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Gregory H. Fox
Chapman University School of Law

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Strengthening the State

GREGORY H. FOX

INTRODUCTION

International law has always relied on States for its implementation. While international regulatory bodies have proliferated in recent years—in some cases even acquiring the power to impose sanctions for non-compliance—the actual fulfillment of international commitments has remained with States. National legislatures, regulatory agencies, courts, and police forces translate increasingly complex international obligations into desired changes in behavior. International supervision, to the extent it exists, is supervision of compliant (or non-compliant) activity by States.

With the explosion in multilateral treaty regimes since World War II, the sheer number of international obligations to be implemented has increased dramatically. The United Nations (UN) Secretary-General now acts as depository for some 486 multilateral treaties, only thirty-three of which predate 1945.1 Regional treaty regimes have also proliferated.2 This expansion in treaty obligations has been qualitative as well as quantitative. Recent instruments require States to alter law and practice in virtually every area of governance: from the environment, to criminal justice, to all manner of health and safety regulations potentially creating non-tariff barriers to trade.3 In some cases, these new obligations complement States’ existing


3. For example, Chayes and Chayes describe a recent environmental instrument as requiring “detailed administrative regulations and vigorous enforcement efforts. In essence, the state will have to establish and enforce a full-blown domestic regime designed to secure the necessary reduction in emissions.” ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 14 (1995).
regulatory institutions. In other cases, those institutions must be created out of whole cloth. In both instances, the international community continues to look, first and foremost, to State institutions for implementation of international law.

The increasingly burdensome nature of international law seems clear enough. One would expect that faced with this phenomenon, international lawyers would turn their attention to asking whether national institutions are up to the task. Can national governments, especially those in developing countries, cope with their new treaty obligations? If so, then the traditional role of States as implementing agents of international norms would appear to have made a successful transition to the modern era of international regulatory regimes. If not, then one would expect scholars to suggest alternative approaches to implementation, perhaps involving actors from the global, regional, or sub-State level. The question might also be answered by exploring whether compliance might be enhanced by certain domestic reforms. Harold Koh's suggestion that familiarity with international obligations be spearheaded by national courts is one example of this approach.

An important literature on compliance control has indeed emerged in the past decade. But there is a more prominent literature that appears to begin with a premise wholly at odds with the burdens now imposed by international

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4. The United States, for example, in explaining its "declaration" that the International Covenant on Civil and Political Rights is not to be a self-executing treaty, has argued that the rights set out in the Covenant are already protected by existing legislation. See Observations by the United States of America on General Comment No. 24 (52), reprinted in 16 HUM. RTS L.J. 52, 53 (1995).

5. See, e.g., Paul C. Szasz, General Law-Making Processes, in THE UNITED NATIONS AND INTERNATIONAL LAW 27, 28 (Christopher C. Joyner ed., 1997) ("[A]ll types of international law, especially treaty law, are being created at an ever-increasing rate—indeed at a rate that sometimes seems to exceed the capacity of the international community (and especially of its newer and less well-equipped members) to absorb and digest all the new norms.").


treaty regimes. This literature proclaims the marginalization of the sovereign State. In this Essay, I examine, and ultimately contest, the implications of this literature for the new international regulatory regimes.

The State marginalization literature takes various forms and frequently reaches conclusions about the changing juridical status of States based largely on analyses of non-legal phenomena. These phenomena include the rapid changes in global communications, expansion of securities, capital and currency markets, the emergence of a cosmopolitan ethic on questions of human rights, and, somewhat differently, the rise in the 1990s of sub-State identity movements that challenge State authority from below. In light of these phenomena, writers claim, the broad legal prerogatives once enjoyed by national governments have slowly been ceded to an array of global and regional organizations. In many areas, international adjudicatory bodies, and not national courts, hold ultimate authority to determine whether domestic laws are compatible with treaty obligations. The creation of international law, once a matter of decentralized custom, is now frequently carried out by multilateral bodies staffed by international civil servants. At those lawmaking conferences, State delegates are often in the minority, outnumbered by representatives of non-governmental organizations (NGOs), transnational corporations, and other actors in a growing "international civil society."

If this description of an increasingly marginalized State is accurate, how can that idea be reconciled with the burdensome and now pervasive demands of new international legal regimes? Stated another way, how can international
law ask States to assume a complex web of legal obligations while, at the same time, working to diminish their authority? States cannot be both marginal to the new international legal order and central to its success.

One could attempt to resolve this dilemma in a variety of ways. One might conclude that the architects of the new regulatory regimes have simply overestimated the States' capacity for implementation. On this view, much of the recent international law will produce only marginal changes in State behavior. Alternatively, one might conclude that the State marginalization literature is simply wrong: States retain, if not the full capacity for compliance, then at least a realistic potential to comply with most of their international legal obligations most of the time. Yet another conclusion would be to reject the idea of a zero-sum trade-off between national and global institutions, and to argue that other sorts of actors (e.g., NGOs) will take up implementation responsibilities that are beyond the capabilities of many State governments.¹⁰

An entirely different approach would be to suggest that there is really no contradiction between State marginalization and the growth in international obligations. One could argue that while the two phenomena employ similar terminology, they are conceptually quite different. One might say that recent international law only expects State institutions to function efficiently. A ministry of the environment, for example, must have sufficient legal authority and resources to implement obligations under an anti-pollution treaty. This is not the same, however, as saying that the source of legal obligation for environmental questions under regulation has remained with the State. Obviously, an international treaty owes its existence in the first instance to State consent. But the phenomenon of State marginalization in areas such as the environment, one might argue, concerns only the relinquishment of plenary authority to prescribe environmental norms applicable within State borders. Thomas Franck has described this authority as "the power of the final cut."¹¹ Thus, while State marginalization involves a change in the locus of decision-making authority (increasingly vested in multilateral institutions), the new international law does not speak to responsibility for carrying out authoritative decisions (still vested in States). If these two functions are thereby seen as complementary, then on this view, the State would retain

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much of its juridical distinctiveness and independence of function. Its implementing responsibilities would be uncompromised by cessions of prescriptive authority to international bodies.

In the discussion that follows, I suggest that none of these responses to the dilemma adequately accounts for trends in contemporary international law. The alternative I present is complex, for it involves changes in relations between States and international law that not only straddle the tasks of normative prescription and practical implementation, but also address broad historical forces that transcend the narrow question of States’ capacities to fulfill treaty commitments. What I suggest is that normative prescription and State implementation are now both concerns of international law. The latter development is new, and its ascent into normativity is the phenomenon that speaks most directly to claims of State marginalization. I argue that the coherent and efficient functioning of national governing institutions has become a central concern of international law. Treaty norms, and a broad body of State practice, are now directed at *strengthening* States’ capacities to function as cohesive and robust political communities. Far from marginalizing States, the objective is to produce States that are more than juridical constructs or mere territorial enclosures with the bare bones of a collective identity. Rather, the goal is to create State institutions that are perceived as legitimate and, as such, conducive to their citizens’ obedience. These institutions will allow States to be more effective participants in the international legal community, strengthening their ability to implement treaty obligations.

These efforts have taken place largely, if not exclusively, in the developing world. This is true for the simple reason that concern over the effectiveness of governing bodies is most acute in developing States. Political scientists have long detailed the adverse consequences of weak States (particularly in Africa) for industrialization, the maintenance of domestic order, and the observance of human rights. Many developed States, by contrast, especially in Europe, are vigorous participants in international regimes that build on the strength of governing institutions within their Member States. This is not to say that developed States always (or even mostly) adhere to their international obligations and that developing States do not. The argument here concerns the *capacity* for participation rather than the willingness to participate. As discussed below, the question of capacity relating to *legitimate governing institutions* is quite different from the question of capacity relating to *resources.*
How does an effort to strengthen the State affect the traditional role of international law as the source or promulgator of norms, and States as the implementing agents of those norms? In other words, is strengthening the State as an "implementing agent" really incompatible with claims that the State is being marginalized? There are several reasons to believe that it is. First, efforts to strengthen the State have made the effectiveness of national governance itself an area of profound interest to the international legal community. To view the implementing bodies of national government as bereft of international normativity is to ignore this pervasive intrusion of international law into matters of domestic governance.

Second, this process of institution-building enhances States' capacity to participate in the creation and interpretation of international norms. Robust international institutions, experience suggests, are built on robust national institutions. Thus, efforts to strengthen the State initiate a process of mutual reinforcement: international organizations work to assist national institutions; resilient national governments participate more effectively and actively in the work of international organizations; and the decisions of international organizations, in turn, more accurately reflect the interests of those States. The decisions of those organizations thereby achieve a broader legitimacy. Absent significant political obstacles (a substantial caveat to be sure), a greater congruence of interests between the institutions of international law and previously marginalized States will thereby develop. This process of convergence, however, is too complex to be described accurately using the old categories of normative prescriber and implementing agent.

