Fixing Failed States

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Failed states pose one of the deepest challenges to American national security and international peace and stability. Finding a comprehensive and effective solution to the challenges of terrorism, human rights violations, or poverty and economic development requires some understanding of how to restore failed states. The response of the United States and its allies has remained the same: to rebuild the institutions of state control, and, if lucky, to plant a working democracy and a market economy within existing state borders. But many international law scholars remain openly dubious about the ability of states to rebuild—the problem is not failed states but the nation-state as the primary actor in international relations. This paper argues that both American and United Nations policy on the one hand, and the conventional academic wisdom on the other hand, are mistaken. Building a normal nation-state with full sovereignty on every territory in the world, without changing any borders, fails to understand why some states are failing in the first place. Viable states simply do not align with the borders recognized by the United Nations or created during the period of rapid decolonization in the decades after World War II. Academics who see in failed states the rise of alternatives to the nation-state have no practical solutions that do not depend on the political, economic, and military resources of strong nation-states. Without them, supranational governments, trusteeships, or nongovernmental organizations have shown little ability to fix failed states. This Article argues that powerful nations can help by performing the more modest role of promoting and guaranteeing power-sharing agreements between competing groups within failed states. It concludes by illustrating the thesis with the outcome of the surge in Iraq.
Introduction

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

Today the United States is rebuilding nations on a grand scale. In Afghanistan and Iraq, the U.S. Armed Forces are building schools and roads and training local government officials. President Obama decided to deploy 30,000 additional troops to Afghanistan—bringing the total number of U.S. troops there to about 100,000—to defeat the Taliban and al Qaeda. The United States, along with other countries, has also intervened in Haiti and Liberia to stop internecine wars. And to this day, U.S. troops remain in Kosovo to
monitor the peace accords in Bosnia signed in 1995. Some failed states—most notably, Afghanistan and Iraq—are rogue nations that the United States invaded and is now attempting to restore; others are not. Regardless of the reasons for the original state failure, the response of the United States and its allies has remained consistent: rebuild the institutions of state control with the aim of planting a working democracy and a market economy.

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

Some international law scholars, however, see intervention as a fool's errand. They believe that the international legal regime, as codified by the U.N. Charter, only permits the use of force by one nation against another for self-defense or when authorized by the Security Council, but not for rebuilding a state. To be sure, some scholars support military intervention in the event of humanitarian disasters. The concept of "failed states" even traces its lineage to efforts to justify armed force to stop human rights abuses in the former Yugoslavia and Somalia. Nonetheless, some international law scholars remain openly dubious about the ability of states—particularly the United States—to rebuild government institutions and physical infrastructure in such places. For these scholars, the problem is not failed states but nation-states. They believe that the nation-state itself is growing obsolete as the organizing unit of international relations, and that various forms of sub-national, regional, or international organizations would better govern some territories and peoples. These scholars seek solutions in international law and institutions that would


2. See U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . .”); see also Sean D. Murphy, Humanitarian Intervention: The United Nations in an Evolving World Order (1996); Fernando R. Teson, Humanitarian Intervention: An Inquiry into Law and Morality (Transnational 2d ed. 1997); Christopher Greenwood, Humanitarian Intervention: The Case of Kosovo, 1999 Finnish Y.B. INT’L L. 141 (2002).
erode the ability of nation-states to exercise their traditional military and political powers in international affairs.

This Article argues that both American and U.N. policy on the one hand, and anti-state academics on the other hand, are mistaken. Building a normal nation-state with full sovereignty on every territory in the world, without changing any national borders, fails to acknowledge why some states are failing in the first place. Many viable states simply do not conform to the borders recognized by the United Nations or created during the period of rapid decolonization in the decades after World War II. Yugoslavia, for example, contained several states that wanted to exist independently of one other. Academics who see in failed states the rise of alternatives to the nation-state offer no practical solutions that do not rely on the political, economic, and military resources of strong nation-states. Supra-national governments, trusteeships, or non-governmental organizations, among other forms of international institutions, have proven ineffective at fixing failed states without the backing of strong states.

This Article proposes an intermediate position, based on what is known about why states fail and why recent interventions have succeeded. It does not view the restoration of the status quo ante as the answer, nor does it endorse replacing nation-states with international institutions. Rather, it argues that nation-states remain the most important actors with the capacity to fix failed states, and with the resources to increase global public goods and reduce global public “bads.” Removing obstacles in international law and policy to intervention in failed states will more effectively allow nation-states to tackle the problem. This solution does not discard state sovereignty, but it may require accepting adjustments to the borders of failed states, possibly resulting in smaller, more numerous, states.

This Article first sketches a theory explaining state disintegration. Scholarship in political science and international economics suggests several forces at work. Rapid decolonization during the 1950s and 1960s, and again in the 1990s in the wake of the collapse of the Soviet Union, produced a large number of new states that had little history or experience with self-governance. At the systemic level, free trade and international security have accelerated the fragmentation of larger states into smaller states, as small states no longer need to merge for economic or defensive purposes. Decentralization produces more states, some of which may suffer from weak institutions and political cultures. Ironically, U.S. policy has promoted broader free trade areas and provided security; however, it has also sought to reverse the very fragmentation

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

4. See infra notes 8-11.
produced by those international public goods. At the domestic level, larger states may actually be more likely to fail in a globalized environment, because ethnic, religious, and regional groups may be less likely to reach bargains in the absence of external economic or security pressures.

International law is counter-productive to the goal of fixing failed states. Several factors create powerful disincentives to intervention in failed states, including the lack of direct benefit to the intervening state, the possibility of high costs in both military and civilian lives, the hard moral dilemmas involved in deciding whom and how to help, and the difficulty in executing withdrawal. To the extent that international law affects the decision making of states, it only exacerbates these existing obstacles to fixing failed states. The U.N. Charter prohibits states from using force except in self-defense or with the permission of the U.N. Security Council. Although a 2005 U.N. General Assembly resolution recognized that governments have a "responsibility to protect" their populations, it still requires Security Council approval before an intervention can violate a state's territorial integrity. This rule discourages states from intervening to stop the chaos and destruction that follow the collapse of state institutions. Once an intervention occurs, international rules further raise the costs of intervention by requiring that failed states be restored to full sovereignty. International law essentially requires that, when other states intervene, those intervening states must restore the status quo ante—underscoring international law's schizophrenic approach to state sovereignty.

International law has things backwards. Failed states produce negative externalities within the international system by harming their own civilian populations or by allowing terrorists or criminal enterprises to operate on their soil. Public choice analysis predicts that nations will intervene at below the optimal rate. International law therefore should encourage, rather than discourage, intervention. Costs borne by intervening states—created by restricting when states can intervene or requiring intervening states to fully restore the sovereignty of the failed state—should be reduced in order to reach the optimal amount of intervention. Rather than requiring a complete restoration of the status quo ante, international law should allow intervening states to restore a functioning government by brokering and enforcing agreements between local groups to share power and resources. International law could further advance this process by allowing for different forms of governance within territories and by permitting the alteration of preexisting borders.

5. See U.N. Charter art. 2, para. 4. The exceptions are (1) "in self-defence if an armed attack occurs against a Member of the United Nations" and (2) if the Security Council authorizes the use of force "to maintain or restore international peace and security." Id. at arts. 42, 51.
This Article proceeds in three parts. Part I describes the phenomenon of failed states and the international system's inconsistent response to the negative externalities that failed states produce. Part II discusses scholarly proposals for reform, and explains why the nation-state is the most effective organizational unit for addressing the problem of failed states. Part III employs a systems approach to understanding the problem as the product of free trade and international security, and describes the role of failures of groups within a state to restore a working government. Part III argues that the solution to the problem of failed states should involve relaxing the rules on the use of force and on post-intervention reconstruction.

I. THE PROBLEM OF FAILED STATES

The concept of a “failed state” was introduced into academic discourse in 1992. Though scholars disagree on the precise definition, the term generally describes nations that cannot perform their domestic functions or meet their obligations under international law because of the collapse of central government authority. Failed states are contrasted with the ideal of states in the Westphalian system, which exercise full sovereign powers over a territory and population, have a functioning government that monopolizes legitimate violence and provides public goods, and can make and keep international obligations. In failed states, non-state actors control resources and population; the government cannot monopolize legitimate violence or provide public goods; and the economy has usually collapsed, producing famine, refugee flows, and human rights disasters. Physical infrastructure decays and living standards decline rapidly. Failed states usually lose legitimacy among their citizens and suffer internal armed conflict, often rooted in longstanding ethnic, religious, or regional rivalries.

A. Which States Have Failed?

There is no consensus on which states have fallen into the “failed states” category. Successor states to the former Yugoslavia or the Soviet Union were
often thought of as the paradigm by scholars.\textsuperscript{12} The end of the Cold War unleashed racial, ethnic, or religious animosities, or yearnings for independence, that had been suppressed by authoritarian dictatorships. These states gave birth to more than two dozen successors, such as Serbia, Bosnia, and Croatia—some turned on their neighbors, and others had difficulty governing themselves as independent nations. Another set of failed states emerged in Africa and Asia, where decolonization tripled the number of states since the end of World War II.\textsuperscript{13} Many of these states were granted the right of self-determination without possessing the ability of self-governance. The Cold War kept afloat some of these nations, such as Somalia and Ethiopia, as the superpowers competed for allies in the Third World, but the collapse of the Soviet Union largely ended the flow of aid. A third set of failed states includes nations such as Haiti or Afghanistan, which have historically had difficulty supporting a fully functioning government because of tribal rivalries and endemic civil wars.

Observers have attempted to create indexes of failed states to measure nations with the worst functioning governments. The World Bank, for example, has created a “Country Policy and Institutional Assessment” index that ranks states for purposes of allocating aid. It categorizes “fragile states” as low-income nations that have weak institutions, poor governance, political instability, and suffer from frequent violence or the effects of past severe conflict.\textsuperscript{14} In 2007, the World Bank listed thirty-four nations as “fragile” based on a review of their economic management (macro policy and fiscal policy), structural policies (trade and business regulation), social inclusion (gender equality, environmental and labor policies), and public sector management and institutions (property rights, budget and revenue, public administration and corruption).\textsuperscript{15} The World Bank ranks such countries as follows:

1. Zimbabwe
2. Eritrea
3. Comoros
4. Sudan
5. Central African Republic
6. Chad
7. Guinea-Bissau
8. Afghanistan
9. Cote d’Ivoire
10. Togo

\textsuperscript{12} See Helman & Ratner, supra note 8, at 5.
\textsuperscript{13} Id. at 3.
\textsuperscript{14} The World Bank, Int’l Dev. Ass’n, Operational Pol’y & Country Serv. & Res. Mobilization Dep’t, \textit{Operational Approaches and Financing in Fragile States} 2 (June 2007).
\textsuperscript{15} Id.
According to the World Bank, these states experience high levels of extreme poverty, infant mortality, and deaths from disease; and they experience low levels of economic growth, savings and investment, and education. Violent conflict is endemic in most of these states.

