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## Berkeley Program in Law and Economics, Working Paper Series

**Title**
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**Permalink**
https://escholarship.org/uc/item/2174x6x7

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**Publication Date**
2010-02-13

Fixing Failed States

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Failed states pose one of the deepest challenges to American national security and international peace and stability. They serve as an incubator for international terrorist groups, such as al Qaeda. Their lack of stable government authority allows them to become trans-shipment points for illicit drugs, human trafficking, or the proliferation of weapons of mass destruction ("WMD") technologies. In Somalia, Rwanda, Haiti, and the former Yugoslavia, failed states have produced catastrophic human rights disasters. Since the end of World War II, far more lives have been lost due to internal wars—many of which occurred in failed states—than to international armed conflicts. Military intervention in response, often led by the United States and its allies, incurs high costs in terms of money, supplies, and lives. Finding a comprehensive and effective solution to the challenges of terrorism, human rights violations, or poverty and economic development requires some understanding of how to restore failed states.

Today the United States is rebuilding nations on a grand scale. In Afghanistan and Iraq, the U.S. Armed Forces are building schools and roads and training local government officials. President Obama decided to surge 30,000 additional troops to Afghanistan—bringing the total number of U.S. troops there to about 100,000—to defeat the Taliban and al Qaeda insurgency. American troops, along with other forces, have also intervened in Haiti and Liberia to stop internecine wars. And to this day, U.S. troops remain in Kosovo and monitor the peace in Bosnia. Some failed states—for example, Afghanistan and Iraq—are rogue nations that the United States invaded, and is now attempting to restore. But others are not. Regardless of the reasons for the original state failure, the response of the United States and its allies has remained the same: to rebuild the institutions of state control, and, if lucky, to plant a working democracy and a market economy.

The United States and the United Nations seem to have concluded that international peace and security depend on the exclusive existence of independent states capable of controlling their territories, policing their populations, and discharging their international obligations. States appear to be the most effective means to control or prevent conduct that threatens international order, global welfare, and the security of other states. Even when military or financial interventions in the affairs of malfunctioning states seem to derogate from the principle of sovereignty, they may in fact advance the broader interests behind using the nation-state as the organizing unit in international affairs and law.

Leading international law scholars, however, see such intervention as a fool's errand.[1] To be sure, some support the use of military intervention to stop humanitarian disasters, despite its inconsistency with the text of the United Nations Charter.[2] Indeed, the concept of "failed states"

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[1] See, for example, Louis Henkin, The Use of Force: Law and U.S. Policy, in Louis Henkin, et al, Right v. Might: International Law and the Use of Force 60 (Council on Foreign Relations 2d ed 1991) ("Extending the meaning of 'armed attack' and of 'self-defense,' multiplying exceptions to the prohibitions on the use of force and the occasions that would permit military intervention, would undermine the law of the Charter and the international order established in the wake of world war"). See also Thomas M. Franck, Recourse to Force: State Action against Threats of Armed Attacks (Cambridge 2002); Ian Brownlie, International Law and the Use of Force by States (Oxford 1963).

[2] See, for example, Fernando R. Teson, Humanitarian Intervention: An Inquiry into Law and Morality (Transnational 2d ed 1997); Sean Murphy, Humanitarian Intervention: The United Nations in an Evolving World

traces its lineage to efforts to justify the use of armed force to stop human rights catastrophes. Nonetheless, many international law scholars remain openly dubious about the ability of states—particularly of the United States—to rebuild the public institutions, not to mention the physical infrastructure, of these countries. For these scholars, the problem is not failed states but nation-states. Rather than seek to restore failed states to functioning states, they seek solutions in international law and institutions that would erode the exclusive role of the nation-state as the primary actor in international affairs.

This paper argues that both American and U.N policy on the one hand, and the conventional academic wisdom on the other hand, are mistaken. Building a normal nation-state with full sovereignty on every territory in the world, without changing any national borders, fails to understand why some states are failing in the first place. Viable states simply do not align with the borders recognized by the United Nations or created during the period of rapid decolonization in the decades after World War II. Academics who see in failed states the rise of alternatives to the nation-state have no practical solutions that do not depend on the political, economic, and military resources of strong nation-states. Without them, supra-national governments, trusteeships, or non-governmental organizations, among other forms of international institutions, have not shown the ability to fix failed states.

This paper proposes an intermediate position, based on what we know about why states fail and why recent interventions have succeeded. It does not view the restoration of the status quo ante as the answer, nor does it replace nation-states with international institutions. Rather, it argues that nation-states remain the most important actor in international relations with the means to fix failed states and the resources to increase global public goods and reduce global public bads. Removing obstacles in international law and policy to intervention and reform in failed states will allow nation-states to more effectively tackle the problem.[3] One result, however, is that the borders of failed states may change – this solution does not discard state sovereignty, but it may mean smaller, more numerous, states.

This Article first sketches out a theory explaining state disintegration. Scholarship in political science and international economics suggests several forces at work.[4] Rapid decolonization during the 1950s and 1960s, and again in the 1990s in the wake of the Soviet collapse, produced a large number of new states that had little history or experience of self-government. At the systemic level, free trade and international security have accelerated the fragmentation of states into smaller nations as the latter no longer need to merge for economic or defense purposes. Decentralization produces more states, some of which may suffer from weak institutions and political cultures. Ironically, American policy has created broader free trade areas and provided security; however, it has also sought to reverse the very fragmentation produced by those international public goods. At the domestic level, failed states free from external pressures to merge with other states may suffer from an inability to reach bargains

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Order (Penn 1996); Christopher Greenwood, Humanitarian Intervention: The Case of Kosovo, 1999 Finish Y.B. Int'l L. 141.

[3] I do not here address the downsides of humanitarian intervention in terms of the incentives it creates for dynamics between interest groups in a failed state before intervention. For a perceptive contribution along this lines, see Jide Nzelibe, Courting Genocide: The Unintended Effects of Humanitarian Intervention, 97 Cal. L. Rev. 1171 (2009).

[4] See *infra* notes

between ethnic, religious, or regional groups. A third-party nation that could enforce power-sharing deals could help overcome the bargaining failure and restore order in such states.

International law is counter-productive to this goal. Several factors create powerful disincentives to intervention in failed states, including the lack of any benefit to the national interest, the possibility of high costs in both military and civilian lives, the hard moral dilemmas involved in whom to help and how, and the difficulty in withdrawal. Still, to the extent that international law affects the decisionmaking of states, it only exacerbates these existing obstacles to fixing failed states. The U.N. Charter prohibits nations from using force except in self-defense or with the permission of the U.N. Security Council.[5] Although a recent U.N. Security Council resolution recognizes that governments have a "responsibility to protect" their populations, it still requires Council approval before an intervention can violate their territorial integrity.[6] This rule discourages states from intervening to stop the chaos and destruction that follows in the wake of a collapse in state institutions. Once an intervention occurs, international rules further raise the costs by requiring that failed states receive full sovereignty. International law essentially requires that the status quo ante be restored – underscoring international law's schizophrenic approach to state sovereignty.

International law has things exactly backwards. Failed states produce negative externalities within the international system by harming their own civilian populations or by allowing terrorists to operate on their soil. Public choice analysis predicts that nations will intervene at *below* the optimal rate.[7] International law should encourage, rather than discourage, intervention. Costs on intervening states—created by restrictions on when intervention can occur or requirements that the sovereignty of the failed state be restored—should be reduced, rather than increased, in order to reach the socially optimal amount of intervention. Intervening states can restore a functioning government by brokering and enforcing agreements between local groups to share power and resources. International law can advance this process by allowing for different forms of governance within territories and the alteration of pre-existing borders and units.

This Article proceeds in three parts. Part I describes the phenomenon of failed states. Failed states would be of little concern were it not for their creation of negative externalities: human rights disasters, refugee flows, and staging grounds for terrorism and transnational crime, to name a few. The international system has responded to these problems in inconsistent ways. Part II discusses scholarly proposals for reform, and explains why reliance on the nation-state remains the most effective means for addressing the problem of failed states. Part III follows with a systems approach to understanding the problem as the product of free trade and international security, and an internal description of the failures of groups within a state to restore a working government. Part III argues that the solution of the problem of failed states

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[5] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter Art. 2(4). The exceptions are: first, "in self-defence if an armed attack occurs against a Member of the United Nations" and, second, if the Security Council authorizes the use of force "to maintain or restore international peace and security." U.N. Charter Arts. 42, 51.

[6] 2005 World Summit Outcome, G.A. Res., U.N. Doc A/60/L.1, (Sept. 15, 2005), art. 138-139.

[7] Compare James D. Fearon & David D. Laitin, Neotrusteeship and the Problem of Weak States, 28 Int'l Sec. 5 (2004).

should involve a loosening of the rules on the use of force and on post-intervention reconstruction.

I. The Problem of Failed States

The concept of a "failed state" was introduced into academic discourse in 1992.[8] Though scholars disagree on a precise definition, it generally describes nations that cannot live up to their obligations under international law or perform their domestic functions because of the collapse of central government authority. Failed states were marked as a contrast to the ideal of states in the Westphalian system, which exercise full sovereign powers over a territory and population, have a functioning government that monopolizes legitimate violence and provides public goods, and can make and keep international obligations. In failed states, non-state actors control resources and population; the government cannot provide public goods to its population; and the economy has usually collapsed, producing refugee flows, starvation, and human rights disasters.[9] Physical infrastructure decays and living standards drop rapidly. Failed states usually suffer from severe internal armed conflict, an inability to control territory, and a loss of legitimacy among their citizens. Conflict usually has roots in long-standing ethnic, religious, or regional rivalries.[10]

A. Which States Have Failed?

There is no uniform consensus on which nations have fallen into the failed states category. Early scholars thought of the successor states to the former Yugoslavia or the Soviet Union as the paradigm. The end of the Cold War had unleashed racial, ethnic, or religious animosities, or yearnings for independence by regions, that had been suppressed by authoritarian dictatorships. These states gave birth to more than two dozen successors, such as Serbia, Bosnia, and Croatia, some of which turned on their neighbors, and others of which had difficulty governing themselves as independent nations. Another set of failed states emerged in Africa and Asia, where decolonization had tripled the number of states since the end of World War II. Some of these states enjoyed the right of self-determination without possessing the ability of self-governance. The Cold War kept some of these nations, such as Somalia and Ethiopia, afloat as the superpowers competed in the Third World for influence, but the collapse of the Soviet Union ended aid. A third set of failed states includes nations, such as Haiti or Afghanistan, which have historically had difficulty supporting a fully functioning government in their territories because of tribal rivalries and endemic civil wars.

Observers have attempted to create indexes of failed states to measure nations that have the worst functioning governments. The World Bank, for example, has created a "Country Policy and Institutional Assessment" Index that ranks states for purposes of allocating aid. It categorizes "fragile states" as low-income nations that have weak institutions, poor governance, political

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[8] Gerald B. Helman & Steven R. Ratner, Saving Failed States, 89 Foreign Policy 3 (1992-93).

[9] See, e.g., Robert I. Rotberg, The Failure and Collapse of Nation-States: Breakdown, Prevention, and Repair, in When States Fail: Causes and Consequences 1 (Robert I. Rotberg ed., 2004); Stuart E. Eizenstat et al., Rebuilding Weak States, 84 Foreign Aff. 134, 136-37 (2005); Daniel Thurer, The "Failed State" and International Law, 81 Int'l Rev Red Cross 731 (1999).

[10] Robert I. Rotberg, The New Nature of Nation-State Failure, 52 Wash. Q. 85, 86 (2002). See also James Fearon, Why do Some Civil Wars Last so Much Longer Than Others?, 41 Int'l Org. 275 (2004).

instability, and frequent violence or suffer the effects of past severe conflict.[11] In 2007, the World Bank included 34 nations as "fragile" based on a review of their economic management (such as macro policy and fiscal policy), structural policies (trade and business regulation), social inclusion (gender equality, environmental and labor policies), and public sector management and institutions (property rights, budget and revenue, public administration and corruption). The World Bank index ranks such countries when making funding decisions:

1. Zimbabwe
2. Eritrea
3. Comoros
4. Sudan
5. Central African Republic
6. Chad
7. Guinea-Bissau
8. Afghanistan
9. Cote d'Ivoire
10. Togo
11. Democratic Republic of Congo
12. Angola
13. Republic of Congo
14. Solomon Islands
15. Timor-Leste
16. Haiti
17. Sao Tome and Principe
18. Guinea
19. Burundi
20. Sierra Leone
21. Djibouti
22. Tonga
23. The Gambia
24. Papua New Guinea
25. Lao PDR
26. Cambodia
27. Vanuatu
28. Uzbekistan
29. Mauritania
30. Nigeria
31. Liberia
32. Myanmar
33. Somalia
34. Territory of Kosovo.[12]

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[11] International Development Association, Operational Policy and Country Services and Resource Mobilization Department, Operational Approaches and Financing in Fragile States 2 (June 2007). A higher ranking corresponds to worse state failure.

[12] Id. The World Bank considers Liberia, Myanmar, Somalia, and the Territory of Kosovo to be fragile states, but are unranked in the bottom 75 states by institutional assessment. I have listed them here in alphabetical order at the

According to the World Bank, these nations experience high levels of extreme poverty, infant mortality, and deaths from disease; and low levels of economic growth, savings and investment, and education. Violent conflict is endemic in most of these states.

Probably the best-known ranking is produced by the Fund for Peace with the cooperation of Foreign Policy magazine. Using similar factors to those of the World Bank, the Fund for Peace ranks the 20 worst functioning states as:

1. Somalia
2. Zimbabwe
3. Sudan
4. Chad
5. Democratic Republic of the Congo
6. Iraq
7. Afghanistan
8. Central African Republic
9. Guinea
10. Pakistan
11. Ivory Coast
12. Haiti
13. Burma
14. Kenya
15. Nigeria
16. Ethiopia
17. North Korea
18. Yemen
19. Bangladesh
20. East Timor.[13]

There are some differences with the way other observers rank failed states, though there is a strong degree of overlap. Professor Robert Rotberg identifies Somalia as a "collapsed state," but only seven other states as "failed": Afghanistan, Angola, Burundi, Democratic Republic of the Congo, Liberia, Sierra Leone, and Sudan. He considers roughly 35 other states as "weak," meaning that they could become failed states.[14] The Brookings Institution's 2008 "Index of State Weakness in the Developing World" contains most of the same states as the World Bank and the Fund for Peace and examines similar measures of economic, political, security, and social welfare factors. Still, it chooses to describe only Somalia, Afghanistan, and Democratic Republic

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end of the listing. Conversely, there are some states that would rank here solely in terms of their institutional assessments, but the World Bank has left them off their list of fragile states, presumably because of the absence of serious violent conflict.