Third, strengthening States not only affects institutions of national government but also the situation of individuals within those States. Some scholars writing about the transformation of the State speak of an evolution in individual personal identities brought about by the intrusion of globalization into everyday life. Thomas Franck has described an emerging flexibility in personal identifications that portends a "newly assertive global claim to personal self-determination, a growing trend toward autochthonous self-identification, an opening up of yet-unbroached possibilities of layered and textured loyalties."\(^{12}\) As we will see, one of the weaknesses exhibited by many developing States is the lack of a strong sense of affinity between citizen and State. Loyalties are more often felt to ethnicity, religion, or region. Institutions of government to which people feel no sense of obligation will

only succeed through coercion, and the track record of such regimes is not exemplary. Efforts to legitimize State institutions in the eyes of citizens seek to foster this missing sense of affinity. The point for present purposes is that such a transformation in personal identities is both, on the one hand, a normative goal of international society realized through the vehicle of international law and, on the other hand, an essential component of effective implementation strategies. A simple dichotomy between the two cannot account for this phenomenon.

What emerges, then, is not the traditional division of labor between normative prescription and implementation, but an extraordinary convergence of overlapping and complementary imperatives all subject to norms of international law. In this Essay, I sketch out the many sources, goals, justifications, and assumptions of international efforts to strengthen the State in the developing world. The Essay will indeed be in the nature of a sketch, a preliminary attempt to analyze the structure of a complex phenomenon. However, I hope to make clear in very general terms the arguments available to respond to the broadest claims of the State marginalization literature.

I

My arguments take the form of five propositions. The first is that claims of State marginalization overlook important differences in how international law and organizations have affected societies in the developed and developing worlds. In the developed world—particularly in Europe—international law emerged in response to the needs of political societies becoming increasingly secular and centralized. Efficient local administration, clear demarcations of jurisdiction for new legal systems, and eventually, in the nineteenth century, widespread divisions between peoples claiming distinct national identities, all required protection against external encroachments. International law protected the autonomy of national institutions, albeit in varying degrees over time. Principles of national jurisdiction formed around the principle of territoriality: “A state was entitled to exercise prescriptive jurisdiction regarding any conduct within its territory; conversely, a state could not exercise jurisdiction over conduct occurring outside of its

boundaries, except with the regard to its own nationals.\textsuperscript{14} International law itself contained virtually no standards governing a State’s conduct within its own territory.\textsuperscript{15} International law functioned much like a protective tariff wall, allowing indigenous political structures to mature, take root, and assert their authority throughout the territory.\textsuperscript{16} Michael Walzer argues that such enclosure was in fact essential to the emergence of rights-based political cultures: “Communal life and liberty requires the existence of ‘relatively self-enclosed arenas of political development.’ Break into the enclosures and you destroy the communities.”\textsuperscript{17} The great theorists of State consolidation, such as Thomas Hobbes and Jean Bodin, wrote of domestic absolutism as a necessary response to conditions of pervasive disorder; the English civil war in the case of Hobbes and the continental religious wars for Bodin.\textsuperscript{18} It is little exaggeration to say that the modern juridical State sanctified this consolidation of power in early modern Europe. The new secular international legal order was thus inseparable from the consolidation of political power within defined territories.

What did this consolidation entail? First and foremost, it involved the creation of autonomous constitutional orders within national territories.\textsuperscript{19} Political and legal structures emerged that reflected traditions of the societies in which they were promulgated. External controls from non-State actors (e.g., the Pope and Holy Roman Emperor) were cast off, and a process of administrative consolidation laid the foundation for national systems of law. The international juridical concept of the State was understood to serve the

\begin{thebibliography}{99}
\item 15. See Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather Than States, 32 Am. U. L. Rev. 1, 9 (1982). The one important exception concerned the treatment of aliens, but because injuries to foreigners were understood as injuries to those individuals’ States of nationality, this exception was consistent with principles of territoriality. See Louis Henkin, The Age of Rights 14 (1990).
\item 16. Territoriality is still the default principle in questions of national jurisdiction, although it has been substantially (some might say wholly) compromised by international norms addressing “domestic matters.” As the Permanent Court stated in the \textit{Lotus} case, “the first and foremost restriction imposed by international law upon a State is that failing the existence of a permissive rule to the contrary— it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial...” S. S. “Lotus,” (Fr. v. Turk.), 1927 P.C.I.J., (ser. A), No. 10, at 18.
\item 19. See James, supra note 18, at 30.
\end{thebibliography}
express purpose of allowing domestic institutions to flourish without external interference. These institutions not only developed substantive legal principles, but also demarcated the legitimate exercise of political power. As a result, "norms for selecting political leadership, assimilated through a long process of socialization and institutionalization, tend to be taken for granted by participants." Additionally, the levying of taxes and the conscription of soldiers for purposes of waging war allowed "the nationalist ideals proclaimed by the new political elites" to serve as "justifications for the conduct of traditional power politics." The constitutional authority to conscript and tax domestically served to reinforce and consolidate the independence of the State internationally.

Second, consolidation allowed a process of cultural homogenization to take place. It is now a commonplace in the literature of nationalism that the State as a cultural community was a deliberate work in progress, one largely fashioned by elites and realized through vehicles such as language, historical myth-making, and national symbols. Most States, as Hobsbawm points out, "differ in size, scale and nature from the actual communities with which most human beings have identified over most of history." Considerable effort was required to reorient these local identities to the new national levels. This deliberate process of nation-building--of constructing new personal identities to coincide with the new territorial States--was essential if States were to function as coherent political units. This nationalist project was naturally aided by--indeed, intertwined with--a juridical conception of the State that allowed common cultures to emerge without interference from outside.

One may even go further and say that this grounding of political communities in nationalist myths necessitated an international law fiercely protective of State territory. Once the medieval notion of territory as the personal province of a monarch gave way to, and was replaced by, a State with

20. David L. Blaney & Naeem Inayatullah, The Third World and a Problem with Borders, in PERSPECTIVES ON THIRD-WORLD SOVEREIGNTY 83, 87 (Mark E. Denham & Mark Owen Lombardi eds., 1996) ("[T]he hallmark of the appearance of the state is the centralization of rule, the replacement of segmentary authority by a unitary and supreme political hierarchy, giving form to a political community.").
24. Id. at 46.
25. See Jürgen Habermas, The European Nation State. Its Achievements and Its Limitations. On the past and Future of Sovereignty and Citizenship, 9 RATIO JURIS 125, 127 (1996). For example, Hobsbawm notes that in 1789 only 50% of Frenchmen spoke French and that at the time of the Italian unification in 1860 only 2 ½% of citizens used Italian for everyday purposes. HOBSBAWM, supra note 23, at 60-61.
a legal existence separate from its ruler, there was every incentive to protect the central attribute of the State's new juridical personality: a defined territory over which it exercised plenary control. International law, therefore, began to develop rules governing interactions between these fictional entities. The law of recognition, for example, did not exist prior to the middle of the eighteenth century, but quickly developed once States were understood as possessing autonomous personalities. Thus, States became both the sole creators and subjects of international law.

Third, and relatedly, territorial consolidation allowed States to become the focal points of activity by citizenries increasingly involved in political life. The identification of territory with nationalist myths, flowing from attributes of "the people," necessitated a more central role for inhabitants of the territory in the national political consciousness. There was simply no need for such a broadening of the political class when territories were identified with individual monarchs. As Habermas observes, "[t]hose who had been subjected to a more or less authoritarian rule, now gained step by step the status of citizens. Nationalism stimulated this move from the status of private subjects to citizenship." With the rise of theories of popular sovereignty in the late eighteenth century, the legal prerogatives accorded the entity giving citizenship its essential meaning—the juridical State—only increased. If the State had become the embodiment of particular nationalist mythologies, then the distinctiveness of each State required protection:

The importance of the idea of popular sovereignty in this context was that it gave the cultural, ethnic and historical communities with which people could identify, and around which they could be mobilised, a political salience they had not previously enjoyed . . . Paradoxically, therefore, because of the historical diversity of peoples, the universalistic idea of popular sovereignty produced a highly particularistic outcome in the form of nationalism, with profound consequences for the spatial reorganisation of states.

International law was thus very much in service of the State-building project, allowing the individual identities of European States to unfold at a

27. Habermas, supra note 25, at 129.
pace dictated by domestic politics. International lawyers in the nineteenth century, the apogee of legal protection for nationalist undertakings, referred frequently to the coherent, almost sentient character of juridical States. Woolsey described the State as “a moral person;” Hall wrote of “the will of an independent community within the territory occupied by it.” This conception of each State as possessing a unique national character, protected by international law, had profound implications for the creation of new international norms. The positivist insistence on State consent as the basis for international law created a theoretically egalitarian procedure for creating new norms, one that recognized each State’s equal entitlement to accept or reject emerging doctrines. This sense of equal entitlement to consent, in turn, reinforced the legitimacy of national legal systems—the means by which State consent was made manifest. Protecting the national legal sphere and an increasingly egalitarian lawmaking process were, thus, two sides of the same positivist coin. In the Island of Palmas case, Max Huber wrote of international law having “established this principle of the exclusive competence of the state in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.”

