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Essay:

Failed States, or the State as Failure?

Note to workshop participants: *As you can see, this is currently cast as a brief "think piece" rather than as an article. Comments on any aspect of this draft are welcome, but in particular I am trying to decide whether to expand this significantly or leave it in pared-down essay form.*

I. Failed States

In the fifteen years since the end of the Cold War, the international community – and the community of international lawyers-- has become increasingly preoccupied with the phenomenon usually dubbed "state failure."[1] Definitions of the "failed state" vary, but, unsurprisingly, most commentators define "failed states" in opposition to the successful states that are presumed to be the norm. Successful states control defined

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[1] *See, e.g.*, Eizenstadt, Porter and Weinstein, *Rebuilding Weak States*, FOREIGN AFFAIRS, Jan/Feb 2005; Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL'Y 3 (1992), Jennifer Moore, *From Nation State To Failed State: International Protection From Human Rights Abuses By Non-State Agents* 31 COLUM. HUM. RTS. L. REV. 81 1999, Henry Perritt, Jr., Structures and Standards for Political Trusteeship, 8 UCLA J. INT'L L. & FOR. AFF. 385 (2004), James Fearon and David Laitin, "Neotrusteeship and the Problem of Weak States, INTERNATIONAL SECURITY, 28-4-2004; Holzgrefe and Keohane, ed., HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (2003); Ben Dunlap, *State Failure And The Use Of Force In The Age Of Global Terror*, 27 BC INT'L COMP LR 453 (2004)

territories and populations, conduct diplomatic relations with other states, monopolize

legitimate violence within their territories, and succeed in providing adequate social

goods to their populations.[2] Failed states, their dark mirror image, lose control over the

means of violence, and cannot create peace or stability for their populations or control

their territories. They cannot ensure economic growth or any reasonable distribution of

social goods. They are often characterized by massive economic inequities, warlordism,

and violent competition for resources. [3]

Recent examples of failed states are familiar to us all, from the total collapse of

state institutions in Somalia and the disintegration of the former Yugoslavia to the varied

crises in Rwanda, Haiti, Liberia, Congo, Sierra Leone, and Afghanistan. One notch up the

food chain from "failed states" are the numerous "weak" or "failing" states,[4] which

together constitute much of sub-Saharan Africa [5] (consider Cote d'Ivoire, Zimbabwe,

Burundi, Mozambique, and Angola, to name but a few of the most notorious), significant

chunks of Central Asia, and parts of Latin American and South Asia. These "weak" states

are tremendously varied, and may in some cases combine fragile governance structures

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[2] *Ibid.* For the classic legal definition of statehood, see the Montevideo Convention, Art 1: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." For classic functional definitions of statehood, see Max Weber, POLITICS AS A VOCATION: "[the] state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory." (1918); Norbert Elias; Wendt, *Why a World State is Inevitable*, EUR J. INT' REL (2003), 504-505; Ernest Gellner, NATIONS AND NATIONALISM 3 (1983).

[3] *See generally* Helman and Ratner, *supra* note 1, Eizenstadt, Porter and Weinstein, *supra* note 1, Daniel Thurer, *The "Failed State" and International Law*, ICRC, 12/31/99; *see also Failed and Collapsed States in the International System*, African Studies Center, Leiden, et. al., 12/2003. *See also* Robert I. Rotberg, *The New Nature of Nation-State Failure,* 25 WASHINGTON QUARTERLY 85-96, Summer 2002: ("Nation-states fail because they can no longer deliver positive political goods [security, education, health services, economic opportunity, environmental surveillance, legal framework of order and a judicial system to administer it, fundamental infrastructure requirements] to their people. Their governments lose legitimacy and, in the eyes and hearts of a growing plurality of its citizens, the nation-state itself becomes illegitimate.")

[4] *Cf* . Rotburg

[5] *See, e.g.*, Okechukwu Emeh, *Africa and the Crisis of Instability,* VANGUARD, March 30, 2004

with substantial regional influence and wealth– consider Indonesia, Pakistan, and

Colombia – but they all teeter in common on the precipice, at seemingly perpetual risk of

collapse into devastating civil war or simple anarchy.[6]

"State failure" creates numerous challenges for the international system.[7] Some

challenges are humanitarian, as state failure generally is both fueled by and creates

overwhelming human need.[8] The poverty, disease, violence and refugee flows

accompanying state failures[9] strain foreign aid budgets and philanthropic resources.

Some challenges relate to international security: especially since 9/11, failed states have

been recognized as breeding grounds for extremism and staging points for organized

terrorist groups.[10] In the absence of effective governmental control, both violence and

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[6] *See supra* note 3

[7] *Ibid.*

[8] *See, e.g.*, Bartram S. Brown, *Nationality and Internationality In International Humanitarian Law,* 34 STAN. J. INT'L L. 347, FN 239 ("The concept of the "failed state" has been linked to the need for the international community to take humanitarian action where a state cannot act effectively to protect fundamental rights: The emergence of certain "failed states," incapable of fulfilling their state responsibility and expressing their consent to the establishment of administrative structures and democratic institutions on their behalf, has introduced what may be called a third generation humanitarian intervention. The United Nations' operations in the Congo (ONUC), Cambodia (UNTAC) and Somalia (UNOSOM), and the European Union's involvement in Mostar (Bosnia-Herzegovina) belong to this generation of humanitarian intervention.")

[9] Foreign Secretary Jack Straw, Failed and Failing States, Speech given at the European Research Institute, University of Birmingham, 6 Sep 2002 ("Over the past decade it is estimated that wars in and amongst failed states have killed about 8 million people, most of them civilians, and displaced another four million. Hundred of millions have been deprived of sustenance, education, healthcare, and security.')

[10] *See, e.g.*, Eizenstadt, Porter and Weinstein, *Rebuilding Weak States*, FOREIGN AFFAIRS, Jan/Feb 2005; David Held, *Violence, Law, and Justice in a Global Age*, SSRC, available at http://www.ssrc.org/sept11/essays/held.htm; Jessica Stern, TERROR IN THE NAME OF GOD 238 (2003), "Americans tend to fixate on enemies that can be fought with military might. We have a much harder time seeing failing states, where terrorists thrive, as a source of danger."; *see also* Jeffrey K. Walker, Thomas P. Keenan Memorial Lecture *The Demise Of The Nation-State, The Dawn Of New Paradigm Warfare, And A Future For The Profession Of Arms,* 51 A.F.L. REV. 323); Tarcisius Tara Kabutaulaka, "Failed State" and the War on Terror: Intervention in the Solomon Islands, Analysis from the East-West Center #72, March 2004 ("Canberra's major concern was the disintegration of [Solomon Islands] state authority that would enable terrorist organizations to reproduce themselves through what Tobias Debiel has called "markets of violence." Hence, the strategy was to target the state: intervene, rebuild, and strengthen the state in order to prevent it from "failing" or becoming a "rogue" state that could be exploited for networks of violence.")

illicit economic activity flourish (narcotics, weapons, human trafficking),[11] and both

terrorist groups and the leaders of "rogue states" take ready advantage of the prevailing

anarchy. Failed states also pose legal challenges: in an international order premised on

state sovereignty and state consent, societies lacking functioning governments create a

range of problems.[12] They cannot enter into or abide by treaties; they cannot participate

in the increasingly dense network of international trade or environmental or human rights

agreements and institutions; they cannot enforce contracts between their citizens and

foreigners. [13]

For these reasons and more, failed states have increasingly been viewed as a cause

for concern by the international community, [14] and a variety of international responses

have been attempted and proposed. In response to state failure, international actors and

institutions (from international and regional organizations to NGOs and states) have

taken steps to address the immediate humanitarian and security problems characteristic of

failed states, through means that range from food aid to the deployment of peacekeeping

forces.[15] And these short-term band-aids are inevitably accompanied by longer-term

efforts to rebuild damaged state structures. Whether through the provision of technical

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[11] Saskia Sassen, *Governance Hotspots: Challenges We Must Confront in the Post-September 11 World,* SSRC. At http://www.ssrc.org/sept11/essays/sassen.htm

[12] Daniel Thurer, *The "Failed" State and International Law*, 836 INTERNATIONAL REVIEW OF THE RED CROSS 731-761 *(1999)* ("In practice, therefore, the counter-measures [to failing states] have come chiefly from the organized international community and, above all, the United Nations. Basically, these reactions had to cope with the dilemma of choosing between two fundamental principles of legitimacy in international law: on the one hand, the sovereignty and equality of States and, on the other, the right of peoples to self-determination.")

[13] *Ibid.*

[14] *See* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1, 10-11 (2002) ("America is now threatened less by conquering states than we are by failing ones.")

[15] *See, e.g.,* Ben N. Dunlap, *State Failure And The Use Of Force In The Age Of Global Terror* , 27 B.C. Int'l & Comp. L. Rev. 453, 455 (2004) ("Until the war on terror, state failure was seen mainly as a humanitarian problem.")

assistance or through temporary international administration of one sort or another,[16] the

international community has sought to reverse state failure by fostering diverse political

parties, strengthening constitutional and legal norms relating to good governance,

building an independent and effective judiciary, reconstituting a professional military and

police service, holding free and fair elections— all, of course, designed ultimately to

return the "failed" state to the status of functioning state.[17] Similarly, international aid to

"weak" states is designed to prevent state failure, in large part by shoring up core state

structures.