[13] Foreign Policy and the Fund for Peace use a 1-10 scale to rank nations on several characteristics, including demographic pressures, refugees, group grievances, human flight, uneven development, economic decline, delegitimization of the state, public services, human rights, security apparatus, factionalized elites, and external intervention. The Failed State Index 2009, available at: http://www.foreignpolicy.com/articles/2009/06/22/2009_failed_states_index_interactive_map_and_rankings.

[14] Rotberg, supra note , at 22-23.

of Congo, as "failed," followed by a larger group of 28 "critically weak states" (the next seven are Iraq, Burundi, Sudan, Central African Republic, Zimbabwe, Liberia, and Cote D'Ivoire).[15]

Grading failed states suffers from the same problems as other forms of ranking, much like the annual declaration by popular magazines of the top 10 law schools or the best places to live in America. There will be disputes about the dysfunctional nature of a nation's governmental institutions or the severity of internal armed conflicts. The rankings may also treat cases differently depending on the cause of a state's decline; Iraq, for example, was not considered a failed state until the United States' 2003 invasion. They may also disagree over whether a nation with a strong, even tyrannical, central government should be considered failed when a small clique presides over widespread poverty and economic collapse—as in North Korea and Zimbabwe. Nonetheless, these rankings show some rough consensus about the majority of states that are considered failed, even if the precise order and the states on the margins are disputed.

B. What are the Effects of Failed States?

The effects of failed states create challenges for both policy and law. While the definition of failed states may be disputed, their effects on the international system seem clearer. The 2002 National Security Strategy of the United States declared that failing states "pose as great a danger to our national interest as strong states."[16] The European Union's 2003 security strategy found failed states to be an "alarming phenomenon," while the United Nations Secretary General observed in 2005 that "if states are fragile, the peoples of the world will not enjoy the security, development, and justice that are their right."[17]

It is not immediately obvious, from a historical perspective, why the internal collapse of a state would pose a serious threat to international peace and security. From the beginning of the period introduced by the Peace of Westphalia, which codified the nation-state as the primary actor in international affairs, to the end of World War II, interstate conflict posed the greater threat to international peace. Wars between states plagued the nations of Europe throughout the seventeenth and eighteenth centuries, culminating in World War I, which killed between 13 and 15 million people. World War II caused the deaths of even more, approximately 65 to 75 million people.[18] Not surprisingly, the United Nations Charter, written in the aftermath of World War II, defined the primary threat to international peace and security as the use of force to resolve disputes between states.[19] It responded by imposing a blanket prohibition on interstate force except for cases of self-defense or authorization by the Security Council. The Security Council could issue such authorization only to maintain international peace and security; a state's internal affairs were not seen as the basis for Security Council action. If anything, the international legal system viewed intervention in another state's internal affairs as a pretext for wars of aggression,

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[15] Susan E. Rice & Stewart Patrick, Brookings Institution Index of State Weakness in the Developing World (2008).
[16] The National Security Strategy of the United States of America 4 (September 2002).
[17] European Security Strategy: A Secure Europe in a Better World (2003); United Nations, Report of the Secretary-General, In Larger Freedom: Towards Development, Security, and Human Rights for All (2005).
[18] Milton Leitenberg, Deaths in Wars and Conflicts between 1945 and 2000 9 (August 2006), online at http://www.cissm.umd.edu/papers/files/deathswarsconflictsjune52006.pdf (visited January 16, 2010).
[19] U.N. Charter art. 1.

as most notably practiced by Nazi Germany.[20] Thus, the U.N. Charter prohibits the United Nations from intervening "in matters which are essentially within the domestic jurisdiction of any state," and guarantees each state's "territorial integrity" and "political independence."[21]

The Cold War, however, witnessed relative stability in international peace and security while internal conflict became more destructive. The rate of interstate conflict dropped, though the number (38 interstate wars between 1945-1995) was higher per year than in earlier periods: 36 from 1715-1814, 29 from 1815-1914, and 25 from 1918-1941. But after controlling for the large rise in the number of states, the rate of wars per country per year fell significantly in the Cold War period: .019 from 1715-1814, .014 from 1815-1914, .036 from 1918-1941, and .005 from 1945-1995.[22] Scholars have advanced a number of theses to explain the sharp drop in international armed conflicts, including the stability produced by the superpower competition between the United States and the Soviet Union and the invention of nuclear weapons.[23]

As interstate war fell, the number and destructiveness of internal armed conflicts increased. According to one estimate, internal wars accounted for 77 percent of all armed conflicts from 1945-1995.[24] They caused about 80 percent of all the casualties from armed conflicts during this period, with 90 percent of those being civilians.[25] In a separate study, James Fearon and David Laitin report that between 1945 and 1999, 25 interstate wars (defined as those with at least 1,000 killed with at least 100 dead on each side) occurred with about 3.33 million battle deaths. Those wars involved 25 states and had a median duration of about 3 months.[26] Yet that same period witnessed 127 intrastate wars (defined as those with 1,000 deaths), involving 73 states with a median duration of 6 years. These civil wars caused at least 16.2 million total battle deaths. In failed states, such destructive conflicts often persist for years.

Casualties from internal armed conflicts, however deplorable, might not in themselves threaten international peace and security. If the fighting is localized to a single country's territory, it may not endanger the security of other nations. However, states may view the human rights violations that often accompany civil wars as a matter of concern. Philosophers continue to debate vigorously over the justifications for international human rights, ranging from arguments that they are a feature of equal human dignity to Rawlsian contractarian claims that they are the product of choices made behind a veil of ignorance.[27] Whatever the moral foundations, nations may understand gross human rights violations as harming their own populations because of the psychic injury from knowing that rights are violated elsewhere. And, of course, a global welfare perspective would call for intervention when the lives saved from human rights abuses outweigh

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[20] Cf. Thomas Franck, Recourse to Force: State Action Against Threats and Armed Attacks 185-86 (2002) (noting that humanitarian intervention could be pretext for national self-interest); Louis Henkin, How Nations Behave: Law and Foreign Policy 144-45 (1979) (humanitarian intervention can be used as pretext for aggression).

[21] U.N. Charter art. 2.

[22] K.J. Holsti, The State, War and the State of War 24 (1996).

[23] See, e.g., John Lewis Gaddis, The Long Peace: Inquiries into the History of the Cold War (1989); Kenneth Waltz, Theory of International Politics (1979).

[24] Holsti, supra note , at 21.

[25] . Data taken from the Correlates of War project, University of Michigan.

[26] James D. Fearon & David D. Laitin, Ethnicity, Insurgency, and Civil War, 97 Am. Poli. Sci. Rev. 75, 75 (2003).

[27] See Eric Posner, Human Welfare, Not Human Rights, 108 Colum. L. Rev. 1758, 1766-69 (2008); Fernando Teson, The Liberal Case for Humanitarian Intervention in J.L. Holzgrefe & Robert O. Keohane, eds., Humanitarian Intervention: Ethical, Legal, and Political Dilemmas 93 (2003).

the costs of intervention. The United Nations Security Council, for example, has authorized action to stop human rights violations, including economic sanctions on South Africa, armed intervention in Somalia, and armed attacks in Bosnia, even though they primarily involved the internal affairs of those nations. Coalitions led by the United States have also intervened in failed states such as Haiti, Somalia, and Bosnia to stop human rights catastrophes.

Failed states may present a more direct case for intervention than human rights disasters alone. While the two are often linked, human rights violations can be caused by strong as well as weak states. Weak states create negative externalities on the international system as a whole that may exceed those created by strong states. Failed states may lack enough governmental control to prevent ethnic groups from attacking each other; the violence may not only reach genocidal proportions—as it did in Rwanda—but may also spread to nearby countries with similar tribal, ethnic, or religious fault lines. A failed state's civil wars may spark widespread human rights violations, starvation and disease that prompt destabilizing refugee movements to neighboring countries. Ungoverned territory can provide a recruiting ground and base of operations for terrorist groups, as it did for al Qaeda in Afghanistan in the years before the September 11, 2001 attacks on the United States. The lack of central control can also allow criminal organizations to flourish, leading to the spread of drug smuggling, the small arms trade, and human trafficking, to name a few.

The externalities created by failed states can be classified into three specific types. First are the cases in which a failure of state authority produces such great harm to a civilian population that other states decide to intervene to restore order. Failed states breed violence, starvation, and often a flow of refugees that impose heavy burdens on their neighbors. In 1993, for example, the failure of state institutions in Somalia allowed armed bands to roam throughout the country, producing starvation and a demand for humanitarian relief. Haiti periodically has experienced a similar problem, in which the absence of a real central government has allowed humanitarian crises to arise and produced waves of refugees bound for the United States. In both cases, the United Nations authorized the use of force in order to assist in the delivery of humanitarian aid, with mixed results. Neither country, it is fair to say, has returned to a condition of political or economic stability. Similar problems elsewhere, particularly in Africa, suggest that failed states are becoming one of the most significant contributing factors to humanitarian disasters.

Second are the cases where the collapse of the institutions of a nation-state unleashes armed conflict between ethnic or religious groups. In the former Yugoslavia, the erosion of the central government led to a breakup by the different groups—Serbs, Croats, Bosnians, and Kosovars—that had been held together by the communist state. Serbia's efforts to restore control over the other provinces of Yugoslavia led to ethnic cleansing and population displacement. One might also understand the genocide in Rwanda as the product of a failure of state authority, in which the assassination of a government leader and the collapse of a government allowed one ethnic group to attack and attempt to destroy another. These internal conflicts threaten to spread to neighboring countries, which might have similar ethnic or religious divisions or which may be tempted to support one side or the other. Neighboring states may be weakened or feel pressured to increase armaments, which may destabilize the region.[28] As with the purely humanitarian

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[28] See Fearon & Laitin, supra note , at 13.

crises, civil wars produced by a failure of state authority have prompted more powerful states to intervene to end the fighting and to form some type of permanent settlement.

A third category came into focus after the September 11, 2001 attacks. States without a centralized government may become anarchic areas where terrorist groups can freely build resources, train their operatives, and establish bases from which to launch attacks. Parts of Yemen, for example, appear to be ungovernable due to a weak central government, which has allowed operatives of the al Qaeda terrorist network to hide there. While it possessed stronger central control under the Taliban, Afghanistan similarly witnessed the free operation of al Qaeda within its territory. It appears now that either the Taliban could not control al Qaeda, or that al Qaeda simply dictated to the Taliban; in either case, a more conventional central government might be expected to prevent the large-scale, open operation of international terrorist organizations on its own soil. In the wake of the September 11 attacks, U.S. government officials clearly believed that failed states—because of their potential use as a base for terrorist groups—presented as great a danger to American national security as the powerful national opponents of old. According to the Bush administration's 2002 National Security Strategy, "America is now threatened less by conquering states than we are by failing ones."[29] Terrorist groups might not be the only problem; a lack of government authority may allow non-state actors to engage in other forms of undesirable activity, such as narcotics smuggling, human trafficking, and money laundering.

C. The International Legal System's Missing Response

International law and policy has failed to grapple with the emergence of failed states. The international legal system still rests on the nation-state as the primary actor in world affairs, and has little place for territory with non-existent governmental institutions. As a general matter, for example, only "States" may legally engage in international relations. The Vienna Convention on the Law of Treaties defines a "treaty" as "an international agreement concluded between States in written form and governed by international law."[30] While international law recognizes that non-State entities, such as international organizations, can become parties to treaties, States still remain the creators of the international organizations, usually also by treaty.[31] Insurgents in control of particular territories have on occasion entered into agreements with governments, but even then the rebels could be understood to be an emerging State in the course of a successful move for independence.[32] These outlier cases aside, the standard rule for treaties requires that the parties be States.

In determining whether a State exists, and hence is entitled to the privilege of participating in international affairs, international law looks to a standard test. The 1933

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[29] National Security Strategy of the United States (2002).

[30] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), entered into force Jan. 27, 1980.

[31] *See, e.g., Reparation for Injuries Suffered in the Service of the United Nations,* 1949 I.C.J. 174, 179 (noting that the United Nations Organization was itself a party to treaties, including, *e.g.,* the Convention on the Privileges and Immunities of the United Nations, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 15, entered into force for the United States Apr. 29, 1970).

[32] See I.I. Lukashuk, Parties to Treaties – The Right of Participation*, 135 Rec. des Cours 231, 280-81 (1972); James Crawford, The Creation of States in International Law 394 (1979).

Montevideo Convention rejects the "constitutive" theory in which recognition by existing States establishes the existence of a new State; instead, it adopts a "declaratory" approach, which uses objective factors to determine statehood. A State must have (1) a permanent population; (2) a defined territory; (3) government; and (4) the capacity to enter into international relations.[33] It is important to make clear that the recognition of States is a distinct question from the recognition of governments, though the initial recognition of a State is often bound up with the recognition of a government of that State, and the test for statehood requires having a government.

The four qualifications for statehood determine whether a State will be able to conduct international relations, both in making and keeping international agreements and in fulfilling its international obligations. States have interests in forming treaties to ensure that other States do not invade their territories or harm their people. Because they have governments, States have identifiable power-holders who can be induced by other States' promises of benefits, or intimidated by their threats of harm, to comply with the treaty obligations that they or their predecessors have assumed. Moreover, such inducements and threats can come from third-party States that have independent interests in securing treaty compliance. A State's breach of its treaty obligations may cause the injured State to retaliate by suspending performance of that treaty and others, cause third-party States to alter their policies, or lead to a rupture of diplomatic relations.

Absence of a State structure makes compliance with international law unlikely or even impossible. A multinational terrorist organization like al Qaeda, for example, has no territories or populations to defend. It provides no public services to a population nor does it operate any traditional governmental institutions. Its apocalyptic vision and practices leave it unsusceptible to the ordinary pressures and incentives that characterize interstate relations.[34] Instead, al Qaeda is motivated by religious doctrines that permit or even encourage both the suicide of its own members and the mass murder of civilians.[35] Finally, al Qaeda engages in an asymmetric form of warfare that makes a State's military forces far less useful either offensively or defensively than against a more traditional enemy. Given these characteristics, it would be absurd to expect al Qaeda to show respect for treaty obligations, and therefore pointless to attribute treaty-making capacity to it.