This entwining of administrative control over territory, with normative conceptions of a right to such control is well captured in Jackson and Rosenberg’s distinction between the “empirical” and “juridical” State. The empirical State focuses on de facto authority, following Max Weber’s well-known definition of a State as a “corporate group that has a monopoly of force over a territory and its population, including ‘all action taking place in the area

29. Christian Tomuschat has identified an intermediate step—the State as a “societal phenomenon.” This iteration, he argues, “predates the creation of the international legal order since as a power centre it existed before factual relationships turned into legal positions and entitlements.” Christian Tomuschat, Obligations Arising for States Without or Against Their Will, 241 RECUEIL DES CORS 210 (1993).
32. WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 56 (4th ed. 1895).
33. For an analysis of how asymmetrical State power actually shapes the formation of customary law, see MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES (1999).
of its jurisdiction." The juridical State is the fictional entity created through international law, capable of asserting rights and bearing obligations. While it is a matter of some historical complexity as to whether the empirical or juridical State emerged first in Europe, it is clear that each was essential to the success of the other. Most importantly, when a State was recognized as having juridical personality in international law, it was assumed that the empirical aspects of Statehood were present. Indeed, the legal criterion of an effective government is itself an empirical question. James Crawford regards effective government as the single most important legal criterion of Statehood because "[t]erritorial sovereignty is not ownership of, but governing power with respect to, territory."

The coincidence of juridical and empirical Statehood is critical to a discussion of State marginalization in the developing world. This coincidence embodies a central assumption of European-based international law to which developing States became subject upon gaining their independence: that States have the legal capacity to carry out obligations imposed through international law. This is not an assumption that all States have equal resources to implement their international law obligations, or that those obligations are assumed with equal enthusiasm. It is rather the quite minimalist view that the various organs of government exert authority over the State’s entire territory and are capable of implementing decisions of the central authorities, whatever those decisions may be.

Several doctrines of international law are indeed substantively premised on the existence of functional domestic institutions. Three examples of these doctrines are: denial of justice to aliens, the principles of attribution in the law of State responsibility, and the obligation to provide a remedy for

37. The existence of an effective government is one of the traditional indicia of Statehood. The others are: (1) a defined territory; (2) a permanent population; and (3) the capacity to enter into relations with other States. See Convention on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19.
38. CRAWFORD, supra note 26, at 42.
39. The Harvard Research draft provided that a State is responsible for the denial of justice to an alien where “there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial processes, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.” Research on International Law Under the Auspices of Harvard Law School, art. 9, reprinted in 23 AM. J. INT’L L. 173 (Spec. Supp. 1929).
40. The International Law Commission has explained that international law presupposes “the existence of rules of internal law which determine the position of the various organs in the State machinery proper
violations of human rights.\footnote{41} Debate raged among international lawyers in the nineteenth century as to whether States whose institutions were only minimally functional—often less felicitously described as lacking "common standards of civilization"—should benefit from full juridical equality.\footnote{42} While the United Nations Charter effectively ended this debate by proclaiming the juridical equality of all Member States,\footnote{43} it nonetheless specified that States wishing to join the United Nations must be "able" to carry out the obligations set out in the Charter.\footnote{44}

While the assumption of effective governance underlay the edifice of international law emerging from Europe, it cannot be applied with any confidence to the developing world. Unlike the States of Europe, developing States generally did not benefit from an international law that enveloped their territories in a protective cocoon during their formative periods of consolidation. Thus, the European experience of assimilating particular cultures to juridically significant territories was largely absent. Instead, any formative period was skipped and the boundaries of developing States have

\footnote{41. The Universal Declaration of Human Rights provides in Article 8 that "everyone has the right to an effective remedy by the competent national tribunal, for acts violating the fundamental rights guaranteed him by the constitution or by law." G.A. Res. 217A (1948). This right is repeated in all major human rights treaties. See International Covenant on Civil and Political Rights, Mar. 23, 1966, arts. 2(3)(a) & (b), 18(2), 999 U.N.T.S. 171; \textit{European Convention on Human Rights}; American Convention on Human Rights, art. 25(1); African Charter on Human and Peoples' Rights, art. 7(1)(a). In the Velásquez Rodriguez Case, the Inter-American Court of Human Rights held that a State Party "has a legal duty to take reasonable steps to prevent human rights violations committed within its jurisdiction." This duty, it continued, "includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights." Velásquez Rodriguez Case, Inter-Am. Ct. of H. R. 91, 155, I/A Court H.R. Ser. C. no. 4 (1988). See generally \textsc{Theodor Meron, Human Rights and Humanitarian Norms as Customary Law} 136-245 (1989).

42. \textit{See generally Edwin D. Dickenson, The Equality of States in International Law} 223-36 (1920). A typical statement of the anti-equality view appears in the writings of an Italian commentator: A state which does not find itself in a position to fulfil its international duties towards other states, either as a result of traditional prejudices, or its internal organization, or its customs and its religious beliefs, can only demand the full enjoyment of international rights in perfect equality on condition that it change its internal organization so as to enable it to fulfil its international duties by giving substantial guaranties on this subject.


43. U.N. \textsc{Charter}, art. 2, para. 1.

44. \textit{Id.} art. 4, para. 2.
generally been those drawn by colonial authorities.45 This rush to juridical Statehood was not, one must add, a dynamic opposed by elites in the developing world. The General Assembly’s 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, which the International Court of Justice (ICJ) has described as “the basis for the process of decolonization,”46 specifically renounced empirical Statehood as a prerequisite to juridical Statehood, declaring that “inadequacy of political, economic or educational preparedness should never serve as a pretext for delaying independence.”47

Skipping the European process of consolidation might not have presented a problem for the new developing States if their borders had borne a rational relationship to the political communities they enclosed. But by and large they did not.48 Judge Ajibola described the nature of border-drawing by colonial officials in his separate opinion in the Chad/Libya case:

The colonial penchant for geometric lines (as exemplified by Lord Salisbury’s ‘horseshoe’-shaped Tripolitarian hinterland), has left Africa with a high concentration of states where frontiers are drawn with little or no consideration for those factors of geography, ethnicity, economic convenience or reasonable means of communication that have played a part in boundary determinations elsewhere.49

The original irrationality of colonial borders was compounded by the colonial powers’ frequent reconfigurations of their administrative subdivisions. This occurred in Afrique Occidentale Française, Afrique Equatoriale Française, the mandated territories formerly under German rule, and in Italian East Africa.50

49. Territorial Dispute (Libyan Arab Jamahiriya v. Chad), 1994 I.C.J. 1, 49, 50-51 (separate opinion of Judge Ajibola).
This resulted in States that are remarkably heterogeneous in ethnicity, language, and religion. While the anti-colonial movements of the immediate post-war era often described the rights of colonial subjects using the rhetoric of nationalism—an effort that sometimes continued into the early years of independence there was rarely a common cultural heritage to serve as a foundation for national politics throughout the entire territory. The populations of most new African States “had not been together in one State long enough to begin to amalgamate and assimilate.” Consider, for example, the lack of “fit” between indigenous institutions and the new independent State of Burma:

The new Republic of the Union of Burma which came into being on 4 January 1948 bore little resemblance to any nation or state from the historic past. The power and authority of the Burmese kings and the central courts at Ava and Mandalay had been destroyed. The economic hub and the political centre had moved to Rangoon... And the institutions of political power bequeathed to the new nation were an ill-fitting suit of clothes modeled on the loose pattern of British parliamentary democracy.

Developing States thus conformed to the prevailing juridical model of Statehood—essential for participation in the international community—but without the concomitant histories of empirical communities. This is not a deterministic argument that ethnic heterogeneity automatically produces a non-functional State. Certainly, developing States began life with a host of

55. Mark E. Denham & Mark Owen Lombardi, Perspectives on Third-World Sovereignty: Problems with(out) Borders, in PERSPECTIVES ON THIRD-WORLD SOVEREIGNTY 1, 7 (Mark E. Denham & Mark Owen Lombardi eds., 1996) ("[T]he national identity of Southern peoples was not appreciably affected by the enclosure and consolidation represented by Westphalia and traditional ethnic identifications remained to inhibit the impact and potency of state sovereignty.").
other disadvantages. But the handicap of working within the form of the State without the substantive coherence that preceded the formation of juridical States in Europe is consistently described in the literature as acutely debilitating. Robert Jackson describes such developing countries as "quasi-states." 56

Acute heterogeneity and lack of community coherence take many specific forms in the developing world. Regulatory bureaucracies are beset by a host of pathologies, many of which "can be traced directly or indirectly to the recruitment and allocation of public servants along personality, family, ethnic, religious, regional and factional lines." 57 Tri Nguyen does not mince words in describing the nature of these pathologies as "self-serving, authoritarian, over-staffed, corrupt, inert, ineffectual, top heavy and bottom thin, lacking qualified managers and professionals, irrational salary schemes and incentive systems, excessively centralized, hamstrung by inefficient rules and procedures, accustomed to selective rule enforcement, process rather than results oriented, and so forth." 58

National bureaucracies are, of course, the primary conduits for implementation of international law obligations. Moreover, entire sectors of developing economies operate outside the realm of law. The scope and regularity of these extra-legal transactions have been described as giving rise to a "shadow state." 59 These shortcomings call into question the capacity of States to represent themselves as fully functional participants in international regimes entailing burdensome regulatory obligations.

