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Failed States, or the State as Failure?

Rosa Ehrenreich Brooks†

This Article seeks to challenge a basic assumption of international law and policy, arguing that the existing state-based international legal framework stands in the way of developing effective responses to state failure. It offers an alternative theoretical framework designed to spark debate about better legal and policy responses to failed states. Although the Article uses failed states as a lens to focus its arguments, it also has broad implications for how we think about sovereignty, the evolving global order, and the place of states within it.

State failure causes a wide range of humanitarian, legal, and security problems. Unsurprisingly, given the state-centric international legal system, responses to state failure tend to focus on restoring "failed" states to the status of "successful" states, through a range of short- and long-term "nation building" efforts. This Article suggests that this is a misguided approach, which in some cases may do as much harm as good.

In large part, this is because most "failed" states were never "successful" states. Indeed, the state itself is a recent and historically contingent development, as is an international legal system premised on state sovereignty. What's more, both states and the state-centric international system have poor track records in creating stability or democratic accountability.

This Article explores the implications of this for approaches to failed states. It concludes that although the existing state system is likely to survive for some time to come, despite the challenges of globalization, not all states will or should survive in their current form. The populations of many failed states might benefit more from living indefinitely in a "nonstate" society than in a dysfunctional state, artificially sustained by international efforts.

Long-term "nonstate" arrangements could range from international trusteeships to affiliations with willing third-party states to special status within regional bodies, and alternative accountability

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† Associate Professor of Law, University of Virginia School of Law. This Article has benefited greatly from comments made by workshop participants at the University of Virginia School of Law, Boalt Hall School of Law, the Georgetown University Law Center, and Vanderbilt University Law School, and it would not exist at all had it not been for the initial suggestions from participants in the 3rd Junior International Law Scholars' Roundtable, who convinced me that this is a conversation worth starting. Many people offered wise comments on early drafts, and had I always taken their advice this Article would likely be much better. I am particularly grateful to William Aceves, Allison Danner, Laura Dickinson, Greg Fox, Larry Helfer, John Harrison, Paul Kahn, Judith Kelley, David Luban, Beth Simmons, Paul Stephan, Jane Stromseth, Carlos Vazquez, Robin West, David Wippman, and Tim Wu. Kevin Donohue provided outstanding research assistance.

mechanisms could be developed to overcome democratic deficits associated with the lack of formal legal statehood as currently understood by international law.

INTRODUCTION: FAILED STATES

In the fifteen years since the end of the Cold War, the international community—and the community of international lawyers—has become increasingly preoccupied with the phenomenon usually dubbed "state failure."[1] Definitions of the failed state vary, but, unsurprisingly, most commentators define failed states in opposition to the successful states that are presumed to be the norm.[2] Successful states control defined territories and populations, conduct diplomatic relations with other states, monopolize legitimate violence within their territories, and succeed in providing adequate social goods to their populations.[3] Failed states, their dark mirror image, lose control over the means of violence, and cannot create peace or stability for their populations or control their territories. They cannot ensure economic growth or any reasonable distribution of social goods.[4] They are often characterized by massive economic inequities, warlordism, and violent

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1 See, for example, Stuart E. Eizenstat, John Edward Porter, and Jeremy M. Weinstein, *Rebuilding Weak States*, Foreign Aff 134 (Jan–Feb 2005) (discussing how to limit threats to America by rebuilding failed nation-states); J.L. Holzgrefe and Robert O. Keohane, eds, *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge 2003) (analyzing humanitarian intervention in the context of state failure); Henry H. Perritt, Jr., *Structures and Standards for Political Trusteeship*, 8 UCLA J Intl L & Foreign Aff 385 (2003) (proposing a political framework based on trusteeship as a model for international intervention in failed states); Karen Musalo, Jennifer Moore, and Richard A. Boswell, *Refugee Law and Policy* 985–88 (Carolina Academic 1997) (defining failed states as "states which are incapable of protecting individuals within their territories").

2 The term "failed state" is only about a decade old, coming to prominence with the publicatio ➡ Gerald B. Helman and Steven R. Ratner's article, *Saving Failed States*, 89 Foreign Policy 3 (Winter 1992–93) (describing the "failed nation-state" as "utterly incapable of sustaining itself as a member of the international community"). Helman and Ratner's definition has gained widespread acceptance. See Ralph Wilde, *The Skewed Responsibility Narrative of the "Failed States" Concept*, 9 ILSA J Intl & Comp L 425, 425 (2003).

3 The concept of "the state" is complex and controversial in and of itself, and scholars have long sought to distinguish between varieties of states and varieties of sovereignty. For the classic legal definition of statehood, see the Montevideo Convention: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." Convention on Rights and Duties of States Art 1, 49 Stat 3097, 3100, 165 LNTS 19, 25 (1933). For classic functional definitions of statehood, see, for example, Max Weber, *Essays in Sociology* 77, 78 (Oxford 1946) (H.H. Gerth and C. Wright Mills, eds and trans) ("[The] state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force within a given territory*.").

4 See Robert I. Rotberg, *The New Nature of Nation-State Failure*, 25 Wash Q 85, 85–87 (Summer 2002) ("Nation-states fail because they can no longer deliver positive political goods [security, education, health services, economic opportunity, environmental surveillance, legal framework of order and a judicial system to administer it, and fundamental infrastructure requirements] to their people.").

competition for resources.[5] Recent examples of failed states are familiar to us all, from the total collapse of state institutions in Somalia[6] and the disintegration of the former Yugoslavia[7] to the varied crises in Rwanda,[8] Haiti,[9] Liberia,[10] Congo,[11] Sierra Leone,[12] and Afghanistan.[13] One notch up the food chain from failed states are the numerous "weak" or "failing" states,[14] which together constitute much of sub-Saharan Africa,[15] significant chunks of central Asia, and parts of Latin America and south Asia. These "weak" states are tremendously varied, and may in some cases combine fragile governance structures with substantial regional influence and wealth—consider Indonesia, Pakistan, and Colombia—but they all teeter in common on the precipice, at seemingly perpetual risk of collapse into devastating civil war or simple anarchy.[16]

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5 See Eizenstat, Porter, and Weinstein, *Rebuilding Weak States*, Foreign Aff at 136 (cited in note 1) (noting that failed states do not provide security, basic services, or "essential civil freedoms"); African Studies Center, Transnational Institute, Coimbra University Center of Social Studies, and Peace Research Center-CIP-FUHEM, *Failed and Collapsed States in the International System* 4 (Dec 2003), online at http://www.tni.org/reports/failedstates.pdf (visited Sept 18, 2005) (stating that the government of a failed state is "unable to uphold an effective monopoly of violence" over its territory); Daniel Thurer, *The "Failed State" and International Law*, 81 Intl Rev Red Cross 731, 733–36 (1999) (describing political, historical, and sociological dimensions of failed stat➡ Helman and Ratner, 89 Foreign Policy at 4–5 (cited in note 2) (describing how Somalia, Sudan, and Zaire suffered after their governments collapsed).

6 For further background on state failure in Somalia, see, for example, Eric Schmitt, *Somalia's First Lesson for Military Is Caution*, NY Times 10 (Mar 5, 1995).

7 For further background on state failure in the former Yugoslavia, see, for example, Michael T. Kaufman, *Killings Shaped Serbia and Also Roiled Europe*, NY Times A10 (Mar 13, 2003).

8 For further background on state failure in Rwanda, see, for example, Barbara Crossette, *Inquiry Says U.N. Inertia in '94 Worsened Genocide in Rwanda*, NY Times A1 (Dec 17, 1999).

9 For further background on state failure in Haiti, see, for example, Michael Kamber, *A Troubled Haiti Struggles to Gain Its Political Balance*, NY Times 1 (Jan 2, 2005).

10 For further background on state failure in Liberia, see, for example, Somini Sangupta, *Fate of Idle Ex-Fighters Poses Challenge for Liberia*, NY Times A16 (Nov 27, 2003).

11 For further background on state failure in Congo, see, for example, Ian Fisher and Norimitsu Onishi, *Chaos in Congo: A Primer; Many Armies Ravage Rich Land in the 'First World War' of Africa*, NY Times 1 (Feb 6, 2000).

12 For further background on state failure in Sierra Leone, see, for example, Norimitsu Onishi, *Sierra Leone Endures in the Grip of Civil War*, NY Times 8 (Nov 19, 2000).

13 For further background on state failure in Afghanistan, see, for example, Stephen Kinzer, *Break Up Afghanistan? Why Not?* NY Times A15 (Dec 1, 2001).

14 Rotberg, 25 Wash Q at 85 (cited in note 4) ("Only a handful of the world's 191 nation-states can now be categorized as failed, or collapsed, which is the end stage of failure. Several dozen more, however, are weak and serious candidates for failure.").

15 Consider Cote d'Ivoire, Zimbabwe, Burundi, Mozambique, and Angola, to name but a few of the most notorious. See Okechukwu Emeh, *Africa and the Crisis of Instability*, Vanguard (Nigeria) (Mar 30, 2004) (describing the "unfolding failed state" syndrome that threatens to spread from failed African states to their neighbors).

16 See Robert Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century* 16–18 (Atlantic Monthly 2003) (arguing that many states are in danger of reverting to "premodern" states if nonstate actors become too strong).

State failure creates numerous challenges for the international system. Some challenges are humanitarian, as state failure generally is both fueled by and creates overwhelming human need.[17] The poverty, disease, violence, and refugee flows accompanying state failures strain foreign aid budgets and philanthropic resources. Some challenges relate to international security: especially since 9/11, failed states have been recognized as breeding grounds for extremism and staging points for organized terrorist groups.[18] In the absence of effective governmental control, both violence and illicit economic activity flourish,[19] and both terrorist groups and the leaders of rogue states take ready advantage of the prevailing anarchy.

Failed states also pose legal challenges: in an international order premised on state sovereignty and state consent, societies lacking functioning governments create a range of problems.[20] They cannot enter into or abide by treaties; they cannot participate in the increasingly dense network of international trade, environmental, or human rights agreements and institutions; they cannot enforce contracts between their citizens and foreigners or protect settled property interests.[21]

For these reasons and more, failed states have increasingly been viewed as a cause for concern by the international community, and a variety of international responses have been attempted and pro-

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17 See, for example, Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 Stan J Intl L 347, 401 n 239 (1998) ("The concept of the 'failed state' has been linked to the need for the international community to take humanitarian action where a state cannot act effectively to protect fundamental rights.").

18 See, for example, Eizenstat, Porter, and Weinstein, *Rebuilding Weak States*, Foreign Aff at 134 (cited in note 1) ("The gravest danger lies in the weakness of other countries—the kind of weakness that has allowed opium production to skyrocket in Afghanistan, the small arms trade to flourish throughout Central Asia, and al Qaeda to exploit Somalia and Pakistan as staging grounds for attacks."); Jessica Stern, *Terror in the Name of God: Why Religious Militants Kill* 238 (Ecco 2003) ("Americans tend to fixate on enemies that can be fought with military might. We have a much harder time seeing failing states, where terrorists thrive, as a source of danger."); David Held, *Violence, Law and Justice in a Global Age* (Social Science Research Council 2001), online at http://www.ssrc.org/sept11/essays/held.htm (visited Sept 18, 2005) ("Those who are poorest and most vulnerable, locked into geopolitical situations which have neglected their economic and political claims for generations, will always provide fertile ground for terrorist recruiters.").

19 Such activities include narcotics dealing, weapons trade, and human trafficking. See, for example, Saskia Sassen, *Governance Hotspots: Challenges We Must Confront in the Post–September 11 World* (Social Science Research Council 2001), online at http://www.ssrc.org/sept11/essays/sassen.htm (visited Sept 18, 2005) ("As governments become poorer they . . . have little interest in the management of emigration and illegal trafficking of people.").

20 See generally Thurer, 81 Intl Rev Red Cross 731 (cited in note 5) (discussing the problems of applying international law where states have broken down).

21 See id at 745 (discussing the difficulties of applying international humanitarian law against those outside a military chain of command); Rotberg, 25 Wash Q at 87 (cited in note 4) (asserting that failed states' courts cannot protect citizens' rights).

posed.[22] In response to state failure, international actors and institutions, from international and regional organizations to nongovernmental organizations (NGOs) and states, have taken steps to address the immediate humanitarian and security problems characteristic of failed states, through means that range from food aid to the deployment of peacekeeping forces. And these short-term band-aids are inevitably accompanied by longer-term efforts to rebuild damaged state structures. Whether through the provision of technical assistance or through temporary international administration of one sort or another,[23] the international community has sought to reverse state failure by fostering diverse political parties, strengthening constitutional and legal norms relating to good governance, building an independent and effective judiciary, reconstituting a professional military and police service, holding free and fair elections—all, of course, designed ultimately to return the "failed" state to the status of functioning state.[24] Similarly, international aid to weak states is designed to prevent state failure, in large part by shoring up core state structures.

