even from Afghanistan to Libya), the complexity would practically rise into the infinite.

The excessive number of insurgent groups, their multiple links with foreign powers, and the absence of legitimate authority in Syria, demonstrate the disintegration of the idea of the "general interest", and thus the disappearance of the basic conditions for the *raison d'état*. Moreover, the parties to the conflict, including the government, do not seem to care about preserving a country capable of serving the interests of its people and enhancing its international reputation, as the *raison d'état* would require. The regional and global powers involved care even less about the creation of a system of balance of power. The totalizing nature of the conflict has so far obstructed a constitutional compromise leading to a new statehood.

It is therefore hard to see how the Westphalian model would be transposed to the Islamic world. A general Peace Congress would be obviously necessary in case of an inter-state war in the Middle East, which will hopefully not occur.

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[11] See *M. Neves*, From the Autopoiesis to the Allopoiesis of Law, J. L. & Soc. 28 (2001), 242 et seq.

[12] *J. Wollenberg*, Richelieu et le système européen de sécurité collective. La bibliothèque du Cardinal comme centre intellectuel d' une nouvelle politique, Dix-septième siècle, Vol. 210, No. 1, 2001, 99 et seq.; *H. Kissinger*, Diplomacy, 1994, 56 et seq.

[13] Written evidence by *Aymenn Jawad Al-Tamimi*, 29.10.2015 (SYR0005), available at <https://www.parliament.uk>. It should be considered that at least thirteen of these groups were linked to the Syrian armed forces.

III. The Space

The character of a peace process depends also on the structure of the space within which the conflict is taking place. At this point, the two conflicts also differ from each other. The authors of the Westphalia project run into difficulties already by the definition of the space within which the Westphalia model would be relevant. They stress, for instance, that

> "one of the chief lessons that we established early on was that, as had been the case in early seventeenth-century Europe, the range of conflicts and grievances in the Middle East now is too complex and interwoven to be successfully solved with piecemeal negotiations aimed at addressing individual territorial parts of the broader regional crisis".[14]

However, the limitation of their proposal in the space in Middle East, leaving Afghanistan, Pakistan,[15] Somalia, Palestine, and Sub-Saharan Africa (Mali, Nigeria) outside of their focus is a major issue.

Their dilemma is clear. If they apply their concept in the space of the Islamic world as a whole, the prohibitive complexity catches the eye immediately. If they restrict the space in the Middle East with Syria as a paradigm, their project may sound more plausible, but they contradict their core point, namely that a comprehensive solution should be sought. Furthermore, the current conflicts are carried out on a global scale.

The Thirty-Years War was fought in the then well-circumscribed European space. All powers, territories, and groups concerned belonged to the Western Christianity, encompassing not only the Holy Roman Empire, but also the other major Catholic and Protestant powers that were directly or indirectly involved.[16] Russia was not capable or willing to get involved in the Thirty-Years War, because, following the collapse of the Russian State in the period of "Troubles" after the death of the Emperor *Boris Godunov* in 1605, the new Emperor *Mikhail Fyodorovich*, the first of the *Romanovs* (reigned 1613-1645), concentrated his efforts in rebuilding the State.[17] The Ottoman Empire was under the pressure of the Safavids of Persia, and re-

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[14] *P. Milton/M. Axworthy/B. Simms* (note 1), 110 et seq.

[15] Afghanistan and Pakistan are merely mentioned as space of interest for Iran, see *P. Milton/M. Axworthy/B. Simms* (note 1), 118.

[16] On the related concept of the *res publica christiana*, see *A. Adam*, Res Publica Christiana? Die Idee des Christentums für die Idee "Europa", in: H. Behr/M. Hildebrandt (eds.), Politik und Religion in der Europäischen Union, 2006, 23 et seq. (25 et seq.).

[17] On this period, see *M. Hildermeier*, Geschichte Russlands vom Mittelalter bis zur Oktoberrevolution, 3rd ed. 2016, 281 et seq.

sumed its offensive against the Reich in the 1660s, having played no active role during the Thirty-Years War.[18]

Thus, the war devastated Germany, but did not evolve into a global conflict that could have also engulfed the Ottoman and the Russian-Orthodox spaces. Despite its endurance, it remained territorially limited in a relatively homogenous geopolitical space and proved ultimately to be manageable, due in particular to the development of common cultural practices in the spheres of diplomacy, communication, and public space (*Öffentlichkeit*).[19]

The contemporary conflicts in the Islamic world have a regional and a global dimension. Practically all major powers, inside and outside the region, have stakes in their outcome, and a multitude of violent state and non-state actors, such as terrorist and sectarian groups, insurgents, and tribal armies are directly participating in them. Major powers outside the Islamic world share little or no common heritage with the parties to the conflicts, and have often difficulties to understand their objectives and "theological" motivations.

Equally important is the role of violent non-state actors. Whilst during the Thirty-Years War the marauders were by-products of the conflict and the mercenaries aspired to participate in the existing order,[20] in our time violent Islamist groups are among the main players and have built networks of global reach with the ambition to create a new dystopian "order" of a non-defined character.

As a conclusion, both function and space exhibit very different features in the Thirty-Years War in comparison to the current conflicts. These differences explain why the chances of a successful Peace Congress are very limited in our time.

IV. Self-Determination as the Leading Principle

The third element of the discussion marks a different point of departure. The primary issue is now not the process itself, but a prerequisite: a leading principle defining the peace order. This may sound counter-intuitive, but it

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[18] *I. Hiller*, Feind im Frieden – Die Rolle des Osmanischen Reiches in der europäischen Politik zur Zeit des Westfälischen Friedens, in: H. Duchhardt (ed.), Der Westfälische Friede – Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte, 1998, 394 et seq.; *K. Malettke*, Hegemonie – Multipolares System – Gleichgewicht, Internationale Beziehungen 1648/1659 – 1713/1714, 2012, 199, 337.