A second consequence of weak empirical Statehood is the widespread absence of participatory politics at the national level. With cultural ties maintained at the local (and not national) level, leaders often impose political coherence by force. More will be said later about efforts to overcome this divisiveness. The point here concerns the results. When the State is not seen as the primary locus of identity for citizens, there is much suspicion to be overcome when the State seeks to convince citizens that it is acting in their interests. 60 When loyalty, in the form of obedience to national policy, is not

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57. Nguyen, supra note 21, at 37.
58. Id.
60. Beetham, supra note 28, at 133 ("[W]here . . . a sense of nationhood is only weakly developed, and there is no single ethnic or cultural community within the territory with which people identify, its absence will be revealed in the degree of loyalty the state can command when under pressure.").
forthcoming, the State often resorts to coercive force in order to achieve desired ends. This frequently has the effect of diminishing loyalty to national institutions even further. Faced with this double distancing of the State from its citizens, the State finds itself with few palatable options: it can continue governing by force or through favoritism to certain groups, which will have the effect of further delegitimizing national institutions; or it can attempt to liberalize, in which case a competitive political environment is likely to break down along existing lines of loyalty, ethnicity, religion, and the like. David Beetham has noted this unfortunate double bind: "the ability of liberal democracies to satisfy the legitimating criteria of an accepted source of authority and expressed popular consent, is incompatible with the attainment of a recognisable general interest in the circumstances of most developing countries."  

What we are left with, then, is an extraordinary asymmetry in the capacities of developed and developing States to function as empirical States. While there are certainly a range of factors contributing to this imbalance—lack of resources, lingering effects of colonialism, Cold War interventions, the economic advantages of economies of scale, etc.—only the disjunction between borders and political communities is squarely a matter of international law. This unfortunate reality, as we have seen, is grounded in a universalizing of the juridical State beyond its European origins in cohesive political communities.

II

The second proposition is that the international community might have responded in a number of ways to this asymmetry. One way States have responded is to eradicate virtually all instances of *de jure* inequality between States under international law. 62 While a small step in the face of vast inequalities of power, the now foundational doctrine of juridical equality "makes enough difference in the processes of international law and politics to modestly vindicate the significance and effectiveness of the system of sovereign equality." 63 But only modestly. States might have taken more

61. Id. at 171-72.
decisive steps and addressed the problem directly in international law. The process of State consolidation in Europe involved both violent changes in control over territory and the forcible integration of once disparate peoples into unified communities under a single sovereign. States in the developing world might have been allowed to replicate this dynamic under international law.

First, the lack of “fit” between sub-State communities and national borders in the developing world might have been addressed by permitting those communities to form their own States. That is, international law might have developed a right of secession for groups self-identified as coherent political communities. Allowing secession might not necessarily lead to the dissolution of all existing States or to a proliferation of microstates: some communities might choose to band together; others might join existing States with which they feel a greater kinship; and some existing States, faced with potential dissolution, might devise power-sharing arrangements to entice secessionist groups to remain within their borders. Whatever path this rearrangement of borders might take, it would allow the developing world to approximate the European process of territorial consolidation in some small way.

Despite claims of historic injustice and ongoing oppression, a majority of States has clearly and repeatedly refused to sanction a right of secession in international law. Because virtually every State has potential secessionist groups within its borders, it should not be surprising that virtually no State has advocated a rule permitting secession. But States have also recognized that right of secession would almost inevitably give rise to a new “Scramble for Africa” (or Asia or Europe): existing States would vie for broken pieces of neighboring States, governments would resist attempted secessions by resource-rich areas of their own territories, and ethnically homogenous States would urge their kinsmen in other States to break lose and join a “Greater” State X. The benefits of a free market in Statehood, in other words, would be dwarfed by the carnage of its transaction costs. International law has repeatedly reflected this conclusion by favoring the principle of territorial

64. Makau wa Mutua makes a different proposal, suggesting that the map of Africa be redrawn through a collective effort of peoples, governments, and regional organizations. Mutua, supra note 48, at 1160-67. While intriguing, at present this proposal has little prospect of realization.

integrity over the right to self-determination. Boundaries cannot be changed for forcible annexation, State succession, or a change in the circumstances attending the negotiation of border treaties. Most notable has been the international community’s insistence on maintaining existing boundaries of States where ethnic animosities appear to make meaningful political cooperation at the national level impossible. The Canadian Supreme Court,

66. See Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation in States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 124, U.N. Doc. A/8028 (1970) [hereinafter Friendly Relations Declaration] (qualifying the right to self-determination with the provision that “[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity ... of States); Vienna Declaration and Programme of Action, U.N. Doc. A/CONF. 157/23 (1993); MALCOLM SHAW, INTERNATIONAL LAW 181-82 (4th ed. 1997) (“[s]elf-determination has also been used in conjunction with the principle of territorial integrity ... to prevent a rule permitting secession from independent states from arising”); FRANCK, supra note 7, at 154-72 (detailing inconsistent application of self-determination principle since World War I in a way that precludes emergence of any coherent rule).

67. Article 2(4) of the UN Charter prohibits Member States from using force “against the territorial integrity or political independence of any state ... .” In its 1970 Friendly Relations Declaration, the General Assembly stated that “the territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.” Friendly Relations Declaration, supra note 66. In 1990, the Security Council declared that Iraq’s attempted annexation of Kuwait “under any form and whatever pretext has no legal validity, and is considered null and void.” S.C. Res. 662, U.N. SCOR, 45th Sess., 2934th mtg. at 20, U.N. Doc. S/INF/46 (1990).

68. Vienna Convention on Succession of States in Respect of Treaties, 17 I.L.M. 1488 (1978) (“A succession of States does not as such affect: (a) a boundary established by treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary.”); Territorial Dispute (Libyan Arab Jamahiriya v. Chad), 1994 I.C.J. 1, 4 (“A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way effecting the continuance of the boundary.”).

69. Vienna Convention on the Law of Treaties (“A fundamental change of circumstances may not be involved as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary ... .”).

in holding that international law did not afford Quebec a right to secede, summarized relevant practice on this question:

The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people’s right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state’s territorial integrity or the stability of relations between sovereign states. 71

Second, international law might have developed a rule allowing consolidation to occur within existing borders by any means necessary. This option has also been rather decisively rejected by a majority of States. The international law of human rights will not sanction the forcible subjugation of distinctive communities within States. As Charles Tilly notes, such tactics were common fare during the formative era of European State-building:

The building of states in Western Europe cost tremendously in death, suffering, loss of rights, and unwilling surrender of land, goods, or labor . . . The fundamental reason for the high cost of European state building was its beginning in the midst of a decentralized, largely peasant social structure. Building differentiated, autonomous, centralized organizations with effective control of territories entailed eliminating thousands of semi-autonomous authorities . . . Most of the European population resisted each phase of the creation of strong states. 72


72. Charles Tilly, Reflections on the History of European State Making, in THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE 71 (1975), quoted in Mohammed Aydoob, State Making, State Breaking and State Failure, in MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 37, 40 (Chester A. Crocker et al. eds., 1996)).
This process took many centuries and, at points, degenerated into chaos and bloodshed. Mohammed Ayoob comments that "there was no dearth of 'Somalias' and 'Liberias' in seventeenth- and eighteenth-century Europe." While Western States only "emerged as the responsive and representative modern states that we know them to be today" at the beginning of the twentieth century, forcible rearrangements of population continued. In 1923, Greece and Turkey even entered into a Convention Concerning the Exchange of Greek and Turkish Populations, pursuant to which "Turkish nationals of the Greek Orthodox religion established in Turkish territory" were exchanged for "Greek nationals of the Moslem religion established in Greek territory." Germans were evicted from Eastern Europe following the Second World War. And the fall of communism has given this old technique of national consolidation the new name of ethnic cleansing.