Failed states thus create a central problem for international law and politics. As a matter of international law, the absence of a State precludes the possibility that a territory or population can make treaties or engage in international relations. As a matter of international politics, the collapse of central government means that nations cannot engage in reciprocal and mutually beneficial relationships with that territory and population, or deter and compel action there by a government. Failed states either will be unable to enter into international agreements or unable to live up to the international obligations that they assumed when their governments were functioning.

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[33] Convention on Rights and Duties of States, 49 Stat. 3097, T.S. 881, 165 L.N.T.S. 19, 3 Bevans 145, entered into force Dec. 26, 1934.

[34] *See* Olivier Roy, Globalized Islam: In Search For a New Ummah 56 (2004).

[35] See Paul Berman, Terror and Liberalism (2004); Rohan Gunaratna, Inside Al Qaeda: Global Network of Terror 122 (2002).

International law once offered a structure that addressed the problem of ungoverned territories by limiting national sovereignty and allowing foreign powers to exercise high levels of control over domestic governmental functions. Chapter XII of the U.N. Charter created a trusteeship system that allowed the U.N. to appoint an established nation to administer a territory and advance it toward self-government.[36] It applied to three types of territory: those still under a League of Nations mandate (which created a similar governance structure), those detached from the Axis powers at the end of World War II, and those voluntarily placed under the system by states already responsible for their administration (which generally applied to colonial powers).[37] Ironically, the U.N. Trusteeship Council, composed of the permanent members of the Security Council and created to oversee the system, terminated its functions in 1994 with the independence of Palau, the last of the trusteeship territories.[38] But even those scholars, such as Gerald Helman and Steven Ratner, who support a rejuvenated trusteeship system, concede that Chapter XII does not reach the case of existing U.N. member states whose governmental institutions fail.[39] The U.N. Trusteeship system addresses the unique situation that arose at the end of World War II, with the redrawing of the map in Europe and Asia and the rapid decolonialization of large parts of the world. The use of trusteeships in failed states would require an amendment to the U.N. Charter that would overcome the prohibition on interference with the internal affairs of states and the guarantee of "sovereign equality" for all members.

## D. The Inconsistent Policies toward Failed States

At the policy level, failed states produce negative externalities. Actors within the failed states will not curb their actions, from which they may benefit, because they do not fully internalize the costs. A warlord who drives out members of his rival ethnic group, for example, will not suffer the full costs of the refugee migrations, which are born by neighboring countries. A rebel leader will not internalize the costs of allowing a terrorist organization or drug cartel to operate on territory under his control; he may benefit by receiving military or financial support from such groups, without bearing the costs of terrorist attacks abroad or drugs smuggled to other nations.

These challenges produce a collective action problem. The negative externalities generated by failed states will often fall upon many nations or the international system as a whole. This collective action dilemma is especially evident with human rights catastrophes that affect only the inhabitants of the failed state, but also the case with the proliferation of WMD technologies. No single nation may receive sufficient benefits to undertake the costs of intervening to rebuild governmental institutions and restore order in the failed state. As with other forms of international collective action problems, nations must bargain in order to identify who will undertake the actual intervention and who will shoulder the costs.

The international system has responded in several noteworthy, yet inconsistent, ways to these problems. First, a small set of nations has used military force to stop the negative effects of failed states on the international system or their regional interests. They have not always done so

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[36] U.N. Charter ch. XII, arts. 75-85.

[37] Id. art. 77.

[38] See Status of Trusteeship Council, http://www.un.org/en/mainbodies/trusteeship/.

[39] Helman & Ratner, supra note , at 16.

consistently or successfully, nor have they always done so with the formal international legal sanction of the U.N. Security Council. Usually, a Western power with advanced military and organizational skills leads the intervening states, though it may act alone.[40] In Somalia and Haiti, for example, the United States and others used their own armed forces to intervene to stop the human rights violations. The mission failed in Somalia, but met with some success in Haiti. In Afghanistan, the United States and its NATO allies overthrew the Taliban regime, which had allowed the al Qaeda terrorist organization to operate freely on its territory. The intervening states sought and received U.N. Security Council resolutions authorizing the use of force in Somalia, Haiti, and Afghanistan. In Kosovo, the United States joined with its NATO allies to successfully prevent Serbia from driving ethnic Albanians out of the territory. And in Iraq, the United States and a coalition overthrew Saddam Hussein. The U.N. Security Council did not formally authorize the use of force in these cases.

What may be just as significant, though less studied, is the omission of intervention. In studying the use of force, scholars focus on *Type I* errors—when nations use force when they should not have. They often neglect *Type II* errors—when nations do not use force, but should have. In some cases where the effects of a failed state are just as negative as Haiti or Somalia, or even worse, no international intervention has occurred. The Kosovo intervention occurred only after Serbia had launched a 1992-95 campaign of ethnic cleansing in Bosnia and Herzogovina, which ultimately resulted in a partition of the territory along ethnic lines. And no nation intervened to prevent the genocide that erupted in Rwanda in 1994, in which members of the Hutu tribe killed almost one million Tutsi.

Second, once intervention has occurred, the nations have gone further than simply establishing enough political and economic stability to end internal civil wars or human rights catastrophes; such stability might be achieved with the long-term or active presence of foreign troops and administrators. Intervening nations instead have often sought to restore working governmental institutions and to return the failed states to full sovereignty. In Afghanistan, for example, the United States and its allies have promoted political parties, free elections, a constitutional democracy, and the rule of law with an independent judiciary. In Haiti, the United States has attempted to restore order by replacing a military junta with a democratically elected president.

Such vigorous efforts to restore a nation-state to proper functioning are not inevitable. In some cases, no leading nation has emerged to direct the intervention, as was the case in Rwanda. Efforts to use the United Nations, rather than regional powers, have led to failed peacekeeping operations. Repeated state failure may actually signal not that existing state institutions have failed, but that a certain territory has never had a functioning state to begin with. This seems to suggest that the nation-state framework is ineffective at governing certain territories or peoples. Both the League of Nations (mandates) and the United Nations (trusteeship) recognize certain forms of quasi-sovereignty in which a more powerful, developed nation takes charge in a territory that cannot quite govern itself, and leads it toward full sovereignty and independence. Scholars recently have suggested that "neo-trusteeships" could become a new form of

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[40] Fearon & Laitin, supra note , at 26-27.

institutional governance for failed states.[41] Historically, there have been alternate forms of governance other than the nation-state, such as multiethnic empires, federations, city-states, and colonialism. In the recent interventions, however, the great powers have not even seriously considered adopting alternate forms of governance. For the United States and its allies, it has been either the nation-state or nothing.

Third, intervening nations have made a determined effort to maintain existing national borders. The United Nations did not seriously consider dividing Rwanda into two nations, one for the Hutus and one for the Tutsis. Nor did the United States and its allies consider dividing Iraq into three different nations that reflected the different religious and ethnic groups there— Kurds in the North, Shiites in the South, and Sunnis in the middle—despite the fact that Iraq's borders were drawn arbitrarily by the British and French at the beginning of the last century. Maintaining existing national borders, even at the price of heterogeneity of groups and preferences within a nation, seems to be consistent American policy. At the end of the Cold War, for example, the United States did not support the fragmentation of the Soviet Union until confronted with a *fait accompli*, and even through the Clinton administration, American presidents kept in force arms control agreements with its successor states.[42]

At other times, however, intervening nations have responded to state failure by encouraging fragmentation. In the former Yugoslavia, for example, the United States and its NATO allies acted to prevent Serbia from maintaining control over Kosovo. After years of peacekeeping, it now appears that a political settlement will include substantial independence of Kosovo. Similarly, neither the United States nor NATO intervened to prevent earlier conflicts in which groups split off from the former Yugoslavia. In these cases, the price of maintaining previous nation-state borders appeared too high; in other words, the heterogeneity of preferences among internal groups was considered too great to justify maintenance of a single state.

International law mirrors this strong political commitment to nation-states as the primary unit of international governance and resistance to changes in borders. In the wake of the American-led invasion of Iraq, for example, the U.N. Security Council required in its authorization of the occupation that Iraq's borders remain intact and that it be returned to full sovereignty in the future. To date, the Security Council has not approved redrawing borders as a response to the problem of failed states. Rather, nations have continued to recognize the borders of failed states such as Somalia and Afghanistan.

When the issue first presented itself, however, there was more uncertainty about the international legal reaction. In the case of Somalia, the Secretary General urged a military intervention pursuant to Article 39 of the U.N. Charter to assist the previously authorized United Nations humanitarian relief effort in Somalia (UNOSOM).[43] He stated in a November 29, 1992

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[41] See, e.g., James D. Fearon & David D. Laitin, Neotrusteeship and the Problem of Weak States, 28 Int'l Security 5 (2004); Stephen D. Krasner, The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law, 25 Mich. J. Int'l L. 1075 (2004); Robert Keohane, Political Authority After Intervention: Gradations in Sovereignty, in Holzgrefe & Keohane, supra note , at .

[42] See John Yoo, Politics as Law?: The Antiballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation, 89 Cal. L. Rev. 851 (2001).

[43] U.N. S.C. Res. 733 (1992).

letter that "no government exist[ed] in Somalia that could request and allow such use of force."[44] The Security Council endorsed the Secretary General's recommendation and welcomed the United States' offer to lead an armed intervention.[45] The Security Council's action might have been inconsistent with Article 2(7) of the U.N. Charter, which prohibits intervention "in matters which are essentially within the domestic jurisdiction of any state." Despite the Secretary-General's finding, the Security Council did not recognize the actual state of affairs in Somalia. Instead, it referred cryptically to "the unique character of the present situation in Somalia" and "its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response."[46] The Security Council resorted to ambiguities in order to avoid the fact that Somalia had collapsed as a state, and that there was no immediate prospect of the restoration of government there. Commitment to the legal preservation of the nation-state was so strong that it precluded reliance on a legal exception to the bar on outside military intervention.

Iraq exemplifies these contradictory approaches. After the United States and its coalition had successfully ousted Saddam Hussein's regime, they deliberately sought the authority of "occupying powers." Under the Fourth Geneva Convention, the Hague Regulations, and customary international law, the status of an occupying power brings both power and duties. Occupying powers can extract natural resources, take possession of state property, install friendly governments, and even rewrite constitutions. However, their powers are temporary. Occupying powers cannot abolish a defeated nation-state or permanently reduce its sovereignty. Thus, the coalition never moved to replace the Iraqi nation-state with something else, such as a protectorate, colony, or a conquered and subsequently annexed territory. Further, the coalition kept Iraq whole and unified, rather than allowing it to split into Kurdish, Shiite, and Sunni states. While, no doubt, there is a strategic reason for this—a unified and friendly Iraqi nation-state could prove a useful bulwark against Iran and Syria—it also appears that current international law has no intellectual category for anything short of a nation-state.

II. International Law and the Nation-State Framework

This Part questions the international law and policy of maintaining nation-states in their current borders. It begins by discussing the reasons for the rise of the nation-state and the purpose behind its use as the basic organizing unit in the international system. Without some understanding of the benefits of the nation-state system, and the possible alternatives, we cannot evaluate whether the international community's current efforts to restore and impose that framework makes sense. Such an evaluation requires us to describe what normative goals we seek in a system of governance and to define a yardstick for their measurement. This Part explains why the nation-state remains superior to alternate forms of government for addressing the failure of government institutions in a territory.

A. The Rise of the Nation-State

Scholars have reacted to the phenomenon of failed states by questioning whether the nation-state framework remains appropriate for all peoples and territories in the world. In 1992,

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[44] U.N. Doc. S/24868, at 6.
[45] U.N. S.C. Res. 794 (1992).
[46] Id.

Helman and Ratner proposed that the United Nations authorize a new form of conservatorship for failed states.[47] Political scientist Robert Keohane found that absolute de jure sovereignty could not take account of failed states. Instead, he believes that mixed forms of sovereignty, in which other nations or international organizations control aspects of a failed state's functions, should be recognized.[48] David Laitin and James Fearon argue that "neo-trusteeship" has emerged, in which foreign countries and international organizations, rather than any single nation, exercise domestic political authority and manage governmental institutions within a failed state.[49]

Although several of these approaches view an international legal mandate as essential, they have mostly found favor with international relations scholars. International legal scholars, on the other hand, have criticized the neo-trusteeship concept.[50] Early criticism from one quarter, for example, responded to the proposal as susceptible to "neocolonialism" that relied on a "theory and system of subjugation, whose sub-text was racial and cultural inferiority."[51] Rosa Brooks has gone even farther. She rejects the idea of restoring failed states because they attempt to put into place the nation-state as the governing form. According to Brooks, the nation-state itself is tottering on eroded foundations, and failed states might be better off in "non-state arrangements."[52] While the state is not "defunct," she urges that "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."[53]

Some practitioners also suggest that the solution to failed states lies in disaggregating the absolute sovereignty of the state. Ashraf Ghani and Clare Lockhart, the former served as a minister in Afghanistan's Karzai government and the latter worked for international organizations in Afghanistan, believe that the state remains the "most effective form of organization of the polity."[54] Nonetheless, they argue that the international community should focus on strengthening specific government functions in economics, politics, and social domains. This is done by creating "a new legal compact" between government, citizens, and the international community and markets, rather than "a top-down imposition of the state."[55] Current international organizations, in their view, present an obstacle to this compact because they assume that the primary actor in international affairs is the unitary state that enjoys absolute authority within its territory.[56]

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[47] Helman & Ratner, supra note , at 3-18.
[48] Robert O. Keohane, Political Authority After Intervention: Gradations in Sovereignty, in Holzgrefe & Keohane, supra note , at .
[49] Fearon & Laitin, supra note , at 7.
[50] See Saira Mohamed, Note, From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council, 105 Colum. L. Rev. 809, 830-34 (2005) (surveying sources). See also Christian Eric Ford & Ben A. Oppenheim, Neotrusteeship or Mistrusteeship—The Authority Creep Dilemma in United Nations Transitional Administration, 41 Vand. J. Transnat'l L. 55 (2008).
[51] Ruth Gordon, Saving Failed States: Sometimes a Neocolonialist Notion, 12 Am. U. J. Int'l L. & Pol'y 903, 907 (1997). See also Ruth E. Gordon, Some Legal Problems with Trusteeship, 28 Cornell Int'l L.J. 301 (1995).
[52] Rosa Ehrenreich Brooks, Failed States, or the State as Failure?, 72 U. Chi. L. Rev. 1159, 1185-86 (2005).
[53] Id. at 1195.
[54] Ashraf Ghani & Clare Lockhart, Fixing Failed States: A Framework for Rebuilding a Fractured World 4 (2008).
[55] Id. at 7.
[56] Id. at 10.