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

11. Democratic Republic of Congo
12. Angola
13. Republic of Congo
14. Solomon Islands
15. Timor-Leste
16. Haiti
17. Sao Tome and Principe
18. Guinea
19. Burundi
20. Sierra Leone
21. Djibouti
22. Tonga
23. The Gambia
24. Papua New Guinea
25. Lao PDR
26. Cambodia
27. Vanuatu
28. Uzbekistan
29. Mauritania
30. Nigeria
31. Liberia
32. Myanmar
33. Somalia
34. Territory of Kosovo.16

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16. *Id.* A higher ranking corresponds to a higher degree of state failure. The World Bank considers Liberia, Myanmar, Somalia, and the Territory of Kosovo to be fragile states, but they are not ranked in the bottom seventy-five states by institutional assessment—in other words, the violence in those states is sufficiently great to push them into the fragile states category, even though their scores on economic, social, and political policy would rank them higher. I have included them at the end of this listing in alphabetical order. Conversely, there are some states that would rank here solely in terms of their policy scores, but the World Bank left them off its list of fragile states, presumably because of the absence of serious violent conflict.
1. Somalia
2. Zimbabwe
3. Sudan
4. Chad
5. Democratic Republic of the Congo
6. Iraq
7. Afghanistan
8. Central African Republic
9. Guinea
10. Pakistan
11. Ivory Coast
12. Haiti
13. Burma
14. Kenya
15. Nigeria
16. Ethiopia
17. North Korea
18. Yemen
19. Bangladesh
20. East Timor.

There are some differences with the way other observers rank failed states, though there is a strong degree of overlap. Professor Robert Rotberg identifies Somalia as a “collapsed state,” and only seven other states as “failed”: Afghanistan, Angola, Burundi, Democratic Republic of the Congo, Liberia, Sierra Leone, and Sudan. He considers roughly thirty-five other states as “weak,” meaning that they could become failed states. The Brookings Institution’s 2008 “Index of State Weakness in the Developing World” contains most of the same states as the World Bank and the Fund for Peace and examines similar measures of economic, political, security, and social welfare. Still, the Brookings Institution’s index describes only Somalia, Afghanistan, and the Democratic Republic of Congo as “failed,” followed by a larger group of twenty-eight “critically weak states,” including Iraq, Burundi, Sudan, Central African Republic, Zimbabwe, Liberia, and Cote D’Ivoire.

17. Foreign Policy, The Failed State Index 2009, http://www.foreignpolicy.com/articles/2009/06/22/the_2009_failed_states_index (last visited Oct. 2, 2010). Foreign Policy and the Fund for Peace use a 1-10 scale to rank nations on several characteristics, including demographic pressures, refugees, group grievances, human flight, uneven development, economic decline, de-legitimization of the state, public services, human rights, security apparatus, factionalized elites, and external intervention.


19. SUSAN E. RICE & STEWART PATRICK, BROOKINGS INSTITUTION INDEX OF STATE
Efforts to grade failed states suffer from the same problems as other rankings, such as the annual declaration by popular magazines of the top ten law schools or the best places to live in America. Disputes about the dysfunctional nature of a nation’s governmental institutions or the severity of internal armed conflicts are inevitable. The rankings may also treat cases differently depending on the cause of a state’s decline. Iraq, for example, was not considered a failed state until the United States’ 2003 invasion. Further, different rankings may disagree about whether a strong, even tyrannical, central government can be considered a failed state when a small clique presides over widespread poverty and economic collapse—as in North Korea or Zimbabwe. Nonetheless, these rankings show rough consensus about the majority of states that are considered failed, even if they do not agree on the precise order or marginal cases.

B. What Are the Effects of Failed States?

Failed states present a challenge for both international law and policy. While the definition of failed states may be disputed, the effects of failed states on the international system are clearer. The 2002 National Security Strategy of the United States declared that failing states “pose as great a danger to our national interest as strong states.” The European Union’s 2003 security strategy found failed states to be an “alarming phenomenon,” while the U.N. Secretary General observed in 2005 that “[i]f States are fragile, the peoples of the world will not enjoy the security, development and justice that are their right.”

From a historical perspective, it is not immediately obvious why the internal collapse of a state poses a serious threat to international peace and security. From the beginning of the period introduced by the Peace of Westphalia in 1648—which codified the nation-state as the primary actor in international affairs—to the end of World War II, interstate conflict posed the greater threat to international peace. Wars between states plagued the nations of Europe throughout the seventeenth and eighteenth centuries, culminating in World War I, which killed between thirteen and fifteen million people. World War II caused the deaths of approximately sixty-five to seventy-five million people. Not surprisingly, the U.N. Charter, written in the aftermath of World War II, defined the primary threat to international peace and security as

23. Id.
the use of force between states. The U.N. Charter responded to this threat by imposing a blanket prohibition on interstate force, except in cases of self-defense or authorization by the Security Council. The Security Council could issue such authorization only to maintain international peace and security. Drafters of the Charter did not see a state’s internal affairs as the basis for Security Council action. If anything, the international legal system viewed intervention in another state’s internal affairs as a pretext for wars of aggression, as most notably practiced by Nazi Germany. Thus, the U.N. Charter prohibits the United Nations from intervening “in matters which are essentially within the domestic jurisdiction of any state,” and guarantees each state’s “territorial integrity” and “political independence.”

The Cold War, however, coincided with relative stability in international peace and security, while internal conflicts became more destructive. The rate of interstate conflict dropped during the Cold War, though the number of conflicts (thirty-eight interstate wars between 1945 and 1995) was higher per year than in earlier periods: thirty-six from 1715 to 1814, twenty-nine from 1815 to 1914, and twenty-five from 1918 to 1941. But after controlling for the large rise in the number of states, the rate of wars per country per year fell significantly in the Cold War period: from a rate of .019 from 1715 to 1814, to a rate of .014 from 1815 to 1914, to a rate of .036 from 1918 to 1941, and a rate of .005 from 1945 to 1995. Scholars have advanced a number of theories to explain the sharp drop in international armed conflicts, including the stability produced by the superpower competition between the United States and the Soviet Union, the invention of nuclear weapons, or the spread of peace between democratic nations.

As rates of interstate war fell, the number and destructiveness of internal armed conflicts increased. According to one estimate, internal wars accounted for 77 percent of all armed conflicts from 1945 to 1995. They caused about 80 percent of all casualties from armed conflicts during this period, with 90 percent of these casualties among civilians. In a separate study, James D.

25. See U.N. Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State.”)
26. Cf. FRANCK, supra note 1 (noting that humanitarian intervention could be pretext for national self-interest); LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 144–45 (2d ed. 1979) (noting that humanitarian intervention could be used as pretext for aggression).
27. U.N. Charter art. 2.
29. Id.
31. HOLSTI, supra note 28, at 21.
32. Id. at 37.
Fearon and David D. Laitin report that, between 1945 and 1999, twenty-five interstate wars occurred (defined as those where at least 1,000 were killed with at least 100 dead on each side), with about 3.33 million battle deaths.33 Those wars involved twenty-five states and had a median duration of about three months.34 Yet this same period witnessed 122 intrastate wars (defined as those with at least 1,000 deaths), involving seventy-three states with a median duration of six years.35 These civil wars caused at least 16.2 million total battle deaths.36 In failed states, such destructive conflicts often persist for years.

Even though internal conflicts may not threaten international peace, states may be justifiably concerned by the grave human rights violations that often accompany civil wars. Philosophers vigorously debate the justifications for international human rights, ranging from arguments that they are an essential feature of equal human dignity to Rawlsian contractarian claims that human rights standards are the product of choices made behind a veil of ignorance.37 Whatever the moral foundation of human rights, nations may understand gross human rights violations abroad as harming their own populations because of the psychic injury from knowing that rights are violated elsewhere. And, of course, a global welfare perspective calls for intervention when the lives saved from human rights abuses outweigh the costs of intervention. The U.N. Security Council, for example, has authorized various actions to stop human rights violations, including economic sanctions on South Africa, armed intervention in Somalia, and armed attacks in Bosnia, even though these interventions primarily involved the internal affairs of those nations. Coalitions led by the United States have also intervened in failed states such as Haiti, Somalia, and Bosnia to stop human rights catastrophes.

Human rights disasters in failed states may present a more direct case for intervention than human rights disasters alone. While the two are often linked, both strong and weak states can commit large-scale human rights abuses. However, human rights violations by weak states create negative externalities on the international system as a whole that may exceed those of human rights violations committed by stronger states. Failed states may lack the means to prevent ethnic groups from attacking each other; the violence may not only reach genocidal proportions—as it did in Rwanda—but may also spread to nearby countries with similar tribal, ethnic, or religious fault lines, for example, when the Rwandan genocide spilled over into the civil war in the Democratic

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34. Id.
35. Id.
36. Id.
Republic of Congo. A failed state’s civil wars may spark widespread human rights violations, starvation, and disease that prompt destabilizing refugee movements to neighboring countries. Ungoverned territory can provide a recruiting ground and base of operations for terrorist groups, as it did for al Qaeda in Afghanistan in the years before the September 11, 2001 attacks on the United States. The lack of central control can also allow criminal organizations to flourish, leading to the spread of drug smuggling, small arms trade, and human trafficking.

Externalities created by failed states fall into three categories. The first category includes cases in which state failure causes such harm to the civilian population that outsiders feel great psychic harm or refugees flee to neighboring countries. Failed states breed violence, produce starvation, and destroy the economy, which can cause widespread death or convince the population to move elsewhere. In 1993, for example, the failure of state institutions in Somalia allowed armed bands to roam throughout the country, producing famine and demands for humanitarian relief. Haiti periodically has experienced similar problems, in which the absence of effective central government allows humanitarian crises to go unaddressed, producing waves of refugees bound for the United States. In both cases, the United Nations authorized intervention to assist in the delivery of humanitarian aid, with mixed results. Neither country has yet to return to a condition of political or economic stability. Similar problems elsewhere, particularly in Africa, suggest that failed states are becoming one of the most significant causes of humanitarian disasters.

The second category includes cases where the collapse of the institutions of a nation-state unleashes armed conflict between ethnic or religious groups. In the former Yugoslavia, the erosion of the central government led to a break-up of the different groups—Serbs, Croats, Bosnians, and Kosovars—that had been held together by the state. Serbia’s efforts to assert control over the other provinces of Yugoslavia led to ethnic cleansing and population displacement. One might also understand the genocide in Rwanda as the product of a failure of state authority, in which the assassination of a government leader and the collapse of a government allowed one ethnic group to attack and attempt to destroy another. These internal conflicts threaten to spread to neighboring countries, which might have similar ethnic or religious divisions, or which may be tempted to support one side or the other. Internal conflict in one country may weaken neighboring states, or create pressure to increase armaments,

which may destabilize an entire region. As with the purely humanitarian crises, civil wars produced by a failure of state authority have prompted more powerful states to intervene to end the fighting and to create some type of permanent settlement.