International human rights law now prohibits forced homogenization of virtually any kind. Not only are States prevented from compelling adherence to dominant ideologies, religions, or political groupings, but they are also affirmatively obligated to accommodate the practices of minority groups within their borders. In 1999, States are further obligated to prohibit by law any advocacy that denigrates particular races, religions, or ethnicities. In
international law, the right of individual autonomy in such matters clearly trumps claims of national entitlement to consolidation.

Kosovo exemplifies the lengths to which the international community will go in order to prevent forced internal consolidation. As the conflict between Serbs and Kosovar Albanians escalated, international actors were faced with powerful forces in Kosovo advocating opposing political outcomes: wholesale consolidation into Yugoslavia or full Kosovar independence. The forces of consolidation had some history in their favor. The various attempts at ethnic purification by Serbia included an abortive agreement with Turkey in 1938 to deport up to 400,000 Kosovar Albanians. Repression of the Albanian majority began again in the late 1980s, culminating in massacres and forced deportations in 1998. However, the forces of independence could point to a forty-year history of Kosovar autonomy under Tito and an ethnic, religious, linguistic, and cultural distinctiveness dating to the time of the Ottoman occupation.

The Security Council opted for neither of the outcomes desired by the parties to the conflict. The Council instead endorsed an extreme form of the functional autonomy Kosovo had enjoyed prior to 1989. The Tito-era borders were effectively frozen as the Council affirmed “the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States in the region.” At the same time, all Yugoslav federal authority over Kosovo was effectively terminated. The United Nations Mission in Kosovo (UNMIK), the NATO-led intervention force, was vested with “[a]ll legislative and executive powers, including the administration of the judiciary.” Ultimate decision-making authority over the legal regime applicable to any given question was granted to a Special


86. S.C. Res. 1244, supra note 85, at 2.

Representative of the Secretary-General. The International Security Force (KFOR) exercised control over Kosovo’s borders, both with Serbia and with neighboring States. While the precise status of Kosovo remains highly ambiguous, the ambiguity is entirely a result of the conflicting imperatives guiding Security Council action. Allowing Belgrade to retain full authority over Kosovo would have been inconsistent with a commitment to human rights. But permitting Kosovar independence would have undermined the broad international consensus opposing a right to secession. As a result, Kosovo remained Yugoslav de jure but became independent de facto. This artificially-sustained life in limbo is in marked contrast to the course events would likely have taken in an era before options for heterogeneous States were radically circumscribed through international law. If Kosovo had attempted to secede, it would likely have been reabsorbed into Yugoslavia. This would have been followed by an aggressive campaign of homogenization. As Ayoob notes, “the elimination of states considered inviable, either because of their internal contradictions or because their existence did not suit great power aspirations, was perfectly acceptable to the European international community virtually through the end of the First World War.”

The international community has, thus, left itself few options in addressing the predicament of weak empirical States. Existing borders, which enclose juridical but not empirical States, have been sanctified and cannot be altered through the assertion of a legal entitlement to secede. At the same time, governments in these States cannot forcibly compel adherence to a national political culture.

88. Id. ¶ 39.
90. This sentiment was particularly strong in regard to the Balkans. U.S. Deputy Secretary of State Strobe Talbott stated in an August 1999 speech:

In Kosovo . . . we have suspended Belgrade’s powers as the administering authority over the province. But that does not mean we support Kosovo’s independence. Quite the contrary, we feel that secession would give heart to separatists and irredentists of every stripe elsewhere in the region. Most of all, secession would encourage proponents of Greater Albania—a single state stretching across the Balkan peninsula from Albania proper to northwestern Macedonia, with its own sizable ethnic Albanian population. Greater Albania would be no less anathema to regional peace and stability than Greater Serbia.

91. Ayoob, supra note 72, at 42.
In light of this dilemma, it is worth reiterating why weak empirical States in the developing world have become the subject of international norms. First, weak empirical Statehood undermines the traditional assumption of juridical Statehood that States have at least a minimal institutional capacity to carry out their international obligations. Second, the crises resulting from ineffective domestic institutions have crowded the agendas of international organizations, compelling an exponential and sometimes dubious expansion of their jurisdiction. Third, the principle of juridical equality becomes increasingly detached from reality with the widening of inequalities in empirical Statehood.

III

The third proposition is that international actors are using international law to strengthen the empirical State through norms intended to invigorate and legitimize national political institutions. The empirical State, in other words, has been largely subsumed into the juridical State. But it is a conception of the juridical State vastly expanded from the minimalist model that attended the emergence of early modern European States. It is a notion of Statehood that encompasses all manner of domestic processes contributing to the efficient and equitable conduct of politics. International law now contains rules relating to the whole of the State and, at least in the developing world, is being used to strengthen the capacity of developing States to participate more fully in international life.

This is not to say that international law now reflects a precise blueprint for governmental reform in weak empirical States. As international organizations have become increasingly concerned with domestic politics, many States have been careful to counter-balance calls for more inclusive domestic politics with warnings that no single model of government is appropriate to all (or even most) States. In human rights law, this solicitude is implicit in the “margin

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92. See FRANK, supra note 9, at 218-83 (discussing the expansion of Security Council jurisdiction over “threats to the peace” to include purely internal crises, such as in Libya and Somalia).

93. See Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in their Electoral Processes, G.A. Res. 119, U.N. GAOR, 52d Sess., No. 2 (1997) (“it is the concern solely of peoples to determine methods and to establish institutions regarding the electoral process, as well as to determine the ways for its implementation according to their constitution and national legislation”). See also, BOUTROS BOUTROS-GHALI, AN AGENDA FOR DEMOCRATIZATION I (1996) (“there is no one model of democratization of democracy suitable to all societies”).
of appreciation” afforded States in, for example, designing electoral systems. But recognizing the diversity of national political processes does not mean certain specific goals deemed essential to strengthening the empirical State are lacking.

The overarching framework of these efforts has been the encouragement of transitions to political democracy. In more or less explicit terms, the UN Secretary-General, the Security Council, the General Assembly, the Human Rights Commission, various regional bodies, and international lenders have all identified democratic institutions as the vehicle by which governance can become coherent, peaceful, and legitimate. While these actors do not always define “democracy” with precision, they frequently speak of the familiar pairing of majoritarian elections with the protection of counter-majoritarian rights. Elections are seen as seminal transition points, and much international effort has gone into monitoring elections and, where the results are not respected, exerting pressure to allow the victors to take office.

96. See Fox, Self-Determination, supra note 65, at 753 n.98 (citing numerous Security Council resolutions affirming the importance of democratic transitions to the permanent resolution of internal conflicts).
97. See Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization, G.A. Res. 50/185 (1995) (The “assistance provided upon the request of Governments for the conduct of free and fair elections, including assistance in the human rights aspects of elections and public information about elections, is of particular importance in the strengthening and building of institutions relating to human rights and the strengthening of a pluralistic civil society.”).
99. See, e.g., Case of Socialist Party and Others v. Turkey, Case No. 20/1997/804/1007, ¶ 47 (1998) (“It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organized, provided that they do not harm democracy itself.”).
The United Nations and many regional organizations now maintain permanent election-monitoring divisions that are at the disposal of Member States. There are also a large number of non-governmental bodies that work in tandem with the international organizations monitoring elections. The pervasiveness of election-monitoring is now such that it is quite difficult for a government to "rig" or overturn an election without the knowledge of outsiders.

During the Cold War, such initiatives would have foundered on ideological divisions as to what constitutes a "free and fair" election, whether monitoring elections infringes on States' protected domestic jurisdiction, and on the consequences for inter-State relations of declaring a particular candidate or party the victor in a national election. While these three questions continue to provoke vigorous debate, there is now a substantial practice supporting tentative answers. On the question of defining a "free and fair" election, the fundamental criteria are to be found in such human rights instruments as Article 25 of the International Covenant on Civil and Political Rights. Treaty bodies have developed a substantial jurisprudence elucidating the requirements of these instruments, resolving such difficult interpretive questions as whether one-party elections are consistent with requirements of choice and freedom of association (they are not). The UN

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103. The following section is taken largely from Gregory H. Fox, The Right to Political Participation in International Law, in Democratic Governance and International Law (Gregory H. Fox & Brad R. Roth eds., forthcoming 2000).