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22 See, for example, *The National Security Strategy of the United States of America* 5–24 (Sept 2002), online at http://www.whitehouse.gov/nsc/nss.pdf (visited Sept 18, 2005) (proposing building strong antiterrorism alliances, engaging in efforts to defuse regional conflicts, opening markets, and promoting democracy); Eizenstat, Porter, and Weinstein, *Rebuilding Weak States*, Foreign Aff at 135 (cited in note 1) (proposing a "four-pronged approach" of crisis prevention, rapid response, centralized American decisionmaking, and international cooperatic → Ratner and Helman, 89 Foreign Policy at 12–18 (cited in note 2) (suggesting United Nations conservatorship over failed states). For a particularly fascinating proposal, consider the recent work of Michael P. Scharf, Paul R. Williams, and James R. Hooper, who have written a series of articles on "earned sovereignty." See, for example, Paul R. Williams, Michael R. Scharf, and James R. Hooper, *Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty*, 31 Denver J Intl L & Policy 349 (2003); James R. Hooper and Paul R. Williams, *Earned Sovereignty: The Political Dimension*, 31 Denver J Intl L & Policy 355 (2003); Michael P. Scharf, *Earned Sovereignty: Judicial Underpinnings*, 31 Denver J Intl L & Policy 373 (2003); Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status*, 31 Denv J Intl L & Policy 387 (2003). The concept of "earned sovereignty" requires a region gradually to prove its worthiness as an independent state, and although the authors propose it as a potential solution to "sovereignty-based conflicts," such as struggles for self-determination on the part of an ethnic minority within an existing state (for example, the Republika Srpska within Bosnia, Northern Ireland within the United Kingdom, etc.), the theoretical paradigm is equally applicable in the context of failed states.

23 Examples of international administration include supervision in Bosnia under the terms of the Dayton Accords. Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, 35 ILM 75 (1996). The role of the UN Interim Administration in Kosovo ("UNMIK") under SC Res 1244, UN SCOR, UN Doc S/Res/1244 (1999), the UN Transitional Administration in East Timor ("UNTAET") under SC Res 1272, UN SCOR, UN Doc S/Res/1272 (1999), and the Coalition Provision Authority in Iraq under SC Res 1483, UN SCOR, UN Doc S/Res/1483 (2003), also come to mind.

24 See generally Rosa Brooks, Jane Stromseth, and David Wippman, *Can Might Make Rights? Building the Rule of Law in the Wake of Military Interventions* (Cambridge forthcoming 2006).

But as any careful reader of newspapers can discern, the international community has not, so far, proven to be particularly adept either at staving off state failure or at reconstituting failed states.[25] The number of failed states attests to the ongoing nature of the phenomenon of state failure, and the still shaky status of once failed states suggests that rebuilding effective state structures is exceptionally difficult. From Bosnia and Sierra Leone to Afghanistan and Iraq (where the collapse of government institutions was, of course, externally induced), efforts to turn failed states into successful states have produced tenuous stability at best.[26]

I. THE FAILED STATE AS METAPHOR FOR THE INTERNATIONAL COMMUNITY

There are many reasons for the international community's poor track record when it comes to turning failed states into successful states. Many of these reasons are complex, and some are usually overlooked by international law scholars and policymakers alike.[27] I will address one of these often overlooked reasons later in this Article, but for the moment, I want to focus on one very straightforward reason for the international community's poor record when it comes to forestalling and remedying state failure. "The international community," as we all know, is a fiction, at least insofar as the term implies a cohesive community of states with the capacity to act in a reliably coordinated and effective fashion.

It goes without saying that the international community is a hodgepodge of actors and institutions, with divergent interests, natures,

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25 See, for example, Minxin Pei and Sara Kasper, *Lessons from the Past: The American Record on Nation Building*, 24 Carnegie Endowment Intl Peace 2 (2003), online at http://www.carnegieendowment.org/pdf/files/Policybrief24.pdf (visited Sept 18, 2005) (recounting only four successes out of the sixteen American attempts at nation-building). See also Rosa Brooks, *The New Imperialism: Violence, Norms and the "Rule of Law,"* 101 Mich L Rev 2275, 2280–82 (2003) (describing a "string of expensive disappointments" in nation-building); see also generally Brooks, Stromseth, and Wippman, *Can Might Make Rights?* (cited in note 24).

26 See, for example, Andrew Higgins, *Could U.N. Fix Iraq? Word from Kosovo Isn't Encouraging*, Wall St J A1 (Aug 2, 2004) (describing United Nations missteps that culminated in riotii Stephen D. Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 29 Intl Sec 85, 99–100 (Fall 2004) (noting that of 124 cases of peacebuilding since World War II, only 43 were successful as measured by the absence of hostilities, and only 35 percent led to peaceful democracies); Sara Terry, *Bosnia No Model of Nation-Building*, Christian Sci Monitor 9 (July 1, 2003) (reporting 49 percent unemployment, low voter turnout, and resurgent nationalism in Bosnia eight years after the arrival of a multinational peacekeeping force).

27 I have written elsewhere about efforts to build the rule of law and about post-conflict reconstruction more generally, emphasizing both the technical complexity of the tasks and the often overlooked norm-creation aspects of post-conflict reconstruction. Brooks, 101 Mich L Rev at 2290–2300 (cited in note 25). See also generally Brooks, Stromseth, and Wippman, *Can Might Make Rights?* (cited in note 24).

and capacities. There are states, to begin with; some of these are powerful and some are weak; some are (relatively) outward-looking while others are (relatively) inward-looking, and many are in between. To point again to the obvious, states differ in territory, population, ideology, culture, and wealth, though as a matter of international law they are united by the shared myth of sovereign equality. States meet for purposes of discussion, joint action, and contestation in numerous overlapping regional and international fora, from the formally constituted (the European Union, NATO, the United Nations, the WTO) to the more informal and ad hoc (the Triad, the G-8).

But states are not the only actors on the world stage. Their influence is simultaneously challenged and extended by an ever wider range of nonstate actors. Some of these are widely viewed as more or less benevolent (Save the Children, Human Rights Watch, Greenpeace), others as fundamentally disruptive (al Qaeda, Hezbollah, the Lord's Resistance Army of Uganda). Still others are more ambivalent in nature: consider for-profit corporate entities, for instance, which may be exceptionally powerful. (Exxon-Mobil's annual revenues exceed those of all but ten or twelve of the world's richest states.[28]) And these are only some of the publicly declared world actors. Illicit regional and global networks, such as weapons smugglers and human traffickers, also abound.[29] What's more, many of these nonstate actors, whether licit or illicit, also have complex (and sometimes nontransparent) links to states.

Little wonder, then, that "the international community" struggles to respond effectively to the challenges posed by failed states. There's no there there[30]—or, anyway, there's very little there there, despite the rhetoric of community. Indeed, from the perspective of an alien observer from another planet, "the international community" of the planet Earth must surely appear like a failed state writ large. The existing international order has proven consistently unable to control the violence of powerful actors (whether states or nonstate entities

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28 See Anthony Giddens, *Runaway World: The Reith Lectures Revisited*, The Director's Lectures (London School of Economics Nov 10, 1999), online at http://www.polity.co.uk/giddens/pdfs/Globalisation.pdf (visited Sept 18, 2005) (arguing that states are still more powerful than massive global corporations, because states control territory, military power, and legal systems).

29 See, for example, Jean-Germain Gros, *Trouble in Paradise: Crime and Collapsed States in the Age of Globalization*, 43 Brit J Criminol 63, 63 (2003) ("[T]he so-called failed or collapsed state is the principal actor in the criminalization of the world economy, while globalization itself is an unwitting but pre-eminent member of the supporting cast.").

30 See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* 5 (Verso 1983) (claiming nationality is an empty concept).

such as terrorist organizations),[31] manage environmental catastrophe such as global warming, remedy astronomically large economic inequities between individuals and societies, constrain the devastating scramble to exploit the Earth's dwindling natural resources, or address crises such as the global AIDS epidemic.[32]

Snapshots of world development present a bleak picture. According to the United Nations Development Programme, an estimated 14,000 people per day become infected with HIV/AIDS, while roughly 30,000 children die each day of preventable diseases.[33] A quarter of the world's population lives in extreme poverty, and the income of the richest 5 percent is 114 times higher than the income of the poorest 5 percent.[34] Even in a world of states, 40 percent of the world's babies are born without official nationality,[35] and eighty-two out of every thousand children born alive die before turning five.[36] A significant percentage of the world's population lives in war zones: during the 1990s, more than a third of the world's countries experienced "serious societal warfare" of one form or another,[37] and one study identified thirty-nine cases of genocide since 1955.[38]

Just as Afghanistan and Iraq are fractured into numerous competing ethnic and religious groups dominated by warlords and other

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31 See Viet D. Dinh, *Nationalism in the Age of Terror*, 56 Fla L Rev 867, 868 (2004) ("The attacks of September 11, and the composition of its perpetrators, should make one lesson crystal clear: nation-states no longer possess a monopoly on warfare or war-like violence.").

32 See J.M. Spectar, *The Olde Order Crumbleth: HIV-Pestilence as a Security Issue and New Thinking About Core Concepts in International Affairs*, 13 Ind Intl & Comp L Rev 481, 482 (2003) (arguing that the spread of HIV forced international communities to rethink "traditional conceptions of national interest, security, and sovereignty").

33 United Nations Development Programme, *Human Development Report 2002: Deepening Democracy in a Fragmented World* 13, online at http://hdr.undp.org/reports/global/2002/en/pdf/chapterone.pdf (visited Sept 18, 2005).

34 Id.

35 UNICEF, *Birth Registration: Right from the Start*, 9 Innocenti Digest 8 (Mar 2002), online at http://www.unicef.at/shop/dbdocs/birthreg.pdf (visited Sept 18, 2005) (describing registration problems as most acute in the poorest states).

36 UNICEF, *State of the World's Children 2004* table 10, online at http://www.unicef.org/sowc04/files/Table10.pdf (visited Sept 18, 2005).

37 Monty G. Marshall and Ted Robert Gurr, *Peace and Conflict 2003* 13–14 (Maryland 2003) (noting that, of the states experiencing serious societal warfare, nearly two-thirds experienced armed conflict for at least seven years in the ten-year period). See also Thomas Hylland Eriksen, *Ethnicity and Nationalism: Anthropological Perspectives* 2 (Pluto 1993) (noting that there were thirty-seven armed conflicts in 1991, most of which involved internal strife between ethnic groups).

38 See Jack A. Goldstone and Jay Ulfelder, *How to Construct Stable Democracies*, 28 Wash Q 9, 11 (Winter 2004) (defining genocides as occurring when governing elites or, in civil war, contending authorities "promoted, executed, granted, or implied consent to sustained policies that intended to destroy, in whole or in part, a communal, political, or politicized ethnic group").

regional powerbrokers,[39] the international order still better resembles a Hobbesian scramble for survival than a coherent system of governance. If there is some sense in which all the world's people constitute a society (and why not insist on that, in this era of globalization and human rights?), it is hard not to conclude that the international community is simply a failed state on a global scale.

II. BUT THAT'S SILLY

The obvious rejoinder to this claim is that it makes no sense at all to think of the international order as a "failed state," since the international order has never been—and has never truly sought to be—a successful state.[40] If we see chaos, poverty, disease, environmental depredation, and enormous unchecked violence around the globe today, this can be attributed to many causes (from original sin to collective action problems, take your pick). But it can hardly be attributed to some sort of state failure—to the collapse of once functioning global governance institutions—since such institutions never existed. By definition, the international order cannot be considered a failed state on a global scale, because there never existed a global state that could fall apart.

But is it so silly to analogize the international order to a failed state? True, there never was a global state that existed, so it seems odd to speak of the international community as a failed state. But much the same could be said of many failed states on the national level. That is, most so-called failed states were never really states in the first place, at least not in anything more than a technical sense. Afghanistan was never a functioning modern state;[41] neither was Congo,[42] nor Sierra

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39 See James C. O'Brien, *Lawyers, Guns, and Money: Warlords and Reconstruction After Iraq*, 11 UC Davis J Intl L & Policy 99, 101–03 (2004) (criticizing the United States for allowing warlords to proliferate in Afghanistan and Iraq since 2001); J. Alexander Thier, Note, *Afghanistan: Minority Rights and Autonomy in a Multi-Ethnic Failed State*, 35 Stan J Intl L 351, 353 (1999) (describing the post-Soviet dissolution of Afghanistan into warring factions).

40 Despite much rhetoric in the interwar and immediate post–World War II period, the politicians who framed the League of Nations and the United Nations stopped very far short of meaningful moves towards world government.

41 See Michael P. Scharf and Paul R. Williams, *Report of the Committee of Experts on Nation Rebuilding in Afghanistan*, 36 New Eng L Rev 709, 711 (2002):

> As a result of the ethnic make-up of Afghanistan, its colonial past, the Soviet occupation, and the evolution of traditional modes of governance, most governance in Afghanistan occurs at the local level, where ethnic and tribal political structures dominate the political bargaining process. In fact, in some areas of Afghanistan central authorities have never exercised any effective control.

42 See generally Robert B. Edgerton, *The Troubled Heart of Africa: A History of the Congo* (St. Martin's 2002) (tracing the history of Congo and observing that the region contained more stable kingdoms and towns with little crime prior to its exploration for trade by the Arabs and Europeans); Adam Hochschild, *King Leopold's Ghost* (Mariner 1999).