An initial, and perhaps fatal, legal challenge with proposals to fix failed states is that there is no clear way to tackle failed states through existing international law. Take, for example, the claims that the U.N. Charter's trusteeship provisions, themselves based on the League of Nation's mandate system, could provide the necessary framework for multiple forms of sovereignty in failed states. International relations scholars, who sometimes favor this approach, display a reluctance to analyze whether the U.N. Charter actually would allow for the rejuvenation of the trusteeship process. This reluctance, no doubt, stems from concerns that restoring failed states could serve as a pretext for neo-imperialism. Such concerns, however, are misplaced.[57] Current interventions show little signs of colonialism or imperialism.[58] Western powers, for example, do not pursue territorial expansion or permanent political control of failed states as part of competition between major powers. They do not seem motivated by a desire to extract wealth from failed states—quite the contrary. Reconstruction may well cost intervening nations more than any possibility of gain from operating the failed state's economy. The threat arises not from other great powers, but from the negative externalities produced by failed states. Nations desire a quick exit after restoring a failed state to some form of legal sovereignty.[59]

International law scholars, on the other hand, too easily assume that other forms of political organization can replace the nation-state, at least for failed states. Globalization is only the latest phenomenon to raise doubts about the longevity of the nation-state.[60] Like Mark Twain's death, predictions of its demise have been greatly exaggerated. Resistance to alternatives to the nation-state may originate from the international legal system itself, which continues to conceive of the nation-state as the basic unit of international affairs. Or perhaps people have come to accept nation-states simply because they are a historical fact. A great deal of work has been done on the emergence of the nation-state as the organizing unit of international politics.[61] The nation-state, by all accounts, appeared relatively late on the world scene. Although states existed in some form before the Peace of Westphalia, 1648 is generally acknowledged as the moment in the Western world when the nation-state became the primary actor in the international system. But long before that, and for several centuries afterwards, other forms of governance existed, including multi-ethnic empires, sub-national units like city-states, and transnational institutions such as the Catholic Church. While the nation-state has been with us for about four centuries, the Roman Empire alone was around for at least twice as long (and more than four times that, if one includes the Byzantine Empire).

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[57] Cf. Ryan Goodman, Humanitarian Intervention and Pretexts for War, 100 Am. J. Int'l L. 107, 110 (2006) (arguing that legalizing unilateral humanitarian intervention may in fact restrain some aggressive wars by undercutting an aggressive state's domestic political support for war).

[58] See Ryan Goodman & Derek Jinks, Toward an Institutional Theory of Sovereignty, 55 Stan. L. Rev. 1749, 1779-80 (2002) (noting that "recent patterns of military intervention exhibit a shift in system-wide norms: National militaries have been employed not for territorial or strategic purposes, but for humanitarian ends" and that "states have come to conceive of gross human rights violations in other countries as a threat to their own security"). See also Martha Finnemore, Constructing Norms of Humanitarian Intervention, in The Culture of National Security in World Politics 153 (Peter J. Katzenstein ed., 1996); Ryan Goodman, Norms and National Security: The WTO as a Catalyst for Inquiry, 2 Chi. J. Int'l L. 101, 106-109 (2002).

[59] Ghani & Lockhart, supra note , at 7-14.

[60] See, for example, Helen Stacy, Relational Sovereignty, 55 Stan. L. Rev. 2029, 2043 (2003).

[61] See Philip Bobbitt, The Shield of Achilles: War, Peace and the Course of History (2002); C. Tilly, Coercion, Capital, and the European States: A.D. 990-1990 (1990).

Further, it appears that the modern state itself—particularly in Europe, from whence the concept sprang—has changed subtly over time. As Charles Tilly and Philip Bobbitt have argued, the nation-state is the result of a series of changes, born of war, that have been ongoing since the fifteenth century.[62] Before the Peace of Westphalia, states represented the extension of the personal power of princes, most notably the individual princes of Germany, but that relationship changed to one in which the prince became the servant of the state. Princely states, however, were too small to take advantage of the standing armies, centralized taxation and finance, and production of new weapons; hence, larger states governed by kings emerged. Kingly states gave way in the eighteenth century to territorial states that did not rest on a monarch for legitimacy but for control over territory and representation of a population. These states eventually gave way to nation-states, which married the state structure to a nation.[63]

History provides a means to understand how the nation-state came into being and became prevalent, but not whether it should remain so. Accepting the nation-state solely because of history would be akin to requiring that all forms of business activity be organized along the lines of the modern corporation, because the corporation happened to become the most popular form. Rather, we want to ask what benefits the corporate form provides, compared to other alternatives, in the context of the environment within which it exists. So, for example, corporations are more effective at raising capital and reducing certain transaction costs (such as producing components for a product internally rather than buying all of them on the open market).[64] But the corporate form is not ideal for all types of business activity, which at times may be better served by sole proprietorships or partnerships (as with law firms).

Similarly, we should ask what advantages the state brings in the international system, just as Oliver Williamson asked why corporations exist in the market. Here, rather than the market, the institutional context is the international system. Rather than efficiency and economic growth, the normative goal is global welfare. This goal is to be distinguished from the goal of any individual unit in the system, which may be limited to preserving its security or include a desire to expand its borders.[65] Global welfare is a function of the world's population and the quality of life enjoyed by that population. In the market, competition for individual profit, through the invisible hand, leads to the efficient production and allocation of goods and services. Is there a similar effect in the international system? Does the nation-state, through its drive for power or its desire for security, promote global welfare in a more effective manner than alternate systems of government?

Historically, nation-states have been more effective at organizing a population for internal security and national defense. Multi-ethnic empires became increasingly expensive to govern due to distances, the lack of loyalty on the part of subject populations, and a lack of innovation caused by the need to suppress dissent. Nation-states, by contrast, are better able to organize populations to defend against external threats in two ways: first, by using appeals to a

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[62] Bobbitt, *supra* note , at .

[63] Bobbitt argues that in between arose the "state-nation," in which a state drew upon nations to achieve its objectives, as opposed to the nation-state, in which the state is the instrument of the will of the nation.

[64] Oliver Williamson, The Mechanisms of Governance (1999).

[65] This is the difference between "defensive" and "offensive" realism. See Kenneth Waltz, A Theory of International Politics (1979) (defense realism); John Mearsheimer, The Tragedy of Great Power Politics (2001).

common national origin to spur patriotic fervor, and second, by providing efficient means of organizing militaries and paying for them.[66] The idea of the nation-state assumed that the population of a "state" would consist, primarily if not solely, of a particular "people," understood in terms of a common historical consciousness or remembered collective past, and likely also of commonalities in ethnicity, language, and perhaps religion.[67] Max Weber explicitly linked the nation-state's success in marrying security with a nation or people:

> The primary formal characteristics of the modern state are as follows: It possesses an administrative and legal order subject to change by legislation, to which the organized corporate activity of the administrative staff, which is also regulated by legislation, is oriented. This system of order claims binding authority, not only over the members of the state, the citizens, most of whom have obtained membership by birth, but also to a very large extent, over all action taking place in the area of its jurisdiction. It is thus a compulsory association with a territorial basis. Furthermore, today, the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it. . . . The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous organization.[68]

Over time, the nation-state expanded beyond a role in guaranteeing negative liberties that allowed for law enforcement and defense to include a role in providing public goods. As Bobbitt has observed, the nation-state's chief functions are to provide internal and external security, to expand material wealth, to uphold civil and political rights of popular sovereignty, to provide its people with economic security and a variety of public goods—in a word, with welfare—and to protect the state's cultural integrity.[69] To be sure, the terrible wars of the twentieth century may only have been made possible by the efficiencies of the modern nation-state in organizing large militaries supported by mass production industries. At the same time, however, nation-states seem to have outclassed empires and other forms of governance in guaranteeing domestic peace and providing public goods such as markets, law enforcement, and security. Interstate conflicts may have led to large amounts of death and destruction, but nation-states may also have led to large increases in population and economic growth, and longer stretches of international peace, than would have occurred under alternate forms of governance, such as the multi-ethnic empire.

Nevertheless, the nation-state today is often seen as the problem, rather than the solution. Human rights advocates, for example, are apt to criticize nation-state sovereignty, which can be used to commit grave human rights abuses.[70] Globalization—the accelerated and cheap movement of goods, service, capital and communication across national borders—is seen as another challenge to the ideal of nation-states. Nations, it is argued, cannot control worldwide

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[66] Seventeenth- and eighteenth-century Great Britain provides a striking example of the means by which a nation could achieve primacy by quickly adopting the financial institutions of a modern state. John Brewer, The Sinews of Power: War, Money and the English State, 1688-1783 (1990).

[67] Benedict Anderson has described Nation States as "imagined communities." *See* Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (pb. ed. 1991).

[68] Max Weber, *The Theory of Social and Economic Organization* 156 (A.M. Henderson & Talcott Parsons (trans.) 1947).

[69] Bobbitt, *supra* note , at .

[70] See, for example, Rosa Ehrenreich Brooks, Failed States, or the State as Failure, 72 U. Chi. L. Rev. 1159, 1173 (2005).

changes that are occurring primarily outside their individual borders.[71] Efforts to solve problems arising from globalization in the area of the environment, development, crime, terrorism, and trade, among others, are likely to view the nation-state and its sovereignty as an obstacle rather than an aid to cooperation.

But, as Jeremy Rabkin argues, it may be the case that the nation-state remains the primary means to solve these problems.[72] Human rights abuses in the Balkans did not end, for example, because of the collective action of the international community, but because of the intervention of the United States and its NATO allies. Individual nations with historical or geographical ties to problem areas, such as the United States and Haiti or France and the Ivory Coast, have taken the lead to stop murderous civil wars. The United Nations proved miserably inadequate at stopping genocide in Rwanda, and it appears, unfortunately, to be repeating that performance in Sudan. Regardless of one's opinion on the Iraq war, it is difficult to imagine a successful resolution to the challenge of rogue nations and the proliferation of WMD that does not involve economic, political, or military action on the part of nation-states. Nation-states have not just become guarantors of their own security, but have been better protectors of international peace and security than any currently existing alternatives.

B. The Benefits of Extending the Nation-State to Failed States

Preserving the nation-state as the primary unit of governance achieves the goal of international security in several ways. Nation-states are most effective at organizing for defense by successfully mobilizing populations and by mass-producing the weapons. Second, nation-states provide a form for the political existence of peoples with distinctive cultures and histories, which further allows for the successful organization of a population for self-defense. Third, nation-states allow the emergence of disparities of power sufficient to allow a group of nations to intervene to stop threats to international peace and security. This latter purpose, however, relies on the historical fact that the nations that prevailed in World Wars I and II happened to be parliamentary democracies that have not sought to use their power since to re-create colonial empires.

If the nation-state framework were extended to failed states, the relationship between an intervening power and a failed state would be comparable to that of two nations in an alliance. Students of international relations have long viewed alliances as devices for "capability aggregation."[73] States form alliances in order to aggregate their strengths against a common foe or set of foes. The nature of the alliance depends on the relative power of the two nations and their strategic position. The greater the military capabilities of a nation, the more attractive it is as an ally; on the other hand, a reduction in the common threat's capabilities or in an ally's abilities makes an alliance less useful. Recent elaboration on these themes suggests that alliances represent a trade-off between security and autonomy.[74] Powerful allies can offer improved

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[71] See, e.g., Anne-Marie Slaughter, A New World Order 12 (2004); Helen Stacy, Relational Sovereignty, 55 Stan. L. Rev. 2029, 2043 (2003); Kenichi Ohmae, The End of the Nation State: The Rise of Regional Economies 140 (1996).
[72] Jeremy Rabkin, The Case for Sovereignty: Why the World Should Welcome American Independence (2004).
[73] Kenneth Waltz, A Theory of International Politics (1979).
[74] James Morrow, Alliances and Asymmetry: An Alternative to the Capability Aggregation Model of Alliances, 35 Am. J. Poli. Sci. 904 (1991).

security, but are more likely to expect substantial autonomy in the partnership; conversely, smaller nations with fewer capabilities will be willing to provide their larger and more capable partners greater control over the alliance. Larger partners may be willing to enter such an alliance because greater control over a smaller ally can allow it to devote resources elsewhere.

Another way of seeing this point is to view a traditional strategic alliance, such as NATO or ANZUS, as a species of international governance that provides a fairly high level of autonomy to its members. Other relationships in which the weaker party has low levels of autonomy approach that of an empire; various forms of federations, colonialism or protectorates lie somewhere in between. For example, one can view the Warsaw Pact as a relationship between a stronger power and weaker ones that fell somewhere between the high autonomy of NATO and the low autonomy of an outright empire. Some have likened alliances to relational contracts, in which the level of control in the relationship depends on the level of opportunism to shirk or abrogate agreements by the smaller power, to entrap the larger power in unwanted conflicts, or to renegotiate the level of contributions to the joint enterprise.[75] The more likely an ally will act opportunistically in these ways, the more likely that the more powerful partner will require greater control over the alliance. Less autonomy, in turn, means higher governance costs for the greater power. Monitoring the activity of the smaller power will distort the allocation of resources available for security. Greater powers could act opportunistically too by exploiting the weaker power once an alliance is formed; safeguards necessary to protect against such exploitation will also increase governance costs. The threat deterred or prevented by the aggregation of capabilities (or, to put it differently, the costs created by going it alone without an alliance) will define the benefit of the alliance. The cost will be the sum of the cost of opportunism and the governance costs to prevent it.

Viewing international relations in this way reveals why the great powers are so committed to the restoration of the nation-state in territories that have witnessed the collapse of state power. Stronger powers still need to create other nation-states as a prerequisite to forming alliances or more hierarchical relations. Thus, we can hypothesize that nations will seek to rebuild nation-states when the benefits from an alliance with the failed state are very high. In Kosovo, the benefit was the prevention of further warfare in a territory on the border of Europe, in an area where previous conflict had produced a continent-wide war and where humanitarian catastrophes could have led to destabilizing refugee flows. With Afghanistan, a powerful central government was necessary to suppress the infighting that had allowed al Qaeda to slip in and establish a base of operations. The September 11 attacks demonstrated that American policymakers had underestimated the benefits of restoring a nation-state in Afghanistan. A failed state can provide little capability to aggregate, but a nation-state in such a strategic place as the Middle East or the border of Europe could offer more. A larger nation could not reap the benefits of an alliance, however, without a nation-state across the table.