104. Article 25(b) provides that every citizen shall have the right "to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." See also, American Convention on Human Rights, art. 23(1)(b); Protocol (No. 1) to the European Convention on Human Rights, art. 3 (1952); African Charter on Human and Peoples' Rights, art. 13(1).

and other election monitors have developed criteria of fairness that have been used so many times that they now approach the status of boilerplate. 106

As to the second issue, until quite recently international lawyers assumed that holding national elections, or indeed any questions related to the selection of national leaders, were matters reserved to States' domestic jurisdiction. 107 This was true, it was believed, because international law simply did not reflect any particular theory of governmental legitimacy. This claim is still made today, most prominently in a series of General Assembly resolutions. 108 However, as a description of State practice, such agnosticism regarding the merits of democratic government is simply inaccurate. Global and regional organizations have, on several occasions, issued resolutions condemning the overthrow of elected governments and calling for the restoration of "legitimate" rulers. 109 Of particular note are resolutions of the African Commission on Human Rights, in which it has declared "the fundamental principle that all governments should be based on the consent of the people freely expressed by them and through their chosen representatives." 110 Addressing military regimes, the African Commission called upon "incumbent military governments to hand over political power to democratically elected governments without prolonging their incumbencies and unnecessarily delaying the return to democratic civilian rule." 111 When the elected government of Sierra Leone was ousted by a military junta on May 25, 1997, the Organization of African Unity foreign ministers "strongly and

107. See RESTATAMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §203, cmt. e (American Law Institute ed., 3d ed. 1987) ("International law does not generally address domestic constitutional issues, such as how a national government is formed.").
108. See Respect for the Principles of National Sovereignty, supra note 93, at para. 1 ("by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right, freely and without external interference, to determine their political status and to pursue their economic, social and cultural development"). Virtually identical resolutions were adopted in prior years.
unequivocally" condemned the coup and called on "all African countries, and
the International Community at large, to refrain from recognizing the new
regime and lending support in any form whatsoever to the perpetrators of the
coup d'état."

Summarizing recent experience, the UN Secretary-General has described
as an "established norm" the view that "military coups against democratically
elected Governments by self-appointed juntas are not acceptable." While
these actions focus predominantly on usurpations of elected regimes, rather
than States in which "free and fair" elections have not been held at all, the
question of governmental legitimacy is clearly no longer part of the protected
domestic sphere.

The third question, concerning the consequences of a democratic
legitimacy principle, presents the area of greatest normative innovation. The
idea of governmental legitimacy involves substantive criteria that determine
a regime's entitlement to represent the State it purports to govern.
Governments stand in an agency relationship with States. A principle of
democratic legitimacy would legally disqualify agents not chosen according
to "democratic" procedures. While, in theory, the legitimacy principle set out
in instruments such as Article 25 of the International Covenant on Civil and
Political Rights would mandate de-recognition of all regimes not chosen
democratically, few international actors have advocated such an extreme
position. The European Union has come closest to this view by limiting its
new membership to democratic States that respect basic human rights.

What is more common is an adherence to legitimacy criteria where elected
governments have been ousted by extra-constitutional means. The
Organization for Security and Cooperation in Europe, Organization of
American States, and MERCOSUR have all adopted policies of refusing to
recognize coup-installed regimes in their Member States. Organs of the

112. Decision Adopted by the Council of Ministers of the Organization of African Unity at its Sixty-


115. In its Moscow Document, the participating states of the OSCE (then the CSCE) pledge to "support
vigorously" the "legitimate organs" of a state in case of "overthrow or attempted overthrow of a legitimately
elected government." Conference on Security and Co-operation in Europe: Document of the Moscow
Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the
its 1992 Washington Protocol, provided for the suspension from its General Assembly of any member state
"whose democratically constituted government has been overthrown by force." 1992 WASH PROTOCOL,
United Nations have refused to accredit delegates from such regimes as Cambodia, Haiti, and Sierra Leone. In the cases of Haiti and Sierra Leone, the UN Security Council also took the remarkable step of authorizing military intervention in order to restore the elected leaders to power. In the cases of Nigeria and Myanmar, where winners of elections were prevented from assuming office, UN organs have only condemned the actions and called upon the incumbent governments to respect electoral results. The European Union (EU) has taken a slightly different approach, inserting provisions in all its treaties with non-EU States providing that the observance of democratic principles is an essential element of the instrument. Failure to adhere to such principles will constitute a material breach of the treaty, permitting the EU to suspend compliance with its treaty obligations.

The problem of acute heterogeneity is only partially addressed, however, by a system of majoritarian democracy. Even in a system of proportional representation, a minority group may find itself either unable to muster a plurality of popular votes, or to join ruling coalitions with other minorities.


116. See U.N. Doc. A/52/719, ¶ 5 (1997) (UN General Assembly’s Credentials Committee refuses to accept credentials of rival Cambodian factions, thus denying representation to Hun Sen regime in effective control of the country); The Situation of Democracy and Human Rights in Haiti, supra note 109 (affirming as “unacceptable any entity resulting” from coup against Aristide government in Haiti); BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 406 (1999) (deposed government of Sierra Leone retained its seat in the General Assembly).


International law responded to this problem beginning with the majority protection regimes of the inter-war period. In the post-Cold War era, as David Wippman has demonstrated, international law has reflected a careful balance between the assimilationist tendencies of many majority cultures and the preservation of minority groups' communal integrity. Recent minority-rights instruments have done so by "explicitly ban[ning] policies or practices aimed at involuntary assimilation," as well as by prescribing "affirmative measures designed to enable minorities to resist more subtle assimilationist pressures." Cultural, ethnic, and religious identities are thereby protected. While these instruments appear to embrace pluralism as a permanent and indeed positive phenomenon, they nonetheless provide that minorities must also have opportunities to participate effectively in national political processes.

Finally, enhancing the rule of law in developing countries is a third means of fostering legitimate governance. "Rule of law" is something of an umbrella term, encompassing norms such as: a right to a remedy for violations of human rights, limitations on amnesties for violators of fundamental human rights, fairness considerations in the administration of justice.

121. *Id.* at 606.
123. Wippman, *supra* note 120, at 608 n.55 (citing a variety of instruments providing for right of effective participation in public affairs).
125. *See sources supra* note 41. *See also*, Caso Castillo Paez, Inter-Am. C.H.R. I/A, 34, OEA/ser.I/R./34.90 (1997) (State under a duty to investigate human rights abuses); Aksoy v. Turkey, 26 Eur. Ct. H.R. at 2287 (1996) ("[T]he notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.").
126. The UN Human Rights Committee has observed that:

some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of the States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an
justice (due process), and guarantees of judicial independence. These initiatives are designed to enhance the predictability and neutrality of national legal systems. In a sense, they are the corporeal embodiment of a strengthened empirical State, designed to translate its values of inclusion and tolerance into concrete outcomes.

Each of these international legal initiatives seeks to assist in legitimating national political institutions and processes. Of course, political legitimacy can be measured in a variety of ways. A government brought to power by citizen consent (legal legitimacy) may nonetheless fail to meet popular expectations (empirical legitimacy), or it may govern unjustly (moral legitimacy). International law, quite obviously, reflects primarily legal conceptions of legitimacy. For example, human rights instruments requiring free and fair elections prescribe an institutional framework that is presumed by a theory of popular sovereignty to legitimate the exercise of power. Realistically, international law can achieve little more. Global and regional organizations are simply not in a position to assure effective governance in their Member States, let alone to ensure that rulers exercise power in accordance with a particular moral scheme.

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129. See BEETHAM, supra note 28, at 4-7.

130. See, e.g., Universal Declaration of Human Rights, supra note 41, art. 21, para. 3 (providing that "the will of the people shall be the basis of the authority of government." The Declaration goes on to require that the "will" be expressed "in periodic and genuine elections"). The Human Rights Committee has stated that Article 25 of the Covenant on Civil and Political Rights, guaranteeing genuine periodic elections, "lies at the core of democratic government based on the consent of the people." General Comment 25, para. 1 (Dec. 7, 1996).
The notion of legal legitimacy, however, carries with it what might be called a “weak” theory of empirical legitimacy. This weak theory is a central element in efforts to strengthen developing States, for those efforts respond to the reality of governmental dysfunction. Unless the legitimation initiatives described above make tangible differences in the quality of governance, they will fail to address the weaknesses of the empirical State. At the same time, international law simply cannot be a guarantor of ruptured social contracts in developing countries. A “strong” theory of empirical legitimacy, stemming from international legal requirements, is therefore not a viable option.

The weak notion of empirical legitimacy proceeds from an assumption about human behavior made by the legal perspective. The legal theory assumes that if citizens participate in selecting their government, and are given opportunities to influence policy once the government is in power, they will perceive a congruence between their interests and those of the government. By virtue of this congruence, States have assumed that a legally legitimate government in international law will be one— to borrow Thomas Franck’s phrase used in another context— that exerts “a pull towards compliance.” That is, citizens are more likely to feel an affinity toward a regime believed to have emanated from a legitimate political process. This is a “weak theory” of empirical legitimacy because it asserts only that, all other things being equal, legally legitimate regimes are likely to secure the adherence of their citizens more readily than legally illegitimate regimes. It does not assert that they will do so, since any number of events may cause citizens to become disillusioned with such a government.

on a Firm and Lasting Peace" contains a straightforward statement of the legal legitimacy principle: "Elections are essential for Guatemala’s current transition to a functional, participatory democracy. Improving the electoral regime will help to strengthen the legitimacy of public authority." In addition, the agreements describe participatory democracy as essential to healing the fragmentation of Guatemalan society and fostering a sense of affinity between Guatemalan citizens and their government. This passage is worth quoting at length:

Peace rests upon democratization and the creation of structures and practices which will, in the future, prevent political exclusion, ideological intolerance and the polarization of Guatemalan society.

