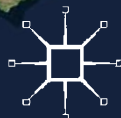
International Development Organizations and Fragile States

Law and Disorder

MARIE VON ENGELHARDT

GOVERNANCE AND LIMITED STATEHOOD



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CHAPTER 1

Introduction

Statehood matters in development cooperation, and so does state fragility. The provision of financial aid by states or international organizations to developing countries depends on two basic conditions: a state must exist and it needs an authorized and competent government. International organizations require government counterparts with the capacity to express consent and to legally commit a country. The transfer of financial aid is contingent on national governments having the capacity to meet specific requirements and to assume responsibility in the development process. In the large number of so-called fragile states that are characterized by weak institutions and poor governance, the lack of a government with both legal and factual capacity can thus significantly complicate, delay, and even prevent development cooperation—in places with the most urgent needs.[1]

When South Sudan became the world's youngest state in July 2011, the country had some of the world's lowest development indicators: half of the population had no access to drinking water, and chances of dying in child birth were higher than completing school for 15-year-old girls.[2] International development organizations like the World Bank sought to assist in building the new state from scratch.[3] To ensure that its resources were used effectively and meet development objectives, however, the World Bank also had to insist that the nascent government fulfils largely the same bulk of requirements as any other state requesting financing.[4]

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With few institutions actually in place and functioning, South Sudan was expected to have a reasonably effective public financial management system, a national framework for the attainment of environmental and social standards, and of course the ability to plan and implement development projects. In short: Before the World Bank could assist in building state institutions, it required a certain level of institutional capacity on the part of the state.

South Sudan is not the only example where the discrepancy between a state's formal legal status and its actual capacity complicated development cooperation in manifold ways. Most post-conflict countries like Kosovo, East-Timor, Afghanistan, and Iraq went through a period where an official government had yet to emerge and develop the type of institutions and administrative capacity that are usually prerequisites for donors to transfer financial aid. Somalia had no functioning government for a period of 12 years—and thus no entity authorized to even request assistance from the African Development Bank, or ratify the Cotonou Agreement,[5] the basis for aid from the European Union (EU).[6]

Looking at development cooperation with fragile states, a problem thus becomes concrete that goes to the heart of international law. Public international law knows only states and non-states and operates on the formal premise that all states have an effective government.[7] This formal premise does not correspond to a reality in which many entities with the legal status of states are actually unable to fulfil even most basic functions. The counterfactual nature of juridical statehood and the principle of sovereign equality thus mask a fundamental challenge that state fragility can pose to the functioning and effectiveness of the international legal order. It crucially depends on the existence of states and governments with a certain level of institutional and administrative capacity necessary to exercise rights and obligations, and to partake in international cooperation.

Yet while international law has remained blind to the actual differences between equal sovereigns, international development organizations, which operate on this premise and within its confines, have not. Arguably, development cooperation has always been concerned with strengthening the effectiveness of government (and governance) in developing countries. As subjects of international law, however, development organizations also operate on the basis of rules that presuppose the existence of an effective government. The lack of a government with both legal and factual capacity can thus stand in the way of providing assisting—a problem that

has attracted increasing attention since latent fragmentation and overt crises in countries deemed fragile have become a key concern for the international donor community.

In this book, I argue that international development organizations have therefore adapted rules that govern the provision of development aid, adapted to reflect the lack or severe limitation of government effectiveness in fragile states. By analysing the mostly internal rule-making activities of the World Bank and a range of other organizations in comparison, I show how a differentiated approach to dealing with fragile states has been implemented in the law of development cooperation—with significant effects on the rights and obligations accorded to fragile states in the development process.[8] Exploring the case of international development organizations holds a broader relevance. It proves how in the actual practice of international cooperation, state fragility has triggered a legal response—with all the potentials and perils involved where international organizations address a problem that based on the principle of sovereign equality, international law deliberately neglects.

1 Objectives of the Book

This book was born out of an academic interest in international law, and practical engagement with fragile states in development cooperation. As an international legal scholar, I was struck by the observation that although fragile state is not a legal category or concept, how international development organizations address the challenges of engaging with countries they deem fragile may well be of legal significance. There seemed to be a large gap between the positivist assertion that variations of government effectiveness have no bearing under international law, and an often messy reality in which international organizations seek to respond to the practical and legal challenges of engaging with countries that have very weak or no government. The ensuing response of international development organizations should interest legal scholars, because it involves the use of formal and informal legal instruments and concerns the rights and obligations accorded to fragile states. At the same time, in the practice of development cooperation, the legal dimension of the challenges of dealing with countries that have no or very weak government is often not fully considered. A general understanding of the regulatory approaches and instruments that different organizations have used, or could use, to better address these challenges is missing.

Accordingly, this book pursues three main objectives. The first objective is to shed light on a phenomenon that has largely escaped the grasp of legal scholars, although (or because) it concerns international law's very foundations.[9] It is a truism that international law defines the state as a constant, not a variable. International law is concerned with the effectiveness of governments when considering the emergence and discontinuity of states, but not with the evolution of their effectiveness. Importantly, the counterfactual nature of law's conception of statehood and sovereignty serves a crucial purpose: to prevent material inequality and factual power discrepancies from translating into law, and hence to protect national autonomy and self-determination.[10] Ideas of 'uncivilized', 'underdeveloped' or 'failed' countries have indeed been used as part of a narrative to justify various kinds of interventions in country's domestic affairs in the past.[11] Therefore, state fragility may be a political construct and, to some extent, an empirical phenomenon—but it is deliberately no legal concept.

Still, the discrepancy between the formal legal status of a state and its factual capacity—between juridical statehood and empirical statehood—undoubtedly poses a problem to the decentralized international legal order. It relies on states having the capacity to exercise rights and obligations, and to implement international law domestically. In essence, international law does not only presume, but also requires states with an effective government, which thus becomes a precondition for the functioning and effectiveness of in fact all international legal regimes.

While the ensuing challenges are widely acknowledged, international legal scholarship has generally limited itself to studying the legal consequences of a complete breakdown of government, like in Somalia.[12] In contrast, state fragility, which encompasses effectiveness deficits that fall short of a complete government breakdown, is certainly more difficult to grasp. It can, however, equally challenge the functioning and effectiveness of legal regimes, if states lack the capacity to participate in intergovernmental fora of decision-making, to comply with an increasing reach and depth of international regulation, and to give real effect to the commitments they enter into. At the same time, with some 30–50 countries considered as 'fragile', state fragility has far more real-world significance than rare incidents of state collapse.[13]

I aim to illustrate the concrete challenges that dealing with fragile states can pose to the subjects of a state-centric international legal order, and to the functioning of international legal regimes. By analysing the regulatory

activity of international development organizations, I show that such challenges are already being addressed in practice—and not just *ad hoc*, but involving the use of formal and informal legal rules to consolidate and formalize a differentiated approach. Ultimately, a look at the actual position that fragile states are accorded could yield more shades of grey than the formal conception of sovereign statehood—the neat picture of internal authority and external equality—suggests. As the distinguished international legal scholar Joseph Weiler already hypothesized: "the international community and international law in certain circumstances contemplate an evolving legal reality of statehood".[14]

This book is not only about fragile states, however, but also about development cooperation with fragile states. After all, this is where the discrepancy between juridical statehood and empirical statehood comes to bear. And it is here that we observe how international organizations have sought to deal with countries that have the legal status of states, but very weak factual capacities, in an increasingly systematic and formalized way, adapting rules that inform the allocation, planning and implementation of aid.

My second objective is thus to highlight an important legal dimension to the challenges of aiding fragile states, which has so far received little attention in the relevant academic or policy-oriented literature.[15] Traditional development cooperation is state-centric: it primarily consists of an intergovernmental process, whereby donor states or international organizations provide financial and technical assistance to recipient states, developing or newly industrializing countries.[16] Counterparts in these countries are national governments, which are expected to take the lead and 'own' the development process.[17] For based on the current aid orthodoxy, not only a certain level of institutional capacity and good governance on the parts of recipient countries, but also commitment to assume ownership are seen as preconditions for aid to be effective. Such conditions are often not met in the weak-capacity, conflict-affected and politically charged environments now associated with fragile states.

In the vast literature on the factors that make aiding fragile states challenging, however, one basic dimension has often been overlooked, or perhaps taken for granted. International development organizations must treat recipient countries as legal sovereigns: They need a government counterpart that can formally request their engagement, and negotiate and sign the international legal agreements on the basis of which they provide assistance.[18] Moreover, development organizations operate on the

basis of a legal agreement themselves, the founding treaty, which determines for what purposes and under what conditions they can engage with a country. Most organizations are thus bound to ensure that the resources they provide are used effectively and support development objectives.[19] They hence establish an array of substantive and procedural requirements that recipient governments must meet in order to receive aid—which demands a certain level of institutional and administrative capacity. Even aid orthodoxies like the ownership principle are regularly incorporated in the rules that guide the conduct of international development organizations, which are committed to accord a decisive role to recipient governments in the development process.

Accordingly, not only factors like insecurity, weak capacity or poor governance make fragile states a particularly challenging environment for development cooperation; rather, an intricate blend of technical considerations, political concerns, and legal issues come together. International development organizations are concerned with strengthening the effectiveness of governments in developing countries. But they equally operate on the basis of rules that presume the existence of effective government counterparts. It is those rules that can significantly complicate, delay or even prevent development assistance in the absence of a government with legal and basic factual capacity—and eventually deprive a population of urgently needed assistance. How do development organizations engage in situations where no official government exists? How do they assist countries that seem to lack the minimum capacity required to qualify for aid, let alone to assume ownership of the development process? And how do they ensure that aid is nonetheless effective?

This book provides an analysis of how development organizations have sought to overcome the constraints posed by their legal and policy frameworks when dealing with countries that have very weak or no government. It shows how a variety of organizations from the World Bank to the EU have adopted or modified rules that mostly regulate the provision of development assistance—and the rights and obligations that are normally accorded to recipient governments.

Such an analysis holds considerable practical relevance, considering the amount of research and resources that development organizations invest into finding a response to the challenges of aiding fragile states.[20] Besides, current poverty projections highlight that the question of how to design an appropriate regulatory framework for dealing with fragile states will remain of practical concern to international development organizations

for decades to come. By 2015, half of the world's poor living on less than US$1.25 a day will already be in fragile states—a trend that is expected to continue.[21]

The law and practice of international development organizations concerning fragile states, however, do not only warrant our attention, but also critical scrutiny. This is the third objective of this book. International development organizations exercise enormous power and influence when setting rules for dealing with fragile states. When they adapt their legal and policy frameworks to account for variations of government effectiveness, or deal with the absence of a government in power, they engage in an area full of intricate questions—questions to which neither general rules and principles of international law, nor the law of international organizations necessarily provide clear answers.

Certainly, their activities could be seen as pioneering and instructive for other areas of international cooperation—international trade, environmental cooperation, or in principle any area that builds on the existence of an effective government to negotiate, sign and give real effect to treaty obligations or other forms of regulation. State fragility is no isolated phenomenon—and we may find that where the discrepancy between juridical statehood and empirical statehood leads to structural problems for which existing rules are systematically inadequate, they need to be addressed through adapting the rules.[22]

But the regulatory activities of international development organizations are also deeply intrusive, considering what is at stake: the sovereignty and formal equality of weaker states. Any attempt at introducing rules that differentiate between states on the basis of different levels of capacity or will to fulfil certain functions should be met with considerable caution, not least for the risk of cementing a second-class status of statehood. After all, who decides what constitutes a sufficient level (or quality?) of effective government, and what are the consequences?

The importance of such concerns becomes clear when looking at the colonial origins of international law, its history of differentiating between civilized and uncivilized states, and at the contemporary practice of development cooperation. Decisions that concern the objectives and means of development interventions are generally taken in a context of material inequality, economic dependencies, and power discrepancies between donors and recipients—a context where donors wield considerable influence and the ability of recipients to integrate their preferences is endangered.[23] Importantly, development organizations wield influence not only

when they become involved in domestic institution-building and governance reforms in recipient countries. The influence starts with setting the rules, mostly single-handedly and often informally, that determine the terms and conditions of aid. Moreover, countries deemed 'fragile' usually belong to the most aid-dependent countries.[24] Their governments—provided there is one—are usually in a weak bargaining position to negotiate with international development organizations.[25] In this context, rules that protect the right of every government to request external assistance and to participate in the planning and implementation of development projects assume a crucial role, and should not be simply discarded.

It is hence impossible to study the regulatory activities of international development organizations without paying attention to another side of the tale—one where organizations appear as influential rule-makers that operate in an unequal environment, and where it is far from clear on what basis and for what purposes they consider countries as 'fragile'. This book critically scrutinizes how international development organizations attempt to uphold the formal sovereignty of recipient states, while dealing with the consequences of empirical fragility.

2 A Few Preliminary Remarks

This book seeks to grapple with the complex phenomenon of state fragility by directing attention to a concrete question: How have international development organizations adapted their legal and policy frameworks to engage with fragile states? The underlying idea is that by examining what position these states are accorded by other legal subjects, we learn more about the significance of state fragility from the perspective of international law. In development cooperation, international organizations have sought to systematically respond to the difficulties of engaging with countries that have the legal status of states, but very weak or no government. Insofar as the response involves the use of formal or informal legal rules that directly or indirectly concern the rights and obligations accorded to fragile states, it is also of legal significance.

My principal focus is thus on development cooperation, and on the practice of international organizations. While this focus makes the analysis relevant and rewarding, it comes with a number of difficulties that need to be clarified upfront. Firstly, development cooperation is a policy field that is only starting to attract more attention from legal scholarship.[26] The process by which donor states or international organizations provide aid

to developing countries is mostly considered as political and voluntary, perhaps guided by technical considerations, but not by legal rules. Thinking of development cooperation as a process instructed by law will thus be new to many development practitioners, political science and legal scholars alike. Yet, while other rationalities may be dominant in the allocation and implementation of foreign aid, this does not mean that law plays no role therein. How national and international donors provide assistance to a country is subject to rules, which define the objectives, establish terms and conditions, and regulate the process of development cooperation. These rules are mostly set by donors, but they can equally determine the roles and responsibilities of (fragile) recipient countries in development cooperation.[27] I refer to the body of rules that regulate the transfer—the allocation, planning, and implementation—of Official Development Assistance (ODA) as the law of development cooperation.[28]

One of the reasons why the law of development cooperation is a field of law that has long escaped the attention of legal scholars is its relative informality, or more precisely, the mixing of traditional sources of international law with some more informal sources.[29] Herein lies a further difficulty that we will have to grapple with, as becomes clear when looking at the sources that regulate the conduct of international organizations engaged in development cooperation. At first glance, the focus on international organizations makes it easier to comprehend that development cooperation is governed by legal rules and procedures. International organizations are founded by states through an international legal treaty, and this founding treaty becomes a quasi-constitutional framework for all their activities.[30] Clearly, the conduct of international development organizations thus does not follow political or technical considerations alone.

More concrete rules that guide the conduct of international development organizations, however, are contained not in founding treaties, but are later adopted by various organs of an organization, and *prima facie* apply only internally. It is at least controversial to what extent these sort of secondary rules can be shoehorned into the traditional sources of international law as established in Art. 38 of the Statute of the International Court of Justice (ICJ).[31] Certainly, they continue to fall largely off the radar of international legal scholarship, while they can assume significant effects, including outside an organization's internal sphere.

When examining how international development organizations adapt their legal and policy frameworks to engage with fragile states, I take internal rules seriously—and demonstrate why we are well advised to do so. I show

that internal rules are potent instruments in steering the conduct of international development organizations, and regularly assume external effects for recipient countries through formulating the terms and conditions, including procedural rights, for the transfer of ODA. Internal rules can be used to consolidate organizational practices or authoritative interpretations of the founding treaties, and thus affect existing treaty law. Rules that are relatively formalized and internally binding can thus be seen as part of an organization's legal framework. The various instruments the organs of international organizations produce to provide further, non-binding guidance to staff instead belong to the policy framework. In considering both, I acknowledge that formal and informal rules often interact in the law of development cooperation—and that informal does not always mean ineffective.[32]

A third difficulty concerns the very notion of fragile states. It bears repeating that 'fragile state' is no legal term, and we will see that international law is indeed short of concepts to grasp a variable condition such as state fragility.[33] If anything, fragile states are best described with reference to the discrepancy between formal legal status, and weak capacity in fact—between the spheres of juridical statehood and empirical statehood. However, not only scholars of international law struggle to define what fragile states are. There is no agreed definition or classification, although the term has become a highly successful catchphrase in the international development community and beyond. It is used in academic and policy circles to refer to a large and extremely heterogeneous group of countries, which are basically characterized as having very weak capacity and poor governance. Many, more or less subjective, elements could be added, such as weak state-society relations or the prevalence of armed conflict. In short: The lack of an agreed definition of fragile states is symptomatic both of the conceptual ambiguity of the notion and of the politics inevitably involved in classifying countries as 'fragile'.

I therefore advocate a cautious and critical handling of the notion of fragile states, or state fragility—for instance, by acknowledging that the underlying empirical phenomenon is not new, and by asking what lies behind its rising popularity as a political concept. Moreover, I do not propose a clear-cut definition where there is none. Instead, I consider how other legal subjects—in our case, international development organizations—define, classify and ultimately address fragile states through legal and policy reforms.

From a methodological perspective, the approach outlined could also be captured in one word: interdisciplinarity. Indeed, the very subject of

state fragility calls for interdisciplinarity. It is an empirical phenomenon, a social construct, a political concept and a challenge for international law. In writing about fragile states, I therefore attempt to consider and bring together the perspectives of different disciplines. For instance, I examine the emerging discourse on fragile states with a view to relevant research in the social sciences, before turning to the juridical conception of the state and the (self-) limitation of legal doctrine in describing state fragility. I look at both practical and legal challenges that international development organizations encounter in aiding fragile states—and do not pretend that all of these can be addressed through modifying the applicable legal framework.

That said, this book was written from a legal perspective, and the type of questions it asks are the type of questions that can be answered with a legal methodology, which are often not the ones that start with 'why'. We will see that a legal analysis that structures and compares, explains and interprets, the rules that international development organizations make or modify to engage with fragile states nonetheless provides insights that reach well beyond a jurisprudence of concepts. In this sense, interdisciplinarity implies putting law in perspective, while demonstrating the relevance of a legal perspective to other disciplines.

Following these preliminary remarks, this book is structured into six chapters. The first two chapters present in more detail the central puzzle: fragile states are a phenomenon beyond law, but how international development organizations address the challenges of engaging with states deemed 'fragile' may well be of legal significance. Chapter 2 sketches out the intellectual history of the notion and its uneasy place in public international law, bringing together a rich literature on state fragility in the social sciences with legal scholarship. Turning to the field of development cooperation, Chapter 3 illustrates how the ambiguous notion moves from discourse to action, through a surge of policy-making, standard-setting and reform activities that increasingly inform how international development organizations engage with fragile states.

Chapter 4 outlines the legal nature and substance of rules that normally govern how international organizations negotiate, plan and implement projects in collaboration with the governments of recipient countries: the law of development cooperation. It lays the basis for the subsequent Chapters 5 and 6, which provide a detailed analysis of how international development organizations have adapted the rules of their legal and policy frameworks to engage with fragile states. Chapter 5 examines the concrete

rules adopted by the World Bank, the most influential development organization, to regulate various aspects of its engagement with fragile states. Chapter 6 compares the relevant rule-making process, instruments and outcomes with those of two similar organizations, the African Development Bank (AfDB) and Asian Development Bank (ADB), and one very different one, the EU.[34]

Chapter 7 synthesizes and discusses the resulting findings. It identifies broader patterns in the regulatory approach of different organizations, and examines the potentials and perils of development organizations adapting legal rules to instruct and formalize how they deal with fragile states. The conclusion reflects on the theoretical and practical relevance of the book's key findings beyond the field of development cooperation.

Notes

1. There is no agreed definition of fragile states. A typical example and frequent reference is the definition of the OECD: "A fragile region or state has weak capacity to carry out basic governance functions, and lacks the ability to develop mutually constructive relations with society." OECD, "*Fragile States 2013. Resource Flows and Trends in a Shifting World*" (2013), 15. In its "Harmonized List of Fragile Situations" for 2015–2016, the World Bank counts 34 countries and one territory (the West Bank & Gaza) as fragile. On the definition of fragile states, see also *infra* Sect. 1 in Chap. 2.
2. The World Bank, *South Sudan—Interim Strategy Note for FY2013-2014* (2013), paras. 17–22.
3. I refer to international development organizations as international organizations that provide Official Development Assistance (ODA), which includes organizations that do not have an exclusive development mandate, such as the EU. On the definition of ODA, see *infra* note 28.
4. Greg Larson, et al., Harvard Center for International Development (CID) Working Paper No. 268, *South Sudan's Capability Trap: Building a State with Disruptive Innovation* (October 2013), 29.
5. Cotonou Agreement, signed in Cotonou on 23 June 2000, last revision in Ouagadougou on 22 June 2010, OJ L 287, 04 November 2010 or OJ L 317, 15 December 2000.
6. In contrast, Somaliland, an autonomous region within Somalia claiming independence, has established a government determined to lead its own development. Not being recognized as an independent state, however, Somaliland could receive no direct support from international development organizations.

7. The existence of an effective government is the central, defining criterion of statehood under international law. For more detail, see *infra* Sect. 3.1 in Chap. 2.
8. On the law of development cooperation as defined by Dann, see *infra* note 28.
9. A limited number of articles and books deal with the phenomenon of state failure from a legal perspective, mostly with a focus on the complete breakdown of government. See, for instance, Daniel Thürer, 'Der Wegfall effektiver Staatsgewalt: "The failed state", 34 *Berichte der Deutschen Gesellschaft für Völkerrecht*, 9 (1996); Robin Geiss, *Failed States. Die normative Erfassung gescheiterter Staaten* (Duncker & Humblot, 2005); or Chiara Giorgetti, *A Principled Approach to State Failure. International Community Actions in Emergency Situations* (Brill, 2010).
10. Martti Koskenniemi, "The Wonderful Artificiality of States", 88 *Proceedings of the Annual Meeting (American Society of International Law)*, 22 (1994).
11. On the origins and persistence of formalized hierarchies in international law, see Gerry J. Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004)
12. *Supra* note 9.
13. The number of countries designated as 'fragile' depends on what criteria and methodology are used. A common reference point is the World Bank's "Harmonized List of Fragile Situations" (*supra* note 1).
14. Joseph H. H. Weiler, "Editorial. Differentiated Statehood? 'Pre-States'? Palestine@the UN", 24 *European Journal of International Law*, 1 (2013), 5.
15. There is a vast non-legal literature on the characteristics of fragile states and the challenges of development cooperation with fragile states. For an overview, see Lars Engberg-Pedersen, et al., Danish Institute for International Studies, DIIS Report 9, *Fragile Situations. Current Debates and Central Dilemmas* (2008); or Claire Mcloughlin, Governance and Social Development (GSD) Resource Center, *Topic Guide on Fragile States* (2010). In detail, see *infra* Sect. 2.2 in Chap. 2 and Sect. 2 in Chap. 3.
16. I consider only the provision of ODA by governments or international organizations, and not assistance provided by non-public entities such as Non-Governmental Organizations (NGOs), or private businesses. See *infra* note 28.
17. The principle of ownership is most prominently captured in the Paris Declaration on Aid Effectiveness of March 2005 (hereinafter Paris Declaration), in which donors commit to basic principles to improve the quality and effectiveness of aid.

18. As international legal subjects, international organizations are bound to respect customary principles of international law, including the fundamental principle of sovereign equality enshrined in the UN Charter, Article 2 (1).
19. PHILIPP DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press, 2013), 241–244 and 284–295.
20. The amount of country-programmable, Official Development Assistance (ODA) going to fragile and conflict-affected states has more than doubled between 2000 and 2010, from approximately US$20 billion to over US$40 billion per year. OECD, *Fragile States 2014. Domestic Revenue Mobilization in Fragile States* (2014), Figure 2.2 (p. 24).
21. HOMI KHARAS & ANDREW ROGERSON, Overseas Development Institute, *Horizon 2025. Creative Destruction in the Aid Industry* (2012), Chapter 2.
22. The underlying assumption is that systematically inadequate rules forfeit the ability to guide and constrain, and the potential to serve as a basis for transparent and consistent decision-making.
23. DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 238, 257.
24. In 2011, aid accounted for 29% of all inflows to fragile states, as compared to other developing countries, where aid accounted for only 5%. OECD, *Fragile States 2014. Domestic Revenue Mobilization in Fragile States*, p. 36.
25. Importantly, fragile states can have a rather strong bargaining position *vis-à-vis* international donor institutions if donors have a specific strategic or political interest in engaging with these countries.
26. This is not entirely true, if we consider that the role of (domestic) law as an instrument in development cooperation has concerned international lawyers at the latest since the 1970s. What role law plays in the regulation of development cooperation itself, however, is an entirely different question, which only few legal scholars have begun to address rather recently. See, for instance, DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*; KEVIN DAVIS & MARIANA MOTA PRADO, 'Law, Regulation, and Development', in Bruce Currie-Alder, et al. (eds), *International Development. Ideas, Experience, and Prospects* (Oxford University Press, 2014); or DANIEL D. BRADLOW & DAVID B. HUNTER (eds), *International Financial Institutions and International Law* (Kluwer, 2010). Beyond, international law scholars have considered development at most for its notable absence of law, e.g. CHRISTINE M. CHINKIN, 'The United Nations Decade for the Elimination of Poverty: What Role for International Law?', 54 *Current Legal Problems*, 553 (2001).

27. Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 200, 217.
28. This definition is based on Dann's foundational work, see ibid., 13–14. What constitutes ODA is defined by the OECD DAC based on three elements: that resources are provided by official agencies, serve the main objective of promoting economic development and welfare of developing countries, and have a concessional character. The definition was last updated in December 2014.
29. On the legal nature and effects of the sources of the law of development cooperation, see *infra* Sect. 1 in Chap. 4.
30. In the case of development organizations, the founding treaty usually defines for what purposes the organization may provide ODA, and further circumscribes how.
31. Markus Benzing, 'Secondary Law', in Rüdiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, March 2007). In detail, see *infra* Sect. 1 in Chap. 4.
32. On the considerable effects of non-binding rules, see, for instance, Kenneth W. Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization*, 421 (2000); Dinah Shelton, *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2003); or Jan Wouters, et al. (eds), *Informal International Lawmaking* (Oxford University Press, 2012).
33. Section 3.2 in Chap. 2.
34. All four organizations belong to the largest contributors of ODA to fragile states. OECD, *Fragile States 2014. Domestic Revenue Mobilization in Fragile States*, p. 93.

CHAPTER 2

Fragile States: The Discrepancy Between Empirical and Juridical Statehood

Not least since 11 September 2001, a group of countries has quickly moved from the periphery of the international community to the top of the policy agenda. It is an extremely heterogeneous group of 30–50 countries, which are loosely characterized by weak institutions and poor governance, often in combination with violent conflict. To various degrees, they are unable to maintain security, enforce the law or provide basic services to their populations. Politicians and diplomats, security experts and development practitioners, collectively refer to these countries as 'fragile states'.

Ask an international law scholar what fragile states are, and he will likely answer what fragile states are not—namely, a legal concept. The legal status of state is a binary category, and not a matter of degree. For gradations of statehood based on form, function, or performance, there is no room in an international legal order built on the principle of sovereign equality. The formal conception of statehood and the principle of sovereign equality thus prevent obvious material inequalities and power discrepancies between states from being translated into law.

Statehood is a variable in fact, but a constant in law—this distinction between empirical-sociological accounts of statehood and the state as a legal concept is essential to understanding the phenomenon of state fragility, and is the starting point of my analysis. Entities that lack the capacity to perform basic state functions, but enjoy the legal status of states, are characterized by the discrepancy between empirical statehood and juridical

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statehood.[1] In order to grasp the phenomenon of state fragility, we need a basic understanding of the *de facto* dimension of statehood and its *de jure* components. Moreover, we need to explore the potential interactions and tensions between the two spheres of fact and law.

This chapter accordingly looks at the distinction between empirical and juridical statehood and explores the phenomenon of state fragility at the fault line. Subsequent to a brief disclaimer concerning the terminology used in this book (Sect. 1), I trace the emergence and meaning of the notion of fragile states from an empirical perspective (Sect. 2), and contrast it with the typically reluctant or self-restrained engagement of international legal scholars with state fragility, based on the static conception of the state in international law (Sect. 3). I conclude that while state fragility is not a legal concept, we are well advised to consider how the challenges of engaging with fragile states are perceived and addressed in the practice of international cooperation (Sect. 4).

1 Disclaimer on Terminology

Terminology constitutes meaning; in law, it can also constitute legal consequences. Accordingly, a book concerned with fragile states first warrants a disclaimer on terminology.

A Babylonian diversity of terms is used to describe the weakness, deficiency or collapse of state institutions and authority. This diversity of terms, however, hardly provides an accurate reflection of the heterogeneity and complexity of the described phenomena. Rather, the different terms often describe the same phenomenon in the same vague manner—the difference being that different actors prefer to focus on different symptoms or consequences. Some allude to a state's lack of capacity (for example, 'weak' or 'ineffective' state), some rather to the lack of legitimacy or political will to abide by certain rules of the international community, with an often-pejorative undertone (for example, 'rogue', 'pariah' or 'outlaw' state). The term 'collapsed state' is perhaps distinct in that it describes the end point and complete breakdown of state structures. But terms like 'failing', 'fragile' and 'failed state' all refer to intermediary stages, without there being a clear distinction.

Relatively new to the international agenda, the terminology of 'fragile state', 'state fragility' or 'fragile situations'[2] features a new quality: It not only groups together certain states or situations for analytical purposes, but also for the purposes of international policy-making. First in international

security, then in development discourse, 'fragile state' has become the catch-phrase for policymakers as well as academics to refer to a heterogeneous group of states, which for various reasons have become a particular concern to the international community. As we will see, the term rapidly makes its way into official policy documents of international organizations like the OECD, the World Bank and the European Union (EU),[3] and is picked up by major Western donor states like the USA, Canada, the UK, France and Germany. Since a group of developing countries—the 'g7+'—have endorsed the label, it also seems no longer politically incorrect to refer to 'fragile states'. The g7+ is an informal forum of developing countries and self-declared fragile states that advocate for their interests *vis-à-vis* international partners.

The success of the 'fragile states' terminology is partly owed to the fact that it reflects a more differentiated understanding of the causes and consequences of weak statehood—for instance, acknowledging fragility as a fluid condition rather than a status. Still, it shares many of the shortcomings of other terms criticized as vague and judgemental, like 'failed state'.[4] The English word 'fragile' can mean 'easily broken or damaged', 'delicate and vulnerable' and even 'morally weak'.[5] Accordingly, entities described as 'fragile' could be threatened to collapse into full anarchy, be particularly vulnerable to internal or external stresses, or have morally corrupted governments. In practice, the term has been used for all of the above—for states from Liberia to Lebanon and Libya. Moreover, 'fragile state' suggests a certain deficiency contrasted with the image of a Western, ideal notion of statehood. It comes with implicit but not always adequate assumptions of how a resilient state should function and perform.

International lawyers in particular must use the term fragile states with caution. Jan Klabbers, professor of international law, once ironically suggested introducing a concept of 'soft statehood'.[6] In reply to the many commentators that took him at face value, he reiterated that unlike other disciplines, law is a formal category that operates in a binary fashion. Social scientists may deconstruct and question claims to statehood and sovereignty as formal categories against the background of empirical observations about limited state capacity, or the politics involved in granting or denying such titles and entitlements in the first place. Lawyers, however, must refrain from describing states as harder or softer, from negligently blending political and normative concepts and creating confusion about the legal consequences. They could run the risk of contributing to a "legal rationalization of political realities",[7] or, through the use of a new terminology, obscure the

persistence of patronizing mind-sets paired with an interventionist agenda. After all, who has the power to call a state 'fragile', on the basis of what, and for what purpose?

In the remainder of this book, the term 'fragile state' is used since it has become the most widely accepted term for addressing weak, politically unstable, conflict-ridden countries in the international community. Instead of proposing a clear-cut definition for the manifold variances of weak statehood, however, it is used as a lens to scrutinize how development organizations define, classify and ultimately deal with fragile states.

2 Empirical Grasp on Fragile States

'Empirically, the state must be treated as a variable rather than the constant supposed by legal theory.'—John Peter Nettl, 1968[8]

Various disciplines are concerned with the normative ideal and empirical functions, the emergence and evolution of states as a form of organized political community. As the quote by the American sociologist John Peter Nettl suggests, the decisive difference between empirical and legal approaches to statehood lies in the engagement with the state as a variable or as a constant. From an empirical-sociological perspective, "stateness, or the saliency of the state, in different societies is indeed a quantitative variable".[9] Form, functions and the effectiveness of states can vary greatly over time and space, although they are regularly presented as variations of an ideal type: the Western model of a nation state with a bureaucratic apparatus at its core, providing security, justice and welfare to its citizens.

The following section approaches statehood from an empirical perspective, and state fragility as a variation of statehood in its *de facto* dimensions. I highlight that the existence of states with variable degrees of effectiveness is neither new nor exceptional (Sect. 2.1), and subsequently explore how and why the phenomenon of state fragility suddenly began receiving so much attention (Sect. 2.2).

2.1 Empirical Statehood: The State as a Variable

In empirical terms, the state has always been a variable of different forms, functions, and capacities. Different manifestations of statehood, however, are often presented as variations of a common theme: the Western state model. This is not surprising, considering that the concept of modern

statehood has a geographically confined, historical origin. Whereas people have been living in modes of social organization other than states for most of human existence, a process of state formation occurring in Western Europe between the 17th and 19th centuries has brought about a model of organization that has since come to dominate the political map around the globe.[10]

This particular model of social organization—the centralized, hierarchical nation state—is equally the product of an intellectual tradition that has its origins in Western Europe. For instance, the idea that the state is founded on a social contract between the rulers and the ruled, which attribute certain functions to the state and in turn pledge to pay taxes and obey the law, emerged from the works of influential political theorists like the English John Locke and the French Jean-Jacques Rousseau. In turn, the institutional patterns and functions of the modern state were further delineated in the works of the German sociologist Max Weber, who described the state as relying on a bureaucratic apparatus with the ability to maintain a claim to the monopoly of the legitimate use of force. Both the social contract theory and Weber's monopoly of the use of force have become key references in most accounts of modern statehood—and as I return to shortly, in accounts of state fragility.[11]

The Western state model, however, proved not to be easily transferable to other parts of the world. In the late 19th and the 20th centuries, the model spread and was spread across the world in the wake of decolonization. Newly independent nations that emerged after the First and Second World Wars were indeed striving for statehood, seeking self-determination, integration and domestic viability by adopting the typical structures of states found in Western Europe. These processes often involved the transplantation or imposition of institutions on other forms of social organization, which would continue to exist below a 'semi-fictional overlay'.[12] In the absence of certain historical, intellectual and cultural dispositions, the Western state model did often not take root.[13] Moreover, colonialism had lasted long enough to destroy traditional, pre-colonial structures, while leaving newly independent states with underdeveloped infrastructure and weak institutions.[14] Consequently, the accumulated cost of maintaining the sort of state that had turned into a global norm by decolonization, in particular the institutional and administrative capacities it required for the expected provision of public goods, could not always be born. As Christopher Clapham sums up: "[i]n a world conditioned by the idea of progress, and accustomed to the state as an essential element in the march

of progress, the universality of this form of organization has been taken for granted, while the question of whether the whole world could afford states has been ignored."[15]

The last episode in the evolution of modern statehood—its expansion to all parts of the world by means of granting the formal attributes of state sovereignty—thus significantly increased the variation of statehood, perhaps at the same time as heralding its decline. Since then, the profound political and sociological transformations associated with globalization have eroded the power of the state as exclusive territorial authority everywhere.[16] No state can today fully control its borders, run its economy autonomously and protect its citizens from transnational threats on its own.[17]

Looking at statehood from an empirical-sociological perspective thus exposes how the existence of states that fulfil variable functions with variable degrees of capacity is neither a new nor necessarily an exceptional phenomenon. If anything, the discrepancy between an ideal type of statehood and its variable manifestations has become more apparent in all parts of the world, including the so-called Western hemisphere. Nevertheless, as a form of political organization and as a fundamental building block of the international system, the state has remained remarkably intact. Political entities are still thriving towards statehood, and care to maintain its formal appearance by cultivating state institutions even where they amount to a mere camouflage. The evolving discourse on state fragility therefore unfolds largely within the confines of an established, though historically contingent and normatively charged, notion of statehood.

2.2 The Evolving Understanding of Fragile States

If the existence of stronger and weaker statehood is not a new phenomenon, how did the notion of state fragility become so prominent over the last two decades? Is it the result of a change of factual circumstances, or rather shifting perceptions in the light of a changing global policy environment? Two factors drive the fragile states discourse. One is the increasing international awareness of the enormously complex challenge of weak governance and chronic underdevelopment. The other is the construction of fragility in Western political and academic discourse as a deficient form of statehood, compared with an ideal notion of statehood. How these factors interplay becomes clear if we look at the evolving understanding of and response to fragile states.

To begin with, the end of the Cold War came with a surge of internal conflict and instability in many parts of the world, which brought about and brought to light the increasing "discrepancies between the outward forms and the inward substance of sovereign states" in many parts of the world.[18] The pathologies of many post-colonial states in Africa and elsewhere became apparent with the retreat of support from Western or communist countries. These had artificially kept alive the weak institutional apparatus of military regimes, dictatorships and one-party states that had come to dominate the political landscape.[19] Now, the wave of democratization that swept through the developing world in the 1990s produced new governments that struggled to keep up with demands for market liberalization and the pressures of globalization.

Initially, the complete breakdown of state structures and ensuing humanitarian crisis seemed to suggest the emergence of a new and unknown challenge, for which Helman and Ratner coined the term 'failed states'—a state "utterly incapable of sustaining itself as a member of the international community".[20] In the following years, however, the international community witnessed the ensuing Bosnian War, how Liberia and Sierra Leone were racked by small-scale conflicts, and the genocide in Rwanda with its destabilizing effects on the Great Lakes region. Though the total collapse of state authority remained a rare occurrence, the proliferation of non-international armed conflicts and protracted humanitarian crises that were soon described as complex emergencies continued.[21] It became clear that state failure was not a temporary problem, nor one confined to Somalia.

Against this background, Robert H. Jackson was probably the first international relations scholar who conceptualized statehood at the fault lines between factual manifestation and legal status—between empirical statehood and juridical statehood.[22] He argued that a large number of developing countries were merely 'quasi states' since they were unable to fulfil even their most basic functions, but were supported from above by international law and financial aid. Quasi states possessed the legal status of states, participated in international organizations, and were protected by the principle of sovereignty, but they were lacking the actual capacity to exercise sovereign rights.

At the same time, the end of the Cold War also entailed significant shifts in terms of political economy and regarding the international political environment in which policies are formulated and implemented. In a new spirit of euphemism over 'the end of history' (Fukuyama), the Western liberal political and economic system came to be seen as the new norm.

The international development community became more interested in what sort of state institutions and government policies could support economic development. To further development, governments were now expected to deliver good governance, typically understood in terms of transparent and accountable management of public resources and respect for the rule of law.[23] The emerging concept of good governance also framed the evolving approach to state fragility, in that it forged a conception of the ideal type of state and governance that came to be juxtaposed to fragile and failed states.[24]

Yet it is a single event that has significantly increased the focus on weak statehood in the international security and development community: the terrorist attacks on the USA of 11 September 2001 (9/11). “America is now less threatened by conquering states than by failing ones”, the US government found in its National Security Strategy of 2002.[25] The terrorist attacks had been launched from Afghanistan, where retreating statehood appeared to have provided fertile grounds for the responsible terrorist group Al Qaeda. In a report released in 2004, the UN provided a broad assessment of the threats that required collective international action—virtually all of them related in some way to weak statehood.[26]

The ensuing ‘securitization’ of weak statehood led powerful states and international organizations to devote increasing amounts of resources to the endeavours of rebuilding conflict-affected countries and stabilizing societies believed vulnerable.[27] Enhancing state effectiveness through state-building came to be seen as a panacea for the external and internal challenges associated with fragile states. Ashraf Ghani, later President of Afghanistan, and Clare Lockhart, referred to the disjunction between *de jure* sovereign states and their malfunctioning in reality as “the key obstacle to ensuring global security and prosperity”.[28] The central objective of the state-building agenda often followed the assumption that all states eventually had to converge towards the Western state model, with the state providing security, justice and welfare to its citizens. Necessarily, attention to state-building thus reinforced both a particular ideal of statehood and the construction of the ‘Other’, the fragile state that did not yet conform to this model.[29]

The moderate success of the international community’s ambitious state-building projects from Kosovo to Afghanistan and Iraq, however, soon revealed the limitations of the approach and its underlying assumptions. State-building was criticized for its patronizing, neo-colonialist undertones, and for being mistakenly technical and too much focused on the formal institutions of the state.[30] This was attributed to an insufficient

understanding not just of the political economy of conflicts, but of the local power structures and sources of legitimacy in these states more generally—that is, of the particular variations of empirical statehood.[31]

Next to external state-building interventions, development and humanitarian assistance gained in importance as elements of a comprehensive strategy to prevent conflict, strengthen state capacity and meet the basic needs of the 'bottom billion' in fragile states.[32] Prompted by the post-9/11 policy shifts of the USA, its major shareholder, the World Bank, established a task force to analyse the specific development challenges of fragile states, the 'Low-Income Countries Under Stress' (LICUS) initiative.[33] The initiative was also a logical consequence of the Bank's growing focus on good governance—sooner or later, the assumption that good governance is a precondition for development had to trigger the question what happened if this condition was not met.

Since then, development actors have increasingly seized the topic of state fragility from the exclusive grasp of security experts and reframed it as the "toughest development challenge of our era".[34] At the same time, the assumption that weak statehood constitutes a major threat to international security has given way to a more nuanced picture, which goes beyond the simple construction of state fragility as *aliud* of an ideal notion of statehood.[35] Allegedly weak states can display multiple forms of social organization, wherein non-state actors and de-centralized modes of service provision gain in importance. In other words, fragile states are not so much characterized by a political vacuum or 'sovereignty gap' as by different forms of governance that assume controlling and allocating functions.[36]

Accordingly, development practitioners have shown a growing interest in opening the 'black box' of the fragile state and understanding state-society relations.[37] Not just the effectiveness of state institutions, their capacity to deliver certain core functions, are critical to the understanding of weak statehood, but also their authority and legitimacy—their ability to forge constructive relations with society.[38] Notably, state legitimacy is mostly cast in terms of the ability of the state to meet the needs and expectations of its citizens, and not related to the democratic form of government.[39]

The evolution of a gradually more pluralist and also more modest understanding of state fragility hit a temporary peak with the endorsement of the 'fragile state' label by some of its nominees. In 2010, a group of fragile states announced the establishment of the g7+, an informal forum to exchange and promote their interest *vis-à-vis* international partners—indicating that being seen as 'fragile' is no longer necessarily a disadvan-

tage.[40] The g7+ have since sought to define fragility not 'through the lens of the developed', but 'through the eyes of the developing', and to influence policy-making through a 'fragile state perspective on fragility'.[41]

Nevertheless, the conflation of competing interests and different social constructions continues to render issues of conceptualization, definition and measurement the most problematic aspects of the study of state fragility. Not only is it doubtful whether a multidimensional, fluid phenomenon like state fragility can meaningfully be captured in a single definition or index,[42] but perhaps inevitably, all accounts of state fragility are also based on a particular conception of the means and ends of statehood—from Weber's monopoly over the legitimate use of force, to a comprehensive conception of statehood along the lines of the Western model of liberal, democratic, rule of law-abiding, welfare states. Increasingly popular are definitions that draw on the social contract theory and look for a state's capacity or will to fulfil certain basic functions towards its citizens, usually in the realm of security, welfare and rule of law.[43] Such functional definitions of statehood and state fragility may appear technical, but they are not necessarily less biased than those that suppose the existence of specific institutions of liberal democracy. For they merely disguise questions that go to the heart of every political system: what functions are expected from the state, and how do different functions—security, welfare, rule of law—relate to each other?