A third type of negative externality came into focus after the September 11, 2001 attacks. States without a centralized government may become anarchic areas where terrorist groups can freely build resources, train operatives, and establish bases from which to launch attacks. Parts of Yemen, for example, appear to be ungovernable due to a weak central government, which has allowed operatives of the al Qaeda terrorist network to hide there. Afghanistan similarly witnessed the free operation of al Qaeda within its territory. It appears now that either the Taliban could not control al Qaeda, or that al Qaeda simply dictated to the Taliban; in either case, a stronger central government might have been expected to prevent the large-scale, open operation of an international terrorist organization on its soil. In the wake of the September 11 attacks, U.S. government officials clearly believed that failed states—because of their potential use as a base for terrorist groups—presented as great a danger to American national security as the powerful national opponents of old. According to the Bush administration’s 2002 National Security Strategy, “America is now threatened less by conquering states than we are by failing ones.”

Terrorist groups are not the only problem. A lack of government authority allows non-state actors to engage in other forms of undesirable activity, such as narcotics smuggling, human trafficking, and money laundering.

C. The International Legal System’s Missing Response

International law and policy have failed to grapple with the emergence of failed states. The international legal system still rests on the nation-state as the primary actor in world affairs. As a general matter, for example, only “States” may legally engage in international relations. The Vienna Convention on the Law of Treaties defines a “treaty” as “an international agreement concluded

41. See Fearon & Laitin, supra note 33, at 13.
42. See Charles Levinson & Margaret Coker, Al Qaeda’s Deep Tribal Ties Make Yemen a Terror Hub, WALL ST. J., Jan. 22, 2010 (“In nearly a decade of rebuilding its terror network here, al Qaeda has put down deep roots. . . . Yemen has emerged as one of the biggest and most dangerous hubs for al Qaeda operations. . . . Complicating the issue is a power struggle between the government and the patchwork of tribes across the country.”); Walter Pincus, U.S. Strike Kills Six in Al Qaeda, WASH. POST, Nov. 5, 2002, at A1 (“The inability of the government to control large areas of Yemen has provided the opportunity for terrorist groups to reorganize there”); James Risen & Judith Miller, C.I.A. Is Reported to Kill a Leader of Qaeda in Yemen, N.Y. TIMES, Nov. 5, 2002, at A14 (noting “Yemen’s apparent inability to exert much control over its remote and largely lawless border region with Saudi Arabia, which the Americans say serves as the country’s main sanctuary for Al Qaeda”).
between States in written form and governed by international law. While international law recognizes that non-state entities, such as international organizations, can become parties to treaties, states remain the creators of international organizations, usually also by treaty. Insurgents in control of particular territories have on occasion entered into agreements with governments, but even then, the rebels could be understood to represent an emerging state in the course of a successful move for independence. These outlier cases aside, the standard rule requires that the parties to treaties be states.

In determining whether a state exists, and hence whether an entity is entitled to the privilege of participating in international affairs, international law looks to a standard test. The 1933 Montevideo Convention rejects the "constitutive" theory in which recognition by existing states establishes the existence of a new state. Instead, it adopts a "declaratory" approach, which uses objective factors to determine statehood. A state must have (1) a permanent population, (2) a defined territory, (3) a government, and (4) a capacity to enter into international relations. It is important to make clear that the recognition of states is a distinct question from the recognition of governments, though the initial recognition of a state is often bound up with the recognition of a government of that state, and the test for statehood requires having a government.

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

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

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

International law once offered a structure that addressed the problem of ungoverned territories by limiting national sovereignty and allowing foreign powers to exercise high levels of control over domestic governmental functions. Chapter XII of the U.N. Charter created a trusteeship system that allowed the United Nations to appoint an established nation to administer a territory and advance it toward self-government. The trusteeship system applied to three types of territories: those still under a League of Nations mandate (which created a similar governance structure), those detached from the Axis powers at the end of World War II, and those voluntarily placed under the system by states already responsible for their administration (which generally applied to colonial powers). Ironically, given the recent rise of many failed states, the U.N. Trusteeship Council, created to oversee the system and composed of the permanent members of the Security Council, terminated its functions in 1994 after the independence of Palau, the last of the trusteeship

50. U.N. Charter arts. 75–85.
51. Id. at art. 77.
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But even those scholars who support a rejuvenated trusteeship system, such as Gerald Helman and Steven Ratner, concede that Chapter XII does not reach the case of existing U.N. member states whose governmental institutions have failed. The U.N. Trusteeship system addresses the unique situation that arose at the end of World War II, with the redrawing of the map in Europe and Asia and the rapid decolonization of large parts of the world. The use of trusteeships in failed states would require an amendment to the U.N. Charter that would overcome the prohibition on interference with the internal affairs of states and the guarantee of “sovereign equality” for all members.

D. The Inconsistent Policies Toward Failed States

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

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

The international system has responded to these problems in several noteworthy, yet inconsistent, ways. First, the great powers have used military force to stop the negative effects of failed states on the international system or their regional interests. They have not always done so consistently or successfully, nor always with the formal approval of the U.N. Security Council. Usually, a major power with advanced military and organizational skills leads a coalition, though a state may act alone. In Somalia and Haiti, for example, the United States and others used their own armed forces to intervene to stop the

53. Helman & Ratner, supra note 8, at 16.
54. See, e.g., Fearon & Laitin, supra note 7, at 5.
human rights violations. The mission failed in Somalia, but achieved some success in Haiti. In Afghanistan, the United States and its NATO allies overthrew the Taliban regime, which had allowed al Qaeda to operate freely in its territory. The intervening states sought and received U.N. Security Council resolutions authorizing the use of force in Somalia, Haiti, and Afghanistan. In Kosovo, the United States joined with its NATO allies and successfully prevented Serbia from driving ethnic Albanians out of the territory. And in Iraq, the United States and a coalition overthrew Saddam Hussein. The U.N. Security Council did not formally authorize the use of force in these cases. There are also a few examples of smaller states that have intervened in failing states, such as Tanzania's 1978 overthrow of Idi Amin in Uganda and Vietnam's 1978 invasion of Cambodia. These interventions are likely to be less frequent than those by the greater powers because smaller states—unless they suffer concentrated costs from the externalities of a neighboring failed state—will have less incentive to spend their even more limited resources on restoring stability.

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

Second, the intervening nations have gone further than simply establishing minimal political and economic stability to end internal civil wars or human rights catastrophes. This basic level of stability could be achieved through lesser means. Instead, intervening nations have often sought to restore working governmental institutions and to return the failed states to full sovereignty. In Afghanistan, for example, the United States and its allies have promoted political parties, free elections, constitutional democracy, and rule of law with an independent judiciary. In Haiti, the United States has attempted to restore

55. **See, e.g., Simon Chesterman, Just War or Just Peace?: Humanitarian Intervention and International Law 77–80 (2001); Murphy, supra note 2, at 102–06; Nicholas J. Wheeler, Saving Strangers: Humanitarian Intervention in International Society 78–138 (2000).**

56. **See, e.g., Editorial Comment, NATO’s Kosovo Intervention, 93 Am. J. Int’l L. 824 (1999).**

order by replacing a military junta with a democratically elected president.\textsuperscript{58}

Such vigorous efforts to restore a failed state to a properly functioning nation-state are not inevitable. In some cases, no leading nation has emerged to direct the intervention, as was the case in Rwanda. Efforts to use the United Nations, rather than regional powers, have led to failed peacekeeping operations. Repeated state failure may actually signal not that existing state institutions have failed, but that a certain territory has never had a functioning state to begin with.

This seems to suggest that the nation-state framework is ineffective at governing certain territories or peoples. Both the League of Nations (mandates) and the United Nations (trusteeship) recognized certain forms of quasi-sovereignty in which a more powerful, developed nation takes charge in a territory that cannot quite govern itself and leads it toward full sovereignty and independence. Scholars recently have suggested that “neo-trusteeships” could become a new form of institutional governance for failed states.\textsuperscript{59} Historically, there have been alternate forms of governance other than the nation-state, such as multiethnic empires, federations, city-states, and colonies. In the recent interventions, however, the great powers have not seriously considered adopting alternate forms of governance. For the United States and its allies, it has been either the nation-state or nothing.

Third, intervening nations have made a determined effort to maintain existing national borders. The United Nations did not seriously consider dividing Rwanda into two nations, one for the Hutus and one for the Tutsis.\textsuperscript{60} Nor did the United States and its allies consider dividing Iraq into three different nations that reflected the different religious and ethnic groups there—Kurds in the North, Shiites in the South, and Sunnis in the middle—even though Iraq’s borders were drawn arbitrarily by the British and French at the beginning of the last century.\textsuperscript{61} Maintaining existing national borders, even at the price of heterogeneity of groups and preferences within a nation, seems to be consistent American policy. At the end of the Cold War, for example, the United States did not support the fragmentation of the Soviet Union until confronted with a \textit{fait accompli}, and even through the Clinton administration,

\textsuperscript{58} James F. Dobbins, \textit{America’s Role in Nation-Building: From Germany to Iraq}, 45 \textit{SURVIVAL} 87 (2003).


\textsuperscript{60} The U.N. Security Council resolutions on Rwanda made no mention of partition. Although one resolution did create the U.N. assistance mission in Rwanda with the objective of implementing what were known as the Arusha Accords—or an agreement between the ethnic groups in Rwanda; however, the Accords did not attempt to partition the country, but instead called for a power sharing government that divided government ministries by ethnic group. See U.N. S.C. Res. 872, U.N. Doc. S/RES/872 (Oct. 5, 1993).

\textsuperscript{61} Although then-Senator Joe Biden proposed a division of Iraq in 2006, the proposal never advanced in American thinking on the war. See Joseph R. Biden, Jr. & Leslie H. Gelb, \textit{Unity Through Autonomy in Iraq}, \textit{N.Y. TIMES}, May 1, 2006, at A19.
American presidents kept in force arms control agreements with the Soviet Union's successor states. At other times, however, intervening nations have responded to state failure by encouraging fragmentation. In the former Yugoslavia, for example, the United States and its NATO allies acted to prevent Serbia from maintaining control over Kosovo. After years of peacekeeping, it now appears that a political settlement will include substantial independence for Kosovo, as suggested by a recent decision of the International Court of Justice. Similarly, neither the United States nor NATO intervened to prevent earlier conflicts in which groups split off from the former Yugoslavia. In these cases, the heterogeneity of preferences among internal groups was considered too great to justify maintenance of a single state. In other words, the price of maintaining previous nation-state borders appeared too high.