It is essential to overcome the deficiencies and weaknesses in civil institutions, which are frequently inaccessible to most of the population, and the prevalence of patterns of thought and behaviour that have been detrimental to the rights and freedoms of citizens. . . .

Together with the agreements already signed, this Agreement seeks to create the conditions for genuine reconciliation among the people of Guatemala, based upon respect for human rights and the diversity of its people and on their shared determination to overcome the lack of social, economic and political opportunities, which undermines democratic coexistence and restricts the development of the nation.

The implementation of this Agreement will benefit the whole population, consolidate the governance of the country and enhance the legitimacy of its democratic institutions in the interest of the people of Guatemala.136

Weak as it is, even this assertion of empirical legitimacy is often challenged. One common claim is that popularly legitimated government will

136. Id. at 304-05.
actually increase citizen alienation from the State by exacerbating existing ethnic cleavages. This is a complex subject that I cannot address fully here; however, several points can be made briefly. First, the fact of ethnic conflict must be distinguished from ethnic conflict resulting directly from liberalizing political processes. At least in Africa, "[t]he endemic civil strife following communal lines in polities such as Sudan and Somalia is entirely unrelated to democratic process." Indeed, ethnic violence has often been most acute in those States in which leaders resist political liberalization on the grounds that it would exacerbate ethnic conflict.

Second, more moderate goals than the wholesale elimination of ethnic conflict may be sufficient to allow pluralistic systems to function. Identity politics is a staple of campaigns in Western States; no ambitious politician (in the United States, in particular) would wholly ignore the interests of racial, ethnic, and religious voting blocs. The crucial difference is that these interests are not all-consuming to voters or wholly defining of who is in and who is out of power. As Harvey Glickman notes, "[e]thnic conflict is not incompatible with institutions of democratic government, when its expression is limited to a group interest among other interests, and if the means of expression provide openings to share rewards in a predictable manner."38 There are various ways in which electoral and regulatory institutions can be structured in order to minimize the role played by ethnic identity. As two other commentators argue, "[t]he rules of the political game can be structured to offer incentives for moderation on divisive ethnic themes, to contain the destructive tendencies, and to preempt the centrifugal thrust created by ethnic politics."39

Third, one must return to the fundamental crisis prompting a concern with empirically weak States and ask for a plausible alternative. Given the permanency of existing borders and the inadmissibility of assimilation through coercion, how else can diversity be accommodated? Crawford Young suggests that the alternatives are unsatisfactory: "[a]ccumulated experience in many world regions suggests that cultural pluralism needs to be acknowledged rather than ignored, through arrangements that induce

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inclusionary politics and create structural incentives for intercommunal cooperation.\textsuperscript{140}

The legal theory of legitimacy, as applied to the developing world, is also empirically weak in that it lacks a foundation in community experience.\textsuperscript{141} As noted earlier, in the developing world, juridical and empirical States arose (if at all) at separate times and through separate processes. Governments in these States cannot appeal to a common ethnicity, language, religion, etc. as a means of securing a sense of affiliation to the State. What remains is an affiliation defined by the institutions of government, flowing both from those institutions' stated goals of openness and inclusiveness and from the sense of common purpose that attends citizen participation in acts of collective decisionmaking. This form of affiliation has variously been labeled "civic identity" and "liberal nationalism."\textsuperscript{142} It suffers from the obvious disadvantage of being essentially ahistorical. As Habermas points out, in Europe people spread over large territories came to feel "responsible for one another" only after "the awareness of a national identity crystallized around a common history, language and culture."\textsuperscript{143} But if this form of affiliation appears to be little more than a legal construct, it must be remembered that many developing States are themselves legal constructs. If international law foreclosed the option of creating new, more "historically determined" States, then we can hardly expect existing heterogeneous States to provide historically conditioned notions of citizenship and affinity.

IV

The fourth proposition is that new international regulatory regimes have incorporated requirements of popular participation, transparent decisionmaking, and the free flow of information as essential components of their normative schemes. Chayes and Chayes have defined regulatory regimes as those addressing "complex economic, political and social problems that

\textsuperscript{140} Young, supra note 137, at 32.
\textsuperscript{143} Habermas, supra note 25, at 130.
require cooperative action among states over time.

While these are not direct efforts to strengthen the empirical State, they make an important and independent contribution. Each of these regimes holds out the promise of benefits to State parties. Tangible incentives are thus created, in the form of normative entitlements, for States to ensure the inclusiveness of their political institutions. Three prominent examples are environmental protection, the rights of indigenous peoples, and efforts to combat official corruption.

Public participation in environmental matters is certainly not a new concept. Most environmental movements in the developed world began with grassroots movements gaining sufficient power to influence policymakers. In Europe, for example, issues of environment emerged on national agendas with the rise of Green parties. In the United States, important doctrines of environmental law are made through the vehicle of "citizen suits." Many of the demands made by these citizen groups involve calls for greater openness, such as governmental disclosure of environmental hazards, and regular opportunities for public comment on environmentally sensitive matters. Multilateral initiatives have been infused with the same imperative of participation.

The 1992 Rio Declaration states the matter directly: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level." Accordingly, many environmental instruments require State Parties to issue environmental impact assessments, provide transparency in decisionmaking, and allow public access to relevant information. The Economic Commission for Europe has adopted a convention devoted solely to public participation in environmental matters. The convention states in its preamble that in order to achieve a healthy environment, "citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters."

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144. CHAYES & CHAYES, supra note 3, at 1 (identifying the chief areas of concern for such regimes as "trade, monetary policy, resource management, security, environmental degradation, and human rights").


147. These instruments are described in detail in Ebbesson, supra note 145.


149. Id.
The second regime, concerning the rights of indigenous peoples, is not commonly understood as addressing governmental processes at the national level. Indigenous peoples and groups have more often stressed the need for local autonomy in matters of concern to their communities.\textsuperscript{150} But given that national governments make important decisions affecting indigenous communities, and that "representation of indigenous peoples [at the State level] remains inadequate and is sometimes purely symbolic,"\textsuperscript{151} enhanced participation nationally is also essential if rights are to be protected. Thus, the Sub-Commission's Draft Declaration on the Rights of Indigenous Peoples provides in Article 19 that: "Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matter which may affect their rights, lives and destinies."\textsuperscript{152} Rights to participation can also assist indigenous peoples in making otherwise apathetic publics aware of their plight. As Mary Ellen Turpel argues, "[w]ithout enormous resources to wage lobby efforts, media campaigns, and education initiatives, some direct access to the state apparatus is required to get public attention and to mobilize opinion effectively."\textsuperscript{153}

The third example is the recent multilateral effort to combat official corruption. An evident link exists between political institutions closed from public scrutiny and the opportunity for corrupt activities. For this reason, anti-corruption initiatives have stressed the interplay between political democracy and the exposure (and deterrence) of corrupt acts. The Inter-American Convention Against Corruption states in its preamble that "representative democracy . . . requires, by its nature, the combating of every form of corruption in the performance of public functions."\textsuperscript{154} Similarly, the UN General Assembly, in an International Code of Conduct for Public Officials,
stressed the importance of public accountability in countering the self-interest of the corrupt official: "the ultimate loyalty of public officials shall be to the public interests of their country as expressed through the democratic institutions of government."  

V  

The fifth and final proposition is that strengthening the empirical State in the developing world is essential to the continued vitality of juridical equality among States. I have already noted how the principle of juridical equality is undermined by the very different empirical origins of developed and developing States. Because empirical cohesion was an assumption of juridical Statehood, this inequality is different from the standard claim of inequality based on size or disparity in resources. It is, instead, an inequality of capacity to function as a coherent political unit in relation to international law. That is, the capacity to perform the minimal obligations of Statehood that are essential to a community of States).  

This type of inequality might be altered in two ways: by changes in the empirical strength of States or by changes in the demands international law places upon States. I have already discussed the former. The fifth proposition concerns the latter. It contends that recent multilateral regimes have assumed a drastically increased capacity to implement international norms. The new regimes make demands on every domestic institution and political process. They require efficient legislative bodies capable of enacting appropriate implementing legislation, effective regulatory agencies, and judicial systems that will respond decisively to alleged violations of international standards. Even a State endowed with sufficient resources, but without a government commanding a sense of legitimacy among its citizens, will be unable to serve as a conduit for the realization of international normative goals. Weak empirical States have difficulty enforcing their own laws, let alone international obligations. This may be because the institutions of government simply do not function in many areas of the country; because laws routinely

156. See supra notes 15-63 and accompanying text.  
157. A quantitative aspect to these developments is also evident: there is simply more international law to implement now. In 1956, just before the majority of developing States achieved independence, there were 132 inter-governmental organizations in the world. In 1998 the number had increased to 4414. 1 YEARBOOK OF INTERNATIONAL ORGANIZATIONS 1764 (Union of International Associations ed., 1999).  
158. See, e.g., Jeffrey Herbst, Responding to State Failure in Africa, INT’L SEC., Winter 1996-97, at
under- or unenforced have come to be seen as so many "pieces of paper;" or because unaccountable leaders divert public resources for their own use.\footnote{159} Whatever the specific cause, where "a sense of nationhood is only weakly developed . . . its absence will be revealed in the degree of loyalty the state can command when under pressure."\footnote{160} This aspect of empirical weakness stands apart from the question of resources.