On the cost side, a failed state represents perhaps the highest possibility of opportunism. Without a central government, the United States is left only with private or quasi-public entities, such as warlords or ethnic leaders, with which to seek a relationship. Without a government to enforce laws on them, these groups may have little incentive to uphold their end of the bargain. Such groups may also lead to entrapment, as they may have more scores to settle in an

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[75] David Lake, Anarchy, Hierarchy, and the Variety of International Relations, 50 Int'l Org. 1 (1996).

environment of competition with similar groups within a failed state. Building nation-states in areas such as the former Yugoslavia or Afghanistan can simply be understood as incurring very high governance costs in order to control extremely high levels of opportunism. Nation-building represents a particularly expensive method for monitoring whether a partner is going to live up to its end of the bargain, whether it be maintaining peace and stability in the former Yugoslavia or hunting down al Qaeda terrorists in Afghanistan.

Balancing these benefits and costs may explain the haphazard meanderings of policy and the presumptions built into international law. Nation-states appear to be the most consistent means for guaranteeing law and order within a territory. If a functioning national government exists, a territory will be less likely to be used as a base for terrorists. It may well be less likely to be the source of humanitarian catastrophes (although this is not true in every case, as in North Korea). However, the governance costs of establishing a functioning nation-state can be high; hence, we would not expect to see the great powers undertake state building except when the expected benefits are high. Perhaps this explains why the West launched its expensive state-building efforts in Kosovo, Afghanistan, and Iraq, but not in other places, such as Africa, which seemed to pose less of a threat to Western security. Nation-state success in the area of security seems so consistent vis-à-vis other alternatives that it may even make sense to embody the policy in a legal rule. A default rule in favor of the establishment of nation-states may well reduce error costs across most cases and will certainly drive down decision costs in attempting to decide on, and then experimenting with other forms of international governance.

The only problem with codifying the choice of the nation-state in international law is that it is doubtful whether we have sufficient experience with other forms of international relationships. Nation-states, with the right regimes, may be a particularly effective tool at stopping terrorism within their borders or protecting human rights. But the governance costs are high, and North Korea stands as an example that the benefits of a nation-state could also be turned to support terrorism and oppose human rights. Building nation-states not only creates high costs, but it also results in a high level of autonomy for the new state *ex post*. It might be the case that other forms of governance could provide much higher levels of control, at lower cost, and still sufficiently control activity within a territory. For example, some form of joint sovereignty between local provinces and NATO nations may prove to be a more effective long-term solution to the problems in the former Yugoslavia than undertaking the expensive task of ensuring that each province can survive as an independent state. Similarly, some form of governance greater than the rule of warlords but less than a fully independent nation-state might prove just as able to track down al Qaeda in Afghanistan, at lower cost.

Alliance theory, however, seems to be less than a perfect fit for another reason. Alliance theory simply may not apply because it assumes the existence of two nation-states able to make agreements and carry them out, while one of the chief characteristics of a failed state is the lack of a nation-state that is even capable of performing its international obligations. The problems in forming a nation-state may simply introduce too much of a distortion into the theory of alliances. An alternative analysis, however, is suggested by a different dimension of relational contracting theory. Williamson's approach as used by alliance theorists is basically one of horizontal integration. In what situations will firms decide to merge or acquire another rather than choosing

to contract for the desired good or service?[76] Just as Williamson posits that a merger or acquisition is more likely to occur as the costs of contract abrogation increase, so too more controlling and hierarchical alliances are needed when the chances of opportunism are high. Failed states, however, do not fit into this approach because of the lack of a contracting partner.

Instead, transaction cost approaches to vertical integration may be more appropriate. A failed state may raise a problem similar to that faced by a firm attempting to decide how to obtain a natural resource, such as the oil from an unexplored field. Suppose the firm itself does not specialize in extracting the natural resource, but instead benefits from its distribution and sale. Since it is undeveloped, the natural resource does not yet have a firm with which the firm can contract to buy the oil. The firm has a few choices—it can encourage a second firm to come in and develop the oil, it can buy a second firm which can then extract the oil, or it can expand its internal operations to gain the expertise necessary to extract the oil. It will choose the option that is most likely to produce the oil at the lowest cost. In some cases that might be inviting the second firm with greater expertise to exploit the field, but if these firms have a history of shirking, abrogating, or modifying contract obligations after substantial investments have been made, then the first firm may choose to develop the field itself or acquire the second firm.

We can analogize the natural resource to a failed state. While in the case of the natural resource the good produced is a benefit (in our hypothetical, oil for sale), the restoration of the state in a territory will lead to the reduction of an expected cost—such as the cost of a terrorist attack or of remedying a humanitarian catastrophe. Nevertheless, a benefit and a reduction in cost should be evaluated in the same way. Or, put differently, an intervening power provides a benefit by governing or controlling a territory. If possible, a great power would prefer that another nation intervene in a failed state and restore order; this would be akin to procuring supply of a resource through short-term contracting in the marketplace. Such an arrangement has low governance costs for the larger power, although it must pay the intervening nation in some way for the costs of placing the failed state under its control. Analogizing to Williamson's discussion of asset specificity in the context of vertical integration,[77] a nation is more likely to seek a third party to restore order if the skills and resources required to rebuild a failed state are relatively simple and available from a number of nations. Or, to draw from history, a larger nation may rely on local elites to govern as a way of reducing its own monitoring costs.

A larger nation will choose to intervene, however, rather than seeking the assistance of a third party, under a number of conditions. First, if the skills and resources needed to restore order successfully are difficult or scarce, then it may not choose to rely on questionable sources such as third parties. Third parties, which would likely be weaker powers, might accept payment or support but perform inadequately. Second, if the probability of unanticipated changes in the environment, which demand significant adaptation or changes in the rebuilding process, are high, then the great powers might intervene directly, rather than rely on third parties that might withdraw or under-perform in the face of new, challenging circumstances. Third, if the great power must make large investments of resources up-front even if it were to seek the assistance of a third party, it is more likely to intervene itself. Fourth, if governance costs involved with direct

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[76] Williamson, supra note , at
[77] Williamson, supra note , at 67-70.

intervention would be relatively low in comparison with a third-party arrangement, then the great power might choose to intervene.

These factors may explain why the great powers, such as the United States and its allies, have been directly involved in restoring government authority in failed states. While they have sought to rely, at times, on regional powers, as in Africa, or on weaker powers with available military force, as with Pakistan in the Somalia intervention, they have undertaken direct intervention when no willing or capable third state has emerged. The task of rebuilding states might represent an opportunity for nations with large militaries or large populations to perform a useful role in international politics by becoming specialists in restoring order in failed states and developing skills in helping those territories build central governments. Those skills would not necessarily be the same as those developed by nations that focus their militaries on fighting wars, stopping proliferation of WMDs, or defeating terrorist organizations.

This analysis also questions whether the nation-state ought to be the paradigm that the intervening powers choose to adapt to territories where central government control has collapsed. Historically, as mentioned earlier, nation-states arose because of their success in mobilizing populations to take advantage of the latest technologies and means of military and economic organization. It may be the case, however, that international security would not be enhanced by allowing failed states to mobilize their populations for effective warfare; territorial defense may also not be an immediate demand because the great powers may be supplying regional security. In such cases, then, the international legal system ought to consider other forms of governance, which may fall short of the nation-state. Such mechanisms could be devoted primarily to maintaining internal stability, law and order, and markets, rather than moving a territory headlong towards a full-scale, independent nation-state.

C. The Legal Obstacles to Restoring Failed States

Currently, the international legal system does not contemplate the possibility of territories that do not ultimately possess full sovereignty as independent nation-states. Some scholars have proposed the revival of the trusteeship system under the United Nations Charter, which originally vested authority in nations to administer territories that had been under a League of Nations mandate or had been detached from enemy nations in World War II.[78] But even these scholars view a modified trusteeship system as creating only a temporary reduction in sovereignty, with the end goal being a fully independent nation-state where a failed state had once been.[79]

This analysis suggests that international legal rules may discourage nations from intervening in territories that witness serious human rights catastrophes or serve as a base for terrorist operations. If nations that intervene in a failed state must receive U.N. permission to use force, which permission is granted only if necessary to maintain international peace and security,

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[78] U.N. Charter, art. 77. See, e.g., Stephen Krasner, The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law, 25 Mich. J. Int'l L. 1075 (2004).

[79] See, e.g., Gerald Helman & Steven Ratner, Saving Failed States, 89 Foreign Policy 3 (1993); Paul Williams, Michael Scharf & James Hooper, Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty, 31 Denv J Int'l L & Pol'y 349 (2003); Paul R. Williams & Francesca Jannotti Pecci, Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination, 40 Stan. J. Int'l L. 347 (2004); Henry H. Perritt, Jr., Structures and Standards for Political Trusteeship, 8 UCLA J. Int'l L. & Foreign Aff. 385 (2003).

and must also shoulder the costs of restoring the territory to some form of functioning nationhood, they will be discouraged from intervening in the first place. To analogize again to the transaction cost approach, the legal rules here operate to require that a firm create a subsidiary to develop a natural resource, and then to give up control of that subsidiary—essentially, to make it an independent firm—without any compensation. While the intervening nation may benefit by halting human rights violations or avoiding a terrorist attack, it eventually loses that control over the territory that gives it confidence that such costs will not arise again in the future.

The effect of the rule against intervention seems to run against a global welfarist approach. Failed states present a collective action problem—they impose costs on the international system, but the diffuse effects do not give any single nation the incentive to take action to restore order. The welfarist approach would favor international legal rules that encourage nations to intervene to prevent human rights catastrophes or the spread of international terrorism, rather than rules that discourage them as do the current international rules that guarantee the internal sovereignty of even failed states. If that approach is correct, then the international legal system should enforce rules that distinguish between intervention to address negative externalities, the establishment of stability and security in the territory, and the more difficult task of creating an independent, functioning nation-state.

In fact, the international legal system as witnessed in Afghanistan or Iraq may create the wrong incentives. If failed states create negative international externalities by allowing massive human rights catastrophes or by serving as a base for terrorist organizations, then it is an international public good to restore order in those territories. By imposing on intervening nations a duty to restore a territory to an independent nation-state, the international legal system makes it less likely that intervention will occur. Two ways that the international legal system can address this collective action problem is by either spreading the burden or reducing the cost. Rather than impose all of the costs of repairing a failed state onto a few nations, the international legal system could allocate the costs of intervening and restoring order among many nations. Of course, bargaining problems, free-riding temptations, and administrative issues may interfere with efforts to overcome such a collective action problem. Or, the international legal system could assist by reducing the overall cost of intervention. That could occur by relieving intervening nations of the legal responsibility of bringing a failed state to independent sovereignty, and instead allowing intermediate forms of governance short of that.

Nonetheless, formal rules of international law produce the opposite incentives needed to address the failed state problem. Discouraging the use of force only compounds the collective action problems that already exist due to the diffuse costs inflicted on the international system as a whole by failed states. The international legal system should loosen its protections for the territorial integrity and political independence of failed states, and focus instead on constructing institutions that could facilitate cooperation and burden-sharing among regional and global powers.

The main criticism against loosening the rules on the use of force is two-fold. First, some maintain that allowing nations to determine whether to use force, without a showing of self-defense or authorization by the U.N. Security Council, will provide an easy pretext for

aggression.[80] Nazi Germany, for example, claimed in its attacks at the start of World War II that it was acting for humanitarian or self-defense reasons.[81] Second, a more subtle argument claims that Security Council authorization will weed out uses of force based on poor reasoning or information by forcing nations to collectively discuss and approve interventions.[82]

In the case of failed states, these concerns are misplaced. Concerns about pretextual uses of force may have little purchase here, as any threat of conflict between the great powers may be deterred without the help of international law. As others have noted, the value of territorial expansion has declined due to the rise in the cost of conventional warfare, and the reduction in the gains from conquest because of the easy mobility of human talent and capital. Aggression by a powerful nation for purposes of extracting wealth or expanding its territory, even if cloaked in claims of humanitarian intervention, may prompt counter-balancing moves by regional or global powers to block the attempted gain. Moreover, failed states may well lack any natural or territorial resources that would make them attractive takeover candidates. Nations intervening in failed states will likely spend more resources than they will receive in gains—hence the collective action problem. The question is whether any harms that arise from a potential increase in pretextual interventions are outweighed by the benefits from faster and more regular interventions in failed states. If the national self-interests of the great powers in international politics and the development of military technology adequately constrain the supposed harms, then loosening the rules on the use of force would produce a net benefit.

Some might respond that the process of receiving U.N. Security Council authorization will test whether the use of force is truly to help end the violence in a failed state. If the Security Council's permanent members unanimously approve an intervention, they are likely to have concluded that the claim of a failed state is not a pretext. They will veto any intervention that harms their interests or even affects the relative balance of power; notice that the Security Council could never reach an agreement to authorize NATO's intervention in Kosovo. But Kosovo also highlights the pitfalls of this argument. Russia blocked resolutions authorizing the use of force in Kosovo because of its interests in protecting Serbia, with which it shared long-standing ethnic and religious ties. Permanent members on the Security Council may veto intervention into a failed state because it might alter the regional balance of power, even if military action would enhance global welfare.

Relying on the Security Council does not solve the collective action problem posed by failed states. If anything, it enhances it. Even assuming that loosening the rules on the use of force might permit more pretextual conflicts between nation-states, that cost to the international system must be balanced against the benefits from a reduction in the harms caused by failed states. As discussed earlier, the rate of interstate conflicts and their casualties have fallen

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[80] See, e.g., Thomas Franck, The Power of Legitimacy Among Nations 76-77 (1990); Richard B. Bilder, Kosovo and the "New Interventionism": Promise or Peril? 9 J. Transnat'l L. & Pol'y 153, 160-61 (1991); Ian Brownlie, Thoughts of Kind-Hearted Gunmen, in Humanitarian Intervention and the United Nations 139, 147-48 (Richard B. Lillich ed., 1973); Louis Henkin, How Nations Behave: Law and Foreign Policy 144-45 (2d ed. 1979); Oscar Schachter, International Law in Theory and Practice 126 (1991).