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

When the issue of intervening in a failed state first presented itself in the case of Somalia, however, there was more uncertainty about what the appropriate international legal reaction should be. U.N. Secretary-General Boutros Boutros-Ghali urged a military intervention pursuant to Article 39 of the U.N. Charter to assist the previously authorized United Nations humanitarian relief effort in Somalia (UNOSOM). He stated in a November 29, 1992 letter that "no government exist[ed] in Somalia that could request and allow such use of force." The Security Council endorsed the Secretary-General's recommendation and welcomed the United States' offer to lead an armed intervention. The Security Council's action might have been inconsistent with Article 2(7) of the U.N. Charter, which prohibits intervention "in matters which are essentially within the domestic jurisdiction of any

66. Id. at 3.
Despite the Secretary-General's finding, the Security Council did not recognize the actual state of affairs in Somalia. Instead, it referred cryptically to "the unique character of the present situation in Somalia" and "its deteriorating, complex and extraordinary nature [as] requiring an immediate and exceptional response." The Security Council resorted to ambiguities in order to avoid the fact that Somalia had collapsed as a state, and that there was no immediate prospect of the restoration of government there. The Security Council was so strongly committed to the legal preservation of the nation-state that it precluded reliance on a legal exception to the bar on outside military intervention.

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

II. INTERNATIONAL LAW AND THE NATION-STATE FRAMEWORK

This Part questions the international law and policy of maintaining nation-states in their current borders. It begins by discussing the reasons for the rise of the nation-state and the purpose behind its use as the basic organizing unit in the international system. Without some understanding of the benefits of the nation-state system, and the possible alternatives, it is impossible to evaluate whether the international community's current efforts to restore and impose that framework make sense. Such an evaluation requires us to describe what

68. U.N. Charter art. 2, para. 7.
normative goals we seek in a system of governance and to define a yardstick for their measurement. This Part explains why the nation-state remains superior to alternate forms of government for addressing the failure of government institutions in a territory.

A. The Rise of the Nation-State

Scholars have reacted to the phenomenon of failed states by questioning whether the nation-state framework remains appropriate for all peoples and territories. In 1992, Helman and Ratner proposed that the United Nations authorize a new form of conservatorship for failed states.72 Political scientist Robert Keohane found that absolute de jure sovereignty could not account for failed states. Instead, he argues that mixed forms of sovereignty, in which other nations or international organizations control aspects of a failed state's functions, should be recognized.73 David Laitin and James Fearon argue that “neo-trusteeship” has emerged, in which foreign countries and international organizations, rather than any single nation, exercise domestic political authority and manage governmental institutions within a failed state.74

Several of these approaches view an international legal mandate as essential, and they have mostly found favor with international relations scholars. International legal scholars, on the other hand, have criticized the neo-trusteeship concept.75 Early criticism from one quarter, for example, responded to the proposal as susceptible to “neocolonialism” that relied on a “theory and system of subjugation, whose sub-text was racial and cultural inferiority.”76 Rosa Brooks has gone even further. She rejects the idea of restoring failed states because she argues these efforts attempt to put into place the nation-state as the governing form. According to Brooks, the nation-state itself is tottering on eroded foundations, and failed states might be better off in “non-state arrangements.”77 While the state is not “defunct,” Brooks urges that “we should be more open to diverse forms of social organization—and that we should strive to create an international legal order that permits and values numerous

72. Helman & Ratner, supra note 8, at 12–18.
74. Fearon & Laitin, supra note 7, at 7.
different forms of social organization.  

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

These proposals to fix failed states outside the nation-state framework encounter a significant obstacle: existing international law. International law, as expressed in the U.N. Charter and the treaties governing occupation during time of armed conflict, does not provide a clear route to dividing state functions into bite-size pieces that can be administered by various international or regional organizations. Take, for example, the claims that the U.N. Charter’s trusteeship provisions can provide the necessary framework for the existence of multiple, overlapping forms of sovereignty in failed states. International relations scholars, who sometimes favor this approach, display a reluctance to analyze whether the U.N. Charter actually would allow for the revitalization of the trusteeship process. At the same time, such proposals rely heavily on the United Nations, probably to assuage concerns that more unilateral moves to restore failed states could serve as a pretext for neo-imperialism.

Such worries, however, are misplaced. Recent interventions show little signs of colonialism or imperialism. Western powers, for example, do not pursue territorial expansion or permanent political control of failed states as part of competition between major powers. The United States has intervened in places like Kosovo, Haiti, and Somalia, for example, where there do not appear to be any economic benefits to control over the territory. Its efforts have

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78. Id. at 1195.
80. Id. at 7.
81. Id. at 10.
82. See Ryan Goodman & Derek Jinks, Toward an Institutional Theory of Sovereignty, 55 Stan. L. Rev. 1749, 1779–80 (2002) (noting that “recent patterns of military intervention exhibit a shift in system-wide norms: National militaries have been employed not for territorial or strategic purposes, but for humanitarian ends” and that “states have come to conceive of gross human rights violations in other countries as a threat to their own security”); see also Martha Finnemore, Constructing Norms of Humanitarian Intervention, in The Culture of National Security: Norms and Identity in World Politics 153 (Peter J. Katzenstein ed., 1996).
demonstrated a desire to leave the country as soon as possible, rather than to establish any significant political control or to extract wealth—witness the hasty American withdrawal from Somalia in 1994 after the deaths of eighteen soldiers. Failed states often exist in territories with few natural resources or productive capital, while Philip Bobbitt has observed that the easy mobility of human and financial capital will make territorial conquest a net loss, because a conquered nation’s productive assets can simply leave. Reconstruction may also cost intervening nations more than any possibility of gain from operating the failed state’s economy. Even American intervention in Iraq, criticized by some as motivated primarily by oil, is estimated to have cost the United States close to one trillion dollars, while Iraq retained full possession of its oil fields and received all oil revenues. The threat arises not from other great powers, but from the negative externalities produced by failed states. On the whole, nations desire a quick exit after restoring a failed state to some form of legal sovereignty.

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

83. PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 338 (2002) (viewing military aggression for material gain as antiquated in the case of powerful nations: “The great powers will be called upon to distribute help and re-establish order, not to secure raw materials and key ports as in the nineteenth century, nor to spread their ideology, as in the twentieth”).


85. GHANI & LOCKHART, supra note 79, at 7-14.


long (and more than four times that, in the guise of the Byzantine Empire).

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

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

Similarly, one should ask what advantages the nation-state brings in the international system, just as Oliver Williamson asked why corporations exist in the market. Here, rather than the market, the institutional context is the international system. Rather than efficiency and economic growth, the normative goal is global welfare. This goal is to be distinguished from the goal of any individual unit in the system, which may be limited to preserving its security or to expanding its borders. Global welfare is a function of the world’s population and the quality of life enjoyed by that population. In the market, competition for individual profit, through the invisible hand, leads to

88. TILLY, supra note 87, at 67–95; BOBBITT, supra note 83, at 67.
89. Bobbitt argues that amidst all of this arose the “state-nation,” in which a state drew upon a nation’s resources to achieve its objectives, as opposed to the “nation-state,” in which the state is the instrument of the will of the nation.
91. This is the difference between “defensive” and “offensive” realism. See generally WALTZ, supra note 30 (defensive realism); JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (2001) (offensive realism).
the efficient production and allocation of goods and services. Is there a similar effect in the international system? Does the nation-state, through its drive for power and security, promote global welfare in a more effective manner than alternate systems of government?

Historically, nation-states have been more effective at organizing a population for internal security and national defense. Multi-ethnic empires became increasingly expensive to govern because of distances, the lack of loyalty of subject populations, and a lack of innovation. Nation-states, by contrast, are better able to organize populations to defend against external threats in two ways: first, by using appeals to a common national origin to spur patriotic fervor, and second, by providing efficient means of organizing militaries and paying for them. The idea of the nation-state assumed that the population of a “state” would consist, primarily if not solely, of a particular “people,” understood in terms of a common historical consciousness or remembered collective past, and likely also in terms of commonalities in ethnicity, language, and perhaps religion. Max Weber explicitly linked the nation-state’s success in marrying security with a nation or people:

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

Over time, the nation-state expanded beyond a role in guaranteeing negative liberties that allowed for law enforcement and defense to include a role in providing public goods. As Bobbitt has observed, the nation-state’s chief functions are to provide internal and external security, to expand material wealth, to uphold civil and political rights of popular sovereignty, to provide its


people with economic security and a variety of public goods, and to protect the state’s cultural integrity.\textsuperscript{95} To be sure, the terrible wars of the twentieth century may only have been made possible by the efficiencies of the modern nation-state in organizing large militaries supported by mass production. At the same time, however, nation-states seem to have outperformed empires and other forms of governance in guaranteeing domestic peace and providing public goods such as markets, law enforcement, and security. Interstate conflicts may have led to large amounts of death and destruction, but nation-states may also have led to large increases in population and economic growth, and longer stretches of international peace, than would have occurred under alternate forms of governance, such as the multi-ethnic empire.

Nevertheless, critics today often see the nation-state as the problem, rather than as the solution. Human rights advocates, for example, are apt to criticize nation-state sovereignty, which can be used to shield states from criticism over grave human rights abuses.\textsuperscript{96} Globalization—the accelerated and cheap movement of goods, service, capital, and communication across national borders—is seen as another challenge to the ideal of nation-states. Nations, it is argued, cannot control worldwide changes that are occurring primarily outside their individual borders.\textsuperscript{97} Those who support efforts to solve problems arising from globalization in the areas of the environment, development, crime, terrorism, and trade, among others, are likely to view the nation-state and its sovereignty as an obstacle rather than as an aid to cooperation.

But, as Jeremy Rabkin argues, it may be the case that the nation-state remains the best way to solve these problems.\textsuperscript{98} Human rights abuses in the Balkans did not end, for example, because of the collective action of the international community, but because of the intervention of the United States and its NATO allies. In fact, European nations proved unable to take decisive action in the Balkans until the Clinton administration decided to throw the weight of the U.S. Armed Forces behind intervention. Individual nations with historical or geographical ties to problem areas, such as the United States and Haiti or France and the Ivory Coast, have taken the lead to stop murderous civil wars. The United Nations proved miserably inadequate at stopping genocide in Rwanda, and it appears, unfortunately, to be repeating that performance in Sudan.\textsuperscript{99} Regardless of one’s opinion on the Iraq war, it is difficult to imagine a

\textsuperscript{95} BOBBITT, supra note 83, at 144–204.
\textsuperscript{96} See, e.g., Rosa Ehrenreich Brooks, Failed States, or the State as Failure?, 72 U. CHI. L. REV. 1159, 1173 (2005).
\textsuperscript{97} See, e.g., KENICHI OMAE, THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES 140 (1995); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 12 (2004); Stacy, supra note 86, at 2043.
\textsuperscript{99} See Cristina G. Badescu & Linnea Bergholm, The Responsibility to Protect and the Conflict in Darfur: The Big Let-Down, 40 SEC. DIALOGUE 287 (2009); Richard Goldstone, The
successful resolution to the challenge of rogue nations and the proliferation of WMD that does not involve economic, political, or military action on the part of nation-states. Nation-states have not just become guarantors of their own security, but have been better protectors of international peace and security than any currently existing alternatives.