Leone,[43] nor Somalia,[44] nor most of the dozens of states that have been characterized in the past decade as failed or failing. With their boundaries often drawn by colonial and imperial powers, these faux states made for tidy maps and possessed seats at the United Nations and had international juridical personalities, but they rarely possessed the attributes of robust states in anything other than a purely formal legal sense.[45]

From their inception, such states rarely exercised anything approaching a monopoly on violence within their territories; to a significant extent, their borders were unmanageably porous, and the reach of government authority often barely extended beyond their capital cities and a handful of other urban centers. Either through incapacity, lack of resources, massive corruption, or all three, most provided basic services (schools, roads, courts, police, and postal service) only sporadically and poorly, and left their populations to fend more or less for themselves. At best, these "states" were, for a time, fragile facsimiles of the nation-states that appeared to thrive in Western Europe and parts of the Americas.[46] During the Cold War, these faux states were propped up by the competing superpowers; with the end of the Cold War, many were revealed as the houses of cards they had been all along.[47] If the "descent" into failed state status requires some prior period as a functioning state, places such as Sierra Leone and Af-

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43 See generally Earl Conteh-Morgan and Mac Dixon-Fyle, *Sierra Leone at the End of the Twentieth Century: History, Politics, and Society* (Peter Lang 1999) (linking the disastrous outcome of Sierra Leone's brief democratic experience to its past history); Mariane C. Ferme, *The Underneath of Things: Violence, History and the Everyday in Sierra Leone* (California 2001).

44 See Peter D. Little, *Somalia: Economy Without State* 2 (Indiana 2003) (arguing that UN and U.S. policy toward Somalia in the 1990s failed in part because the UN and the United States treated Somalia—a nonstate with only local politics—as a state with a central government).

45 There is an enormous theoretical literature on statehood and sovereignty, and I will not attempt to summarize that literature here. See, for example, Stephen D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 Mich J Intl L 1075, 1077–78 (2004) (contending that no unified theory of sovereignty adequately accounts for de facto sovereignty).

46 See, for example, Scharf, 31 Denver J Intl L & Policy at 375–76 (cited in note 22) ("Contrary to the conventional view, since the dawn of the state system 355 years ago with the Peace of Westphalia, very few states have actually possessed full juridical autonomy. Rather, most states in the world might more accurately be characterized as quasi-sovereigns.").

47 See Adrian Hamilton, *The Idea of the Nation State Is Fatally Flawed*, Independent 35 (Aug 18, 2004) ("[T]he deeper truth is that most of these states are failing because they were western constructs in the first place."). See also Helen Stacy, *Relational Sovereignty*, 55 Stan L Rev 2029, 2038 (2003) ("The end of the Cold War not only created more than twenty new states, but also reopened the debate about the meaning of . . . the limits of sovereignty.") (internal quotation marks omitted).

ghanistan can hardly be considered failed states. They never really were states to begin with.[48]

III. THE STATE AS NEWCOMER

We can go further, and say that there is every reason to consider the apparent permanence and ubiquity of the nation-state to be a mirage. Although both international law and popular understandings of international affairs take it for granted that nation-states are (and ought to be, and must be) the building blocks of world order, viewed historically the state (and particularly the nation-state) is a transient and contingent form of social organization.[49] After all, the history of the modern state is a short one—and not a particularly happy one. Since prehistory, groups of human beings have found a very wide range of ways to organize themselves into societies.[50] The world has seen tribes, sects, feudal kingdoms, city-states, and empires, among other modes of social organization. The idea of the territorial state as the locus of authority, within a system of formally equivalent similar states, is of recent vintage.

Although one can point to many precursors of the modern idea of statehood, it was not until 1648, when the Peace of Westphalia ended the Thirty Years War, that the modern international system of sovereign states began to develop.[51] Even after this symbolic starting point, it took centuries of conquest and many more wars before anything truly resembling today's state system took shape. In the three centuries following the Peace of Westphalia, Europe's numerous squab-

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48 See Hamilton, *The Idea of the Nation State*, Independent at 35 (cited in note 47) (stating that to describe these states as failing is "just whistling in the wind").

49 I make no claim to originality here. A vast and influential body of literature has documented this. See, for example, Peter van Ham, *Identity Beyond the State: The Case of the European Union*, Copenhagen Peace Research Institute (June 2000), online at http://www.ciaonet.org/wps/vap01 (visited Sept 18, 2005) ("[I]t does seem rather brazen to claim the singularity of the nation-state and its indispensableness for all meaningful political and cultural development in the light of the nation-state's rather short historical life."); William H. McNeill, *A History of Human Community, Prehistory to Present* (Prentice-Hall 5th ed 1997) (describing poly-ethnicity as the historical norm); E.J. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* 9–10 (Cambridge 1990) ("I do not regard 'nation' as a primary nor as an unchanging social entity. It belongs exclusively to a particular, and historically recent, period. . . . [N]ationalism comes before nations."); Hans Kohn, *The Idea of Nationalism: A Study in Its Origins and Background* (MacMillan 1944).

50 See Charles Tilly, *Epilogue: Now Where?*, in George Steinmetz, ed, *State/Culture: State Formation After the Cultural Turn* 407, 408 (Cornell 1999). See also Ernest Gellner, *Nations and Nationalism* 137 (Cornell 1983).

51 → Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 Am J Intl L 20, 21–24 (1948); Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 Yale J Intl L 1, 9 (1998). But see Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 20 (Princeton 1999) (contending that "[t]he norm of nonintervention in internal affairs had virtually nothing to do with the Peace of Westphalia").

bling principalities (which were linked by complex ties of language, ethnicity, religion, and kinship networks among the aristocracy, and cut through by similar cleavages) underwent a process of consolidation.[52] State consolidation was rarely peaceful: consider the three wars of the German unification,[53] or the bloody excesses of the Italian unification.[54] (It was the carnage of the battle of Solferino that inspired Swiss philanthropist Henri Dunant to form the International Committee for the Red Cross, and led indirectly to the emergence of the modern law of armed conflict.[55])

And the emergence of nation-states in particular was far from a simple or natural development.[56] National identity for the peoples of Europe had to be created, and it was only the nineteenth century that saw this process accelerate.[57] Monuments were built and national anthems composed; regional dialects and various particularisms were stamped out by central authorities, often ruthlessly.[58]

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52 See Anderson, *Imagined Communities* at 113 (cited in note 30):

> The First World War brought the age of high dynasticism to an end. By 1922, Habsburgs, Hohenzollerns, Romanovs and Ottomans were gone. In place of the Congress of Berlin came the League of *Nations*, from which non-Europeans were not excluded. From this time on, the legitimate international norm was the nation-state, so that in the League even the surviving imperial powers came dressed in national costume rather than imperial uniform. After the cataclysm of World War II the nation-state tide reached full flood. By the mid-1970s even the Portuguese Empire had become a thing of the past.

53 See Lewis L. Snyder, *Varieties of Nationalism: A Comparative Study* 90–94 (Dryden 1976) (describing Bismarck's use of nationalism as propaganda).

54 See id at 94–99 (describing how petty princes used nationalism to form a united front despite the fragmentation of the Italian states).

55 See Francois Bugnion, *The International Committee of the Red Cross and the Development of International Humanitarian Law*, 5 Chi J Intl L 191, 191 (2004) ("[T]he International Committee of the Red Cross . . . has been the main driving force behind the development of international humanitarian law for 140 years."); Jeremy Rabkin, *The Politics of the Geneva Conventions: Disturbing Background to the ICC Debate*, 44 Va J Intl L 169, 178 (2003) (noting that the Swiss origins of and headquarters of the Red Cross explain Geneva's pivotal role in modern international diplomacy).

56 See generally Alexander Wendt, *Social Theory of International Politics* (Cambridge 1999).

57 See Anderson, *Imagined Communities* at 4 (cited in note 30) ("[N]ationality, or, as one might prefer to put it in view of that word's multiple significations, nation-ness, as well as nationalism, are cultural artefacts of a particular kind."); Ernest Gellner, *Thought and Change* 168 (Chicago 1964) ("Nationalism is not the awakening of nations to self-consciousness: it invents nations where they do not exist.").

58 See, for example, Eriksen, *Ethnicity and Nationalism* at 104 (cited in note 37) (noting that industrialization and mass education turned "peasants into Frenchmen"); Eugene Weber, *Peasants into Frenchmen: The Modernization of Rural France, 1870–1914* 73 (Stanford 1976) (noting that it was not until World War I that France was able to achieve a common language). A similar narrative can be seen outside of Europe as well. See, for example, Christopher Saunders, *The Making of the South African Past: Major Historians on Race and Class* (Barnes & Noble 1988) (describing the approaches of various historians in analyzing the role of the black majority in the history of South Africa); Leonard Thompson, *The Political Mythology of Apartheid* 230–36 (Yale 1985) (showing how the minority in South Africa gained power over the majority by creat-

Depending on one's theoretical vantage point, one can see the ferocious militarism that characterized Europe until the post–World War II period as a direct result of state expansion and nationalism—or, alternatively, in line with Charles Tilly's famous argument, one can see state formation and nationalism as incidental byproducts of militarism, as warlords required ever more elaborate infrastructural support to fund and sustain their armies.[59] Either way, few scholars would dispute that the history of the state as the dominant form of social organization is a history dripping with blood.[60]

This has been as true in the rest of the world as in Europe. Although empires and kingdoms have long existed around the globe, the modern state largely spread outward from Europe, a byproduct of imperialism and colonial expansion. In the Americas, indigenous populations were small and lacked sophisticated military technologies, and European colonists soon killed or marginalized them; then, drawing on their own political traditions, the colonists quickly replicated the state structures of Europe. Soon enough, the colonists insisted on independence from their parent states, and new states were born, often through violent rebellion.

Meanwhile, in Africa, Asia, and South Asia, where they found indigenous populations more formidable, the European powers (often loosely represented by commercial enterprises acting under state charters, such as the British East India Company) first established nominally independent puppet-states, which they often molded out of far more varied local forms of social organization, such as tribe and city.

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ing the myth of the Afrikaner nationalist movement). See also Paul W. Kahn, *The Question of Sovereignty*, 40 Stan J Intl L 259, 268–69 (2004):

> The story of modern European political evolution is in substantial part a story of the growing autonomy of the sovereign from the Church, but it is wrong to think of that simply as a secularization of the sovereign. Rather, it was a process in which ultimate meanings shifted from the Church to the state—a process of sacralization of the state rather than secularization of authority.

59 See Charles Tilly, *War Making and State Making as Organized Crime*, in Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol, eds, *Bringing the State Back In* 169 (Cambridge 1985) (discussing the place of organized means of violence in the growth and change of government in the nation-states of Western Europe).

60 See Kahn, 40 Stan J Intl L at 263 (cited in note 58):

> The sovereign state emerges out of a bloody past. States are the results of wars fought and won, rather than of some sort of natural truth about the community. Sovereignty is a club of victors. Why is there no sovereignty for Quebec, Catalonia, Scotland, Burgundy, or Provence? Why is there sovereignty for the Democratic Republic of the Congo, the Islamic Republic of Pakistan, and a single Federal Republic of Germany? Each question is answered by a narrative of battles lost or of power successfully asserted.

See also van Ham, *Identity Beyond the State* (cited in note 49) (arguing that after World War II "the nation-state was the main source of hatred and war among European peoples that had to be overcome").

Quickly enough, however, most abandoned the charade of local rule in favor of straightforward colonial regimes. Ultimately, Africa's and Asia's most portable natural resources were depleted, and two world wars made maintaining colonies an expensive luxury.[61]

At the same time (and not coincidentally), emerging global norms of self-determination, nondiscrimination, and human rights made colonial regimes more difficult to justify.[62] As indigenous elites began to demand independence themselves, often through violence here as well, still more states were formed. Their governance structures generally mirrored the internal governance structures bequeathed them by Europe's colonial powers, and their borders notoriously reflected happenstance and inter-European conflicts and compromises rather than any precolonial political or social units.[63]

IV. THE STATE AS FAILURE

The state as we know it today is thus of recent origin. As one commentator notes, the modern state system has not lasted even as

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61 See generally Remo Guidieri, Francesco Pellizzi, and Stanley J. Tambiah, eds, *Ethnicities and Nations: Processes of Interethnic Relations in Latin America, Southeast Asia, and the Pacific* (Rothko Chapel 1988) (studying closely the last phases of the colonial era and the early decades of independence in the third world, when competition between ethnic groups intensified).

62 See Scharf, 31 Denver J Intl L & Policy at 378–79 (cited in note 22):

> The principle of self-determination is included in Articles 1, 55, and 73 of the United Nations Charter. . . . The principle of self-determination was further codified in the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and in the International Covenant on Economic, Social, and Cultural Rights, which together are considered to constitute the international "Bill of Rights." The vast majority of countries of the world are party to the two Covenants, which constitute binding treaty law.

See also Thomas D. Grant, *Between Diversity and Disorder: A Review of Jorri C. Duursma, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood*, 12 Am U J Intl L & Policy 629, 632 (1997) (critiquing the theory that small countries allow the principle of self-determination to flourish without disrupting the organizing structure necessary for international stability); Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 Stan J Intl L 255, 264 (1996) ("The U.N. Charter [art 1, sec 2] initiated the climb in the prestige of self-determination by casting the principle as one of the organization's major purposes.").