But as any careful reader of newspapers can discern, the international community

has not, so far, proven to be particularly adept either at staving off state failure or at

reconstituting failed states.[18] The number of failed states attests to the ongoing nature of

the phenomenon of state failure, and the still-shaky status of once-failed states suggests

that rebuilding effective state structures is exceptionally difficult. From Bosnia and Sierra

Leone to Afghanistan and Iraq (where the collapse of a government institutions was, of

course, externally induced), efforts to turn "failed states" into "successful states" have

produced tenuous stability at best.[19]

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[16] Examples of international administration include supervision in Bosnia under the terms of the Dayton Accords; UNMIK's role in Kosovo under UN Security Council Resolution 1244, UNTAET in East Timor under Security Council Resolution 1272, the Coalition Provision Authority in Iraq under Security Council Resolution 1483, etc….

[17] *See* generally Brooks, Stromseth, & Wippman, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW IN THE WAKE OF MILITARY INTERVENTIONS, Forthcoming, 2005.

[18] *See, e.g.*, Minxin Pei & Sara Kasper, *Lessons from the Past: The American Record on Nation Building*, Carnegie, 2003, at http://www.ceip.org/files/Publications/Pei_PB24.asp?from=pubauthor . *See also* Brooks, *The New Imperialism*: *Violence, Norms & the Rule of Law*, 101 MICH. L. REV. 2275 (2003).; Brooks, Stromseth & Wippman, *supra* note __.

[19] *See, E.g.*, Higgins, *Could UN Fix Iraq? Word from Kosovo isn't Encouraging*. WALL STREET JOURNAL 8/2/04; Terry, *Bosnia No Model of Nation-Building*, CHRISTIAN SCIENCE MONITOR, 7/1/03; Carnegie report; Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, INT'L SECURITY (2004).

II.   The Failed State as Metaphor for the International Community

There are many reasons for this. Most are complex, and some are usually overlooked by international law scholars and policy-makers alike.[20] I will address one of these often overlooked reasons later in this essay, but for the moment, I want to focus on one very straightforward reason for the international community's poor record when it comes to forestalling and remedying state failure. "The international community," as we all know, is a fiction, at least insofar as the term implies a cohesive community of states with the capacity to act in a reliably coordinated and effective fashion. It goes without saying that the international community is a hodgepodge of actors and institutions, with divergent interests, natures, and capacities. There are states, to begin with; some of these are powerful and some are weak; some are (relatively) outward-looking while others are (relatively) inward-looking, and many are in between. To again point to the obvious, states differ in territory, population, ideology, culture, and wealth, though as a matter of international law they are united by the shared myth of sovereign equality. States meet for purposes of discussion, joint action, and contestation in numerous overlapping regional and international fora, from the formally constituted (the European Union, NATO, the United Nations and the W.T.O., for instance) to the more informal and ad hoc (the Triad, the G-8).

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[20] I have written elsewhere about efforts to build the rule of law and about post-conflict reconstruction more generally, emphasizing both the technical complexity of the tasks and the often overlooked norm-creation aspects of post-conflict reconstruction. *See* Brooks, *The New Imperialism*, and Brooks, Stromseth and Wippman, CAN MIGHT MAKE RIGHTS, forthcoming.

But states are not the only actors on the world stage. Their influence is simultaneously challenged and extended by an ever-wider range of non-state actors. Some of these are widely viewed as more or less benevolent (Save the Children; Human Rights Watch; Greenpeace), others as fundamentally disruptive (al Qaeda; Hezbollah; the Lord's Resistance Army of Uganda). Still others are more ambivalent in nature: consider for-profit corporate entities, for instance, which may be exceptionally powerful (Exxon-Mobil's annual revenues exceed those of all but ten or twelve of the world's richest states, for instance).[21] And these are only some of the publicly declared world actors. Illicit regional and global networks -- such as weapons smugglers and human traffickers – also abound.[22] What's more, many of these non-state actors, whether licit or illicit, also have complex (and sometimes non-transparent) links to states.

Little wonder, then, that "the international community" struggles to respond effectively to the challenges posed by failed states. There's no there there—or, anyway, there's very little there there, despite the rhetoric of community.[23] Indeed, from the perspective of an alien observer from another planet, the "international community" of the planet Earth must surely appear like a failed state writ large. The existing international order has proven consistently unable to control the violence of powerful actors (whether states or non-state entities such as terrorist organizations)[24], control

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[21] *Cf* Giddons.

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

[23] Cf Benedict Anderson, Imagined Communities: Reflections On The Origin And Spread Of Nationalism 5 (1983)

[24] Viet D. Dinh, *Dunwoody Distinguished Lecture in Law: Nationalism in the Age of Terror*, 56 FL. L. REV. 867, 868 (2004) (" The attacks of September 11, and the composition of its perpetrators, should make one lesson crystal clear: nation-states no longer possess a monopoly on warfare or war-like violence.

environmental catastrophe such as global warming; remedy astronomically large economic inequities between individuals and societies, constrain the devastating scramble to exploit the earth's dwindling natural resources, or address crises such as the global AIDS epidemic. Seventy percent of the world's population is illiterate; eighty percent live in substandard housing; six percent control nearly sixty percent of the world's wealth, and twenty percent use eighty percent of the world's energy.[25] Even in a world of states, forty percent of the world's babies are born without official nationality. [26]A significant percentage of the world's populations lives in war zones: during the 1990s, more than a third of the world's countries experienced "serious societal warfare" of one form or another, [27] and one study identified 39 cases of genocide since 1945.[28]

Just as Afghanistan and Iraq are fractured into numerous competing ethnic and religious groups dominated by warlords and other regional power-brokers, the international order still better resembles a Hobbesian scramble for survival than a coherent system of governance. If there is some sense in which all the world's people constitute a society (and why not insist on that, in this era of globalization and human rights?), it is hard not to conclude that the international community is simply a failed state on a global scale.

Nineteen individuals, with several hundred thousand dollars, inflicted more damage and took more lives in one day than even the mightiest of armies-and, I should add, they did so against the nation that is currently the most powerful on earth.")

[25] Cite.

[26] UN: 40% of Babies Born without Official Nationality, Associated Press, June 4, 2002.

[27] http://www.cidcm.umd.edu/inscr/PC03web.pdf at 14

[28] Jack A. Goldstone & Jay Ulfelder, *How to Construct Stable Democracies*, 28 WASHINGTON QUARTERLY 9, Winter 2004-2005.

III. But That's Silly

The obvious rejoinder to this claim is that it makes no sense at all to think of the international order as a "failed state," since the international order has never been – and has never truly sought to be—a successful state.[29] If we see chaos, poverty, disease, environmental depredation, and enormous unchecked violence around the globe today, this can be attributed to many causes (from original sin to collective action problems: take your pick). But it can hardly be attributed to some sort of state failure-- to the collapse of once-functioning global governance institutions-- since such institutions never existed. By definition, the international order cannot be considered a "failed state" on a global scale, because there never existed a global state that could fall apart.

But is it so silly to analogize the international order to a failed state? True, there never was a global state that existed, so it seems odd to speak of the international community as a failed state. But much the same could be said of many "failed states" on the national level. That is: most so-called failed states were never really states in the first place, at least not in anything more than a technical sense. Afghanistan was never a functioning modern state;[30] neither was Congo, or Sierra Leone, or Somalia, or most of the dozens of states that have been characterized in the past decade as failed or failing. With their boundaries often drawn by colonial and imperial powers, these faux states

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[29] Despite much rhetoric in the interwar and immediate post WWII period, the politicians who framed the League of Nations and the UN stopped very far short of meaningful moves towards world government.

[30] Michael P. Scharf & Paul R. Williams, *Responding to Rogue Regimes: From Smart Bombs to Smart Sanctions*, 36 New Eng. L. Rev. 709, 711 ("As a result of the ethnic make-up of Afghanistan, its colonial past, the Soviet occupation, and the evolution of traditional modes of governance, most governance in Afghanistan occurs at the local level, where ethnic and tribal political structures dominate the political bargaining process. In fact, in some areas of Afghanistan central authorities have never exercised any effective control.")

looked tidy on maps and possessed seats at the United Nations and international juridical

personality, but they rarely possessed the attributes of robust states in other than a purely

formal legal sense.[31]

From their inception, such states rarely exercised anything approaching a

monopoly on violence within their territories; to a significant extent, their borders were

unmanageably porous, and the reach of government authority often barely extended

beyond their capital cities and a handful of other urban centers. Either through incapacity,

lack of resources, massive corruption, or all three, most provided basic services (schools,

roads, court, police, telephone service) only sporadically and poorly, and left their

populations to fend more or less for themselves. At best, these "states" were, for a time,

fragile facsimiles of the nation-states that appeared to thrive in Western Europe and parts

of the Americas.[32] During the Cold War, these *faux* states were propped up by the

competing superpowers; with the end of the Cold War, many were revealed as the houses

of cards they had been all along.[33] If the "descent" into failed state status requires some

prior period as a functioning state, places such as Sierra Leone and Afghanistan can

hardly be considered failed states. They never really were states to begin with.[34]

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[31] There is an enormous theoretical literature on statehood and sovereignty, and I will not attempt to summarize that literature here…. But.. [note especially….Krasner, etc.] We could distinguish between varieties of sovereignty: Westphalian, Montevidean, and so forth…. At best, many "failed" states only possessed Montevidean, or "legal" sovereignty.

[32] Scharf, *supra* note __, at 375- 376 ("Contrary to the conventional view, since the dawn of the state system 355 years ago with the Peace of Westphalia, very few states have actually possessed full juridical autonomy. Rather, most states in the world might more accurately be characterized as quasi-sovereigns.")

[33] Adrian Hamilton, *The Idea of the Nation State is Fatally Flawed*, INDEPENDENT, August 19, 2004.; Stacy, supra, at 2038 ("The end of the Cold War not only created more than twenty new states, but also "reopened the debate about the meaning of . . . the limits of sovereignty.")