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

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

If the nation-state framework were extended to failed states, the relationship between an intervening power and a failed state would be comparable to that of two nations in an alliance. Students of international relations have long viewed alliances as devices for "capability aggregation." States form alliances in order to aggregate their strengths against a common foe or foes. The nature of the alliance depends on the relative power of the two nations and their strategic position. The greater the military capabilities of a nation, the more attractive it is as an ally; on the other hand, a reduction in the common threat’s capabilities or in an ally’s abilities makes an alliance less useful. Recent elaboration on these themes suggests that alliances represent a trade-off between security and autonomy. Powerful allies can offer improved security, but are more likely to expect substantial autonomy in the partnership; conversely, smaller nations with fewer capabilities will be willing to provide their larger and more capable partners greater control over the alliance. A larger partner may be willing to enter such an alliance because greater control over a smaller ally can allow it to devote resources elsewhere.

Another way of seeing this point is to view a traditional strategic alliance, such as NATO or the Australia, New Zealand, United States Security Alliance (ANZUS), as a species of international governance that provides a fairly high

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101. Id.
level of autonomy to its members. Other relationships in which the weaker party has low levels of autonomy approach that of an empire; various forms of federations, colonialism, or protectorates lie somewhere in between. For example, one can view the Warsaw Pact as a relationship between a stronger power and weaker ones that fell somewhere between the high autonomy of NATO and the low autonomy of an outright empire. Some have likened alliances to relational contracts, in which the level of control in the relationship depends on the level of opportunism to shirk or abrogate agreements by the smaller power, to entrap the larger power in unwanted conflicts, or to renegotiate the level of contributions to the joint enterprise.\textsuperscript{102} The more likely that an ally will act opportunistically in these ways, the more likely that the more powerful partner will demand greater control over the alliance. Less autonomy, in turn, means higher governance costs for the greater power. Monitoring the activity of the smaller power will distort the allocation of resources available for security. Greater powers could act opportunistically too by exploiting the weaker power once an alliance is formed; safeguards necessary to protect against such exploitation will also increase governance costs. The threat deterred or prevented by the aggregation of capabilities (or, to put it differently, the costs created by going it alone without an alliance) will define the benefit of the alliance. The total cost will be the sum of the cost of opportunism and the governance costs to prevent it.

Viewing international relations in this way reveals why the great powers are so committed to the restoration of the nation-state in territories that have witnessed the collapse of state power. Stronger powers still need to create other nation-states as a prerequisite to forming alliances or more hierarchical relations. Thus, one can hypothesize that nations will seek to rebuild nation-states when the benefits from an alliance with the failed state are high. With Kosovo, the benefit was the prevention of further warfare in a territory on the border of Europe, in an area where previous conflict had produced a continental war and where humanitarian catastrophes could have led to destabilizing refugee flows. With Afghanistan, a capable, central government did not exist to suppress infighting and prevent al-Qaeda from slipping in and establishing a base of operations.\textsuperscript{103} The September 11 attacks demonstrated that American policymakers had underestimated the benefits of restoring a nation-state in Afghanistan. A failed state can provide little capability to aggregate, but a nation-state in such a strategic place as the Middle East or the border of Europe could offer more. A larger nation could not reap the benefits of an alliance, however, without a nation-state across the table.

\textsuperscript{102} David A. Lake, \textit{Anarchy, Hierarchy, and the Variety of International Relations}, 50 \textsc{Int'l Org.} 1, 2 (1996).

On the cost side, a failed state presents the greatest opportunity for rogue actors to undermine international stability. Without a central government, the United States is left only with private or quasi-public entities, such as warlords or ethnic leaders, with whom to seek a relationship. Without a government to enforce laws, these groups may have little incentive to uphold their end of the bargain. Such groups may also lead to unwanted entanglements in local affairs, as they may have more scores to settle in an environment of competition with other groups within a failed state. Building nation-states in areas such as the former Yugoslavia or Afghanistan can simply be understood as incurring very high governance costs in order to control extremely high levels of opportunism. Nation-building represents a particularly expensive method for monitoring whether a partner is going to live up to its end of the bargain, whether it be maintaining peace and stability in the former Yugoslavia or hunting down al Qaeda terrorists in Afghanistan.

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

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

Furthermore, alliance theory seems to be less than a perfect fit for another reason. Alliance theory simply may not apply because it assumes the existence of two nation-states able to make agreements and carry them out, while one of the chief characteristics of a failed state is the lack of a stable government authority that is even capable of performing its international obligations. The problems in forming a nation-state may simply introduce too much distortion into the theory of alliances. An alternative analysis, however, is suggested by a different dimension of relational contracting theory. Williamson’s approach as used by alliance theorists is basically one of horizontal integration. In what situations will firms decide to merge or acquire each other rather than choose to contract for the desired good or service? Just as Williamson posits that a merger or acquisition is more likely to occur as the costs of contract abrogation increase, so too more controlling and hierarchical alliances are needed when the chances of slacking by one side are high. Failed states, however, do not fit into a horizontal integration approach because of the lack of a contracting partner.

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

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

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

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

This analysis also questions whether the nation-state ought to be the paradigm that the intervening powers choose to adapt to territories where central government control has collapsed. Historically, nation-states arose because of their success in mobilizing populations to take advantage of the latest technologies and the means of military and economic organization. It

104. WILLIAMSON, supra note 90, at 67–70.
may be the case, however, that international security would not be enhanced by allowing failed states to mobilize their populations for effective warfare; territorial defense may also not be an immediate demand because the great powers may be supplying regional security. In such cases, then, the international legal system ought to consider other forms of governance, which may fall short of the nation-state. Such mechanisms could be devoted primarily to maintaining internal stability and economic development, rather than to moving a territory headlong towards a full-scale, independent nation-state.

C. The Legal Obstacles to Restoring Failed States

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

This Article suggests that international legal rules may discourage states from intervening in territories that witness serious human rights catastrophes or serve as a base for terrorist operations. If nations that intervene in a failed state must receive permission from the United Nations to use force, which is granted only if necessary to maintain international peace and security, and must also shoulder the costs of restoring the territory to some form of functioning nationhood, many states will be discouraged from intervening in the first place. To analogize again to the transaction cost approach, the legal rules here operate to require that a firm create a subsidiary to develop a natural resource and then to give up control of that subsidiary—essentially, to make it an independent firm—without any compensation. While the intervening nation may benefit by halting human rights violations or avoiding a terrorist attack, it eventually loses the control over the territory and the confidence that such costs will not arise again in the future. It might also be the case that continued occupation raises the costs of intervention, by encouraging insurgent attacks, though those costs may be much lower than the harms that would arise if a capable government does not take root in a failed state.

105. U.N. Charter art. 77; see also, Krasner, supra note 59.

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

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

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

The main criticism against loosening the rules on the use of force is two-fold. First, some scholars maintain that allowing nations to determine whether to use force, without a showing of self-defense or authorization by the U.N. Security Council, will provide an easy pretext for aggression. See, e.g., THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 76–77.
for example, claimed in its attacks at the start of World War II that it was acting for humanitarian or self-defense reasons. Second, a more subtle argument claims that requiring Security Council authorization will weed out uses of force based on poor reasoning or information by forcing nations to discuss and approve interventions collectively.

In the case of failed states, these criticisms are misplaced. Concerns about pretextual uses of force may have little purchase here, as a number of factors—indeed, of any force exerted by international law—already deter the threat of conflict between the great powers. As others have noted, the value of territorial expansion has declined due to the rise in the cost of conventional warfare and the reduction in the gains from conquest because of the easy mobility of human talent and capital. Aggression by a powerful nation for purposes of extracting wealth or expanding its territory, even if cloaked in claims of humanitarian intervention, may prompt counter-balancing moves by regional or global powers to block the attempted gain. Moreover, failed states may lack any natural or territorial resources that would make them attractive takeover candidates. Nations intervening in failed states will likely spend more resources than they will receive in gains—hence the collective action problem. The question is whether any harms that arise from a potential increase in pretextual interventions are outweighed by the benefits from faster and more regular interventions in failed states. If the national self-interests of the great powers in international politics and the development of military technology adequately constrain the supposed harms, then loosening the rules on the use of force would produce a net benefit.

Some might respond that the process of receiving U.N. Security Council authorization will test whether the use of force is truly to help end the violence in a failed state. If the Security Council's permanent members unanimously approve an intervention, they are likely to have concluded that the claim of a failed state is not a pretext. They will veto any intervention that harms their interests or even affects the relative balance of power—notice that the Security Council could never reach an agreement to authorize NATO's intervention in Kosovo. But Kosovo also highlights the pitfalls of this argument. Russia blocked resolutions authorizing the use of force in Kosovo because of its


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


110. See, e.g., Bobbitt, supra note 83, at xxii.
interests in protecting Serbia, with which it shared longstanding ethnic and religious ties. Permanent members on the Security Council may veto intervention in a failed state because it might alter the regional balance of power, even if military action would enhance global welfare. Reform of the Security Council, such as enlarging the permanent membership while replacing the veto with a supermajority rule, might better allow interventions that enhance global welfare. But even the last round of reform proposals to the United Nations to enhance the options for humanitarian intervention still preserved the veto of the permanent members, and the United States, Russia, China, Great Britain, or France are unlikely to give it up.  

Relying on the Security Council does not solve the collective action problem posed by failed states. If anything, it enhances it. Even assuming that loosening the rules on the use of force might permit more pretextual conflicts between nation-states, that cost to the international system must be balanced against the benefits from a reduction in the harms caused by failed states. As discussed earlier, the rate of interstate conflicts and their casualties have fallen significantly since the end of World War II, while the deaths due to internal armed conflicts have risen dramatically. Not all internal armed conflicts occur in failed states, but failed states are often characterized by high levels of violence and indiscriminate civilian casualties.

III. THE CAUSES OF STATE FAILURE AND PROPOSED REFORMS

A. A Systems Approach to Understanding State Decentralization

Although an alliance or transaction-costs perspective helps to explain why the nation-state template should apply to ungoverned territories, it leaves many questions unresolved. The alliance approach explains why nation-states should favor the creation of other nation-states, but it does not explain why intervening states should continue to restore nation-states to their preexisting borders. A failure of state institutions could signal, for example, that the preexisting nation-state was unstable, either because of internal conflict or because of external threats. Devoting substantial effort to maintain an unstable state may prove futile and, in the long run, may waste substantial resources.