In sum, though a more nuanced understanding of the symptoms and drivers of state fragility is emerging, it may be impossible to disentangle the two factors that drive the evolving understanding of fragile states, and to 'de-politicize' the notion.[44] No matter whether the notion of fragile state is seen as a viable category or concept, however, or merely a 'trading language' to talk about complex social realities too heterogeneous for theoretical agreement',[45] it still has an impact on international policy-making. We return to this in Chap. 3.

3 Legal Grasp on Fragile States

'The State has two aspects: rest and movement, continuance and progress, body and spirit.'—Johann Kaspar Bluntschli, 1895[46]

Unlike empirical-sociological accounts of statehood, legal scholars conceive of the state not as a variable or an aggregate of social conditions or events, but as part of the law—law stands for and guarantees the aspects of rest, continuance and body. Whereas the emergence of states may be a

historical and sociological process, international law transforms the empirical situation into a legal condition as soon as it attaches legal consequences to the existence of states. Once attained, the legal status of statehood is static and in principle does not reflect the empirical variances between states in terms of form or function, capacity or performance.

In the following, I start with a brief introduction to the juridical concept of statehood (Sect. 3.1), which explains why international law scholars have approached the topic of fragile states with considerable caution and a legal definition of state fragility remains of limited practical value (Sect. 3.2).

3.1 Juridical Statehood: The Wonderful Artificiality of the State

The main difference between empirical and juridical statehood is aptly described by James Crawford in his seminal work on statehood in international law: "A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices."[47] If juridical statehood can thus be distinguished from empirical statehood, this raises two questions: what does the legal status consist of, and what are the rules or practices on the basis of which the status is granted?

First, international law recognizes the state as a legal person. As such, the state obtains the capacity to be a bearer of rights and duties under international law.[48] It is not merely a passive recipient, but also an active participant in the international legal order—states constitute "the gatekeepers and legislators of the international system", and, importantly, its principal enforcers.[49] Accordingly, characteristics that constitute the core of juridical statehood include the competence to perform acts on the international level, in particular to conclude treaties; the exclusive competence to regulate internal affairs, subject only to restrictions posed by international law; and the right to be regarded as equal to other states under international law. Importantly, we need to distinguish between the legal status of the state and the specific role it assumes as the primary subject of international law. The role of the state—its extent of powers, rights and responsibilities—is variable in as much as states take on different rights and obligations under international law.[50] These variations, however, do not concern the legal status of state, which is categorical.

If statehood is not merely presupposed by international law, the second question concerns the rules and practices that exist to determine whether

an entity constitutes a state. The legal status of statehood is generally granted on the basis of three criteria, which were first established by Georg Jellinek in his doctrine of the three elements (*Drei-Elementen-Lehre*): a defined territory, a permanent population and a government exercising effective control over the territory and population. These criteria also inform the Montevideo Convention on the Rights and Duties of States, the most widely cited, textual basis for a definition of statehood to date.

For the purposes of this book, we can skip the first two criteria,[51] and go straight to effective government as the central constituting principle of statehood.[52] In order to qualify as a state, an entity must have a government in general and exclusive control of its territory and with the ability to maintain law and order. The government is also the central organ by which the state acts on the international level. Effective government thus entails two aspects. Internally, a government is essential for enforcing international law domestically. Externally, the existence of a government remains the precondition for the state to act autonomously from other states on the international plane, and to represent its people in international relations.

Despite its central importance, what effective government requires in international law is not easily established. As the concept implies, international law traditionally looks for the effectiveness of a government, and not so much its legality or legitimacy.[53] There is no legal rule that prescribes the form or internal constitution of a government and states are free to choose their political, economic and social system. In contrast, international law does require at least some centralized authority that is vested with the basic institutions and capacities necessary to uphold the monopoly on the use of force and effectively perform governmental functions—that is, some form of concrete manifestation of statehood.[54] The nature and extent of control required in order for a government to be 'effective' is, however, not stipulated anywhere.

The requirement of effective government is thus the most central and the least stringently applied criterion of statehood. Effective entities have existed that were denied the legal status of states, just as entities that hardly exercised effective control were (still) accepted as states under international law.[55] This suggests that the effective government criterion is not absolute, but can sometimes be outweighed by other principles. Based on the principle of continuity, the temporary loss of effective control or disappearance of government, for instance, during external occupation or internal conflict, does not automatically lead to the extinction of

the state.[56] The principle of self-determination, in turn, can compensate for lower levels of government effectiveness, at least in the context of decolonization, where newly independent states whose governments hardly exercised effective control were conferred the legal status of states.[57]

In sum, we can clearly distinguish juridical statehood from empirical statehood with regard to its consequences: primarily, to grant an entity international legal status. This status is the same for all states and thus secures the state as a necessary form or structure of authority regardless of its specific functions, its capacity or its performance in practice. Herein lies what Martti Koskenniemi praises as the "wonderful artificiality of the state": the formality of the concept of juridical statehood allowed the distinguishing of "the state as the realization of Utopia, and the state as the form in which different Utopias clash today".[58] Ideally, sovereign statehood protects the state as a location where these clashes over competing societal visions can take place—a major reason why international legal scholars continue supporting the formal trappings of sovereign statehood.[59]

Fault lines between juridical and empirical statehood appear, however, when turning to the criteria on the basis of which the legal status of statehood is conferred. The legal definition of statehood is necessarily premised on the existence of empirical facts. This is not only because states were generally empirical realities before they assumed legal personality. As a decentralized legal order, international law relies on states possessing certain actual capacities in order to implement its norms domestically, to exercise legal rights and fulfil obligations. Accordingly, effectiveness assumes a central, constituting role in the criteria of statehood, and serves "a genuinely normative function" for the legal order as a whole.[60] It acts as a bridge between facts and norm, in that it ascribes legal significance to certain facts.[61] Once the legal status of statehood has thus been conferred on entities with an effective government, juridical statehood operates as a binary legal category, presuming that effectiveness is maintained.

International law thus appears to both require effective government and presume effective government. What happens when the principle of effectiveness is neglected in the creation of states—and the "juridical cart is now before the empirical horse"?[62] What if a government's effectiveness subsequently declines, and its continued presumption turns into an untenable fiction? With juridical statehood built along the fault lines of law and fact, of legal and of factual capacity, these are questions of considerable complexity, and significance. The balance between international law's

'concreteness' and 'normativity' (Koskenniemi), the need to respond to changing realities while maintaining its counterfactual character, regularly tilts to the latter when it comes to the doctrine of statehood.[63] This becomes clear when we seek to approach the factual phenomenon of fragile statehood from a legal perspective.

3.2 Approaching Fragile States from a Legal Perspective

As a phenomenon located at the challenging interface between empirical and juridical statehood, fragile states have so far received little attention in international legal scholarship. Where legal scholars have engaged with fragile or rather 'failed states', the issue has triggered diverging and sometimes heated reactions.[64] Three can be distinguished, which I briefly outline in the following. Firstly, some legal scholars seek to add clarity to the discourse among international relations scholars, rife with legal terminology, by translating what state failure means in terms of legal doctrine. Secondly, there are those scholars for whom state failure confirms the anachronism and potential harmfulness of the traditional understanding of sovereign statehood, and who demand that sovereignty should be reconfigured to facilitate external intervention. Thirdly, and quite to the contrary, critical legal scholars relentlessly caution about the neo-colonialist and anti-pluralist undertones of the 'failed state' agenda, and demand that it should not be legitimized by international law, or lawyers.

To begin with, in terms of legal doctrine, state failure is typically equated with the breakdown of effective government. This translation goes back to Daniel Thürer, who was the first to define a failed state for the purposes of legal analysis as one that "though retaining legal capacity has for all practical purposes lost the ability to exercise it."[65] Thürer thus distinguishes between a state's legal capacity and its factual capacity to act.[66] Based on the principle of continuity, the failed state usually maintains its legal status and hence its legal capacity.[67] However, while legal capacity and capacity to act normally coincide, failed states only retain the former. Their capacity to act is lost or—in the case of fragile states—severely restrained, following the loss of the monopoly on the use of force and the lack of organs capable of performing the state's rights and obligations under international law.[68]

The most important assertion of international legal scholarship regarding failed states is thus that the legal status of the failed state continues, and that it makes more sense for the purposes of legal analysis to focus on

the government's capacity to act.[69] The international community has no interest in the premature denial of statehood—for reasons of legal certainty, and to guarantee the continued and universal applicability of the legal order. Therefore, it prefers to uphold the legal fiction of effective government.

The fundamental shortcomings of such a fictitious assumption, however, are also widely acknowledged in legal scholarship.[70] International law largely relies on states to enforce international norms and judgements domestically.[71] It is for this reason that effective government is the central criterion of juridical statehood, and makes the conferral of legal status dependent on factual circumstances.[72] If effectiveness is on the wane and the discrepancy between normative assumptions and empirical facts becomes too large, nothing less than the functioning and effectiveness of the international legal order are at stake. Its fundamental objectives—from the maintenance of peace and security to the realization of people's self-determination—cannot be met if its constituting members lack the minimum level of capacities required to exercise rights and obligations under international law.

Next to international law's effectiveness, the decline or breakdown of effective government affects the legitimacy of the international legal order, in so far as it still relies on state consent as its principal source. Without effective government, states cannot negotiate and enter into legal agreements, nor effectively participate in an increasingly dense network of international organizations and other fora of global policy-making and standard-setting.[73] Furthermore, the rights of residents are left unprotected and they lack international representation if the government drops out as the central organ to uphold law and order domestically and to maintain international relations.[74]

Considering that the lack of an effective government can pose such fundamental problems to the international legal order perhaps explains why a second group of legal scholars look at state failure as a proof for the declining viability of sovereign statehood in its traditional, positivist conception. Few legal scholars actually propose dismantling the formal trappings of juridical statehood altogether. However, some attempt to deconstruct and reconstruct state sovereignty in ways that first of all concern the sovereignty of states deemed to have 'failed' by various standards. For instance, following a constitutionalist or cosmopolitan tradition of thought, state sovereignty has its source and objective in the protection of individual autonomy or human rights.[75] Continuing this line of thought

has sometimes resulted in proposals to qualify sovereignty in accordance with the extent a government respects the human rights of its citizens, or, more generally, based on the government's internal legitimacy or performance.[76]

Certainly, the line between *lex lata* and *de lege ferenda*, between positivist and normative arguments, is increasingly difficult to draw in this context. To some extent, state practice already supports the qualification of sovereignty where a state commits mass atrocities or large-scale violations of human rights, as the emerging concept of the 'responsibility to protect' suggests.[77] In the evolving discourse on the limits of sovereignty, however, it is safe to say that failed states are routinely quoted as examples where various kinds of external interventions in domestic affairs are, or should be, justified.[78]

The impression that the failed state label is (mis)used to justify infringements on the sovereignty of states deemed ineffective or illegitimate in turn explains why a third group of (critical) legal scholars follows the discourse with so much suspicion. They point to the 'colonialist nostalgia' that underlies attempts to conceptualize and address weak or imploding statehood in the global South, and retrace historical precedents and continuities of hierarchies between states.[79] Any attempt at grading sovereign statehood based on a state's capacity or will to fulfil certain functions would have to be considered in light of these continuities. Moreover, a critical perspective allows the juridical discourse on failed and fragile states to be turned upside down: rather than inquiring how they challenge the effectiveness of the legal order, attention turns to the question how existing legal rules may be complicit in creating and perpetuating state fragility through disadvantaging particularly weak states.

In sum, it seems that legal scholars' willingness to engage with failed or fragile states depends on whether they take state failure for granted as an empirical phenomenon, or primarily expose and criticize it as a social construction not worthy of doctrinal reconstruction. In any case, legal scholars have mostly concentrated on extreme (and extremely rare) instances of complete state failure or collapse and its implications for international security. In contrast, the broader spectrum and much more common phenomenon of state fragility remains difficult to grasp in terms of legal doctrine, and is usually considered irrelevant for international law.

4 Conclusion

In this chapter, I approached fragile states as a phenomenon characterized by the discrepancy between empirical statehood and juridical statehood. Fragile states often lack the institutional and administrative capacities required to exercise rights and obligations under international law, while they are bestowed with the legal status of states and the formal trappings of sovereignty. An empirical-sociological perspective can well account for variations in state effectiveness. The causes and consequences of state fragility have attracted much research, although the notion of fragile states remains highly ambiguous and politically charged. From a legal perspective, variations in state effectiveness, the factual inequalities between states, or attempts at qualifying statehood accordingly, retreat behind the doctrine of juridical statehood and the principle of sovereign equality. The static conception of juridical statehood also explains why international legal scholars have mostly followed the evolving discourse on state fragility with reservation, if not outright criticism.

As suggested at the outset, however, the important distinction between empirical and juridical statehood should not obstruct our view on the twilight existence of fragile states. However doubtful the value of a uniform designation as 'fragile', states do exist whose governments struggle to exercise effective control over their territory and people, while they are caught in cycles of extreme poverty and repeated conflict. Weak statehood can undoubtedly threaten human development and human security, and pose challenges to the international system that require an urgent and concerted response. To paraphrase James Crawford, the language of state failure has perhaps created a lot of confusion—but its principal value still consists in pointing to an urgent, "real debate about development and governance".[80]

At the same time, we have seen that the existence of states with extremely weak capacities puts into question international law's fundamental assumptions—namely, the assumption of effective government and the almost exclusive focus on the formal institutions of the state. And while state fragility is not a new phenomenon, its relevance from the perspective of international law is still growing with the increasing reach and depth of international regulation, as well as the diversification of actors and instruments of regulation. States that have a limited capacity to act will struggle with ever more demanding international obligations to provide numerous goods and services, and with maintaining the infrastructure necessary to

fulfil these tasks.[81] On the one hand, the fictitious assumption of effective government has thus more far-reaching consequences in an international legal order that has long moved from a law of coordination to a law of cooperation. On the other hand, it becomes easier for a state to be regarded as fragile, if statehood itself is increasingly cast as requiring not just the maintenance of a minimum level of law and order, but also the fulfilment of an array of requirements in other realms—from the combat of transnational crime to environmental protection. Neither the analytical shortcomings of the broad-brush notion of fragile states, nor the dubious premises of the evolving fragile states agenda, can thus conceal the fundamental challenge that the discrepancy between empirical and juridical statehood can pose to the international legal order—and to the actors operating on its premises and within its confines.

Fragile states matter to international law—and a legal grasp on the empirical phenomenon that acknowledges the internal contradictions and biases of the notion is relevant and due. For international legal scholarship, it means looking not just at the emergence or breakdown of effective government, but also at its evolution. The current restraint may constitute a tribute to the formality and 'wonderful artificiality' of juridical statehood. In fact, the difficulty of defining and determining the legal consequences of state fragility constitutes not a regrettable constraint, but a deliberate restraint of an international legal order based on sovereign equality. Yet it risks lagging behind a reality that has long responded to a widespread lack of basic capacity on the part of national governments.

Therefore, I propose shifting the focus away from the question of what state fragility is, to the question of how it is perceived and responded to, in order to learn more about its practical meaning and its significance from the perspective of international law.[82] A look at the evolving understanding of fragile states has shown that they have become a key priority and attracted a lot of attention, particularly in the fields of international security and development cooperation. In this context, international organizations emerge as important actors in furthering a concerted approach to fragile states. As I illustrate in the subsequent chapters, international organizations increasingly engage in regulatory activities concerning fragile states, adopting rules that do not necessarily conform to the traditional sources of international law—and yet they do require our attention. Ultimately, considering the actual position that fragile states are thus accorded by different actors, through different legal instruments, could yield more shades of grey than the formalistic conception of juridical statehood suggests.

Notes

1. Coined by Robert H. Jackson, the notions of empirical and juridical statehood serve to differentiate empirical-sociological accounts of statehood from the legal concept. Robert H. Jackson & Carl G. Rosberg, 'Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood', 35 *World Politics*, 1 (1982), p. 2.
2. Since 2009, the OECD DAC, the World Bank and other donors have begun to refer increasingly to 'fragile situations' rather than 'fragile states'. This terminological fine-tuning acknowledges that there can be pockets of fragility within non-fragile countries and is thus less state-centric. For the sake of simplicity, however, I predominantly refer to 'fragile states' or 'state fragility'.
3. See *infra* Sect. 3 in Chap. 3.
4. The term 'failed state', coined by Helman and Ratner in 1992 (Gerald B. Helman & Steven R. Ratner, 'Saving Failed States', 89 *Foreign Policy*, 3 (1992)), was rightly criticized as 'inaccurately state-centric', 'destructively ambiguous' and because it 'misplaces normative liability and attracts dangerous colonialist nostalgia'. Henry J. Richardson, ''Failed States', Self-Determination, and Prenventive Diplomacy: Colonialist Nostalgia and Democratic Expectations', 10 *Temple International and Comparative Law Journal*, 1 (1996), 77.
5. Oxford Dictionary, available online: http://oxforddictionaries.com/definition/fragile (accessed January 2017).
6. Jan Klabbers,' Soft Statehood?' Opinio Juris (20 January 2010), at http://opiniojuris.org/2010/01/20/soft-statehood/.
7. Alexandros Yannis, 'The Concept of Suspended Sovereignty in International Law and its Implications in International Politics', 13 *European Journal of International Law*, 1037 (2002), p. 1038.
8. John Peter Nettl, 'The State as a Conceptual Variable', 20 *World Politics*, 559 (1968).
9. Ibid., 579. Also: Christopher Clapham, 'Degrees of Statehood', 24 *Review of International Studies*, 143 (1998).
10. There is a rich literature on state-building processes in Western Europe, often described as the particularization of sovereignty into smaller territorial units and ethnically defined areas and the centralization, institutionalization and consolidation of power within these territories. For instance, Charles Tilly (ed) *The Formation of National States in Western Europe* (Princeton University Press, 1975); Thomas Ertman (ed) *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe* (Cambridge University Press, 1997).
11. Section 2.2 in this chapter.

12. Outti Korhonen, 'The 'State-Building Enterprise': Legal Doctrine, Progress Narratives and Managerial Governance', in Brett Bowden, et al. (eds), *The Role of International Law in Rebuilding Societies after Conflict. Great Expectations* (Cambridge University Press, 2009), at 21.
13. On the struggle of post-colonial states particularly in Africa, see, for instance, Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control* (Princeton University Press, 2000).
14. Pre-colonial state structures existed, for instance, in the Ashanti Empire (now Southern Ghana), the Kingdom of Congo (cutting across today's Angola, Republic of Congo, and Democratic Republic of Congo).
15. Christopher Clapham, 'The Challenge to the State in a Globalized World', 33 *Development & Change*, 775 (2002), 778.
16. For example, Peter Evans, 'The Eclipse of the State? Reflections on Stateness in an Era of Globalization', 50 *World Politics*, 62 (1997); or Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004), studying the effects of globalization through the lens of the concept of the 'disaggregated state'.
17. In some ways, however, the globalizing economy has also reinforced the institutional centrality of the state. For instance, a strong state capable of providing legal certainty and exerting control over the economy through regulation is often seen as beneficial to economic development.
18. Robert Houghwout Jackson, *Quasi-states. Sovereignty, International Relations and the Third World* (Cambridge University Press, 1990), p. 24.
19. See, for instance, Crawford Young, 'The End of the Post-Colonial State in Africa? Reflections on the Changing African Political Dynamics', 103 *African Affairs*, 23 (2004).
20. Helman & Ratner, 'Saving Failed States', p. 3.
21. At the UN, collapsing state institutions and the resulting breakdown of law and order were identified as central features of a new breed of conflict in the 1992 'Agenda for Peace'. An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peace-Keeping. Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992. UN Doc. A/47/277 - S/24111 (17 June 1992).
22. Jackson, *Quasi-states. Sovereignty, International Relations and the Third World*, at 5. Jackson unfolds his key argument with reference to the development regime, which 'presupposes a new type of sovereign state which is independent in law but insubstantial in reality and materially dependent on other states for its welfare.'
23. An important turning point was the publication of a World Bank study in 1989, which found that '[u]nderlying the litany of Africa's development problems is a crisis of governance.' The World Bank, '*Sub-Saharan Africa: From Crisis to Sustainable Growth. A Long-Term Perspective Study*' (1989), p. 60.

24. For example, Rudolf Dolzer, 'Good Governance: Neues transnationales Leitbild der Staatlichkeit?', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 535 (2004), referring to good governance as an emerging 'guiding principle of statehood'. Accordingly, there is a close link in the 1990s between shifting aid policies, for instance the increasing use of conditionality and selectivity in development aid, and broader trends in international relations, whereby it became more accepted for external actors to become concerned with the political system and performance of a state, and to intervene in matters that used to be seen as part of the state's domaine reservée.
25. National Security Strategy, Washington D.C., 2002.
26. United Nations Secretary General, A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004).
27. Edward Newman, 'Failed States and International Order: Constructing a Post-Westphalian World', 90 *Contemporary Security Policy*, 421 (2009), 434, whereby securitization is the 'process by which issues are accorded security status or seen as a threat through political labelling, rather than as a result of their real or objective significance.'
28. Ashraf Ghani & Clare Lockhart, *Fixing Failed States. A Framework for Rebuilding a Fractured World* (Oxford University Press, 2008), 21.
29. See Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011), p. 80, arguing that labelling some states as failed served to maintain the integrity and monopoly of statehood itself, since 'nation states that 'failed' did not challenge the orthodoxy that nation statehood was the natural form of collective politico-territorial organization, but were instead narrated away as not yet developed enough to achieve and maintain the nation state form.'
30. For example, Ralph Wilde, *International Territorial Administration. How Trusteeship and the Civilizing Mission Never Went Away*, 1. publ. (Oxford University Press, 2008) and Simon Chesterman, 'International Territorial Administration and the Limits of Law', *Leiden Journal of International Law*, 437 (2010) 23.
31. For a critique of the 'fetishization of state capacity' in the earlier state-building literature, see, Shahar Hameiri, 'Regulatory Statebuilding and the Transformation of the State', in David Chandler & Timothy Sisk (eds), *Routledge Handbook on International Statebuilding* (Routledge, 2013), at 54–57.
32. Paul Collier, *The Bottom Billion. Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford University Press, 2007).

33. The World Bank's commitments to fragile and conflict-affected states more than doubled immediately after fiscal year 2001. Independent Evaluation Group, The World Bank, *World Bank Assistance to Low-Income Fragile- and Conflict Affected States* (2013), p. 26.
34. Robert B. Zoellick, 'Fragile States: Securing Development', 50 *Survival*, 67 (2009), 68–69.
35. For example, Michael J. Mazarr, 'The Rise and Fall of the Failed-State Paradigm. Requiem for a Decade of Distraction', in *Foreign Affairs* (January/February 2014) or Stewart Patrick, *Weak Links: Fragile States, Global Threats, and International Security* (Oxford University Press, 2011), arguing that terrorist networks and organized crime require the infrastructure of functioning states, and fragile states therefore pose a greater risk to their own people than to international peace and security.
36. Institute of Development Studies, *An Upside Down View of Governance* (April 2010) or the findings of the Berlin-based research project on 'Governance in Areas of Limited Statehood' in Josef Braml, et al. (eds), *Einsatz für den Frieden. Sicherheit und Entwicklung in Räumen begrenzter Staatlichkeit* (Oldenbourg, 2010).
37. For example, OECD, *The State's Legitimacy in Fragile Situations. Unpacking Complexity* (2010), 7, stating that a 'lack of legitimacy is a major contributor to state fragility because it undermines state authority, and therefore capacity'.
38. Going further, some authors find that not just state institutions, but the dynamics of socio-political cohesion on their own can be a driver of fragility; e.g. Alexandre Marc, et al., *Societal Dynamics and Fragility. Engaging Societies in Responsing to Fragile Situations* (The World Bank, 2013); or Nicolas Lemay-Hébert, 'Statebuilding without Nation-building? Legitimacy, State Failure and the Limits of the Institutionalist Approach', 3 *Journal of Intervention and Statebuilding*, 21 (2009).
39. For example, OECD, *The State's Legitimacy in Fragile Situations. Unpacking Complexity*, p. 15; or The World Bank, *World Development Report: Conflict, Security, and Development* (2011), Glossary of Terms whereby legitimacy 'denotes a broad-based belief that social, economic, or political arrangements and outcomes are proper and just.'
40. For example, Jonathan Fisher, 'When it Pays to be a 'Fragile State': Uganda's Use and Abuse of a Dubious Concept', 35 *Third World Quarterly*, 316 (2014). It is important to note that many countries continue to refuse the fragile states terminology, however, and therefore refuse to join the g7+.
41. As of January 2017, the g7+ counts 20 members from four continents: Afghanistan, Burundi, Central African Republic, Chad, Comoros, Côte d'Ivoire, The Democratic Republic of the Congo, Guinea, Guinea Bissau,

Haiti, Liberia, Papua New Guinea, Sao Tome and Principe, Sierra Leone, Solomon Islands, Somalia, South Sudan, Timor-Leste, Togo, and Yemen. On the formation of the g7+ and their potential to influence political decision-making on conflict-affected and fragile states, see Vanessa Wyeth, 'Knights in Fragile Armor: The Rise of the 'G7+'', 18 *Global Governance*, 7 (2012).

42. More recent proposals for measuring or defining fragility therefore seek to differentiate different dimensions of fragility. For example, Charles T. Call, 'Beyond the 'Failed State': Toward Conceptual Alternatives', 17 *European Journal of International Relations*, 303 (2010) or OECD, '*States of Fragility. Meeting Post-2015 Ambitions*' (2015).
43. For example, Ghani & Lockhart, *Fixing Failed States. A Framework for Rebuilding a Fractured World*.
44. Also Newman, 'Failed States and International Order: Constructing a Post-Westphalian World', 421.
45. Nehal Bhuta, 'Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order', in Kevin E. Davis, et al. (eds), *Governance by Indicators. Global Power Through Quantification and Rankings* (Oxford University Press, 2012), at 135.
46. Johann-Caspar Bluntschli, *The Theory of the State* (Clarendon, 1985), 66–67, continuing: 'There are two political sciences corresponding to this internal distinction, Public Law and Politics'.
47. James Crawford, *The Creation of States in International Law*, 2nd Edition (Clarendon Press, 2007), 5.
48. ICJ in *Reparations for Injuries Suffered in the Service of the United Nations* case, advisory opinion [1949] ICJ Rep. 174 at 178.
49. Crawford, *The Creation of States in International Law*, 29. Of course, the proliferation of international organizations, courts and tribunals, as well as other international, national or transnational public and private actors who contribute to shaping the international legal order has challenged the state's monopoly in this regard.
50. In detail, ibid., pp. 40–44. A state can agree to limit its powers, for example, by means of a binding agreement with other states or membership in an international organization. As long as the state's legal independence from other states is maintained, however, its legal status remains unaffected.
51. It suffices to note that international law makes no specification as to the required size of the population or territory, even if states with very small populations or territories may be less able to comply with certain requirements, for instance of membership in international organizations.
52. Ian Brownlie, *Principles of Public International Law*, 7th Edition (Oxford University Press, 2008), 71; Crawford, *The Creation of States in*

International Law, 42. Government is the central criterion in that all other elements depend on it: territory is defined by international law with regards to territorial jurisdiction, i.e. the extent the government's power extents over a geographical area or population.

53. James Crawford, 'State', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* January 2011), para. 14. The legality of a government has mattered in certain cases, for example when Rhodesia was not recognized as a state by a majority at the United Nations since it was established on racial ideology. Regarding the legitimacy of a government, some authors have proposed to condition the recognition of states or governments on whether they enjoyed popular support. For example, Gregory Fox, 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law*, 539 (1992); or, Anne Peters, 'Statehood after 1989: 'Effectivités' between Legality and Virtuality', in James Crawford & Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (Oxford University Press, 2010).
54. For example, Crawford finds that a state requires 'competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so' (Crawford, *The Creation of States in International Law*, 59), whereas Shaw highlights that there is no 'necessity for a sophisticated apparatus of executive and legislative organs'. Malcolm N. Shaw, *International Law*, 5th (Cambridge University Press, 2003), 180.
55. Examples for the former category include Rhodesia/Zimbabwe, Taiwan, the Turkish Republic of Northern Cyprus, and Somaliland; examples for the latter category include entities unlawfully annexed in the period 1936–1940 (e.g. the Baltics or Poland), or Kuwait during the Iraq-Kuwait War in 1990–1991,
56. Crawford, *The Creation of States in International Law*, 59. Siegfried Magiera, 'Governments', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (September 2007), para. 17.
57. Shaw, *International Law*, pp. 183–185. This trend has since been reinvigorated by international practice *vis-à-vis* the successor states of former Yugoslavia. Both Croatia and Bosnia and Herzegovina were recognized by members of the EU and admitted into the UN at a time when their respective governments did not control substantial areas of their territories during civil war.
58. Koskenniemi, 'The Wonderful Artificiality of States', p. 28.
59. In contrast, Korhonen doubts that in light of its historical contingency, the state is the 'neutral structure, which the classic and the formalist doctrines of state constitution seem to assume'. Korhonen, 'The 'State-Building Enterprise': Legal Doctrine, Progress Narratives and Managerial Governance', p. 27.

60. Peters, 'Statehood after 1989: 'Effectivités' between Legality and Virtuality', 174. See also the discussion in Gerard Kreijen, *State Failure, Sovereignty and Effectiveness. Legal Lessons from the Decolonization of Sub-Saharan Africa* (Nijhoff, 2004), pp. 179–192.
61. Hiroshi Taki, Effectiveness, in Rüdiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008), para. 5; Heike Krieger, *Das Effektivitätsprinzip im Völkerrecht* (Duncker & Humblot, 2000), 80–81.
62. Jackson, *Quasi-states. Sovereignty, International Relations and the Third World*, 23–24.
63. For example, Martti Koskenniemi, 'The Politics of International Law', 1 *European Journal of International Law* (1990).
64. Most legal studies use the term 'failed state' rather than 'fragile state'. This is more than a terminological nuance, as most legal studies also focus on extreme instances of state collapse or 'failure', rather than weaker forms of preliminary stages that fall on a broad spectrum of state fragility.
65. Daniel Thürer, 'The 'Failed State' and International Law', 81 *International Review of the Red Cross*, 731 (1999), 734.
66. The capacity to act is the effective capacity of an international legal subject to dispose over the realization of rights and duties through its own behaviour.
67. On the principle of continuity, see *supra* note 56.
68. As a variable condition, state fragility is of course even less amenable to a clear-cut legal definition than state failure or collapse.
69. The capacity of a government to act may have consequences for its ability to be held responsible for violations of international law, but it does not concern the status of the state *per se*. In detail, Hinrich Schröder, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States* (Nomos, 2007), pp. 84–107.
70. See, for instance, Gerard Kreijen (ed) *State, Sovereignty, and International Governance* (Oxford University Press, 2002), 262 ff; or Giorgetti, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, 1–8.
71. On the problem of international law's enforcement in failed states in detail, see Jonathan E. Hendrix, 'Law Without State: The Collapsed State Challenge to Traditional International Enforcement', 24 *Wisconsin International Law Journal*, 587 (2006). Importantly, not just non-compliance, but also the partial or superficial implementation of international legal rules count as a challenge in this regard.
72. On the principle of effectiveness, see *supra* note 60.
73. Giorgetti, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, chapter 1. The important

consequences of state failure for the legitimacy of the international legal order have rarely been addressed in detail in legal literature – possibly because problems of legitimacy become apparent only when we look beyond rare cases of state collapse and consider a broad range of fragile states as unable to effectively participate in international policy- and law-making.

74. For example, THÜRER, 'Der Wegfall effektiver Staatsgewalt: 'The failed state', 17, arguing that the issue of failed states must also be considered in light of the principle of self-determination of peoples, since state institutions no longer exist to represent the rights and legitimate interests of the people.
75. For example, ANNE PETERS, 'Humanity as the A and Ω of Sovereignty', 20 *The European Journal of International Law*, 513 (2009), constructing state sovereignty as flowing from 'humanity', thus dissolving the conflict between sovereignty and human rights, and claiming the primacy for human rights.
76. For example, ANNE-MARIE SLAUGHTER, 'International Law in a World of Liberal States', 6 *European Journal of International Law*, 503 (1995); or MICHAEL P. SCHARF, 'Earned Sovereignty. Juridicial Underpinnings', 31 *Denver Journal of International Law and Policy*, 373 (2002–2003).
77. According to the concept sovereignty is reconfigured as the primary responsibility of the state to protect its population. If a state, due to a lack of capacity and/or will, does not meet its primary responsibility, it passes to the international community. See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), International Development Research Centre, '*Responsibility to Protect*' (2001), endorsed by the UN General Assembly in the 2005 World Summit Outcome, UN Doc. A/60/L.1 (15.09.2005), para. 138. On the legal nature of the responsibility to protect, see CARSTEN STAHN, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', 101 *The American Journal of International Law*, 99 (2007).
78. For instance, the ICISS Report on the Responsibility to Protect explicitly refers to situations of state failure as circumstances justifying intervention (para. 4.19).
79. RICHARDSON, ' 'Failed States', Self-Determination, and Prenventive Diplomacy: Colonialist Nostalgia and Democratic Expectations'; on the dichotomy between civilized and uncivilized states and how it has shaped the international legal order, ANTONY ANGHIE, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2005); and on 'legalised hierarchies' that persist behind the principle of sovereign equality, SIMPSON, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order*.

80. CRAWFORD, *The Creation of States in International Law*, 723: "To this real debate about development and governance the language of state failure has added little but confusion." Crawford adds: "what is needed is not a more intrusive intervention *doctrine*, but more effective '*measures*' ". He seems to imply that such measures would consist of operational activities aimed at strengthening domestic capacities and governance.
81. GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, 1–4. The array of formal and informal requirements imposed on them may actually create a burden that exceeds their limited capacities. In this this context, the World Bank has used a very graphic comparison to illustrate that international obligations on states are becoming more demanding: whereas the 1948 UN Convention Against Genocide consisted of 17 operative paragraphs, the 2003 Convention Against Corruption has 455.
82. Jochen Frowein takes a similar approach in his study of *de facto* regimes, which also challenge the formalist doctrine of statehood. Frowein finds that "[b]ecause of the imperfect nature of international law no possibility exists of clarifying whether entities have the quality of States although they are not recognized as such. Therefore, it is of great importance to analyze State practice as to the position of those regimes in international law." JOCHEN FROWEIN, *Das de facto-Regime im Völkerrecht* (Heymann, 1968), pp. 1–3.

CHAPTER 3

Development Cooperation with Fragile States: From Discourse to Action

We may endorse the notion of fragile states as a label for the development challenges of weak-capacity states, or reject it as too broad a category to be of any analytical value. We may endorse it for drawing attention to the familiar shortcomings of a state-based international system, or reject it as a term too politicized to be used objectively. Either way, through constant reiteration, quantification and operationalization, the notion of fragile states has become a basis for action in the field of development cooperation.

For development cooperation, the existence of states with very weak capacities for economic and social development constitutes its principal *raison d'être*. To some extent, the very emergence of an international development regime stems from the recognition that sovereign states may be autonomous in law, but weak and materially dependent on others in reality. The declared objective of development cooperation consists of promoting the long-term economic, social and political development of poorer countries through the provision of financial and technical assistance. In that it is fundamentally concerned with strengthening the factual capacity and effectiveness of governments, development cooperation could be seen to assume a crucial, auxiliary function for international law.[1] Development cooperation helps to strengthen or maintain the 'effective government' on which the international legal order is premised.

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If there is already an intrinsic link between the international development regime and the broader challenge of weak statehood, in recent years, fragile states have emerged as a key priority in development discourse and practice. The combination of weak capacity and governance, insecurity and political instability render some countries a particularly challenging environment—and one where the state-centric paradigm and traditional business models of development cooperation have often proven inadequate or ineffective. An enormous amount of research and resources have gone into finding a response to the challenge of aiding fragile states, producing reports, rankings, and policy recommendations.

International organizations have been a driving force in these developments. Their track record in instable and politically charged environments from the West Bank and Gaza to Afghanistan has been comparatively poor. Virtually all international organizations engaged in operative development cooperation have therefore sought to identify and address the specific constraints of engaging in fragile settings. Many have begun to draft new strategies, and to adapt the processes and aid instruments whereby they engage with a country and provide assistance. Others have supported the development of international principles and guidelines for dealing with fragile states.

Ultimately, it is the standard-setting activities, strategic and operational reforms, and evolving organizational practice of international development organizations that is essentially changing the design, management, and delivery of ODA *vis-à-vis* fragile states. Moreover, it is through their actions that policy shifts in multilateral development cooperation have a direct bearing on the states concerned and their respective populations. Since fragile states are typically very dependent on aid, whether and how development organizations engage with these countries can have considerable material, as well as political consequences.

In this chapter, I begin by outlining how the fragile state notion, through its constant reiteration, quantification, and operationalization, has become a basis for action (Sect. 1). Looking closer at the field of development cooperation, I lay out the challenges that international organizations face when seeking to engage with fragile states on the basis of a traditionally state-centric paradigm (Sect. 2). To illustrate how different organizations have responded to these challenges, I then provide an overview of general policy-making and standard-setting activities in the context of the OECD Development Assistance Committee (DAC), and of strategic and operational reforms undertaken by organizations engaged in

development cooperation (Sect. 3). In conclusion, I point out that not only development objectives, processes, and instruments are adapted for fragile states, but also the rules that govern them (Sect. 4).

1 From Discourse to Action

Over the past two decades, the notion of fragile states has slowly migrated from the realm of political and academic discourse to a stage where it directly informs policy-making. Firstly, attention and resources devoted to research on the causes, characteristics, and consequences of state fragility have increased steadily, and have contributed to the normalization of a certain idea of statehood and state fragility as a deviation thereof.[2] The interests and needs of different actors that commission or produce such research may vary, but it is generally driven by a search for similarities between diverse countries, and the corresponding objective of generating uniform solutions. The idea that a 'unified object' of study exists, and that "qualities of highly heterogeneous political and social orders can be mapped, grasped, known, compared and addressed" are thus continuously reiterated.[3]

This trend has been reinforced, secondly, by numerous efforts to measure state fragility, facilitating the move from discourse to action. Research institutions, governments and international organizations produce different indices, classifications, and rankings, both for analytical and practical purposes.[4] For the purposes of measurement, statehood is often disaggregated in certain core dimensions (for instance, politics, security, economy, and social welfare). A state's performance is measured for each dimension using a compilation of different indicators, such as Gross Domestic Product (GDP), the Human Development Index (HDI), and the World Bank Governance Indicators (WGI).[5] Countries are then ranked on the basis of a metric scale, with an ideal notion of effective or resilient statehood positioned at the top end of the spectrum. The resulting country rankings show considerable overlap: typically, they are headed by Somalia, followed in diverging order by Sudan, the Democratic Republic of Congo (DRC), Chad and Afghanistan.

This is notable in that indicators and rankings can play a potentially powerful role in constituting and shaping perceptions, and can have important material consequences.[6] Used for measuring state fragility, they contribute to elaborating and entrenching a particular social construction of fragile states. Indicators and rankings become a means of proving the

objectivity and viability of the concept, and hence a basis for its operationalization.[7] Though measurement and classification occur on the basis of seemingly technical, indicator-based assessments, the political and normative nature of the underlying claims can hardly be disguised. The material consequences of indicator-based classifications become evident where they are put to use, for instance, in the allocation of development aid.

Despite the lack of a clear concept, let alone an agreed definition, the notion of fragile states has thus proceeded to a stage where it directly informs policy-making in security, development, and other fields of practice. For example, the construction of state fragility as a complex and multi-dimensional challenge has affected the interaction of different policy fields and actors, and contributed to the incorporation of civilian components into military operations, to the 'securitization' of development cooperation, and to fostering a closer linkage between humanitarian assistance and development cooperation. In as much as weak statehood is increasingly seen as a root cause for multiple problems, state-building is seen as a global public good, which requires a concerted effort across institutions and policy fields.[8]

Such policy shifts have direct material implications, too. In development cooperation, the understanding that fragile states face specific constraints or needs has led to a substantial increase in resource flows to fragile states. The amount of ODA going to conflict-affected and fragile states has more than doubled between 2000 and 2010, when it accounted for 37% of all ODA.[9] Additional resources flows have usually concentrated in countries or regions of strategic interest to the West, but have also benefited long-forgotten crisis and aid orphans.[10] The growing interest in fragile states has also affected the distribution of resources to specific projects and programs, shifting emphasis to those with a focus on institution-building and governance reforms.[11]

Against this background, it is important to ask on what basis states are designated 'fragile', and what are the consequences. The combined effects of the reiteration, quantification, and operationalization of the fragile states idea are far from unidirectional, but certainly substantial. On the one hand, the rise of the idea has often involved throwing "a monolithic cloak over disparate problems that require tailored solutions", and inspired intrusive and paternalistic policy prescriptions.[12] On the other hand, it has helped to direct attention to the specific needs of marginalized states, and highlighted that the universalization of a particular model of statehood in the past has been informed by unrealistic assumptions.

It is also important to turn attention to the actors that are making the relevant judgements, and to look closer at the processes and instruments through which the notion progresses from discourse to action. In the context of ongoing transformations from an inter-state system to a multi-level system of governance, international organizations emerge as important actors in formalizing the idea of fragile states, and in furthering a concerted response to state fragility—as sites for intergovernmental policy-making and standard-setting, and through adapting their own processes and instruments.

2 The Challenge of Aiding Fragile States

In recent years, there has been an unprecedented surge of reforms and regulatory activity in multilateral development cooperation with fragile states. Before we consider how the notion is thus operationalized, however, I want to turn attention to the challenges that have prompted such a proactive response from international development organizations. Multilateral development cooperation rests on a state-centric paradigm, which underscores the objectives, processes and instruments of aid. Development organizations act on the assumption that recipient countries have effective governments—both in a formal, juridical sense, and from an empirical perspective, that is concerning the actual capacity of state institutions. Accordingly, development organizations face a number of challenges—technical, political and legal—when seeking to engage in the weak-capacity and often high-risk environments associated with fragile states, with sometimes no effective and functioning government counterparts.

In the next section, I look in more detail at the state-centric development paradigm that informs multilateral development cooperation (Sect. 2.1), and outline the various challenges that international organizations encounter in the context of fragile states (Sect. 2.2).

2.1 The State-Centric Development Paradigm and Its Premises

The traditional regime of development cooperation is largely state-centric. Development cooperation essentially constitutes an intergovernmental process through which, in the case of multilateral development cooperation, an international organization provides ODA to one or more recipient states.[13] Recipient governments constitute the natural counterparts for

international organizations: they negotiate and sign the agreements on the basis of which assistance is provided, participate in the design of projects and programs, and are responsible for their implementation. For based on the current aid orthodoxy, recipient states are expected to take the lead and assume responsibility for their own development. The regime of development cooperation is thus premised on the existence of a state with an 'effective government' in a juridical sense, that is a government with the legal capacity to express consent and to legally commit the country.[14] Moreover, it is premised on the existence of a government with a certain level of institutional capacity and good governance, which are seen as preconditions for aid to be effective. Both aspects, juridical and empirical statehood, thus influence under what conditions and how international organizations provide development funding.[15]

Why juridical statehood is generally a minimum condition for access to ODA becomes clear when considering that as an intergovernmental process, the transfer of ODA is essentially governed by international law. International organizations must treat recipient countries as legal sovereigns, which implies that they can engage only with the consent of the government in power. Moreover, international organizations generally provide development assistance on the basis of international legal treaties.[16] These are negotiated and signed by the governments of recipient countries, which possess the capacity to legally commit the country. As we will see in Chap. 4, the formal primacy of the sovereign state is also clearly expressed in the legal and policy frameworks of international development organizations.[17]

Recipients that have the formal attributes of juridical statehood alone, however, are not able to assume a decisive role in planning and implementing development projects and programs. For this purpose, international development organizations equally expect recipients to have certain institutions and policies in place, factors associated with empirical statehood.