[34] *Cf.*. Hamilton: to "describe this as state failure" is "just whistling in the wind."

IV. The State as Newcomer

We can go further, and say that there is every reason to consider the apparent

ubiquity of the nation-state to be a mirage. Although both international law and popular

understandings of international affairs take it for granted that nation-states are (and ought

to be, and must be) the building blocks of world order, viewed historically, the state (and

particularly the nation-state) is a transient and contingent form of social organization.[35]

After all, the history of the modern state is a short one—and not a particularly happy one.

Since pre-history, groups of human beings have found a very wide range of ways to

organize themselves into societies.[36] The world has seen tribes, sects, feudal kingdoms,

city-states, and empires, among other modes of social organization. The idea of the

territorial state as the locus of authority, within a system of formally equivalent similar

states, is of recent vintage. Although one can point to many precursors of the modern idea

of statehood, it was not until 1648, when the Peace of Westphalia ended the Thirty Years

War, that the modern international system of sovereign states began to develop.[37]

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[35] I make no claim to originality here. A vast and influential body of literature has documented this. *See, e.g.,* William McNeill on poly-ethnicity as the historical norm; E. J. Hobsbawm, NATIONS AND NATIONALISM SINCE 1780 (1990)("…I do not regard "nation" as a primary nor as an unchanging social entity. It belongs exclusively to a particular, and historically recent, period….Nations as a natural, God-given way of classifying men as an inherent political destiny, are a myth….9-10); Hans Kohn, THE IDEA OF NATIONALISM: A STUDY IN ITS ORIGINS AND BACKGROUND (1944); Hendrik Spruyt, THE SOVEREIGN STATE AND ITS COMPETITORS (1996); Peter van Ham, *Identity Beyond the State: The Case of the European Union*, at http://www.ciaonet.org/wps/vap01/: ("…it does seem rather brazen to claim the singularity of the nation-state and its indispensableness for all meaningful political and cultural development in the light of the nation-state's rather short historical life.")

[36] *See* Charles Tilly, "Now Where," in Steinmetz, ed. *Cf* Gellner: "It is no part of my purpose to deny that mankind has at all times lived in groups…" at 137.

[37] Straw, *supra* note __ ("The problem for contemporary policy makers is that whilst the Peace [of Westphalia] had an answer to the problem of violence between states—namely, recourse to war—it offered little solution to conflict within states arising from civil war, ethnic conflict and human rights violations.") [move this note?] *See,* e.g, Leo Gross, AJIL, 1948 article; Diane F. Orentlicher, Separation Anxiety: International Responses to Ethno-Separatist Claims, 23 Yale J. Int'l L. 1, 9 ("Against the broad sweep of history, states are a peculiarly modern phenomenon. Although states have antecedents as ancient as

Though the Peace of Westphalia is usually viewed as the symbolic starting point

for the modern state system, it took centuries of conquest and many more wars before

anything truly resembling today's state system took shape. In the three centuries

following the Peace of Westphalia, Europe's numerous squabbling principalities (which

were linked by complex ties of language, ethnicity, religion and kinship networks among

the aristocracy, and cut through by similar cleavages) underwent a process of

consolidation.[38] State consolidation was rarely peaceful: consider the three wars of the

German unification, or the bloody excesses of the Italian unification[39] (it was the carnage

of the battle of Solferino which inspired Swiss philanthropist Henri Dunant to form the

International Committee for the Red Cross).[40] And the emergence of nation-states in

particular was far from a simple or natural development.[41] National identity for the

peoples of Europe had to be created, and it was only the 19th century that saw this process

accelerate. Monuments were built and national anthems composed; regional dialects and

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civilization, the modern state arose out of the disintegration of the medieval Holy Roman Empire. By general acknowledgment, the Peace of Westphalia, which ended the Thirty Years' War in 1648, inaugurated the modern European state system, including the legal system governing relations between sovereign territorial states.") *See also* Dinh, *Nationalism in the Age of Terror,* U FL L. Rev. *But Cf* Goldsmith, FN 5 ("The norm of nonintervention in internal affairs had virtually nothing to do with the Peace of Westphalia, which was signed in 1648. It was not clearly articulated until the end of the eighteenth-century. Nevertheless, the common terminology is used here because the Westphalian model has so much entered into common usage, even if it is historically inaccurate.")

[38] *See generally* Andreas Osiander, THE STATES SYSTEM OF EUROPE, 1640-1990: PEACEMAKING AND THE CONDITIONS OF INTERNATIONAL STABILITY (1994); *also cf* Benedict Anderson, IMAGINED COMMUNITIES: "The First World War brought the age of high dynasticism to an end. By 1922, Habsburgs, Hohenzollerns, Romanovs and Ottomans were gone. In place of the Congress of Berlin came the League of Nations, from which non-Europeans were not excluded. From this time on, the legitimate international norm was the nation-state, so that in the League even the surviving imperial powers came dressed in national costume rather than imperial uniform. After the cataclysm of World War II the nation-state-tide reached full flood. By the mid-1970s even the Portuguese Empire had become a thing of the past." 113

[39] Cites.

[40] *See* http://www.icrc.org/web/eng/siteeng0.nsf/iwpList74/88B8C8C9E9DE970CC1256B66005B0F4B.

[41] Cites. Wendt, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999).

various particularisms stamped out by central authorities, often ruthlessly.[42]

Depending on one's theoretical vantage point, one can see the ferocious militarism that has characterized Europe until the post World War Two period as a direct result of state expansion and nationalism—or, alternatively, in line with Charles Tilly's famous argument, one can see state formation and nationalism as incidental by-products of militarism, as warlords required ever more elaborate infrastructural support to fund and sustain their armies.[43] Either way, few scholars would dispute that the history of the state as the dominant form of social organization is a history dripping with blood.[44]

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

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[42] *Cf.*. Weber, PEASANTS INTO FRENCHMEN (noting that it was not until WWI that France was able to achieve a common language and universally acknowledged central authority); Anderson, IMAGINED COMMUNITIES ("nationality, or, as one might prefer to put it in view of the world's multiple significations, nation-ness, as well as nationalism, are cultural artifacts of a particular kind." (4), and, quoting Gellner: "Nationalism is not the awakening of nations to self-consciousness: it invents nations where they do not exist."(6)) ; *see also* Thompson, THE POLITICAL MYTHOLOGY OF APARTHEID, Saunders, THE MAKING OF THE SOUTH AFRICAN PAST. *See also* Thomas Hylland Eriksen, ETHNICITY AND NATIONALISM (1993)

[43] *See* Charles Tilly, *War-Making and State-Making as Organized Crime*, in Evans, ed. BRINGING THE STATE BACK IN.

[44] *See* Paul Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L 259, 263 (2004): "The sovereign state emerges out of a bloody past. States are the results of wars fought and won, rather than of some sort of natural truth about the community. Sovereignty is a club of victors. Why is there no sovereignty for Quebec, Catalonia, Scotland, Burgundy, or Provence? Why is there sovereignty for the Democratic Republic of the Congo, the Islamic Republic of Pakistan, and a single Federal Republic of Germany? Each question is answered by a narrative of battles lost or of power successfully asserted.") *See also* Van Ham.

the colonists insisted on independence from their parent states, and new states were born, often through violent rebellion.

Meanwhile, in Africa, Asia, and South Asia, where they found indigenous populations more formidable, the European powers (often loosely represented by commercial enterprises acting under state charters, such as the British East India Company) first established nominally independent puppet-states, which they often molded out of far more varied local forms of social organization such as tribe and city. Quickly enough, however, most abandoned the charade of local rule in favor of straightforward colonial regimes. Ultimately, Africa and Asia's most portable natural resources were depleted, and two world wars made maintaining colonies an expensive luxury.[45] At the same time (and not coincidentally), emerging global norms of self-determination, non-discrimination, and human rights made colonial regimes more difficult to justify.[46] As indigenous elites began to demand independence themselves, often through violence here as well, still more states were formed. Their governance structures generally mirrored the internal governance structures bequeathed them by Europe's colonial powers, and their borders notoriously reflected happenstance and inter-

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[45] *See* generally Remo Guidieri, Francesco Pellizzi, and Stanley J. Tambiah (eds.), ETHNICITIES AND NATIONS: PROCESSES OF INTERETHNIC RELATIONS IN LATIN AMERICA, SOUTHEAST ASIA, AND THE PACIFIC (1988)

[46] *See* Scharf at 378-379 ("The principle of self-determination is included in Articles 1, 55, and 73 of the United Nations Charter…. The principle of self-determination was further codified in the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and in the International Covenant on Economic, Social, and Cultural Rights, which together are considered to constitute the international "Bill of Rights." The vast majority of countries of the world are party to the two Covenants, which constitute binding treaty law.")

European conflicts and compromises rather than any pre-colonial political or social units.[47]

V. The State as Failure

The state as we know it today is thus of recent origin. As one commentator notes, the modern state system has not lasted even as long as the Roman Empire,[48] and there is little "natural" or inevitable about it; states are the product of both a unique history and of multiple conscious choices.[49] For that matter, there is no reason to view the state as a particularly successful or benign mode of social organization. I have already noted that even in Europe, the birthplace of the modern state, the history of the state has been a history of repression and war. As states expanded they consumed or trampled on other, weaker social systems; as they vied for dominance they sent millions to be slaughtered on battlefield after battlefield, and as they sought to create unified national cultures they cannibalized their own citizens. This process reached its apotheosis in the Nazi state's genocidal policies.