There are numerous examples of the heightened demands international law places on domestic institutions. In the area of environmental protection, the Convention on International Trade in Endangered Species of Fauna and Flora requires States to designate four separate management authorities to oversee trade in the species listed in various appendices.\footnote{161} Among other things, these authorities are charged with issuing species export permits (subject to a list of specified conditions) and determining the validity of exceptions.\footnote{162} The Montreal Protocol on Substances that Deplete the Ozone Layer requires the reduction of certain ozone-depleting substances by specified dates, the achievement of which is to be measured by data accumulated by State Parties themselves.\footnote{163} The Convention on Biodiversity requires States to develop national strategies to conserve biodiversity, including \textit{in situ} conservation measures and the promotion of public awareness of biodiversity.\footnote{164} And the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal specifically requires implementing action at the State level, including the designation of a focal point for implementation, the enactment of implementing legislation, and the dissemination to the Convention Secretariat of information regarding Convention-related events.\footnote{165}

\footnote{120, 123 (noting that in many African States "[e]ven the most basic agents of the state—agricultural extension agents, tax collectors, census takers—are no longer to be found in many rural areas. As a result, some states are increasingly unable to exercise physical control over their territories").}

\footnote{159. In Nigeria, for example, a state rich in natural resources, a regime that jailed the winner of multiparty elections engaged in corruption on a scale that left the government literally bereft of capital. "Most of Nigeria's revenue was paid into private bank accounts before the return to democracy, and senior members of successive military administrations amassed fortunes amounting to billions of dollars." BBC News, \textit{Nigeria Purges Military}, (June 10, 1999) <http://news2.thls.bbc.co.uk/hi/english/world/africa/newsid%5F365000/365497.stm>.}

\footnote{160. \textsc{Beetham, supra} note 28, at 133.}


\footnote{162. \textit{Id.} art. IV.}


Innovations in the General Agreement on Tariffs and Trade and the World Trade Organization (GATT/WTO) regime require open and efficient regulatory institutions. One example is the Uruguay Round's Agreement on Import Licensing Procedures, which requires States to publish information sufficient to make clear the basis on which import licenses are granted.\textsuperscript{166} Changes in licensing procedures must also be made public.\textsuperscript{167} As Jeremy Rosen argues, "[t]ransparency is important because if the rules are not clearly stated and available, foreign traders would be at a serious disadvantage because they would not know how to comply with local rules, and therefore might not be able to secure a license."\textsuperscript{168} Another example is the Agreement on Trade-Related Aspects of Intellectual Property Rights,\textsuperscript{169} which for many developing States will require the creation of an entirely new legal regime to protect intellectual property.\textsuperscript{170}

A third example is the complex of undertakings that comes with claiming an Exclusive Economic Zone (EEZ) under the UN Law of the Sea Convention.\textsuperscript{171} These include establishing laws and regulations governing access by foreign nationals,\textsuperscript{172} devising conservation measures for the living resources of the EEZ,\textsuperscript{173} and policing the EEZ against unauthorized foreign intrusion.\textsuperscript{174} A combination of factors, including scarce resources, "have made it very difficult, particularly for small developing countries, to turn their newly acquired legal authority into the economic benefits they had sought to gain from the EEZ regime."\textsuperscript{175}

A fourth example is the various conventions on international judicial assistance drafted by the Hague Conference on Private International Law.\textsuperscript{176}


\textsuperscript{167} \textit{Id.} art. 5.


\textsuperscript{169} Agreement on Trade-Related Aspects of Intellectual Property Rights, \textit{in Agreement on Import Licensing Procedures, supra note 166, Annex IC.}


\textsuperscript{172} \textit{Id.} art. 62(4).

\textsuperscript{173} \textit{Id.} art. 61.

\textsuperscript{174} \textit{Id.} art. 73.


\textsuperscript{176} For a description of the Hague Conference, see GARY B. BORN, \textit{INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS} 796-97 (3rd ed. 1996).
The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters requires State Parties to designate a “central authority” which arranges to have documents served in its territory, and prepares certificates to show that service occurred. The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters requires State judicial authorities to execute document requests expeditiously from other contracting parties and to apply appropriate measures of compulsion in order to obtain requested documents. In addition, the Convention on the Civil Aspects of International Child Abduction requires its “central authorities” to perform a wide range of administrative tasks, from discovering the whereabouts of an abducted child, to securing the voluntary return of the child, to providing legal advice where appropriate.

A final example involves the organizations overseeing regional economic integration in the developing world. Teshome Mulat counts eleven major African regional and sub-regional economic communities in 1998, with many other smaller organizations having the potential to evolve into economic communities. With few exceptions, these organizations have failed to advance the cause of economic cooperation. Much of the problem lies not in the integration schemes themselves, but in the national institutions of their Member States. As R. Kenneth Kiplagat observes, “the institutional, political, and legal arrangements within developing countries have been weak, and this weakness has permeated their interstate dealings.”

CONCLUSION

This Essay has asked whether international law is working to marginalize the State in the developing world. While a variety of global trends might appear to make this so, a crisis of empirical governance has in fact led States to pursue the opposite goal in international law. The empirical State has always been a marginal presence in the developing world. However, this
weakness has become a subject of regulation in international law because of the increasing demand multilateral regimes impose on national institutions of government. These demands range from implementing sophisticated trade and environmental regimes, to respecting human rights, to combating corruption, and to granting indigenous peoples a voice in national government. In addition, international organizations, freed from the paralysis of the Cold War, have become deeply involved in settling internal conflicts that disrupt the process of governance, sometimes to the point of total breakdown. In short, the international community has a range of interests to be furthered by strengthening empirical Statehood in the developing world.

This imperative is reinforced by the lack of alternative means to promote effective governance. European States benefitted from an international law that ratified the borders of political communities emerging from centuries of reconfiguration and consolidation. Modern conceptions of the State had their origins in this process, and so assumed a coincidence between empirical and juridical Statehood. States in the developing world are often characterized by the absence of such a coincidence. Yet, international law contains rules that deny developing States and peoples the possibility of taking drastic action to bring themselves in line with the European model. A right to secession, which would have acknowledged the contingent nature of borders largely drawn by colonial authorities, has been decisively rejected. Discretion to homogenize populations within existing borders, to accord with the linguistic, religious, cultural, or other preferences of the dominant group, has also been decisively rejected by the international law of human rights. Permitting either of these courses of action would have acknowledged that European assumptions of empirical Statehood simply could not be transferred to the developing world. But the majority of States have been unwilling to relinquish that assumption in international law. States have largely taken an extraordinarily conservative position by, in effect, adopting a normative freeze on current borders and national demographic profiles. In international law, heterogeneous States with little common history are here to stay.

The only option, then, is to focus on the governing institutions of existing States. If heterogeneity has been the problem, then inclusiveness must be the guiding principle of a normative solution. Initiatives to foster transitions to democracy, respect for minority rights, the creation of civil societies, and transparent regulatory processes all work to legitimize government in the eyes of citizens with little sense of affinity to the State that the government
represents. It is hoped that enhancing a regime’s legitimacy will also enhance its capacity for effective governance.

This “weak” theory of empirical legitimacy is the link between these efforts and more effective implementation of international regulatory norms. At present, there is a radical disjunction between the regulatory actions called for by recent multilateral treaty regimes and the capacities of regulatory authorities in developing States. This raises the specter of inequalities between the developed and developing worlds expanding with the creation of each new multilateral treaty regime. While inclusive and legitimate government cannot itself prevent this from occurring—many other problems, first and foremost the lack of resources, must also be overcome—it is a necessary step. If legitimate government is generally acknowledged as essential to effective implementation of complex domestic law, it is no less essential to enforcement of multilateral regimes of the same kind.

Despite a host of new actors appearing on the international scene in recent years, “states are and must remain the overwhelmingly important subjects of international law.” The effective function of States cannot help but implicate every aspect of the international legal process. Efforts to strengthen developing States recognize the substantial cost and fundamental inequity of allowing an entire sector of States to continue to be marginal players in the international legal system. For those States, continued empirical weakness portends nothing less than the further marginalization of international law itself.