Today's predominant assumption that development depends on "the existence of a unified and secure state, and a benign and competent government to run its institutions" is the result of a considerable evolution.[18] Initially, development was understood as a mostly state-driven process, and organizations supported a strong role for the governments of newly independent nations in initiating economic activity. In contrast, in the 1970s and 1980s, inefficient public administrations, weak policies and massive corruption came to be seen as major home-grown and state-related

impediments to economic growth. For many years, development organizations advocated for reducing the role of the state in the economic process, in line with the neoliberal ideas encapsulated in the economic agenda of the 'Washington Consensus'.[19] Only in the late 1980s, mainstream development thinking began turning to the state again.

Three important developments have since significantly shaped the role and responsibilities accorded to recipient governments in development cooperation. First, the concept of development itself came to be conceived more holistically in all of its economic, social and ultimately political facets.[20] As a result, development actors began looking more comprehensively at the state's performance in all of these areas, some of which traditionally belonged to the state's domestic affairs. A more concrete conception of what was expected of the state to reduce poverty and increase human welfare emerged.

Second, the rise of 'good governance' as a *leitmotif* in the 1990s reflects the growing consensus that for aid to be effective, it requires a favourable institutional and policy environment.[21] Macroeconomic evidence from cross-country regressions appeared to suggest that the impact of aid on growth and poverty-reduction was reduced in countries with poor policies and institutions.[22] Hence, recipient states were expected to conduct public affairs and manage public resources in an efficient, transparent and responsible manner. International organizations became involved with an expanding agenda of political reforms, and more selective in the allocation of aid in the first place. The endorsement of good governance as a necessary ingredient, if not precondition for development has thus influenced the perceived role and expected functions of recipient states in an unprecedented manner.[23] For many development organizations, the ideal state became one capable of fulfilling certain core functions in an effective and efficient manner, while cooperating both with the private sector and civil society.[24]

Third, the success of the aid effective agenda, reflected in the broad endorsement of five principles to improve the quality and impact of aid in the 2005 Paris Declaration on Aid Effectiveness, has firmly entrenched the understanding that aid effectiveness requires government effectiveness.[25] In other words, not only do many governments rely on external aid to function effectively. For aid to be effective and sustainable, it requires a sufficient level of institutional capacity and good governance on the parts of recipients. In particular, the principle of ownership reflects how both the role and the according expectations of recipient states have grown over

the last decades. 'Ownership' prominently expresses the claim that recipient states should take the lead over their own development, which corresponds to an entitlement as well as duties and responsibilities.[26] For instance, recipients are responsible for formulating a national development plan, guaranteeing broad-based participation, and for maintaining the institutions necessary for its implementation.[27]

These broader trends concerning the role of the recipient state find expression in a proliferating number of political declarations and standard-setting instruments that inform the conduct of development cooperation—the Paris Declaration, the 2013 Busan Partnership for Effective Development Cooperation,[28] and the UN's Agenda 2030 and the Sustainable Development Goals (SDGs) adopted in 2015.[29] These documents convey the central tenets of the state-centric development paradigm: on the one hand, that recipient states are recognized as equal partners, and on the other hand, that recipients are expected to provide the enabling (transparent, accountable) environment necessary for rendering aid effective.

Apart from being expressed in high-level policy statements, such trends have profoundly affected the way in which development organizations plan, manage, and deliver assistance. To a greater or lesser extent, all international organizations have made the fulfilment of good governance-related political and macroeconomic requirements a decisive factor in determining the volume of aid, the choice of aid instruments, or the continuation of projects and programs. For instance, Multilateral Development Banks (MDBs) like the World Bank, the African Development Bank (AfDB) or the Asian Development Bank (ADB), allocate resources to low-income countries on the basis of assessments of their policies and institutions, including in the area of good governance. Other donor organizations like the European Union (EU) explicitly condition assistance on a country's adherence to democratic principles and human rights. The idea of country ownership is reflected in the fact that development organizations are expected to build on a country's own development objectives and priorities. Moreover, donors increasingly provide ODA directly to a country's budget, thus allowing a greater say for recipient governments in determining the use of resources.

The conviction that external assistance is successful and sustainable where it builds on effective and accountable state institutions is hence reflected in the objectives, processes, and instruments used in multilateral development cooperation—and as Chap. 4 will show, in the legal and policy

frameworks of international development organizations.[30] Development organizations operate on the assumption that governments are in principle capable of fulfilling certain requirements in the development process, and can serve as a counterpart for the donor community. They expect that recipient governments have the capacities and institutions necessary for taking the lead in planning and implementing development projects, in a participatory manner, in line with environmental and social standards, and guaranteeing the transparent and accountable use of ODA. What they look for is literally effective governments—governments that conform to an array of requirements concerning their functions and expected performance in the development process. The precise content of such requirements is generally dependent on the particular ideas and preferences of different donors.

Ultimately, the state-centric paradigm of development cooperation and its premises lead to a peculiar paradox. International organizations operate on the basis of the assumption that recipient counterparts have an effective government, while they are essentially concerned with strengthening government effectiveness. They are simultaneously bound to respect the sovereignty of recipients, and committed to establishing the conditions required for sovereignty to be exercised.[31] This paradox is particularly apparent in the context of multilateral development cooperation with fragile states.

2.2 Practical and Legal Challenges of Engaging with Fragile States

In 2009, the World Bank's President declared "fragile states are the toughest development challenge of our era".[32] A large consensus has emerged among donors that these states need assistance in building the capable and responsive institutions necessary to escape from cycles of poverty and conflict. Donors also agree, however, that achieving positive and lasting development results in the absence of basic institutional structures and capacities is exceptionally difficult. In other words, fragile states may be seen as the toughest development challenge because they face particular development challenges, or because they pose particular challenges to development cooperation.

It bears repeating that the origins and analytical value of the notion of fragile states are highly dubious.[33] Yet putting aside for a moment the question whether it makes sense to collectively refer to these states as

'fragile', empirical data substantiates the dire situation and elevated needs of a certain group of countries. Based on World Bank statistics, poverty rates in conflict-affected and fragile states are on average 21% higher than in developing countries that are not affected by conflict; their populations are twice as likely to be undernourished, and children are three times as likely to be out of school.[34] The governments of fragile low-income countries spend less than half the amount of public resources on government services in the realm of education, health, security and administration than other developing countries.[35] The aggregated effects of these facts and figures concern about 1.5 billion people living in fragile states, amounting to one-sixth of the world's population.

What makes development cooperation with fragile states so challenging? Many difficulties that development actors face are in one way or another related to the security situation. Fragile states often constitute insecure and politically instable environments, and many experience ongoing conflicts. Security concerns can complicate, if not prevent, the engagement of development actors on the ground. Insecure or highly volatile political environments also make it difficult to generate or obtain reliable information required for planning development interventions, or to articulate longer-term objectives and priorities required for multi-annual, strategic planning. Different and potentially conflicting objectives may prevail in the short term, and require, for instance, the prioritization of security and reconstruction needs over more long-term development goals. Particularly in the context of non-linear crises, where circumstances are in flux and there is a constant danger that violent conflict re-erupts, projects can often not be implemented as planned.

Further, considering the often complex political economy of fragile states, the risk is higher not only that projects remain ineffective, but that funds are misused or end up exacerbating existing societal tensions or ethnic conflicts. In addition, non-linear crises often involve a plurality of development, humanitarian, and military actors that operate alongside each other. With their competing mandates, objectives and *modi operandi*, coordination between these different actors remains difficult.[36]

Yet fragile states do not just constitute particularly challenging environments for international development actors. They also bring to light a considerable disconnect between central tenets of the state-centric development paradigm and circumstances on the ground. Put differently, development organizations require precisely what many fragile states lack. They operate primarily with and through governments, and see national

governments as principal providers of law and order, of security and other basic services.

What if no government in power can be identified, or more than one entity claims power? What if the government formally in power lacks even the most basic capacities to exercise control beyond the capital? And what if the government that is supposed to serve as a counterpart in development cooperation has lost not only any meaningful authority, but also legitimacy in the eyes of the population?

These questions point to the intricate blend of legal, political, and technical challenges that development cooperation with fragile states can involve—challenges that are not necessarily characteristic of states deemed 'fragile', but often go along with weak governance, political instability and conflict. First of all, they engage the minds of international lawyers who work in the legal departments of international development organizations. Lawyers need to identify a government counterpart that can formulate an official request for assistance, or sign off the legal agreements on the basis of which assistance is provided. Difficulties emerge if either the juridical status of the state, or the legal authority or international recognition of the government is in doubt.[37]

This is not only the case in an exceptional situation like Somalia, where no effective government emerged for over a decade. The legal status of statehood may be contested, for instance, in situations immediately following state creation (for example, Kosovo); in states or territories that are temporarily administered by the United Nations (UN) (for example, East Timor or Kosovo); or in territories with relatively effective government, but a permanently unresolved legal status (that is *de facto* regimes like Somaliland or Palestine). The fact that Somaliland has not yet been recognized as an independent state has generally precluded the *de facto* regime from receiving international development assistance.[38] Moreover, difficulties in identifying the government in power after an unconstitutional change of government can occur after a military coup or in a post-conflict situation (for example, occupied Iraq in 2003), which regularly lead to an interruption of aid flows.

Even if a government or interim authority can be identified, however, it is important to note that weak governance by governments in fragile states are regularly complemented by informal, non-state forms of governance.[39] In this context, the disproportionate focus on the formal institutions of the state and the central state level can limit the effectiveness and reach of important to note that weak governance by development cooperation. At

the same time, for intergovernmental organizations that are used to dealing with national governments, identifying interlocutors among non-state actors—including actors like warlords or rebel forces—is extremely difficult and politically sensitive. Particularly in post-conflict settings, civil society is often weak and fragmented, and the form and functions of civil society may substantially differ from the Western understanding.

No less difficult is engaging with governments that are formally in power and effective control, but violate human rights. In such situations, development organizations face the critical question of how to continue supporting a population in need, while avoiding the risk of supporting or legitimizing the government. Repressive governments are not a necessary characteristic of fragile states. Where governments appear more engaged in rent-seeking and clientelism than providing basic services, however, they are deemed by donors as 'unresponsive', 'difficult partners' or 'spoilers', rather than vital partners in development.[40]

Apart from questions concerning the legal or legitimate authority for international organizations to engage with, the significant lack of capacity on the part of national governments in fragile states can cause many more difficulties in development cooperation. Fragile states are often in urgent need of external assistance, but simply lack the capacity to qualify for assistance in the first place, or to ensure that projects and programs are later implemented effectively. Development organizations regularly condition aid on the fulfilment of an array of requirements concerning the institutions and policies thought necessary for aid to be effective, to conform with fiduciary, environmental or social standards, or to ensure the accountable use of ODA.[41]

Safeguarding such standards may appear particularly warranted in countries where national standards are low. At the same time, insisting on the same level of requirements can prohibit any donor engagement—and donors increasingly acknowledge the risks associated with inaction or delayed action in already fragile states.[42] Besides, for a weak government, the struggle to meet the aggregated requirements of various donors concerning project approval, implementation, and reporting will likely put a strain on its already limited capacities. In practice, the result is often that implementation is bumpy, or institutions are created as mere camouflage.[43]

Very weak capacity can also hamper a government's ability to assume ownership. Realizing the principle of ownership regularly involves that recipients prepare a comprehensive national development plan on the

basis of broad-based consultations, and seek an active role in planning, implementing, and monitoring projects—activities that all presume considerable institutional capacities and human resources.[44] Accordingly, even relatively extensive and formalized guarantees of national decision-making power and participation in processes of multilateral development cooperation are only as effective at ensuring national autonomy as governments have the capacity (and intent) to realize them. Ultimately, engaging with fragile states often involves a dilemma. In light of limited capacity or weak governance, substituting or bypassing state institutions appears warranted in the short term. Yet, bypassing state institutions reduces national autonomy, and risks undermining the longer-term objective of strengthening their capacity.

In sum, fragile states pose a challenge to development cooperation since in accordance with the state-centric development paradigm, development objectives, processes, and instruments rely on the presence of an effective and authorized, capable, and responsive government. The finding that international development organizations are challenged to a significant extent because of their own reliance on (or required obedience to) fixed assumptions in terms of juridical and empirical statehood has an important implication. It is not only—and perhaps not even primarily—internal factors that make these states a development challenge.[45] Rather, fragile states are perceived and singled out as exceptionally challenging environments on the basis of an analysis that is inevitably influenced by different interests, policy goals, and eventually mandate constraints. Behind the identification, conceptualization and response to fragile states as a development challenge stand actors that are, within the confines of their particular mandates, making judgements and taking decisions—on the legal status or effectiveness of a government, on the capacity of institutions, or on the quality of governance, for example. Bearing this in mind, the following section sketches how international development organizations are responding to the challenges they associate with engaging in fragile states.

3 An Evolving Response

Specific attention to fragile states in the development community commenced with the World Bank's establishment of a taskforce on 'Low Income Countries Under Stress' (LICUS) in 2001. Since then, the OECD Development Assistance Committee (DAC), a forum composed

of the most important, traditional donors, has assumed a central role in developing general principles and guidelines concerning the design, management, and delivery of ODA to fragile states.[46] Such principles and guidelines are concretized by international organizations engaged in operative development cooperation: international and regional development banks, UN institutions and the EU. These organizations do not only refer to the outcomes produced by high-level policy fora. Responding to the practical and legal challenges they face when engaging with fragile states, many have revised their own strategies and processes. Reforms at the operational level in turn influence the development of more general principles for dealing with fragile states in high-level policy fora like the OECD DAC. Although the regime of development cooperation is not structured hierarchically and composed of diverse organizations, through such processes of mutual influence or cross-fertilization between institutions, their understanding of and response to fragile states becomes increasingly consistent.[47]

In the following section, I outline the development policy-making and standard-setting activities concerning fragile states in the context of the OECD DAC (Sect. 3.1), and provide a first overview of the type of strategic shifts and operational reforms undertaken by international development organizations (Sect. 3.2).

3.1 Standard-Setting in the Context of the OECD DAC

The OECD DAC is a grouping of the traditionally most important donors of development aid, that is 28 OECD member countries and the EU. Created in 1960, the intergovernmental committee does not itself provide ODA, but is mandated to promote cooperation by reviewing, analysing and providing guidance on development policies and practices.[48] Though not vested with the power to enforce compliance with its decisions, the OECD DAC thus exerts influence by promoting certain policies and standards.

As a norm entrepreneur, the OECD DAC has significantly contributed to development policy-making and standard-setting regarding fragile states. Already the landmark Paris Declaration expresses the idea that fragile states require a differentiated approach, given their weak capacity and poor governance.[49] In 2007, OECD ministers formally adopted a special set of guidelines to complement the Paris Declaration, the ‘Principles for Good International Engagement in Fragile States and Situations’.[50]

The ten principles reflect the emerging international consensus that state-building is the central objective in fragile states. To support this objective, international actors should focus on strengthening the capacity, legitimacy and accountability of state institutions, and refrain from bypassing state institutions and building parallel systems. Further, the Principles demand international actors to tailor their operational response to the specific situation of each country, namely the "different constraints of capacity, political will and legitimacy". In the absence of strong government leadership and good governance, for example, international actors should reach out to actors outside of the government.[51] In addition, the 'Do no harm' principle requires all international actors to adopt a cautious approach and avoid exacerbating societal tensions or conflict. The principle was originally developed to guide the work of humanitarian organizations during conflict. Its application to a range of international actors and beyond conflict settings reflects how aiding fragile states is understood to require a concerted response from humanitarian, development, and other actors.[52]

Though the Fragile States Principles are stipulated in a non-binding policy declaration, they have become a central reference and yardstick for international actors engaging in fragile and conflict-affected states.[53] The Principles are, however, formulated in relatively vague terms; instead of stating concrete requirements for donors, they put forth certain objectives and considerations to be taken into account. Although donors subsequently agreed on a number of more concrete steps, implementation of the Fragile States Principles in practice has remained patchy.[54]

Since 2008, international policy-making and standard-setting processes concerning fragile states have become gradually more institutionalized. The 'International Dialogue on Peacebuilding and Statebuilding' was set up in response to the legitimate demand from a number of fragile states to have a greater say in policy-making processes that directly affect them. The intergovernmental forum brings together donor organizations and representatives from fragile states, to elaborate and agree on common objectives and approaches.[55] In addition, the OECD DAC established the International Network on Conflict and Fragility (INCAF) as a subsidiary body in 2009. INCAF is mandated to review donor practices in line with the Fragile States Principles, to provide operational guidance, and to set international norms for development cooperation with conflict-affected and fragile states. In turn, a number of self-declared fragile states founded the g7+, a forum to advocate for their interests and

to speak with a stronger, more uniform voice to international partners.[56]

The participants of the International Dialogue—with the participation of the g7+ and decisive inputs from INCAF—have since adopted a number of policy declarations that build on the Fragile States Principles, but go further in formulating concrete commitments for donors and recipients alike. The 2010 Dili Declaration, for instance, expresses the common aspiration to develop "capable, accountable states that respond to the expectations and needs of their population".[57] The Declaration was formulated without much participation from governments in fragile states, but the g7+ made unilateral commitments in a separate statement, using strikingly similar language.[58] In 2011, the surge of policy-making and standard-setting concerning fragile states culminated in the adoption of an international action plan, the New Deal, at the fourth High-Level Forum on Aid Effectiveness in Busan.[59]

The New Deal so far constitutes the most ambitious attempt of donors and recipients to commit to common objectives, and to implement a changed approach to the design, management, and delivery of ODA in fragile states. It was endorsed by 35 countries, including all traditional donor countries and the g7+, as well as by the OECD, the UN Development Group, the World Bank, the AfDB, the ADB and the EU. Though adopted in the form of a policy declaration, not an international legal treaty, the New Deal formulates explicit actions and is complemented by piloting, monitoring and reporting mechanisms.

Mutual commitments contained in the New Deal concern three areas. First, the document establishes five Peace- and Statebuilding Goals (PSGs), which formulate the broad objectives of strengthening legitimate politics, security, and justice, while creating economic foundations and enabling the state to deliver basic services. The PSGs shall inform development cooperation with fragile states, from donors' funding decisions to country-level and country-led planning and implementation processes. Progress is measured against a set of indicators, which are developed and piloted jointly by recipient and donor states.

Second, the New Deal promotes 'new ways of engaging', namely on the basis of a country-owned assessment of the causes and symptoms of fragility, which informs a country-owned national plan. The national plan is again implemented through a country-specific 'compact', a sort of strategic partnership agreement to which different donors commit in order to coordinate and harmonize their engagement.[60]

Third, the New Deal contains commitments on how aid is provided and managed, with the aim of making aid to fragile states more timely, reliable and sustainable, the latter through strengthening country capacities. Capacity-building should balance support to state institutions and civil society actors, and enhance the capacity of the latter to participate in and monitor public decision-making. This balancing act informs the whole model for ODA delivery and management put forth in the New Deal: It is strongly committed to supporting "country-owned and -led pathways out of fragility", while making equally strong demands concerning the participatory nature and inclusiveness of the processes and outcomes of such pathways.

Most of the New Deal's recommendations concerning donor policies in fragile states are not new. They were already set out in the Fragile States Principles, and in a large number of studies and policy documents produced by INCAF and development organizations that operate in fragile states.[61] Whereas the Fragile States Principles consist of rather vague, political commitments made by donors unilaterally, however, the New Deal was agreed by donors and a coalition of fragile states. It contains commitments by donors as well as the governments of the g7+ countries, including on such delicate matters as fostering 'legitimate politics'.[62]

In sum, since the establishment of the International Dialogue and the g7+, there has been a clear trend towards more inclusive processes of development policy-making and standard-setting concerning fragile states, resulting in more tangible commitments. Both the Fragile States Principles and the New Deal are political declarations, not international legal treaties. But they have received high-level endorsement and emerged as a key reference for development agencies operating in fragile states. To what extent donor and recipient governments will deliver on their commitments remains to be seen.[63] Yet it is safe to say that both documents have contributed to establishing conflict and the need for legitimate institutions firmly on the mainstream development agenda.[64] At the same time, they have reinforced the role that a number of deeply political questions concerning the structure and functions of the state, as well as state-society relations, assume on this agenda. And even if the broad principles and recommendations developed and promoted in the context of the OECD DAC have not always led to significant changes in donor practice, they have inspired strategic shifts and operational reforms of international development organizations, to which we turn now.

3.2 Strategic and Operational Reforms of International Development Organizations

In parallel to the OECD DAC-driven elaboration of general principles, international organizations engaged in development cooperation have embarked on their own research and reform initiatives. Often supported through the establishment of dedicated policy units within the institution, they have begun to develop new strategies and adapt aid processes and instruments to facilitate operations in fragile states. The resulting changes have an immediate effect on the practice of development cooperation, for instance, regarding the allocation of resources, requirements for project approval, or the role accorded to recipient governments in planning and implementation. Accordingly, international development organizations do not only assume a particularly important role as resource providers in fragile states, including through catalysing aid from more risk-averse, bilateral donors.[65] They are also central actors in developing, promoting and implementing a differentiated approach to development cooperation with fragile states.

The World Bank, for example, is the third largest provider of all ODA to fragile states, and has been at the forefront of the international efforts to enhance development cooperation in these settings.[66] Specific attention to the challenges of states with weak policies, institutions, and governance in the development community commenced at the World Bank, with the establishment of a taskforce on 'Low Income Countries Under Stress' (LICUS) in 2001.[67] Since then, the organization has produced influential research, reformed internal policies and procedures, and contributed to a dynamic standard-setting process concerning fragile states in the context of the OECD DAC.[68]

A preliminary highlight in this development is the publication and subsequent operationalization of the World Development Report (WDR) on 'Conflict, Security, and Development' in 2011.[69] The WDR constitutes the analytical backbone and centrepiece of the World Bank's approach, calling for nothing less than a paradigm shift in development cooperation with fragile states. It finds that the legacy of violence, weak institutions and other challenges in these countries cannot be resolved by short-term or partial solutions, and by operating on the basis of rules that were originally developed for more stable and high-capacity countries. Instead, the Bank should adapt donor requirements to national conditions and capacities; balance the risk of action with the risk of inaction; and ultimately,

expect a degree of failure in weak-capacity environments. Fuelled by the insights of the WDR, the organization has embarked on a major reform effort that affects virtually all areas of its work: from defining the legal aspects of Bank involvement in the security sector, to re-allocating resources, adapting aid instruments and improving inter-agency relations.[70] The reform process has received the highest-level endorsement in March 2011, when the Executive Directors, called on the organization to rethink its business models and revisits its legal and policy framework to engage with fragile states.[71]

The operationalization of the Bank's fragile states agenda through the WDR also illustrates how mutual influences between different institutions foster a shared understanding of state fragility and contribute to a gradually more consistent approach. The report largely reflects and concentrates the findings of earlier publications not just of the World Bank, but also of the OECD DAC.[72] It was drafted in close collaboration particularly with the UN, which is traditionally responsible for political and security-related forms of cooperation. In turn, the report's recommendations and how the Bank defines and addresses state fragility more generally have influenced the strategies and approaches of other bilateral and multilateral donor organizations.

This influence becomes most apparent with regards to other Multilateral Development Banks like the African Development Bank and the Asian Development Bank, which often look to the World Bank when considering new policies.[73] The AfDB has been particularly active in developing a differentiated approach for dealing with fragile states, not least because a third of its member countries are considered fragile.[74] In 2008, following the adoption of the OECD Fragile States Principles, AfDB's Board of Directors approved a 'Strategy for Enhanced Engagement in Fragile States'.[75] The strategy, which is binding on the organization's staff, outlines how processes and procedures need to be adapted to allow for more flexibility in dealing with countries with severely degraded institutional capacity. AfDB's growing concern with fragile states also went along with the allocation of significant, additional resources through a Fragile States Facility (FSF), which provides financial and technical assistance specifically targeted at building state capacity.[76]

The Asian Development Bank, too, acknowledges the need for a differentiated approach to engaging with fragile states.[77] Following the adoption of the OECD's Fragile States Principles in 2007, the publication of the World Bank's WDR in 2011, and the broad endorsement of the New

Deal in 2012, the organization has sought to translate the emerging paradigm shift for development cooperation into its own policies and operational approaches. The Staff Handbook and Operational Plan, for instance, two rather informal documents adopted in 2013, together offer comprehensive guidance to ADB staff on how to work differently in fragile states.[78] This includes focusing more strongly on strengthening state capacities, while making processes and instruments of aid delivery more adapt to weak-capacity or insecure environments.

But MDBs are not alone in taking up the fragile states agenda. The EU has become the second largest provider of ODA to fragile states after the USA, and the largest provider of multilateral aid.[79] As a supranational organization with a broad, political mandate that extends far beyond development, its approach to fragile states is characteristically multifaceted, combining political and diplomatic, security, development and humanitarian instruments.[80] The EU has also a specific development mandate, however, and within its role as a multilateral donor organization, it has committed to implementing the OECD's Fragile States Principles and modified its own policies and aid instruments accordingly.

To set out the analytical grounds for the EU's response to situations of fragility, for example, the EU Commission and the Council of the European Union first adopted a series of policy documents in 2007.[81] Accordingly, building state capacity, strengthening state-society relations, and fostering democratic governance constitute key objectives in addressing state fragility. A reform plan presented by the EU Commission in 2011 to increase the impact of EU development aid calls for 'differentiated development partnerships', specific forms of support and greater flexibility when dealing with fragile situations.[82] The EU has also adapted its aid instruments. The Instrument for Stability (IfS), for example, was created in 2007 specifically to provide timely financial support to countries in situations of crisis or emerging crisis.[83] Though the EU is not a driving force behind the fragile states agenda, its development policies and procedures have thus evolved in tune with the emerging practices of other donors.[84]

Other development organizations have sought to enhance their engagement in weak capacity countries without explicitly adopting the terminology of the fragile states agenda. This is true for the United Nations Development Programme, the UN's main programme responsible for development cooperation.[85] UNDP has long been engaged in many fragile and conflict-affected states, which have gradually come to account for a dominant part of its programming activity.[86] Presumably for reasons of

political correctness, it generally refrains from referring to 'fragile states' to label challenges associated with weak institutions, poor governance or conflict. Nonetheless, UNDP's efforts to improve operations in crisis-affected countries show similarities with those of other development organizations focused on fragility.

For example, UNDP has established a quick-disbursing and flexible tool to more effectively respond to the fluid circumstances and urgent needs of crisis-affected countries, the 'Thematic Trust Fund for Crisis Prevention and Recovery'.[87] The 'Bureau for Crisis Prevention and Recovery' (BCPR) was set up to manage the Fund in 2001, and has since been responsible for concentrating UNDP's efforts of building effective and responsive state institutions, restoring democratic processes, and strengthening justice and security systems. Moreover, UNDP cooperates closely with the World Bank and the EU,[88] and often implements development projects and programs financed by the EU and the World Bank in fragile states.[89] Last but not least, as an active participant in OECD's INCAF network, the New Deal process, and particularly in negotiating the post-2015 development agenda, UNDP has contributed to shaping new ways of dealing with fragile states.

In sum, this overview shows that international organizations have developed specific strategies for engaging with fragile states and have adapted the design, management, and delivery of aid in these settings. Abstract principles and high-level political commitments emerging from the OECD DAC are thus concretized and operationalized by international organizations that often have a significant part of their operations in fragile states. The dynamic is reinforced through mutual exchange, efforts at harmonization, and enhanced cooperation between organizations.[90] Importantly, these processes are still ongoing and constantly produce new concepts and approaches. For example, in 2015, the OECD's States of Fragility Report redefined fragility as a complex, multidimensional challenge that can affect middle-income as well as low-income countries.[91]

We will return to a more detailed analysis of how individual organizations respond to state fragility in Chaps. 5 and 6. For now, it is sufficient to note that the understanding of fragile states constituting a unique challenge for development cooperation is increasingly shared, and translates into a growing consensus on the need for a differentiated approach. All major development organizations have therefore begun to revisit development objectives, processes, and instruments when engaging with fragile states.

4 Conclusion

This chapter provided a *tour d'horizon* of the evolving engagement of international development organizations with fragile states. I started from the observation that the fragile state notion, through its constant reiteration, quantification, and ultimately operationalization in development discourse and practice, has become a basis for action. International organizations assume a prominent role in this process. Operating on the basis of a state-centric paradigm, they normally expect to find an effective government in recipient countries—both in a formal, juridical sense, and in terms of basic capacities. Seeking to address the various practical and legal challenges that complicate engagement in weak-capacity, politically unstable environments, development organizations contribute to general standard-setting and policy-making, and develop and implement differentiated approaches to the design, management, and delivery of ODA *vis-à-vis* fragile states.

Such policy shifts have important implications: the overall volume and share of aid to fragile and conflict-affected states has increased considerably, with activities in the realm of institution-building and good governance reforms receiving a growing portion of available resources.[92] The increasing entanglement of development and security-related objectives has provided the grounds for development organizations to gradually expand their mandate and field of engagement into the realm of peace- and state-building.[93] Apart from getting involved in often highly politicized contexts of conflict, or alongside humanitarian actors in complex emergencies, development organizations have become more concerned with deeply political subject matters, such as fostering inclusive political settlements, or constructive state-society relations.

In turn, how development organizations plan, manage, and deliver ODA in fragile states has significant implications for the states concerned, and for their populations. Countries considered fragile are typically among the most aid-dependent countries, where not only the economy, but also the functioning of the bureaucratic apparatus and the ability of state institutions to deliver basic services rely on steady, incoming resource flows in the form of ODA. Accordingly, upon what terms and conditions international organizations decide to engage or disengage, to increase, suspend or terminate development funding is likely to have considerable material implications for governments, and have humanitarian implications for an already vulnerable population. Even where a government is not so much

materially dependent on aid, whether development organizations engage with a country, and through procedures and instruments of aid more particularly, can send important political messages. Such decisions are regularly seen to reflect whether donors deem a government as reliable or legitimate counterpart, an implicit endorsement that becomes especially relevant where the legal status of a state or a government's claim to power are in doubt.[94]

In light of the conceptual weaknesses and ambiguities of the fragile state agenda, as well as the potentially significant implications just outlined, it becomes even more important to scrutinize how the notion is operationalized and ultimately formalized in multilateral development cooperation. The preceding overview of policy-making and standard-setting, strategic shifts and operational reforms suggests that development objectives, processes and instruments are increasingly modified vis-à-vis fragile states. Importantly, objectives, processes and instruments, are set out in substantive and procedural rules that determine for what purposes and how aid is designed, managed and delivered. Ultimately, how international organizations assess the 'type and quality of statehood' thus affects not just the scope and content of aid, but also the way it is governed—and what roles and responsibilities are accorded to recipient governments in the process.[95] The remainder of cooperation is increasingly shared, and translates into a growing consensus this book addresses the question of how the evolving engagement of international development organizations with fragile states may hence be legally significant.

Notes

1. See also Jackson, *Quasi-states. Sovereignty, International Relations and the Third World*, pp. 5 and 48, arguing that many developing countries are "consisting not of self-standing structures with domestic foundations – like separate buildings – but of territorial jurisdictions supported from above by international law and material aid – a kind of international safety net"; or Kal Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law', 6 *Journal of International Economic Law*, 841 (2003), arguing that international economic institutions help reasserting the sovereignty of developing countries.
2. Seen through the lens of constructivist theories of international relations, the discourse on fragile states contributes to the formation of identities and interests with an important impact on how fragile states are perceived and

addressed by the international community; see e.g. Newman, 'Failed States and International Order: Constructing a Post-Westphalian World'.

3. Bhuta, 'Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order', pp. 134, 136.
4. Examples include the Brookings "Index of State Weakness' and the 'Failed State Index' issued jointly by the Fund for Peace and Foreign Policy magazine. For an overview, see Javier Fabra Mata & Sebastian Ziaja, United Nations Development Programme (UNDP) and German Development Institute, '*Users' Guide on Measuring Fragility*' (2009), 24.
5. The indicators used are a compilation from various sources and regularly include data that was not collected for the specific purpose of measuring fragility. Indicators are typically aggregated to generate the index value that seeks to display a country's degree of fragility. Dan Harris, et al., German Development Institute, Discussion Paper 9/2009, '*Country Classifications for a Changing World*' (2009), pp. 17–23.
6. For example, Kevin E. Davis, et al., 'Indicators as a Technology of Global Governance', 46 *Law & Society Review*, 71 (2012).
7. Bhuta, 'Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order', p. 143.
8. Kharas & Rogerson, '*Horizon 2025. Creative Destruction in the Aid Industry*', p. 26.
9. **OECD**, '*Fragile States 2013. Resource Flows and Trends in a Shifting World*', Figure 2.1 (p. 46). Since 2011, however, aid to 'fragile states' has started declining somewhat.
10. Ibid., Figure 2.14 (p. 66). In 2010, by far the largest share of resources went to Afghanistan, followed by Ethiopia, DRC, Pakistan, Haiti, Tanzania, West Bank and Gaza, Iraq, Sudan and Nigeria.
11. Ibid., Figures 2.9 and 2.10 (p. 58), on the evolving allocation of aid to fragile states per sector. However, the OECD's 2015 fragile states report finds that despite the growing recognition of the importance of security and justice for development in fragile states, only a fraction of ODA is allocated to security and justice sector reforms. OECD, '*States of Fragility. Meeting Post-2015 Ambitions*', Figure 3.7 (p. 68).
12. Charles T. Call, 'The Fallacy of the 'Failed State"', 29 *Third World Quarterly*, 1491 (2008), 1495.
13. Assistance provided by a group of donor states to one or more recipient countries without being channelled through an international organization also constitutes multilateral development cooperation, but shall not be considered here.
14. See also Joanna Macrae, et al., Overseas Development Institute, '*Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues*' (July 2004), para. 4.3, arguing that "development cooperation relies on

three related but distinct conditions being in place: that a state exists; that the state is competent and legitimate; that there is an authority recognized and sanctioned internationally to represent that state."

15. On the concepts of empirical and juridical statehood, see *supra* Sects. 2 and 3 in Chap. 2.
16. These treaties regulate a variety of aspects, e.g. certain obligations of recipients in connection with the carrying out of a development project. See Michael Riegner & Philipp Dann, 'Foreign Aid Agreements', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, May 2011); and on the content of agreements and the procedural regime for their adoption, Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 377–379 (on the World Bank); and 391–392 (on the EU's financing agreements).
17. *Infra* Sect. 2 in Chap. 4.
18. For an overview of the changing role of the state in development theory, see, for instance, John Martinussen, *Society, State and Market. A Guide to Competing Theories of Development* (Zed Books, 1997), chapter 4; or Adrian Leftwich, *States of Development. On the Primacy of Politics in Development* (Blackwell, 2000), pp. 71–104.
19. The Washington Consensus refers to a set of policy prescriptions that were believed a necessary first step requirement for all countries to achieve economic growth, for instance, restructuring the bureaucratic apparatus, reducing public employment, privatizing certain industries, and deregulating markets.
20. The work of Amartya Sen had an important influence on shifting the focus to a more holistic and human-centred conception of development. See Amartya Sen, *Development as Freedom* (Oxford University Press, 2001); or Leftwich, *States of Development. On the Primacy of Politics in Development*, pp. 40–70.
21. On the legal nature and content of good governance, also Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 234–235.
22. In 2000, US economists Craig Burnside and David Dollar furnished statistical data to undermine the correlation between economic growth and sound institutions and (monetary, fiscal, and trade) policies. C. Burnside & D. Dollar, 'Aid, Policies, and Growth', 90 *American Economic Review*, 847 (2000). However, subsequent studies found that aid can still have positive outcomes in less favourable policy and institutional environments; e.g. William Easterly, et al., Center for Global Development. CGD Working Paper # 26, '*New Data, New Doubts: Revisiting "Aid, Policies, and Growth"*' (2003); or David Roodmann, 'The Anarchy of Numbers:

Aid, Development and Cross-Country Empirics', 21 *World Bank Economic Review* 255 (2007).

23. The concept itself does not indicate whether more or less government is more conducive to achieving development, nor does it prescribe a certain form of government. Its emergence, however, has entailed a growing concern with the question how different political systems influence governance, including considerations of democracy and human rights. See also Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 118, who finds that "[t]he goal of all concepts is more stable and responsible statehood".
24. See, for instance, The World Bank, '*Good Practice Note for Development Policy Lending. Development Policy Operations and Program Conditionality in Fragile States*' (7 June 2005), 7, listing revenue collection, public expenditure management and civil service appointment as desirable state functions, but also functions that relate to "state authority" (e.g. security services) and to "state legitimacy" (e.g. the holding of elections).
25. The Paris Declaration on Aid Effectiveness adopted in 2005 concretized and strengthened by the Accra Agenda for Action in September 2008, and developed further by the Busan Partnership for Effective Development Cooperation of November 2012. The Paris Declaration is not hard law, but some overlap exists between its five principles and norms of international law. See Leonie Vierck & Philipp Dann, 'Paris Declaration on Aid Effectiveness (2005)/Accra Agenda for Action (2008)', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, April 2011), paras. 14–17.
26. The OECD DAC defines national ownership as "[t]he effective exercise of a government's authority over development policies and activities, including those that rely – entirely or partially – on external resources. For governments, this means articulating the national development agenda and establishing authoritative policies and strategies." See the OECD's Glossary of Statistical Terms, available online: http://stats.oecd.org/glossary/detail.asp?ID=7238 (accessed January 2017). For a critical discussion, see Willem H. Buiter, '"Country Ownership": A Term Whose Time has Gone', 17 *Development in Practice*, 647 (2007).
27. For example, Paris Declaration on Aid Effectiveness, para. 14 ("developing and implementing their national development strategies through broad consultative processes"), or para. 20 ("ensure that national systems, institutions and procedures for managing aid and other development resources are effective, accountable and transparent").
28. Virtually all international development organizations have committed to adhere to the principles of ownership and alignment, mutual accountability and results included in the Paris Declaration, and to the principles of

partnership, transparency and shared responsibility included in the Busan Partnership Agreement.

29. Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, UN Doc. A/RES/70/1 (21 October 2015).
30. *Infra* Sect. 2 in Chap. 4.
31. The according tension underlying donor-recipient relations is somewhat characteristic for the regime of development cooperation, but becomes more obvious with regards to fragile states. See also Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International State-Building* (Oxford University Press, 2005), 4–5, referring to a 'sovereignty paradox' with regards to the state-building practice of international transitional administrations. These compromise the right to self-government as one element of sovereignty, in order to implement domestic reforms and strengthen local political institutions to ultimately strengthen sovereignty.
32. Zoellick, 'Fragile States: Securing Development', pp. 68–69.
33. It has become much easier for a state to be regarded as 'fragile' if the opposite – effective or resilient statehood – is seen to require not just the maintenance of a minimum level of law and order ('effective government'), but also the transparent, accountable, participatory conduct of public affairs ('good government'). See *supra* Sect. 2 in Chap. 2.
34. The World Bank, '*World Development Report: Conflict, Security, and Development*', pp. 60–65.
35. Ibid., Table 7.2 (p. 236). Normal developing countries accordingly spend USD 267 per person every year, as opposed to USD 131 per person (purchasing power parity adjusted) in fragile states.
36. For example, insufficient coordination regularly leads to gap between crisis response and longer-term recovery. For a comprehensive account of the difficulties facing development and humanitarian actors in protracted crisis, see Adele Harmer & Joanna Macrae, Overseas Development Institute, HPG Research Report 18, '*Beyond the Continuum. The Changing Role of Aid Policy in Protracted Crises*' (July 2004).
37. Both are factors that are rarely addressed in academic literature concerned with the challenges of development cooperation with fragile states. I am aware of only one brief discussion in Macrae, et al., '*Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues*', pp. 43–45.
38. Importantly, the lack of or unresolved legal status of a government generally precludes an entity from receiving traditional forms of government-to-government assistance that require the conclusion of an international legal agreement between donor and recipient. As we will see later, other forms and channels of aid can remain open, for instance, humanitarian assistance, or ODA provided through trust funds.

39. On the importance of non-state actors and non-traditional forms of governance in fragile states, see, for instance, MARTINA FISCHER & BEATRIX SCHMELZLE, Berghof Research Centre for Constructive Conflict Management, Dialogue Series 8, '*Building Peace in the Absence of States – Challenging the Discourse on State Failure*' (2009); or LEMAY-HÉBERT, 'Statebuilding without Nation-building? Legitimacy, State Failure and the Limits of the Institutionalist Approach'.
40. State fragility is primarily conceptualized in terms of the government's lack of capacity, rather than legitimacy. Governments that command sufficient resources but deliberately choose to starve or otherwise oppress their population fortunately remain a marginal phenomenon. However, studies on state fragility sometimes point to the intrinsic link between weak state legitimacy and a lack of state capacity and authority; e.g. OECD, '*The State's Legitimacy in Fragile Situations. Unpacking Complexity*'.
41. In detail, see *infra* Sect. 2 in Chap. 4.
42. On the risk of inaction and how it can outweigh the risks associated with action in fragile states, see OECD, '*Managing Risks in Fragile and Transitional Contexts. The Price of Success?*' (2011); or THE WORLD BANK, '*IDA 17. IDA's Support to Fragile and Conflict-Affected States*' (March 2013).
43. LANT PRITCHETT, et al., Center for Global Development Working Paper 234, '*Capability Traps? The Mechanisms of Persistent Implementation Failure*' (December 2010), referring to "isomorphic mimicry" as a tactic of states to adopt certain organizational forms or best practices that are successful elsewhere as a mere camouflage, hiding their actual dysfunction.
44. Forms of engagement that rely on country ownership or that favour the use of conditionality to ensure the effective use of ODA therefore face restrictions in fragile states; e.g. LAURENCE CHANDY, The Brookings Institution, Global Economy and Development Policy Paper 2011–12, '*Ten Years of Fragile States. What Have We Learned?*' (2011), p. 6; or OXFORD POLICY MANAGEMENT AND THE IDL GROUP, '*Evaluation of the Implementation of the Paris Declaration: Thematic Study. The Applicability of the Paris Declaration in Fragile and Conflict-affected Situations.*' (August 2008).
45. See also MACRAE, et al., '*Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues*', p. xi. The authors analyse the performance of different developing countries against two sets of indicators, economic growth and infant mortality, and find that few countries appear consistently across indicators and time as performing poorly. Therefore, country performance alone does not explain why certain countries are perceived as particularly challenging environments—rather, "the problem of poorly performing countries must also be understood as relational, in other words

that the labeling of a country as poorly performing is in part a reflection of the political, security and aid relations between that country and the international community."

46. Importantly, the OECD does not itself provide ODA to developing countries, but is only engaged in development policy-making.
47. With a systematic analysis of how the World Bank and OECD have shaped the concept of fragile states, see Olivier Nay, 'International Organisations and the Production of Hegemonic Knowledge: How the World Bank and the OECD helped invent the Fragile State Concept', 35 *Third World Quarterly*, 210 (2014). Nay finds that the concept was originally invented by a small group of bilateral donors, but successfully promoted and disseminated through international organizations, acting as norm entrepreneurs in constant interaction with other organizations, policy forums, and knowledge networks.
48. On the influential role of the OECD DAC in defining and monitoring standards for development assistance rendered by traditional donor countries, see Martin Marcussen, 'OECD Governance through Soft Law', in Ulrika Mörth (ed) *Soft Law in Governance and Regulation. An Interdisciplinary Analysis* (Edward Elgar, 2004). The OECD DAC is assisted by the Development Co-operation Directorate (DCD), which acts as its Secretariat and provides technical expertise and operational capacity.
49. Paris Declaration on Aid Effectiveness, paras. 7, 37–39. The OECD's focus on the specific development challenges of countries with weak institutional capacity or political commitment began in 2001, with a serious of discussions on 'poor performers' and 'difficult partnerships', resulting in the creation of a Fragile State Group in 2003.
50. The Fragile States Principles were first agreed at a Senior Level Forum on Aid Effectiveness in Fragile States in 2005, and after a piloting phase, were adopted in April 2007, together with an OECD Ministerial Policy Commitment to improve development effectiveness in fragile states (DCD/DAC(2007)29).
51. Fragile States Principles, para. 7, stating that if it is not possible or desirable to align with local priorities as conveyed by the government due to weak governance or violent conflict, international actors should seek to consult with national stakeholders outside of the government.
52. Several of the Fragile States Principles state the need to recognize linkages between political, security and development objectives, as well as to improve policy coherence and practical coordination between political, security, development and humanitarian actors.
53. Policy documents adopted by bilateral and multilateral donors regularly refer to the OECD's Fragile States Principles, for instance, the African Development Fund, '*Strategy for Enhanced Engagement in Fragile States*' (2008) (at para. 7.1).