This is a story familiar to international lawyers, and a happy ending is usually proffered: the U.N. Charter, the emergence of human rights law, and various other

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[47] *See generally* Makau wa Matua, *Putting Humpty Dumpty Together Again,* 21 BROOK INTL L. J. 505 (1995) and *Why Redraw the Map of Africa: A Moral and Legal Inquiry* [cite]; Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in 19th Century International Law*, 40 HARV INT'L L J (1999).; Orentlicher, 15 ("The postcolonial experience of African states in particular is often cited as empirical support for the ideal of nation-states. In this view, the enduring weakness of some African states is due in large measure to the arbitrariness of the postcolonial states' borders.")

[48] *See* Van Ham

[49] *Cf* Gellner: "Having a nation is not an inherent attribute of humanity, but it has now come to appear as such. In fact nations, like states, are a contingency, not a universal necessity." 6

sovereignty-limiting doctrines.[50] But these new norms and institutions have not ended

state predation. Even in Europe, the birthplace of the modern state, "ethnic cleansing" in

the former Yugoslavia is only the most recent chapter in the story of state predation. The

best that can be said of the state in Europe and the Americas may be that it proved a form

of social organization well-suited to the era of industrialization,[51] and that its excesses

have to some extent been tamed by the UN Charter system on the outside and by robust

internal checks and balances on the inside. The emergence of the welfare state (loosely

understood) is surely an improvement over the predatory state, but it is not clear how

much one should make of this.[52] It is a sort of teleological social Darwinism of the most

dangerous sort to assume that because the state has emerged as the dominant mode of

social organization, it must therefore be inevitable, a "better" and more advanced way to

structure societies.

Outside of Europe, the state has hardly been kinder or gentler, and it has certainly

been less "successful" as state success is traditionally evaluated. The successful nation-

states of Europe spawned imitator states around the globe, and in a few places (including,

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[50] Somewhere in here I should discuss Krasner etc. Goldsmith at 960-961 ("Lawyers tend to think (or assume) that, as a rule of international law, sovereignty exercises an influence on national behavior that cannot be captured in instrumental terms. International lawyers are optimistic about the independent efficacy of international law because they give pride of place to the rhetoric of sovereignty in international affairs, and because their empirical investigations tend to focus on behaviors consistent with (rather than contrary to) sovereignty norms. Krasner attempts to turn the lawyer's view on its head by providing an instrumental explanation for both the existence of sovereignty norms and the behaviors that constitute compliance with and violation of these norms. He argues that sovereignty as a legal principle does little independent work; it is largely epiphenomenal to the power of nations and the interests of national leaders.")

[51] *Cf* Gellner, "Nationalism—the principle of homogenous cultural units as the foundations of political life, and of the obligatory cultural unity of rules and ruled—is indeed inscribed neither in the nature of things, nor in the hearts of men, nor in the pre-conditions of social life in general, and the contention that it is so inscribed is falsehood which nationalist doctrine has succeeded in presenting as self-evident. But nationalism as a phenomenon, not as a doctrine presented by nationalists, is inherent in a certain set of social conditions; and those conditions, it so happens, are the conditions of our time." 125

[52] Particularly insofar as many scholars see the emergence of the welfare state as a direct outgrowth of state militarism.

of course, America), this model "took." In many places, it did not. In most places (much

of Africa, much of central and south Asia, parts of the Americas) the state was never

more than a semi-fictional overlay of institutions that masked the continuance or

development of other more protean forms of social organization. When the Cold War

ended, some of these "states" simply reverted, more or less messily and painfully and

visibly, into whatever it was that they had always been; in others, new and often even

more lethal modes of social organization emerged.[53] To a significant extent, the state in

the developing world has offered its citizens all the violence that accompanied European

state formation, and few of the corresponding benefits.[54] Weak, failing and failed states

are not the exception in many parts of the world. They are the norm, and have been since

their inception. [55]

VI. So What?

If this is an accurate account (and the historical and empirical evidence strongly

suggests that it is) then the modern state may be a bit of ephemera, a fleeting and

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[53] *Cf.* Orentlicher at 17 ("Instead, intergroup conflict in postcolonial Africa, as in other multiethnic countries beset by conflict, is usually proximately caused by the actions of political leaders who have deliberately fostered and exacerbated intergroup tensions. Indeed, to the extent that blame for "tribalism" in Africa can be laid at the doorstep of former colonial powers, their fault may have less to do with their legacy of "artificial borders" that cage into shared citizenship inherently unsuitable compatriots than with patterns of colonial administration that heightened Africans' awareness of their ethnic identity and fostered interethnic rivalry.")

[54] *Ibid: cf.* Orentlicher, 18 ("A crucial difference between the nation-building of Western Europe and that of Africa and much of Asia was that the processes in Europe occurred well before the rise of popular demands for democratic rights: Nations already existed as relatively cohesive citizenries. In postcolonial Asia and Africa, on the other hand, nation-building was the first task on the agenda of newly independent colonies, which were suddenly endowed with the full panoply of democratic institutions. . . . [D]emocratization and nation-building were to prove antithetical in circumstances of ethnic diversity.")

[55] *Cf* African Studies Ctr report, *supra* note__: failed states not a "temporary dysfunction" but a "structural trait." And ".. the building process that was at the heart of the Westphalia legacy currently faces radical counter-dynamics of state break-up and state failure."

historically contingent social experiment that has not worked for long (or at all) in most parts of the globe. And if this is an accurate account, it raises two interrelated sets of initial questions.

A. *Is the State Useful?*

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

Of course, it may be that there is independent value in trying to turn troubled societies into functioning states, regardless of their prior history – but if this is so, it must be because we believe the state to be the only truly effective means of organizing large groups of people in the modern world.[56] As I have already suggested, the state's history is not cause for great confidence. But perhaps one could say of the state what is often said of democracy: that it's the worst system, except for all the others. [57]

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[56] *Cf.* Hegel: "The state is the divine idea as it exists on earth."

[57]To a significant extent, most normative defenses of the current international legal order rest on this assumption, whether or not it is consciously articulated, and so do most current proposals for reforming international approaches to the problem of failed states. In an influential 1992 *Foreign Policy* article, for instance, Steven Ratner and Gerald Helman proposed some variety of "conservatorships" for failed states. Ratner and Helman suggested that such conservatorships should be undertaken by the United Nations, after

B. *Why Not a World State?*

If the world's trouble spots never *were* functioning states, we might ask a second

set of questions relating to the international order. Do we learn anything useful if we

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appropriate revisions of the trusteeship provisions of the U.N. charter. Ratner and Helman took it for granted, however, that state sovereignty during trusteeship periods would only be in temporary abeyance; they emphasized both that "no state should be the unwilling object of a U.N. trusteeship" and "the purpose of conservatorship is to enable the state to take responsibility for itself." Thus, "conservatorships should not devolve into long-term custody." In other words, Ratner and Helman take trusteeship as a temporary condition, designed to shepherd a state from "failure" back to "success." Helman and Ratner, *supra* note —.

In the thirteen years since the Ratner and Helman article came out, followers of their general approach have tended to share the assumption that "successful" statehood is the desired outcome in "failed" states. Henry Perritt, for instance, recently proposed revising the UN Trusteeship system in the wake of recent events in Kosovo, Afghanistan, Iraq, and elsewhere. (*See generally* Perritt, *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT'L L. & FOR. AFF 385 (2003). *See also* Deiwert, *A New trusteeship for World Peace and Security: Can an Old League of Nations Idea Be Applied to A Twenty First Century Iraq?* 14 IND. INT'L & COMP L. REV 771 (2004).) Perritt, like Ratner and Helman, emphasizes that the "legitimacy of a political trusteeship depends on its being temporary and aimed at developing the capacity for independence." (467) Perritt situates his proposal within the "strong tradition within international political and legal history of 'intermediate' or 'transitional' sovereignty," which sees sovereignty as "something that can be grown or expanded or achieved." (434)

The tradition to which he refers is best exemplified in the legal literature by the recent work of Michael Scharf, Paul Williams, and James Hooper, who have written a series of articles on "earned sovereignty." (*See* Paul R. Williams, Michael R. Scharf, & James R. Hooper, *Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty*, 31 Denv. J. Int'l L. & Pol'y 349 (2003); James R. Hooper & Paul R. Williams, *Earned Sovereignty: The Political Dimension*, 31 Denv. J. Int'l L. & Pol'y 355 (2003); Michael P. Scharf, *Earned Soveignty: Judicial Underpinnings*, 31 Denv. J. Int'l L. & Pol'y 373 (2003); Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict Over Kosovo's Final Status*, 31 Denv. J. Int'l L. & Pol'y 387 (2003)). Although they propose "earned sovereignty" as a potential solution to "sovereignty-based conflicts," such as struggles for self-determination on the part of an ethnic minority within an existing state (examples include the Republika Srpska within Bosnia, Northern Ireland, etc.), the theoretical paradigm is, as Perritt suggests, equally applicable in the context of failed states.

Scharf, Williams, and Hopper propose that instead of seeing independent sovereignty as an either/or proposition in the short term, the international community should develop solutions to sovereignty-based conflicts that entail "the conditional and progressive devolution of sovereign powers and authority from a state to a substate entity." They note that we already see "ad hoc reliance on the approach of earned sovereignty by mediators and parties to conflict," but "there is scant scholarly commentary as to the precise nature of the approach." But although they emphasize the importance of considering models of "shared sovereignty," "phased sovereignty," "conditional sovereignty" and "constrained sovereignty," they nonetheless assume that less-than-total sovereignty is an inherently temporary state of affairs. The resolution of "final status" is presumed to be necessary, and the presumption is that all entities will either ultimately become fully sovereign or will accept permanent status as a formal subpart of some other fully sovereign entity, though perhaps with some substantial internal autonomy with regard to local affairs. (*See also* Williams and Pecci, 40 STAN J INT'L L 347, 350 (2004).)

think about the international order as a failed state on a global scale? The fact that most sub-international "failed states" were never truly successful states does not prevent most of us from measuring them against the standards of successful states, as typified by the U.S. or the prosperous democracies of Western Europe. Is it inevitably frivolous, then, to measure the international order against the same yardstick, and strive to make it more "statelike"?