A more permanent solution may lie in dividing a nation into more governable parts, as appears to be the course set in Kosovo. This may reduce internal conflict by separating warring ethnic or religious groups. While less common, consolidation of smaller nations into a larger unit has occurred in certain cases, such as the unifications in Germany and Italy. Since the end of World War II, however, the trend has clearly been toward more fragmentation.

In 1945, there were 74 independent nations. Today, there are 193 (or 195, if one were to include Taiwan and Palestine).\textsuperscript{112} The end of the Cold War witnessed the dissolution of the Soviet Union into fifteen independent nations and the violent collapse of the former Yugoslavia into different states. Furthermore, the trend seems to be toward more breakups. Separatist movements have resorted to violence in Chechnya and the Basque region in Spain, for example, while others have pursued more peaceful efforts in other European regions, as well as in Quebec.

American foreign policy in the post-Cold War world has not charted a consistent path in addressing these developments. Initially, for example, the first Bush administration supported efforts to keep the Soviet Union together, but then chose to accept its disintegration.\textsuperscript{113} At first, the United States chose not to promote decentralization in the former Yugoslavia, but later intervened to prevent Serbia from restoring its control over Kosovo. More recently, the United States has decided to support keeping Afghanistan and Iraq whole, despite potentially strong centrifugal forces.\textsuperscript{114} In its recent history, the United States does not seem to distinguish between cases in which decentralization should be favored and those in which previous borders should be maintained.

Similarly, international law has no means to analyze whether to promote or discourage decentralization, and seems instead to follow a presumption against the breakup of states. Under the doctrine of \textit{uti possidetis}, the international legal system follows a presumption that the administrative borders drawn by previous colonial regimes should be preserved in the event of decolonization, but with little explanation for when (or why) that doctrine should apply.\textsuperscript{115} This default rule has even governed in more recent cases where decolonization or imperial collapse did not apply. The United Nations, for example, commanded that Iraq continue as one nation rather than to consider its division into three independent nations. Resolution 1483, the Security Council’s initial recognition of the occupation of Iraq by the United States and its coalition, “reaffirm[ed] the sovereignty and territorial integrity of Iraq.”\textsuperscript{116}

To be sure, international law seems to operate by ratifying decentralization or centralization after the fact. Nevertheless, assuming that colonial or preexisting borders should remain intact precludes considering whether nations as currently organized make the most sense, or whether they

\textsuperscript{114} See supra note 57.
should either be decentralized or merged with others to form a larger nation. Some international legal scholars also seem to oppose the proliferation of states because they posit that the oppression of minorities would correspondingly be more likely. They offer no empirical support for this claim, however, and, as argued below, it would seem more likely that smaller units would better represent the preferences of the minority groups of large nations.

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

On the other hand, nations have inherent size constraints. The larger a country becomes, Alesina and Spolaore argue, the more its population will contain groups with heterogeneous policy preferences. A larger nation is also more likely to contain diverse cultures and ethnic groups. As the nation grows, it is less likely that the policy choices of the central government will satisfy all of these groups. At some point, the deviation of central policy from the preferences of local groups will become so great that the local groups may attempt to secede from the nation. This may occur when the difference between the preferences of minority groups and majority policy outweighs the benefits in terms of additional public goods provided by the central government. Nations can attempt to use regional transfer payments to overcome centrifugal forces—for example, Canada can send more federal spending to Quebec to keep it from seceding—but such transfers come at a cost: problems created by imperfect information about the preferences of minority groups, the issue of credibly committing to future transfer payments, and resentment on the part of other groups that do not receive transfer payments.

The problem posed by large heterogeneous countries can also be understood as one of agency costs. As the electorate becomes larger, it becomes

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117. Ratner, supra note 115, at 592.
119. Id. at 18–23.
120. Id. at 57.
more difficult to elect good leaders who act in the public interest rather than their own. Larger size makes it harder for the principals to monitor elected officials to discover cases of agency “slack” when agents are shirking or seeking rents at the public expense. Greater heterogeneity makes it easier for the agents to play interest groups off against each other, thereby creating more space for the pursuit of their own agendas.

One cautionary note is in order. It is not clear whether the theoretical link between nation size and group heterogeneity is born out empirically. There are certainly large nations that include many small ethnic, religious, or social groups, such as the United States and India. Instability from internal groups, moreover, has occurred in nations dominated by one or two relatively large minority groups, such as in the former Yugoslavia, Kenya, or Sri Lanka. James Madison may have offered an alternative explanation. In Federalist No. 10, he argued that the higher number of groups in an extended republic would lead to greater political stability, because the groups would tend to cancel each other out in the political system.121 “Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens,” Madison wrote. “[O]r if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”122 Madison believed that the transaction costs of political organization among a larger number of groups would produce a greater amount of stability than decentralization into smaller units. Empirically, however, it is a fact that the number of nations has increased, rather than decreased, dramatically since the end of World War II.123

122. Id. at 64.
123. For further discussion, see Badredine Arfi, International Change and the Stability of Multiethnic States: Yugoslavia, Lebanon, and Crises of Governance (2005) (arguing that when intercommunal vulnerability is high, trust is low, and reliance on institutional power is high, state failure will occur in multiethnic societies); Ravi Bhavnani & Dan Miodownik, Ethnic Polarization, Ethnic Salience, and Civil War, 53 J. CONFLICT RESOLUTION 30 (2009) (finding that increased polarization and higher levels of ethnic salience increases the potential for conflict); Joan Esteban & Debraj Ray, Polarization, Fractionalization and Conflict, 45 J. PEACE RES. 163 (2008) (theorizing that “in highly polarized societies, the occurrence of open conflict should be rare but its intensity very severe . . . [and] highly fractionalized societies are prone to the occurrence of conflict, but its intensity will be moderate”); Erika Forsberg, Polarization and Ethnic Conflict in a Wide Strategic Setting, 45 J. PEACE RES. 283 (2008) (finding that “when a state experiences ethnic conflict, neighboring states that are ethnically polarized are more likely to also experience ethnic conflict” and “when a group involved in ethnic conflict has a kinship tie to a group in a neighboring state . . . [across border conflict] contagion [is] more likely”); Gerald Schneider & Nina Wiesehomeier, Rules that Matter: Political Institutions and the Diversity-Conflict Nexus, 45 J. PEACE RES. 183 (2008) (showing that “fractionalization can indeed be linked to low-intensity civil wars and that this effect is particularly strong in democracies in comparison to autocracies,” “rules that encourage power-sharing lower the risk of war in diverse societies;” and “the combination of fractionalization and majoritarian voting forebodes badly for the internal stability of a state”); Sammy Smooha, The Model of Ethnic Democracy: Response to
Another determinant of nation size is whether the country’s political system is democratic or authoritarian. According to Alesina and Spolaore, dictators are more likely to pursue larger nations because they provide larger populations and resources from which to extract rents for their personal benefit.\textsuperscript{124} Dictators, however, are likely to encounter more resistance and insurrections as their countries grow; hence, they may engage in efforts to create an artificial sense of national unity. Since democracies are committed to representing the preferences of their citizens and are less likely to use force to restrain them from leaving, they are more likely to devolve into smaller nations. Two developments, according to Alesina and Spolaore, have produced the recent surge in the proliferation of nations. First, economic openness in the form of the General Agreement on Tariffs and Trade (GATT), the World Trade Organization (WTO), and regional economic integration (such as the European Union) have created large markets that are not constrained by the territorial boundaries of a single state.\textsuperscript{125} Economic integration into a worldwide or regional market reduces the need to be part of a large nation-state with its own open market. The more open an international trade regime becomes, the more viable smaller states become.\textsuperscript{126}

Second, states have proven most successful in comparison to other forms of governance at harnessing a territory for conflict and defense. A larger nation will prove more likely to field a larger military and provide defense more effectively and cheaply, per capita. Thus, the less need for military defense, the more likely again that a smaller state will prove viable. A number of causes can reduce the need for a large military, such as more peaceful relations between nations, a larger power deciding to guarantee regional security, or international institutions offering the means for dispute resolution. On the other hand, the more nations there are in the world, the more international transactions there are, which raises the probability of international conflict and the need for defense. Finally, the spread of democracy may actually lead to lower levels of international conflict because of the “democratic peace,” and therefore produce smaller, viable states.\textsuperscript{127}

\textit{Daniel, 28 J. Israeli Hist.} 55, 55–56 (2009) (positing that ethnic democracies differ from more standard democracies in two key ways: “While in a democracy a minority can in principle become a political majority through persuasion, pressure, and voting, in an ethnic democracy this theoretical option is institutionally closed to the ethnic minority. Ethnic democracy differs categorically from liberal, individual-based democracy (as in France), and for consociational, group-based democracy (as in Belgium), which are civic by nature. Unlike ethnic democracy, the state in these non-ethnic democracies is neutral, does not prefer the majority to the minority, and accords equal rights to citizens regardless of their ethnic origin”).

\textsuperscript{124} \textit{ALESINA \& SPOLAORE, supra} note 118, at 69.
\textsuperscript{125} \textit{Id.} at 81–85.
\textsuperscript{126} \textit{Id.} at 82.
\textsuperscript{127} On the democratic peace, see \textit{DEBATING THE DEMOCRATIC PEACE} (Michael E. Brown et al. eds., 1996); \textit{BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE} (1993).
Another cautionary note arises from the debate over whether separating hardened ethnic groups can help reduce conflict. Chaim Kaufmann has suggested that partition could solve the problem of ethnic groups that refuse to live together peacefully in a large state. He and others argued that separating relatively homogeneous groups into compact territories would allow them to defend themselves more effectively and lead to a settlement of differences. Opponents of partition responded that division of a state only transforms a domestic conflict into an international one, that ethnic rivalries would be undiminished by an artificial border, and that lives would be lost as populations transferred due to the change in borders. The empirical record, however, was mixed. Croatia went to war with Serbia after the 1991 dissolution of Yugoslavia; Eritrea fought a border conflict after seceding from Ethiopia in 1993; and India and Pakistan have fought three wars since their 1947 partition. On the other hand, conflict ended after the division of Greeks and Turks in Cyprus, and no war occurred after the 1971 partition of Bangladesh from Pakistan. It is fair to say that, at this point, empirical studies are inconclusive about whether partition increases or decreases the chances of war, or whether the results in the context of ethnic conflict can be generalized to all other cases of decentralization.