54. So far two voluntary surveys through which the implementation of the principles is monitored yield that international practice of aid delivery and management in fragile states has not significantly improved in line with the principles. See online, http://www.oecd.org/dac/governance-peace/conflictandfragility/monitoringthefragilestatesprinciples.htm (accessed January 2017).
55. The International Dialogue was set up in 2008 and meets once per year at the ministerial or senior level. It is supported by a steering group and a Secretariat hosted by the OECD.
56. The g7+ is supported by a Secretariat based in Dili, Timor-Leste, which acts as a counterpart to the International Dialogue's Secretariat. The Secretariat receives annual funding from Timor Leste's national budget, and some staff are funded by international donors.
57. Dili Declaration – A New Vision for Peacebuilding and Statebuilding, adopted at the first meeting of the International Dialogue on April 10, 2010.
58. See the "Statement of the g7+", Annexed to the Dili Declaration, which also serves as the Charter of the g7+.
59. The New Deal, endorsed on 30 November 2011, at the 4th High Level Forum on Aid Effectiveness in Busan, South Korea.
60. A compact constitutes a basic agreement between national governments and international partners on what should be delivered, and how, by interventions aimed at supporting a transition from fragility. It is not an international legal treaty, and does not contain any sanction mechanism. The first such Compact was developed for Somalia.
61. For instance, the emphasis on state-building and the linkage between political, security, and development objectives, as well as donor commitments to ensure more sustainable and predictable aid flows, were all set out in the OECD Fragile States Principles. Further, significant parallels exist with the INCAF publication OECD, '*The State's Legitimacy in Fragile Situations. Unpacking Complexity*', and the OECD DAC Guidelines OECD, '*Supporting Statebuilding in Situations of Conflict and Fragility: Policy Guidance*' (2011).
62. With the push of the g7+, however, the language actually used in the New Deal's implementation was watered down to 'inclusive politics'.
63. See International Dialogue Secretariat, International Dialogue on Peacebuilding and Statebuilding, '*New Deal Monitoring Report 2014*' (June 2014), which states that progress was scattered and had to intensify; also Jacob Hughes, et al., The Brookings Institution, '*Implementing the New Deal for Fragile States*' (July 2014).
64. A still more universal endorsement constitutes the inclusion of 'peaceful and inclusive societies for sustainable development' as stand-alone Goal 16

of the Sustainable Development Goals, the post-2015 development agenda. For an analysis of the respective negotiations leading up to the adoption of the SDGs, see L. Ribeirio Pereira, Friedrich Eberst Stiftung (FES), '*What's Peace Got To Do With It? Advocating Peace in the Post-2015 Sustainable Development Agenda*' (September 2014).

65. The largest percentage of ODA to fragile states is provided in the form of bilateral aid, as is generally the case. The share of multilateral aid, however, is significantly higher in fragile states than in non-fragile states (50% over 37%). See OECD, '*Fragile States 2014. Domestic Revenue Mobilization in Fragile States*', p. 32.
66. The IDA provided US$4.365 million to fragile states in 2012, a bit less than the EU institutions with US$5.599 million. See OECD, '*States of Fragility. Meeting Post-2015 Ambitions*', p. 119, Figure B.5 (providers of official development assistance to fragile states and economies in 2012). For a detailed analysis of the World Bank's engagement with fragile states, see *infra* Chap. 5.
67. The task force led to the launch of the LICUS initiative in 2002, which shifted the focus from improving development effectiveness in weak-capacity environments, to the broader goals of peace- and state-building.
68. For instance, the findings and policy implications of the LICUS task force were taken up by the OECD DAC, by the UN and various bilateral donors. The OECD's Fragile States Principles, in turn, emerged from a process led by the World Bank and DFID as co-chairs of the OECD DAC's Fragile States Group.
69. The World Bank, '*World Development Report: Conflict, Security, and Development*'. The World Development Report is the World Bank's annual flagship publication. The WDR 2011 was prepared by a team of World Bank researchers, with inputs from other international organizations and governments and other stakeholders in donor and recipient countries.
70. The reform program is set out in a staff paper that calls on the Bank "to significantly adjust its operations model while remaining within its established mandate". The World Bank, Operationalizing the 2011 World Development Report: Conflict, Security, and Development, DC2011-0003 (4 April 2011), p. iii.
71. The World Bank, '*Additions to IDA Resources: Sixteenth Replenishment – IDA 16: Delivering Development Results*' (2011), paras. 84–92. A signal that the Bank's focus will remain on fragile states is the increase by over 50% of IDA's resources made available to fragile states in the period from 2014 to 2017.
72. The bibliography of the 2011 World Development Report refers to 22 OECD documents and publications.

73. For a detailed analysis of the AfDB's and the ADB's engagement with fragile states in comparison with that of the World Bank, see *infra* Sect. 2 in Chap. 6.
74. Like the World Bank, the AfDB keeps a list of 'fragile situations', which includes countries with particularly weak policies and institutions, or the presence of a UN peace operation. The quality of institutional arrangements and governance is assessed in the AfDB's Country Policy and Institutional Assessment (CPIA).
75. African Development Fund, '*Strategy for Enhanced Engagement in Fragile States*'; and the independent evaluation Operations Evaluation Department, African Development Bank, '*Evaluation of the Assistance of the African Development Bank to Fragile States*' (2012), vii. In 2014, the organization adopted a new Fragile States Strategy for 2014–2019, providing authoritative guidance on how to adapt policies and processes to the specific circumstances and needs of fragile states. See African Development Bank, '*Addressing Fragility and Building Resilience in Africa: The African Development Bank Group Strategy 2014–2019*' (June 2014).
76. The FSF was created by means of a Resolution of the Executive Directors, B/BD/2008/05-F/BD/2008/03, adopted on 28 March 2008.
77. See, for instance, the Asian Development Bank, '*Achieving Development Effectiveness in Weakly Performing Countries. The Asian Development Bank's Approach to Engaging with Weakly Performing Countries*' (April 2007); and ADB's long-term strategic framework, Asian Development Bank, '*Strategy 2020. The Long-term Strategic Framework of the Asian Development Bank 2008–2020*' (April 2008).
78. Asian Development Bank, '*Working Differently in Fragile and Conflict-affected Situations – The ADB Experience: A Staff Handbook*' (2012) and Asian Development Bank, '*Operational Plan for Enhancing ADB's Effectiveness in Fragile and Conflict-Affected Situations*' (April 2013).
79. Supra note 66. For a detailed analysis of the EU's engagement, see *infra* Sect. 3 in Chap. 6.
80. In fact, the EU became concerned with fragility first as a security, and then as a development challenge: the 2003 European Security Strategy identifies state failure as a key threat before the 2005 European Consensus on Development formulates the commitment to more effectively address state fragility. See European Security Strategy "A Secure Europe in a Better World", Brussels, 12 December 2003; and the Joint declaration by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the EU entitled "The European Consensus" (hereinafter European Consensus on Development), OJ C 46/1 of 24 February 2006, at paras. 20–22; 89–92.

81. See, for instance, the Communication from the Commission, Towards an EU Response to Situations of Fragility – Engaging in Difficult Environments for Sustainable Development, Stability and Peace, Brussels, 25.10.2007, COM (2007) 643; and the Council Conclusions on a EU Response to Situations of Fragility , 2831st External Relations Council meeting in Brussels, 19–20 November 2007.
82. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Increasing the Impact of EU Development Policy: An Agenda for Change, Brussels, 13 October 2011, COM(2011) 637 final (hereinafter: EU Agenda for Change), pp. 9–10.
83. Instrument for Stability (IfS), Regulation (EC) No 1717/2006, which was succeeded by Regulation (EU) No 230/2014 establishing an Instrument contributing to Stability and Peace (IcSP) in 2014.
84. In this context, Furness describes the EU "as a 'norm taker' rather than a 'norm maker'". Markus Furness, German Development Institute, Discussion Paper 5/2014, '*Let's Get Comprehensive. European Union Engagement in Fragile and Conflict-Affected Countries*' (2014), p. 7.
85. UNDP also leads the United Nations Development Group, consisting of 32 UN programmes and funds, departments and offices, as well as UN-specialized agencies that all play a role in development cooperation.
86. For an overview of UNDP's engagement, see also Bruce D. Jones, 'The Changing Role of UN Political and Development Actors in Situations of Protracted Crisis', in Harmer & Macrae, '*Beyond the Continuum. The Changing Role of Aid Policy in Protracted Crises*'.
87. Further, UNDP has adopted a long-term strategy of "resilience-building", and developed specific "fast track policies and procedures" to get there. UNDP, '*Changing with the World. UNDP Strategic Plan 2014–2017*', pp. 34–37.
88. All three organizations have concluded formal agreements to facilitate their inter-organizational cooperation in fragile states. For example, the World Bank and the UN have established the United Nations-World Bank Partnership Framework for Crisis and Post-Crisis Situations in 2008, and concluded a Fiduciary Principles Accord to facilitate cooperation. UNDP and the EU collaborate through a special partnership on crisis prevention and recovery since 2003, whereby both institutions share best practices and jointly develop operational guidance.
89. The fact that UNDP's own financial contributions to fragile states are comparatively minor (amounting to less than 5% of the EU's contributions) is deceiving. It has an operational presence in more fragile states than the World Bank, and almost half of the EU's funding to UNDP in 2011 was to support its work on crisis prevention and recovery.

90. See, for example, the Report of the MDB Working Group, 'Towards a More Harmonized Approach to MDB Engagement in Fragile Situations', adopted in 2007, wherein the heads of the AfDB, ADB, the Islamic Development Bank, the Inter-American Development Bank, the European Bank for Reconstruction and Development, the World Bank and the International Monetary Fund (IMF) agree to develop common definitions and operating principles, and effective and participatory procedures.
91. OECD, '*States of Fragility. Meeting Post-2015 Ambitions*'.
92. *Supra* Sect. 1 of this chapter.
93. This entanglement is often viewed critically, since political and security actors may seek to influence the means and ends of development cooperation, particularly in countries considered of strategic importance; e.g. Eva Nieuwenhuys, 'Development Aid by Tank Viewed in the Light of the Globalisation of the Western Development Model', in Bruce Currie-Alder, et al. (eds), *International Development. Ideas, Experience, and Prospects* (Oxford University Press, 2014).
94. For example, Macrae, et al., '*Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues*', 44, arguing that there is "a link between aid, the capacity of political authorities to govern and claims to juridical status."
95. Ibid., 41, highlighting the powerful role of donors in analysing "the type and quality of statehood", and thus in deciding on the volume of aid, the form of aid, and the channels through which it is delivered.

CHAPTER 4

The Law of Development Cooperation: Interlude on the Nature of Rules and Substance of Analysis

A certain supposition has inspired and informed the preceding elaborations: that state fragility deserves more attention from legal scholarship than suggested by the fact that 'fragile state' is no legal term or concept. By shifting the focus away from the question what fragile states are, to the question what role they are accorded by other legal subjects, using different legal instruments, we may learn more about the actual significance of state fragility, not least from the perspective of international law.

Multilateral development cooperation already proved to be a fruitful field for analysis. International development organizations traditionally assume the existence of effective government counterparts, but have increasingly sought ways of working more effectively in weak-capacity, politically unstable environments. Interestingly, we have seen that they have not always settled for responding to practical and legal constraints *ad hoc,* on a case-by-case basis. Instead, many organizations have apparently decided on a more formal, consolidated approach modifying rules and procedures that guide the transfer of ODA.

The previous chapters have thus provided preliminary evidence to support the assumption that fragile states may be a phenomenon beyond law, but the evolving response of international development organizations is not. In Chaps. 5 and 6 of this book, we turn to a detailed investigation of how four different development organizations adapt their legal and policy frameworks *vis-à-vis* fragile states. In order to do so, however, we first

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need a basic understanding of the rules that normally inform the objectives, processes and instruments of multilateral development cooperation: the law of development cooperation.

The law of development cooperation is a field of law that has long escaped the attention of legal scholars. This is due in part to its relative informality, or more precisely, the combination of traditional sources of international law and some more informal sources. With a view to multilateral development cooperation, it is safe to say that not all, or perhaps not even most of the strategies, policies, and guidelines that international organizations produce to guide operations in fragile states are legally significant, let alone formally binding. Yet the scope and depth of international regulation is expanding, and international organizations produce a plethora of normative outputs. Therefore, we need to consider practices and instruments of governance that do not fit neatly with established categories and sources of international law.[1] As Dann notes: "To ignore the law of development cooperation simply because of its informality would be shortsighted".[2]

To understand how development cooperation with fragile states may ultimately differ from that with other countries, we also need to look at the substance of the rules that normally govern how international organizations plan, manage and implement aid. The legal and policy frameworks of different organizations engaged in development cooperation have a number of very similar rules, concerning their objectives, functions and, importantly, how they deal with recipient countries. For instance, all organizations are naturally mandated to foster development. We have also seen that international organizations operate on the basis of a state-centric paradigm, and need to respect the sovereignty of recipient states. It is thus possible to identify a number of basic ideas that structure a large diversity of rules and guide the conduct of development organizations. In this context, it also becomes more clear why some of these rules may appear less adequate to deal with specific circumstances associated with fragile states.

This chapter accordingly sets the grounds and provides the necessary tools for examining how international organizations adapt rules that govern the transfer of ODA to fragile states. I begin by analysing the legal nature of these rules, with a particular focus on internal, secondary rules (Sect. 1). Next, I draw on the legal frameworks of different development organizations to outline basic ideas of the law of development cooperation (Sect. 2). I conclude by highlighting the inherent restrictions, but also the

significant value that a legal perspective can bring to the study of how international organizations engage in development cooperation with fragile states (Sect. 3).

1 Legal Nature and Effect of Rules in the Law of Development Cooperation

Development cooperation is not only subject to technical considerations and political decision-making. It is increasingly guided by rules. At the international, supranational and national level, a diverse set of institutions and instruments define the terms and regulate the process whereby financial resources flow to developing countries. Seen from the perspective of their common subject matter, they converge to a body of law that can be referred to as the law of development cooperation. Dann has defined the law of development cooperation as the set of rules that regulate the transfer—the allocation, programming and implementation—of ODA.[3] This definition excludes a rapidly growing variety of forms and actors, including private ones, through which financing is increasingly provided to developing countries.[4] However, it still aptly describes the law that governs the provision of public funds through international organizations, which is the focus of this book.[5]

Our focus on development assistance provided by international organizations (that is multilateral development cooperation) also reduces the otherwise large variety of legal sources that regulate the transfer of ODA through different actors. By far the largest part of the rules that establish objectives and inform processes of multilateral development cooperation in fact form part of the legal and policy frameworks of international organizations, or in the case of the European Union, EU law.[6] Accordingly, the law of multilateral development cooperation constitutes not only an important subfield of the law of development cooperation. It can also be approached as a thematic subfield of international institutional law, which is generally concerned with the common rules and practices of international organizations.[7] International institutional law thus provides a useful starting point for examining the sources and legal nature of the rules that guide international organizations in providing development assistance.

The first source of international institutional law are the founding treaties or statutes of international organizations, that is their primary law. The statutes of international organizations are international legal treaties,

which at the same time constitute quasi-constitutional frameworks for all activities. Generally binding, they establish the functions of the organization, and some basic rules on how they ought to be exercised.[8] Since statutes are usually formulated in rather broad terms and without necessarily anticipating all subsequent developments, they need to be concretized and at times adapted to changing realities. This is usually done through purposive or dynamic interpretation, whereby an organ of the organization construes the text with due regard to the organization's purposes and the dynamic evolution of the environment in which it operates.[9]

As another means to concretize or adapt the statute, international organizations produce additional rules that form part of secondary law. In fact, many of the concrete rules that inform the processes whereby international organizations provide ODA are adopted by their various organs, and hence *prima facie* belong to secondary law. Nevertheless, they are important sources of the law of development cooperation, and thus deserve more attention.

In a broad sense, all secondary law derives its normative effect from primary law and must conform to the rules of competence and substantive and procedural limitations contained therein.[10] But with the exception of the EU, most statutes only barely regulate the process whereby secondary rules are set and applied, leaving ample room for rule-making "outside constitutionally controlled conditions".[11] Organizations in fact produce a large variety of secondary rules with different denominations, for example, resolutions, decisions, declarations, recommendations, operational policies or guidelines. These different denominations only exemplify the variety of forms and functions secondary rules may take, and often provide few insights into their legal effects.

A basic distinction is usually drawn between external and internal secondary law. External secondary law refers to rules that are addressed to (member) states, other subjects of international law or individuals, and which assume effects outside the organizational structure of the institution. In addition, all international organizations—either through an explicit authorization in their statutes or an 'implied power'—have the competence to regulate internal procedure and organizational structure, and to adopt rules to govern their operations on a daily basis.[12] These rules are addressed to organs (or staff) of the organization and their effect is *prima facie* internal, which is why they are referred to as internal secondary law, or internal rules.[13]

Looking closer at the legal nature and effects of secondary rules of international organizations, however, the distinction between external and internal effects starts to blur. It gives way to a much more complex picture, wherein the rules that different organs of international organizations usually develop autonomously in more or less formalized processes can assume a number of legal effects within and outside their institutional structures—for which the institutional law of international development organizations provides ample evidence.

The primary function of the internal rules of international organizations is to regulate their own, effective functioning. International organizations engaged in the provision of development assistance adopt internal rules to structure and guide the allocation, programming and implementation of aid. They adopt internal rules to guide staff, for instance, in the use of specific financial instruments, the conduct of environmental assessments, or in procurement.[14] Besides providing substantial guidance, internal rules are used to structure the according decision-making processes, regulating which actors within or outside the organization must be involved.[15] Some of these rules are explicitly non-binding and have a recommendatory character. In contrast, other rules are considered to be binding on the organs and staff of international organizations. The World Bank's Operational Policies (OPs) are a common example. OPs are abstract, general rules that are prepared in a relatively structured process by the Bank's Management, and which are subject to a quasi-judicial review mechanism, the Inspection Panel.[16]

In addition to regulating the conduct of international development organizations, however, internal rules can have significant external effects on the countries with which they engage. For instance, some rules are adopted as internal rules but later incorporated in the financing agreements that the organization concludes with recipient states. By means of reference, the environmental and social safeguard policies of the World Bank and other Multilateral Development Banks (MDBs) are incorporated in the international legal treaties that the organizations conclude with borrowing countries. They thus create direct obligations under international law for borrowers concerning the implementation of approved projects.[17]

In other cases, international organizations use internal rules to consolidate organizational practices or authoritative interpretations of their statutes—and hence as a more or less informal tool to adapt existing international law. As we will see in the next chapters, such practices of adaptation are

rather common among international development organizations such as the World Bank.[18] The relative informality of internal rules can facilitate the consolidation of organizational practices or interpretations. Although only very few organizations are explicitly authorized to adopt secondary rules to change the rights or obligations of member states as contained in the statute, internal rules can thus in principle have such an effect.[19]

But internal rules cannot only assume binding effects through interacting with formally binding, international legal rules, such as those contained in the statute or in international legal treaties concluded between an organization and a recipient country. More recent legal scholarship has drawn attention to those activities of international organizations that reach beyond traditional, formal sources of public international law.[20] In this context, it is increasingly acknowledged that rules can constrain legal subjects without even directly binding them, simply by building up sufficient pressure—economic, reputational or other—to comply.[21]

This can also be true for internal rules of international organizations. In fact, particularly in the context of development cooperation, it is not unlikely that recipient states in need of financial assistance are in practice compelled to abide by an internal rule, although it is not formally binding on them, and actually not even addressed to them.[22] For instance, the terms and conditions for the use of specific financing instruments are regularly set out in internal rules addressed to an organization's staff. Recipient states that want to qualify for development funding must nonetheless meet these terms and conditions, all the more if they crucially depend on external aid.[23] Their structural dependency can at least reduce the freedom not to engage with an organization on the terms and conditions set out in its internal rules.

Looking at the internal rules of international organizations, it is thus safe to say that international law's traditional doctrine of sources fails to "satisfactorily explain their legal effect and significance."[24] In particular, rules that are formally binding only in the organization's internal sphere have for a long time largely fallen off the radar of international law. However, independent of the question of if and when internal rules actually constitute 'law', we need to grapple with such informal or partly formalized rules if we want to understand how international organizations operate.[25] In other words, we may refuse to call them 'law', but we cannot afford to ignore their effects—and this is particularly true for multilateral development cooperation.

At least two reasons speak for considering not only the statutes, but also the internal rules of international development organizations, when analysing the legal significance and effects of their regulatory activity on fragile states. First, particularly binding internal rules can be potent instruments in steering the conduct of organizations. Looking at the often abstract (if not outdated) rules contained in the statutes alone, it is nearly impossible to comprehend how they operate, how and by whom operational decisions are taken, and what factors matter. This is not to say that statutes are irrelevant—but the rules set out therein are often concretized in internal rules, which thus reflect how organizations understand and operationalize their legal mandate. Moreover, internal rules reflect how organizations seeks to adapt or further develop their legal mandate in response to challenges that were not foreseen in the founding treaties—including challenges they associate with engaging in fragile states.

Second, whether binding or non-binding, internal rules regularly assume external effects: they formulate the terms and conditions, including procedural rights, for the transfer of ODA to recipient countries. They are sometimes incorporated in financing agreements and thus become formally binding, or they are used to codify organizational practices or interpretations and thus informally adapt existing rules in the statute. Arguably, organizational practice that follows repeated patterns—as can be expected where it is instructed by rules—can contribute to the development of (customary) international law in certain matters.[26] The adoption or modification of internal rules can thus directly or indirectly affect the conduct of development cooperation with fragile states, and their roles and responsibilities in the process.

Considering the internal rules of international development organizations is thus crucial to draw a comprehensive and realistic picture of their regulatory and operational activities—while being mindful of the various legitimacy concerns that may arise in this context. Again, a large part of international organizations' rule- and decision-making is internal, subject to few legal constraints—and in the case of the World Bank, based on tenuous structures of representation.[27] Statutes are often 'notoriously unclear' about the division of competences and procedures for rule- and decision-making.[28] Meanwhile, in practice, rule-making processes have long moved beyond formalized, political processes in plenary organs that are dominated by governments. Instead, they take the form of informal processes of administrative rule-making, involving an interplay of different organs of the organization. Similarly, organizations typically enjoy large

discretion in making operational decisions that concern the implementation of rules, and ultimately of the organization's mandate.[29]

Such concerns must be born in mind when examining the rules of international development organizations and how they are made or modified to formalize the notion of fragile states. In Chap. 7, we will return to these concerns and the proposals made for addressing them. For now, it is sufficient to emphasize that even rules that are *prima facie* internal may be legally significant, whereas decision-making processes concerning the adoption and implementation of rules often remain relatively informal and subject to few legal constraints. If internal rules are relatively formalized and considered binding on the organization's staff, as is the case with the World Bank's OPs, they can be considered a part of the organization's legal framework. If not, they still belong to its broader policy framework, which include the various non-binding instruments that are produced by the organs of the organization to provide further guidance to staff in carrying out the activities of the organization. With such a basic understanding of the legal nature and potential effects of the rules that make up the legal and policy frameworks of international development organizations, we are well equipped to study how they are adapted with regards to fragile states.

2 Basic Ideas in the Law of Development Cooperation

What are basic ideas in the legal and policy frameworks of different organizations engaged in development cooperation? What do they tell us about the usual objectives and processes of multilateral development cooperation, and the role accorded to recipient states?

Looking at the plethora of rules of international development organizations alone, identifying a common core appears challenging. Each organization has its own founding treaty and adopts different instruments, including internal rules. Moreover, as subjects of international law, development organizations are bound by rules outside of their own institutional law—for instance, by international legal treaties concluded with recipient states and by principles of customary international law, insofar as these are relevant and applicable to their conduct.[30] We are, however, concerned with the question how development organizations adapt the rules of their own legal and policy frameworks to engage with fragile states. To

get to a basic understanding of the substance of these rules, we need to look at the institutional law of different organizations and search for significant regularities.

International organizations that engage in development cooperation have some rules and practices in common—not just by virtue of being international organizations, but also because they share a common purpose and assume similar functions.[31] This is true for organizations as diverse as the World Bank, a rather technocratic organization with a specific development mandate, and the European Union, which has a much broader, and essentially political mandate.[32] Looking at the legal frameworks of the World Bank, the African Development Bank (AfDB), the Asian Development Bank (ADB) and the EU, we can identify similar rules that require the organization to, firstly, engage in activities that foster development; secondly, ensure standards of effectiveness; and thirdly, respect the sovereignty of recipient states.

To begin with the obvious, the statutes of all international organizations that provide development assistance stipulate their purposes and objectives: to support development. For instance, the Articles of Agreement of the International Development Association (IDA), the World Bank's concessional lending arm, establish that the organization shall "promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world".[33] The AfDB was established "to contribute to the sustainable economic development and social progress" of its members,[34] and the ADB "to foster economic growth and co-operation […] and to contribute to the acceleration of the process of economic development".[35] The EU's primary law stipulates "the reduction and, in the long term, the eradication of poverty" as the principal goal of EU development cooperation.[36]

The objective of development serves an important role in delineating the scope of the organizations' activities, and in preventing the misuse of ODA for other purposes. International organizations with a development mandate must ensure that all their activities are ultimately directed at supporting development.[37] This also means that international development organizations must ensure the projects and programs they finance—even if proposed and implemented by recipient governments—support development objectives, and not unrelated purposes.

Importantly, what development entails is usually not defined in the statutes of international development organizations.[38] It is left open to interpretation, which makes it easier for organizations to adapt to changing

circumstances and demands. Mainstream development thinking on what constitutes development has shifted considerably over the last decades: initially equated by and large with economic growth, development is now seen as a comprehensive concept, including a wide range of aspects related to socio-economic well-being and environmental sustainability.[39] As a consequence of these conceptual shifts, the scope of activities of development organizations has expanded well beyond the original mandates, including into realms that originally belonged to the state's domestic affairs.[40]

In the next chapters, we will see the same kind of dynamic of 'mission creep' at play with regards to the evolving engagement of development organizations in conflict-affected and fragile states.[41] The adoption of the SDGs and especially Goal 16 in September 2015 reflects the growing understanding that development requires security, capable institutions, and functioning state-society relations.[42] The according expansion of the notion of development entails an expansion of the scope of activities of development organizations—the policy prescriptions they make, and what they expect from recipient countries to achieve development outcomes.

Secondly, development organizations are usually required to ensure that their operations are economically reasonable, cost-effective and results-oriented, i.e. adhering to standards of effectiveness. The respective rules can be seen as procedural add-ons to the substantive objective of development. They are contained both in the statutes and secondary rules of international development organizations.[43] Perhaps not surprisingly, requirements of effectiveness and efficiency are particularly prominent in the mandates and internal rules of the World Bank and other MDBs. The World Bank must direct its resources towards 'productive purposes', and ensure the economic efficiency of its loans.[44] The statutes of the World Bank, AfDB and ADB require making "arrangements to ensure that the proceeds of any loan made or guaranteed by it are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency".[45] The EU, in turn, is bound to ensure that resources of the European Development Fund are used "in accordance […] with standards of economy, efficiency and effectiveness."[46]

Accordingly, development organizations must ensure the cost-effective use of ODA—after all, they dispose over public resources for which donors of ODA are themselves accountable to their taxpayers. But they are also required to ensure the effective and responsible use of ODA by recipients. MDBs, particularly, have therefore concretized standards of effectiveness

in internal rules that establish detailed fiduciary, financial management, and other accountability requirements for the transfer of ODA. Such requirements may be addressed to the organizations' staff, but ultimately fall on recipient states that seek to qualify for assistance. Governments with weak public financial management systems or high levels of corruption—conditions that are often associated with fragile states—are thus *prima facie* less likely to qualify for development assistance. Fiduciary, financial management, and other requirements of international development organizations can thus become a major obstacle to providing assistance to countries with weak capacities, especially if applied indiscriminately.[47]

Thirdly, the legal frameworks of international development organizations contain specific rules that serve to protect the sovereignty of recipient countries. We have seen before that development cooperation is largely state-centric, and that the formal primacy of the sovereign state translates into the way that development cooperation must be requested, negotiated, and approved by national governments.[48] This state-centric paradigm of development cooperation is also reflected in the institutional law of international organizations, which are thus bound not just by the fundamental principle of sovereignty as contained in the UN Charter and customary international law, but by more concrete rules in their own legal frameworks.

The World Bank, for instance, is required by its founding treaties to provide financing only to its members countries, and only states can become members.[49] When the Bank provides loans to a country, it does so on the basis of a legal agreement concluded with the government, which thus assumes legal liability for the reimbursement of loans.[50] Even if the government is not itself the recipient of a loan, the Bank still has to conclude a guarantee agreement with the government.[51] In fact, the World Bank generally deals with countries only through their governments.[52] Any engagement with entities or stakeholders outside of the government is subject to the government's consent.[53] Beyond, the World Bank has a dense set of internal rules that define the roles and responsibilities of recipient countries in the development process.[54]

The statutes of the AfDB and the ADB contain provisions that are largely similar to those of the World Bank. Membership is confined to states,[55] the governments of member states constitute the primary recipients of aid,[56] international involvement depends on state consent,[57] and interventions in the political affairs of member states are prohibited.[58]

The Cotonou Agreement, the legal basis for EU development cooperation with the African, Caribbean and Pacific (ACP) countries, explicitly recognizes the 'central government' of a recipient country as 'main partner', whereas non-state actors are only eligible for financing "subject to the agreement of the ACP state".[59] The Cotonou Agreement also acknowledges ownership, the idea that national governments should assume a lead role in planning and implementation, as a fundamental and legally binding principle.[60]

Different aspects of the legal principle of sovereign equality are thus concretized in the rules of international development organizations: autonomy, self-determination regarding decisions that concern the core of domestic affairs and non-intervention. Only with regards to the aspect of formal equality, we must note that it is not unusual for development organizations, or international organizations in general, to differentiate between member states on the basis of functional or other considerations.[61] For instance, the statutes of the World Bank, the AfDB and the ADB do not formulate a principle of equal treatment of all member states like the UN Charter in Art. 2 (1).[62] In contrast, the World Bank even uses a system of weighted voting that accords richer member countries a greater say in the organization's decision-making.[63] Though a deviation from formal equality in the strict sense, differentiations between fragile and other countries would thus in principle be permitted if they were based on mutual consent.[64]

As noted before, rules of international development organizations that protect the sovereignty of even the weakest and most aid dependent country can become obstacles to providing assistance to countries with no or only very weak government.[65] What should be the legal basis for engagement if there is no government counterpart to express consent or sign a legal agreement? Who should take the lead in preparing and implementing development strategies, programs, or projects, if the government lacks the minimum level of capacity required to effectively assume 'ownership'? Such problems are exacerbated by the fact that the state-centric legal and policy frameworks of development organizations in general offer comparatively little protection at the sub-state level, for example, to protect the self-determination of a people independent of the government's status. In a certain sense, we are thus reminded of nothing less than "the perennial dilemma of a state-centric international legal system": the tension between protecting state sovereignty, and the rights of individuals and groups where state institutions fail to do so.[66]

In sum, development, effectiveness and sovereignty are basic ideas that can be found in the legal and policy frameworks of all international organizations engaged in development cooperation. Sometimes, rules that reflect these different ideas may pose specific obstacles to engaging in fragile states. Sometimes, they may require difficult balancing acts.[67] For example, national ownership is regularly considered key to the effectiveness of multilateral development cooperation.[68] Yet where international organizations impose detailed conditionality on recipient states, for instance concerning the design of public financial management systems to ensure the effective use of ODA in countries with barely effective government, they also restrict autonomous decision-making. In other cases, the objective of development may conflict with standards of effectiveness, if we consider situations where external assistance is vital for supporting a country's development, but weak state institutions cannot guarantee the cost-effective, results-oriented, and accountable use of ODA. The subsequent chapters will show how international development organizations seek to provide systematic answers to such challenges in relation to fragile states.

3 Conclusion

This chapter sought to provide a basic understanding of the legal nature and substance of rules that make up the legal and policy frameworks of international development organizations. As the body of rules that governs how international organizations usually transfer ODA to recipient countries, it also provides a basis for studying how they adapt their legal and policy frameworks *vis-à-vis* fragile states. Within the broader field that constitutes the law of development cooperation, our focus was on the institutional law of development organizations. I drew particular attention to the significance of secondary rules, namely internal secondary rules, in instructing the conduct of development organizations. They can have a critical impact on the outcomes of decision-making for which they provide the set-up, and further sizeable, external effects on recipient states. Subsequently, I outlined a number of substantive commonalities in the rules of different development organizations: the objective of development, standards of effectiveness, and protections of sovereignty.

With this basic understanding, we can study how international development organizations respond to challenges of engaging with fragile states—from a legal perspective. But what is the value, one may ask, of studying

from a legal perspective an issue that seems to challenge or exceed the scope of law? 'Fragile state' is no legal term or concept, and law generally does not account for state fragility as in varying degrees of government effectiveness. Not all of the challenges that development organizations encounter when seeking to engage with fragile states concern their legal mandates. They face an intricate blend of technical, political, and legal questions, and their response thus needs to be conceived in light of different reasoning.[69] What is more, in focusing on the rules of international development organization, we risk forgetting that these are not necessarily implemented, or that implementation may be sketchy. In this sense, the focus on rules could be seen to obstruct the view at the activities of development organizations in practice, and ultimately divert attention away from questions that ought to be at the centre of inquiry instead.

And yet a legal analysis that structures and describes, interprets and evaluates the rules that international development organization make or modify to engage with fragile states remains immensely significant. Why? It first of all explains the substance and hence adds transparency to a body of rules that has so far received little to no attention. The internal rules of international development organizations like the World Bank are often not on the radar even of those that may be directly affected by them. Further, how organizations adapt their legal and policy frameworks—whether they adopt new rules or modify existing rules, for instance, and whether they introduce exceptions specifically for fragile states or make changes that concern all recipient countries—are important questions to answer from a legal perspective. But the answers equally shed light on key parameters of how international development organizations seek to address fragile states. Is it a through a systematic approach that acknowledges their special circumstances and needs—or rather a half-hearted attempt to circumvent legal constraints to engage in countries of special interest?

Last but not least, law naturally serves an evaluative function, which is why we will consider whether the rules that international organizations make or modify to govern engagement with fragile states are in conformity with their primary law. But often our focus will be on the processes through which they adapt their legal and policy framework, as much as on specific outcomes.[70] For a legal analysis also involves scrutinizing competences and dissecting more or less formalized processes of rule- and decision-making, looking at who has the right to participate and who has not. We can thus shed light on distributions of power, and these are

important to consider in a policy field that may appear technical at first, but essentially concerns a political process. Ultimately, in this political process, it also matters which questions are subjected to regulation, and which are deliberately left unregulated.

Notes

1. José E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005).
2. Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 29.
3. Ibid., 13–14. From a methodological standpoint, Dann's exclusive focus on ODA constitutes a reasonable attempt to reduce the complexity of the field and make it amenable to public law analysis. See also Giedre Jokubauskaite, 'Philipp Dann. The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany', 25 *European Journal of International Law* (2014).
4. Other authors have sought to study the field of development finance with a view to both public and private sources, for instance Kevin Davis, '"Financing Development" as a Field of Practice, Study and Innovation', *Acta Juridica*, 168 (2009).
5. Moreover, the focus on ODA over other sources of financing is particularly relevant with regards to fragile states, where ODA remains by far the most important external resource flow. See OECD, '*Fragile States 2013. Resource Flows and Trends in a Shifting World*', 47.
6. Besides, it is mostly non-binding multilateral agreements or policy declarations like the Paris Declaration on Aid Effectiveness that contain specific rules concerning the transfer of ODA through international organizations.
7. Henry G. Schermers & Niels Blokker, *International Institutional Law. Unity within Diversity*, 4. rev. (Nijhoff, 2003); or Jan Klabbers, *An Introduction to International Institutional Law*, 2nd Edition (Cambridge University Press, 2009).
8. On the substance of rules governing the conduct of international development organizations, see Sect. 2 of this chapter.
9. E. Alvarez José, 'Constitutional Interpretation in International Organizations', in Jean-Marc Coicaud & Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (New York University Press, 2001).
10. Benzing, 'Secondary Law', paras 1–2.

11. Schermers & Blokker, *International Institutional Law. Unity within Diversity*, § 1215; Klabbers, *An Introduction to International Institutional Law*, p. 203.
12. Benzing, 'Secondary Law', para. 36. On the doctrine of implied powers, see the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, pp. 182–183: "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."
13. There is some ambiguity surrounding the concept of secondary rules as opposed to internal rules in international legal scholarship. In this book, I use "internal rules" to refer to the rules of internal secondary law only, and not primarily law.
14. Rather than strictly internal rules, the EU therefore adopts 'Regulations', a particularly formalized form of secondary legislation that is applicable to the institution, but also its member states and addressed individuals. See Art. 189 Treaty on the Functioning of the European Union (TFEU), and on the EU's legal framework, *infra* Sect. 1 in Chap. 6.
15. Jochen von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations', in Armin von Bogdandy, et al. (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010), 797.
16. For a detailed analysis of the legal nature and effects of the Bank's Policies, see *infra* Sect. 1.1 in Chap. 5.
17. E.g. Laurence Boisson de Chazournes, 'Policy Guidance and Compliance: The World Bank's Operational Standards', in Dinah Shelton (ed) *Commitment and Compliance* (Oxford University Press, 2000), pp. 289–90.
18. See A. Rigo Sureda, 'Informality and Effectiveness in the Operation of the International Bank for Reconstruction and Development', 6 *Journal of International Economic Law*, 565 (2003); and *infra* Sect. 1.1 in Chap. 5.
19. von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations', 796, elaborating that operational decisions that are taken outside the plenary bodies of an organization to apply internal rules can contribute to the concretization and creation of new norms, not least where they contribute to an emerging organizational practice.
20. In particular the Global Administrative Law (GAL), the International Public Authority (IPA) and the Informal International Law-Making (IN-LAW) projects seek to grasp the legal effects and significance of a plurality of normative outputs that international organizations increasingly produce, and to understand and conceptualize their forms, functions and effects. For a comparison of these research projects, see Philipp Dann &

Marie von Engelhardt, 'Legal Approaches to Global Governance and Accountability: Informal Lawmaking, International Public Authority, and Global Administrative Law Compared', in Joost Pauwelyn, et al. (eds), *Informal International Lawmaking* (Oxford University Press, 2012).

21. See Armin von Bogdandy, et al., 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', in Armin von Bogdandy, et al. (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010), 12, arguing that "the capacity to determine another legal subject can also occur through a non-binding act which only *conditions* another legal subject."
22. Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 216–218, and on the resulting legitimacy concerns, 510–511.
23. Even if actual development projects and programs are usually still governed by international legal agreements concluded between donor organizations and recipients, and not just by internal rules, these legal agreements are "intensely 'pre-structured' by the donors' own rules". Ibid., 217.
24. Benzing, 'Secondary Law', paras. 49–51.
25. For a compelling discussion of the question of whether informal rules in general can constitute law, see Joost Pauwelyn, 'Is it International Law or Not, and Does It Even Matter?', in Jan Wouters, et al. (eds), *Informal International Lawmaking* (Oxford University Press, 2012).
26. For example, Ibrahim F. I. Shihata, *The World Bank in a Changing World*, 3 (Nijhoff, 2000), 429, speaking about the practice of the World Bank on matters of state succession; Daniel Bradlow & Andria Naudé Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?' *International Organizations Law Review*, 3 (2013), 7; and on the contribution of secondary law to the formation of customary international law in general, Benzing, 'Secondary Law', paras. 4 and 32.
27. On the World Bank's governance structure and system of weighted voting, see *infra* Sect. 1.1 in Chap. 5.
28. von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations', 778. Also Alan E. Boyle & Christine M. Chinkin, *The Making of International Law* (Oxford University Press, 2007), Chapters 3 and 5.
29. This is even if international organizations increasingly choose to adopt internal rules or put up managerial controls to structure and guide their decision-making. von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations', pp. 798–802.
30. For example, Daniel Bradlow, 'International Law and the Operations of the International Financial Institutions', in Daniel Bradlow & David

Hunter (eds), *International Financial Institutions and International Law* (Kluwer, 2010). Legal obligations may also arise from fundamental principles of human rights; e.g. PHILIP ALSTON, et al. (eds), *Human rights and development. Towards mutual reinforcement* (Oxford University Press, 2005); or SIGRUN I. SKOGLY, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish, 2001).

31. These commonalities are increasing, as organizations with similar mandates tend to adopt similar rules. See BENEDICT KINGSBURY, 'Global Administrative Law in the Institutional Practice of Global Regulatory Governance', in Hassane Cissé, et al. (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012), 22, referring to the "[i]somorphism among clusters of institutions with similar missions, taking informal mimetic steps to resemble each other institutionally or to adopt similar operational policies."
32. Given its much broader mandate, it would of course be more accurate to refer to the EU as an organization engaged in development cooperation. For the sake of simplicity, however, I refer to all four organizations as international development organizations.
33. IDA Articles, Art. I. The development mandate is further concretized in Operational Policy (OP) 1.0 on Poverty Reduction, a secondary rule that formulates a broad conception of development underscoring the work of the World Bank.
34. Agreement establishing the African Development Bank (hereafter AfDB Agreement), Art. 1. See also the Agreement establishing the African Development Fund (signed on 29.11.2972), Art. 2.
35. Agreement establishing the Asian Development Bank (hereafter ADB Agreement), Art. 1.
36. Treaty on the Functioning of the European Union (TFEU), Art. 208 (1). See also Art. 209 TFEU and Treaty on European Union (TEU), Art. 21 (2) lit. f).
37. Otherwise, an organization risks acting *ultra vires*, that is outside the scope of its competence. See VON BERNSTORFF, 'Procedures of Decision-Making and the Role of Law in International Organizations', 784–785, who also highlights the doctrine's limited effectiveness and scope of application in view of the fact that international organizations can deduce "implied powers" from their mandated purposes. On "implied powers", see *supra* note 12.
38. This is not unusual. Statutes in general, and the objectives and purposes of an organization in particular, are rarely phrased in narrow terms. See *supra* Sect. 1 in Chap. 4.

39. Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 127–129.
40. See also *supra* Sect. 2.1 in Chap. 3, where I argue that the broadening notion of development implies that international organizations became concerned with the state's actual performance in areas that go well beyond factors that directly concern its economic development.
41. Mission creep refers to the gradual expansion of the activities of international organizations beyond the confines of the original mandate. See Jessica Einhorn, 'The World Bank's Mission Creep', 80 *Foreign Affairs*, 22 (2001); or Ibrahim F. I. Shihata, 'The Dynamic Evolution of International Organizations: The Case of the World Bank', 2 *Journal of the History of International Law*, 217 (2000).
42. The SDGs, which succeeded the Millennium Development Goals in September 2015, for the first time include "peace, justice, and strong institutions" as an explicit goal.
43. Besides, standards of effectiveness are also expressed in international policy declarations, most prominently the Paris Declaration on Aid Effectiveness, to which all major international development organizations adhere.
44. IBRD Articles, Art. I (i). See also *infra* Sect. 1.2 in Chap. 5.
45. AfDB Agreement, Art. 17 lit. h), and with almost identical wording ADB Agreement, Art. 14, lit. xi) and IDA Articles, Art. V Sect. 1 lit. g).
46. See Art. 11 of the Financial Regulation applicable to the 10th European Development Fund, Council Regulation (EC) No 215/2008 of 18 February 2008. The EDF is a special budget used to finance development cooperation with ACP states. On the dual legal framework and separate budgets of EU development cooperation with ACP and non-ACP states, see *infra* Sect. 1 in Chap. 6.
47. Arguably, the level of requirements imposed by international development organizations has increased with the rise of the aid effectiveness agenda, which reflects donors' belief that competent, well-governed institutions that assume ownership are a necessary condition for aid to be effective. See *supra* Sect. 2.1 in Chap. 3.
48. *Supra* Sect. 2.1 in Chap. 3.
49. Articles of Agreement of the International Bank for Reconstruction and Development of 1944 (hereinafter IBRD Articles), Art. II Sect. 1 (Membership) in combination with Art. III Sect. 1 (a) "The resources and the facilities of the Bank shall be used exclusively for the benefit of members"; and Articles of Agreement of the International Development Association of 1966 (hereinafter IDA Articles) Art. II Sect. 1 and Art. V Sect. 1 (a).
50. Due to the nature of the World Bank as an international financial institution that lends to its member countries, the conclusion of legal agreements

also serves to secure the reimbursement of loans. Other organizations that provide non-refundable assistance, however, similarly conclude legal agreements with recipient states. See Riegner & Dann, 'Foreign Aid Agreements'.

51. IBRD Articles, Art. III Sect. 4 (i) and IDA Articles, Art. V Sect. 2 d). Shihata explains how only a treaty concluded with a member government qualifies as treaty under international law, and is hence subject to executive and legislative control within the country, and more easily insulated from domestic law. Ibrahim F. I. Shihata, *The World Bank Legal Papers* (Kluwer Law International, 2000), pp. 126–127.
52. Member states are requested to designate the governmental agencies for the Bank to deal with. IBRD Articles, Art. III Sect. 2 and IDA Articles, Art. VI Sect. 10. In case of the IDA, the Articles foresee the designation of an "appropriate authority" as "channel of communication" for the Association. IDA Articles, Art. VI Sect. 10.
53. IDA Articles, Art. V Sect. 1 lit e), together with the political prohibition clause in IBRD Articles Art. IV Sect. 10 and IDA Articles Art. V Sect. 6. The political prohibition clause is a particularly noteworthy expression of the legal principle of non-intervention. See Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 255–256.
54. See *infra* Sect. 3 in Chap. 5.
55. ADB Agreement, Art. 3; AfDB Agreement, Art. 3 (1) "Any African country which has the status of an independent State may become a regional member of the Bank."
56. ADB Agreement, Art. 11 and AfDB Agreement, Art. 14.
57. ADB Agreement, Art. 14 (iii) and AfDB Agreement, Art. 17 (1) lit. b).
58. ADB Agreement, Art. 36 (2); AfDB Agreement, Art. 38 (2).
59. Cotonou Agreement, Art. 2 Fundamental Principles and Art. 58 (2) lit (a).
60. Cotonou Agreement, Art. 2, and also EC Regulation No 1905/2006 of 18 December 2006 L 378/41, establishing a financing instrument for development cooperation, i.e. binding EU secondary law.
61. Macrae, et al., '*Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues*', 605, pointing out that sovereign equality in the design of new international organizations is regularly compromised, since it is balanced with functional concerns, the need for efficacy, as well as the political interests of powerful member states. Also Riegner & Dann, 'Foreign Aid Agreements'.
62. The EU is principally bound to treat its member countries equally, but the recipients of EU aid are not included in the EU's membership. In contrast, the EU's legal framework makes differentiation between different recipient countries a key principle. See *infra* Sect. 3 in Chap. 6.

63. See *infra* Sect. 1.1 in Chap. 5.
64. On procedural equality within international organizations, see ATHENA DEBIIE EFRAIM, *Sovereign (In)Equality in International Organizations* (Martinus Nijhoff, 2000), Part IV and pp. 365–366.
65. *Supra* Sect. 2 in Chap. 3.
66. RICHARDSON, "'Failed States', Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations', p. 7.
67. On typical, normative tensions in the law of development cooperation, see also DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 295–298.
68. The Paris Declaration on Aid Effectiveness therefore formulates national ownership as one of five principles of aid effectiveness.
69. See *supra* Sect. 2.2 in Chap. 3 for an overview of the different challenges that development organizations face when aiding fragile states.
70. Kevin Davis finds that the most valuable role for lawyers in analysing the "law of financing development" and how it evolves is precisely in "processes by which the law of financing development adapts and innovates, rather than on specific outcomes of that process. DAVIS, '"Financing Development" as a Field of Practice, Study and Innovation', p.183.

CHAPTER 5

The World Bank's Rules for Engaging with Fragile States

The World Bank is the largest and the most influential international development organization, in terms of both financial resources and knowledge. In fiscal year 2015, the organization committed a total of US$42.5 billion in financial assistance globally to low- and middle-income countries.[1] Seventy years after its establishment, in a global political landscape that has profoundly changed, the World Bank's role as an important agenda-setter in the international development community remains largely undisputed.[2] This is also due to the organization's track record of adapting to changing demands and needs, turning from a financier of infrastructural development to a promoter of good governance—and from an organization largely absent from conflict-affected countries, to the second most important contributor of multilateral ODA to fragile states. The World Bank is second to none when it comes to promoting and operationalizing the notion of fragile states.

In the light of its financial leverage, intellectual influence and role as a policy pioneer, there is already ample reason to study how the World Bank engages with fragile states. More importantly, the World Bank makes for an interesting and rewarding case study because it has a comparatively well-structured and transparent legal and policy framework, where we can trace how the notion of fragile states has been formalized. Lawyers constitute a small minority in an organization largely run by economists, but they play an important role in interpreting the mandate in the light of

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changing circumstances. Emerging practices are often captured and consolidated in internal rules, which are publicly available and amenable to legal analysis. Certainly, a change in the rules does not always result in behavioural changes: staff incentives and institutional culture matter, and particularly the latter is slow to change in a huge bureaucracy like the World Bank. There may sometimes be a gap between *de jure* and *de facto* practice. The focus of this book, however, is on the former: how international organizations make or modify rules to formalize a differentiated approach to fragile states. For this, the World Bank provides important evidence.

Before we start, how does the World Bank define fragile states? As noted before, the Bank publishes a list of countries and territories that it classifies as 'fragile situations' every year, which has become a habitual reference point for the international development community.[3] The classification rests on the CPIA, an indicator-based, diagnostic tool that Bank staff normally use to rate how favourable a country's political and structural environment is to the effective use of aid, and to allocate aid accordingly.[4] Countries with a particularly low CPIA score or the presence of a peace-keeping or peace-building mission during the past 3 years are considered as 'fragile situations'.[5] On the basis of the CPIA, fragile states are basically defined as low-income countries with weak policies and institutions, or as the opposite of the 'good governance state'.[6]

While it is important to consider how the World Bank defines fragile states since it reflects the organization's understanding of the challenge and may shape its response, it is also important to note that the definition plays only a minor role in the Bank's legal and policy framework. The 'Harmonized List of Fragile Situations' serves mostly analytical purposes, which does not mean that it cannot have political or reputational effects.[7] But the term 'fragile situation' hardly crops up in Bank-internal rules, and does not entail any legal effects for the Bank's operational decision-making. The organization thus refrains from using 'fragile state' or 'fragile situation' as a legal term, in the sense of attaching formal consequences to its application, or creating a specific category of member state. Consequently, to find out how the Bank adapts its legal and policy framework in response to the challenges of engaging with fragile states, we need to look beyond the 'fragile' label.

This chapter begins with an outline of the World Bank's legal framework and mandate, highlighting how internal rule-making and legal opinions have paved the way for the organization's growing involvement in

fragile states (Sect. 1). The subsequent sections analyse and assess how the Bank has adapted its legal and policy framework to engage in countries that appear to lack effective government counterparts—in a formal, juridical sense (Sect. 2), or in terms of actual capacity (Sect. 3). In conclusion, I discuss whether being seen as fragile constitutes an advantage or a disadvantage for a member state in its dealings with the World Bank (Sect. 4).

1 The World Bank and Its 'Law'

What is commonly referred to as the World Bank in fact consists of two international organizations, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).[8] Both organizations have separate legal personalities and were founded by two different international legal treaties that set out their respective mandates. However, the two organizations have an analogous structure, which largely resembles the tripartite model of other organizations. The organ that is responsible for general policy-making and vested with the highest decision-making authority is the Board of Governors, where all member states are typically represented by their finance or development ministers.[9] The Board of Governors has delegated far-reaching powers to the Board of Directors (or Executive Board), which consists of 25 member state representatives that together preside over the organizations' day-to-day business.[10] The same representatives constitute the Board of Governors and the Executive Board of both the IBRD and the IDA.[11] The World Bank's President heads the staff of civil servants, and is responsible for the 'ordinary business' of both organizations.[12]

The following section introduces the World Bank and its 'law'. I begin by taking a closer look at the rules that make up its legal framework—that is those rules that are relatively formalized and considered binding—and at the means available for their adaptation (Sect. 1.1). Next, I outline the substance of the World Bank's mandate in light of dynamic interpretations, which have prepared the grounds for the organization's growing engagement in fragile states (Sect. 1.2).

1.1 Legal Framework and Means of Adaptation

The World Bank's legal framework is primarily determined by its founding treaties, the Articles of Agreement of the IBRD and the IDA. Like the statutes of most international organizations, they are formulated in

relatively broad terms and need to be concretized through the adoption of secondary rules that govern operations on a daily basis.[13] Apart from by-laws and other forms of secondary law that are used by many organizations,[14] the World Bank has other instruments that are of particular interest and importance in guiding the conduct of its activities: Policies (Operational and Bank Policies), Directives, and Bank Procedures.[15] Operational Policies and Bank Policies are internal rules of an abstract, general character, which state "broad substantive policy principles that require, permit or constrain Bank activities to achieve institutional goals."[16] Bank Procedures lay out the according procedural requirements, and thus explain how the Policies are to be carried out by staff. Directives constitute a new instrument introduced in 2014, and can either complement a Policy or address substantive matters not covered by a Policy.[17] What makes the World Bank's internal rules so interesting and important?

To begin with, they are comparatively elaborate and formalized, and form part of the Bank's legal framework—the 'law'—of the World Bank.[18] Unlike many other international organizations, the Bank clearly differentiates between internal rules that are binding for staff, and those that are only of a recommendatory nature—for instance, Bank Guidance or Good Practice Notes, which belong to its policy framework.[19] In contrast, Bank Policies, Directives, and Procedures are considered mandatory and must be published.[20] But staff's compliance with these rules in the project cycle can be subject to a quasi-judicial review mechanism, the Inspection Panel.[21] Moreover, deviations in the form of waivers need to be requested and formally approved by the Executive Directors.[22]

Although the Bank's Policies and Procedures have a comparatively high level of formality and act as binding rules within the internal sphere of the Bank, the Articles do not contain procedural requirements for their formulation and adoption.[23] They are developed in a largely internal process that has gradually merged into a coherent organizational practice, and which was partly codified in 2014.[24] Accordingly, Policies need to be approved and issued by the Executive Directors, whereas Directives, Procedures and non-binding Bank guidance are approved and issued by the Bank's Management. In practice, the World Bank has also increasingly invited affected or interested parties to comment on drafts of its Policies.[25]

Member states are thus principally involved in the rule-making process of Policies through the Executive Directors. However, the influence of recipient states is limited given the composition and weighted voting

procedures of the Executive Board. At the World Bank, how much a country contributes financially formally translates into its decision-making influence. Only the five largest financial contributors—the USA, Japan, Germany, France and the UK—have the right to appoint their own Director in the Executive Board. The remaining 183 member countries elect the 20 Directors representing them every 2 years, according to regional alliance. Further, decisions are taken on the basis of a weighted system of voting. Member states that contribute more to the capital base of the organizations are thus allocated a higher percentage of votes.[26] The fact that the World Bank's voting and representation rules do not strictly reflect the principle of sovereign equality is thus important to bear in mind when considering the role of the Executive Directors in processes of rule-making and adaptation.

Because of their relative formality, Bank Policies and Procedures have assumed an enormous significance in steering the Bank's operations, and also constitute a prime example for the external effects of internal rules. We have seen that environmental and social safeguard policies, for instance, are regularly incorporated in the financing agreements that the Bank concludes with recipient countries, and thus create direct obligations under international law. Further, with many Policies forming part of the legal framework that governs how projects are approved, any government seeking financing from the World Bank must in practice respect them—all the more if they are dependent on external assistance. Besides, other international financial institutions often copy the Bank's Policies and Procedures, which become "*de facto* global standards among other development banks".[27]

Finally, it is important to note that the World Bank also uses its internal rules to consolidate organizational practices and mandate interpretations, and thus as a means to adapt its legal framework. As for other organizations, the principal avenues for adapting the Articles of Agreement are formal amendment or interpretation. The Bank has rarely modified its statute by means of amendment, which would require a qualified majority in the Board of Governors.[28] Instead, it relies on interpretation, a task that is incumbent upon the Executive Directors.[29] As an instrument of adaptation, interpretation is less inclusive than amendment, since a simple majority of member countries that are (unequally) represented in the Board can basically change the Articles. The World Bank's practice of interpretation makes it an instrument that is also less transparent, and it is here where the Bank's Policies and Procedures come in again.

The Executive Directors have rarely ever issued a formal interpretation of a provision in the statute, but the Articles are instead adapted through informal or 'implied interpretation'.[30] The Directors will discuss and approve a loan, a Policy draft prepared by the Bank's Management, or a legal opinion prepared by the Bank's General Counsel—and given that they have the power of interpretation—their approval is considered to imply conformity with the Articles of Agreement. Through the formulation of Policies and Procedures, the Bank's Management has thus actively contributed to the dynamic interpretation of the organization's mandate—just as the Bank's General Counsel has done through the preparation of legal opinions.[31] Internal rule-making and legal opinions have also paved the way for the World Bank's evolving engagement in fragile states.

1.2 The Mandate in the Light of Dynamic Interpretations

The Articles of Agreement of the IBRD and the IDA, the two organizations that make up the World Bank, determine its different purposes and functions. The IBRD was founded to assist in the 'reconstruction and development' of war-torn European economies after the Second World War.[32] Its major task consists in assisting middle-income and credit-worthy poorer countries in achieving sustainable growth and development through credit investments at discounted market rates and advisory services. In the two decades after its establishment, newly independent nations joined the ranks of sovereign states that had massively underdeveloped economies and were far from being creditworthy for IBRD borrowing. The IDA was therefore established in 1960 to complement the IBRD's activities in the realm of development—an acknowledgment of the immensely different needs and capacities among the Bank's recipient countries.

The IDA is mandated to assist the poorest countries "to promote economic development, increase productivity and thus raise standards of living".[33] It provides countries where private or IBRD financing is not available with loans that come with zero or very low interest charges, or with grants that do not have to be reimbursed.[34] The IDA is thus more explicitly mandated to promote development, and only the highly concessional lending of the IDA actually qualifies as ODA. Moreover, it is the World Bank's principal arm and source of financing for fragile and conflict-affected countries.[35]

What 'development' or 'standards of living' means was left deliberately open in the Articles of Agreement. As the Bank's former General Counsel Roberto Dañino explained, the Articles have to be "examined against the back-drop of the current international legal regime and the evolving understanding of development", an understanding that the organization is continuously challenged to refresh.[36] While focused on economic growth in the beginning, today, the World Bank sees development as a comprehensive concept and all-encompassing goal, including a wide range of aspects related to socio-economic well-being and environmental sustainability. This understanding is captured in OP 1.00 on Poverty Reduction, which states the Bank's mission is poverty reduction, and defines poverty as a "lack of opportunities (including capabilities), lack of voice and representation, and vulnerability to shocks."[37]

The evolving understanding of development has also encompassed a growing acknowledgement of the inextricable link between peace, security and development. We have seen that from the 1990s, the international community became increasingly concerned with civil wars and complex emergencies that deeply affected societal structures.[38] Though largely absent from the high-risk environments of conflict-affected states in the decades following its establishment, the World Bank, too, sought a greater role in the international community's efforts at post-conflict reconstruction.

Though the Bank could rely on its purposes of 'reconstruction and development' explicit in the IBRD Articles,[39] an interpretation of the Articles of Agreement was nonetheless necessary to clarify the boundaries of the Bank's development mandate in the context of conflict and emergencies.[40] In 2001, the Executive Directors approved Operational Policy 2.30 on Development Cooperation and Conflict, which confirms that violent conflict adversely affects the Bank's development mandate and establishes guiding principles for engagement in conflict-affected areas.[41] In addition, OP 8.00 on Rapid Response to Crisis and Emergencies of 2007 provides the basis for the Bank's involvement in activities that may transgress the boundaries between development, humanitarian assistance, and security activities.[42] A Legal Opinion on 'Peace-Building, Security, and Relief Issues' prepared by the General Counsel in 2007 confirms the broad lines established in both Policies.[43] Accordingly, the Bank can principally engage in activities related to peace-building, security, and relief issues, an important precondition for operating in the fluid environments of fragile states. The organization must, however, remain focused on its

core economic competences, and respect other provisions of the Articles. Rather than establishing a bright line-test, the Legal Opinion demands careful consideration of legal, operational, and reputational risks in each case.

The two principal restrictions of the Articles that remain relevant in delineating the scope of the Bank's mandate are economic and efficiency requirements, and the political prohibition clause. Economy and efficiency requirements make up the so-called 'fiduciary duty' of the World Bank. As noted before, they assume a prominent role in the legal framework of a 'Bank' that strives to uphold its good credit ratings.[44] The fiduciary duty provides the basis for a range of Bank policies in areas like procurement, financial management, disbursement, and anti-corruption. Notably, while the Bank has begun to reform these policies to move 'from strict-rules to principles-based approach', and towards greater reliance on country systems (that is recipient laws and institutions), the underlying provisions in the Articles of Agreement have not yet been subject to a holistic interpretation by the Legal Department.[45]

Further, the Articles of Agreement establish that the organization "shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned."[46] The political prohibition clause applies to the Executive Directors as well as the Bank's Management and staff. It contains two individual but related aspects: the duty to refrain from interfering in the political affairs and be influenced by the political character of member states, and the requirement to ensure that only economic considerations are relevant to the organization's decisions.[47]

The political prohibition clause serves an important function for the Bank, namely, to prevent a 'creeping politicization' or over-ambiguous expansion of its original development mandate.[48] A clear separation between political and economic spheres, however, has never been easy. Starting with the 1990 Legal Memorandum of Ibrahim Shihata that clarified the permissible scope of engagement with good governance, the World Bank has increasingly recognized that political circumstances within a member country—perhaps rather than its 'political character' *per se*—can have economic effects.[49] To the extent they have a 'direct and obvious' economic effect on the outcomes of Bank-funded operations, Shihata argues, the organization should be able to assess governmental institutions and their performance in deciding about loans.[50] In principle, the Bank can thus consider the structure, functioning, and effectiveness of national

institutions, including in areas that belong to the core of political affairs.[51] The interpretation of governance as falling within the scope of the Bank's legal mandate thus constitutes another important stepping stone for the organization's involvement with state-building in fragile states.

Finally, as part of the Bank's efforts to position fragility and conflict at the core of its mandate after the publication of the WDR 2011, the legal department has begun to develop a more elaborate approach to assessing risks and differentiating between permissible and impermissible activities on the basis of the Articles.[52] In the 2012 'Legal Note on Bank Involvement in the Criminal Justice Sector', the General Counsel outlines a two-part test for this purpose.[53] First, activities should be grounded in an "appropriate and objective economic rationale". Second, the risk of political interference should be carefully assessed and managed through a number of proposed measures, for instance, ensuring that activities are based on "a specific request or consent from the borrowing government", are subject to a special review mechanism if they involve a high risk, and are closely monitored. The approach thus offers some decision-making parameters grounded in the Articles, while encouraging staff to carefully assess individual cases. At least in theory, it appears commensurate to the task of ensuring the World Bank remains a law-governed organization, even as it responds to the changing demands of the environment in which it operates.

2 Engagement in the Absence of Formal Government Counterparts

The World Bank's legal and policy framework rests on a state-centric development paradigm. Accordingly, the organization is attuned to dealing with official government counterparts—as interlocutors, signatories and owners of the development process.[54] The political prohibition clause defines to what extent the organization can consider the structure or performance of government institutions.[55]

However, with its growing involvement in conflict-affected and fragile states, the World Bank has increasingly faced situations where an effective government counterpart in a formal, juridical sense could not be identified. Protracted crises and outright conflicts often entail a partial breakdown of government authority, if not the temporary absence of government counterparts, for instance in post-war Afghanistan or Iraq. In Somalia, the prolonged absence of any reasonably effective government prevented the

Bank from engaging for more than a decade, despite the country's enormous development needs.[56] Disorderly transfers of power in the context of conflicts or political turmoil can also raise doubts as to the effectiveness or legitimacy of unelected, interim authorities—or lead to a situation where more than one entity claims to be the government in power. Such doubts can delay Bank assistance when it appears most needed. Besides, in post-conflict situations involving the dissolution of states, not just the legal status of a government, but also that of (member) states or their dissolving units can be in question, like in Kosovo or South Sudan.

Aid effectiveness concerns are thus very much bound up with the settlement of legal questions that pertain to the identification of effective government counterparts in a formal, juridical sense.[57] In dealing with such a complex reality and the political questions it invariably entails, the World Bank has not only sought *ad hoc* solutions to work around legal restrictions that make juridical statehood a minimum condition for development cooperation. The Bank has consolidated and formalized its evolving, organizational practice through the adoption of internal rules.

In this section, I describe and analyse the rules that the World Bank has adopted to engage in countries that have no government, or where an official government cannot easily be identified. Operational Policy 2.30 on Development Cooperation and Conflict essentially redefines on what legal grounds the Bank can engage in case there is no government, and in non-member states or territories with an unresolved legal status (Sect. 2.1). Operational Policy 7.30 on Dealings with De Facto Governments establishes under what conditions the Bank deals with a *de facto* government (Sect. 2.2). In comparing the two Policies, I discuss how the World Bank seeks to strike a balance between legal restrictions in its mandate, and the urge to assist fragile states in concert with the international community (Sect. 2.3).

2.1 Operational Policy 2.30 on Development Cooperation and Conflict: Between State Consent and Community Interests

In the 1990s, the World Bank sought a more proactive role in the reconstruction and development of post-conflict countries.[58] However, legal constraints posed by the Articles of Agreement made it difficult for the Bank to engage in countries with an unresolved legal status or no effective, recognized government. The World Bank first sought to circumvent these legal constraints on an *ad hoc* basis, and subsequently codified its evolving practice with the adoption of Operational Policy 2.30 in 2001.

The first important precedent on the way to OP 2.30 constitutes the Bank's assistance to the West Bank and Gaza, following a request from the cosponsors of the Oslo peace process. The Bank is normally required to use its resources "exclusively for the benefit of members",[59] and for projects or programs in the territory of member states.[60] Since the Palestinian Territories were neither a sovereign state, nor part of a member state's territory, however, there appeared to be no legal basis for the extension of loans. The Bank's General Counsel Ibrahim Shihata therefore argued that the organization could provide assistance if the Executive Directors, who are competent to render an interpretation of the Articles, approved such engagement as being "for the benefit of members".[61] The organization was thus authorized to provide assistance, but not in the form of loans. To extend loans, the World Bank still required a member state counterpart with a government capable of assuming legal responsibility for reimbursement. Therefore, two trust funds were established—autonomous funding mechanisms where contributions from one or more donors are held in trust by an administrator, a task assumed by the World Bank. Being separate from its normal lending, trust funds provide greater flexibility regarding the use of funds and the recipients of aid—in this case, the West Bank and Gaza.[62]

With the authorization of the Executive Directors and the use of trust fund arrangements, the World Bank thus provided assistance to a non-member territory with an unresolved legal status and no *de jure* government.[63] Following this precedent, the Bank used the same legal reasoning and trust fund arrangements to engage in Bosnia in 1994, where the USA requested a decisive role for the Bank in post-conflict reconstruction,[64] and in Kosovo and East Timor in 1999, where it was asked to engage alongside the UN.[65]

Kosovo and East Timor, however, challenged the ingenuity of the Bank's jurists in another regard. With state institutions not yet existent or having suffered total collapse, both were placed under the authority of a UN administration for an interim period.[66] During this period, Kosovo and East Timor had no fully functioning, elected governments, whereas the UN administrations exercised far-reaching, sovereign powers. Who should thus request assistance, serve as legal counterpart, and receive disbursements from the World Bank? In Kosovo, the World Bank decided to conclude grant agreements with the United Nations Interim Administration of Kosovo (UNMIK) in the absence of a fully effective, national government. In East Timor, it entered into grant agreements with the United

Nations Interim Administration for East Timor (UNTAET).[67] In the light of their far-reaching consequences, the World Bank thus decided to treat UN administrations as governments for the purpose of extending assistance, and to accept their approval in lieu of a national government.[68]

In the course of the 1990s, the World Bank had thus demonstrated its readiness to overcome mandate restrictions to partake in the international community's joint efforts at post-conflict reconstruction. Its evolving organizational practice was consolidated with the adoption of OP/BP 2.30 on 'Development Cooperation and Conflict', which sets out the basic principles for engagement in countries affected by or in transition from conflict.[69] Two provisions in OP 2.30 deserve special attention, since they modify the legal grounds and permissible scope of Bank engagement on the basis of organizational practices developed over the 1990s.

The first provision concerns situations where there is no government in power. OP 2.30 expressly reaffirms that the Bank only operates in the territory of a member upon request of the government—it is not 'a world government'.[70] Yet it introduces a noteworthy exception to this fundamental principle of Bank involvement. If there is no government in power, "Bank assistance may be initiated by requests from the international community, as properly represented (for example, by UN agencies), and subject in each case to the prior approval of the Executive Directors."[71] Assistance can only be provided in the form of non-refundable grants or non-financial assistance, so that the Bank does not have to consider a country's creditworthiness.

Secondly, OP 2.30 codifies the Bank's practice of engaging in non-member countries, or in territories with an unresolved status. The Policy establishes that the organization's "resources and facilities may be used for the benefit of a country that is not a member", if such an engagement was found to be "beneficial to the Bank and its members".[72] Again, each such engagement requires approval from the Executive Directors.

OP 2.30 does not establish objective criteria for determining at what point a country has no government in power, what constitutes a 'request', who is authorized to represent the 'international community' (apart from UN agencies), or when Bank engagement would benefit the membership as a whole. Further, neither OP 2.30 nor the corresponding BP 2.30 establish procedural requirements—for instance, regarding the decision-making process or form of approval required from the Executive Directors. The two provisions have thus a primarily enabling nature: They grant full decision-making authority and discretion to the Executive Directors.

The fact that the Executive Directors have to approve any operation in the absence of a government in power or in non-member countries is important also for understanding the consequences of the Policy's application. OP 2.30 itself does not provide a legal basis for such operations. It articulates and codifies a specific approach for staff to follow, and thus creates certain normative expectations as to the Bank's response. Only an approval from the Executive Directors, however, would make such operations conform to the Articles of Agreement. Since they have the power to interpret the Articles, their approval would amount to an implied interpretation.[73] We will return to a discussion of OP 2.30, but not before looking at the second Policy that is relevant in this context—OP 7.30 on Dealings with *De Facto* Governments.

2.2 Operational Policy 7.30 on Dealing with **De Facto** *Governments: Criteria for Assessing Government Effectiveness and Legitimacy*

A rather common phenomenon the World Bank has to deal with are situations where a government comes to power by unconstitutional means, and possibly more than one entity purports to be the government in power.[74] This may be the case after a coup d'état, where the Bank has to weigh the competing claims of the ousted and the coup government to represent the member country. Military coups alone, though not necessarily characteristic of fragile states, occur on average three times every year.[75] In addition, doubts as to the *de facto* or *de jure* government of a country can arise in post-conflict situations, where transitions of power are often not orderly.[76] For instance, conflict may result in an unconstitutional change of power to an interim or transitional authority that is not yet confirmed through a general election, as was the case in post-conflict Iraq.

Though there is no established meaning of '*de facto* government' under international law, the term is often used to refer to a government that comes into power by means not provided for in the country's constitution.[77] It is not recognized by the majority of the international community, but exercises control over substantial parts of the territory. Since the choice of government is a matter of domestic law exclusively, only the effectiveness of a government, not its international recognition, affect the legal status of the state.

Still, international organizations face difficulties in determining what entity to deal with, and what entity has the right to represent the member

country in the organs of the organization.[78] And international *development* organizations face an additional challenge: they need to decide whether to continue financing or extend new financing to an entity in a situation of legal uncertainty. Particularly the World Bank, an international financial institution that provides loans, has an interest and indeed obligation to ensure their repayment.[79] Hence, the Bank must assure itself that the loan-receiving government is actually able to enter into legal obligations for the country. How it decides has potentially far-reaching material as well as political consequences for the entity concerned, not least because the decision has a signalling effect concerning the legitimacy of a *de facto* government at home and abroad.

With the adoption of OP/BP 7.30 in 2001, the World Bank was therefore the first international organization to formally establish criteria for determining under what conditions to engage with a *de facto* government for the purposes of development cooperation.[80] OP 7.30 defines '*de facto* government' as one that "comes into, or remains in, power by means not provided for in the country's constitution, such as a coup d'état, revolution, usurpation, abrogation or suspension of the constitution".[81] In such cases, the Policy highlights that the decision of the Bank to continue or discontinue operations does not amount to an 'approval', that is recognition, of the government.[82] Recognition is essentially a political act, and as such outside of the Bank's mandate. OP 7.30 does not concern who is entitled to represent a country at the Bank either. It solely regulates under what conditions the Bank can process new projects or administer existing ones, after an unconstitutional transition of power raises questions as to the ability and commitment of the *de facto* government to honour its obligations with the Bank.

For this purpose, OP 7.30 distinguishes between the handling of existing operations and of new operations. In the first case, the Bank has already concluded legal agreements with the ousted government, which it cannot unilaterally suspend or terminate other than under the conditions established in existing agreements. Accordingly, the Bank generally deals with the new, *de facto* government, provided that it is in effective control of the country; recognizes the country's past obligations and specifically its obligations towards the Bank; and is capable of implementing development projects and programs.[83] The first criterion is particularly crucial in situations where more than one entity claims to be the government in power, as the Bank has to ascertain not only whether, but also with whom to continue working.[84]

For new operations, the criteria are more demanding, as the Bank has more discretion in deciding on new operations. Bank staff should consider not only whether the *de facto* government is in effective control, but also if it "enjoys a reasonable degree of stability and public acceptance".[85] Staff must therefore assess how many countries, especially neighbouring countries, have recognized the government, and how other international organizations have responded to the situation—as the Bank does not want to be a trend-setter. Finally, staff need to consider whether the government honours its financial obligations towards the Bank, or is likely to challenge them.[86]

Next to the decision-making criteria established in OP 7.30, BP 7.30 regulates in detail the decision-making process. It is a decentralized process that accords the ultimate authority to Bank staff, as they are most familiar with the situation on the ground.[87] Though they are not required to inform or consult the Executive Directors, in practice, they usually do. Importantly, both the Bank's assessments and its final decisions under OP 7.30 are considered as deliberate information and hence not disclosed to the public.

What follows from the World Bank's internal assessment of the *de facto* government's nature? If the Bank concludes that it cannot continue engaging with the *de facto* government, it tries to suspend or terminate its existing legal commitments. Suspension or termination, however, are legal remedies that can be applied only on the basis of well-argued grounds, which are valid under the applicable financing agreement (an international legal treaty) and other secondary rules (the General Conditions and other OPs/BPs).[88] Suspension or termination are thus no automatic consequences of an OP 7.30 assessment.

Still, Operational Policy 7.30 has the legal effect of authoritatively guiding Bank staff in their immediate response to unconstitutional changes of government, which regularly includes the temporary suspension of payments until a final decision has been made.[89] At least concerning the decision to take up new operations in such contexts, OP 7.30 essentially expands the criteria and modifies the process whereby projects and programs are usually processed, according a greater role to factors pertaining to a government's effectiveness and legitimacy. Moreover, the application of OP 7.30 turns the burden of proof to the *de facto* government, which has to demonstrate it meets the criteria for continued disbursement or new lending.

2.3 Discussion

Operational Policy 2.30 and 7.30 are of central importance to the Bank's engagement in fragile states. Both were adopted in 2001 and codify an approach developed in response to specific situations that posed a challenge under existing rules. Together, the Policies determine how the organization engages in non-member countries or in countries with no effective government, and how it identifies an effective government counterpart in the first place. In other words, they reflect the Bank's approach to situations where complex legal questions concerning statehood and effective government complicate its involvement in fragile states.

First of all, the Policies demonstrate that the World Bank has not only sought to deal with such situations *ad hoc,* on a case-by-case basis.[90] Instead, the organization has codified organizational practices and interpretations in internal rules, which authoritatively guide its decision-making thereafter. Whether it is in spite of or rather because of the deeply political nature of the challenges at hand, this is remarkable. After all, how to respond to the absence of government or determine the effectiveness or legitimacy of *de facto* authorities are controversial questions even under general international law.[91]

The World Bank's decision to adopt internal rules suggests there is a demand for practicable guidance, and comes with the promise of enhancing the predictability, consistency, and transparency of decision-making. Whether this inherent promise of internal rule-making is met, however, depends on a number of factors pertaining to the Policies' design. To whom do they accord decision-making authority? To what extent do they determine decision-making criteria and process, and incorporate checks and balances—for instance, enabling public scrutiny through public disclosure?

In these regards, OP 2.30 and OP 7.30 show important differences, which partly reflect the different objectives for which they were adopted. The relevant provisions in OP 2.30 were introduced to justify Bank involvement despite mandate restrictions in certain post-conflict situations. Wanting to act quickly and in concurrence with the international community, the Bank required a simple authorization mechanism. OP 2.30 thus grants the sole decision-making authority to the Executive Directors. They approve an operation and imply it conforms to the Bank's mandate, without rendering a formal interpretation.[92] In the absence of any objective decision-making criteria or procedural demands (for instance,

to hold internal consultations prior to taking a decision), Bank involvement is left entirely to the purview of the Executive Directors. Their deliberations are kept secret, which does not help to render the process more transparent.[93]

For this reason, it is also difficult to assess the application of the Policy in practice. Whereas the Bank has engaged quite frequently outside the territories of member-states,[94] there seems to be only one case where it used OP 2.30 to engage in a country with no government in power: Somalia. It is beyond doubt that Somalia had no effective government for several years following 1991, which would normally have prevented any Bank engagement despite the country's enormous development needs. Based on OP 2.30, however, the Bank acted on the request of the international community and with the approval of the Executive Directors to provide financial resources to support at least a limited number of operations.[95]

If the use of the Policy in the exceptional case of Somalia seems uncontroversial, the Bank could still have disclosed its decision-making rationale to provide more legal clarity to its staff, the countries it engages with, and the public at large. After all, there may be more contentious cases concerning the application of OP 2.30 in the future—while the consequences of the Bank's decision to engage in a country with no government (consent) are significant. Right now, the Executive Directors can use the discretion granted by OP 2.30 to respond swiftly to the circumstances of each case—or misuse it for politicized decision-making and selectivity, authorizing Bank involvement if it fits their interests.

OP 7.30 was adopted with a rather different objective. The Policy aims to provide guidance to staff on how to deal with *de facto* governments without interfering in the political affairs of members—or without having members interfere in the apolitical affairs of the Bank. To insulate the Bank's loan decisions from the political preferences of its shareholders, OP 7.30 does not foresee a role for the Executive Directors.[96] Decisions are taken by the country and regional management, based on a list of decision-making criteria that are supposedly relevant to the economic viability of its operations, and following a process of internal consultations.

Looking closer, however, many of the Policy's criteria offer little practical guidance and appear vague beyond a degree that is necessary to leave room to respond to individual cases. How should the Bank's staff determine whether a *de facto* government is in 'effective control', or assess its 'stability and public acceptance'? What degree of public acceptance would

be sufficient for the Bank to resume its engagement with an unelected, post-conflict government—and could it outweigh a lack of effectiveness? It is also striking that though BP 7.30 regulates the assessment process in relative detail, the Country Director is free to decide when to invoke the Policy in the first place—that is, whether or not an event constitutes an unconstitutional change of government. Besides, decision-making under OP 7.30 is not subject to any form of independent monitoring or disclosure.

In these regards, OP 2.30 and OP 7.30 show important differences, which partly reflect the different objectives for which they were adopted. The relevant provisions in OP 2.30 were introduced to justify Bank involvement despite mandate restrictions in certain post-conflict situations. Wanting to act quickly and in concurrence with the international community in such exceptional situations, the Bank required a simple authorization mechanism. Therefore, OP 2.30 grants the sole decision-making authority to the Executive Directors. They approve an operation and imply it conforms to the Bank's mandate, without rendering a formal interpretation of the Articles of Agreement. The absence of any objective decision-making criteria or procedural demands in OP/BP 2.30, for instance, to hold internal consultations prior to taking a decision, confirms the impression that Bank involvement is left entirely to the purview of the political organ. The Executive Directors can use the granted discretion to respond swiftly to the circumstances of each case—or they can misuse it for politicized decision-making and selectivity, authorizing Bank involvement if it fits their interests. The fact that the deliberations are kept secret since they fall under an exemption from the Bank's Access to Information Policy does not help to render the (informal interpretation) process more transparent.[97]

It is thus doubtful whether the Policy's objective can be attained, namely, to decide an essentially political question through technical assessments that are free from member states' political meddling. There are only very few studies that provide insights on the application of OP 7.30 in practice.[98] Those studies suggest that the World Bank applies the Policy in a manner that is inconsistent beyond a measure that can be explained on the grounds that every case is unique.[99] Rather, it seems that the position of regional organizations, major bilateral donors, if not the geo-political and strategic relevance of a country in the eyes of the Executive Directors, regularly influence how the Bank deals with a *de facto* government.[100]

Looking beyond the design of OP 2.30 and 7.30, what do the two Policies tell us about how the World Bank's engagement with fragile states may differ from that with other countries? To answer this question, I refer to three fundamental provisions of the Articles of Agreement introduced above: the development mandate, the fiduciary duty, and the political prohibition clause.[101]

To begin with, OP 2.30 expands the thematic scope of Bank operations by confirming that activities aimed at conflict prevention or mitigation fall within its development mandate. In addition, the Policy expands the geographic scope of Bank operations to territories outside of its member states. OP 2.30 thus facilitates Bank engagement in the most difficult circumstances—political or legal—as long as it is in the interest of the Executive Directors.

Does the expansion of Bank operations to fragile- and conflict-affected states entail that standards of effectiveness become less important? Not necessarily. We have seen that OP 7.30 explicitly caters to the World Bank's fiduciary duty of ensuring the effective use of resources and repayment of loans. The decision-making criteria in OP 7.30 require Bank staff to consider a country's legal and financial liability in deciding on how to deal with a *de facto* government. Such considerations may well trump other developmental considerations that could speak for Bank assistance in a conflict-ridden country.[102] OP 2.30, in turn, might facilitate engagement in difficult contexts where the effective use of resources cannot be guaranteed. But it only allows the Bank to administer trust fund resources or extent non-reimbursable grants, not loans. In other words, the Policy seeks to override legal barriers to Bank involvement in fragile states without risking the effective use of its own resources. Trust funds have thus become a central tool for the World Bank to reconcile engagement in fragile and conflict-affected states with its fiduciary duties.[103]

Finally, how do the two Policies relate to the protection of sovereignty in the Articles of Agreement? The political prohibition clause implies that the World Bank can only engage in a country upon the request of the government in power. To this fundamental principle of Bank involvement, OP 2.30 introduces a striking exception: engagement at the request of the international community in countries with no government. Though the Policy suggests that the exception needs to be authorized through an implied interpretation of the Executive Directors, no such interpretation has apparently been submitted so far.[104] It is thus not clear what legal basis the interpretation relies on, and what are the consequences—for instance,

concerning the application of the Articles of Agreement. Besides, interpretation may be a common tool to adapt the statutes of international organizations to changing circumstances and demands, but it is not without limits.[105] A formal amendment of the Articles adopted by a qualified majority in the Board of Governors, the organ where all member states are represented, would lend more legitimacy to Bank operations in a country without the government's consent.[106]

OP 7.30 was introduced to guide Bank staff in responding to situations that require navigating exceedingly close to the political prohibition clause. As noted before, the Bank can take political circumstances into consideration if it is sufficiently clear that they could affect the viability of a project or program in economic terms.[107] Whether this is the case concerning the criteria of OP 7.30 is, however, doubtful. For instance, there is no sufficiently clear link between the number of states that have recognized the *de facto* government and the success of the Bank's operations. The World Bank argues that a non-recognized government would be internationally isolated and as a consequence, projects could no longer successfully be implemented. Yet this is not always the case, and international recognition should thus be a decision-making factor only if it is clearly relevant for the economy or efficiency of a project.[108] Similarly, OP 7.30's criteria do not only require the Bank to ascertain the effectiveness of a *de facto* government, but also its 'public acceptance'.[109] But the link between the legitimacy of a government and its ability to serve as an effective partner for the Bank is not always obvious. In short, the problem with OP 7.30 is that the Policy emphasizes the technical nature of the relevant assessments, but cannot disguise the quintessentially political nature of the issue at hand.

If the political prohibition clause has thus been side-lined in both Policies, it is by a somewhat vague reference to the interests of the international community. The World Bank has often engaged in post-conflict countries when it was called to partake in the broader reconstruction and state-building efforts of the international community. In Kosovo and East Timor, it engaged directly with international transitional administrations, UNMIK and UNTAET, in lieu of a government. The notion of community interests features prominently in both of the examined provisions in OP 2.30—Bank engagement may be requested by the 'international community', or be approved if 'beneficial' to the Bank's membership as a whole. Such collective expressions of interest can substitute for a request from the government—that is,

state consent. In a similar vein, Deputy General Counsel Hassane Cissé has noted that the Bank's approach under OP 7.30 would be "consistent with the Bank's will to act as a good and responsible international citizen."[110]

In a country like Somalia, this sort of legal ingenuity in support of an international response to fragility seems vindicated, and may even be grounded in the emerging legal concept of responsibility to protect and to rebuild.[111] But we should not forget that it is not always clear what the international community stands for, let alone whether it can speak for the people of a country that has no effective government.

3 Engagement in Countries with Weak Capacity

The World Bank does not only require national governments as legal counterparts. The state-centric development paradigm further translates into the way the Bank plans and implements development projects and programs.[112] Recipient governments are expected to draft long-term development strategies, prepare concrete projects, and ensure their implementation in accordance with the Bank's economic and fiduciary, environmental and social standards. The roles and responsibilities of national governments and the Bank in the development process are outlined in the Articles of Agreement, and concretized in a comprehensive set of internal rules.

The World Bank accordingly requires government counterparts that are literally effective—governments with basic levels of institutional and administrative capacity. In the weak-capacity, politically unstable environments of many fragile and conflict-affected states, however, these conditions are not always met. Governments may lack the capacity to meet the Bank's *ex ante* requirements, or fail to implement projects and programs as agreed, resulting in the suspension of aid. How does the Bank operate in countries with weak capacity, or empirical statehood?