Although the notion of "world government" is apt to generate-- at best-- nostalgic chuckles today, we might recall the not too distant era in which the vision of world government, though utopian, was seen as a normatively attractive vision, and serious political figures (including Roosevelt and Churchill) spoke of it is as something both desirable and eventually attainable. If the state, at least in its Platonic ideal form, is the optimal form of social organization, then it is logical to want international structures to mirror the structures found in stable and prosperous states. If the state is the best mode of social organization, it is logical to seek an international order that provides for all humans what a successful national state can theoretically provide for its own citizens.

While questions can always be raised about the most efficient level on which various governance decisions should be made, [58] there is no defensible reason for wishing to preserve the socially constructed difference that is used to justify nation-states. The largest modern state today (China) has a population that approaches the size of the entire world's population in 1900. [59] If a modern state can be as large as China (1.3 billion) or India (1.1 billion) and not be automatically suspect because of its scale, why should we

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[58] *Cf* John H. Jackson, *Sovereignty Modern*: *A new Approach to an Outdated Concept,* 97 AM J INT'L L 782 (2003),arguing that a better understanding of sovereignty is as a set of questions about the appropriate level of power at which particular decisions should be made.

[59] 1.6 billion.

not want a global state in which we can all participate and from which we can all

benefit?[60] The current system of states is arbitrary and irrational;[61] a world where the

Solomon Islands and China are formal equals seems hardly worth preserving—especially

when we know that in practice, states are very far from being equals, and the state-

centered international legal order serves mainly to preserve the power and privilege of

those in successful states at the expense of everyone else.[62]

      If, despite its flaws, the state is the best form of social organization we've got, it is

also logical to sympathize with the transparently normative goals of traditional

international law scholarship,[63] which tended to assume that more international law is

always better than less, and that international structures capable of limiting and

transcending state power (through coercion if necessary) are generally good things.[64]

Traditional international law scholarship was thus dominated by questions about the

degree to which international legal structures were or were not like the structures of

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[60] See generally Alberto Alesina & Enrico Spolaore, THE SIZE OF NATIONS (2003). *But cf.* Anne Marie Slaughter, who argues that "world government is both infeasible and undesirable. The size and scope of such a government presents an unavoidable and dangerous threat to individual liberty." Slaughter, NEW WORLD ORDER, 8. While I tend to think that the issue is moot, since I see no particular likelihood of a world government emerging regardless of any effort to promote on, it's worth noting that the Framers would presumably have said the same of a polity of 300 million, as the US now is.

[61] *Cf.* John Meyer, "Changing Cultural Content of the Nation-State," in Steinmetz, ed., NEW APPROACHES TO THE STATE IN THE SOCIAL SCIENCES: "All sorts of unlikely populations and areas are now at least nominally organized as nation-states." *See also* Ulrich Beck: the state as "zombie category."

[62] *See* generally Goldstein, Kahler, Keohane, and Slaughter, *Introduction: Legalization and World Politics*, in Goldstein et al., eds., LEGALIZATION AND WORLD POLITICS (2001); Held, DEMOCRACY AND THE GLOBAL ORDER (1995); GLOBAL TRANSFORMATIONS; "Violence, Law, and Justice in a Global Age," SSRC. *But see* Jean Cohen, *Whose Sovereignty*.

[63] *Cf* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 206 (1993).

[64] Steven R. Ratner, *International Law: The Trials of Global Norms*, FOREIGN POLICY, Spring 1998. "Most international lawyers, fortunately, are grounded well enough in the real world not to advocate as an immediate priority the creation of some sort of legal superstructure similar to our national government or, like Carnegie and Root, of international courts with mandatory jurisdiction. But they do believe that most issues of transnational concern are best addressed through legal frameworks that render the behavior of global actors more predictable and induce compliance from potential or actual violators."

effective states on the domestic level, often taking the form of questions about whether

international law is or could become "hard law," with adequate coercive mechanisms to

induce state compliance.[65]

VII. Alternatives to the State System?

Whether the state is the best deal humans can come up with is a question that is

both empirical and theoretical. Increasingly, it is a question that has attracted serious

scholarly attention, fueled by the rapid pace of globalization of the last couple of

decades.[66] The emerging literature on this is already too vast to summarize here, but it is

worth repeating something that has become, perhaps, so much of a truism that it often

obscures analysis: globalization has indeed raised new challenges to the viability of the

state.[67] The trans-border flow of ideas, images, technologies, people, drugs, disease,

money, weapons, pollution, and so on makes irrelevant many of the state's traditional

capacities; no state today can fully control its borders, run its economy autonomously or

fully shield its citizens from "outside" threats.[68] Regardless of the state's past utility, the

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[65] Cites. *Cf* Steven R. Ratner, *International Law: The Trials of Global Norms*, FOREIGN POLICY, Spring 1998.

[66] Cites. Slaughter, A NEW WORLD ORDER; Sassen, Negri, Ohmae, etc. *See*. E.g, Roy Rosenzweig & David Thelen, THE PRESENCE OF THE PAST: POPULAR USES OF HISTORY IN AMERICAN LIFE (1998). ("The nation-state still has policies and institutions, but it is by no means clear that these provide the most necessary, desirable, creative, or responsible arenas in which people can control their lives or fulfill a civic heritage." 203)

[67] *See,* e.g, Alice Teichova and Herbert Matis (eds.), NATION, STATE, AND THE ECONOMY IN HISTORY (2003) "The nation-state is a historical phenomenon, and as such liable to 'expiry' fostered by the globalization process… "(7); Stacy, supra, at 2043 ("What seems to be clear, irrespective of the wide variety of beliefs about globalization as a force for good or evil, is that globalization represents a revolution in historical circumstances; a historical moment equal to the Peace of Westphalia and the creation of scores of nation states in the postcolonial moment.")

[68] *See,* e.g, Held; Tony Giddons: *Runaway World: The Reith Lectures Revisited,* 10 November 1999. *See also Measuring Globalization: Who's Up, Who's Down?*, Foreign Policy, 2003

processes of globalization raise serious questions about the state's future utility, at least as the state is currently understood.[69]

The discourse about globalization and international law still tends to take the state as a given, however. Thus, the conventional narrative animating much international legal scholarship is that the (recent) forces of globalization are challenging the (age-old) centrality of sovereign states as the sole players on the global stage.[70] This essay has suggested that the sovereign state[71] was never as static, uncontested, or central as we tend to assume, however.[72] If we look to a counter-narrative, one that emphasizes the degree to which the vision of an international order made up of sovereign states was *always* a mirage,[73] we might equally well ask some rather different questions than those outlined in the previous section.

A.   *A Changed International Legal Order?*

Here too, the questions relate both to the nature of the international order and the nature of sub-international social organization. This time, take the international order first, and turn the original question on its head. If we assume that the existence of nation-

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[69] Cites. Slaughter, Sassen, Negri, Ohmae, etc. Helen Stacy, *Relational Sovereignty*, 55 Stan. L. Rev. 2029, 2030 (2003) ("Globalization provides the conditions to constitute a third revolution in sovereignty; it is an opportunity to make a choice between a definition of sovereignty as yet stronger declarations of borders and difference, or something crucially different.")

[70] *Cf.* Jean Cohen, *Whose Sovereignty? Empire versus International Law*

[71] In any of its meanings…

[72] Again, much scholarship on this issue…. Cites.

[73] *See generally* Krasner: SOVEREIGNTY; Jack Goldsmith rev. Louis Henkin, Human Rights and State Sovereignty, 25 Ga. J. Int'l & Comp. L. 31, 31 (1994) ("Sovereignty is a mistake,…a mistake built upon mistakes, which has barnacled an unfortunate mythology.") *See also* Hendrik Spruyt, THE SOVEREIGN STATE AND ITS COMPETITORS (1996).

states reflects historical accident, rather than the inevitable triumph of the most effective form of social organization, why should we care if the international order does not resemble the domestic order in successful nation-states? If the state is in fact a form of social organization that has not worked very well in most places, why would we want to replicate its structures on a global level?

If the state itself is a failure, then instead of trying to make the international order more state-like, and the international legal system more like a domestic legal system, (complete, perhaps, with effective executive, legislative, and judicial branches), maybe we should instead be asking questions about whether there is some other form of international ordering that neither relies on fictions of state sovereign equality[74] nor seeks to wholly trump existing sub-international power structures.

Here again, what this might be is beyond this essay's scope. But asking these questions—as some scholars in both international law and international relations are beginning to do[75] -- might make us think rather differently about various much-debated phenomena. For instance, many international law scholars are increasingly interested in various forms of so-called "soft" law that nonetheless seem to induce substantial compliance from both states and non-state actors.[76] Much of the time, the debate about international "soft law" centers around the question of whether or not such soft law will "gel" into "hard law," being taken up in treaties between states, for instance, and backed by state-created enforcement mechanisms.[77] But if the state is not a desideratum, perhaps

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[74] *See generally* Krasner: SOVEREIGNTY; Goldsmith rev.

[75] Cites. John Jackson, *Sovereignty Modern*, AJIL; Andre Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 (2004) Krasner, Wendt…

[76] Cites.