63 See Orentlicher, 23 Yale J Intl L at 15 (cited in note 51) ("The postcolonial experience of African states in particular is often cited as empirical support for the ideal of nation-states. In this view, the enduring weakness of some African states is due in large measure to the arbitrariness of the postcolonial states' borders."). See also Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 Harv Intl L J 1, 22–25 (1999) (arguing that the universalization of the European experience has suppressed other histories); Makau wa Mutua, *Putting Humpty Dumpty Together Again: The Dilemmas of the Post-Colonial African State*, 21 Brooklyn J Intl L 505, 526–28 (1995) (arguing that the strategy of imposing post-colonial states in Africa has been harmful and that instead sovereignty should be returned to the smaller pre-colonial communities); Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 Mich J Intl L 1113, 1135–37 (1995) (arguing that the imposition of nation-states on Africa permanently disfigured it).

long as the Roman Empire,[64] and there is little that is "natural" or inevitable about it; states are the product of both a unique history and of multiple conscious choices.[65] For that matter, there is no reason to view the state as a particularly successful or benign mode of social organization. I have already noted that even in Europe, the birthplace of the modern state, the history of the state is a history of repression and war. As states expanded they consumed or trampled on other, weaker social systems; as they vied for dominance they sent millions to be slaughtered on battlefield after battlefield; and as they sought to create unified national cultures they cannibalized their own citizens, a process that reached its terrible apotheosis in the Nazi state's genocidal policies.

This is a story familiar to international lawyers, and a happy ending is usually proffered: the UN Charter, the emergence of human rights law, and various other sovereignty-limiting doctrines.[66] But these new norms and institutions have not ended state predation. Even in Europe, the birthplace of the modern state, "ethnic cleansing" in the former Yugoslavia is only the most recent chapter in the story of state predation. The best that can be said of the state in Europe and the Americas may be that it proved a form of social organization well suited to the era of industrialization,[67] and that its excesses have to some extent been tamed by the UN Charter system on the outside and by robust checks and balances on the inside.

The emergence of the welfare state (loosely understood) is surely an improvement over the predatory state, but it is not clear how much

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64 See van Ham, *Identity Beyond the State* (cited in note 49).

65 See Gellner, *Nations and Nationalism* at 6 (cited in note 50) ("Having a nation is not an inherent attribute of humanity, but it has now come to appear as such. In fact nations, like states, are a contingency, not a universal necessity.").

66 ⇀ Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 Stan L Rev 959, 960–61 (2000):

> Lawyers tend to think (or assume) that, as a rule of international law, sovereignty exercises an influence on national behavior that cannot be captured in instrumental terms. International lawyers are optimistic about the independent efficacy of international law because they give pride of place to the rhetoric of sovereignty in international affairs, and because their empirical investigations tend to focus on behaviors consistent with (rather than contrary to) sovereignty norms.

67 See Gellner, *Nations and Nationalism* at 125 (cited in note 50):

> Nationalism—the principle of homogenous cultural units as the foundations of political life, and of the obligatory cultural units of rules and ruled—is indeed inscribed neither in the nature of things, nor in the hearts of men, nor in the pre-conditions of social life in general, and the contention that it *is* so inscribed is a falsehood which nationalist doctrine has succeeded in presenting as self-evident. But nationalism as a phenomenon, not as a doctrine presented by nationalists, is inherent in a certain set of social conditions; and those conditions, it so happens, are the conditions of our time.

one should make of this.[68] It is a sort of teleological social Darwinism of the most dangerous sort to assume that because the state has emerged as the dominant mode of social organization, it must therefore be inevitable—a "better" and more advanced way to structure societies.

Outside of Europe, the state has hardly been kinder or gentler, and it has certainly been less "successful" as state success is traditionally evaluated. The successful nation-states of Europe spawned imitator states around the globe, and in a few places (including, of course, the United States), this model "took." In many places, it did not. In most places (much of Africa, much of central and south Asia, parts of the Americas), the state was never more than a semifictional overlay of institutions that masked the continuance or development of other more protean forms of social organization. When the Cold War ended, some of these "states" simply reverted, more or less messily and painfully and visibly, into whatever it was that they had always been; in others, new and often even more lethal modes of social organization emerged.[69] To a significant extent, the state in the developing world has offered its citizens all the violence that accompanied European state formation and few of the corresponding benefits.[70] Weak, failing, and failed states are not the exception in many parts of the world. They are the norm, and have been since their inception.[71]

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68 Particularly insofar as many scholars see the emergence of the welfare state as a direct outgrowth of state militarism. See Tilly, *Now Where?* at 417 (cited in note 50).

69 See, for example, Orentlicher, 23 Yale J Intl L at 17 (cited in note 51):

> [I]ntergroup conflict in postcolonial Africa, as in other multiethnic countries beset by conflict, is usually proximately caused by the actions of political leaders who have deliberately fostered and exacerbated intergroup tensions. Indeed, to the extent that blame for "tribalism" in Africa can be laid at the doorstep of former colonial powers, their fault may have less to do with their legacy of "artificial borders" that cage into shared citizenship inherently unsuitable compatriots than with patterns of colonial administration that heightened Africans' awareness of their ethnic identity and fostered interethnic rivalry.

70 See David Welsh, *Domestic Politics and Ethnic Conflict*, in Michael E. Brown, ed, *Ethnic Conflict and International Security* 43, 44 (Princeton 1993):

> A crucial difference between the nation-building of Western Europe and that of Africa and much of Asia was that the processes in Europe occurred well before the rise of popular demands for democratic rights: Nations already existed as relatively cohesive citizenries. In postcolonial Asia and Africa, on the other hand, nation-building was the first task on the agenda of newly independent colonies, which were suddenly endowed with the full panoply of democratic institutions. . . . [D]emocratization and nation-building were to prove antithetical in circumstances of ethnic diversity.

71 See, for example, African Studies Center Report, *Failed and Collapsed States in the International System* at 5 (cited in note 5) ("[Failed states are not a] temporary dysfunction [but a] structural trait. . . . [T]he state building process that was at the heart of the Westphalia legacy currently faces radical counter-dynamics of state break-up and state failure.").

V. SO WHAT?

If this is an accurate account (and the historical and empirical evidence strongly suggests that it is), then the modern state may be a bit of ephemera, a fleeting and historically contingent social experiment that has not worked for long (or at all) in most parts of the globe. And if this is an accurate account, it raises two interrelated sets of initial questions.

A. Is the State Useful?

The first set of questions revolves around the utility, if any, of the state as a form of social organization. What, if anything, is the value of treating the world's many unstable and strife-ridden societies as "failed states," if in fact they never possessed most of the attributes of functioning states in the first place? If the world's trouble spots are "failed states," it follows, logically, that one should try to fix them by rebuilding functioning state institutions. If the world's trouble spots never *were* states, though, it is not wholly obvious that the cure for their problems is to try to make them look as much as possible like states.

Of course, it may be that there is independent value in trying to turn troubled societies into functioning states, regardless of their prior history—but if this is so, it must be because we believe the state to be the only truly effective means of organizing large groups of people in the modern world.[72] As I have already suggested, the state's history is not cause for great confidence. But perhaps one could say of the state what is often said of democracy: that it's the worst system, except for all the others.[73]

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[72] See, for example, Georg Wilhelm Friedrich Hegel, *The Philosophy Of History* 39 (Dover 1956) (J. Sibree, trans) ("The State is the Divine Idea as it exists on Earth."). To a significant extent, most normative defenses of the current international legal order rest on at least a weak version of this assumption, whether or not it is consciously articulated, and so do most current proposals for reforming international approaches to the problem of failed states.

[73] In their influential 1992 article, for instance, Gerald Helman and Steven Ratner proposed some variety of "conservatorships" for failed sta → Helman and Ratner, 89 Foreign Policy at 12 (cited in note 2). Just as a court-appointed conservator might manage the affairs of an incapacitated individual within a domestic legal system, the international legal system might permit some agency or state to manage the affairs of a failed state for the benefit of its populace. Helman and Ratner noted that the idea of conservatorships has a long history. Id at 6. The League of Nations created a "mandate system" after World War I, which placed Germany and Turkey's former possessions under foreign supervision, overseen by the League's Permanent Mandates Commission. After World War II, the mandate system was replaced by the UN Charter's trusteeship provisions, and the remaining mandate systems became UN trusteeships. When the last of the trusteeship territories, Palau, became independent in 1994, the UN Trusteeship Council suspended operations. Although the trusteeship provisions of the UN Charter do not permit the creation of new trusteeships, Helman and Ratner suggested revising the UN Charter

B. Why Not a World State?

If the world's trouble spots never were functioning states, we might ask a second set of questions relating to the international order. Do we learn anything useful if we think about the international order as a failed state on a global scale? The fact that most "failed states" were never truly successful states does not prevent most of us from measuring them against the standards of successful states, as typified by the United States or the prosperous democracies of Western Europe. Is it inevitably frivolous then to measure the international order against the same yardstick, and strive to make it more "state-like"?

Although the notion of "world government" is apt to generate—at best—nostalgic chuckles today, we might recall the not too distant era in which the vision of world government, though utopian, was seen as a normatively attractive vision, and serious political figures (including Roosevelt and Churchill) spoke of it is as something both desir-

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to permit the establishment of new trusteeships in cases of state failure. Id at 17. Helman and Ratner took it for granted, however, that state sovereignty during trusteeship periods would only be in temporary abeyance; they emphasized both that "no state should be the unwilling object of a U.N. trusteeship," id at 16, and that "the purpose of conservatorship is to enable the state to resume responsibility for itself." Id at 17. Thus, "conservatorships should not devolve into long-term custody." Id at 19. In other words, Helman and Ratner take trusteeship as a temporary condition, designed to shepherd a state from "failure" back to "success."

In the thirteen years since the Helman and Ratner article was published, followers of their general approach have tended to share the assumption that "successful" statehood is the desired outcome in "failed" states. Henry Perritt, for instance, recently proposed revising the UN trusteeship system in the wake of recent events in Kosovo, Afghanistan, Iraq, and elsewhere. See generally Perritt, 8 UCLA J Intl L & Foreign Aff 385 (cited in note 1). Perritt, like Helman and Ratner, emphasized that the "legitimacy of a political trusteeship depends on it being temporary and aimed at developing the capacity for independence." Id at 467. Perritt situated his proposal within the "strong tradition within international political and legal history of 'intermediate' or 'transitional' sovereignty," which sees sovereignty as "something that can be grown or expanded and achieved." Id at 434.

The tradition to which he refers is best exemplified in the legal literature by the work of Scharf, Williams, Hooper, and their occasional collaborators. See note 22. Thus, Williams and Francesca Pecci propose that instead of seeing independent sovereignty as an either/or proposition in the short term, the international community should develop solutions to sovereignty-based conflicts that entail "the conditional and progressive devolution of sovereign powers and authority from a state to a substate entity." Paul R. Williams and Francesca Jannotti Pecci, *Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination*, 40 Stan J Intl L 347, 350 (2004). They note that we already see "ad hoc reliance on the approach of earned sovereignty by mediators and parties to conflict," but that "there is scant scholarly commentary as to the precise nature of the approach." Id at 349. But although they emphasize the importance of considering models of "shared sovereignty," "phased sovereignty," "conditional sovereignty" and "constrained sovereignty," they nonetheless assume that less-than-total sovereignty is an inherently temporary state of affairs. The resolution of "final status" is presumed to be necessary, and the presumption is that all entities will either ultimately become fully sovereign or will accept permanent status as a formal subpart of some other fully sovereign entity, though perhaps with some substantial internal autonomy with regard to local affairs. Id at 385–86.

able and eventually attainable.[74] If the state, at least in its platonic ideal form, is the optimal form of social organization, then it is logical to want international structures to mirror the structures found in stable and prosperous states. If the state is the best mode of social organization, it is logical to seek an international order that provides for all humans what a successful nation-state can theoretically provide for its own citizens.

While questions can always be raised about the most efficient level on which various governance decisions should be made,[75] there is no defensible reason for wishing to preserve the socially constructed difference that is used to justify nation-states. The largest modern state today (China) has a population that approaches the size of the entire world's population in 1900.[76] If a modern state can be as large as China (1.3 billion) or India (1.1 billion) and not be automatically suspect because of its scale, why should we not want a global state in which we can all participate and from which we can all benefit?[77] The current system of states is arbitrary and irrational;[78] a world where the Solomon Islands and China are formal equals seems hardly worth preserving—especially when we know that in practice states are very far from being equals, and that the state-centered international legal order serves mainly to preserve the power and privilege of those in successful states at the expense of everyone else.[79]

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74 See, for example, Alexander Wendt, *Why a World State Is Inevitable*, 9 Eur J Intl Rel 491, 517 (2003) (calling "all stages short of the world state . . . unstable" and postulating the inevitability of a world government); Snyder, *Varieties of Nationalism* at 251 (cited in note 53) (attributing calls for world government to Plato, Grotius, and Bertrand Russell).

75 → John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 Am J Intl L 782, 801 (2003) (arguing that sovereignty is better understood as a set of questions about the appropriate level of power at which particular decisions should be made).