To effectively engage and achieve development objectives in fragile states, the World Bank has included special provisions in the rules that regulate how its staff normally plan and implement operations. Through these provisions, the organization has essentially postponed or reduced requirements for governments with weak capacities, while scaling up capacity-building and implementation assistance. Although the Bank has thus introduced a sort of differential treatment, its approach has not always been systematic, and not explicitly targeted at fragile states.

In this section, I look at the substantive and procedural rules that regulate the World Bank's normal lending operations and examine how they have been adapted for fragile states. I distinguish between the organization's three financial instruments, which pose different questions with regards to fragile states: Investment Project Financing (Sect. 3.1), Development Policy Lending (Sect. 3.2), and Program-for-Results Financing (Sect. 3.3).[113] To conclude, I compare the approach chosen under each of the three regimes (Sect. 3.4).

3.1 Operational Policy 10.00 on Investment Project Financing: A Kind of Differential Treatment

The largest share of the IDA's concessional loans or grants is provided for concrete development projects and programs that pursue specified results—that is, in the form of Investment Project Financing or IPF. IPF is the organization's central financing instrument, accounting for 75–80% of all lending over the past two decades.[114]

In fragile states, the World Bank used to face a number of challenges when seeking to provide IPF. For project financing is normally subject to a complex regime of substantive and procedural requirements contained in the Articles of Agreement and Bank-internal rules, namely OP/BP 10.00 on Investment Project Financing.[115] These requirements serve to ensure that governments play an active role in designing and implementing development projects, but also that the Bank's resources are used effectively and in accordance with certain standards—standards that may be particularly warranted in countries where national standards are low and public management is fraught with corruption. For example, government-proposed projects have to meet the Bank's standards of financial management, procurement, environmental protection, protection of indigenous people and protection from involuntary resettlement. So-called safeguard policies prescribe thorough assessments that every country needs to conduct when applying for financing, including the consultation of certain vulnerable groups and the preparation of comprehensive risk-mitigation strategies.[116]

The accumulated standards, procedures and accountability mechanisms for IPF operations often proved too demanding for fragile states with already scarce resources and capacities, and thus stood in the way of rapid Bank engagement. Moreover, non-compliance during implementation led

to the suspension or termination of Bank funding, contributing to aid volatility in fragile states.

To facilitate and accelerate operations in fragile states, the World Bank first began reverting to the emergency policies and procedures set out in OP/BP 8.00 on Rapid Response to Crises and Emergencies. OP 8.00 was originally adopted with single-event emergencies like floods or earthquakes in mind. But with the Bank's increasing engagement in post-conflict situations in the mid 1990s, the Policy became the preferred tool for avoiding the procedural and material requirements of normal lending operations.[117] Bank staff had to argue that a conflict-affected country suffered from social and economic distortions amounting to 'crises or disasters' as defined in OP 8.00, and could then reduce *ex ante* requirements for project approval and modify fiduciary and safeguard requirements to facilitate implementation.

Though the extensive reliance on OP 8.00 served the purpose of simplifying and accelerating IPF operations in fragile states, Bank staff had to constantly justify that an emergency still persisted, and requirements could only be waived temporarily. After all, by using emergency policies to engage in fragile states, the World Bank pretended that fragility was an exceptional deviation from a normal condition that could be returned to once crisis had ceased—whereas the organization's evolving understanding of state fragility suggested the opposite.[118] In the light of these constraints, the World Bank turned away from habitually evoking emergency policies and procedures in fragile states, and instead mainstreamed the option of downsizing requirements for all countries experiencing capacity constraints. This shift was implemented with a substantial revision of OP 10.00 in 2013.[119]

The revised Policy establishes that not only projects in countries "in urgent need of assistance because of natural or man-made disaster or conflict", but also those that "experience capacity constraints because of fragility or specific vulnerabilities (including small states)" are eligible for certain exceptions.[120] The existence of 'fragility' at the state-level is determined on the basis of the Bank's CPIA-based list of fragile situations.[121] In the case of sub-national fragility in an otherwise stable country, fragility refers to areas with "very low capacity, unstable and rapidly changing conditions and limited or no functional state presence."[122] As previously stated under OP 8.00, exceptions concern the deferral of fiduciary, environmental and social requirements to the implementation phase; the use of

simplified and accelerated procedures; and the use of alternative implementation arrangements.[123] The latter implies that the Bank can, instead of working through national institutions, rely on other international agencies or implement projects itself.[124] Such arrangements must, however, be limited in time and supplemented with capacity-building measures.

How such exceptions are approved and applied is subject to Bank Procedures 10.00. Exceptional arrangements must be requested by the recipient's government and approved by the Bank's Management, if it determines that the country meets the eligibility criteria. In addition to BP 10.00, the World Bank has issued detailed, non-binding instructions that provide further guidance on the use of exceptional arrangements.[125] Once approved, Bank staff can accordingly access a menu of options that are not available under the Bank's normal investment lending regime, from deferring substantive requirements under the safeguard policies, to simplified procedures, and alternative implementation arrangements for start-up activities. Which of these measures they apply is subject to discretion, and the recipient state in whose territory the project is implemented gains no entitlement to a certain treatment.

In sum, the new OP 10.00 allows the Bank to apply lower standards and different implementation modalities in order to acknowledge and address substantial differences between member states. In other words, the Bank has introduced a kind of differential treatment in the legal regime for investment project lending.[126]

3.2 Operational Policy 8.60 on Development Policy Lending: Turning Preconditions into Objectives

Development Policy Lending is budget assistance. The World Bank provides financial assistance to the general budget of recipient countries to support pro-development policy and institutional reforms. Unlike IPF, budget assistance constitutes untied funding for country-owned programs, which are managed and implemented through the country's national systems.

To some extent, Development Policy Operations (DPOs) thus appear particularly suitable for fragile states. It allows larger sums of money to be disbursed quicker, at minimal administrative burden for recipient states.[127] Being channelled through national systems, it focuses on strengthening the capacity of state institutions to carry out basic functions. And since different donors align with country-owned programs, the burden on weak

governments to meet the requirements of various donor-imposed parallel systems is reduced.[128]

However, for the World Bank, budget assistance also involves higher fiduciary, economic and political risks than project lending—risks that can be amplified in fragile states.[129] With resources going directly to the national budget of a country, for reform programs implemented through national systems in their entirety, the organization has fewer means of ensuring they are used effectively to achieve development objectives. It is no coincidence that budget assistance is permitted under the Articles of Agreement only under 'special circumstances', and still accounts for only 20% of overall Bank lending.[130]

Two central components of the Bank's legal regime for DPOs aim at mitigating these risks—and both make it *prima facie* unlikely that budget assistance is used in fragile states. First, more than any of the Bank's financing instruments, DPOs are predicated on the existence of a government with capable institutions, good governance, and the political commitment to assume ownership. Based on OP 8.60 on Development Policy Lending, the decision to provide budget assistance depends on a thorough appraisal of a country's policy and institutional framework, and its commitment to propose and implement national reforms.[131] Fragile states by definition score low on most of these aspects.[132] Second, budget assistance is disbursed only upon fulfilment of specific, mutually agreed conditions—that is, prior actions that need to be completed before disbursements are made.[133] Countries with weak institutions and poor governance often lack the capacity to deliver on these conditions, or fail to attain the agreed results in circumstances of political instability or conflict.

In order to facilitate the extension of budget assistance to post-conflict and fragile states, the World Bank has introduced an exceptional provision in OP 8.60 in 2004.[134] In 'crisis and post-conflict situations' where countries may need rapid assistance but lack the capacity to design DPOs that meet the usual requirements, budget assistance may be approved by the Executive Directors 'on an exceptional basis'.[135] Bank staff must therefore explain in the program document when and how the usual requirements—for instance, environmental standards, fiduciary arrangements, or requirements to consult national stakeholders outside of the government—would be addressed at a later stage.

Besides defining 'crisis and post-conflict situations', neither OP 8.60, nor the according Bank Procedures specify decision-making parameters or procedures to be followed. Some more guidance, though non-binding, is

contained in the 2005 Good Practice Note for Development Policy Operations in Fragile States.[136] Accordingly, the use of budget assistance should be considered once a country has a legitimate government, adopted a budget, and has a reasonably functioning treasury system. In addition, the Note makes specific recommendations for adapting the design and implementation of DPOs to the weak capacity and volatile environment of fragile states, for instance, using fewer performance- or outcome-based conditionalities, and contemplating the consequences for a country's stability before suspending aid flows in response to non-compliance. In turn, the risks of providing budget assistance to fragile states should be managed through more rigorous *ex ante* analysis and intensified monitoring.[137]

In sum, based on the exceptional provision in OP 8.60 and following the guidance laid out in the Good Practice Note, the World Bank has developed an organizational practice of using budget assistance as a state-building tool in fragile states.[138] It does so by considering capable institutions, good governance, and strong ownership on the part of national governments not longer as preconditions, but as objectives of Development Policy Lending.

3.3 Bank Policy on Program-for-Results Financing: A Flexible Legal Framework

Program-for-Results Financing (PfoR) is the Bank's newest financial instrument and a true novelty in the toolbox of development finance. It was introduced in 2012, in response to recipient countries' demands for less bureaucratic and cumbersome, more country-owned sources of financing.[139] PfoR allows the Bank to support government programs that are governed by national laws and implemented through country systems. The World Bank only provides co-funding, and its role is focused on capacity-building and implementation support. In turn, the disbursement of funds is directly linked to the achievement of concrete results. As a governing framework for PfoR, the Board of Directors approved the Bank Policy and Bank Directive on Program-for-Results Financing.[140]

The Bank Policy on PfoR was drafted at a time where fragile states had already achieved full prominence on the World Bank's agenda, and the shortcomings of traditional aid instruments *vis-à-vis* fragile states were widely acknowledged. It is thus little surprising that the Policy is the first of the Bank's internally binding rules to explicitly refer to 'fragile states'.[141]

What is more, the new rules and procedures for PfoR financing contain some notable features that have the potential of making the instrument particularly suitable for states with very weak capacities.

The most outstanding feature of the legal framework is its adaptability to different contexts. Not only can PfoR financing be provided as grants or loans, for small and large programs, and for programs that are carried out by nongovernmental or governmental parties. The instrument also appears suitable for countries with weak institutions since the Policy shifts the emphasis from *ex ante* requirements to ongoing and *ex post* controls, and focuses on building a country's capacity. The Bank still assesses the adequacy of country systems (that is, national institutions and laws) before extending loans, but it only refers to a lighter version of the standards contained in its safeguard policies.[142]

Further, the results of the Bank's *ex ante* assessments are understood as a benchmark for monitoring and for identifying capacity-building measures.[143] Where country systems currently fall behind the Bank's financial management, environmental, and social standards, the country is thus not automatically excluded from financing. Instead, the Bank provides implementation support through activities that are aimed precisely at strengthening country systems in those areas.[144] In other words, achieving the standards outlined in the Bank Policy on PfoR becomes the objective of Bank assistance, rather than a precondition. Though some have cautioned that the Bank should not abandon its own standards when relying on country systems, in countries with weak institutions and lower standards, the Policy's approach also presents an opportunity—it opens a door for capacity-building to achieve and maintain higher standards in the medium-term.

Moreover, Bank Policy on PfoR seeks to balance the risk of using country systems and overall simplified *ex ante* requirements by putting more emphasis on *ex post* controls, that is more rigorous monitoring during implementation.[145] PfoR makes the disbursement of funds dependent on the achievement of results, which is determined on the basis of 'specific, measurable and verifiable' indicators that are formulated by recipients.[146] The major burden for recipient countries under the PfoR regime consequently consists in preparing appropriate results frameworks, indicators and, above all, monitoring, achieving and verifying achievement.

A last feature of the legal regime for PfoR that is noteworthy with regards to fragile states concerns the handling of non-compliance, that is the use of legal remedies when a country fails to fulfil its obligations.

Particularly in fragile states, abrupt suspensions of aid flows can cause significant, negative disruptions. The Bank Policy on PfoR commits the organization to exercise self-restraint, using remedies only after having paid due regard to the severity of non-compliance, a country's circumstances, and its commitment to tackle the identified problems, for which the Bank first engages in consultations with the country.[147] Whereas the World Bank has usually refrained from automatically using its legal remedies under other financial instruments, the Policy codifies this informal, organizational practice.[148]

3.4 Discussion

Three Operational Policies—OP 10.00 on Investment Project Financing, OP 8.60 on Development Policy Lending, and the Bank Policy on PfoR—regulate how the bulk of World Bank operations are planned, approved, and implemented. The Policies determine under what conditions recipient countries get access to the Bank's resources, and what roles and responsibilities they assume in the process.[149] How has the organization sought to adapt this regulatory framework for operations in weak capacity, high-risk environments?

The World Bank has taken a different approach for each of its three financial instruments. Concerning Investment Project Lending, the Bank has introduced a new section into OP 10.00 that allows for the use of exceptional arrangements when planning and implementing operations in conflict-affected or fragile states. It has thus mainstreamed exceptions that were previously available only under its emergency policy, OP 8.00. Whereas Bank staff had come to rely heavily on OP 8.00 outside of traditional emergencies to engage with fragile states, the revision of OP 10.00 formalizes under what conditions a member state can qualify for exceptional arrangements. They must be requested by the recipient country and approved by the Bank's Management, on the basis of objective, detailed eligibility criteria, following a process of internal consultations. The revision of OP 10.00 has thus the potential to strengthen the consistency, predictability, and transparency of the Bank's decision-making.

In contrast to the relatively comprehensive, exceptional regime available for Investment Project Financing in fragile states, OP 8.60 on Development Policy Lending contains only one provision on crisis and post-conflict situations. It enables the Bank to put aside certain requirements in order to use budget assistance on an exceptional basis, if approved

by the Executive Directors. Which design considerations can be put aside under what conditions is not regulated in detail, but apparently determined on a case-by-case basis. In principle, this room for discretion can facilitate a flexible and country-specific approach to tailor operations to the specific constraints of fragile states. In practice, however, it is not necessarily predictable and consistent when the World Bank is prepared to provide funding directly to a country's budget. There seems to be a certain imbalance within the group of fragile states that is difficult to explain on the basis of technical considerations alone, and suggests that the decision to use budget assistance could be politically influenced.[150] At the same time, the decision to channel resources directly to a country's budget has significant consequences for the countries concerned, as it is usually seen as a signal of political endorsement.

The Bank Policy on PfoR, in turn, does not contain any special provisions for fragile and conflict-affected. The Policy does, however, establish a legal framework for Bank operations that is flexible and adaptable to different circumstances in recipient countries, including fragile states. Due to the novelty of the instrument and the scarcity of implementation experience,[151] it is too early to assess the suitability of PfoR financing for conflict-affected and fragile states in practice.[152]

Judged on the basis of the three Policies, the World Bank's approach reveals some patterns, but remains little systematic overall. For all types of operations, the Bank has sought to make its legal and policy framework more flexible and give recognition to the fact that its member states have significantly different capacities. Importantly, it has avoided the use of differential treatment for a clearly defined group of countries, as does, for instance, the World Trade Organization (WTO) for Least Developed Countries (LDCs).[153] Instead, to acknowledge that fragility may occur in otherwise stable or middle-income countries, the Bank has preferred a situations-based approach, and used differential treatment in any country that faces specific constraints or circumstances.

While OP 10.00 was accordingly revised to establish a detailed, exceptional regime, the Bank Policy on PfoR rather establishes a legal framework flexible enough to be used in any country or situation. OP 8.60 allows lowering the threshold for budget assistance on an exceptional basis, but leaves the details of when and how to be sorted out in practice. Considering these differences, it is not clear to what extent the World Bank deems fragile states to require a systematic and targeted response—or rather aims to make is legal and policy framework generally more

flexible. After all, we have seen that there is a larger trend at the World Bank that favours a principles-based approach over adhesion to strict rules, and instead of rigid, *ex ante* requirements, puts more emphasis on implementation assistance and building the capacity of states to meet standards.

What do the aforementioned changes tell us about how the World Bank's operations with fragile states may differ from those with other countries? To address this question, I refer once more to three fundamental provisions of the Articles of Agreement—the objective of development, standards of effectiveness, and the political prohibition clause.[154] Since the World Bank increasingly understands peace- and state-building objectives as part of its core development mandate, the organization has become more prepared to take risks and postpone or put aside some of its usual requirements to engage in fragile states. OP 8.60, for example, allows staff to put aside certain design considerations that aim to ensure that budget assistance furthers equitable, broad-based, and sustainable development.[155] Under OP 10.00, environmental and social requirements for project lending can be postponed to the implementation phase, so that the organization can finance projects in countries that face capacity constraints. This prioritization of rapid engagement to support state-building in fragile states is in line with the OECD's Fragile States Principles, as well as the Bank's commitments under the New Deal.[156]

But how does the organization strike a balance between the need for a rapid response, and upholding standards of effectiveness? The Articles of Agreement require the organization to ensure the effective use of resources, and many requirements in the three Policies that regulate the Bank's financing instruments serve precisely this objective.[157] If they are eased in order to facilitate, speed up or otherwise enhance operations in fragile states, the risk that resources are misappropriated or not used effectively could increase. Yet the Articles do not specify the means through which the World Bank must ensure that its resources are used effectively. The World Bank can compensates for the postponement or reduction of certain *ex ante*, fiduciary requirements with intensified *ex post* controls, as it does under OP 10.00, 8.60, and the Bank Policy on PfoR.[158] In essence, the World Bank thus shifts to an approach that strives not to avoid, but to better manage the risks associated with working in fragile states.[159] This shift has been codified in internal rules, while an interpretation of the meaning and scope of the Articles' fiduciary duty in light of the risk-management credo is still pending.

Finally, how do the special provisions introduced in OP 10.00 and 8.60 relate to the protection of sovereignty in the legal and policy framework of the World Bank?[160] Looking at the political prohibition clause as a protection of recipient autonomy in the development-process, it is notable that OP 10.00 permits the Bank to implement certain activities on behalf of the country, or enter into agreements with third parties for that purpose.[161] In the latter case, the Bank provides funding not directly to the government as it usually does, but instead to international organizations (mostly the UN) or NGOs.[162] It is no news that in practice, the World Bank regularly assumes a "more hands-on approach of assisting counterparts" in countries that lack the capacity to conceive and implement development projects and programs single-handedly.[163]

Seeing arrangements that *prima facie* reduce the role of recipient governments codified in an Operational Policy is perhaps more unusual. However, the revised OP 10.00 permits alternative implementation arrangements only at the request of the government, and the Bank is then required to strengthen the government's ability to implement in the medium term. While prepared to substitute for national governments for as long as necessary to establish or restore national capacity, the overriding objective thus remains fostering the capacity and ownership of national institutions—that is, state-building.[164]

The World Bank also increasingly seeks to support state-building through Development Policy Operations. In this context, we have seen that based on OP 8.60, institutional capacity and ownership that are usually preconditions for budget assistance can turn into objectives of DPOs in fragile states. When talking about DPOs, however, we must also note that the World Bank generally wields considerable influence in supporting domestic policy and institutional reforms through conditionality—and that its leverage *vis-à-vis* nascent post-conflict governments with limited capacity and domestic support is even greater.[165] In this context, broad-based ownership of domestic reform programs, though always difficult to assess for external actors, appears crucial. And yet it is one of the requirements that OP 8.60 permits the Bank to dispense with in fragile states.

Looking at the changes the Bank has introduced for operations in fragile states prompts one further question. OP 10.00 and 8.60 allow fragile and conflict-affected states to be treated differently from other member states—in terms of the level of requirements that need to be fulfilled, and at what point in time. Does the political prohibition in the Articles of

Agreement encompass a duty for the Bank to treat all member states equally, forbidding the use of differential treatment?

The political prohibition clause requires the organization to be impartial in its considerations. In this sense, it entails a duty to treat all member states equally with regards to their political character. It does not, however, extend to economic considerations that are covered by the purposes of the organization. Economic considerations can actually require the Bank to differentiate not just concerning the pricing of loans, but also the choice of financing instrument and implementation arrangements.[166] Accordingly, the Articles do not provide strong footing for a strict principle of equal treatment of all member states.[167]

Against this background, the question of equal treatment only directs our attention to an important accomplishment of the new OP 10.00—in comparison with the Bank's previous organizational practice, and also with OP 8.60. As noted before, OP 10.00 formalizes and makes transparent under what conditions a member state—any member state, at any time—can qualify for special considerations. The Policy thus reduces the likelihood that differential treatment is extended in an inconsistent manner, to one member state but not another, on the basis of political and not economic considerations.

4 Conclusion

In this chapter, I investigated how the World Bank has adapted its legal and policy framework *vis-à-vis* fragile states. I began by outlining how internal rule-making and dynamic interpretations of the Articles of Agreement have paved the way for the organization to become concerned with state-building in fragile states. On this basis, I engaged in a systematic reconstruction of the internal rules that govern whether and how the World Bank provides financial assistance to a country—analysing to what extent they are premised on the existence of effective government counterparts, and were therefore adapted to facilitate engagement in countries with very weak or no government.

What emerges from this analysis, and what does it tell us about the World Bank's approach to fragile states? To begin with, it is safe to say that the Bank has successfully extended its mandate and area of engagement—in geographic, and in thematic terms. It is by now well-established that peace, security, and functioning state institutions are preconditions for development—and that for better or worse, a predominantly technical

development organization like the World Bank has a role to play in processes of state-building.[168] Since the Bank increasingly understands state fragility as a matter not just of weak state capacity, but weak state-society relations, it remains to be seen how far the organization will go in embracing an openly political agenda, assisting countries in fostering political settlements and building legitimate institutions.[169] For now, state-building remains a rather state-centric enterprise, and the Bank thus attuned to working with governments—though not only 'effective government'.

The concern with state-building in fragile states has come with an increasing acknowledgement that institutional capacities in many areas required by the Bank first need to be established or strengthened. They are rather ill-suited as conditions for assistance. What does this mean, for instance, for standards of effectiveness that the World Bank is required to uphold? As illustrated, they often translate into *ex ante* requirements concerning a country's public financial management, fiduciary, and procurement systems, requirements that have often prevented or complicated engagement in countries with weak capacities. Broadly speaking, the World Bank has responded to this challenge not by abandoning its standards, but by shifting to a decidedly different approach: reducing strict *ex ante* requirements in favour of differentiated requirements or generally more flexible, principles-based regulation, while placing more emphasis on implementation assistance and capacity-building. To say it in the language of the Bank: the organization has moved from risk avoidance to risk management, through regulatory adaptations that have yet to show effect on its institutional culture.

A more complex picture emerges when considering how the Bank's approach to engaging with fragile states relates to recipient sovereignty, protected, for example, by the political prohibition clause. In the most extreme and exceptional cases, there is not even a government to refer to. This has led the World Bank to adopt an internal rule, OP 2.30, which allows it to engage upon the request of the international community instead—an extreme and exceptional departure from the principle of sovereignty enshrined in its mandate. Beyond—and with the consent of the government—the Bank has modified the legal framework for project lending to allow it to entrust other international organizations or NGOs with implementing projects and programs in countries with insufficient capacity for implementation. Whereas ownership of the government may be reduced somewhat as a consequence, the relevant rule also requires staff to invest in capacity-building and thus foster the conditions for full

government ownership. Bank staff are not, however, required to engage with sub-national or non-state actors in the absence of a government capable of representing the population.[170]

Against this background, it is difficult to say whether from the perspective of recipients, being seen as a fragile state constitutes an advantage or rather a disadvantage. How the Bank has remodelled some of its internal rules to more effectively engage with fragile states has certainly affected the terms and conditions upon which they receive, participate, and command over the use of development funding. Access to the Bank's resources is facilitated through an extension of the legal basis for engagement, and through the lifting or postponing of certain requirements that recipient governments are expected to fulfil to be eligible for funding. Potential recipient countries could benefit from such modifications, in so far as they require assistance but have previously been unable to fulfil the Bank's terms and conditions.

At the same time, how the Bank has adapted its legal and policy framework may concern not just the requirements that fragile state must meet, but also the right to consent and to 'own' the development process. The aforementioned omission of state consent as a legal basis for engagement is certainly an exceptional case. Nonetheless, the impression that ownership is not necessarily seen as an unconditional right of sovereign governments, but instead as an objective and outcome of the development process, can be traced throughout the Bank's engagement with fragile states. In some instances, internal rules thereby serve to condition the roles and responsibilities usually accorded to national governments in the process of development cooperation on a government's effectiveness.

It is also difficult to conclude whether being seen as fragile state constitutes an advantage or disadvantage if we consider the way the World Bank has been adapting its legal and policy framework. In many regards, the Bank has shown a preference for not responding *ad hoc*, but consolidating emerging practices. It has done so through mostly internal and only partly formalized processes of rule-making, sometimes codifying implied interpretations. At the same time, the Bank's response is far from systematic, and often rests on rules that are formulated in ambiguous terms, leaving considerable discretion to decision-makers, be it the Executive Directors or Management. Whether such rules provide practical guidance and enhance the predictability and consistency of decision-making is not always clear. Nor is it clear whether the World Bank seeks to systematically adapt to the special circumstances and needs of fragile states, or rather to

evade certain mandate constraints to engage in countries that are of particular concern to its major shareholders.

Would a more systematic approach be preferable, where a country's definition as 'fragile situation' automatically triggers a differentiated approach to planning and implementing development cooperation? On the one hand, a clear definition could perhaps add transparency and consistency to the Bank's engagement with fragile states, and provide the basis for a more systematic approach. If so, given what significant consequences it would have, the process of classifying fragile states would need to be made more transparent and inclusive than the CPIA process at present.[171] On the other hand, the danger is that a clear definition would provide the Bank's decision-making only with "an allure of sophistication while absolving actors of the need to engage substantively with the detailed idiosyncrasies of marginal or specific cases".[172] After all, it also remains controversial whether fragile states have something in common that defines them as substantially different from other Bank member countries—and whether these differences can be described clearly enough to trigger automatic conclusions for the Bank's response.

We will return later to a discussion of the potentials and perils of regulation in instructing and formalizing a differentiated approach to dealing with fragile states. For now, we can maintain that an analysis of the World Bank has provided sufficient evidence for both, the potentials and perils, to be able to say that the answer (as always) depends—in this case, on the design of rules and the rule-making process.

Notes

1. The World Bank, '*Annual Report 2015*' (2015), p. 58.
2. See only Christopher L. Gilbert, et al., 'Positioning the World Bank', in Christopher L. Gilbert & David Vines (eds), *The World Bank. Structure and Policies* (Cambridge University Press, 2000), characterizing the World Bank as a global player in development; or Nicolas Stern & Francisco Ferreira, 'The World Bank as "Intellectual Actor"', in Devesh Kapur, et al. (eds), *The World Bank. Its First Half Century. Volume 2: Perspectives* (Brookings Institution, 1997).
3. In 2015–2016, the "Harmonized List of Fragile Situations" included 35 countries and territories. The OECD relies on the Bank's list for its annual report on resource flows to fragile and conflict-affected states.
4. CPIA assessments follow an internal administrative practice whereby Bank staff measure a country's policies and institutions in the areas of

economic management, structural policies, policies for social inclusion and equity, and public sector management and institutions. The resulting scores inform the performance-based allocation of resources between IDA-eligible countries, with those countries with a higher score receiving a higher per-capita allocation.

5. 'Fragile situations' are classified as having a composite World Bank, African Development Bank (AfDB) or the Asian Development Bank (ADB) rating of 3.2 (out of 6) or the presence of a UN and/or regional peace-keeping or peace-building mission during the past 3 years. Three assumptions follow from this classification: the weakness of a country's institutional and policy framework serves as a proxy for fragility; fragility mostly concerns low-income countries, as the CPIA score for middle-income countries is not disclosed; and post-conflict countries form a sub-group of fragile states.
6. The definition is thus out of sync even with the World Bank's own evolving understanding of fragility as captured, for instance, in the WDR 2011. In 2013, the Independent Evaluation Group (IEG) therefore criticized the CPIA-based definition and asked the organization to develop a "more suitable and accurate mechanism" to identify fragile states. Independent Evaluation Group, '*World Bank Assistance to Low-Income Fragile- and Conflict Affected States*'.
7. It is increasingly acknowledged that indicator-based assessments like the CPIA have the potential to considerably impact on individual or collective perceptions and behaviour. For instance, the Bank's definition of a country as fragile could influence how other donor countries or development organizations deal with a country, including how they assess the risk of engagement and how much resources they allocate.
8. The 'World Bank Group' in turn consists of five institutions: the IBRD; the IDA, as well as the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). The World Bank Group as such has no legal personality. Maurizio Ragazzi, 'World Bank Group', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, March 2010), para. 5.
9. IBRD Articles Art. V, Sect. 2 lit. (a) and (b) and IDA Articles Art. VI, Sect. 2 lit. (a) and (c).
10. IBRD Articles Art. V, Sect. 5 (a) and IDA Articles Art. VI, Sect. 4 (a). The Executive Directors work on-site at the World Bank's headquarters, where they meet twice per week to determine its general policies, decide on all loans or grants to be awarded, and exercise oversight.
11. IBRD Articles Art. V, Sect. 5 and IDA Articles Art VI, Sect. 5.
12. See IBRD Articles Art. V Sect. 5; IDA Articles Art. VI Sect. 5.

13. On the primary and secondary law of international (development) organizations, see also *supra* Sect. 1 in Chap. 4.
14. The Articles explicitly authorize the Board of Governors and the Executive Board "to adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank". See IBRD Articles Art. V, Sect. 2 lit. (f) and IDA Articles Art. VI, Sect. 2, lit. (h).
15. Operational Policies and Bank Procedures (OPs and BPs) are the Bank's traditional instruments. In 2014, the Bank has reformed and restructured its system of internal rules and introduced the so-called Policy and Procedure Framework, in order to clarify how the different types of policies and procedures are developed and managed. In this context, the Bank has established a clear hierarchy of different rules, clarified which organ is responsible for developing them, and introduced Bank Policies and Directives.
16. See the Bank Policy on the Policy and Procedure Framework (January 2014), Bank Policies are equivalent to the Bank's Operational Policies, though they follow a more standardized format. They are the highest level of Bank-internal rules, and are approved and issued by the Board.
17. Bank Directive on the Policy and Procedure Framework (January 2014).
18. As noted in *supra* Sect. 1 in Chap. 4, I will not hinge on the question whether or not we want to call these rules "law", but rather demonstrate why we should consider and assess them in legal terms—even if the Bank itself refuses to do so.
19. See the Bank Policy on the Policy and Procedure Framework, Sec. III, paras. 2 and 3; and the Bank Directive on the Policy and Procedure Framework, Sec. II, paras. 1 a) and b) on the hierarchy and mandatory nature of the Bank's different rules.
20. Bank Policy on Access to Information (1 July 2013), para. 6.
21. The Inspection Panel has the power to control whether staff members have complied with Policies and Procedures during the planning and implementation stages of Bank-financed operations, and can receive complaints directly from a party affected by the Bank's operational activities in a country, where those have caused harm. See IBRD Resolution 93–10 of 22 September 1993, para. 12. On other institutional guarantees for the implementation and monitoring of the Bank's policies, see Bradlow & Naudé Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?', 37–40.
22. See the Bank Policy on Operational Policy Waivers (April 2014), whereby waivers can be approved by the Board if they are proposed prior to the approval of a loan to which the policy deviation relates.
23. As noted in *supra* Sect. 1 in Chap. 4, it is not unusual for international organizations to issue instruments that were not foreseen in their statutes.

24. *Supra* note 16.
25. The revision of the Bank's policy on Indigenous People that involved a relatively extensive process of external consultation constitutes a prominent example. In detail, see DAVID HUNTER, 'International Law and Public Participation in Policy-making at the International Financial Institutions', in Daniel Bradlow & David Hunter (eds), *International Financial Institutions and International Law* (Kluwer, 2010).
26. IBRD Articles, Art. V, Sect. 3 and IDA Articles, Art. VI Sect. 3. The unequal influence of the Bank's largest shareholders on the organization's decision-making has drawn much criticism given the Bank's leverage over many developing countries. In response, the Bank has increased the voting power of all developing countries and provided for one more Executive Director to represent countries from Sub-Saharan Africa. See THE WORLD BANK, '*Repowering the World Bank for the 21st Century. Report of the HighLevel Commission on Modernization of World Bank Group Governance*' (2009), and with a critical assessment, DANIEL BRADLOW, 'The Reform of Governance of the IFIs: A Critical Assessment', in Hassane Cissé, et al. (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012).
27. GALIT A. SARFATY, 'The World Bank and the Internationalization of Indigenous Rights Norms', 114 *Yale Law Journal*, 1791 (2004–2005), 1792.
28. IBRD Articles Art. VIII lit. (a) and IDA Articles Art. IX lit. (a). Amendment procedures are typically much more cumbersome than interpretations, not least since the plenary organs of international organizations are often blocked by political struggles and considered as less productive or effective. VON BERNSTORFF, 'Procedures of Decision-Making and the Role of Law in International Organizations', p. 786.
29. IBRD Articles Art. IX lit. (a); IDA Articles Art. X lit. (a).
30. On this practice of interpretation, see RIGO SUREDA, 'Informality and Effectiveness in the Operation of the International Bank for Reconstruction and Development', pp. 593–595, explaining how the Bank has preferred "informal interpretations" of its mandate, "made possible by the fact that the organ approving new policies or operations has the power to interpret formally the Articles of Agreement."
31. On the important role of the World Bank's General Counsel, see IBRAHIM SHIHATA, 'The Creative Role of Lawyers: Example: The Office of the World Bank's General Counsel', 48 *Catholic University Law Review* (1999).
32. IBRD Articles, Art. I (i).
33. IDA Articles, Art. I.

34. On the permissible use of IDA resources, see also IDA Articles, Art. V Sect. 1 (a), (b), (c). Eligibility and terms of repayment for IDA's lending are laid out in Annex D of OP 3.10, last updated in September 2013.
35. Of the 78 countries and territories eligible for IDA assistance in 2015, 26 were considered 'fragile'.
36. R. Dañino, Legal Opinion on Human Rights and the Work of the World Bank (Jan. 27, 2006), para. 3. The Bank's legal department understands itself as "problem-solver and innovator", committed to "lawyering that is proactive, creative, flexible and responsive." LEGAL VICE PRESIDENCY, The World Bank, '*Annual Report FY 2011: The World Bank and the Rule of Law*' (2011), p. v, 10.
37. Operational Policy 1.00 on Poverty Reduction was first approved in 1991, and has been revised several times to reflect the Bank's evolving understanding of poverty.
38. *Supra* Sect. 2.1 in Chap. 2.
39. IBRD Articles, Art. I (i).
40. It became necessary not least when the World Bank increased its narrow focus on rebuilding infrastructure and began supporting demobilization and disarmament, community-based rehabilitation programs, and broader issues of governance in post-conflict countries. THE WORLD BANK, '*The Role of the World Bank in Conflict and Development. An Evolving Agenda*' (2004), 5.
41. See OP 2.30, paras. 1 and 3; and *infra* Sect. 3.1 of this chapter. The link between peace and development was first elaborated in the "Framework for World Bank Involvement in Post-Conflict Reconstruction", endorsed by the Executive Directors in May 2007. The Framework provided the first conceptual and operational guideline for staff working in post-conflict situations, at a time when USD 400 million in grants had already been given to post-conflict countries and to support humanitarian operations of United Nations agencies. See THE WORLD BANK, '*Post-Conflict Reconstruction. The Role of the World Bank*' (1998).
42. OP 8.00, approved by the Executive Directors on 1 March 2007, lists the activities that the Bank can pursue with an emergency operation. This includes support to partners in carrying out activities that fall outside of its own mandate, in order to bridge the gap between short-term relief and reconstruction activities (para. 5).
43. Legal Opinion on Peace-Building, Security, and Relief Issues under the Bank's Policy Framework for Rapid Response to Crises and Emergency, prepared on request of the Committee on Development Effectiveness on 22 March 2007, and annexed to the Report "Toward a New Framework for Rapid Bank Response to Crises and Emergencies" (revised version R2007-001012, dated March 2007).

44. IBRD Articles Art. III Sect. 5, lit. (b); IDA Articles Art. V, Sect. 1, lit (g). Moreover, IBRD Articles Art. I (i) state that the IBRD must direct its resources towards "productive purposes". The provision figures prominently in the *travaux preparatoires* of the Articles, and has been reiterated and concretized in World Bank policies ever since. On standards of effectiveness in the law of international development organizations in general, see *supra* Sect. 2 in Chap. 4.
45. Anne-Marie Leroy, 'The Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the "Solutions Bank": An Essay', in Legal Vice Presidency (ed) *Annual Report FY 2013. The World Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the "Solutions Bank"* (The World Bank 2013), 97.
46. It goes on: "Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I." IBRD Articles, Art. IV Sect. 10 and with almost identical wording, IDA Articles, Art. V Sect. 6.
47. Moreover, the World Bank understands the clause to imply that it can only engage in a country upon the request of the government in power, and that it must be careful not to engage with actors outside of the government without its approval. This becomes clearer in The World Bank, '*Guidance Note on Bank Multi-Stakeholder Engagement*' (2009), which provides guidance to staff on how to engage with a broad range of non-governmental actors, including parliaments, the media, civil society, the private sector, or community members.
48. Hassane Cissé, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank', in Hassane Cissé, et al. (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012), 81.
49. Issues of 'Governance' in Borrowing Members: The Extent of their Relevance under the Bank's Articles of Agreement, Legal Memorandum of the General Counsel, dated 21 December 1990 (SecM91-131). The Memorandum informs the Bank's subsequent legal reasoning on governance issues and a number of key policy documents, e.g. the Guidance Note on Multi-Stakeholder Engagement (June 2009) and the Governance and Anticorruption (GAC) strategy, endorsed by the Executive Board on 27 March 2012.
50. For example, Legal Opinion of the General Counsel, dated 11 July 1995 (SecM95-707, 12 July 1995), reprinted in Shihata, *The World Bank Legal Papers*, 229. Shihata further argues that Bank-supported reform policies always depend on the existence of a "system which translates them into workable rules and makes sure they are complied with", a sys-

tem constituting "a basic requirement for a stable business environment; indeed for a modern state." (p. 273).

51. For an in-depth analysis of the mandate conformity of good governance-related activities the Bank undertakes, see Stefanie Killinger, *The World Bank's Non-Political Mandate* (Heymanns, 2003).
52. The World Bank, Operationalizing the WDR 2011, iii.
53. The Legal Note was issued by General Counsel Anne-Marie Leroy on 9 February 2012. For an overview of the Bank's growing involvement with justice sector reforms in fragile states, see Klaus Decker, 'World Bank Rule-of-Law Assistance in Fragile States: Developments and Perspectives', in Amanda E. Perry (ed) *Law in the Pursuit of Development. Principles into Practice?* (Routledge, 2010), pp. 228–232.
54. See *supra* Sect. 2.1 in Chap. 3 on the state-centric paradigm of development cooperation, and Sect. 2 in Chap. 4 on the protection of sovereignty in the law of international development organizations, including the World Bank.
55. *Supra* Sect. 1.2 of this chapter.
56. The World Bank disengaged in 1991 when Somalia stopped paying its debts, and remained disengaged for more than a decade, due to the continuous insecurity but mostly the lack of a fully functioning government. Somalia's development and humanitarian indicators are among the lowest in the world. See, for instance, UNDP, '*Somalia Human Development Report 2012: Empowering Youth for Peace and Development*' (2012), pp. 26–32.
57. On the problems for Bank engagement in situations of severe political crisis, disorderly transfers of power, state dissolution or state failures, see already Robert Muscat, The World Bank, '*Conflict and Reconstruction. Roles for the World Bank*' (1995), Chapter 2; and the summary of Board discussions on the Bank's evolving engagement in post-conflict reconstruction, in The World Bank, '*The Role of the World Bank in Conflict and Development. An Evolving Agenda*', pp. 6–8.
58. On the Bank's evolving post-conflict work, see John D. Ciorciari, 'Prospective Enlargement of the Roles of the Bretton Woods Financial Institutions in International Peace Operations', 22 *Fordham International Law Journal*, 292 (1998), 297 ff.
59. IBRD Articles, Art. III Sect. I lit. a).
60. IBRD Articles I lit. i), Art. III Sect. 1 lit. i) and v), Art. IV Sect. 3 lit. a) and c) and Art. V Sect. 7, as well as in the IDA Articles, Art. I (Purposes) and Art. V Sect. 1 lit. a). In contrast to the IBRD, the IDA can also provide financing to a dependent or associated territory within the meaning accorded to Art. V Sect. 1, but the Bank did not recognize the West Bank and Gaza as such.

61. The Executive Directors accordingly passed a Resolution to confirm that due to the significant consequences of the economic circumstances of the Palestinian Territories for the Middle East peace process, the Bank's involvement was in the interest of the organization's membership as a whole. See the Legal Memorandum on World Bank Assistance to the West Bank and the Gaza Strip, R-93-163 IDA/R93-134, dated 20 September 1993; and Ibrahim F. I. Shihata, et al., 'Legal Aspects of the World Bank's Assistance to the West Bank and the Gaza Strip' *The Palestine Yearbook of International Law*, 19 (1992).
62. Trust funds can disburse not only to governments, but also international organizations or non-governmental organizations, and can finance activities that are executed by the World Bank itself. Moreover, they usually come with their own governance structure, lending criteria, processing procedures and implementation modalities.
63. With the Palestinian Territories not being recognized as a state, they did not have a formal government either. Therefore, the World Bank (acting as trust fund administrator) concluded the necessary legal agreements with the Palestinian Liberation Organization (PLO).
64. Bosnia is a successor state of the Socialist Federal Republic of Yugoslavia (SFRY). The SFRY seized to be a member of the Bank in 1993, but Bosnia had not yet become a new member in 1994. For an interesting account of how the US administration under Clinton convinced the Bank to become involved in Bosnia, see Sebastian Mallaby, *The World's Banker. A Story of Failed States, Financial Crises, and the Wealth and Poverty of Nations* (Penguin Press, 2004), Chapter 5.
65. In Kosovo, for example, the World Bank became engaged following the adoption of UN Security Council Resolution 1244, UN Doc. S/RES/1244 (10 June 1999), which was adopted under Chapter VII and called for a coordinated international effort to support Kosovo's reconstruction. See also the World Bank' Transitional Support Strategy for Kosovo, Progress Report 2000.
66. Kosovo was placed under a UN administration that should enable its people to enjoy substantial autonomy and self-government within the Federal Republic of Yugoslavia, pending the final settlement of its legal status. See Security Council Resolution 1244. East Timor was placed under temporary UN administration before its independence became effective in 2002. See Security Council Resolution 1272, UN Doc. S/RES/1272 (25 October 1999).
67. See, for instance, the Trust Fund for East Timor Grant Agreement concerning an Economic Institution Capacity Building Project, dated 26 February 2001. Agreements were concluded first with UNTAET, then with "East Timor as administered by [UNTAET]", and following its independence in 2002, with East Timor itself.