[77] Cites.

we should not be concerned about whether soft law will gel into "hard" law. Perhaps we should be willing to embrace a greater pluralism in global legal and institutional structures, rather than measure everything by how closely it approximates "state-like" law.[78]

Similarly, international legal scholars have been preoccupied with the increasing pluralism and diversity of non-state global actors, from NGOs and corporations to ethnic or religious groups, and the challenges they pose to traditional international law assumptions.[79] In a state-centered legal order, we lack both legal tools and basic concepts for understanding and responding to powerful non-state actors. But if we stop fetishizing the state, perhaps many phenomena that now appear to many international law scholars as problems—or at least as conundrums—would instead appear as virtues or opportunities.[80]

In the near term, there is very little likelihood that states will disappear as the core entities in the international system.[81] While globalization has unquestionably altered the nature of state influence, it has not by any means eliminated it. Indeed, it is difficult to speak intelligently about the effects of globalization on "the state," because states are so different from one another. Globalization has increased the incentives for inter-state and international cooperation in many ways, but it has simultaneously decreased them in other ways by concentrating control of resources and capital in fewer and fewer states.

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[78] Cite to Scharf et al. on intermediate sovereignty, earned sovereignty, etc.

[79] *Cf* Abbott et al., *The Concept of Legalization*

[80] *Cf* Koh, Slaughter, Raustiala… *cf* Dickinson. [Ask Laura for latest draft].

[81] *But cf.* Ohmae, THE END OF THE NATION-STATE; earlier predictions of Karl Deutsch; Hans Morgenthau ("modern technology has rendered the nation-state obsolete as a principle of political organization." In Dhanapula.)

Powerful states such as the U.S. have seen their global influence grow in the era of globalization, and the US remains the world's dominant military force.[82]

But although states as such are unlikely to wither away any time soon,[83] it is quite likely that *some* states will fade into non-existence (of which more below), and that the international legal order will come to reflect this. To some extent, through the Security Council, the inequality between states is already a given of international law, and scholars can also point to an increasing amount of international law directed at non-state actors rather than at states. But by and large the international system continues to maintain the pretense of state equality and state centrality. As a formal matter, today only states make international law (though many international law scholars do their best to insist otherwise). And proposals for UN Charter reform mainly involve increasing the diversity of states represented on the Security Council, rather than seeking to develop new principles that recognize the changing facts on the ground.[84]

Various different kinds of international order could evolve over the next fifty to a hundred years.[85] Some scholars predict the emergence of a multilayered system, in which

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[82] *Cf.* Giddons, *Runaway World: The Reith Lectures Revisited,* 10 November 1999. Sassen; Darien-Smith; Bordieu.

[83] Somewhere in here… discuss why what I am saying is not neo-marxism….?

[84] *See, eg*, Secretary General's High Level Panel on Threats, Challenges, and Change, A MORE SECURE WORLD, report at http://www.un.org/secureworld/. Ironically, it recommends eliinating the UN Trusteeship Council….

[85] *See* generally Wendt, *Why a World State is Inevitable*, EUR J. INT' REL (2003), noting that "Three end-states suggest themselves – a pacific federation of republican states, a realist world of nation-states in which war remains legitimate, and a world state." 493; *see also* Bobbitt, Kennedy… Ohmae, Slaughter, Hardt & Negri, etc.; Ambassador Richard N. Haass, Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University (Jan. 14, 2003) (transcript available at http:// www.georgetown.edu/sfs/documents/haass_sovereignty_20030114.pdf).(cited in Dinh)("Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and a monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention. These components of sovereignty were never absolute, but together

states continue to exist more or less in their present form, but increasingly delegate

certain kinds of decisions to international bodies (decisions on environmental matters,

public health, trade, etc.).[86] This is already happening to some extent; the trend could

continue in a way that radically alters old understandings of state sovereignty.[87] It is not

impossible that the international order could become a large scale version of the U.S. or

the E.U., with many economic and security issues handled by central bodies.[88] Such

international bodies might be themselves premised on state equality, or, like the Security

Council, they might be organized in a way that explicitly or implicitly reflects the fact

that some states are more equal than others.

Alternatively, several rival regional regimes might emerge, along the lines of the

European Union. Instead of a world in which some powers dominate, but through

nominally universal institutions, regional institutions might emerge in which sub-regional

entities either dissolve as autonomous political units or become merely local in their

authority. Or perhaps a few states (the US, China?) will develop formal empires, reducing

other states to sub-units.[89]

This does not come close to exhausting the possibilities for an international legal

and political order in which states as such are not obsolete, but are to some significant

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they offered a predictable foundation for world order. What is significant today is that each of these components-internal authority, border control, policy autonomy, and non-intervention-is being challenged in unprecedented ways.")

[86] *Cf.* Jackson; Guzman.

[87] Williams at 387 ("The classic nineteenth-century concept of sovereignty, even if it rarely pertained in practice, was a concept of absolute territorial sovereignty. In the twenty-first century, sovereignty is necessarily shared and dependent on agreements with a range of international actors. -- Independent International Commission on Kosovo, Chaired by Justice Richard Goldstone).

[88] See generally Liesbet Hooghe & Gary Marks, MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION (2001)

[89] *See generally* Wendt, Ohmae, Giddons…. Ferguson

extent de-centered or altered from their current form. And the point in outlining these

possibilities is neither to argue that any is deterministically inevitable[90] nor that any is

normatively superior. But even if we believe that human agency will have little impact on

the evolution of the international order, there is value in entertaining thought experiments

about likely changes. That is because existing states and sub-state entities will fare

differently in different possible future scenarios. Existing actors may be able to position

themselves now in ways that will enable them to reap greater benefits (or avoid emerging

hazards) as the global order changes.[91] While we may not be able to entirely halt or bring

about any particular future, we can probably slow or hasten various developments, and

purposive human action may influence them at least on the margins.[92]

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

Returning to the issue of "failed states," with which this essay began, what are the

implications of thinking of the modern state as an ephemeral and not necessarily benign

form of social organization? The most obvious implication is that our instinctive response

to state failure could well be the wrong response. If the state as a form of social

organization is no longer adaptive, or if it never was adaptive, then it doesn't necessarily

make any sense to "fix" so-called failed states through heroic efforts to build or rebuild

traditional state structures. At any rate, we may need to distinguish between governance

structures, which all societies require, and the particular governance structures that have

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[90] *But cf* Deudner; *cf* Wendt.

[91] *Cf* Wendt, 530.

[92] *Cf* David Held, 2/04 Polity Interview: "The history of liberal democracy is associated with a single political form, the territorial nation-state… today we need to cash those principles in at a different level."

characterized the modern state. We may also need to discard the legal fictions associated

with the belief that every society must be part of some sovereign state as a matter of

international law, and instead invent new ways for both individuals and groups to interact

with international entities within a framework of international law[93]

I should make it clear that although the category of "failed states" is largely

illusory,[94] insofar as most failed states were never truly successful states, there is nothing

illusory about the conflict and human misery rampant in these societies. However we

analyze the root causes of such conflict and misery, the humanitarian and security

problems associated with failed states must be addressed. The question is not whether it

is appropriate for external actors to intervene in catastrophic crises – I take it as a given

that it is,[95] and international law has already evolved to accept this.[96] The question is

how?

Ironically, if we continue to assume that the solution to the many problems in

strife-ridden societies is to prop up pseudo-states, then hand over legal sovereignty as

quickly as possible, we may do far more harm than we would by developing alternatives

to statehood.[97] State-building, at least as done recently in Afghanistan and Iraq, for

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[93] Ibid: ideas of multi-layered, multi-level citizenship.

[94] *Cf* Adrian Hamilton, *The Idea of the Nation State is Fatally Flawed*, INDEPENDENT, August 19, 2004. The concept of the failed state is "One of the most over-used, least useful concepts to understand the modern world…." In addition to being illusory, some scholars have argued that the concept is racially inflected… *cf* Gordon, supra FN x at 927-928; Richardson.

[95] Notwithstanding critiques by Gordon, Richardson. Lots of writing on humanitarian and other interventions, and ways in which they can be imperialist etc. I don't deny this—but also think we can't stop with that critique. Given the inequalities in global power, interventions, for the foreseeable future, may be tainted by the dark history of colonialism and imperialism, but non-intervention in situations of severe human rights abuses, war, or poverty has even greater costs for the affected populations.

[96] Cites.

[97] Pei and Casper, LESSONS FROM THE PAST….

instance, can itself simply be cover for abandoning troubled societies to the same old

warlordism and violence that tore them apart in the first place.

What are the alternatives to the sovereign state? In recent memory, there have

been many: colonies, dependencies, condominia, protectorates, mandates, trusteeships,

situations of "intermediate sovereignty" as in Palestine or the Western Sahara.[98] Some of

these governance arrangements lasted for only a few years; others for centuries.[99] In the

state-centric view of the world, all these alternatives to the sovereign state appear, at best,

as temporary half-way houses on the way to statehood—and, at worst, as varieties of

repression by great powers, squelching subjects peoples' aspiration for self-

determination.[100] It is of course true that the recent history of sub-state entities has not

been a terribly happy one; although I have suggested here that statehood isn't all it's

cracked up to be, the injustice of colonialism, by whatever name, was also real.[101] (As

real as the suffering in so-called "failed states.")

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[98] *See* Scharf, Hooper, Williams *supra* on "earned sovereignty." *See generally* Robert Jackson, QUASI STATES, SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD, 1990; Ralphe Wilde, AJIL piece.