76 The world's population in 1900 was 1.6 billion. United Nations, 1 *The Determinants and Consequences of Population Trends* 21 table II.4 (United Nations 1973). The CIA estimates the current population of China at 1.3 billion, India at 1.1 billion, and the United States at 295 million. CIA, *World Factbook: Rank Order–Population*, online at http://www.cia.gov/cia/publications/factbook/rankorder/2119rank.html (visited Sept 18, 2005).

77 Anne-Marie Slaughter argues that "world government is both infeasible and undesirable. The size and scope of such a government presents an unavoidable and dangerous threat to individual liberty." Anne-Marie Slaughter, *A New World Order* 8 (Princeton 2004). While I tend to think that the issue is moot, since I see no particular likelihood of a world government emerging regardless of any effort to promote one, it's worth noting that the constitutional framers would presumably have said the same of 300 million people, as the United States now is.

78 See John Meyer, *The Changing Cultural Content of the Nation-State: A World Society Perspective*, in Steinmetz, ed, *State/Culture* 123, 126 (cited in note 50) ("All sorts of unlikely populations and areas are now at least nominally organized as nation-states.").

79 See generally Judith Goldstein, et al, *Introduction: Legalization and World Politics*, in Judith Goldstein, et al, eds, *Legalization and World Politics* 1, 7 (MIT 2001) (explaining legalization as a set of rules that emanate from dominant powers and represent their interests). But see Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 Ethics & Intl Aff 1, 4 (2004), online at http://www.carnegiecouncil.org/media/5052_Cohenforweb.pdf (visited Sept 18,

If, despite its flaws, the state is the best form of social organization we've got, it is also logical to sympathize with the transparently normative goals of traditional international law scholarship,[80] which tended to assume that more international law is always better than less, and that international structures capable of limiting and transcending state power (through coercion if necessary) are generally good.[81] Traditional international law scholarship thus was dominated by questions about the degree to which international legal structures were or were not like the structures of effective states on the domestic level, often taking the form of questions about whether international law is or could become "hard law," with adequate coercive mechanisms to induce state compliance.[82]

VI. ALTERNATIVES TO THE STATE SYSTEM

Whether the state is the best deal humans can come up with is a question that is both empirical and theoretical. Increasingly, it is a question that has attracted serious and renewed scholarly attention, fueled by the rapid pace of globalization of the last couple of decades.[83] The emerging literature is already too vast to summarize here, but it is worth repeating something that has become, perhaps, so much of a truism that it often obscures analysis: globalization has indeed raised new challenges to the viability of the state.[84] The transborder

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2005) (arguing that a political realist view of international law as only serving the powerful ignores the fact that today there is a great deal of effective international law).

80 → Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 Am J Intl L 205, 206 (1993) (describing a theory that emphasizes the role of international law in shaping state expectations and behavior).

81 → Steven R. Ratner, *International Law: The Trials of Global Norms*, 110 Foreign Policy 65, 78 (Spring 1998) ("Most international lawyers . . . believe that most issues of transnational concern are best addressed through legal frameworks that render the behavior of global actors more predictable and induce compliance from potential or actual violators.").

82 See Slaughter Burley, 87 Am J Intl L at 223 (cited in note 80). See also Ratner, 110 Foreign Policy at 67 (cited in note 81) (discussing a trend in the rise of "soft law" over formal treaties).

83 See, for example, Slaughter, *A New World Order* (cited in note 77); Saskia Sassen, *The Participation of States and Citizens in Global Governance*, 10 Ind J Global Legal Stud 5, 6 (2003) (arguing that the current formation of new authority involves denationalization of the state); Roy Rosenzweig and David Thelen, *The Presence of the Past: Popular Uses of History in American Life* 203 (Columbia 1998) ("The nation-state still has policies and institutions, but it is by no means clear that these provide the most necessary, desirable, creative, or responsible arenas in which people can control their lives or fulfill a civic heritage."); Kenichi Ohmae, *The End of the Nation State: The Rise of Regional Economies* 79 (Free Press 1996) ("[T]he glue holding traditional nation-states together, at least in economic terms, has begun to dissolve.").

84 See, for example, Alice Teichova and Herbert Matis, *Introduction*, in Alice Teichova and Herbert Matis, eds, *Nation, State, and the Economy in History* 1, 7 (Cambridge 2003) ("The nation-state is a historical phenomenon, and as such liable to 'expiry' fostered by the globalisation proces → Stacy, 55 Stan L Rev at 2043 (cited in note 47):

flow of ideas, images, technologies, people, drugs, disease, money, weapons, pollution, and so on makes irrelevant many of the state's traditional capacities; no state today can fully control its borders, run its economy autonomously, or fully shield its citizens from "outside" threats.[85] Regardless of the state's past utility, the processes of globalization raise serious questions about the state's future utility, at least as the state is currently understood.[86]

The discourse about globalization and international law still tends to take the state as a given, however. Thus, the conventional narrative animating much international legal scholarship is that the (recent) forces of globalization are challenging the (age-old) centrality of sovereign states as the sole players on the global stage.[87] This Article has suggested, however, that the sovereign state[88] was never as static, un-

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> What seems to be clear, irrespective of the wide variety of beliefs about globalization as a force for good or evil, is that globalization represents a revolution in historical circumstances; a historical moment equal to the Peace of Westphalia and the creation of scores of nation states in the postcolonial moment.

85 See, for example, Giddens, *Runaway World* (cited in note 28) (observing that the modern world has "new kinds of unpredictability, new kinds of risk, new kinds of uncertainty"); Held, *Violence, Law, and Justice* (cited in note 18) ("Changes in the law of war, human rights law and in other legal domains have placed individuals, governments and non-governmental organizations under new systems of legal regulation—regulation which, in principle, recasts the legal significance of state boundaries."). See also A.T. Kearney, *Measuring Globalization: Who's Up, Who's Down?*, 134 Foreign Policy 60 (Jan–Feb 2003).

86 See Stacy, 55 Stan L Rev at 2030 (cited in note 47) ("Globalization provides the conditions to constitute a third revolution in sovereignty; it is an opportunity to make a choice between a definition of sovereignty as yet stronger declarations of borders and difference, or something crucially different."). See also, for example, Slaughter, *A New World Order* at 12 (cited in note 77) (describing the major shift "from the unitary state to the disaggregated state"); Sassen, 10 Ind J Global Legal Stud at 7 (cited in note 83) (arguing that we are now seeing "a type of authority and state practice that entails a partial denationalizing of what historically had been construed as national"); Ohmae, *The End of the Nation-State* at 140 (cited in note 83) ("In today's borderless world, the lesson for central governments is clear: hold onto economic control too long, and it becomes worthless.").

87 See Russell Menyhart, Note, *Changing Identities and Changing Law: Possibilities for a Global Legal Culture*, 10 Ind J Global Legal Stud 157, 158 (2003) (arguing that the old nation-state system which was thought to be unchallengeable may well be ill suited for a globalized world). See also Cohen, 18 Ethics & Intl Aff at 5–6 (cited in note 79):

> There are two versions of the thesis that a decentered cosmopolitan world order has emerged that renders the discourse of sovereignty irrelevant: one focuses on political institutions and the other on legal developments. Both maintain that a transition has occurred away from the international society of states and international law to a decentered form of global governance and cosmopolitan law. And both cite the individualization of international law, the invocation of *jus cogens*, which signals the obligatory character of key human rights norms based on consensus, not state consent, and the emergence of transnational loci of decision and rule making as evidence for this shift.

88 In any of its meanings. See Remarks of Ambassador Richard N. Haass, *Sovereignty: Existing Rights, Evolving Responsibilities* 2 (Jan 14, 2003), online at http://www.georgetown.edu/sfs/documents/haass_sovereignty_20030114.pdf (visited Sept 18, 2005):

contested, or central as we tend to assume.[89] If we look to a counter-narrative, one that emphasizes the degree to which the vision of an international order made up of sovereign states was *always* a mirage, and the degree to which the state itself was rarely benign,[90] we might equally well ask some rather different questions than those outlined in the previous Part.

A. A Changed International Legal Order?

Here, too, the questions relate both to the nature of the international order and the nature of subinternational social organization. This time, take the international order first, and turn the original question on its head. If we assume that the existence of nation-states reflects historical accident, rather than the inevitable triumph of the most effective form of social organization, why should we care if the international order does not resemble the domestic order in successful nation-states? If the state is in fact a form of social organization that has not worked very well in most places, why would we want to replicate its structures on a global level?

If the state itself is a failure, then instead of trying to make the international order more state-like, and the international legal system more like a domestic legal system (complete, perhaps, with effective executive, legislative, and judicial branches), maybe we should instead be asking questions about whether there is some other form of international ordering that neither relies on fictions of state sovereign equality[91] nor seeks to wholly trump existing subinternational power structures.

Here again, what this might be is beyond this Article's scope. But asking these questions—as some scholars in both international law

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Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and a monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention.

89 See notes 49–58 and accompanying text.

90 See Louis Henkin, *Human Rights and State "Sovereignty"*, 25 Ga J Intl & Comp L 31, 31 (1996) ("'Sovereignty' is a mistake, . . . a mistake built upon mistakes, which has barnacled an unfortunate mythology."). See also Krasner, 29 Intl Sec at 85 (cited in note 26) (arguing that "conventional rules of sovereignty . . . no longer work, and their inadequacies have had deleterious consequences for the strong as well as the wea➞; Goldsmith, 52 Stan L Rev at 960 (cited in note 66) (describing scholars' arguments that "international law principles of sovereignty were never powerful checks on national behavior, and were frequently violated when nations found it in their achievable interests to do so"); Krasner, *Sovereignty* at 7 (cited in note 51) ("Rulers have found that it is in their interest to break the rules.").

91 See text accompanying notes 78–79.

and international relations are beginning to do[92]—might make us think rather differently about various much-debated phenomena. For instance, many international law scholars are increasingly interested in various forms of so-called "soft" law that nonetheless seem to induce substantial compliance from both states and nonstate actors.[93] Much of the time, the debate about international "soft law" centers around the question of whether or not such soft law will "gel" into "hard law," being taken up in treaties between states, for instance, and backed by state-created enforcement mechanisms.[94] But if the state is not a desideratum, perhaps we should not be concerned about whether soft law will gel into hard law. Perhaps we should be willing to embrace a greater pluralism in global legal and institutional structures, rather than measure everything by how closely it approximates "state-like" law.[95]

Similarly, international legal scholars have been preoccupied with the increasing pluralism and diversity of nonstate global actors, from NGOs and corporations to ethnic or religious groups, and the challenges they pose to traditional international law assumptions.[96] In a state-centered legal order, we lack both legal tools and basic concepts for understanding and responding to powerful nonstate actors. But if we stop fetishizing the state, perhaps many phenomena that now often

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92 See, for example, Andrew T. Guzman, *Global Governance and the WTO*, 45 Harv Intl L J 303, 305 (2004) (recommending the expansion of the WTO in a way that would increase the level of international cooperation while taming its trade bi→ Jackson, 97 Am J Intl L at 785 (cited in note 75) (suggesting that the concept and term "sovereignty" be replaced by a pragmatic and empirically based "sovereignty-modern" approach); Wendt, 9 Eur J Intl Rel at 524–25 (cited in note 74) (predicting that the threat of anarchy from the imbalance of power between "Great Powers" and "Small and Middle Powers" will result in the transfer of state sovereignty to the global level).

93 See, for example, Kenneth W. Abbott and Duncan Snidal, *Hard and Soft Law in International Governance*, in Goldstein, et al, eds, *Legalization and World Politics* 37 (cited in note 79) (arguing that international actors choose softer forms of law when those offer preferable solutions).

94 Id at 40.

95 See generally the recent work of Michael Scharf, Paul Williams, and James Hooper. See note 22. See also Krasner, 25 Mich J Intl L at 1091 (cited in note 45) (arguing that "shared sovereignty" is a promising alternative to governance assistance, transitional administration, or trusteeship).

96 See, for example, Kenneth W. Abbott and Duncan Snidal, *The Concept of Legalization*, in Goldstein, et al, eds, *Legalization and World Politics* 17 (cited in note 79). See also J. Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium*, 15 Am U Intl L Rev 151, 192–93 (1999) (arguing that the eclipse of the state has been marked by the concomitant emergence of business as the dominant world force and that this rise in international business has dwarfed traditional sovereignty).

appear to international law scholars as problems—or at least as conundrums—would instead appear as virtues or opportunities.[97]

In the near term, there is very little likelihood that states will disappear as the core entities in the international system.[98] While globalization has unquestionably altered the nature of state influence, it has not by any means eliminated it. Indeed, it is difficult to speak intelligently about the effects of globalization on "the state," because states are so different from one another.[99] Globalization has increased the incentives for interstate and international cooperation in many ways, but it has simultaneously decreased them in other ways by concentrating control of resources and capital in fewer and fewer states. Powerful states, such as the United States, have seen their global influence grow in the era of globalization, and the United States remains the world's dominant military force.[100]

But although states as such are unlikely to wither away any time soon, it is quite likely that *some* states will fade into nonexistence (of which more below), and that the international legal order will come to reflect this. To some extent, through the Security Council, the inequality between states is already a given of international law, and scholars

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97 A number of authors have already embraced this perspective to some extent. See, for example, Slaughter, *A New World Order* at 161 (cited in note 77) (arguing that interconnected "transgovernmental networks and more traditional international organizations" actually support domestic power structures); Harold Hongju Koh, *The Globalization of Freedom*, 26 Yale J Intl L 305, 306 (2001) (noting with approval the emergence of transnational law that is "fundamentally public in its characte➞ Allan Gerson, *Peace Building: The Private Sector's Role*, 95 Am J Intl L 102, 113 (2001) (suggesting a Peace Transitions Council that would allow for partnering arrangements between the private and public sectors to help build and sustain peace); Kal Raustiala, *Sovereignty and Multilateralism*, 1 Chi J Intl L 401, 402 (2000) (querying whether "the development and expansion of multilateral institutions are systematically altering our customary modes of domestic law and politics"); Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 Wm & Mary L Rev (forthcoming 2005).