68. Chopra recalls that whereas "the UN tried to circumvent the issue by reducing the status of the grant agreement to a memorandum of understanding between the two institutions", "[t]he Bank refused and demanded that the agreement be accorded the stature of an international treaty between the IDA and a sovereign government." JARAT CHOPRA, 'The UN's Kingdom of East Timor', 42 *Survival*, 27 (2000), pp. 29–30.
69. OP 2.30 was first adopted in January 2001 and has so far been subject to only minor revisions in 2005, 2009 and 2013. It does not explicitly refer to fragile states, as it was adopted before the Bank began focusing on LICUS or fragile countries. On the role of OP 2.30 in outlining the scope of the Bank's mandate in conflict-affected states and specific considerations for planning or maintaining operations in these settings, see *supra* Sect. 1.2 of this chapter; and MAURIZIO RAGAZZI, 'The Role of the World Bank in Conflict-Afflicted Areas', 95 *American Society of International Law Proceedings*, 240 (2001).
70. OP 2.30, para. 3 lit. a).
71. OP 2.30, para. 3 lit. b).
72. OP 2.30, para. 3 lit. c). It is notable that the wording again refers to non-member *countries*, not territories. Strictly speaking, the provision would thus not apply to the West Bank and Gaza unless they were understood to belong to the territory of another (member or non-member) country.
73. IDA Articles Art. X lit. a). In practice, the World Bank's Legal Department has rendered an interpretation of the Articles to justify engagement, and these interpretations were then authorized through a Resolution of the Executive Board. On the Bank's practice of implied interpretations, see *supra* Sect. 1.1 of this chapter.
74. On the high practical relevancy of unconstitutional changes of government for development organizations, see IFAD, Guidelines on Dealing with De Facto Governments, Draft document EB 2009/98/R. 16 for approval by the Executive Board, Rome, 15–17 December 2009, at paras. 1–8.
75. The occurrence of coups in many developing countries has, however, been associated with low income and low growth more generally. See PAUL COLLIER & ANKE HOEFFLER, *Coup Traps: Why does Africa have so many Coups D'état?* (Oxford University Press, 2005).
76. The link between conflict and unconstitutional changes of government is confirmed through mutual reference in OP 2.30 and OP 7.30 ("The issues addressed in this OP may arise in the context of a country emerging from conflict").
77. Other definitions are listed in STEFAN TALMON, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Clarendon Press, 1998), 60.

78. The UN General Assembly discussed the question of how to deal with situations where there is more than one government claiming power in its early days, but never agreed on specific criteria to be followed. See the UN General Assembly Resolution 396 (V) on Recognition by the United Nations of the Representation of a Member State (14 December 1950).
79. For instance, IBRD Articles, Art. III Sect. 4 states that "the Bank shall pay due regard to the prospects that the borrower, and, if the borrower is not a member, that the guarantor, will be in position to meet its obligations under the loan".
80. In fact, a first policy-framework for dealing with *de facto* governments was already outlined in the Bank's Operational Manual in 1964, and subsequently updated in 1978, 1991 and 1994. The Bank's original concern with *de facto* government situations thus did not have to do with its growing engagement with conflict-affected and fragile states.
81. OP 7.30, para. 1. The definition's focus on coup situations reflects that these were considered the most obvious examples, while other situations can also be considered under the policy. The application to interim or transitional authorities in the context of conflicts gained in importance only after the policy was drafted in 1994.
82. OP 7.30, paras. 2 and 3.
83. OP 7.30, para. 4 lit. a)–e), including further the requirement that the "government duly authorizes a representative for the purpose of requesting withdrawals".
84. If the ousted *de jure* government of the country still exercises partial control or has some meaningful potential to regain power, the Bank must also be careful not to subvert its claim to power by engaging prematurely with a *de facto* government.
85. OP 7.30, para. 5 lit. b).
86. OP 7.30 para. 5 lit. a) and note 6 For instance, it has occurred that governments refuse to meet the obligations incurred by a previous, *de facto* government, on the grounds that it did not have the competence or legitimacy to enter into long-term obligations for the country.
87. The Country Director gathers relevant information about the new government and situation in the country, and initiates an internal, consultative process. The final decision rests with the Regional Vice President.
88. For instance, based on IDA's General Conditions on credits, Art. VI, an unconstitutional change of government could constitute an "extraordinary situation", "which makes it improbable that the Project can be carried out or that the Recipient or the Project Implementing Entity will be able to perform its obligations under the Legal Agreement to which it is a party." General Conditions are incorporated by reference in all financing agreements, and are thus formally binding.

89. See BP 7.30 para. 4. The suspension of disbursements initially occurs as a temporary measure for which staff should seek an "informal agreement with the new authorities in the country". The legal basis for this temporary measure is not specified. In practice, the Bank sometimes claims that the new government's representatives must first obtain a new authorization to make withdrawals.
90. Otherwise, the Bank could have used policy waivers in particular cases. For instance, IFAD has extended loans and grants (i.e. not only trust fund resources) to the West Bank and Gaza, based on a policy waiver adopted by IFAD's Governing Council, the equivalent to the World Bank's Board of Governors. The waiver was adopted with the same (i.e. large) number of votes that would be required for a formal amendment. See Rutsel Martha, 'Mandate Issues in the Activities of the International Fund for Agricultural Development (IFAD)', 6 *International Organizations Law Review*, 447 (2009), pp. 465–472.
91. *Supra* Sect. 3 in Chap. 2.
92. On the practice of implied interpretations, see *supra* Sect. 1.1 of this chapter.
93. The deliberations fall under an exemption from the Bank's Access to Information Policy Bank Policy on Access to Information, para. 16 lit. c).
94. For instance, in South Sudan post-independence and prior to becoming a member. Evarist Baimu, South Sudan: A New State is Born, The World Bank—Law, Justice and Development (September 2011), at http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0, contentMDK:22994807~pagePK:210058~piPK:210062~theSitePK:445634~isCURL:Y~isCURL:Y,00.html (accessed October 2015).
95. The World Bank, '*Interim Strategy Note for Somalia for the period of FY 08–09*' (21 June 2007), para. 18: "Now and in the foreseeable future the Bank's engagement in Somalia is based on an explicit request from the international community." Requests were sought from the Special Representative of the UN Secretary General for Somalia or the UN's Resident and Humanitarian Coordinator. They took the form of letters that described the humanitarian need in Somalia, and—echoing the language of OP 2.30—called on the Bank's Management and Executive Board to approve a particular project. Approved projects were mostly small-scale, concentrated on Somalia's more stable regions, and were financed through trust funds. At no point did the organization enter into legal relations with Somalia's transitional authorities, nor were any funds disbursed to or channelled through the government. Instead, funding was provided mostly to the UN.

96. This is in contrast, for instance, to the practice of the IMF, which leaves the decision of how to deal with a *de facto* government entirely to its member states. It conducts an informal poll among the Executive Directors, whose views are seen to reflect the majority view (in terms of voting power) of all members, and who determine.
97. The World Bank's Inspection Panel, for instance, reviews staff compliance with Policies and Procedures during the planning and implementation stages only if a party directly affected by the Bank's operational activities in a country files a complaint. The (*de facto*) governments of member states cannot call for an investigation. See *supra* note 21.
98. For an analysis of the application of OP 7.30 in Afghanistan and Iraq, see Michael Nesbitt, 'The World Bank and De Facto Governments. A Call for Transparency in the Bank's Operational Policy', 32 *Queen's Law Journal*, 641 (2007); and for an analysis of Bank practice in Honduras 2009, Cote d'Ivoire 2010, Tunisia 2011 and Mali 2012, Georgia Harley, 'To Disburse or Not to Disburse? Strengthening the World Bank's Response to Revolutions and Coups d'Etat', 3 *Sanford Journal of Public Policy*, 20 (2012).
99. For example, Nesbitt, 'The World Bank and De Facto Governments. A Call for Transparency in the Bank's Operational Policy', p. 643.
100. Harley thus explains why the World Bank rapidly continued its disbursements to Tunisia and Egypt following the Arab Spring revolutions, but was equally quick to suspend disbursements following coups in seemingly less important countries like Mauritania, Mali and Niger. Harley, 'To Disburse or Not to Disburse? Strengthening the World Bank's Response to Revolutions and Coups d'Etat', 28. See also Nesbitt, 'The World Bank and De Facto Governments. A Call for Transparency in the Bank's Operational Policy', 671, who concludes from his analysis of the Bank's practice with regards to Afghanistan and Iraq that "the Bank has hurried to the aid of Western-oriented post-conflict societies".
101. *Supra* Sect. 1.2 of this chapter.
102. Consider, for instance, the requirement for staff to assess the government's commitment to honour its obligations under international law, namely financial obligations towards the Bank.
103. Other reasons why trust funds have become an increasingly popular financing instrument in conflict-affected and fragile states include the associated benefits of better donor coordination and risk sharing, funding predictability, transparency and other principles of aid effectiveness. See Oliver Walton, Governance and Social Development (GSD) Resource Center, '*Helpdesk Research Report: Trust Funds in Fragile and Low Capacity States*' (2011); and with a more critical assessment of actual trust fund performance, Independent Evaluation Group, '*World Bank Assistance to Low-Income Fragile- and Conflict Affected States*', pp. 115–120.

104. The IDA cannot provide assistance to a country if the government objects, so it is *prima facie* subject to interpretation what happens if there is no government to object. At least some provisions in the Articles of Agreement could have served as a basis for such an interpretation. For instance, the IDA may provide financing not only to a government, but also to "a public, or private entity in the territories of a member or members, or to a public international or regional organization" (Art. V Sect. 2 lit. c). Moreover, the IDA Articles generally accommodate the idea that there may be territories with no sovereign government, as the territorial application of the Articles extends to "all territories for whose international relations [each member] is responsible" (Articles, Art. XI, Sect. 3).
105. One limit for the use of interpretation as a means for adapting the statutes of international organizations consists in the statutes' amendment procedures, which shall not be undermined by an excessive use of interpretation.
106. Interestingly, an earlier formulation of the policy still required the Board of Governors to approve Bank operations in such cases, not the Executive Board, where only 25 Directors vote according to a system of weighted voting. See The World Bank, '*Post-Conflict Reconstruction. The Role of the World Bank*', 30, requiring "prior approval of the Board, where all Bank members are represented."
107. See *supra* Sect. 1.2 of this chapter.
108. The IFAD has drafted a similar policy for dealing with *de facto* governments than the World Bank, but has explicitly sought to modify its criteria "to emphasize the practical over the political", and therefore consider international recognition only where it directly impacts on the likelihood that IFAD's projects can be carried out successfully. IFAD, Guidelines on Dealing with De Facto Governments, EB 2009/98/R.16 (17 November 2009), para. 12. The final draft of IFAD's Guidelines approved in 2011, however, does not include such a specification, apparently because it was not in the interest of Executive Board members.
109. Though many states consider a government's internal legitimacy when deciding to enter into diplomatic relations, traditionally, international legal doctrine knows only the "effective control" test to identify the government of a country. See Magiera, 'Governments', para. 18.
110. Cissé, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank', p. 66.
111. On the concept of responsibility to protect, see *supra* Sect. 3.2 in Chap. 2.
112. On the state-centric paradigm of development cooperation and its premises in terms of juridical and empirical statehood, see *supra* Sect. 2.1 in Chap. 3.

113. Which of the three instruments the Bank uses in a country generally depends on the circumstances of a country, including donor relations with the government. The respective reasoning is laid out in the Country Partnership Framework (CPF), which is prepared by the Bank's staff in consultation with national authorities. The CPF is a medium-term strategy that establishes the basic parameters of Bank assistance to a country.
114. The World Bank, '*Annual Report 2015*', Table 19 (p. 58).
115. OP/BP 10.00 on Investment Project Financing was adopted in April 2013, replacing a Policy from 1994. The Policy forms the core of the Bank's project-lending regime, regulating the process from project identification to approval. See also *supra* Sect. 1.2 on basic requirements under the Bank's legal mandate.
116. Safeguard policies are Bank-internal policies aimed at preventing and mitigating potential harm to people and the environment caused by Bank-financed projects. Safeguards are currently contained in separate Policies and Procedures, for instance OP/BP 4.01 on Environmental Assessment and OP/BP 4.10 on Indigenous Peoples. In August 2016, the World Bank approved a new "Environmental and Social Framework" that consolidates the Bank's requirements in the areas of environmental and social protection, involuntary resettlement, indigenous people, cultural heritage and other. The new framework is expected to take effect in early 2018.
117. The World Bank, '*Post-Conflict Reconstruction. The Role of the World Bank*', at 33. Approximately two-thirds of countries recognized in the Bank's list of fragile situations in 2012 had emergency operations between 2005 and 2012, and these were seldom in response to natural disaster. For instance, in Haiti, the World Bank used OP 8.00 to work with the government and the UN Peacekeeping mission to improve road access and refuse collection in highly insecure urban slams of the capital.
118. See, for instance, The World Bank, Operationalizing the WDR, Annex A, para. 4, explaining that fragility is "a long-term challenge rather than an episodic emergency".
119. The revisions made to OP 10.00 are part of a broader effort to consolidate a complex and incoherent set of policies and procedures for investment lending, and to shift the Bank's role from supervising how recipient countries implement projects on the basis of prescribed standards, to providing implementation support. See the Board paper "Investment Lending Reform: Modernizing and Consolidating Operational Policies and Procedures" (1 November 2012).
120. OP 10.00, para. 11. Examples of Bank operations "in situations of urgent need or capacity constraints" include an involvement in the CAR to support a food response and to pay salaries of public servants; an operation

in Somalia equally to pay salaries of public servants; and Bank support to the reconstruction of Northern Mali.

121. On the Bank's CPIA-based list of 'fragile situations', see the introduction of this chapter.
122. Instructions: Preparation of Investment Project Financing—Situations of Urgent Need of Assistance or Capacity Constraints (2013), p. 6. Instructions are issued by the Bank to provide more detailed step-by-step guidance than contained in Bank Procedures.
123. All exceptions are established in OP 10.00, para. 11 lit. (a)–(e), and the procedural modifications particularly in BP 10.00, para. 47 lit. (c). OP 8.00 was accordingly revised and is now focused on establishing guiding principles, objectives and limits of Bank engagement in the context of crises and emergency.
124. OP 10.00, para. 11 lit. (d) permits the Bank to "enter into agreements with relevant international agencies, including the United Nations, national agencies, private entities, or other third parties", or use grants or trust funds arrangements to implement activities itself.
125. *Supra* note 122.
126. See the definition of differential treatment by Philippe Cullet, *Differential Treatment in International Environmental Law* (Ashgate, 2003), 19, and on forms and instruments of differential treatment, pp. 32–36. I elaborate this thought in *infra* Sect. 1 in Chap. 7.
127. For instance, the World Bank approved US$750 million of budget support to the government of Ukraine, as the government was facing continued tensions on the eastern border with Russia in May 2014. While there were only five Development Policy Lending operations in fragile states in the fiscal years 2005–2007, by 2008, the number had already increased to almost 40. Still, fragile states received only 10% of assistance as direct budgetary contributions between 2009 and 2011, whereas the overall portion of Bank funding disbursed through budget assistance is 20%. The World Bank, '*2012 Development Policy Lending Retrospective*' (2013), para. 17.
128. The Bank's shift to Development Policy Lending (previously known as Structural Adjustment Lending) in the 1980s is partly owed to the experience that financing specific projects alone is ineffective or insufficient in countries with weak capacities and poor policies. See Carol Lancaster, 'The World Bank in Africa since 1980: The Politics of Structural Adjustment Lending', in Devesh Kapur, et al. (eds), *The World Bank. Its First Half Century. Volume 2: Perspectives* (Brookings Institution, 1997).
129. The World Bank & African Development Bank, '*Providing Budget Aid in Situations of Fragility: A World Bank—African Development Bank Common Approach Paper*' (2011), pp. 15–17; and The World Bank, '*2012 Development Policy Lending Retrospective*', pp. 34–37.

130. IDA Articles, Art. V, Sect. 1 (b). The Bank's legal department has adopted a rather liberal interpretation of "special circumstances", however, making sure only that loans are used in accordance with the productive purposes requirement of the Bank's mandate.
131. OP 8.60 on Development Policy Lending (February 2012) establishes criteria that are further elaborated in non-binding Good Practice Notes on various aspects of Development Policy Lending. Moreover, recipients are required to commit in a separate document annexed to the loan agreement, the so-called Letter of Development Policy, to the broad objectives and policy, institutional, or legislative measures of government programs for which they seek Bank funding. The self-commitment contained in the Letter addressed to the World Bank's President is a prerequisite for budget assistance to be approved by the Executive Board.
132. For analytical purposes, the Bank classifies those countries with a particularly low score in the CPIA as fragile situations. See the introduction of this chapter.
133. The Bank supervises the implementation of government programs supported through DPOs to verify the fulfilment of the agreed conditions.
134. OP 8.60 replaces Operational Directive OD 8.60 of December 1992, which contained no such exception. The old Directive instead explicitly stated "Adjustment lending is not advisable when the political commitment to adjustment is weak or highly uncertain", which should be determined on the basis of the "capacity and willingness of country authorities to prepare acceptable Letters of Development Policy."
135. OP 8.60, para. 32. The term "crisis" refers to financial crisis "with substantial structural and social dimensions", or economic shocks. "Post-conflict" countries are those with urgent reconstruction needs but lacking a medium-term reform agenda usually required for the Bank to assess the government's policies and commitment.
136. The World Bank, '*Good Practice Note for Development Policy Lending. Development Policy Operations and Program Conditionality in Fragile States*'.
137. Similar recommendations were later formulated in a Common Approach Paper of the World Bank and African Development Bank: The World Bank & African Development Bank, '*Providing Budget Aid in Situations of Fragility: A World Bank—African Development Bank Common Approach Paper*', 11.
138. Between Fiscal Year 2006 and 2009, the World Bank implemented 13 Development Policy Operations in nine countries: in Afghanistan, Burundi, the Central African Republic, Côte d'Ivoire, Haiti, Laos, Liberia, Sierra Leone and Togo.

139. Demands came mostly from middle-income countries, which increasingly have access to other public, private or public-private sources of financing and could thus exert pressure on the Bank to adapt the services it offers. At the same time, PfoR is a brainchild of the Paris aid effectiveness agenda, providing donors with a tool to increase the results-focus, effectiveness and leverage of their funds.
140. The Bank Policy and Bank Directive on PfoR replaced the almost identical OP/BP 9.00 on PfoR, which was adopted in 2012 in the old format of World Bank policies and procedures. For an early analysis of the legal framework for PfoR, see Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, Chapter 8.
141. Bank Policy on PfoR, para. 8 lit. (f).
142. The core standards deduced from the Bank's comprehensive set of safeguard policies are condensed into one paragraph, para. 8. These standards are considered to the extent that they are "applicable or relevant in a particular country, sector, or Program circumstances". Only programs that could have "significant adverse impacts" on the environment or affected people are generally excluded from PfoR (para. 9). The Bank's financial management and procurement guidelines do not apply to co-financed government programs.
143. As part of implementation support, the Bank provides technical assistance for capacity- and institution-building in a broad range of areas, including fiduciary, environmental and social systems.
144. In para. 29, the Policy foresees that the Bank identifies the aspects of a country's environmental and social systems that require strengthening, which can become part of the Program's action plan and will be taken on during preparation and implementation of the program.
145. Commensurate to the recipient country's capacities, the Bank continues its own risk assessments and monitoring during implementation, particularly to prevent and mitigate fraud and corruption. In connection with the Bank Policy on PfoR, the Bank has therefore adopted Guidelines on Preventing and Combating Fraud and Corruption, which become binding through the reference made in para. 15 of the Policy.
146. Bank Directive on PfoR, para. 13.
147. Bank Policy on PfoR, para. 14 and Bank Directive on PfoR para. 44. Also The World Bank, '*A New Instrument to Advance Development Effectiveness: Program-for-Results Financing*' (29 December 2011), para. 78.
148. Rigo Sureda, 'Informality and Effectiveness in the Operation of the International Bank for Reconstruction and Development', pp. 585–588, arguing that the organization has often preferred to reach an informal

agreement with the recipient country rather than suspending loans on the grounds of non-compliance with contractual obligations.

149. Besides, Operational Policy 2.30 provides an overarching framework to guide the Bank's work in countries affected by or in transition from conflict. It does not, however, affect the rules whereby operations are planned and implemented. *Supra* Sect. 2.1 of this chapter.
150. A study commissioned by the German Ministry for Development criticized that most DPOs were in states that also received exceptional resource allocations from the IDA, i.e. post-conflict countries, countries in arrears, or countries re-engaging with the Bank. The authors suggest that the World Bank develops clear criteria for determining when it considers project lending the only adequate financing instrument in fragile states, and accordingly rules out the use of budget assistance. Rachel Folz & Manuela Leonhardt, Gesellschaft für Internationale Zusammenarbeit (GIZ), '*The Engagement of the International Development Association in Fragile States. Proposals for a Reform Agenda*' (April 2012), pp. 41–43.
151. PfoR was introduced in 2012 without broad prior piloting. To limit its risks, the World Bank decided to provide only a maximum of 5% of IDA or IBRD funding through the new instrument during the first two years.
152. Arguably, the success of results-based disbursements in fragile states ultimately depends on the use of realistic indicators that are commensurate to the countries' limited capacities, so as not to cause the abrupt suspension of aid in the case of non-compliance.
153. I return to the concept of differential treatment in *infra* Sect. 1 in Chap. 7.
154. *Supra* Sect. 1.2 of this chapter.
155. OP 8.60 suspends design considerations that relate to the distributional effects or effects on natural resources and the environment of operations.
156. On the objective of state-building prioritized in the Fragile States Principles and the New Deal, see *supra* Sect. 3.1 in Chap. 3.
157. On standards of effectiveness in the Bank's legal framework, see *supra* Sect. 1.2 of this chapter.
158. Besides, the use of trust fund arrangements instead of the Bank's normal lending instruments can be seen as an alternative strategy to ensure the effective use of resources in fragile and conflict-affected states. See *supra* Sect. 2 of this chapter.
159. While particularly relevant for operations in fragile states, the credo that risks need to be managed, not avoided, also constitutes a pillar of the Bank's updated Governance and Anticorruption strategy, and is the subject of the 2014 WDR, The World Bank, '*Word Development Report.*

Risk and Opportunity. Managing Risk for Development' (2014). Given the Bank's institutional culture that is often accused of being front-loaded and neglecting implementation, it remains to be seen whether the shift from *ex ante* requirements to *ex post* controls materializes in practice.

160. The Bank Policy on PfoR includes no specific provisions for fragile states. Since PfoR finances government programs that are implemented through country systems, it is generally supportive of recipient ownership.
161. Where governments request the Bank to execute certain activities on their behalf, this is usually accomplished using financing from trust funds like the State- and Peacebuilding Fund, which can also be used to provide resources directly to non-state actors—and in principle without involving the government. However, activities financed through the State- and Peacebuilding Fund are usually of a small scale only, and often pertain to analytical work.
162. For example, the majority of Bank-financed projects in Somalia rely on alternative implementation arrangements, often UN agencies. The World Bank, '*Interim Strategy Note for the Federal Republic of Somalia*' (11 November 2013).
163. The World Bank, '*IDA 15. Operational Approaches and Financing in Fragile States*' (June 2007), para. 25.
164. I discuss the shift to state-building as a strategic objective and regulatory theme in *infra* Sect. 1 in Chap. 7.
165. Boon criticizes the Bank's extraordinary influence in supporting domestic reforms in post-conflict countries, Kristen E. Boon, '"Open for Business": International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law', 9 *New York University Journal of International Law & Politics*, 513 (2007).
166. For instance, the World Bank differentiates between countries eligible for IDA's concessional loans or only IBRD loans. Some IDA-eligible countries receive loans with different maturities, and others can receive non-refundable grants. See also Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 207–209.
167. Also Leonie Guder, *The Administration of Debt Relief by the International Financial Institutions. A Legal Reconstruction of the HIPC Initiative* (Springer, 2009), 158–161; and *supra* Sect. 2 in Chap. 4.
168. For example, the 2013 Independent Evaluation Group's review of "World Bank Assistance to Low-Income Fragile and Conflict-affected States no longer raises the same, fundamental question as the 2006 IEG review of the LICUS initiative did—questioning what the Bank's declared state-building objective entailed; whether it was aware of the political and ideological connotations of such an agenda; and whether it had a response to the central state-building dilemma of balancing support for central

government and non-state actors. See Independent Evaluation Group, '*World Bank Assistance to Low-Income Fragile- and Conflict Affected States*'.

169. Critical voices still question the Bank's competence and legitimacy to engage in the highly politicized environments of fragile and conflict-affected states. See, for instance, Irfan Nooruddin & Thomas Edward Flores, 'Financing the Peace: Evaluating World Bank Post-Conflict Assistance Programs', 4 *Review of International Organizations*, 1 (2009), 22–23, arguing that the Bank had no positive effect on recovery in post-conflict settings; or Boon, '"Open for Business": International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law', 515, stating that the "absence of representative and functioning governmental counterparts that can bargain over proposed policy and legislative changes" made any type of Bank engagement in post-conflict environments more intrusive.
170. In practice, the World Bank has often sought to consult and involve actors outside of the government, e.g. civil society representatives or local community stakeholders, e.g. in Somalia and East Timor. From an operational as well as a legal perspective, however, engaging with non-state actors remains a "frontier issue" for the World Bank. Cissé, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank', 63.
171. Over the last years, the CPIA process has already become increasingly being structured, and mechanisms have been designed to ensure a certain level of transparency, reason-giving and review. With concrete proposals on how to increase the process' conformity with such standards known from domestic administrative law, see Michael Riegner, "Governance Indicators in the Law of Development Finance: A Legal Analysis of the World Bank's 'Country Policy and Institutional Assessment'" *Journal of International Economic Law* (2016).
172. Michael Woolcock, UNU WIDER Working Paper 2014/097, '*Engaging with Fragile and Conflict-affected States. An Alternative Approach to Theory, Measurement and Practice*' (July 2014), 4.

CHAPTER 6

A Comparison with the African Development Bank, the Asian Development Bank and the European Union

The World Bank is not the only international development organization that has come to acknowledge the specific challenges of engaging with fragile states. Fragile states have emerged as a key priority for the international development community as a whole. Inasmuch as other organizations operate on the premise that recipient countries have an effective government, they, too, face difficulties in fragile environments. Many have also sought to respond with legal and policy reforms that affect the design, management and delivery of ODA in fragile states.[1]

To what extent and how different organizations have adapted the rules and procedures that govern their operations naturally varies. After all, a great variety of international organizations engage in development cooperation. They share a common purpose and assume similar functions, which is why their legal frameworks have a lot of ideas in common.[2] But there are also notable differences between them. Some organizations have universal membership like the World Bank, some consist only of donor states, like the European Union (EU). Multilateral Development Banks (MDBs) like the World Bank, the African Development Bank (AfDB) and the Asian Development Bank (ADB) mostly provide financing in the form of concessional loans, whereas the EU provides grants that recipient countries do not need to reimburse. And while the World Bank, the AfDB and

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the ADB have a focused development mandate that is explicitly non-political, the EU has a much broader mandate, and is a political organization to the core.

It is such differences in the legal and policy frameworks of international development organizations that largely determine what constraints they face when seeking to engage with fragile states, and how they may respond. After all, organizations need to modify existing rules only to the extent that they are deemed too constraining or inadequate to begin with. And they can modify existing rules only to the extent that they are subject to adaptation. Besides, there are other factors that could affect an organization's approach towards fragile states—for example, the interests of strong member states and their decision-making power within the organization, or the institutional culture of an organization more generally. In comparing the World Bank's approach towards fragile states with that of other organizations, my objective is thus twofold. First, to paint a more nuanced picture of how the law of international development organizations is adapted *vis-à-vis* fragile states. And second, to get to a better understanding of the factors that might influence how different organizations respond.

In this chapter, I analyse how the AfDB, the ADB and the EU have adapted their legal and policy frameworks for engaging with fragile states. I begin with an overview of the different types of rules that govern how the three organizations normally provide development assistance (Sect. 1). On this basis, I analyse the rule-making activities of the AfDB and the ADB, two multilateral development banks that are very similar to the World Bank (Sect. 2), and those of the EU, which in many regards stands in marked contrast to the World Bank (Sect. 3). I conclude with a reflection on the factors that may influence how different international development organizations engage with fragile states (Sect. 4).

1 Different Legal Frameworks, Different Starting Points

The AfDB and the ADB on the one hand and the EU on the other hand represent two very different types of international development organizations.[3] The differences between them are also reflected in their legal frameworks, which constitute the starting point of our analysis.

The AfDB and the ADB belong to the same type of organization as the World Bank, the sole difference being that the former have a regional focus in their operations. All three are MDBs, organizations that concentrate on

providing technical advice and financial assistance through loans and grants to developing countries.[4] As such, they have very similar organizational structures, funding mechanisms, and importantly, legal mandates. The Agreements establishing the ADB, the AfDB and its concessional lending arm, the African Development Fund, define the organizations' purposes and objectives of contributing to development.[5] Like the World Bank, the organizations are bound to respect standards of effectiveness and 'sound banking' in their operations, not least since they need to raise money on global financial markets and therefore depend on a good credit rating.[6] Moreover, in almost identical wording, all three MDBs have a political prohibition clause in their mandate that expressly protects the sovereignty of the countries they engage with.[7]

Besides these commonalities in the founding treaties, the AfDB and the ADB further resemble the World Bank in that they make extensive use of internal rules to govern their operations on a daily basis. ADB's Operations Manual systematically collects all of its binding operational policies and procedures.[8] The AfDB has a series of policies, guidelines and procedures, even if they are overall less comprehensive and less structured.[9]

Such internal rules assume an important role in concretizing the legal obligations contained in the organizations' statutes—and perhaps not surprisingly, they are rather similar in substance to the World Bank's internal rules. MDBs engage in the same types of activities and face similar challenges that were not necessarily foreseen when the organizations were first created. Accordingly, if they adopt policies and procedures in areas of common concern, they often emulate each other—which is why the internal rules of MDBs converge towards a "*droit commun* in the field of development finance."[10] Pending a detailed analysis in Sect. 2 of this chapter, we can thus expect that the AfDB and the ADB also emulate the World Bank's rule-making in response to the challenges of dealing with fragile states.

The EU, in turn, is fundamentally different from other international organizations providing multilateral aid—which makes a comparison more challenging, but also particularly worthwhile.[11] To begin with, the EU is not a development organization in the sense of a technical organization that is solely or primarily mandated to promote development.[12] It is a political organization that has a broad mandate covering several policy fields. This characteristic also makes the EU a unique actor in fragile states, where it has a range of instruments at its disposal—development cooperation, humanitarian assistance, and its Common Foreign and Security Policy (CFSP).[13] Unlike the MDBs with their near universal

membership, the EU is also composed almost exclusively of countries that are themselves donors, not recipients of aid. Moreover, the EU has a rather different legal framework and hence starting point for engaging with fragile states.

EU development cooperation is subject to intense legal regulation, and the rules that guide the allocation, planning and implementation of EU assistance are generally of a more formal, legal nature than those of other organizations. It is important to distinguish between three different sources: EU primary law, secondary law and the Cotonou Agreement, an international legal treaty. EU primary law provides a common basis for all EU development cooperation. It regulates fundamental principles, objectives and competences.[14] Beyond this common basis, the legal sources differ for EU development cooperation with ACP countries which some EU member states have former colonial ties, and for all other developing countries.

Cooperation with ACP countries is largely based on an international legal treaty, the Cotonou Partnership Agreement, as well as the rules that govern the European Development Fund (EDF), which constitutes a separate budget for development initiatives in ACP countries.[15] Cooperation with all other developing countries rests not on a mutually agreed treaty, but on EU secondary law, namely the Regulation establishing the central 'Development Cooperation Instrument' and four other Regulations with a more refined geographic or thematic focus.[16] The different legal sources for cooperation with ACP and with non-ACP states—one multilateral, one unilateral—are important to bear in mind, as they partly explain why ACP states can assume a more autonomous role in development cooperation with the EU. Besides, non-binding documents like the 2005 European Consensus on Development and the EU Commission's 2011 Agenda for Change provide further orientation on the objectives and principles of EU development policy and its delivery.[17]

The according legal framework for EU development cooperation *prima facie* overlaps with that of other development organizations. It establishes the objective of development, standards of effectiveness, and protections of recipient sovereignty.[18] But there are some important differences that also concern the EU's engagement with fragile states.

To begin with, the EU is more expressly mandated to further state- and peace-building through development cooperation than the MDBs. The Treaty on the Functioning of the European Union commits the EU to the objective of poverty reduction, but this broad objective must be interpreted in light of commitments and objectives that the EU and its

member states have "approved in the context of the United Nations and other competent international organizations."[19] Since the EU has endorsed the OECD's Fragile States Principles and the New Deal, it is committed to foster state- and peace-building through development cooperation by means of reference in its primary law. The Cotonou Agreement further states that cooperation with ACP states should support the objectives of peace-building and conflict prevention,[20] while the DCI Regulation expresses that cooperation with non-ACP states aims at building "legitimate, effective, and accountable public institutions" in fragile states.[21]

In stark contrast to most MDBs, EU development cooperation is also committed to fostering political principles like democracy, rule of law and human rights.[22] The political mandate circumscribes what issues the EU can or must address in development cooperation with ACP and non-ACP countries. At the same time, it affects the protected realm of recipient countries' domestic affairs. For inasmuch as the EU's legal framework makes democracy, rule of law and human rights subjects of its cooperation with developing countries, their realm of domestic affairs is reduced.

Another important nuance concerns the state-centeredness of EU development cooperation. The EU engages mostly with national governments as the 'main partner'.[23] Sovereignty, equality of partners and ownership constitute fundamental principles of EU development cooperation.[24] In contrast to the MDBs, however, the EU's mandate also formulates a principle of participation that refers to non-state actors.[25] The principle acknowledges that actors outside of the central government play an important, complementary role both in policy-formulation and implementation—and that ownership extends beyond the national government.

The EU's legal framework thus leaves more room for cooperation with local authorities and non-state actors than those of the MDBs—with an important distinction between ACP and non-ACP countries. Under the Cotonou Agreement, EU cooperation with non-state actors in ACP countries remains subject to the approval of governments.[26] In contrast, when cooperating with non-ACP countries, the EU shall expressly consider financing non-state actors and local authorities if "there is no agreement on the action with the partner country concerned".[27] Arguably, this distinction stems from the fact that EU cooperation with ACP states rests on an agreement negotiated with recipient governments, which shows more deference to the principle of sovereignty than unilaterally-set EU secondary law.

Finally, the EU's legal framework defines 'differentiation' as a fundamental principle of cooperation—an idea that cannot be found in the legal

frameworks of the World Bank, the AfDB or the ADB.[28] Broadly speaking, differentiation implies that the EU takes into account a country's level of development, needs or performance in the allocation, planning and implementation of assistance.[29] First introduced in the Cotonou Agreement, the principle seeks to acknowledge the immense diversity of developing countries, in particular the gap between developing and Least Developed Countries within the ACP group.[30]

In sum, the EU's legal framework for development cooperation can be characterized as expressly political and conveniently adaptable. In fact, some of the features that distinguish the EU's legal framework from that of the MDBs have been introduced only recently, to reflect the latest shifts in mainstream development thinking.[31] For unlike the Agreements establishing the World Bank, AfDB, and ADB, the EU's legal framework does not date back to the 1940s or 1960s, but is regularly renewed and generally easier to adapt.[32] At least in theory, the EU thus enjoys greater latitude when engaging with countries that have limited or no effective government. What this means for the EU's response to fragile states, we will explore in Sect. 3 of this chapter.

2 The African Development Bank's and the Asian Development Bank's Engagement with Fragile States

Since the African and the Asian Development Bank have very similar legal frameworks than the World Bank, they are also likely to face similar challenges in countries with very weak or no government counterparts—from Somalia to South Sudan, and from Afghanistan to East Timor. Have the AfDB and the ADB also sought a similar response in terms of rule-making? In the following section, I examine how the AfDB and the ADB have adapted their legal and policy frameworks for engaging with fragile states, by analysing their rules for dealing with countries with no formal government counterparts (Sect. 2.1), and for countries with very weak factual capacity (Sect. 2.2).

2.1 Dealings with Ineffective and De Facto Governments

The first type of challenge that international development organizations often encounter when engaging in fragile states concerns the identification of a formal government counterpart. The World Bank has adopted Operational Policy 2.30 to deal with such situations, which essentially

permits the organization to provide assistance at the request of the international community rather than a government in power. In addition, Operational Policy 7.30 regulates how to identify an effective government counterpart for the purposes of the Bank.[33] The AfDB and the ADB, too, are normally required by their legal mandates to deal with countries through the formal government. Yet to facilitate their growing engagement in fragile states, both organizations have adopted rules that permit operations without the request or cooperation of the government in power. These rules show notable similarities, but also differences compared to those of the World Bank.

For the AfDB, the relevant rules can be found in the Operations Guidelines of the Fragile States Facility (FSF). The FSF is an autonomous financing instrument established by the Board of Directors in 2008, after the adoption of AfDB's first Fragile States Strategy.[34] It is dedicated to channelling additional resources to countries emerging from conflict or crisis, and, established as a legally autonomous trust, is subject to somewhat different rules than AfDB's normal operations.[35] These rules are contained in the Operations Guidelines, which are internally binding and establish the FSF's objectives, eligibility criteria and implementation arrangements. The AfDB thus follows a somewhat similar logic than the World Bank, which relies on trust funds to circumvent some of the legal restrictions that apply to the use of its normal resources.[36]

To be eligible for resources from the FSF, countries are generally required to have "formed a functional (transitional) governmental authority *broadly acceptable to stakeholders and the international community*".[37] In this sense, the Operations Guidelines establish a higher bar than AfDB's primary law. Countries that seek financing from the FSF do not only need a formal government, but one that is legitimate in the eyes of AfDB's shareholders and the international community at large.

But the FSF was created with a special financing window targeted precisely at supporting "operations in fragile states that cannot be addressed through traditional projects and instruments".[38] Though it involves only very limited grant resources and is mostly used for technical assistance and knowledge activities, the targeted support window is not restricted to countries that have an effective and legitimate government. Moreover, if approved by the Board of Executive Directors, resources from this window can be channelled directly to non-state actors in fragile states.[39]

With the FSF's targeted support window, the African Development Bank has thus established an (albeit small) avenue through which it could

extent assistance to countries without approval of a government, or a request from the international community. In fact, its 2008 Fragile States Strategy explicitly recommends non-sovereign support as a means for engaging in situations where no consensus can be reached with the government, where there is no legitimate government, or where effective government has broken down.[40] Though it may seem unlikely that the AfDB would support non-state actors in a member's territory if the government objected, it has at least created the tools for doing so. The organization could thus come into conflict with its own statute, which expressly prohibit the financing of projects against the will of the member state concerned.[41]

Next to resources from the FSF, the AfDB also extends exceptional support to conflict-affected or fragile states in the form of Emergency Relief Assistance. According to the relevant Policy Guidelines and Procedures for Emergency Relief Assistance, emergency grants can be processed upon request of the government or "upon receipt of a general appeal from United Nations (UN) Agencies to the international community".[42] The formulation might remind us of the reference to "requests from the international community" in the World Bank's OP 2.30. Yet unlike the World Bank, the AfDB still needs "to obtain Government's acknowledgement" before acting on a UN appeal. In this case, the international community's call for action cannot substitute for the government's own approval.

In practice, the AfDB has used both targeted support from the FSF and Emergency Relief grants to provide assistance to Somalia following the breakdown of government. Since 2010, the organization therefore concluded legal agreements with Somalia's Transitional Federal Government as the country's legitimate (though hardly effective) government.[43] In the light of its virtually inexistent capacities, actual implementation was done by third parties.

The Asian Development Bank, in turn, has no special facility to support fragile states, but an internally binding Disaster and Emergency Assistance Policy that is also applicable in conflict-affected or post-conflict countries. Contrary to the organization's mandated practice of engaging only with formal governments, the policy allows Emergency Assistance Loans to be requested by "an internationally legitimate governing authority". Similar to the World Bank's OP 2.30, the provision lowers the bar on whom ADB accepts as a counterpart, including, for example, the UN in East Timor, or the transitional government in Afghanistan.[44]

The organization can thus provide assistance to countries in the absence of an official government counterpart, using short-term and small-scale emergency loans that are not subject to the usual terms and conditions.[45] In contrast to OP 2.30, however, ADB's Emergency Assistance Policy does not seem to require an extraordinary approval from the Executive Directors in such cases. An explicit approval from the Directors could have been construed as an implied interpretation of ADB's statute. In the absence of such an implied interpretation, Emergency Assistance Loans that are provided without the approval of a formal government could come into conflict with the Articles' political prohibition clause and requirement of government state.[46]

Finally, both the African and the Asian Development Bank have also issued specific guidance on how to deal with *de facto* governments. Here, the regional development banks more closely emulate the World Bank. The guidelines prepared by the AfDB and ADB in large parts use the same wording as OP 7.30 on "Dealings with *De Facto* Governments"—which is why I focus on the remaining differences, for instance concerning the type of legal instrument used to adopt the guidelines. The African Development Bank has not adopted an operational policy, but a Presidential Directive concerning engagement with *de facto* governments, an instrument that is not used by the World Bank. In contrast to Operational Policies, Presidential Directives are issued directly by the President pursuant to Art. 37 (2) of the AfDB Agreement and exercising the power to "conduct, under the direction of the Board of Directors, the current business of the Bank". Presidential Directives are equally considered binding on the organization's staff, but without participation of the Board of Directors, the rule-making process does not directly involve any organ representing the organization's member-states.

The decision-making criteria and process that AfDB's staff are requested to follow after an unconstitutional change of government again largely correspond to those of the World Bank.[47] Unlike OP 7.30, however, the AfDB's Directive also establishes general principles to govern its engagement with *de facto* governments. Accordingly, staff should avoid a "major deterioration in the Bank Group's investments and projects", as well as, "to the extent possible", a "major deterioration of the economic situation of the population".[48] In addition, they should be informed by the views and decisions of the international community. How to balance these different concerns—technical considerations and fiduciary interest, the humanitarian needs of the population, and conformity with the political

decisions of the international (donor?) community—is largely left to the discretion of staff.

The Asian Development, in turn, has issued guidelines on dealing with *de facto* governments in the form of a Memo of its General Counsel from 2000.[49] The organization has thus refrained from adopting a more formal and internally binding operational policy, declaredly because the frequency of coups in the region did not warrant so. The formulation of the guidelines itself still closely follows that of the rules adopted by the World Bank and African Development Bank.

2.2 Differentiation in the Planning and Implementation of Operations

The African and the Asian Development Bank have in various official documents affirmed that development cooperation with fragile states requires a differentiated approach. AfDB's 2008 Fragile States Strategy, for example, demands that business processes and procedures should be adapted to better take into account the different circumstances of each country.[50] ADB's Operational Plan and Staff Handbook for 'working differently' in fragile states acknowledge that standard policies and approaches can be inadequate and require adaptation.[51] But to what extent have these commitments been translated into differentiated rules for planning and implementing development cooperation with fragile states?

How the organizations plan, manage, and implement development projects and programs is generally governed by substantive and procedural rules, which also define the roles that recipient governments assume in the process. Similar to the World Bank, these rules are laid down in the statutes and regularly concretized in operational policies and procedures. Whereas the World Bank has gradually introduced a number of exceptional rules that essentially aim at reducing or simplifying the requirements for operations in fragile states, both the AfDB and the ADB have chosen a somewhat different approach.

Let us start by looking at the AfDB. As indicated before, AfDB's system of internal rules is *prima facie* less detailed and systematic than that of the World Bank. Not all of its activities are subject to an operational policy. Where they are, the respective rules tend to be formulated in a less stringent manner. Concerning the protection of environmental and social standards, for instance, the AfDB has adopted a more principles- and outcome-based approach than the World Bank—though the latter has

recently started moving away from its prescriptive and heavily front-loaded safeguards policies, too.[52] In as much as AfDB's policies and procedures generally leave more room to adapt to the different circumstances of each country, there is also less need for the organization to introduce special policies and procedures for fragile states.

Still, the AfDB has found that its claim to 'consistent engagement' in all member countries is difficult to uphold in post-conflict countries or otherwise fragile states.[53] It has therefore introduced a special instrument to provide additional financing and enhance the effectiveness of operations in these settings, the Fragile States Facility. As seen before, the FSF was set up as an autonomous entity within the organization so that it can operate with its own flexible rules and procedures, and not those applicable to AfDB's normal resources and operations.[54] The legal department has elaborated that due to the FSF's "operationally and financially autonomous nature", AfDB's operational policies "would not necessarily be strictly applicable", although they may "provide guidance".[55]

One example where operations funded through the FSF differ from AfDB's normal operations is budget assistance. The Operations Guidelines that govern the FSF allow some of the usual prerequisites for budget support—such as strong institutional capacity and sound governance—to be waived for countries that are supported under the FSF. This exception is quite important in practice, as staff have consequently been using the quick-disbursing instrument of budget support almost by default in fragile states that would otherwise be unlikely to qualify. Besides, the Operations Guidelines provide for the use of more lenient procedures to accelerate disbursements and procurement activities for the benefit of fragile states.