[99] Colonies have been a feature of international political life for several thousand years, disappearing only in the 1960s. Condominia have flourished on and off; typical was the joint control of Bosnia by the Ottoman Empire and Austria-Hungary from 1878 to 1908. *See* Perritt, at 417. The "mandate system," created by the League of Nations, placed Germany and Turkey's former possessions under foreign supervision overseen by the League's Permanent Mandates Commission. Most mandate territories still under foreign supervision after World War Two became U.N. trusteeships when the United Nations replaced the League of Nations. When the last of the trusteeship territories, Palau, became independent in 1994, the U.N. Trusteeship Council suspended operations. (The recent UN High Level Panel on Threats, etc. now recommends abolishing the trusteeship provisions of un charter. ADD MORE on this.)

[100] *Cf* Gordon, Richardson. "[T]he racist law of conquest and colonization brought to the New World by Columbus and the Europeans who followed him continues to serve as an instrument of racial discrimination against indigenous peoples' rights of self-determination." Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination against Indigenous People's Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51, 67 (1991).

[101] *Ibid.* My goal here is not to defend the alternatives to full state sovereignty that have so far emerged. The past history of colonies, trusteeships and the like is not pretty: much of the time, these terms masked straightforward oppression and exploitation, often racist in nature. Recent interventions, occupations, and international administrations can also be criticized, either in motivation, or execution, or both. But as we know, the state's history is just as ugly.

But perhaps it is time to reexamine some of these forms of social organization,[102] and ask whether they must inevitably take repressive forms or be explicitly understood as temporary. It's worth recalling that the world today still contains a surprising number of entities that are neither sovereign states in a strict sense nor sub-state units in a strict sense, and many of these are both stable and fairly contented (at least, more contented than many states). Consider first many of the small island states, such as Guam, Aruba, the British Virgin Islands or Anguilla. Guam is an American dependency; Aruba part of the Kingdom of the Netherlands; the British Virgin Islands is a Crown Colony, and Anguilla is an "associated state" of Britain. All have defined territories and populations; none is directly represented in their "parent" state's legislature, and none is a member-state of the United Nations. In each case, local authorities are responsible for most internal affairs, while the "parent" state is responsible for defense and external relations. None is without problems, but each appears quite stable and reasonably successful.[103]

Or consider the Holy See: its territory is minute, and it has fewer than 200 resident "nationals" (who acquire Vatican nationality through election to certain positions within the religious hierarchy). Nonetheless, it conducts formal diplomatic relations and has permanent observer status at the U.N. The Sovereign Military Order of Malta functions in a quasi-state manner as well: though it lacks a defined territory or population, it issues passports and currency, has UN observer status, and is considered formally a sovereign subject of international law, capable of entering into treaties with states.

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[102] *See,* e.g, Perritt, *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT'L L. AND FOR. AFF 385 (2003), proposing a reinvigorated UN trusteeship system. *See* Ratner; Krasner; Keohane.

[103] *But see* Roman and Simmons, Membership Denied: Subordination and Subjugation under United States Expansionism, 39 San Diego L. Rev. 437 (2002).

More examples could be given – Puerto Rico, Taiwan, Andorra-- but this is probably enough to remind us that even today, despite the state-centered international legal order, there is room for other forms of social organization that are not just half-way houses on the way to "full" statehood.[104] Indeed, it is only within living memory that the dogma of state sovereignty solidified within international legal and political discourse, making it difficult or impossible to openly suggest that not every society ought to be (or strive to become) a sovereign state.

Bearing this in mind, perhaps we can begin to think differently about certain existing problems. Take Kosovo: technically a province of the former Yugoslavia, Kosovo currently exists in limbo, administered by the United Nations. Many Kosovars want Kosovo to become an independent state; Serbia and Montenegro oppose this. The international community continues to hedge, anxious about the proliferation of micro-states,[105] but leery of leaving Kosovo under the thumb of Serbia. It is conventional

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[104] *See* Krasner, Keohane, etc. Indeed, as many commentators have observed, we have already entered an era in which alternatives to total state sovereignty are being attempted in troubled regions. (*See* Ignatieff; Brooks, *The New Imperialism*; Krasner, Keohane, Scharf, Williams and Hooper, etc.) In Bosnia, foreign peacekeepers (currently from the European Union) remain on the ground to this day, and the U.N. High Representative exercises ongoing authority over numerous day-to-day governance activities. In Kosovo, the same is true of UNMIK, and thousands of NATO troops remain in the region. In Sierra Leone, more than 4000 blue-helmeted troops help ensure security and assist with a wide range of reconstructive tasks. There are 14,000 UN troops in Congo, 8000 in Haiti, and 1000 still in East Timor (*See generally* http://www.un.org/Depts/dpko for stats). In Afghanistan, 8000 NATO-commanded troops remain on the ground, along with nearly 7000 U.S. troops, and in Iraq, of course, the foreign troop presence remains in the hundreds of thousands. (*See* http://www.centcom.mil/Operations/Coalition/joint.htm).

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

[105] *Cf.* Moynihan, PANDEAMONIUM; Pascal Boniface, *Pandora's Box: Ideals or Interest?*, LE MONDE DIPLOMATIQUE, January 1999, noting that in 1500 Europe had almost 500 political entities. By the beginning of the 20th century, it had only few dozen, but by 2000 there were again nearly 200 states. *See also* Williams at 425 ("The approach of earned sovereignty to the Kosovo conflict, which began in 1998 as a proposal by the Public International Law & Policy Group working with the International Crisis Group has evolved over the past five years through peace negotiations and UN Security Council Resolutions and

wisdom to lament the uncertainty about Kosovo's final status, and attribute many of

Kosovo's ongoing problems solely to this uncertainty. But why should we assume that

Kosovo faces an either/or choice, with independent statehood as one option, and

provincial status (or merger with Albania) as the other? Why not a permanent UN

administration? Or a loose affiliation with a willing third-party state? Or some sort of

special status within the EU? [106] Perhaps Kosovo's problem is not the *ambiguity* of its

final status, but our collective inability to think beyond the paradigm of statehood.

We could ask similar questions about Iraq, Afghanistan, and a multitude of other

failed or weak states. Is statehood best suited to bringing peace, prosperity and the rule of

law to these troubled societies? In some cases, perhaps it is; in others, it probably is

not.[107] In Kosovo, where independent statehood has always been a non-starter from the

international community's perspective, and indigenous conceptions of identity have never

strongly coalesced around the idea of statehood, some "third way" might well appear to

most Kosovars as a viable option. Similarly, a "third way" might well appeal to many in

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subsequent interpretations of those resolutions to now to serve as the foundation for the resolution of Kosovo's final status…. Throughout its development and application in Kosovo, the earned sovereignty approach competed for influence with the alternative approach of stability through accommodation and was shaped by the compromises inherent in the foreign policy decision making process. In the end, the debate yielded a more refined approach which presents the greatest opportunity for facilitating a viable and lasting settlement of the Kosovo conflict.")

[106] Refer again to emerging literature on trusteeships, intermediate sovereignty, etc. here (Scharf, Williams, Hooper). The important point of distinction between what I am arguing and what they are arguing needs to be emphasized: though they note that sovereignty should not and need not be conceptualized in a unitary fashion, they still see intermediate sovereignty, in practice, as a short-term solution to sovereignty-based conflicts. My argument is that there is no reason not to see various intermediate forms of sovereignty as normatively desirable longer-term end-states. Cites. *See generally* African Studies Ctr report, *supra* note__: failed states not a "temporary dysfunction" but a "structural trait." But see Krasner, Keohane.

[107] And this question should be answered based on facts on the ground, not on commitment to any particular theory. Although I have argued that many modern states reflect historical happenstance more than "natural" social or political communities, in some places the nation-state, however artificially created, is nonetheless today the locus of identity for most people. In Iraq, for instance, I suspect that nationalist sentiment is deep enough amongst Iraqis of all ethnic and religious backgrounds to make statehood the only viable option; even most Kurds appear to want the continued existence of the Iraqi state. Despite the violence that continues to plague post-Saddam, post-election Iraq, for now, attempting other alternatives – some status other than continued sovereign statehood-- might generate even more opposition.

the weak or failed states of Central Asia and Africa, where the nation-state has not been

as historically important to local understandings of identity. In Sierra Leone, for instance,

during the height of the civil war, many indicators suggested that a majority of Sierra

Leonean would have preferred a return to the status of British colony, had that option

been available.[108]

The state is a means to realize peace, prosperity, and human dignity, and should

be evaluated based on how well it in fact achieves those ends for particular peoples. But

the state is not an end in itself. Instead of trying to prop up political structures that don't

necessarily work, we should accept that the challenge, today, is to develop alternatives to

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[108] It was not. The British, whose military interventions did help stabilize Sierra Leone as the civil war wound down, made it clear that the British public had no appetite for accepting longer-term responsibility for Sierre Leone.

It's worth noting that any preference for a return to colonial status on the part of Sierra Leoneans was hardly based on revisionist colonial nostalgia; I have never encountered a Sierra Leonean who had the slightest illusions about the racism and exploitation that characterized life under British rule. (I visited Sierra Leone frequently between 1999 and 2001.) But everything is relative. Colonial exploitation, bad as it was, struck most Sierra Leoneans as nonetheless preferable to a brutal civil war characterized by extensive forced recruitment of child soldiers and mutilation and rape as terror tactics.