98 But see Ohmae, *The End of the Nation State* at 8 (cited in note 83) (arguing that a "truly borderless economy and global marketplace" are supplanting traditional notions of borders); Hans J. Morgenthau, *Introduction*, in David Mitrany, *A Working Peace System* 7, 9 (Quadrangle 1966) ("Modern technology has rendered the nation-state obsolete as a principle of political organization.").

99 See Slaughter, *A New World Order* at 8 (cited in note 77) ("[T]he diversity of the peoples to be governed makes it almost impossible to conceive of a global demos.").

100 See, for example, Michael A. Newton, *Harmony or Hegemony? The American Military Role in the Pursuit of Justice*, 19 Conn J Intl L 231, 233 (2004) (exploring aspects of U.S. military power including the danger that this military superiority could superficially impose norms on other legal syste➞ Eve Darian-Smith, *Structural Inequalities in the Global Legal System*, 34 L & Socy Rev 809, 811–12 (2000) (arguing that the West is determining the function and form of global governance); Giddens, *Runaway World* at 8 (cited in note 28) ("The United States . . . has easily become the dominant superpower, and is in a position to shape the world economy to its own interests."); Pierre Bourdieu, *Rethinking the State: Genesis and Structure of the Bureaucratic Field* (Loïc J.D. Wacquant and Samar Farage, trans), in Steinmetz, ed, *State/Culture* 53, 56–64 (cited in note 50).

can also point to an increasing amount of international law directed at nonstate actors rather than at states. But by and large, the international system continues to maintain the pretense of state equality and state centrality. As a formal matter, today only states make international law (though many international law scholars do their best to insist otherwise). And proposals for UN Charter reform mainly involve increasing the diversity of states represented on the Security Council, rather than seeking to develop new principles that recognize the changing facts on the ground.[101]

Various different kinds of international order could evolve over the next fifty to one hundred years.[102] Some scholars predict the emergence of a multilayered system, in which states continue to exist more or less in their present form, but increasingly delegate certain kinds of decisions to international bodies (decisions on environmental matters, public health, trade, etc.).[103] This is already happening to some extent; the trend could continue in a way that radically alters old understandings of state sovereignty.[104] It is not impossible that the international order could become a large scale version of the United States or the EU, with many economic and security issues handled by central bodies. Such international bodies might be themselves premised on state equality, or, like the Security Council, they might be organized in a way that explicitly or implicitly reflects the fact that some states are more equal than others.

Alternatively, several rival regional regimes might emerge, along the lines of the EU. Instead of a world in which some powers dominate, but through nominally universal institutions, regional institutions might emerge in which subregional entities either dissolve as autonomous political units or become merely local in their authority. Or per-

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101 See, for example, High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility* 92, online at http://www.un.org/secureworld/report.pdf (visited Sept 18, 2005) (recommending the elimination of the UN Trusteeship Council, an ironic twist).

102 See, for example, Wendt, 9 Eur J Intl Rel at 493 (cited in note 74) ("Three end-states suggest themselves—a pacific federation of republican states, a realist world of nation-states in which war remains legitimate, and a world state.").

103 See, for example, Guzman, 45 Harv Intl L J at 309 (cited in note 92) (discussing expanding the jurisdiction of the WT➡; Jackson, 97 Am J Intl L at 794–97 (cited in note 75) (analyzing the role of international versus national and subnational institutions in power-allocation decisions).

104 See International Commission on Kosovo, *The Follow-Up of the Kosovo Report: Why Conditional Independence?* 31, online at http://kulturserver-hamburg.de/home/illyria/kosovocommission.org_report_english_2001.pdf (visited Sept 18, 2005) ("The classic nineteenth-century concept of sovereignty, even if it rarely pertained in practice, was a concept of absolute territorial sovereignty. In the twenty-first century, sovereignty is necessarily shared and dependent on agreements with a range of international actors.").

haps a few states will develop formal empires, reducing other states to subunits.[105]

This does not come close to exhausting the possibilities for an international legal and political order in which states as such are not obsolete but are to some significant extent de-centered or altered from their current form. And the point in outlining these possibilities is neither to argue that any is deterministically inevitable,[106] nor that any is normatively superior. But even if we believe that human agency will have little impact on the evolution of the international order, there is value in entertaining thought experiments about likely changes. That is because existing states and substate entities will fare differently in different possible future scenarios. Existing actors may be able to position themselves now in ways that will enable them to reap greater benefits (or avoid emerging hazards) as the global order changes.[107] While we may not be able entirely to halt or bring about any particular future, we can probably slow or hasten various developments, and purposive human action may influence them at least on the margins.[108]

B. Back to "Failed" States: A Modest Proposal

Returning to the issue of failed states, with which this Article began, what are the implications of thinking of the modern state as an ephemeral and not necessarily benign form of social organization? The most obvious implication is that our instinctive response to state failure could well be the wrong response. If the state as a form of social organization is no longer adaptive, or if it never was adaptive, then it doesn't necessarily make any sense to "fix" so-called failed states through heroic efforts to build or rebuild traditional state structures. At any rate, we may need to distinguish between governance structures, which all societies require, and the particular governance structures that have characterized the modern state. We may also need to discard the legal fictions associated with the belief that every society

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105 Which states is anyone's guess, but the United States and China have to be frontrunners. See generally Niall Ferguson, *Colossus: The Price Of America's Empire* 2 (Penguin 2004) (arguing that the United States is not only now an empire but also that it has always been an empire); Wendt, 9 Eur J Intl Rel at 524 (cited in note 74) (describing certain countries, including the United States, as "Great Powers" and "hyper-powers"); Giddens, *Runaway World* (cited in note 28) (noting America's unparalleled power in the post–Cold War world).

106 See Wendt, 9 Eur J Intl Rel at 525 (cited in note 74) (arguing that a world state is the only rational choice available to Great Powers).

107 See id at 530.

108 See Mikkel Thorup and Mads P. Sorensen, *Inescapably Side by Side: An Interview with David Held*, Polity (Feb 2004), online at http://www.globalpolicy.org/globaliz/define/2004/04heldinterview.htm (visited Sept 18, 2005) ("[T]he history of liberal democracy is associated with a single political form—the territorial nation-state—today we need to cash those principles in at different levels.").

must be part of some sovereign state as a matter of international law, and instead invent new ways for both individuals and groups to interact with international entities within a framework of international law.[109]

I should make it clear that although the category of failed states is largely illusory,[110] insofar as most failed states were never truly successful states, there is nothing illusory about the conflict and human misery rampant in these societies. However we analyze the root causes of such conflict and misery, the humanitarian and security problems associated with failed states must be addressed. The question is not whether it is appropriate for external actors to intervene in catastrophic crises—I take it as a given that it is,[111] and international law has already evolved to accept this.[112] The question is, "How?"

Ironically, if we continue to assume that the solution to the many problems in strife-ridden societies is to prop up pseudostates, then hand over legal sovereignty as quickly as possible, we may do far more harm than we would by developing alternatives to statehood.[113] State-building, at least as done recently in Afghanistan and Iraq, for instance, can itself simply be cover for abandoning troubled societies to the same old warlordism and violence that tore them apart in the first place.

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109 Lon Fuller famously defined a legal fiction as "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility." Lon L. Fuller, *Legal Fictions* 9 (Stanford 1967). In this case, however, the legal fictions connected with statehood and sovereignty may have outlived their utility. See Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 Colum J Transnatl L 7, 23 (1997) (discussing the trends in transnational activities that have made the state vulnerable while expanding the horizons of international law).

110 See Hamilton, *The Idea of the Nation State*, Independent (cited in note 47) (noting that the concept of the failed state is "[o]ne of the most over-used and least useful concepts for understanding the modern world"). In addition to being illusory, some scholars have argued that the concept is racially inflected. See, for example, Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 Am U J Intl L & Policy 903, 969 (1997); Henry J. Richardson, *"Failed States," Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 Temple Intl & Comp L J 1, 7–8 (1996) (arguing that "failed states" is a pejorative label used to justify intervention by more powerful countries).

111 Notwithstanding the critiques by Ruth Gordon and Henry Richardson, see note 110, humanitarian and other interventions can arise out of mixed motives, and can be imperialist in complex ways. But we cannot stop with that critique. Given the inequalities in global power, interventions, for the foreseeable future, may be tainted by the dark history of colonialism and imperialism, but nonintervention in situations of severe human rights abuses, war, or poverty has even greater costs for the affected populations.

112 See J.L. Holzgrefe, *The Humanitarian Intervention Debate*, in Holzgrefe and Keohane, eds, *Humanitarian Intervention* 15 (cited in note 1) (discussing the development of the law of humanitarian intervention); Brown, 34 Stan J Intl L at 347 (cited in note 17) (noting that the International Criminal Tribunal for the former Yugoslavia was designed "to apply a well-established body of international humanitarian law as criminal law").

113 See Pei and Kasper, *Lessons from the Past* at 3–4 (cited in note 25) (describing the "mixed" results in Grenada, Panama, and Haiti when the United States, after militarily intervening to topple a government, quickly handed over power to elected local leaders).

What are the alternatives to the sovereign state?[114] In recent memory, there have been many: colonies, dependencies, condominia, protectorates, mandates, trusteeships and situations of "intermediate sovereignty," as in Palestine or the Western Sahara.[115] Some of these governance arrangements lasted for only a few years; others for centuries.[116] In the state-centric view of the world, all of these alternatives to the sovereign state appear, at best, as temporary halfway houses on the way to statehood—and, at worst, as varieties of repression by great powers, squelching subject peoples' aspirations for self-determination.[117]

It is of course true that the recent history of substate entities has not been a terribly happy one; although I have suggested here that statehood isn't all it's cracked up to be, the injustice of colonialism, by whatever name, was also real.[118] (As real as the suffering in so-called "failed states.")

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114 See Krasner, 25 Mich J Intl L at 1077 (cited in note 45):

> Sovereignty is now the only game in town. Other ways of ordering political life, including colonialism, trusteeships, empires, and the traditional Sino-centric system, lack legitimacy; that is, they would either not make sense (how many people in Taiwan would be able to explain the concept of a tributary state, a central element in the traditional Sino-centric view of international relations), or would be rejected by a large proportion of the populations that might be subject to them, which would clearly be the case for colonialism.

115 See the series of articles by Scharf, Hooper, and Williams on "earned sovereignty" in note 22. See generally Robert Jackson, *Quasi-States, Sovereignty, International Relations and the Third World* (Cambridge 1990) (arguing that Third World nations are sustained by the "negative sovereignty" of the patronage of industrialized nations). See a→ Ralph Wilde, Note, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 Am J Intl L 583, 587–90 (2001) (describing the use of "international territorial administration" in the territories of Leticia, West Irian, Eastern Slavonia, the German Saar, and Mostar). Some suggest that the current arrangement in Iraq is a form of trusteeship. See, for example, Brian Deiwert, *A New Trusteeship for World Peace and Security: Can an Old League of Nations Idea Be Applied to a Twenty-First Century Iraq?*, 14 Ind Intl & Comp L Rev 771, 771 (2004) ("The United States led coalition . . . had assumed . . . a de-facto trusteeship over Iraq.").

116 Colonies have been a feature of international political life for several thousand years, disappearing only in the 1960s. Condominia have flourished on and off; typical was the joint control of Bosnia by the Ottoman Empire and Austria-Hungary from 1878 to 1908. Perritt, 8 UCLA J Intl L & Foreign Aff at 417 (cited in note 1). The "mandate system," created by the League of Nations, placed Germany and Turkey's former possessions under foreign supervision overseen by the League's Permanent Mandates Commission. Most mandate territories that were still under foreign supervision after World War II became UN trusteeships when the United Nations replaced the League of Nations. When the last of the trusteeship territories, Palau, became independent in 1994, the UN Trusteeship Council suspended operations. → Helman and Ratner, 89 Foreign Policy at 6, 12 (cited in note 2). The recent UN High Level Panel on Threats now recommends abolishing the trusteeship provisions of UN Charter. See High-Level Panel on Threats, Challenges, and Change, *A More Secure World* at 92 (cited in note 101).