[81] Letter from Reich Chancellor Hitler to Prime Minister Chamberlain (Sept. 23, 1938), in The Crisis in Czechoslovakia, April 24-October 13, 1938, 19 Int'l Conciliation 433, 433-35 (1938).

[82] For a representative argument along these lines, see Allen S. Weiner, The Use of Force and Contemporary Security Threats: Old Medicine for New Ills? 59 Stan. L. Rev. 415 (2006).

significantly since the end of World War II, while the deaths due to internal armed conflicts have risen dramatically. Not all internal armed conflicts occur in failed states, but failed states are often characterized by high levels of violence and indiscriminate civilian casualties.


III. The Causes of State Failure and Proposed Reforms

A. A Systems Approach to Understanding State Decentralization

Although an alliance or transaction costs perspective gets us off to a good start in understanding why the nation-state template should apply to ungoverned territories, it is not fully satisfying. The alliance approach explains why nation-states should favor the creation of other nation-states, but it does not explain why we should continue to restore nation-states to their pre-existing borders. A failure of state government could signal, for example, that the pre-existing nation-state was unstable, either because of internal conflict between conflicting groups or weakness against external threats. Devoting substantial effort to maintain an unstable state may prove futile and, in the long run, waste substantial resources.

A more permanent solution may lie in dividing a nation into more governable parts, as appears to be the course set in Kosovo, which may reduce internal conflict by separating warring ethnic or religious groups. While less common, consolidation of smaller nations into a larger unit has occurred in certain cases, such as the unification of East and West Germany or the gradual integration of Europe into the European Union. Since the end of World War II, however, the trend has clearly been toward more fragmentation. In 1945, there were 74 independent nations. Today, there are 193—195 if one were to include Taiwan and Palestine.[83] The end of the Cold War witnessed the dissolution of the Soviet Union into 15 independent nations, and the violent collapse of the former Yugoslavia into different states. Furthermore, the trend seems to be toward more breakups. Separatist movements have resorted to violence in Chechnya and the Basque region in Spain, for example, while others have pursued more peaceful efforts in Quebec and regions in Europe.

American foreign policy in the post-Cold War world has not charted a consistent path in addressing these developments. Initially, for example, the first Bush administration supported efforts to keep the Soviet Union together, but then chose to accept its disintegration.[84] At first, it chose not to promote decentralization in the former Yugoslavia, but later intervened to prevent Serbia from restoring its control over Kosovo. More recently it has decided to support keeping Afghanistan and Iraq whole, despite potentially strong centrifugal forces. Throughout, the United States does not seem to have employed an analysis that distinguishes between cases in which decentralization should be favored and cases in which previous borders should be maintained.

Similarly, international law has no means to analyze whether to promote or retard decentralization, and in fact seems to follow a presumption against the breakup of states. Recently, for example, the United Nations has commanded that Iraq continue as one nation

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[83] See table at http://www.nationsonline.org/oneworld/
[84] Edwin Williamson & John Osborn, A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia, 33 Va. J. Int'l L. 261 (1993).

rather than considering whether Iraq might be better off as three independent nations. In Resolution 1483, for example, the Security Council's initial recognition of the occupation of Iraq by the United States and its coalition "reaffirmed the sovereignty and territorial integrity of Iraq."[85] Under the doctrine of *uti possidetis*, the international legal system follows a presumption that the administrative borders drawn by previous colonial regimes should remain in the event of decolonization, but with little explanation for when (or why) that doctrine should apply.[86]

To be sure, international law seems to operate by ratifying decentralization or centralization after it has occurred. Nevertheless, assuming that colonial or pre-existing borders should remain intact precludes considering whether nations as currently organized make the most sense, or whether they should either be decentralized or merged with others to form a larger nation. Some international legal scholars also seem to oppose the proliferation of states because they posit that more states will make more likely the oppression of minorities.[87] They offer no empirical support for this claim, however, and, as argued below, it would seem more likely that smaller units would better represent the preferences of the minority groups of large nations.

Economists Alberto Alesina and Enrico Spolaore have proposed a new way to think about this problem.[88] They argue that the size of a nation is determined by the trade-off between the benefits of scale for larger nations versus the heterogeneity of preferences within the nation. Nations can benefit from larger size because expansion can reduce the per capita cost of supplying public goods, such as defense, law and order, and infrastructure, among others. While the cost of some public goods may increase at a steady per capita rate, others may require initial high investments whose cost can be more cheaply spread among a larger population. Defense from foreign aggression may be the best example of this. Purchasing necessary weapon systems or building fixed defenses may require high initial investments, but after a certain point economies of scale come into play. Also, Alesina and Spolaore argue, larger nations benefit from the creation of larger markets. If territorial borders provide nations with the opportunity to establish trade restrictions on imports, then a larger nation can create a larger, internal free trade area.

On the other hand, nations contain their own built-in limits on size. The larger a country becomes, Alesina and Spolaore argue, the more its population will contain heterogeneous policy preferences. A larger nation is also more likely to contain diverse cultures and ethnic groups. As the nation grows, it is less likely that the policy choices of the central government will satisfy all of these groups.[89] At some point, the deviation of central policy from the preferences of local groups will become so great that the local groups may attempt to secede from the nation. This may occur when the distance between the preferences of minority groups and majority policy outweighs the benefits in terms of additional public goods provided by the central government. Nations can attempt to use regional transfer payments to overcome centrifugal forces—for example, Canada can send more federal spending to Quebec to keep it from seceding—but such

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[85] S/Res/1483 (May 22, 2003).

[86] Steven Ratner, Drawing A Better Line: Uti Possidetis and the Borders of New States, 90 Am. J. Int'l L. 590 (1996).

[87] Id. at 592.

[88] Alberto Alesina & Enrico Spolaore, The Size of Nations (2003).

[89] Id. at 18-23.

transfers come at a cost in economic distortions, problems created by imperfect information about the preferences of minority groups, and the problem of credibly committing to future transfer payments.[90]

The problem posed by large heterogeneous countries can also be understood as one of agency costs.  As the electorate becomes larger, it becomes more difficult to elect good leaders who act in the public interest rather than their own.  Larger size makes it harder for the principals to monitor elected officials to discover cases of agency "slack" when the latter are shirking or gaining rents at the public expense.  Greater heterogeneity makes it easier for the agents to play interest groups off against each other, thereby creating more space for the pursuit of their own agendas.

Another determinant of national size is whether the country's political system is democratic or authoritarian. According to Alesina and Spolaore, dictators are more likely to pursue larger nations because they provide larger populations and resources from which to extract rents for their personal benefit.[91] Dictators, however, are likely to encounter more resistance and insurrections as their countries grow; hence, they may engage in efforts to create an artificial sense of national unity. Since democracies are committed to representing the preferences of their citizens and are less likely to use force to restrain them from leaving, they are more likely to devolve into smaller nations.

Two developments, according to Alesina and Spolaore, have produced the recent surge in the proliferation of nations. First, economic openness in the form of the GATT, WTO, and regional economic integration (such as the European Union) have created large markets that are not constrained by the territorial boundaries of a single state.[92] Economic integration into a worldwide or regional market reduces the need to be part of a large nation-state with its own open market. The more open an international trade regime becomes, the more viable smaller states become.[93]

Second, as we observed in our short discussion of the history of the nation-state, states have proven most successful in comparison to other forms of governance at harnessing a territory for conflict and defense. A larger nation will prove more likely to field a larger military and provide defense more effectively and cheaply, per capita. Thus, the less need for military defense, the more likely again that a smaller state will prove viable. A number of causes can reduce the need for a large military, such as more peaceful relations between nations, a larger power deciding to guarantee regional security, or international institutions offering the means for dispute resolution. On the other hand, the more nations there are in the world, the more international "transactions" there are, which raises the probability of international conflict and the need for defense. Finally, the spread of democracy may actually lead to lower levels of international conflict because of the "democratic peace," and therefore produce smaller, viable states.

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[90] Id. at 57.
[91] Id. at 69.
[92] Id. at 81-85.
[93] Id. at 82.

One cautionary note arises, however, from the debate over whether separating hardened ethnic groups can help reduce conflict. In the 1990s, Chaim Kaufmann prominently suggested that partition could solve the problem of ethnic groups that refused to live together peacefully in a large state.[94] He and others argued that separating relatively homogeneous groups into compact territories would allow them to defend themselves more effectively and lead to a settlement of differences. Opponents of partition responded that division of a state only transformed a domestic conflict into an international one, that ethnic rivalries would be undiminished by an artificial border, and that lives would be lost as populations transferred due to the change in borders.[95] The empirical record, however, was mixed.[96] Croatia went to war with Serbia after the 1991 dissolution of Yugoslavia, Eritrea fought a border conflict after seceding from Ethopia in 1993, and India and Pakistan have fought three wars since their 1947 partition.[97] On the other hand, conflict ended after the division of Greeks and Turks in Cyprus, and no war occurred after the 1971 partition of Bangladesh from Pakistan. It is fair to say that at this point empirical studies do not show one way or the other whether partition increases or decreases the chances of war, or whether the results in the context of ethnic conflict can be generalized to all other cases of decentralization.

All of this suggests that there is no compelling reason why the United States and its allies, or the United Nations, should seek to maintain the pre-existing borders of failed states. We have currently been living in a period of decentralization, in which the number of nations has almost tripled in the last 60 years. Some of the policies of the United States and its allies, in fact, have produced the conditions for this development. By pressing for trade liberalization through GATT and then the WTO, the United States and its Western allies have made it possible for smaller territories to survive, and even prosper, as independent nations.

And by playing a hegemonic role in providing international peace and security,[98] the United States has again made it more likely that smaller nations can survive without having to merge with a larger nation for protection. Since the end of World War II, the United States has guaranteed the peace in Europe, both from external attack and from internecine warfare. The North Atlantic Treaty Organization allowed the integration of Europe to proceed without heavy demands for military spending, thanks to the stationing of United States forces to contain the Soviet Union. As Lord Ismay, the first secretary general of NATO, famously quipped, the purpose of the Atlantic alliance was "to keep the Americans in, the Russians out, and the Germans down."[99] The disparity in defense spending has been even starker since the end of the Cold War. In the 1990s, Europeans discussed increasing collective defense expenditures from

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[94] See Chaim Kaufmann, Possible and Impossible Solutions to Ethnic Conflict, 20 Int'l Security 136 (1996); Chaim Kaufmann, When All Else Fails: Ethnic Population Transfers and Partitions in the Twentieth Century, 23 Int'l Security 129 (1998). See also Alexander Downes, The Holy Land Divided: Defending Partition as a Solution to Ethnic Wars, 10 Security Studies 58 (2001).

[95] See Carter Johnson, Partitioning to Peace: Sovereignty, Demography, and Ethnic Civil Wars, 32 Int'l Security 140, 151 (2008) (summarizing debate).

[96] See, e.g., Nicholas Sambanis & Jonah Schulhofer-Wohl, What's in a Line?: Is Partition a Solution to Civil War?, 34 Int'l Security 82 (2009); Thomas Chapman & Philip G. Roeder, Partition as a Solution to Wars of Nationalism: The Importance of Institutions, 101 Am. Poli. Sci. Rev. 677 (2007);

[97] Sambanis & Schulhofer-Wohl, supra note , at 85.

[98] See John Yoo, Using Force, 71 U. Chi. L. Rev. 729, 792-93 (2004).

[99] W.R. Smyser, From Yalta to Berlin: The Cold War Struggle Over Germany 135 (1st 1999).

$150 billion to $180 billion a year while the United States was spending $280 billion a year.[100] Ultimately, the Europeans did not. There was little political desire to come within shouting distance of the United States, which in the wake of September 11 and the wars in Afghanistan and Iraq has spent up to $500 billion a year on defense.[101] By supplying defense, clearly to promote its own interests, the United States allows small countries to survive in Europe. The same might also be said of the Americas, where the United States has long played a hegemonic role in blocking outside interference under the Monroe doctrine.[102] It has played a balancing role in East Asia, where the United States has attempted to stabilize the security environment since the end of World War II, prevent any territorial changes, and suppress old rivalries.[103]

The implications of these dynamics run counter to the presumptions built into international law and American foreign policy, which generally favor maintaining the global status quo. Interestingly, however, American foreign policy to open international trade and to maintain security in Europe, America, and Asia has created the conditions that have encouraged greater national fragmentation. Supplying security and creating broader free trade areas are international public goods which we would generally expect to be undersupplied by states acting rationally in their self-interest. If we want the international system to continue providing these goods, then we should institute presumptions that do not act counter to their secondary effects, for several reasons. First, decentralization will break down the larger national units that would have an interest in raising trade barriers and pursuing more militaristic foreign policies—interests which are especially strong in dictatorships. Second, decentralization will increase the number of nations that support policies that encourage the opening of international trade and a reduction in the use of force to resolve international disputes. Third, a larger number of smaller nations may mean that a larger share of the world's population will be able to benefit from peace and free trade than if the world were divided into smaller numbers of large nations. Global welfare would increase as a result.

If peace and free trade are international public goods, then the international legal system ought to promote rules that encourage their supply. By seeking to recognize or maintain existing borders, the international legal system currently has the effect of supporting the existence of larger nations, which on the margin will have less of an interest in supplying these goods. Better rules would eliminate the presumption against border change, as in the *uti possidetis* doctrine. Also, the United Nations could promote international welfare by allowing for the possibility that nations breakup along ethnic or religious lines, rather than requiring that interventions be followed by the restoration of a nation-state along its previous borders.

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[100] Post-Cold War developments may be largely responsible for European opposition to defense spending increases. See Office of Technology Assessment, Global Arms Race: Commerce in Advanced Military Technology and Weapons 63-82 (June 1991), available at http://www.wws.princeton.edu/cgi-bin/byteserv.prl/~ota/disk1/1991/9122/912206.PDF; Robert Kagan, Of Power and Power 22-23 (2003) ("Under the best of circumstances, the European role was limited to filling out peacekeeping forces after the United States had, largely on its own, carried out the decisive phases of a military mission and stabilized the situation.").

[101] United States Department of Defense, Budget FY 2001-FY 2010 (May 2009), online at. http://comptroller.defense.gov/defbudget/fy2010/fy2010_BudgetBriefing.pdf (showing that the United States spent $535 billion in 2006; $601 billion in 2007; and $667 billion in 2008 on defense).

[102] See, e.g., John Mearsheimer, The Tragedy of Great Power Politics (2001) (characterizing the United States as a regional hegemonic power in the Americas).