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

(*See generally* Matua, supra note __; Guidieri, *supra* note __ , noting that postcolonial state development "[was] expected, under the sponsorship and direction of Western and North American countries, to heap great benefits upon the rest of the world…[Yet these processes have generated] –whether by collusion or reaction, in good faith but poor anticipation—massive civil war, repressive authoritarianism by military coteries fortified by Western weaponry, and gruesome interracial and interethnic bloodshed roused by fundamental religious bigotry and inflamed by flagrant misuse of mass media." (2) And: "The idea of the nation-state has survived the corrosive enthusiasm of internationalists, the xenophobic excesses of the first half of this century, the wars and revolutions they unleashed, and the global power of multinational corporations and organizations. It continues to resurface forcefully, sometimes as a last resort, often chaotically. Frequently, as in Africa and Oceania, mosaics of different peoples have been coerced onto a more or less hasty acceptance of this formula, in order to acquire the international legitimacy and financial standing (i.e. the 'right' to contract debts) needed to tackle the problems brought on by the demise of the old colonial administrations."(8) *Also cf.* Bjorn Moller, THE SECURITY SECTOR IN ZIMBABWE: ITS ROLE IN STATE-BUILDING AND THE PRESENT CRISIS- on Africa's "vampire states.")

the state, alternatives that can be respectful of human rights and democratic imperatives, but not paralyzed by the need to mimic state structures that have little or no independent value.

The project of devising democratic, accountable and rights-respecting alternatives to the state is well beyond the scope of this short essay. But it is not hard imagine some possible forms of "non-state" arrangements that might at times be preferable to statehood in troubled regions: indefinite international administration by the UN; similarly indefinite administration by a regional body such as the E.U. or African Union, long-term "partnership" or "affiliation" with one or more "successful" states (which need not be geographical neighbors), federation with neighbors, and so on. In a world in which the lines between public and private get blurrier by the day, it is even possible to imagine societies "outsourcing" some traditional governance functions to private actors, not on a short-term, "emergency" basis,[109] but indefinitely. This already happens, to some extent, and although the record is mixed,[110] the option merits further exploration.

There are various obvious objections to what I am proposing, and virtually all relate, in one way or another, to the risk that people living in what I will call "non-state societies" will lose all control over their own destinies. Thus, critics of my proposal might argue that the state is currently the only means by which individuals in troubled and impoverished societies can hope to have an impact on the international order. Since only the state possesses international legal personality, only states can impact the

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[109] E.g, contracting with international aid organizations to run refugee camps or train health workers. See Dickinson.

[110] See NYT story re Bolivia and water supply…. Mercenaries, contractors. Acknowledge huge problems—but also 1) positive stories and 2) could improve accountability mechanisms.

structure of international treaties and trade pacts, for instance. If people in troubled societies lose the state, won't they also lose all capacity to ensure that the international order does not end up stacked against them? If we decide that people living in failed states ought not to be living in sovereign states at all, but in some other non-state arrangement, aren't we just relegating large portions of the world's populace (who just happen to be, in the main, non-Western) to permanent second class status? And in any case, just who is the "we" who decides that some societies are best off without the state?

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

Realistically, becoming "non-states" could hold real advantages for people in "failed" states. As globalization marches on, even many powerful states have found it advantageous to explicitly constrain their own sovereignty in many respects in order to

solve collective action problems. The European Union is the most far-reaching example

of modern states (nearly all prosperous) voluntarily constraining their own sovereignty in

order to achieve mutual benefits.[111] When it comes to sovereignty, the E.U. suggests that

at times, less can be more.[112] Even the United States, despite recent unilateral rhetoric,

accepts the strictures of the World Trade Organization in exchange for the economic

benefits it acquires.[113]

These examples are not wholly generalizable, since the EU and WTO are each, in

their way, "rich men's clubs[114]," but the irony is worth noting: in this era of globalization,

the rich states have all constrained their sovereignty voluntarily to one degree or another,

and reaped significant advantages.[115] Meanwhile, the poorer states find themselves

locked out, left alone to enjoy the dubious benefits of their unabridged sovereignty.

Increasingly, sovereignty has become a chump's game.

Constraining—even wholly sacrificing-- their own sovereignty could thus bring

substantial benefits to the populations of troubled states. Far from being relegated to a

permanent global underclass, the residents of quasi-states or non-states might be able to

reap substantial benefits from constraining or sacrificing their sovereignty. [116]

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[111] Cite. Huge literature on this. Philip H. Gordon, *Globalization: Europe's Wary Embrace*, YALE GLOBAL, November 1, 2004.

[112] *See, e.g.*, Peter van Ham, *Identity Beyond the State: The Case of the European Union* http://www.ciaonet.org/wps/vap01/. *See also* Ben Rosamond, THEORIES OF EUROPEAN INTEGRATION (European Union) (2000); Hooghe & Marks, *supra* note__.

[113] *Cf. Guzman, supra* note __.

[114] [consider NATO partner Turkey's struggle to join EU]

[115] *Cf* Moller.

[116] Indeed, the main challenge may lie in persuading the wealthier states to share the benefits of certain profitable forms of constrained sovereignty (such as EU membership). This issue too is beyond this essay's scope, but has been discussed elsewhere by Robert Keohane, Stephen Krasner, and others. For the purposes of this discussion, it is perhaps enough to say that wealthy and stable states do have a real interest in aiding poor and failed states, for the reasons noted at the beginning of this essay: failed and failing states pose

This realist response does not wholly address all the objections that might be raised to my proposal, however. In particular, it does not help us with the question of "who decides?," or the question of how we can ensure democracy, human rights, and accountability in the absence of state structures.[117] If a failed state moves into some non-state status of indefinite duration, who governs? Who makes the decisions that affect day to day life? Who ensures that decision-makers are responsive, transparent and accountable, and that ordinary people—and organized political communities-- have the ability to participate in the decisions that affect them? Who remedies wrongs in these non-state societies?

In response, it is not quite enough to note simply that many existing states (and not just failed states) already lack internal democracy and accountability, just as they lack the ability to influence the global order. Some degree of imaginative utopianism is also needed to respond to these concerns. And here we might again take our cue from the so-called "anti-globalization" movement – not its most knee-jerk representatives, but the many thoughtful individuals and NGOs who have begun to explore ways to make both public and private global institutions more accountable to ordinary people.[118] Just as the state is not necessarily democratic or benevolent, non-state entities (from private, for-profit corporations, to NGOs, to international financial institutions, to international organizations) need not inevitably be undemocratic and heedless of the common good. Increasingly, mechanisms for ensuring accountability and democracy within a very wide

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grave risks to international security and economic stability. This truth alone is not enough to overcome collective action problems, but it is a start.

[117] Add cites on emergence of "right to democracy," accountability. Franck et. al. Beutz article.

[118] *Cf.* Jagdish Bhagwati, IN DEFENSE OF GLOBALIZATION (2004); Joseph E. Stiglitz, GLOBALIZATION AND ITS DISCONTENTS (2003); John Cavanagh, Ed., ALTERNATIVES TO ECONOMIC GLOBALIZATION (2002).

range of institutions are beginning to emerge.[119] Shareholder resolutions and voluntary

codes of conduct help ensure corporate responsibility; international criminal law helps

deter abuses by non-state actors; grievance mechanisms in international organizations

help resolve disputes over non-compliance and address arbitrariness in decision-making.

These mechanisms are enormously varied in their sophistication and their

efficacy, and they offer no panacea. Nonetheless, they invite us to imagine a world in

which norms of human dignity and democratic participation can be realized through an

ever-wider range of governance institutions, some of which may increasingly be distinct

from the state.

VIII. The End

My goal in this essay has been to raise questions about issues we often take for

granted, and suggest that both domestically and internationally, perhaps we should be

more open to diverse forms of social organization – and that we should strive to create an

international legal order that permits and values numerous different forms of social

organization .The state as such is not defunct, despite the changes wrought by

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[119] *Cf* David Held, *Violence, Law, and Justice in a Global Age*, SSRC, *supra* note__ "Changes in the law of war, human rights law and in other legal domains have placed individuals, governments, and non-governmental organizations under new systems of legal regulation-regulation which, in principle, recasts the legal significance of state boundaries. The regime of liberal international sovereignty entrenches powers and constraints, and rights and duties in international law which—albeit ultimately formulated by states, and can come into conflict, and sometimes contradiction, with national laws. Within their framework, states may forfeit claims to sovereignty, and individuals their right to sovereign protection, if they violate the standards and values embedded in the liberal international order; and such violations no longer became a mater of morality alone. Rather, they become a breach of a legal code, a breach that may call forth the means to challenge, prosecute and rectify it. To this end, a bridge is created between morality and law where, at best, only stepping stones existed before in the era of classic sovereignty."

globalization. On the other hand, some states may well be defunct, and shoring up the state wherever it is in jeopardy may be both pointless and damaging to human security.

I have suggested just a few ways in which de-fetishizing the state might change the way we think about both the architecture of international law and about the challenges associated with societies in crisis. Moving forward along this trajectory presents many challenges, as powerful actors no longer have the luxury of ignoring demands for democratic governance.[120] Both individuals and groups have a legitimate right, increasingly recognized by international law, to enter into various forms of voluntary association, to determine their own political arrangements, and to be subject to political authority that is transparent and accountable.[121] But there is no right to statehood, nor should there be.[122]

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[120] And should not: many studies suggest that robust democratic governance structures are the best predictor of social stability. *See, e.g.*, Jack A. Goldstone & Jay Ulfelder, *How to Construct Stable Democracies,* 28 WASHINGTON QUARTERLY 9, Winter 2004-2005. [And cite: Franck, Beutz, etc on right to democracy….]

[121] Need to talk more about what this would mean. *Cf.* Hirschman, *Exit, Voice, and Loyalty.*

[122] *Cf* Waters: "While we may owe Bosnians a great deal, we owe Bosnia nothing…." 29 YALE J. INT'L L. 423 (2004)