117 See, for example, Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 Ariz J Intl & Comp L 51, 67 (Fall 1991).

118 See Gordon, 12 Am U J Intl L & Policy at 969–70 (cited in note 110); Richardson, 10 Temple Intl & Comp L J at 7–8 (cited in note 110). My goal here is not to defend the alternatives to full state sovereignty that have so far emerged. The past history of colonies, trusteeships, and the like is not pretty: much of the time, these terms masked straightforward oppression and

But perhaps it is time to reexamine some of these forms of social organization, and ask whether they must inevitably take repressive forms or be explicitly understood as temporary. It's worth recalling that the world today still contains a surprising number of entities that are neither sovereign states in a strict sense nor substate units in a strict sense, and many of these are both stable and fairly contented (at least, more contented than many states). Consider first many of the small island states, such as Guam, Aruba, the British Virgin Islands, or Anguilla. Guam is an American dependency, Aruba is part of the Kingdom of the Netherlands, the British Virgin Islands is a Crown Colony, and Anguilla is an "associated state" of Britain. All have defined territories and populations, none is directly represented in their "parent" state's legislature, and none is a member-state of the United Nations. In each case, local authorities are responsible for most internal affairs, while the parent state is responsible for defense and external relations. None is without problems, but each appears quite stable and reasonably successful.[119]

Or consider Vatican City: its territory is minute, and it has fewer than two hundred resident "nationals" (who acquire Vatican nationality through election to certain positions within the religious hierarchy). Nonetheless, it conducts formal diplomatic relations and has permanent observer status at the United Nations.[120] The Sovereign Military Order of Malta functions in a quasi-state manner as well: though it lacks a defined territory or population, it issues passports and currency, has UN observer status, and is considered formally a sovereign subject of international law, capable of entering into treaties with states.

More examples could be given—Puerto Rico, Taiwan, Andorra—but this is probably enough to remind us that even today, despite the state-centered international legal order, there is room for other forms

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exploitation, often racist in nature. Recent interventions, occupations, and international administrations can also be criticized, either in motivation, or in execution, or both. But as we know, the state's history is just as ugly.

119 That said, even this claim is contested. See, for example, Ediberto Román and Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 San Diego L Rev 437, 522 (2002):

> [W]hat is newsworthy is that millions of United States citizens and nationals who happen to live on the United States island territories do not and have not ever had the right to decide this country's or their own territory's future. They are disenfranchised yet few see them that way. The hegemonic tools of citizenship, international status, and economic dependency have well served the United States' empire building.

120 See Kal Raustiala and Lara Stemple, *Benedict XVI's Other Role*, The New Republic Online (Apr 29, 2005), online at https://ssl.tnr.com/p/docsub.mhtml?i=w050425&s=raustialastemple042905 (visited Sept 18, 2005). See also Office of the United Nations High Commissioner for Human Rights, *Information on Countries*, online at http://www.ohchr.org/english/countries/ (visited Sept 18, 2005) (listing the Holy See as a nonmember state).

of social organization that are not just halfway houses on the way to "full" statehood.[121] Indeed, it is only within living memory that the dogma of state sovereignty solidified within international legal and political discourse, making it difficult or impossible to openly suggest that not every society ought to be (or strive to become) a sovereign state.[122]

Bearing this in mind, perhaps we can begin to think differently about certain existing problems. Take Kosovo: technically a province

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121 Indeed, as many commentators have observed, we have already entered an era in which alternatives to total state sovereignty are being attempted in troubled regions. See, for example, Michael Ignatieff, *State Failure and Nation-Building*, in Holzgrefe and Keohane, eds, *Humanitarian Intervention* 299, 306 (cited in note 1) (asserting that "[i]t is a mistake to assume that the aim of rebuilding failed states is simply to restore complete Westphalian sovereignty in these place ➡ Brooks, 101 Mich L Rev at 2284 (cited in note 25) (arguing that international intervenors should not apply a standard rule-of-law "template" when trying to resuscitate failed states). Scharf, Hooper, and Williams also propose an earned-sovereignty approach to post-intervention state-building. See note 22. In Bosnia, foreign peacekeepers (currently from the EU) remain on the ground to this day, and the UN High Representative exercises ongoing authority over numerous day-to-day governance activities. In Kosovo, the same is true of UNMIK, and thousands of NATO troops remain in the region. In Sierra Leone, more than 3,371 blue-helmeted troops help ensure security and assist with a wide range of reconstructive tasks. There are 16,310 UN troops in Congo, 6,700 in Haiti, and 510 still in East Timor. See United Nations Peacekeeping Operations, *Background Note: 31 March 2005*, online at http://www.un.org/peace/bnote010101.pdf (visited Sept 18, 2005). In Afghanistan, 8,000 NATO-commanded troops remain on the ground, along with nearly 7,000 U.S. troops; and in Iraq, of course, the foreign troop presence remains in the hundreds of thousands. See *International Contributions to the War on Terrorism*, online at http://www.centcom.mil/Operations/Coalition/joint.htm (visited Sept 18, 2005); *US and Coalition Troops in Iraq, June 2003*, online at http://uspolitics.about.com/od/wariniraq/a/troops_june05.htm (visited Sept 18, 2005).

With the exception of Kosovo, all of these regions just mentioned possess formal legal sovereignty, but in practice all remain subject to the decisions of foreign powers and operate with their sovereignty severely constrained. The niceties of international relations require the various intervening powers to insist that this state of affairs is purely temporary—but can we doubt that in practice, in some cases, it will be for a very long period of time, perhaps extending indefinitely into the future?

122 There is, in fact, a significant historical irony here. Until quite recently, few scholars or diplomats or policymakers assumed statehood as the norm. See notes 110, 115–116. This was not because of the greater broadmindedness of earlier generations. At least in the West, the willingness to accept numerous nonstate arrangements stemmed, most of the time, from a collective readiness to see many societies as occupied by inferior beings, suited only to life as a permanent subject in colonies or other "lesser" political entities. As the twentieth century's catastrophes sparked the dawn of the human rights era, the notion that some peoples are inherently less capable of self-governance than others has thankfully ceased to be an acceptable basis for foreign policy and international affairs.

Ironically, however, this salutary development had an unintended consequence. Increasingly universalist conceptions of human dignity gave rise to widespread commitments to self-determination and democracy. See note 136. These, in turn, came to be understood as best realized through the vehicle of the state. Since the independent, sovereign state was seen as essential by Westerners, who dominated the emerging human rights and democracy discourses, it gradually became more and more difficult to imagine nonstate solutions to societal violence and collapse. The idea of the state-as-means began to converge with the idea of the state-as-end. As a result, instead of the emergence of a universalist human rights discourse opening up discussion of new governance arrangements distinct from the state, the universalist human rights discourse may have contributed to our collective inability to defetishize the state.

of the former Yugoslavia, Kosovo currently exists in limbo, administered by the United Nations. Many Kosovars want Kosovo to become an independent state; Serbia and Montenegro oppose this. The international community continues to hedge, anxious about the proliferation of microstates,[123] but leery of leaving Kosovo under the thumb of Serbia. It is conventional wisdom to lament the uncertainty about Kosovo's final status, and to attribute many of Kosovo's ongoing problems solely to this uncertainty. But why should we assume that Kosovo faces an either/or choice, with independent statehood as one option, and provincial status (or merger with Albania) as the other? Why not a permanent UN administration? Or a loose affiliation with a willing third-party state? Or some sort of special status within the EU? Perhaps Kosovo's problem is not the *ambiguity* of its final status, but our collective inability to think beyond the paradigm of statehood.

We could ask similar questions about Iraq, Afghanistan, and a multitude of other failed or weak states. Is statehood best suited to bringing peace, prosperity, and the rule of law to these troubled societies? In some cases, perhaps it is; in others, it probably is not; and this question should be answered based on facts on the ground, not on commitment to any particular theory.

States weaken and fail for many different reasons.[124] In Iraq, a repressive but fairly effective regime toppled only as a result of external invasion; the collapse of Iraqi state institutions was hastened along by postinvasion Coalition policies. Other moderately well-functioning

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[123] See Daniel Patrick Moynihan, *Pandaemonium: Ethnicity in International Politics* 148 (Oxford 1993) ("[W]hen the question arises as to whether an ethnic sub-unit within a state is entitled to self-determination and recognition, the legal complexity grows exponentially."); Pascal Boniface, *Pandora's Box: Ideals or Interest?*, Le Monde Diplomatique (Jan 1999), online at http://mondediplo.com/1999/01/19states (visited Sept 18, 2005) (Lorna Dale, trans) (noting that in 1500 Europe had almost five hundred political entities, and by the beginning of the twentieth century it had only a few dozen, but by 2000 there were fifty, and querying what Europe would be like in another decade); *Growth in United Nations Membership, 1945–2005*, online at http://www.un.org/Overview/growth.htm#2000 (visited Sept 18, 2005) (showing that UN membership has grown to nearly two hundred states). See also Williams, 31 Denv J Intl L & Policy at 389 (cited in note 22) (discussing potential sovereignty structures in Kosovo); Jorri C. Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* 110–32 (Cambridge 1996) (examining the statehood of and the legal issues at stake in relation to the European microstates and arguing that the development of international law improves the stability of such states).

[124] And different reasons for state failure may lend themselves to different solutions. In some cases, strengthening or reinventing state structures and "tweaking" our understanding of the state may suffice to address existing societal problems. But in others, more radical "nonstate" solutions may be called for. It is also important to acknowledge that there are very many external factors affecting state "failure" that can be addressed in ways separate from the state or nonstate status of a given society. Thus, the flow of arms from elsewhere around the globe, or the existence of easy mechanisms for corrupt elites to export and hide capital, can facilitate violence and corrupt governance.

states may be ripped apart by lengthy civil wars fought on ideological grounds. Although I have argued that many modern states reflect historical happenstance more than natural social or political communities, in some places the nation-state, however artificially created, is nonetheless today the symbolic locus of identity for most people. This may remain true, in cases like those above, even when state institutions fall apart.[125] In such cases, statehood may be a nonnegotiable demand of the local population, and an effort to make the society in question indefinitely forgo statehood may spark more instability than a standard state-building approach.

My proposal will likely be most appropriate for societies where indigenous conceptions of identity have never strongly coalesced around the idea of statehood. In Kosovo, where independent statehood has always been a nonstarter from the international community's perspective and few Kosovars even dreamt of independence until relatively recently, some "third way" might well appear to many as a viable option. Similarly, a "third way" might well appeal to many in the weak or failed (the never-really-were) states of central Asia and Africa, where the nation-state has not in general been as historically important to local understandings of identity. In Sierra Leone, for instance, during the height of the civil war, many indicators suggested that a majority of Sierra Leoneans would have preferred a return to the status of British colony, had that option been available.[126]

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125 Thus, in Iraq I suspect that nationalist sentiment is deep enough amongst Iraqis of all ethnic and religious backgrounds to make statehood the only viable option. Despite the violence that continues to plague post–Saddam Hussein, post-election Iraq, for now, attempting other alternatives—some status other than continued sovereign statehood—might generate even more opposition.

126 It was not. The British, whose military interventions did help stabilize Sierra Leone as the civil war wound down, made it clear that the British public had no appetite for accepting longer-term responsibility for Sierra Leone. And any preference for a return to colonial status on the part of Sierra Leoneans was hardly based on revisionist colonial nostalgia; I have never encountered a Sierra Leonean who had the slightest illusions about the racism and exploitation that characterized life under British rule. (I visited Sierra Leone frequently between 1999 and 2001.)

But everything is relative. Colonial exploitation, bad as it was, struck most Sierra Leoneans as nonetheless preferable to a brutal civil war characterized by extensive forced recruitment of child soldiers and mutilation and rape as terror tactics.

The tragedy for Sierra Leoneans, as for many other people around the globe, is that the range of options is so limited. "Independence or bust" often turned into "independence *and* bust." In many post-colonial states, collapse was virtually preordained: stripped of many natural resources, with traditional social structures damaged by colonialism, borders drawn arbitrarily, and power passed along from colonial rulers to corrupt local elites, how could collapse have been prevented? Most post-colonial states faced vast structural disadvantages that few have overcome. For many of these societies, decolonization simply became a way for Western powers to avoid cleaning up the messes they left in their wake. Decolonization helped some local elites, but did as much harm as good to most ordinary people. See note 58. See also Guidieri, Pellizzi, and Tambiah, eds, *Ethnicities and Nations* at 1–2, 8 (cited in note 61):

If we separate out the abstract idea of the state from its violent history, we can view the modern state as a means to realize peace, prosperity, and human dignity. But the state should be evaluated functionally, based on how well it in fact achieves those ends for particular peoples. There is no reason to consider the state an end in itself. Instead of trying to prop up political structures that don't necessarily work, we should accept that the challenge, today, is to develop alternatives to the state, alternatives that can be respectful of human rights and democratic imperatives, but not paralyzed by the need to mimic state structures that have little or no independent value.