[103] Id. (characterizing American role in Asia as balancer).

B. A Rational Choice Approach to Understanding Intrastate Bargaining Breakdowns

A rational choice perspective provides an additional lesson for the failed states problem. To this point, most of the discussion has focused on "macro" issues: when international law should allow intervention in failed states (when the benefits to global welfare exceed the costs), and a reorientation in goals (dividing failed states into smaller nation-states). It has yet to provide much analysis of the "micro" issue: how intervening nations can actually restore failed states to some level of sovereignty and full function, and what role international law can play.

As noted earlier, the international law of occupation and recent practice place relatively heavy burdens on nations that intervene in failed states. Occupying powers are forbidden from altering the domestic laws of the occupied country, cannot change its borders, and presumably must leave most domestic institutions in place, except where they pose a threat to the security of the occupying forces. At the same time, occupying powers are responsible for maintaining law and order and basic social services in the occupied country, even when conflict with insurgents is ongoing. For this reason, military officers estimate that maintaining security in an occupied country is manpower intensive. Pacifying Kosovo required 50,000 troops, or 1 soldier for every 40 inhabitants.[104] Extrapolating from that experience, General Eric Shinseki testified that occupying Iraq would require "several hundred thousand" coalition troops, which was considered politically infeasible at the time.[105]

Such manpower demands would effectively render the restoration of failed states to full sovereignty impractical in many cases. In fact, Western powers have not even been able to restore Kosovo to independence, not to mention more difficult environments such as Somalia. Nonetheless, the United States and its allies were able to restore stability and functioning governmental institutions in Iraq with troop levels that, while known as the "surge," still fell far short of the original estimates for a comprehensive occupation. Understanding why the surge in Iraq succeeded will point the way to a reorientation of international legal doctrine on occupation.

One way to conceive of the fundamental problem, and ultimate solution, in Iraq is to view it as a problem between Shiites and Sunnis to reach a stable bargain over sharing power. This was caused in part because each side, but particularly the Sunnis, misestimated their power relative to the other. Here, I make use of the political science literature on crisis bargaining.[106] Because war is so destructive, rational actors with complete information should prefer a negotiated settlement to armed conflict. Wars, for example, often conclude with bargains – in the form of treaties – that both sides prefer to conflict. Both sides would have been better off by simply agreeing to the peace settlement initially and avoiding the costs of war, so the question arises: why don't they?

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[104] NATO, Nato's Role in Kosovo, online at http://www.nato.int/cps/en/natolive/topics_48818.htm#evolution. Kosovo has an estimated population of 2 million.

[105] Thomas E. Ricks, Fiasco: The American Military Adventure in Iraq 97 (2006). An army briefing noted that postwar reconstruction of Iraq would require around 470,000 troops. Id. at 79. Iraq has an estimated population of 28.9 million.

[106] See Fearon, Rationalist Explanations for War, 49 Int'l Org. 379, 379–81(1995); Robert Powell, Bargaining Theory and International Conflict, 5 Ann Rev Pol Sci 1 (2002); Kenneth A. Schultz, Do Democratic Institutions Constrain or Inform?: Contrasting Two Institutional Perspectives on Democracy and War, 53 Intl Org 233 (1999).

Imagine, for example, that the government and a rebel group have a dispute over the control of a territory. The rebel group issues a threat that it is willing to use force unless the government withdraws. The government must decide whether to accede to the demand or to resist with force. Both the government and the rebel group have an expected value for going to war, which is a function of the probability that each will win the conflict and the value of controlling the territory minus the expected cost of fighting. If the government knows that the expected value of controlling the territory is lower for the rebel group than the likely cost of any conflict, it will not back down because it knows that a rational rebel group would not wage war. Likewise, if the government knows that the expected value of controlling the territory is higher to the rebel group than the likely cost of war, it will withdraw or reach some negotiated settlement. In both cases, both the government and the rebel group avoid the deadweight loss of warfare, the only change being whether the territory remains within the control of the rebel group or the government.[107]

Several assumptions in this model are likely to fail and produce war, even when both sides to the dispute are acting rationally. First, incomplete information can cause the groups to estimate important variables incorrectly. For example, the government may not know the rebel group's expected value of going to war. It may have an understanding of the value of the territory to the rebels, but the probability that the group would prevail in a conflict will depend on several factors—its military and political capabilities, its support among the population, and outside support—that could well be private information known to the rebel group. The government might not know, for example, the size of rebel units, their armament, or their fighting effectiveness. Conversely, the rebels may have little information on the true capability of government forces in the territory, its abilities to redeploy new troops into the area, and how much political support it enjoys internally and externally.

The two groups could benefit by revealing private information to each other so as to reduce the chances of conflict. A few problems stand in the way. They might feed misleading information in the hopes of exaggerating their probability of winning.[108] Bluffing may produce a more favorable settlement than a player's true resources should demand. To reveal private information credibly, they must send a costly signal. One way that a leader can send a credible signal is to issue a threat or make a promise that will incur domestic political costs if he or she does not follow through.[109] If a political leader makes a public threat to use force, for example, but then backs down during negotiations, he or she could experience a loss of public opinion or support among political elites. A leader can also send a signal by undertaking a course of action that requires significant *ex ante* investments or would produce high *ex post* costs, such as building bases or local infrastructure in a disputed region, if he or she changed course.

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[107] Several assumptions underlie this model. There must be a real probability that either group will win, and that both can estimate this probability. Neither the government nor the rebel group is risk-seeking, in the sense that they would gamble to win a low-probability victory. Additionally, the territory in dispute can be bargained over and divided, rather than transferred as a whole, through side payments, linked deals, or different spheres of influence. Also, neither group can prevail in the first stage of bargaining by completely eliminating the other, so that any armed conflict may result in the loss of the territory, but not the end of the insurgency.

[108] Rosato, *The Flawed Logic of Democratic Peace Theory* at 599; James Fearon, Domestic Political Audiences and Escalation of International Disputes, 88 Am. Pol. Sci. Rev. 577, 578 (1994).

[109] Shultz, *Do Democratic Institutions Constrain or Inform? Contrasting Two Institutional Perspectives on Democracy and War* at 241.

In the case of a failed state, the difficulty of revealing private information in a credible manner can be acute. Historical regional, ethnic, or religious tensions may make different groups particularly distrustful of any information revealed by others. An insurgent group that has suffered abuses at the hands of the government may view any information revealed by authorities as an effort at deception. Similarly, a government that has fought against a rebel group may believe that the group is attempting to bluff its way to a better deal, or that the irregular tactics used by the group to conduct hostilities make it untrustworthy.

Both the government and rebel groups in a failed state could try to send credible signals through a third party. Both sides must trust the third party to provide accurate, reliable information that is not biased toward either party. Some multilateral arms control agreements, for example, create an international organization that operates independently of the control of any single state or group of states. Institutions such as the Secretariat of the Chemical Weapons Convention or the International Atomic Energy Agency conduct inspections that can generate information on whether state parties are upholding their international agreements. And agreeing to submit to an intrusive inspection regime, one managed by an international organization, itself can be a costly signal.

Commitment problems pose a second obstacle to nations seeking to reach a resolution of a dispute. Full information allows each party to identify the acceptable range of outcomes for the other, and hence reach a resolution and a distribution of the surplus. But even if groups have full information about their rival's probability of prevailing in conflict, they still may be unable to reach a bargain to head off war. Instead, neither party may hold much confidence that the other will perform its obligations.[110] This is not a problem that arises as much in domestic affairs between private parties, which ultimately can rely on the courts or administrative agencies to enforce their bargains. But in an environment characterized by weak institutions, parties to an agreement may have little confidence that their partners will keep their commitments. In the field of international relations, for example, James Fearon and Robert Powell have argued that the lack of supranational institutions capable of enforcing international agreements will make it more difficult for states to reach such bargains in the first place.

A failed state will lack any mechanism to enforce agreements between contending groups. By definition, failed states have already experienced a collapse of their authority and institutions. If state failure has arisen from conflict between two or more ethnic, religious, or regional groups, government institutions are not going to be strong enough to force them to comply with their obligations. If conflict instead has arisen between the government and a rebel group, no third party is likely to exist within the state powerful enough to enforce an agreement between the two.

This commitment problem can be compounded in the case of struggles involving territory or natural resources. The division of an asset in dispute could give one side an advantage in future conflicts. Suppose, for example, that a government and rebel group could settle the territorial question by agreeing to a division of the land in question. Assume that the division would give the rebels a distinct military advantage in any future conflict by providing it with

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[110] See, for example, Robert Powell, War as a Commitment Problem, 60 Int'l Org. 1 (2006); Robert Powell, The Inefficient Use of Power: Costly Conflict with Complete Information, 98 Am. Pol. Sci. Rev. 231 (2004).

additional resources and by reducing tactical advantages enjoyed by government forces. The government cannot rely on the rebels to keep the agreement in the future, instead of taking advantage of the relative shift in resources to seek even further gains in territory, population, or resources. The lack of an enforcement mechanism prevents the two groups from reaching a negotiated settlement, even though they might have complete information about the other side's expected value from conflict.

These problems point the way to a reworking of international law. Rather than place barriers before intervention of any kind, international rules should allow nations to overcome the informational and commitment problems with intrastate bargaining. Once an outside nation has intervened in a failed state, they will often find different groups vying for political and economic control. The intervening nation can begin the process of establishing political stability by facilitating a power-sharing agreement between the different domestic groups. For that bargain to succeed, it must reflect the actual distribution of power among the competing groups— otherwise, groups that are short-changed either will not agree to it or will work to undermine it. To reach such an agreement, each group will want reliable information on the expected value for other groups of continuing to fight for gains. Intervening nations can advance this process by serving as an impartial conduit for information, such as each group's military strength, willingness to fight, probability of prevailing, and the value of winning increased resources and population. Without information, groups might refuse to reach a deal and fight on because they underestimate their opponents' strength or determination to resist.

As observed earlier, even with accurate information, groups may still fail to reach a stable bargain because of a weak institutional environment. Two groups, for example, might agree to a division of territory, which reflects the current division of power. Imagine, for example, two ethnic groups, A and B, which hold roughly a 60-40 balance of power. They would agree to a division of disputed territory along the same 60-40 lines, but only if they were confident that the other would obey the agreement in the future. If either side will grow stronger as a result of the deal—because, possibly, time to grow in population, resources, or outside support—it will have a strong incentive to renege and pursue a revision of the terms. A guarantee against breaking the deal, which would be in the interests of both sides, could only be provided by an outside institution.

An intervening nation could provide the means for enforcement. As in our earlier discussion, a powerful nation may have little incentive to fix a failed state. It may seek to stabilize a state because of the latter's strategic location, possession of needed resources, or provision of operating ground for terrorism, international criminal activity, and other negative externalities. Suspicion by local groups of a intervening power's motives may make other nations more effective in reconstruction or may require a signal of commitment not to take advantage of the failed state.

Putting this problem to one side for the moment, an intervening nation would need several important powers to carry out an enforcement function. It should have the legitimacy to identify violations of a bargain in a way that both sides trust – serving as a neutral factfinder, as it were. It would have to be able to coerce a recalcitrant group into obeying its agreements. It should have the ability to provide economic and political support, change regional lines, or even

change political or constitutional institutions in order to reward parties that keep the agreement and punish those that violate it. An outside nation, for example, could reduce the territory, population, and resources administered by a religious or ethnic group that violates a power-sharing agreement. Ultimately, such moves will be backed by the threat or the actual use of force.

Existing international law does not clearly grant intervening nations the flexibility to play these roles. As an initial matter, it is uncertain what aspects of international law would govern intervention into a failed state. The most conventional approach would consider territory held by an outside power to fall within the international law of occupation, a subset of the laws of armed conflict. A doubt as to this conclusion arises, however, from the character of intervention—it may not rise to the level of an armed conflict if the outside power does not actually conduct hostilities against any of the groups. In authorizing the 1992 intervention in Somalia, for example, the United Nations Security Council did not specify whether the laws of armed conflict applied or the laws of occupation would govern territory held by the militaries involved.[111] By contrast, the Security Council's resolution in the wake of the March 2003 invasion of Iraq specifically called upon "all concerned to comply with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."[112] Those treaties set out the positive laws of occupation.

If the international law of occupation does apply, intervening nations may have some limited authority to carry out an enforcement role. Under the customary laws of war, an occupying army enjoyed broad discretion to administer a defeated enemy.[113] A victorious nation was once considered to be the absolute owner of occupied territory. In the nineteenth century, customary law shifted to consider the occupying power to exercise only temporary control until a peace treaty of complete subjugation of the enemy could be executed.[114] While that territory remained under occupation, the army held the legal authority to change the laws and institutions in force. According to the 1862 Lieber Code, issued by President Lincoln to guide the operation of Union forces during the Civil War, the army could impose martial law, which included "the suspension by the occupying military authority of the criminal and civil law, and of the domestic administration and government in the occupied place or territory," the "substitution of military rule and force for the same," and the "dictation of general laws."[115] These changes to the occupied nation's laws had to be justified by "military necessity" and no more; elsewhere, the Lieber Code defined military necessity as "those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."[116]

Codification of the laws of war produced tighter limits on the occupying powers' discretion. The 1907 Hague Convention, known as the "Hague Regulations," allows the occupant to "take all measures in his power to restore, and ensure, as far as possible, public order

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[111] UNSCR 794 (1992).
[112] UNSCR 1483 (2003).
[113] Doris Graber, The Development of the Law of Belligerent Occupation 13 (1949).
[114] See, e.g., American Ins. Co. v. 365 Bales of Cotton, 26 U.S. (1 Pet.) 511, 542 (1828); Emmerich de Vattel, The Law of Nations or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns 308 (Charles G. Fenwick, trans., 1916) (1758).
[115] General Order No. 100, Section I, para. 1.
[116] Id. para. 14.

and safety," but also requires it to "respect[], unless absolutely prevented, the laws in force in the country."[117] The Fourth Geneva Convention expressed a similar presumption in favor of pre-existing laws and institutions, except where they threatened security. Article 64 of the Convention declares that the "penal laws of the occupied territory shall remain in force," but allows for their repeal or suspension "where they constitute a threat" to the security of the occupying power or the implementation of the Geneva Conventions.[118] It allows the occupying power to establish new laws when necessary to implement the Conventions, "maintain the orderly government of the territory," and "ensure the security of the Occupying Power." Article 64 of the Fourth Geneva Convention is more generous to the occupying power than the Hague Regulations, in that it creates a presumption only for criminal laws and can be inferred to allow for changes in constitutional, administrative, and civil laws when necessary for security and order in the territory. This reading comports with state practice, which recognized an occupying power's authority to alter laws, including government institutions, in order to maintain the security of military forces, preserve its gains, and keep order.[119]

International law might allow the role identified by our bargaining analysis. An occupying country would need the ability to sanction parties that refuse to follow through on a power-sharing agreement. It would want to access a broad spectrum of possible measures, including the alteration of institutions and constitutional arrangements. To fall within the formal rules of Hague and Geneva, an occupying nation's actions to create, enforce, or modify governance agreements would have to maintain public order and safety or protect the security of its own forces. This standard should be satisfied in cases where a previous regime took the form of a hostile dictatorship. Keeping in place Iraq's government and constitution from the Saddam Hussein era would have presented an obvious threat to public order and military security after the April 2003 invasion. A power-sharing agreement that governed while the United States and its allies occupied Iraq, and its enforcement against shirkers, would be understood as necessary to maintain peace and order and to protect the security of the coalition's troops.