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

By playing a hegemonic role in providing international peace and security, the United States has again made it more likely that smaller nations can survive without having to merge with a larger nation for protection. Since the end of World War II, the United States has guaranteed peace in Europe,

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131. Sambanis & Schulhofer-Wohl, supra note 130, at 85.

both from external attack and from internecine warfare. The North Atlantic Treaty Organization allowed the integration of Europe to proceed without heavy demands for military spending, thanks to the stationing of U.S. forces to contain the Soviet Union. As Lord Ismay, the first secretary general of NATO, famously quipped, the purpose of the Atlantic alliance was "to keep the Americans in, the Russians out, and the Germans down."\(^{133}\) The disparity in defense spending has been even starker since the end of the Cold War. In the 1990s, Europeans discussed increasing collective defense expenditures from $150 billion to $180 billion a year while the United States was spending $280 billion a year.\(^{134}\) Ultimately, the Europeans decided against this increase. There was little political desire to come within shouting distance of the United States, which in the wake of the September 11, 2001 terrorist attacks and the wars in Afghanistan and Iraq has spent up to $500 billion a year on defense.\(^{135}\) By supplying defense, the United States allows small countries to survive in Europe. The same might also be said of the Americas, where the United States has long played a hegemonic role in blocking outside interference under the Monroe doctrine.\(^{136}\) The United States has also played a balancing role in East Asia, where it has attempted to stabilize the security environment since the end of World War II, prevent any territorial changes, and suppress old rivalries.\(^{137}\)

The implications of these dynamics run counter to the presumptions built into international law and into American foreign policy, which generally favor maintaining the global status quo and opening international trade. Interestingly, however, American foreign policy has created the conditions that have encouraged greater national fragmentation. Supplying security and creating broader free trade areas are international public goods, which will generally be undersupplied by states acting rationally in their self-interest. In order to encourage strong states to continue providing these goods, the international legal system should institute presumptions that do not act counter to their secondary effects, for several reasons. First, decentralization will break down the larger national units that have an interest in raising trade barriers and

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134. Post-Cold War developments may be largely responsible for European opposition to defense spending increases. See Office of Technology Assessment, Global Arms Race: Commerce in Advanced Military Technology and Weapons 63–82 (June 1991), available at http://www.fas.org/ota/reports/9122.pdf; Robert Kagan, Of Paradise and Power: America and Europe in the New World Order 22–23 (2003) ("Under the best of circumstances, the European role was limited to filling out peacekeeping forces after the United States had, largely on its own, carried out the decisive phases of a military mission and stabilized the situation.").


137. Id. at 257–61 (characterizing American role in Asia as balancer).
pursuing more militaristic foreign policies—interests which are especially strong in dictatorships. Second, decentralization increases the number of nations that support policies that encourage the opening of international trade and a reduction in the use of force to resolve international disputes. The more nations that participate in free trade, the more efficient will be the provisions of goods and services to a larger number of people; regional trade blocs will prevent Ricardo’s mechanism of comparative advantage from allocating resources across borders effectively. Greater international stability will reduce conflict, the costs of which are deadweight losses, and will allow nations to devote fewer resources on the military and intelligence. Global welfare will increase as a result.

If peace and free trade are international public goods, then the international legal system ought to promote rules that encourage their supply. By seeking to recognize or maintain existing borders, the international legal system currently has the effect of supporting the existence of larger nations, which will have less of an interest in these goods because they benefit from the trading blocs and the efficiencies of scale of providing security to a larger population more than smaller states. Better rules would eliminate the presumption against border change, as in the uti possidetis doctrine. Also, the United Nations could promote international welfare by allowing for the possibility that nations break up along ethnic or religious lines, rather than by requiring that interventions be followed by the restoration of a nation-state along its previous borders.

B. A Rational Choice Approach to Understanding Intrastate Bargaining Breakdowns

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

1. How and When Bargaining Breakdowns Occur

As noted above, the international law of occupation and recent practice place relatively heavy burdens on nations that intervene in failed states. Occupying powers are forbidden from altering the domestic laws of the occupied country, from changing its borders, and from revamping most

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138. See generally David Ricardo, Principles of Political Economy and Taxation (1821).
domestic institutions unless they pose a threat to the security of the occupying forces. At the same time, occupying powers are responsible for maintaining law and order and basic social services in the occupied country, even when conflict with insurgents is ongoing. For this reason, military officers estimate that maintaining security in an occupied country is manpower intensive. Pacifying Kosovo required 50,000 troops, or one soldier for every forty inhabitants. Extrapolating from the Balkan experience, General Eric Shinseki testified that occupying Iraq would require “several hundred thousand” coalition troops—a number considered politically infeasible at the time.

Such manpower demands would render the restoration of failed states to full sovereignty impractical in many cases. Western powers have had difficulty restoring capable government in Haiti, not to mention harder cases like Somalia. Nonetheless, the United States and its allies restored stability and functioning governmental institutions in Iraq with troop levels that, while known as the “surge,” still fell far short of the original estimates for a comprehensive occupation. Understanding why the surge in Iraq succeeded will point the way to a reorientation of international legal doctrine on occupation.

One way to conceive of the fundamental problem, and ultimate solution, in Iraq is to view it as a problem between Shiites and Sunnis to reach a stable bargain over sharing power. This was caused in part because each side, but particularly the Sunnis, misestimated its power relative to other groups. The political science literature on crisis bargaining is instructive. Because war is so devastating, rational actors with complete information should always prefer a negotiated settlement to armed conflict. Wars, for example, often conclude with bargains—in the form of treaties—that both sides prefer over continued conflict. Both sides would have been better off by simply agreeing to the peace settlement initially and avoiding the costs of war, so the question arises: Why don’t they avoid war altogether?

Imagine, for example, that a government and a rebel group have a dispute over the control of a territory. The rebel group issues a threat that it is willing to use force unless the government withdraws. The government must decide whether to accede to the demand or to resist with force. Both the government and the rebel group have an expected value of going to war, which is a function

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

of the probability that each will win the conflict and the value of controlling the territory minus the expected cost of fighting. If the government knows that the expected value of controlling the territory is lower for the rebel group than the likely cost of any conflict, it will not back down because it knows that a rational rebel group would not wage war. Likewise, if the government knows that the expected value of controlling the territory is higher to the rebel group than the likely cost of war, it will withdraw or reach some negotiated settlement. In both cases, both the government and the rebel group avoid the deadweight loss of warfare, the only change being whether the territory remains within the control of the rebel group or the government.142

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

The two groups could benefit by revealing private information to each other as to reduce the chances of conflict. A few problems stand in the way. First, they might feed misleading information in the hopes of exaggerating their probability of winning.143 Bluffing may produce a more favorable settlement than a player’s true resources should demand. Second, to reveal private information credibly, the player must send a costly signal. One way that a leader can send a credible signal is to issue a threat or make a promise that will incur domestic political costs if he or she does not follow through.144 If a political leader makes a public threat to use force, for example, but then backs

142. Several assumptions underlie this model. There must be a real probability that either group can win, and that both groups can estimate this probability. The government and the rebel group in this model are not risk-seeking in the sense that they would gamble to win a low-probability victory. Additionally, the territory in dispute can be bargained over and divided, rather than transferred as a whole, through side payments, linked deals, or different spheres of influence. Also, neither group can prevail in the first stage of bargaining by completely eliminating the other, so that any armed conflict may result in the loss of the territory, but not the end of the insurgency.


144. See Schultz, supra note 141, at 241.
down during negotiations, he or she could experience a loss of public support or backing among political elites. A leader can also send a signal by undertaking a course of action that requires significant ex ante investments or produces high ex post costs, such as building bases or local infrastructure in a disputed region, which would have high costs if he or she later changed course.

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

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

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


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

This commitment problem can be compounded in the case of struggles involving territory or natural resources. The division of an asset in dispute could give one side an advantage in future conflicts. Suppose, for example, that a government and rebel group could settle a territorial question by agreeing to a division of the land in question. Assume that the division would give the rebels a distinct military advantage in any future conflict by providing it with additional resources and by reducing tactical advantages enjoyed by government forces. The government cannot rely on the rebels to keep the agreement in the future, rather than take advantage of the relative shift in resources to seek even further gains in territory, population, or resources. The lack of an enforcement mechanism prevents the two groups from reaching a negotiated settlement, even though they might have complete information about the other side’s expected value from conflict.

2. The Proper Role of International Law

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

As observed earlier, even with accurate information, groups may still fail

INTERNATIONAL POLITICS (1999); Fearon, supra note 141, at 379.
to reach a stable bargain because of a weak institutional environment. Two
groups, for example, might agree to a division of territory which reflects the
current division of power. Imagine, for example, two ethnic groups, A and B,
which hold roughly a 60–40 balance of power. They would agree to a division
of disputed territory along the same 60–40 lines, but only if they were confident
that the other would obey the agreement in the future. If either side would grow
stronger as a result of the deal, it will have a strong incentive to renege and
pursue a revision of the terms. A guarantee against breaking the deal, which
would be in the interests of both sides, could only be provided by an outside
institution.

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

Putting this problem to one side, an intervening nation would need several
important powers to carry out an enforcement function. It must have the
legitimacy to identify violations of a bargain in a way that both sides trust,
serving as a neutral fact-finder. The intervening nation would have to be able to
coerce a recalcitrant group into obeying its agreements. It should have the
ability to provide economic and political support, change regional lines, or even
change political or constitutional institutions in order to reward parties that
keep the agreement and punish those that violate it. An outside nation, for
example, could reduce the territory, population, and resources administered by
a religious or ethnic group that violates a power-sharing agreement. Ultimately,
such moves will be backed by the threat or the actual use of force.

Existing international law does not clearly grant intervening nations the
flexibility to play these roles. As an initial matter, it is uncertain what aspects of
international law would govern intervention in a failed state. The most
conventional approach would consider territory held by an outside power to fall
within the international law of occupation, a subset of the laws of armed
conflict. A doubt as to this conclusion arises, however, from the character of
the intervention—it may not rise to the level of an armed conflict if the outside
power does not actually conduct hostilities against any of the groups. In
authorizing the 1992 intervention in Somalia, for example, the U.N. Security
Council did not specify whether the laws of armed conflict applied or whether
the laws of occupation would govern territory held by the militaries
involved.\textsuperscript{147} By contrast, the Security Council’s resolution in the wake of the

March 2003 invasion of Iraq specifically called upon “all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.” Those treaties set out the positive laws of occupation.