The project of devising democratic, accountable, and rights-respecting alternatives to the state is well beyond the scope of this short Article. But it is not hard to imagine some possible forms of "nonstate" arrangements that might at times be preferable to statehood in troubled regions: indefinite international administration by the UN, similarly indefinite administration by a regional body such as the EU or African Union, long-term "partnership" or "affiliation" with one or more "successful" states (which need not be geographical neighbors), federation with neighbors, and so on. In a world in which the lines between public and private get blurrier by the day, it is even possible to imagine societies outsourcing some traditional governance functions to private actors, not on a short-term, emergency basis,[127] but indefinitely. This already happens, to some extent, and although the record is mixed,[128] the option merits further exploration.[129]

> [Postcolonial state development was] expected, under the sponsorship and direction of Western and North American countries, to heap great benefits upon the rest of the world.... [Yet these processes] have generated—whether by collusion or reaction, in good faith but poor anticipation—massive civil war, repressive authoritarianism by military coteries fortified by Western weaponry, and gruesome interracial and interethnic bloodshed roused by fundamental religious bigotry and inflamed by flagrant misuse of mass media.... Frequently, as in Africa and Oceania, mosaics of different peoples have been coerced into a more or less hasty acceptance of this formula, in order to acquire the international legitimacy and financial standing (i.e., the "right" to contract debts) needed to tackle the problems brought on by the demise of the old colonial administrations.

See also Bjørn Møller, *The Security Sector in Zimbabwe: Its Role in State-Building and the Present Crisis* 4–5 (unpublished draft 2001), online at http://www.ihis.aau.dk/~bm/Zim-crisis.doc (visited Sept 18, 2005) (discussing Africa's "vampire states," where the state itself is the main threat to the security of its citizens).

127 Such outsourcing currently occurs in the contracting of international aid organizations to run refugee camps or train health workers. See Dickinson, 47 Wm & Mary L Rev (cited in note 97).

128 See John Tagliabue, *As Multinationals Run the Taps, Anger Rises over Water for Profit*, NY Times A1 (Aug 26, 2002) (detailing protests in several Latin American countries where there has been privatization of government-run water systems).

129 As David Luban provocatively noted, in connection with this Article, at the January 27–28 Vanderbilt International Law Roundtable (2005), all of our legal categories are based on the assumption that we can distinguish reliably between the "public" and the "private" spheres. This dichotomy has long been challenged, but perhaps we today live in an era in which there is no

There are various obvious objections to what I am proposing. Virtually all relate, in one way or another, to the risk that people living in what I will call "nonstate societies" will lose all control over their own destinies. Thus, critics of my proposal might argue that the state is currently the only means by which individuals in troubled and impoverished societies can hope to have an impact on the international order. Since only the state possesses international legal personality, only states can impact the structure of international treaties and trade pacts, for instance. If people in troubled societies lose the state, won't they also lose all capacity to ensure that the international order does not end up stacked against them? If we decide that people living in failed states ought not to be living in sovereign states at all, but in some other nonstate arrangement, aren't we just relegating large portions of the world's populace (who just happen to be, in the main, non-Western) to permanent second-class status? And in any case, just who is the "we" who decides that some societies are best off without the state?

These objections are far from frivolous, but I think they can be countered by a mixed dose of realism and imaginative utopianism. First, the realist response: like it or not, much of the world's population is already relegated to second-tier status. The fiction of state sovereignty notwithstanding, most of the world's states have little or no capacity to meaningfully affect global financial, environmental, or security arrangements. As the misnomered "antiglobalization" movement has often pointed out, the global order is increasingly controlled by a finite number of states and actors, and it is sheer delusion to imagine that statehood offers the peoples of Uruguay, Armenia, or Zambia any real ability to alter this. Put differently, if the people of Liberia or Bosnia were to lose the state, what would they truly be losing? Many of the advantages of independent statehood are illusory—and, as I have argued throughout this Article, the disadvantages are often legion. Losing the state would, at worst, make the residents of most troubled societies no worse off than they already are in relation to the global order.[130]

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longer anything unique about the "public" sphere at all: we may live in what Luban termed a "post–public choice world." If this is indeed the case, then, however disquieting we find it, it is an additional argument for thinking creatively about remedies for governance problems that seek to merge the public and the private.

130 See Timothy William Waters, *Contemplating Failure and Creating Alternatives in the Balkans: Bosnia's Peoples, Democracy, and the Shape of Self-Determination*, 29 Yale J Intl L 423, 462 (2004):

> [S]ince 1991, there has not been an integrated state on Bosnia's territory. Dayton did not reverse, but rather cemented, that dispensation, and subsequent developments have not fundamentally changed matters. There is still barely a Bosnian state, and still not enough of one to matter. A U.N. seat does not make a state, and most decidedly not a nation. Yet in

Realistically, becoming "nonstates" could hold genuine advantages for people in "failed" states. As globalization marches on, even many powerful states have found it advantageous to constrain explicitly their own sovereignty in many respects in order to solve collective action problems. The EU is the most far-reaching example of modern states (nearly all prosperous) voluntarily constraining their own sovereignty in order to achieve mutual benefits.[131] When it comes to sovereignty, the EU suggests that, at times, less can be more. Even the United States, despite recent unilateral rhetoric, accepts the strictures of the WTO in exchange for the economic benefits it acquires.[132]

These examples are not wholly generalizable, since the EU and the WTO are each, in their way, "rich men's clubs,"[133] but the irony is worth noting: in this era of globalization, the rich states have all constrained their sovereignty voluntarily, to one degree or another, and reaped significant advantages.[134] Meanwhile, the poorer states find themselves locked out, left alone to enjoy the dubious benefits of their unabridged sovereignty. Increasingly, sovereignty has become a chump's game.

Constraining—even wholly sacrificing—their own sovereignty could thus bring substantial benefits to the populations of troubled

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the case of Bosnia, that is about all there is: recognition has meant little more, except, of course, the denial of everything else that is happening or could happen.

One might also raise a related practical objection to my proposal: in societies torn by violence, with few functioning governance institutions, why should we expect "nonstate" status to solve problems just because statehood has failed to solve those problems? In other words, just because you don't lose much if you lose the state doesn't mean you gain much either. Won't whatever conditions that led to state collapse continue to exist in a given society, even if it operates under a different, "nonstate" appellation?

In answer, I have already noted that not all "failed" or "weak" states *should* become nonstates; whether or not they should will depend on their unique histories. But in at least some cases, state structures did not merely fail to stop societal collapse, they actually hastened or led to societal collapse. Thus, in situations of ethnic warfare, condemning warring groups to perpetually share the same unitary state can be a recipe for disaster. (Though ethnicity is as socially constructed as the idea of the nation-state, once in place it can be hard to shake.) "Nonstate" solutions that bring numerous "outsiders" into the internal governance process (for example, trusteeship arrangements) may help diffuse internal ethnic tensions. And nonstate arrangements that allow nonstate residents greater external educational, employment, and cultural opportunities can diffuse the intergroup competition (or simple lack of opportunity) that fueled conflict in the first place. See also Waters, 29 Yale J Intl L at 423 ("While we may owe Bosnians a great deal, we owe Bosnia nothing.").

131 See Møller, *The Security Sector in Zimbabwe* at 3 (cited in note 126).

132 See Guzman, 45 Harv Intl L J at 347 (cited in note 92) ("The United States can better promote economic growth, prosperity, and job creation through international cooperation, specifically the WTO, than it can acting alone.").

133 Consider NATO partner Turkey's struggle to join the EU. See, for example, Editorial, *Turkey's Promises*, NY Times A22 (Apr 4, 2005).

134 See Møller, *The Security Sector in Zimbabwe* at 3 (cited in note 126). These examples also reinforce the general argument that both on the level of the state and on the level of the international system, the continued fading away of certain forms of sovereignty is both likely and desirable.

states. Far from being relegated to a permanent global underclass, the residents of quasi-states or nonstates might be able to reap substantial benefits from constraining or sacrificing their sovereignty—assuming that wealthier states can be persuaded to collaborate.[135]

This realist response does not wholly address all of the objections that might be raised to my proposal, however. In particular, it does not help us with the question of who decides, or the question of how we can ensure democracy, human rights, and accountability in the absence of state structures. If a failed state moves into some nonstate status of indefinite duration, who governs? Who makes the decisions that affect day-to-day life? Who ensures that decisionmakers are responsive, transparent, and accountable, and that ordinary people—and organized political communities—have the ability to participate in the decisions that affect them? Who remedies wrongs in these nonstate societies?[136]

In response, it is not quite enough to note simply that many existing states (and not just failed states) already lack internal democracy and accountability, just as they lack the ability to influence the global order. Some degree of imaginative utopianism is also needed to respond to these concerns. And here we might again take our cue from the so-called "antiglobalization" movement—not its most knee-jerk representatives, but the many thoughtful individuals and NGOs who

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135 A main practical challenge to implementing my proposal may not be in convincing residents of "failed" or weak states to forgo sovereignty. The main challenge may instead lie in persuading the wealthier states to share the benefits of certain profitable forms of constrained sovereignty (such as EU membership). This issue, too, is beyond this Article's scope, but has been discussed elsewhere by Robert Keohane, Stephen Krasner, and others. See, for example, Krasner, 29 Intl Sec at 118–19 (cited in note 26); Robert O. Keohane, *Political Authority After Intervention: Gradations in Sovereignty*, in Holzgrefe and Keohane, eds, *Humanitarian Intervention* 275, 276 (cited in note 1). For the purposes of this discussion, it is perhaps enough to say that wealthy and stable states do have a real interest in aiding poor and failed states for the reasons noted at the beginning of this Article: failed and failing states pose grave risks to international security and economic stability. See notes 17–21 and accompanying text. This truth alone is not enough to overcome collective action problems, but it is a start. The overall EU willingness to "let in" poorer neighbors suggests that prosperous states can, at times, be persuaded that collaborative shared sovereignty arrangements with poorer states are in their own interest.

136 These questions are central in thinking about failed states. See, for example, Molly Beutz, *Functional Democracy: Responding to Failures of Accountability*, 44 Harv Intl L J 387, 396 (2003) (articulating a definition of democracy as accountability and arguing that responses to failures of democracy should promote the rule of law and transparency); Larry Garber, *Democratic Governance and International Law*, 19 Wis Intl L J 369, 376 (2001) (arguing that democratic entitlement is important to achieving both a more peaceful and a more just world); Thomas M. Franck, *The Democratic Entitlement*, 29 U Richmond L Rev 1, 7–8 (1994) (noting that the paradox of states "clamor[ing] . . . for credible monitors to observe, and sometimes to run their first attempts at free and open elections," is also a practice that "is bound to diminish their sovereignt→; Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 Am J Intl L 46, 64 (1992) (arguing that the widespread adoption of international electoral norms shows that the "balance [is] tilting toward . . . states actually practicing . . . electoral democracy").

have begun to explore ways to make both public and private global institutions more accountable to ordinary people.

Just as the state is not necessarily democratic or benevolent, nonstate entities (from private, for-profit corporations to NGOs, international financial institutions, and international organizations) need not inevitably be undemocratic and heedless of the common good. Increasingly, mechanisms for ensuring accountability and democracy within a very wide range of institutions are beginning to emerge.[137] Shareholder resolutions and voluntary codes of conduct help ensure corporate responsibility; international criminal law helps deter abuses by nonstate actors; grievance mechanisms in international organizations help resolve disputes over noncompliance and address arbitrariness in decisionmaking.

These mechanisms are enormously varied in their sophistication and their efficacy, and they offer no panacea. Nonetheless, they invite us to imagine a world in which norms of human dignity and democratic participation can be realized through an ever wider range of governance institutions, some of which may increasingly be distinct from the state.

CONCLUSION

My goal in this Article has been to raise questions about issues we often take for granted, and suggest that both domestically and internationally, perhaps we should be more open to diverse forms of social organization—and that we should strive to create an international legal order that permits and values numerous different forms of social organization. The state as such is not defunct, despite the changes wrought by globalization. On the other hand, some states may well be defunct, and shoring up the state wherever it is in jeopardy may be both pointless and damaging to human security.

This Article can only begin the conversation, however. I have suggested just a few ways in which defetishizing the state might change the way we think about both the architecture of international law and about the challenges associated with societies in crisis. Moving forward along this trajectory presents many challenges, as powerful actors would no longer have the luxury of ignoring demands for de-

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[137] See Held, *Violence, Law, and Justice* (cited in note 18) ("Changes in the law of war, human rights law and in other legal domains have placed individuals, governments and non-governmental organizations under new systems of legal regulation—regulation which, in principle, recasts the legal significance of state boundaries."). See also Albert O. Hirschman, *Exit, Voice, and Loyalty; Responses to Decline in Firms, Organizations, and States* 111–12 (Harvard 1970) (showing that individuals can use their "voice" by agitating from within to make private entities like corporations accountable).

mocratic governance.[138] Both individuals and groups have a legitimate right, increasingly recognized by international law, to enter into various forms of voluntary association, to determine their own political arrangements, and to be subject to political authority that is transparent and accountable. It will not be easy to create new domestic and international structures through which to realize these goals. But there is no right to statehood, nor should there be.

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[138] And should not: many studies suggest that robust democratic governance structures are the best predictor of social stability. See, for example, Goldstone and Ulfelder, 28 Wash Q at 15 (cited in note 38) (noting that the most stable governments are either closed dictatorships or liberal democracies). See also Beutz, 44 Harv Intl L J at 393 (cited in note 136); Franck, 86 Am J Intl L at 64 (cited in note 136).