Other situations, however, pose difficulties for the application of the Hague and Geneva standards. An intervening nation may want to create a power-sharing agreement that is not currently necessary to maintain order or to protect the security of its forces, but will provide political stability after the occupation ends. The aim of such a pact would be to provide for stability in the future, once the occupying power's troops leave, rather than security and order during the occupation itself. For example, the United States and its allies may want to make territorial changes among different provinces controlled by Afghani warlords because of their non-compliance with a provisional constitution. Positive international law leaves uncertain whether an intervening nation may make permanent changes to domestic laws and institutions in order to enforce a governance agreement. In Somalia, for example, an intervening nation that has already established a secure environment would have difficulty showing the necessity of a constitution that would divide authority among competing ethnic groups in the future.

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[117] Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, art. 43, 36 Stat. 2277, T.S. No. 539.

[118] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 64, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[119] See Eyal Benvenisti, The International Law of Occupation 73-74 (1993).

Clarifying the authority of intervening nations to possess such powers in failed states is critical. Of all the many strategies that have been tried, enforcement of power-sharing agreements seems to be the most effective way to rebuild failed states. We can draw a lesson here from the "surge" of American forces in Iraq in 2007-08. Until 2007, the United States had responded to growing sectarian violence between Shiites and Sunnis by concentrating its forces in large bases outside major cities, and deploying troops as a reaction force. American strategy hoped that building up the Iraqi military and police forces would allow the provisional Iraqi government to provide security. Holding democratic elections and establishing a constitution would provide the necessary political legitimacy for the Iraqi central government to exercise authority. Maintaining a light "footprint," American leaders believed, would keep United States forces from becoming a lightening rod for attacks by either side.

In 2007, the Bush administration switched course. It augmented U.S. forces in Iraq by about 24,000 soldiers and Marines. A sharp change in strategy accompanied the surge in forces. Rather than keep outside the cities, U.S. forces were sent to secure Baghdad and several cities and provinces nearby where insurgent activity had reached its peak. Troops were sent into neighborhoods to provide security for the Iraqi population, gain intelligence, and conduct counter-insurgency operations. Sunni volunteers formed "Sons of Iraq" units that provided security in their regions and helped American troops fight al Qaeda. Violence dropped quickly within the year. Monthly Iraqi civilian deaths from violence, which had risen from 700 in November 2003 to 3,450 in November 2006, fell to 650 in November 2007 and 550 in June 2008. Daily attacks by insurgents, which had risen from 35 in November 2003 to 180 in November 2006, fell back to 80 in November 2007 and 45 in May 2008. American troops killed per month, which had fluctuated between 69 and 137 before the surge, fell to 40 in November 2007 and fell to 19 in May 2008.[120]

Historians and strategists will argue for years over how the surge of U.S. forces produced the sharp decline in violence, restored security, and created stability for the Iraqi government to take hold. A leading argument gives credit to protecting the Iraqi population rather than conducting search-and-destroy missions for insurgents. According to this account, restoring security allows civilian authorities to build infrastructure and provide public services, encourages the local population to provide information on insurgent activities, and boosts government security forces. American counter-insurgency doctrine focused on "clear and hold": pushing rebels out and then holding territory, giving time for the government to win the loyalty of the local population. In short, the surge created the space for nation-building to succeed in Iraq. This apparent lesson from the Iraqi surge has influenced plans for a similar surge of 30,000 American troops into Afghanistan.[121]

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[120] All statistics taken from Jason H. Campbell & Michael E. O'Hanlon, The Brookings Institution, The State of Iraq: An Update (Dec. 22, 2007), at http://www.brookings.edu/opinions/2007/1222_iraq_ohanlon.aspx, and Jason H. Campbell & Michael E. O'Hanlon, The Brookings Institution, The State of Iraq: An Update (June 22, 2008), at http://www.brookings.edu/opinions/2008/0622_iraq_ohanlon.aspx.

[121] In testimony after the announcement of the Afghanistan surge, for example, American commanders testified before Congress that their plan was to create "breathing space" for the Afghani central government, the same language used to describe the Iraq surge. See Yochi Dreazan & Peter Spiegel, Surge Strategy Borrows From Bush Argument, Wall St. J. at A8 (Dec. 4, 2009).

This Article's analysis suggests that American troops may have played a more modest role in stabilizing Iraq. The counter-insurgency strategy may have worked, though it is unclear whether 24,000 soldiers and Marines, in addition to the roughly 140,000 already there in 2006 (and 323,000 Iraqi security forces), were sufficient, on the margins, to secure a population of 24 million Iraqis spread over 437,000 square kilometers. Baghdad itself is estimated to have a population of roughly 6.5 to 7.0 million inhabitants in 1,134 square kilometers. By contrast, the New York City police department requires about 38,000 officers to control crime for 8 million inhabitants in a space of 783 square kilometers, without the additional challenge of controlling political violence.

It may well be the case that the surge sent sufficient forces so that U.S. troops and Iraqi allies could patrol the neighborhoods in Iraqi cities. But a better explanation may lie elsewhere. Rather than improving security throughout Iraq, the surge troops may have performed the enforcement function described here. We can understand part of the ongoing violence in Iraq until the surge as a result of asymmetric information. If we simplify the civil war as a struggle between Shiites and Sunnis, the Sunnis controlled the main instruments of power in Iraq for decades despite their smaller share of the population. The 2003 invasion and the destruction of Saddam Hussein's regime opened a re-bargaining of the governance arrangements between the two groups. In the post-invasion period, the Sunnis likely overestimated their power vis-à-vis the Shiites because of their historical dominance of the government and military. Civil war ensued because the Sunnis did not have full information on Shiite military power and willingness to fight. Al Qaeda attacks further disrupted any bargaining by confusing the information on each side's capabilities and undermining trust to comply with any agreement.

The asymmetric information problem would have begun to disappear as the civil war proceeded. Setbacks in conflicts between the Sunnis and Shiites would show the Sunnis that their population and resources were smaller than that supported by their previous regime, and that their efforts to restore complete control over the Iraqi government would fail. In fact, a durable power-sharing agreement would place the Sunnis in a minority role, in line with their share of the population, territory, and resources. Similarly, the results of the civil war might reveal to the Shiites that their numbers and resources would not support complete control of Iraq's governing institutions, but rather the need for a power-sharing arrangement that protected the minority status of Sunnis. Each conflict, and its result, would give each side more information on the strength of the other, which would permit an agreement that more closely matched the balance of power.

But even with asymmetric information solved, Sunnis and Shiites would still confront the difficulty of trusting each other to keep a governance bargain. Features specific to Iraq may have compounded this problem. A long history of Sunni oppression of the Shiite majority would have made Shiites particularly unlikely to trust Sunnis, and also would have led Sunnis to doubt the Shiites. Uncertainty over demographic trends in Iraq—whether the Sunni population would continue to grow while Sunnis would continue to leave the country—and the corresponding effect of the balance of power between the two groups, would raise fears among Sunnis that the Shiites would renege on the deal when their raw power outstripped their share of the government. Without an external enforcement mechanism, there was little way for Sunnis and Shiites to credibly commit to complying with a bargain to share political authority.

Under these conditions, the American troop surge may have provided more than security: it created an institution for enforcement of political bargains. The military contingents necessary to perform this function need not have been as large as that required to police Baghdad and other major cities. Rather, the surge provided enough troops for both Sunnis and Shiites to believe that the United States had sufficient resources and will to enforce an agreement. The surge did this in two ways. First, it increased the units available to carry out missions imposing sanctions on either side for violating the terms of the agreement. Ideally, those sanctions would be calibrated to counter-balance any gains achieved by the cheating party. Second, the American show of force itself represented a costly signal by the United States that it was resolved to enforcing agreements, even at the cost of higher combat casualties. High-profile, regular U.S. military patrols in neighborhoods in Baghdad and other cities sent visible signals of that commitment, in addition to their value in reducing insurgent activity.

If that account of the surge is correct—and we will not know for many years why the surge reduced violence in Iraq from 2007-09—it indicates a narrower but deeper role for intervention in failed states. The Bush administration's "Freedom Agenda" of replacing autocracies with democracies, whatever its merits in political philosophy or international relations, cannot take credit for stabilizing Iraq.[122] If so, then several of the ambitious efforts to remake Iraqi society were not crucial to producing the reduction in internal conflict. Building infrastructure, providing public services, and establishing a parliamentary democracy may have their own virtues, but they go well beyond what is necessary to restore a failed state. Intervening nations, such as the United States and its allies, could reduce their role in these areas and interfere less with existing cultural and social norms. International legal mandates to occupy and temporarily govern a nation may also reach too far by placing such goals on the same plane as restoring security and brokering a governing arrangement.

This is not to say that democracy itself can never serve as a useful means to produce enforceable bargains between groups in a failed state. A smaller elite with control over a large sector of resources, for example, may have difficulty making a credible promise to a larger, poorer majority that it will redistribute a stream of wealth in the future. Agreeing to the introduction of democratic governing structures that transfer more power to majorities might send a credible signal of commitment.[123] This could allow the elites and majority from escaping a repeated-game in which the inability to commit creates the conditions for warfare or coups. Democracy, however, does not seem to explain the Iraq surge, in which the majority Shiite population already held power after the fall of Saddam Hussein due to their large numbers.[124]

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[122] For discussion of the merits of spreading democracy from an American national security perspective, see Robert J. Delahunty & John Yoo, Kant, Habermas, and Democratic Peace, __ Chi. J. Int'l L. __ (2010).

[123] See, e.g., D. Acemoglu & J. Robinson, Why Did the West Extend the Franchise?: Democracy, Inequality, and Growth in Historical Perspective, 115 Q. J. Econ. 1167 (2000); D. Acemoglu & J. Robinson, A Theory of Political Transitions, 91 Am. Econ. Rev. 938 (2001).

[124] Another dynamic that might be at work in successful interventions, though not in Iraq, is that a larger power could force ethnic groups to cooperate temporarily. One study has found ethnic violence to be far more exceptional than might be expected. J. Fearon & D. Laitin, Explaining Interethnic Cooperation, 90 Am. Poli. Sci. Rev. 715-35 (1996). It proposes that ethnic groups that end up in conflict have been unable to maintain a cooperative equilibrium because of a downward cycle of a loss of trust. Cooperation over time, imposed by an intervening power, might reintroduce trust between fighting groups that would create the conditions for a permanent political settlement.

While international law and policy may sweep too widely, it may also dip too shallowly. The international law of occupation creates a presumption in favor of leaving domestic laws intact. This rule seems to apply not just to the conventional case of a nation temporarily occupied during the course of a war, but also the unconventional case of a territory where organized government has ceased to function effectively. These two different circumstances require different legal rules. In the former, international law assumes that governing authority will eventually return to the original sovereign once the war is over. The occupying power's hold over the territory should only temporarily displace the normal functioning of domestic law. In the latter, however, there is no pre-existing ideal state to which the territory should return. The intervening nation should have broader authority to re-work domestic institutions in order to establish permanent, effective government authority. In order to do that, the outside power needs greater discretion to develop and enforce political bargains between competing groups. If the international legal system is to provide a legal environment that will help restore a failed state, it should provide intervening nations with greater leeway to reshape the domestic constitution and laws.

Lastly, it could be argued that the vision of a deeper but narrower scope for intervention would further undermine the nation-state as the main actor in international relations. Permitting longer occupations with broader powers for the occupying nations may attack the principle of state sovereignty. The remedy proposed here, however, attacks the problem of territories where states have not succeeded. Even without intervention, the nation-state system would face collapse in these areas. Second, the ultimate goal of fixing failed states is to raise them to a level of independence and self-sufficiency as states, rather than to place them into a long-term, subordinate category of quasi-statehood as suggested by proposals for U.N. trusteeships.

Conclusion

Failed states create negative externalities of international dimension. The collapse of central authority, or its failure to take root, can create the conditions for massive human rights catastrophes. The absence of state institutions can allow a territory to be employed by international terrorist organizations or proliferators of WMD as a base of operations. Even though remedying these problems represent the provision of an international public good, the international legal system continues its protections for national sovereignty and its strict limits on the use of force to intervene. In fact, international legal rules create the wrong incentives by discouraging intervention, requiring that interveners restore a nation to full independence, and maintaining failed states within their pre-existing borders.

This Article argues that the international legal system should construct a different set of rules that would encourage intervention in failed states. Such rules could permit nations to contract with less developed nations with relatively large militaries to intervene in failed states. They could permit intervening nations to intervene without the responsibility of bringing the nation to the level of a functioning, independent nation-state. They could also permit schemes to allow for the sharing of the costs of intervention and the termination of the negative international externalities. Similarly, the international legal system should encourage the provision of international public goods such as the maintenance of international peace and security and the

spread of free trade areas by allowing failed states to decentralize into smaller units that are more consistent with the heterogeneous preferences of different ethnic, religious, or cultural groups.

At a micro level, international law can advance the restoration of government authority in a failed state by focusing the power to reform more narrowly. Rather than attempting to remake a nation along the lines of parliamentary democracy, intervening nations should focus their efforts on enforcing power-sharing agreements between competing ethnic, religious, or regional groups. This would narrow the broad claims made on behalf of intervening nations to reshape the economies and societies of failed states, but it would require a broadening of the authority, under international law, to change domestic constitutions and laws. Reaching for more modest goals may prove to be the better way to address the challenges of failed states.