[19] On these themes, see *K. Repgen*, Dreißigjähriger Krieg und Westfälischer Friede – Studien und Quellen, 1998, *passim*.

[20] See *H. Münkler* (note 2), 843.

is not, because such a principle reduces the limitless complexity of an indefinite horizon of negotiation possibilities and potentialities. Those who effectively determine the leading principle control the format of the process, those who control the format of the process define the class of participants, and those who define the class of participants exercise "overall control" over the outcome. There is no escape from that truth.

The leading principle may be drawn from an "authoritarian sovereigntism" imposed by the original dictatorial and arbitrary violence, establishing an order of fear; a governance arising from such a constellation contradicts the values of the international community, but, still, it is a real possibility. Or, the principle may be self-determination in a broad legal-political sense, whose exercise may lead to a free and decent, albeit not necessarily liberal, society.[21] Self-determination in its three forms, political, economic, and cultural, is the leading principle for the construction of legitimate order. This principle facilitates stable order within States and within world society, and is sufficiently flexible to permit a variety of forms of political and market participation.

Self-determination has a Janus-like face: it is exercised within a certain State or territory as an "original decision", but is limited by, and materialized through, the links the people are establishing with other actors and institutions of the international community. The exercise of self-determination is not an act of self-referentiality, but a communicative act of integration within a broader system. If peace is to be achieved in the Islamic world, this has to be done via the exercise of the right of self-determination within the individual States and the adoption of a fundamental charter that would provide for the integration of each State in the global political and economic systems, and in a regional system of peace.

There is nothing mystifying in it. People yearn for the opportunity of rebuilding their lives within a decent legal order that provides them with the freedom to connect with others and engage in a variety of activities of an economic or non-economic order, even if the constitutional system is not liberal in the sense of the Western political tradition.

By the exercise of self-determination, the principle of inclusiveness should come into application. Not only the groups competing for power should participate, but also regional and world powers prepared to contribute genuinely in the resolution of the conflict. Moreover, the rights of women and minorities should be guaranteed. Inclusiveness in the context of self-determination is compatible with both, the exclusion of the most violent terrorist organizations and militias, and the participation of international

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[21] See *J. Rawls*, The Law of Peoples, 1999, 59 et seq.

civil society actors. The former should be excluded, as long as they do not accept the basic philosophy and constitutional basis of a "decent society". The latter should be included, as far as they have been part of the struggle to preserve the freedoms of the people during armed conflict, and are committed to offer support in the future, as well.

V. What Should Be Done?

Democratic States should recognize that their capacities to introduce fair solutions, reforms, and democracy in the Islamic world are limited. 2019 marks the fortieth anniversary of the birth of the contemporary Islamist fundamentalist movements. The victory of the Iranian revolution and the Soviet invasion in Afghanistan, both in 1979, created the bases for the awakening of the Shia and Sunni fundamentalism respectively. The end of the Cold War ten years later created conditions conducive to the global reach of the fundamentalist message and for the destabilization of statehood in large parts of the Islamic world.

The restoration of peace is a complex societal process presupposing, at least, that moderate groups or governments would prevail and implement a Contract with their peoples and with the international community. Neither autocracies, nor Potemkin villages of impotent "recognized authorities", nor the grandstanding of a "new Westphalia" offer meaningful solutions.

Europe, a region deeply affected by the crises in the Islamic world (terrorism, mass migration), should fully employ proactively its vast diplomatic experience to devise an effective policy by identifying, co-opting, and empowering groups with some degree of real popular support that commit themselves to reform. The task is difficult, but not impossible.

This commitment should have four aspects. First, such groups or governments should be given the necessary support to restore order, exercise control over the capital and define the fundamentals of a future polity. Second, they should accept the idea of constitutional negotiations and arrangements, that would include both liberal and conservative groups, subscribe to the principle of coalition governments during the initial phases of "new statehood", to political pluralism and the rule of law, even if a truly democratic government would not be possible in the short-term. These are also the broad principles of the *lex pacificatoria* that the United Nations have been following since the end of the Cold War.[22] Third, they should

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[22] See *C. Bell*, On the Law of Peace – Peace Agreements and the Lex Pacificatoria, 2008.

introduce a social market economy, integrated in the world economic system that would create the basic infrastructure of a welfare State that would support the process of reconstruction. Fourth they should follow a path towards some form of secularism.

These conditions describe the promise of "decent statehood", because they realize, at least in part, the aspiration of political and economic self-determination. Reconstruction should involve measures for the protection of State borders, institution-building, and economic integration, preferably through the creation, in the long-term, of free-trade areas with developed economies.

Of particular significance is the right of cultural development of the peoples of the newly pacified States and territories, which is an area where a fruitful cooperation with Europe can be developed. The Islamic world has produced great thinkers, such as *Averroes* (*Ibn Rushd*) in Moslem Spain of the 12th century, who, as judge, legal scholar and philosopher successfully combined Aristotelian rationalism with the teachings of Islam. His rediscovery could open new frontiers to the cultural debates of our time.[23]

Europe should avoid the temptation of simplistic solutions, as it did in the catastrophic war in Libya, but should continue its involvement through the smart and targeted use of its diplomatic, economic and military-technological resources in order to preserve peace in its neighborhood. The main objective would be to protect and empower reformist forces that can resist both terrorist violence, and the threats and pressures of external potentates.

Achilles Skordas

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[23] *C. L. Clark*, Aristotle and Averroes: The Influences of Aristotle's Arabic Commentator upon Western European and Arabic Rhetoric, The Review of Communication 7 (2007), 369 et seq.