If the international law of occupation does apply, intervening nations may have some limited authority to carry out an enforcement role. Under the customary laws of war, an occupying army enjoyed broad discretion to administer a defeated enemy. A victorious nation was once considered to be the absolute owner of occupied territory. In the nineteenth century, customary law shifted to consider the occupying power to exercise only temporary control until a peace treaty of complete subjugation of the enemy could be executed. While that territory remained under occupation, the army held the legal authority to change the laws and institutions in force. According to the 1863 Lieber Code, issued by President Lincoln to guide the operation of Union forces during the Civil War, the army could impose martial law, which included “the suspension by the occupying military authority of the criminal and civil law, and of the domestic administration and government in the occupied place or territory,” the “substitution of military rule and force for the same,” and the “dictation of general laws.” These changes to the occupied nation’s laws had to be justified by “military necessity” and no more. The Lieber Code defined military necessity as “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”

Codification of the laws of war produced tighter limits on the occupying powers’ discretion. The 1907 Hague Convention, known as the “Hague Regulations,” allows the occupant to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety,” but also requires it to “respect[,] unless absolutely prevented, the laws in force in the country.” The Fourth Geneva Convention expressed a similar presumption in favor of preexisting laws and institutions, except where they threatened security. Article 64 of the Convention declares that the “penal laws of the occupied territory shall remain in force,” but allows for their repeal or

152. Id. at § 1, art. 14.
suspension "where they constitute a threat" to the security of the occupying power or the implementation of the Geneva Conventions.\(^{154}\) It allows the occupying power to establish new laws when necessary to implement the Conventions, "maintain the orderly government of the territory," and "ensure the security of the Occupying Power."\(^{155}\) Article 64 of the Fourth Geneva Convention is more generous to the occupying power than the Hague Regulations, in that it creates a presumption only for criminal laws and can be inferred to allow for changes in constitutional, administrative, and civil laws when necessary for security and order in the territory.\(^{156}\) This reading comports with state practice, which recognized an occupying power's authority to alter laws, including government institutions, in order to maintain the security of military forces, preserve its gains, and keep order.\(^{157}\)

International law might allow the role identified by our bargaining analysis. An occupying country would need the ability to sanction parties that refuse to follow through on a power-sharing agreement. It would want to access a broad spectrum of possible measures, including the alteration of institutions and constitutional arrangements. To fall within the formal rules of Hague and Geneva, an occupying nation's actions to create, enforce, or modify governance agreements would have to maintain public order and safety or protect the security of its own forces.\(^{158}\) This standard should be satisfied in cases where a previous regime took the form of a hostile dictatorship. Keeping in place Iraq's government and constitution from the Saddam Hussein era would have presented an obvious threat to public order and military security after the April 2003 invasion. A power-sharing agreement that governed while the United States and its allies occupied Iraq, and its enforcement against shirkers, would be understood as necessary to maintain peace and order and to protect the security of the coalition's troops.

3. The Surge in Iraq: A Case Study on the Potential of a Rational Choice Approach

Other situations, however, pose difficulties in applying the Hague and Geneva standards. An intervening nation may want to create a power-sharing agreement that is not necessary to maintain order or to protect the security of its forces, but instead will provide political stability after the occupation ends. The aim of such a pact would be to provide for stability in the future, once the occupying power's troops leave, rather than security and order during the occupation itself. For example, the United States and its allies may want to


\(^{155}\) Id.

\(^{156}\) Id.


\(^{158}\) See id.
make territorial changes among different provinces controlled by Afghan warlords because of their non-compliance with a provisional constitution. Positive international law leaves uncertain whether an intervening nation may make permanent changes to domestic laws and institutions in order to enforce a governance agreement. In Somalia, for example, an intervening nation that has already established a secure environment would have difficulty showing the necessity of a constitution that would divide authority among competing ethnic groups in the future.

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

In 2007, the Bush administration switched course. It augmented U.S. forces in Iraq by about 24,000 troops. A sharp change in strategy accompanied this surge in military force. Rather than being stationed outside the cities, U.S. forces were sent to secure Baghdad and several cities and provinces nearby where insurgent activity had reached its peak. The United States sent troops into neighborhoods to provide security for the Iraqi population, gain intelligence, and conduct counter-insurgency operations. Sunni volunteers formed “Sons of Iraq” units that provided security in their regions and helped American troops fight al Qaeda. Violence dropped quickly within the year. Monthly Iraqi civilian deaths from violence, which had risen from 700 in November 2003 to 3450 in November 2006, fell to 650 in November 2007 and to 550 in May 2008. Daily attacks by insurgents, which had risen from 35 in November 2003 to 180 in November 2006, fell back to 80 in November 2007 and 45 in May 2008. The number of American troops killed per month, which had fluctuated between 69 and 137 before the surge, fell to 40 in November 2007, and to 19 in May 2008.

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Historians and strategists will argue for years over whether or how the surge of U.S. forces produced the sharp decline in violence, restored security, and created stability for the Iraqi government to take hold. A leading argument credits the focus on protecting the Iraqi population rather than conducting search-and-destroy missions. According to this account, restoring security allows civilian authorities to build infrastructure and provide public services, encourages the local population to provide information on insurgent activities, and boosts government security forces. American counter-insurgency doctrine focused on “clear and hold”: pushing rebels out and then holding territory, providing time for the government to win the loyalty of the local population. In short, this argument suggests the surge created the space for nation-building to succeed in Iraq. This apparent lesson from the Iraqi surge has influenced plans for a similar surge of 30,000 American troops into Afghanistan.\textsuperscript{161}

This Article's analysis suggests that U.S. troops may have played a more modest role in stabilizing Iraq. The counter-insurgency strategy may have worked, though it is unclear whether adding 24,000 troops, in addition to the roughly 140,000 already present in 2006 (and 323,000 Iraqi security forces), was sufficient to secure a population of 24 million Iraqis spread over 437,000 square kilometers. Baghdad itself is estimated to have a population of roughly 6.5 to 7.0 million inhabitants spread over 1134 square kilometers. By contrast, the New York City police department requires about 38,000 officers to control crime for 8 million inhabitants in a space of 783 square kilometers, without the additional challenge of controlling political violence.

It may well be the case that the surge sent sufficient forces so that U.S. troops and Iraqi allies could patrol the neighborhoods in Iraqi cities. But a better explanation may lie elsewhere. Rather than improving security throughout Iraq, the surge troops may have performed the enforcement function described here. We can understand part of the ongoing violence in Iraq until the surge as a result of asymmetric information. If we simplify the civil war as a struggle between Shiites and Sunnis, the Sunnis controlled the main instruments of power in Iraq for decades despite their smaller share of the population. The 2003 invasion and the destruction of Saddam Hussein’s regime opened the door for a renegotiation of the governance arrangements between the two groups. In the post-invasion period, the Sunnis likely overestimated their power vis-à-vis the Shiites because of their historical dominance of the government and military. Civil war ensued because the Sunnis did not have full

\textsuperscript{161} Testifying before Congress following the announcement of the Afghanistan surge, American commanders acknowledged that their plan was to create “breathing space” for the Afghani central government, the same language used to describe the Iraq surge. See Yochi J. Dreazen & Peter Spiegel, Surge Strategy Borrows From Bush Argument, WALL ST. J., Dec. 4, 2009, at A8.
information on Shiite military power and willingness to fight. Al Qaeda attacks further disrupted any bargaining by confusing the information on each side’s capabilities and undermining trust to comply with any agreement.

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

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

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

If this account of the surge is correct—and it will not be known for many years why the surge reduced violence in Iraq from 2007–09—it indicates a narrower but deeper role for intervention in failed states. The Bush administration’s “Freedom Agenda” of replacing autocracies with democracies, whatever its merits in political philosophy or international relations, cannot take credit for stabilizing Iraq.162 Further, if this account of the surge is correct, then several of the ambitious efforts to remake Iraqi society were not crucial to producing the reduction in internal conflict. Building infrastructure, providing public services, and establishing a parliamentary democracy may have their own virtues, but they go well beyond what is necessary to restore a failed state. Intervening nations, such as the United States and its allies, could afford to reduce their role in these areas and interfere less with existing cultural and social norms. International legal mandates to occupy and temporarily govern a nation may reach too far by placing such goals on the same plane as restoring security and brokering a governing arrangement between local groups.

This is not to say that democracy itself can never serve as a useful means to produce enforceable bargains between groups in a failed state. A smaller elite with control over a large sector of resources, for example, may have difficulty convincing a larger, poorer majority that it will redistribute a stream of wealth in the future. Agreeing to the introduction of democratic governing structures that transfer more power to the population might send a credible signal of commitment.163 This could allow the elites and the population to escape a repeated game in which the inability to commit creates the conditions for warfare or coups. Democracy, however, does not seem to explain the success of the Iraqi surge, in which the majority Shiite population already held power after the fall of Saddam Hussein due to their large numbers.164

While international law and policy may sweep too widely, it may also dip too shallowly. The international law of occupation creates a presumption in favor of leaving domestic laws intact. This rule seems to apply not just to the

162. For discussion of the merits of spreading democracy from an American national security perspective, see Robert J. Delahunty & John Yoo, Kant, Habermas, and Democratic Peace, 10 CHI. J. INT’L L. 437 (2010).


164. Another dynamic that might be at work in successful interventions, though not in Iraq, is that a larger power could force ethnic groups to cooperate temporarily. One study has found ethnic violence to be far more exceptional than might be expected. See James D. Fearon & David D. Laitin, Explaining Interethnic Cooperation, 90 AM. POLI. SCI. REV. 715–35 (1996). The study proposes that conflicts between ethnic groups result from inabilities to maintain a cooperative equilibrium because of a downward cycle of a loss of trust. Cooperation over time, imposed by an intervening power, might reintroduce trust between fighting groups that would create the conditions for a permanent political settlement.
conventional case of a nation temporarily occupied during the course of a war, but also to the unconventional case of a territory where organized government has ceased to function effectively. These two different circumstances require different legal rules. In the conventional case of occupation, international law assumes that governing authority will eventually return to the original sovereign once the war is over. The occupying power’s hold over the territory should only temporarily displace the normal functioning of domestic law. However, in the case of failed states that are occupied, there is no preexisting normal state to which the territory should return. The intervening nation therefore should have broader authority to rework domestic institutions in order to establish permanent, effective governmental authority. In order to do that, the outside power needs greater discretion to develop and enforce political bargains between competing groups. While the United States may have had relatively broad authority in Iraq after the completion of the 2003 invasion, international law and policy does not clearly grant this authority. If the international legal system is to provide a legal environment that will help restore a failed state, it should provide intervening nations with greater leeway to reshape the domestic constitution and laws.

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

CONCLUSION

Failed states create a broad range of negative externalities. The collapse of central authority, or its failure to take root, can generate the conditions for human rights catastrophes. The absence of state institutions can allow a territory to be exploited by international terrorist organizations or proliferators of WMD. Even though states that remedy these problems provide an international public good, the international legal system continues to protect national sovereignty and place strict limits on the use of force. In fact, international legal rules create the wrong incentives by discouraging intervention, requiring that interveners restore a nation to full independence, and maintaining failed states within their preexisting borders.

This Article argues that the international legal system should construct a different set of rules that would encourage intervention in failed states. Such rules could permit nations to contract with less developed nations with
relatively large militaries to intervene in failed states. The rules could permit intervening nations to intervene without the responsibility of bringing the nation to the level of a functioning, independent nation-state. They could also permit schemes to allow for the sharing of the costs of intervention, thereby creating incentives toward the termination of the negative international externalities. Similarly, the international legal system should encourage the provision of international public goods—such as the maintenance of international peace and security and the spread of free trade areas—by allowing failed states to decentralize into smaller units that are more consistent with the heterogeneous preferences of different ethnic, religious, or cultural groups.

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