In contrast to the World Bank, AfDB has thus established a more coherent, almost self-contained regime for resource allocation, planning, and implementation in fragile states. It has done so by setting up a special-purpose entity with a largely autonomous legal and policy framework, the FSF. On the basis of the clearly defined eligibility criteria in the relevant Operations Guidelines, both the allocation of additional resources, and the application of differential treatment to fragile states are relatively transparent and predictable—and hence more likely to be "perceived as equitable", as AfDB's Fragile States Strategy demands.[56]

That having been said, AfDB has subsequently revised the eligibility criteria for support under FSF. Acknowledging that rigid criteria can constrain its flexibility and responsiveness when faced with extremely heterogeneous fragile states, the organization has shifted to a more qualitative,

country-by-country assessment of eligibility.[57] This shift illustrates that, though perhaps preferential in terms of predictability and coherence, a clear-cut definition of fragile states as a trigger for differential treatment inevitably confines an organization in responding flexibly to heterogeneous and evolving situations of fragility.

The Asian Development Bank, in turn, has followed neither the World Bank's nor the African Development Bank's approach in fragile states. Though it fully accords that fragile states pose specific challenges to development cooperation, so far, the ADB' has apparently preferred to respond with a rather *ad hoc*, case-by-case approach—and if needed, through waiving normal policy requirements, or using its Disaster and Emergency Assistance Policy.[58] Under ADB's Emergency Policy, which is also applicable in the context of conflict or post-conflict countries, standard ADB policies and procedures can "be liberally interpreted to ensure speedy and effective rehabilitation".[59] On the basis of this remarkably broad formulation, ADB's staff apparently enjoys far-reaching discretion in applying policies and procedures in the case of emergency—and what constitutes an emergency is again defined rather broadly.

The ADB's approach thus contrasts with that of the AfDB with its special Fragile States Facility, and with that of the World Bank with its new OP 10.00 for project lending. Both define more precisely which of their relevant policies and procedures can be simplified, modified or postponed, and in what situations. In practice, the ADB may no longer use uniform processes and procedures for fragile and non-fragile states alike—looking at its system of internal rules, however, this shift is so far barely reflected.[60]

We will return to a more detailed discussion of how and why AfDB and ADB have adapted their legal and policy frameworks to engage with fragile states. To make the comparison more meaningful, I first examine the approach of one further organization, the EU.

3 The European Union's (EU's) Development Cooperation with Fragile States

The EU has become one of the most important organizations providing ODA—and this is without counting the bilateral assistance provided by its member states in parallel. It is also the single largest provider of multilateral aid to fragile states, and in solely financial terms, outperforms even the World Bank.[61]

At the same time, we have seen that the EU is fundamentally different from other international development organizations, and that these differences also concern its legal framework. Firstly, with its political mandate, the EU can openly address issues of governance, internal conflict, or human rights violations. How does the EU consequently deal with questions of government effectiveness or legitimacy in fragile states? Secondly, the EU's legal framework is less state-centric and foresees a greater role for the participation of non-state actors in development. Is the organization thus more flexible to engage in the absence of effective government counterparts? Thirdly, the EU's legal framework contains a formal commitment to differentiation. How does this commitment reflect on the planning and implementation of EU development cooperation with fragile states?

In the following section, I look in more detail at these three, distinctive aspects of the EU's legal framework—the political mandate, the openness to non-state actors, and the commitment to differentiation—and examine how they shape the EU's approach to fragile states. The political mandate informs how the EU deals with ineffective or illegitimate government counterparts (Sect. 3.1). The EU's flexibility to engage with actors outside the central government concerns how it may bypass governments, or engage in the absence of government (Sect. 3.2). Finally, the principle of differentiation stimulates how in the allocation, planning, and implementation of aid, aid instruments and procedures can be adapted to different country circumstances and needs (Sect. 3.3).

3.1 The Political Mandate and the EU's Interactions with 'Difficult Partners'

The political mandate is probably what distinguishes the EU most from the World Bank, the AfDB and the ADB. The EU sees development cooperation as an aspect of foreign policy, involving political decision-making and diplomacy rather than the expertise of development economists alone.[62] With its commitment to fundamental principles like democracy, the rule of law, and human rights in development cooperation, the EU can, and to a certain extent must, address political issues in dealing with recipient countries.

Yet a strong, openly political dimension was introduced into the EU-ACP cooperation only in 1995, and further elaborated in the 2000 Cotonou Agreement.[63] Arguably, it is a direct expression of the new aid

orthodoxy that democracy and good governance are necessary for development, and a reflection of the changing understanding of state sovereignty post-1989—the same paradigm shifts that have informed the growing concern with fragile states in the development community.[64] From the outset, the EU has understood fragile states in terms of weak governance, rather than weak capacity alone. It does not have a formal classification of fragile states like the MDBs, but refers to "weak or failing structures and to situations where the social contract is broken due to the State's incapacity or unwillingness to deal with its basic functions".[65] Accordingly, the EU's decision to reinforce the political dimension in EU development cooperation is in itself a result of its increasing concern with fragile states, or 'difficult partners'.[66]

The key tools for addressing political issues in development cooperation with ACP countries are the Political Dialogue, and as a last resort, the invocation of Art. 96 procedures under the Cotonou Agreement. Inasmuch as the EU understands state fragility in terms of weak governance and the failure to provide basic services—issues that have a direct bearing on principles of democracy, the rule of law, and human rights—these tools are also central components of the EU's engagement with fragile states, Moreover, the EU uses the Political Dialogue and Art. 96 to respond to disorderly transfers of power in recipient countries, that is situations where the legal status of a government may be in doubt.

The Political Dialogue constitutes a continuous, formal or informal process of political consultations between the EU and ACP states,[67] with the broad objective of fostering mutual understanding and facilitating agreement.[68] Most importantly, the Dialogue provides a format for addressing developments concerning the political principles or 'essential elements' that underscore the EU-ACP partnership: democracy, rule of law, human rights and good governance.[69] The Political Dialogue is also explicitly concerned with peace-building, conflict prevention policies, and as later amended, "responses to situations of fragility".[70]

While the Political Dialogue constitutes the EU's process of first choice to address questions of government effectiveness or legitimacy in fragile states, Article 96 offers a last resort for dealing with political disagreements up to a breakdown of official relations.[71] If a party considers that one of the essential elements of the Agreement has been violated, it can unilaterally initiate formal consultations to identify measures that remedy the situation.[72] On the EU side, the Commission proposes when to invoke Article 96, upon which the Council decides by consensus.[73] If consultations fail,

are refused, or in the case of particularly flagrant violations of essential elements, the EU can take 'appropriate measures'. These are not further specified, except that they must be in accordance with international law, proportionate, and include suspension as a last resort.[74]

Notably, Article 96 is generally successive to the regular and more informal Political Dialogue that the EU holds with every ACP state under Article 8; once triggered, Article 96 consultations are still geared to reaching mutual agreement through dialogue, rather than sanctions.[75] From the perspective of ACP states, however, already the initiation of formal consultations is usually considered a form of punishment: consultations have always been initiated by the EU, and let to some form of 'appropriate measures'.[76]

In deciding when to trigger Article 96—that is when and by what standards human rights, the rule of law, or the principle of democracy have been violated—the EU holds considerable discretion—which it uses in practice.[77] In some cases, the Commission deliberately abstains from invoking Article 96 in response to violations, for instance when it expects consultations or sanctions to have no impact on the violating state. In essence, Article 96 thus constitutes a flexible, diplomatic tool: it allows the EU to enforce its general, political conditionality in development cooperation, but only if it sees a chance of inducing positive change.[78] Consistent decision-making concerning the invocation of Art. 96 and the use of sanctions are thus not a priority for the EU.

Since in about half the cases, Art. 96 was invoked in response to a coup d'état, it makes sense to draw a brief comparison with the World Bank's Operational Policy 7.30 on Dealing with De Facto Governments. Unlike OP 7.30, Art. 96 procedures can be used for addressing questions of ineffective or illegitimate government, independent of whether they directly affect the economic feasibility and success of concrete development projects or programs. The EU can and does openly address the essentially political nature of such questions, through an openly political process. Potential fiduciary risks of engaging with *de facto* governments are less important, as the EU's financial assistance usually does not come in the form of loans. For the World Bank with its non-political mandate, the purpose of OP 7.30 lays precisely in insulating an operational decision concerning the identification of government counterparts that are able to assume financial liability for the repayment of loans, from the political influence of its member states—which the Policy does more or less successfully.[79]

Article 96 and the Bank's OP 7.30 have in common that they leave a certain latitude to decision-makers, that is the EU Commission and Council and the World Bank's staff respectively. Neither foresees a procedure that allows for an open discussion of different considerations and objectives in deciding on how to engage with a *de facto* government. In both cases, the organization is not obliged to furnish reasons for its decision, which thus remain largely non-transparent.[80] Arguably, inasmuch as the EU's Article 96 and the World Bank's OP 7.30 serve different purposes, the organizations use their discretion differently. The EU uses its discretion to allow political considerations to decide how it will respond to an unconstitutional change of government, or deteriorating standards of governance more generally. OP 7.30, in contrast, aims to ensure that staff decisions on such delicate political matters are guided by mostly technical considerations. The discretion built into OP 7.30 thus rather reflects the Bank's preference for flexible and decentralized decision-making on operational matters.

Finally, both organizations could use their discretion to carefully consider the circumstances of each case and thus avoid an automatic suspension of aid, for instance, after a military coup or in situations of deteriorating governance more generally. After all, both organizations have committed to the OECD's Fragile States Principle to 'stay engaged' even in difficult situations, where disengagement may be neither adequate in light of the humanitarian needs of the population, nor conducive to longer-term objectives of development cooperation. For instance, if the EU seeks to gradually raise standards of good governance also in fragile states, it cannot automatically disengage wherever its standard of good governance is not yet or no longer met. At the same time, the EU and the World Bank could use the accorded discretion for political considerations—with the possible result being that the relative economic or political importance of a country may ultimately decide whether the EU's political conditionality are enforced, or Bank operations discontinued. The lack of transparency and often consistency in the decision-making of both organizations does not serve to dispel this suspicion.

3.2 Engagement in the Absence of (Good) Government and with Non-State Actors

How does the EU deal with situations where there is no government in power, temporarily or for prolonged periods of time? To address this

question, we first need to look to the EU's involvement in Somalia, where the organizations found ways to overcome constraints of its legal framework that it subsequently formalized and mainstreamed.

With the breakdown of government in Somalia, the ACP state was not able to ratify the Lomé IV Convention in 1989, the predecessor of the Cotonou Agreement.[81] The EU provided humanitarian aid to Somalia from 1991, but given the absence of a legal basis and government counterpart, it could not provide development funds. Therefore, the EU and the government representatives from all ACP states authorized the exceptional release of unspent funds reserved for Somalia under preceding Lomé Conventions. In the absence of a national government, the role of National Authorizing Officer, usually a senior government official appointed by the ACP state in all EU-financed operations, was to be replaced by the EU's Commissioner for External Relations, for as long as the circumstances justified.[82]

When Somalia still had no government to sign the Cotonou Agreement in 2000, the EU and the ACP countries agreed on a formal provision whereby countries that were parties to the previous Conventions but unable to sign and ratify "in the absence of normally established government institutions" may receive aid subject to the approval of the ACP-EU Council of Ministers.[83] Further, the Agreement states that "provisions will be made for those countries which, due to exceptional circumstances, cannot access normal programmable resources."[84] The Council of Ministers subsequently authorized an EU official to be entrusted with the competence usually accorded to the National Authorizing Officer—and to act on behalf of the Somali people.[85] This practice was codified in a 2005 amendment to the Agreement, and is now applicable in all situations where an ACP state has insufficient capacity due to a crisis caused by "war or other conflict, or exceptional circumstances with a comparable effect"—that is, situations that fall short of a complete breakdown of government like in Somalia.[86] Normal implementation arrangements shall resume as soon as the responsible national authorities are again able to manage development resources.

Like the World Bank, the EU has thus not only sought an *ad hoc* response to dealing with the absence of government, but has formalized and mainstreamed its response by amending the Cotonou Agreement.[87] The approach of the World Bank and the EU is also similar in that, broadly speaking, both organizations respond to the ineffectiveness of national governments by allowing for the temporary substitution of government approval or implementation.

A notable difference consists in the legal nature of the relevant rules. The World Bank's response is codified in internal rules, OP 2.30 and OP 10.00, which are elaborated by Management and approved by the Executive Directors. In contrast, the provisions in the Cotonou Agreement were included in a multilateral treaty following negotiations between the EU and the ACP States and a formal amendment procedure. The EU's rules were thus not unilaterally set, but at least formally, are based on the consent of those states to which substituting arrangements could eventually apply.

Besides the exceptional arrangements included in the Cotonou Agreement, it is important to note that the EU is generally more flexible when it comes to engaging in a country despite the absence of government. Firstly, the EU can always use humanitarian assistance as an alternative channel for rendering assistance to populations in need without going through the government, as it also did in Somalia.[88] Under the Cotonou Agreement, humanitarian assistance can be provided at the request of the affected ACP state, or alternatively, of the Commission, an international organization, or even an international or local NGO.[89] Though humanitarian assistance is usually also provided with the consent of the affected state, a formal request from the government in power is hence not required. Not least for this reason, the EU understands humanitarian assistance also as an instrument of last resort in fragile states: to continue rendering assistance in situations that are deemed inadequate for the more state-centric and cooperative modes of development assistance.

Secondly, we have seen that the EU's legal framework leaves room for providing assistance to local authorities and non-state actors directly. These are further avenues of development cooperation where institutions of the central government are not functioning, and explicitly recognized as such by the EU in its approach to fragile states. For the EU, cooperation with non-state actors constitutes a way to ensure continued engagement in a country "for reasons of solidarity with populations, of long term aid effectiveness and of global security"—which captures very well the mix of humanitarian, operational and political motivations that regularly shape the international community's concern with fragile states.[90]

Financing of non-state actors under the Cotonou Agreement is still subject to the agreement of the ACP state, and there is no explicit exception for situations where there is no government to render approval.[91] More flexibility exists under the DCI Regulation concerning Thematic Programmes, though they receive only a relatively small share of the EU's

budget.[92] The EU uses Thematic Programmes, specifically the one for non-state actors and local authorities, to finance activities precisely where there is no agreement with the government—or for that matter, no government to agree with.[93] In addition, the EU's Instrument on Democracy and Human Rights (EIDHR) is specifically designed for rendering direct support to civil society organizations, parliaments, and even individuals.[94] Established by means of a separate Regulation, the instrument shall be used precisely in difficult situations where there is no agreement with the government on the promotion of democratic values and human rights, or no official cooperation with the government. It is another preferred instrument of the EU for engaging with fragile states.

Finally, even if the EU has thus a legal basis and specific instruments for supporting local authorities and non-state actors instead of engaging with the national government, its development cooperation remains very much focused on central government actors.[95] This is partly owed to the fact that in order to engage with actors outside of the government—be it as participants in planning and implementation, or as direct recipients of grants—the organization needs to have a sound knowledge of local circumstances and dynamics, and decide whom to support or not to support without fuelling conflict or societal tensions. In Somalia, for instance, the EU sought to extend its cooperation with national and local non-state actors, but struggled to identify counterparts with the necessary capability and some degree of broader representativeness.[96] Even where counterparts can be identified, the EU's procedures for engaging with non-state actors are still particularly complex, posing further obstacles. Last but not least, the gap between the EU's formal commitment and operational practice is owed to an established institutional culture of dealing with formal government institutions—a culture not so different from that of the MDBs.[97]

3.3 Differentiation and Special Treatment in Aid Allocation, Planning and Implementation

The EU has a comprehensive set of non-binding policy documents acknowledging that fragile states constitute particularly challenging environments for development cooperation.[98] These documents form part of the policy framework that provides the analytical and conceptual grounds for the EU's engagement, but do not take the form of binding EU secondary law. Moreover, they mostly formulate strategies and objectives—such as strengthening democratic governance, institutional capacities, and

state-society relations—rather than establishing different processes for development cooperation with fragile states.

If the EU thus appears more concerned with doing different things, than with doing things differently in fragile states, this is for two reasons. Firstly, the EU's legal regime for project lending and budget assistance is generally less prescriptive and demanding on recipients' institutions than those of the MDBs, where internal rules that regulate the provision of ODA have posed obstacles to engaging in weak-capacity, high-risk environments.[99] For project lending, the EU's legal framework establishes less demanding *ex ante* requirements for the approval of projects.[100] For budget assistance, the EU maintains relative discretion in deciding when and on what grounds to provide direct support to a country's budget, and there is no minimum threshold of preconditions that potential recipients must meet.[101] Certainly, the EU makes considerable use of political conditionalities that come to bear during implementation.[102] Yet we have seen that the EU does not always strictly enforce these conditionalities by sanctioning violations.

Secondly, the EU is less concerned with doing things differently in the sense of adapting its standards and processes for fragile states, because differentiation already constitutes a fundamental principle of EU development cooperation. In principle, the legal framework thus appears more attuned to different levels of capacity, or for that matter, variations in empirical statehood. How does the relatively abstract commitment to differentiation inform the actual allocation, planning and implementation of EU development assistance to fragile states?

The principle of differentiation resounds in a number of provisions throughout the legal framework for development cooperation with ACP as well as non-ACP countries. Both at the level of resource allocation and in project planning and implementation, the EU must ensure that its approaches and aid instruments are tailored to a country's specific circumstances or needs.[103] Next to this general commitment, the principle of differentiation applies in particular to Least-Developed Countries and other vulnerable groups that are not further defined, where it provides the basis for special and differential treatment. For instance, the EU allocates resources for cooperation with ACP and non-ACP countries on the basis of a country's performance as well as needs, paying particular attention to the difficulties of conflict-affected states.[104] Similarly, the Cotonou Agreement and DCI Regulation call for differentiation in the design of strategies, projects, and programs in

general, and require special treatment for LDCs and special consideration of the needs of post-conflict countries.[105]

Apart from differentiation according to local context, a number of provisions in the EU's legal framework also allow for flexibility in adapting to changing circumstances over time. Again, flexibility concerns the allocation of resources to unforeseen needs, the review of projects and programs in line with changing circumstances, as well as adjustments in the implementation phase. Since the adoption of the new DCI Regulation in 2014, such measures concerning the extraordinary allocation of resources and flexibility in programming are available for all countries "in crisis, post-crisis, or situations of fragility".[106]

The Cotonou Agreement and the DCI Regulation thus contain a number of provisions that differentiate in favour of weak-capacity states, some of which explicitly address fragile and conflict-affected states. In addition, the EU has created specific instruments to more effectively prevent or respond to crisis in developing countries, most importantly, the Instrument contributing to Stability and Peace (IcSP).[107]

Through the IcSP, the EU seeks to overcome the constraints of other financing instruments that are less suitable for rapid, flexible and sustained engagement in countries experiencing crisis. In fact, the IcSP serves the express purpose of providing rapid aid for to (re)establish the conditions deemed necessary to implement the EU's normal development cooperation in crisis-affected countries.[108] The instrument can be used to finance activities at the interface between foreign, security, and development policy, including in situations where cooperation has been suspended under Article 96, following a violation of democracy, rule of law, or human rights.

To address its broad objectives, the IcSP offers considerable flexibility regarding what type of measures can be supported and who can receive aid, from national governments to community-level institutions, international organizations and non-state actors. Besides, the instrument is subject to a simplified decision-making process and lighter programming requirements to enable a more rapid use of funds.

Finally, a number of more recent reforms of EU development cooperation explicitly target fragile states.[109] Before, the fragile states terminology appeared in EU Regulations and in the Cotonou Agreement since 2010, but played no concrete role in guiding the planning and implementation of EU development cooperation. Now, the EU's revised budget support instrument, for example, has a specific category for fragile states that is

targeted at state-building, or more precisely, "transition processes towards development and democratic governance".[110] For its so-called 'State Building Contracts', the EU no longer needs to assess a government's track record in terms of human rights, democracy, and rule of law before granting budget support. Instead, potential risks shall be balanced against the risk of inaction, for example, concerning the provision of vital basic services—a shift in thinking that we have also seen at the World Bank.[111] This is not to say that a country's commitment to human rights or democracy no longer matter in the EU's choice of aid instrument. If countries "loosen" their commitment to such standards, the EU may instead gear up its cooperation with non-state actors and local authorities.[112]

In sum, the EU's legal framework for development cooperation establishes differentiation—a commitment to take into account the different starting point of each country—as a general principle, which neither that of the World Bank, the AfDB or ADB do. As an abstract principle, what differentiation entails needs to be concretized through more specific rules concerning the allocation, planning, and implementation of aid. Similar to the MDBs, the EU has accordingly introduced a number of provisions that differentiate based on a country's capacity or needs. Differential treatment is mostly accorded to LDCs and vulnerable groups, though increasingly also to countries affected by conflict, crises, or 'situations of fragility'.

But what material and procedural standards can be modified, under what conditions, and how, is not always clear. Arguably, this corresponds to the finding that the legal framework that governs the planning and implementation of EU operations is generally more flexible and accommodating to political considerations than those of the MDBs. Whether and how a government's structure or performance affect how the EU differentiates between different recipient countries thus appears to remain a political decision—perhaps not surprisingly for a political organization.

4 Comparison and Conclusion

This chapter provided a short analysis of how the AfDB, the ADB and the EU have adapted their legal and policy frameworks to engage in development cooperation with fragile states. My objective was twofold: first, to present a more comprehensive picture of adjustments and regulatory trends concerning fragile states in the law of development cooperation. Second, to learn more about the factors that may influence whether and

how an organization decides to adapt its rules, and thus formalize a differentiated approach.

The African and the Asian Development Bank do not only operate with the same classification and hence understanding of fragile states than the World Bank. With their similar legal frameworks, they also face similar constraints when engaging in fragile situations. I therefore suspected that they also emulate the World Bank's response to these challenges.

This is indeed the case with regards to the MDBs' dealings with *de facto* governments. After all, how to engage with an entity that came to power by unconstitutional means is an area of common concern to development banks, which need clarity particularly regarding a government's capacity and will to fulfil its financial obligations. The question arises so frequently that all organizations have felt the need to provide guidance to staff, though with varying degrees of bindingness.

In contrast, how to engage in the absence of a government in power is a question that has obviously come up much less often. Neither AfDB nor ADB have formulated a general policy principle concerning their involvement in the absence of a government in power, as the World Bank did in OP 2.30. Nonetheless, though normally bound to operate with and through governments, both organizations have created avenues through which they can provide limited support to the population of a country without necessarily involving the government—the AfDB with its Fragile States Facility, and the ADB through emergency assistance. Especially where the organizations' regular resources are not involved, both organizations are thus prepared to work around the government—though if not from a government, the ADB still insists on the approval of an "internationally legitimate governing authority".[113]

Like the World Bank, AfDB and ADB have also a practice of reducing or postponing requirements to enable a more flexible and speedy response in countries with low capacity and urgent needs. How they do so, however, differs. With its Fragile States Facility, the AfDB has created a quasi self-contained, differentiated regime that governs the use of resources for operations in fragile states. In contrast, the ADB has largely refrained from introducing specific exceptions for fragile or conflict-affected states in its legal and policy framework, and instead preferred to respond *ad hoc*, if necessary by waiving requirements. In sum, the 'gravitational force' and model role of the World Bank, the oldest and largest of the MDBs, is less potent than expected when it comes to developing and formalizing an approach to engaging with fragile states.[114]

The EU is an organization essentially different from the MDBs, and also operates with a different mandate when providing ODA to fragile states. Besides the fact that is not a development bank that provides loans, the most notable distinction is that the EU has a political mandate, and development cooperation constitutes one of several instruments of the EU's external relations toolkit. Two additional distinctions in its legal framework proved to be relevant in the context of EU engagement in fragile states: the principle of participation (and hence the commitment to a notion of ownership that extends beyond the executive branch of government), and the principle of differentiation.

Still, the EU assumes "the presence of a functioning government as a legitimate interlocutor and partner" in development cooperation no less than the MDBs, and has faced challenges in the context of fragile states.[115] A number of exceptional provisions were therefore included in the Cotonou Agreement, to allow allocating resources and conducting operations in countries with no government in power. Importantly, these provisions were not introduced through the adoption of an internal rule like those of the World Bank in OP 2.30, but through negotiation and subsequent amendment of the Cotonou Agreement—and hence with the consent of those potentially affected.

In turn, the EU's approach to situations that concern not the absence of a government, but rather the identification of a legitimate government counterpart in post-conflict countries or following a coup d'état, is markedly different from that of the MDBs. These are situations that quite simply do not pose a challenge to the EU, since what makes them so tricky for the MDBs—their undeniably political nature—makes them palatable for a political organization. Instead of adopting guidelines for steering the difficult course between admissible and inadmissible political considerations, the EU can call a spade a spade—and leave it to political decision-making how to choose and interact with different government counterparts—including 'difficult partners'. What is more, if it does not want to interact with a government for political reasons, the EU has still the mandate and instruments to directly deliver aid to non-state actors or local authorities, and is hence less fixated on dealing only with national governments than the MDBs.

When it comes to modifying substantive or procedural requirements for recipient states with capacity constraints, the EU's approach proved to be at once more comprehensive and less specific. Differentiation constitutes a fundamental principle for development cooperation. Throughout

its legal framework, the EU is bound to take into consideration the special circumstances and needs of each country, including those in 'situations of fragility'. Beyond this broad commitment, however, precisely what standards can be lowered or postponed, for whom and under what conditions, is not always clear. With regard to fragile states, the EU's emphasis has rather been on simplifying procedures to be able to respond more rapidly to situations of crises.

On the basis of this more nuanced picture, what do we learn about the factors that influence whether and how international development organizations adapt their rules to engage with fragile states? Obviously, a first, important factor is to what extent an organization's rules are deemed too constraining or inadequate to begin with. It is thus not surprising that we found the greatest differences between the EU and the MDBs. In contrast to the EU with its political mandate, the MDBs have a political prohibition clause in their statutes, which probably poses the most constraints in dealing with fragile states—for better or for worse. Besides, standards of effectiveness that are partly responsible for the high *ex ante* requirements on ODA recipients in the internal rules of the MDBs are somewhat less paramount in the EU's legal framework, and hence do not stand in the way of assisting countries with weak capacity.

Yet the analysis of the AfDB and the ADB has also brought to light notable differences in their respective approach, although their legal frameworks and mandates are largely similar to that of the World Bank. We have seen differences emerge regarding the extent to which the three MDBs have decided to modify rules of the legal framework—or instead preferred a less regulated, less formalized response. After all, it is not mandate questions alone that account for an organization's approach to fragile states. Other factors can also be important, even if they are more difficult to grasp, at least from a legal perspective: an organization's institutional culture, for instance, its particular conception of state fragility, or the interests of influential member states.

In this light, the fact that the ADB has largely abstained from making substantial modifications to its legal framework can be attributed to the fact that there are fewer fragile states in the region.[116] It is also owed to an institutional culture that is particularly responsive to the sensitivities of treating 'fragile states' differently. This becomes clear considering that the ADB has continuously reiterated that the classification of a country as fragile does not in any way impair its membership status within the organization, but constitutes an acknowledgement of the country's special needs.[117]

The AfDB, in turn, covers the region that includes by far the most fragile states. Still, it has not been as active as the World Bank in adopting or modifying internal rules. One reason is that the AfDB quite simply has a general preference for flexibility and experimental, case-by-case approaches over strict regulation—as suggested by the fact that it has still no Operational Manual like the other MDBs. Arguably, the role of lawyers within the institution is not the same as the role that lawyers have come to assume in the World Bank.

Further, a fundamental difference between the EU and the MDBs lies not just in their legal mandates, but also in the fact that the former is not a bank that needs to worry about its creditor rating or the financial liabilities of its clients. Its institutional culture is less risk-averse, which is also reflected in how the EU engages with fragile states.[118] Besides, the EU also seems to have a somewhat different conception of state fragility than the MDBs. At least in policy documents, the EU emphasizes poor governance and weak state legitimacy as key characteristics of state fragility.[119] In contrast, the World Bank's conception of state fragility (at least initially) focused on weak state capacity, and its approach accordingly on differentiated requirements and implementation assistance.

Further, it should not be underestimated what role an organization's membership structure can play in shaping its approach to fragile states. Differentiating more between individual recipient states, for instance, is unlikely to meet with objections in an organization consisting only of donors like the EU. In contrast, development organizations with a more mixed membership structure like the World Bank will always have to respond to the concern that differentiation in favour of one country automatically entails disadvantages for others.

Finally, the comparison between the World Bank and the often similar-minded AfDB and ADB, which have gone less far in their reform efforts concerning fragile states, draws attention to a last, important factor. The World Bank's most powerful shareholders have shown a strong interest in seeing the organization engage more with fragile states, and therefore overcome constraints posed by its legal framework. That the World Bank has overcome such constraints has much to do with the dominant position of these shareholders in the Executive Board, the organ that has the power to interpret the Articles of Agreement, and to approve new internal rules and operations.[120]

Notes

1. For an overview, see already *supra* Sect. 3.2 in Chap. 3.
2. On fundamental commonalities in the legal frameworks of international development organizations, see *supra* Sect. 2 in Chap. 4.
3. Dann distinguishes between specialized, technocratic organizations on the one hand, and organizations with a 'diplomatic-heteronomous' focus on the other hand. See Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 200–202.
4. Next to the World Bank, the AfDB and the ADB, the Inter-American Development Bank (IDB) and the European Bank for Reconstruction and Development (EBRD) belong to the group of MDBs.
5. The African Development Fund is the concessional lending arm of the AfDB, which thus has the same dual structure as the World Bank (consisting of the IBRD and the IDA). The Asian Development Bank provides both loans to middle-income countries and concessional loans to developing countries, but uses 'Special Funds' for the latter, which are held separate from its ordinary capital.
6. AfDB Agreement, Art. 17 (1) lit. j; ADB Agreement, Art. 14 (xiv).
7. ADB Agreement, Art. 36 (2); AfDB Agreement, Art. 38 (2).
8. ADB's Operations Manual contains operational policies that are similar to the World Bank's OPs, but called Bank Policies (BPs). ADB's Operational Procedures (OPs) spell out procedural requirements like the World Bank's Bank Procedures.
9. AfDB has no Operations Manual, though all policy and legal documents are available online on its website. These include sectoral policies and policies on cross-cutting issues, financing policies, and guidelines and procedures. Which of these are considered binding for staff is not clear from their designation. AfDB's Independent Review Mechanism (the equivalent of the World Bank's Inspection Panel), however, is mandated to review staff compliance with its "operational policies and procedures", which suggest that they are meant to be internally binding. See the Board Resolution instituting the Independent Review Mechanism, Resolution B/BD/2010/10—F/BD/2010/04 (June 16, 2010), para. 11 (i).
10. Laurence Boisson de Chazournes, 'Partnerships, Emulation, and Coordination: Toward the Emergence of a Droit Commun in the Field of Development Finance', in Hassane Cissé, et al. (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012).
11. This is true even without considering the fact that the EU is an international organization with a supranational character. In fact, its suprana-

tional character does not matter much for EU development cooperation, since it is a policy field where EU institutions and member states exercise their competences in parallel (see TFEU, Art. 4 IV).

12. For a comprehensive account of the EU as a provider of development assistance, its historical origins, applicable legal framework, and specific characteristics in comparison with the World Bank and Germany, see Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*.
13. For an overview of the different instruments, see EU Directorate-General for External Policies, European Parliament, '*EU Development Cooperation in Fragile States: Challenges and Opportunities*' (April 2013), Figure 4. While often seen as an important comparative advantage of the EU in fragile states, the range of instruments that can be used in parallel also makes the delimitation, coordination, and coherence between them particularly challenging. See, for instance, Panos Koutrakos, 'The Nexus Between the European Union's Common Security and Defence Policy and Development', in Anthony Arnull, et al. (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford University Press, 2011).
14. TFEU Art. 4 (4), establishes the competence of the EU in the field of development cooperation, whereas Art. 208-211 contain more specific provisions. At the institutional level, competences are divided between "Development and Cooperation—EuropeAid", which is mainly responsible for concrete implementation, and the European External Action Service (EEAS), a functionally autonomous body whose staff consists one-third each of former employees of the Commission, of the Council and national diplomats. On the organizational structure and legal framework of EU development cooperation in detail, see Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 170–180.
15. The Internal Agreement on the 11th EDF (OJ L 210, 6.8.2013) is an agreement between EU member state governments that determines the contributions of each member state to the EDF. In addition, Regulation (EU) 2015/322 determines the budgetary and procedural regime for the implementation of the EDF.
16. EU Regulation No. 233/2014 establishing a financing instrument for development cooperation for the period of 2014–2020, 11 March 2014 (hereinafter DCI Regulation). The DCI Regulation constitutes the basic act that is the precondition for EU budget appropriations, covering the objectives and principles, processes and procedures of cooperation. Of the four other regulations, of particular interest in the context of the present study are Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11

March 2014 on establishing a financing instrument for democracy and human rights worldwide (OJ L 77/85); and Regulation (EU) No 230/2014 establishing an Instrument contributing to Stability and Peace (IcSP).

17. In general, however, soft law plays a less important role in the legal framework for EU development cooperation, since it has such a plurality of formal legal acts at its disposal.
18. On basic ideas in the law of international development organizations in general, see already *supra* Sect. 2 in Chap. 4.
19. TFEU Art. 208 (2).
20. Cotonou Agreement, Art. 11 (2). See also Art. 1 (Objectives), and Art. 11 (1), which was amended in 2010 to explicitly acknowledge the interdependency between development and poverty reduction on the one hand, and peace and security on the other hand.
21. DCI Regulation, Art. 3 (3) and Annex I on the Areas of Cooperation under Geographic Programmes.
22. TFEU Art. 208 (1), referring to TEU Title V, Art. 21 (1), the principles of EU External Action. Also Cotonou Agreement, Art. 9 (1) and DCI Regulation Art. 3 (1). On the EU's political mandate, see also Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 178–179.
23. Cotonou Agreement, Art. 2 and Art. 58 (2) lit (a).
24. See Cotonou Agreement, Art. 2, where the principle of ownership was for the first time included in a binding international legal treaty; and Art. 4, whereby "The ACP States shall determine the development principles, strategies and models of their economies and societies in all sovereignty." Somewhat less prominently, the principle of ownership is also included in the DCI Regulation, Art. 3 (8) lit. a).
25. Cotonou Agreement, Art. 2; DCI Regulation, Art. 3 (8) lit. c); and the European Consensus on Development, recognizing participation of civil society as a common principle (para. 4 (3)).
26. For example, Cotonou Agreement, Art. 58 (2), according to which local authorities, private enterprises, "decentralised cooperation and other non-State actors from the ACP States" are eligible for EU financing only subject to the consent of the ACP state. The EU typically funds civil society organizations only when their activities are identified in the country's national development strategy.
27. DCI Regulation, Art. 6 (2) lit. a).
28. Cotonou Agreement, Art. 2. Also DCI Regulation, Art. 3 (2); and the European Consensus on Development, paras. 56–66.
29. In detail, see *infra* Sect. 3.3 of this chapter.
30. The EU is required to treat all its member states equally, but this principle of equal treatment does not extent to its cooperation with developing countries, which are not member states of the organization.

31. For instance, the principles of participation and differentiation were all introduced with the 2000 Cotonou Agreement. On the changing political relations between the EU and ACP states since the 1990s and the according legal modifications introduced to their cooperation agreement, see Karin Arts, 'ACP-EU Relations in a New Era: The Cotonou Agreement', 40 *Common Market Law Review*, 95 (2003), and Bernd Martenczuk, 'From Lomé to Cotonou: The ACP-EC Partnershp Agreement in a Legal Perspective', 5 *European Foreign Affairs Review*, 461 (2000).
32. For example, the Cotonou Agreement was signed in 2000 for a 20-year period and has been updated several times. The Regulations that inform the EU's cooperation with non-ACP states were adopted in 2006 and updated in 2014. Even in usually static, EU primary law, there are provisions that allow for an adaptation over time. A case in point is Art. 208 (2) of the TFEU, whereby the objectives of EU development cooperation may evolve with the EU's commitments to new, internationally agreed objectives
33. See *supra* Sect. 2 in Chap. 5 for an analysis of OP 2.30 and OP 7.30.
34. African Development Bank Group's Strategy for Enhanced Engagement in Fragile States (ADB/BD/WP/2008/37-ADF/BD/WP/2008/10), approved by the Board of Directors in March 2008. Before, the AfDB had already approved non-binding Policy Guidelines for Post-Conflict Assistance in 2001, just after the World Bank had approved OP 2.30. Unlike OP 2.30, however, the Guidelines did not regulate how to engage in countries with no government in power, or in non-member states territories.
35. AfDB Operations Guidelines of the Fragile States Facility (hereinafter FSF Operations Guidelines), Annex 1: Legal Note on the Fragile States Facility and the Operations Guidelines (hereinafter FSF Legal Note).
36. On the World Bank's use of trust fund arrangements in fragile states, see *supra* Sect. 2 in Chap. 5. The FSF also resembles the World Bank's State- and Peacebuilding Fund, which can be used to channel resources directly to non-state actors.
37. FSF Operations Guidelines, para. 3.1.3 [emphasis added]. AfDB staff should therefore candidly assess "the composition of the transitional government, whether it has support from the international community and the timetable for holding parliamentary and presidential elections". Moreover, post-conflict countries should have signed an "internationally recognized Comprehensive Peace Agreement (CPA) or a post-crisis or reconciliation agreement."
38. FSF Operations Guidelines, para. 3.3.1.

39. FSF Operations Guidelines, para. 3.3.5 (ii). The targeted support window is the only window for which the AfDB has issued specific guidelines, the Guidelines on Administration of the Technical Assistance and Capacity Building Program of Pillar III Operations.
40. African Development Fund, '*Strategy for Enhanced Engagement in Fragile States*', para. 2.3 and Figure I; and the FSF Operations Guidelines, para. 3.3.5 on service delivery through non-sovereigns. The AfDB has channelled resources through non-sovereigns such as NGOs, private sector organizations, or UN agencies particularly to support service delivery in fragile states.
41. AfDB Agreement, Art. 17 (1) lit. b).
42. AfDB, Revised Policy Guidelines and Procedures for Emergency Relief Assistance, para. 3.1. Emergency relief is financed through a small Special Relief Fund, which is mostly an instrument of solidarity as it only provides grants of US$1 million. Implementing agencies can be either the government, a UN specialized agency, or NGOs.
43. In contrast, the World Bank did not deal directly with the Transitional Federal Government, but only later with Somalia's Federal Government established in 2012. On the World Bank's engagement in Somalia under OP 2.30, see also *supra* Sect. 2.1 in Chap. 5.
44. ADB Disaster and Emergency Assistance Policy, OM Section D7/BP (June 15, 2004), para. 26 (i) and the according Operational Procedures (OM Section D7/OP), para. 7 (ii).
45. See ADB Disaster and Emergency Assistance Policy, paras. 20–25 on the scope and conditions of Emergency Assistance Loans (EALs). Notably, though a portion of ADB's resources can also be provided in the form of grants, EALs are still loans for which the government or the "legitimate governing authority" would need to assume financial liability.
46. ADB Agreement, Art. 14 (iii) and 36 (2).
47. AfDB Presidential Directive No.03/2010 concerning Continuity of Operations and Engagement with *De facto* Governments in Regional Member Countries, issued by the President on October 20, 2010. Some smaller differences concern, for instance, the requirement for AfDB's Management to inform the Board, which is not spelled out but practiced by the World Bank under OP 7.30. Moreover, the Directive states that new operations with a *de facto* government could also be implemented by the UN or another emergency assistance agency, which would again reduce the role that the *de facto* government would play during implementation (para. 13).
48. AfDB De Facto Governments Directive No.03/2010, para. 9.
49. Memo of the General Counsel re *De Facto* Governments, dated 16 August 2000, with attached ADB Guidelines on Dealings with *De Facto* Governments.

50. African Development Fund, '*Strategy for Enhanced Engagement in Fragile States*'.
51. Asian Development Bank, '*Operational Plan for Enhancing ADB's Effectiveness in Fragile and Conflict-Affected Situations*' and Asian Development Bank, '*Working Differently in Fragile and Conflict-affected Situations—The ADB Experience: A Staff Handbook*'.
52. Approved in August 2016, the World Bank's new "Environmental and Social Framework" consolidates pre-existing requirements in the areas of environmental and social protection. It is expected to take effect in early 2018.
53. FSF Legal Note, para. 1.1.
54. *Supra* Sect. 2.1 of this chapter.
55. FSF Legal Note, para. 6.1 and 2.2.
56. African Development Fund, '*Strategy for Enhanced Engagement in Fragile States*', para. 3.10.
57. See the Report from the African Development Fund's 13th Replenishment, ADF-13 Report on Supporting Africa's Transformation, para. 4.21. The importance of the CPIA-based classification of a country as fragile in the eligibility criteria has thus been further reduced, and merely acts as one possible reference point for staff.
58. See Asian Development Bank, '*Achieving Development Effectiveness in Weakly Performing Countries. The Asian Development Bank's Approach to Engaging with Weakly Performing Countries*', para. 48, whereby relaxations to business process requirements require would require an approval of Management or the Board of Directors.
59. ADB's Bank Procedures for Disaster and Emergency Assistance (OM Section D7/ BP), paras. 16, 18, 19.
60. ADB's Staff Handbook (*supra* note 51) therefore explicitly states that it does not propose any changes at the level of operational policies and procedures. The recommendations in the Handbook rather concern the provision of policy advice, capacity-building and implementation assistance through ADB staff around the design of projects in fragile states, as well as recommendations concerning the implementation of projects in weak-capacity, high-risk environments.
61. In 2012, the EU provided US$5599 Million to fragile states. OECD, '*States of Fragility. Meeting Post-2015 Ambitions*', p. 119, Figure B.5.
62. Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 339, 384, describes the EU's law for planning and implementing development cooperation as being "diplomatically oriented".
63. Political principles entered into the Cotonou Agreement despite the reservations of ACP states, an expression of power asymmetries. See the

Communication to the Council and the European Parliament: Guidelines for the Negotiation of New Cooperation agreements with the African, Caribbean and Pacific (ACP) Countries, COM (97) 537 final, 29 October; and on the EU's motivation for introducing stronger political conditionality, Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press, 2005), 12–17.

64. *Supra* Sect. 2.1 in Chap. 3. Dann argues that the explicit commitment of EU development cooperation to political values marks a decisive change after the Cold War, when it became increasingly accepted to limit recipients' sovereignty by linking aid to political goals. Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 178–179.
65. Council Conclusions on a EU Response to Situations of Fragility, 2831st External Relations Council meeting in Brussels, 19–20 November 2007, para. 2. The Conclusions further outline the basic functions of the state in terms of "rule of law, protection of human rights and fundamental freedoms, security and safety of its population, poverty reduction, service delivery, the transparent and equitable management of resources and access to power".
66. For the EU, "difficult partners" are countries where cooperation has been suspended, national authorities are not committed to poverty reduction and basic political principles, and where the dialogue on participation of non-state actors in development is very limited. See the Commission Communication on the Thematic Programme "Non-State actors and local authorities in development cooperation", COM(2006) 19 (25 January 2006).
67. Cotonou Agreement, Art. 8 (6). The format of the Dialogue is very flexible, and formal or informal according to what is appropriate and required.
68. Cotonou Agreement, Art. 8 (2) and (3). The objective of facilitating mutual understanding concerns all aspects of the Agreement and basically any other question of common interest. See also the guidelines for the Political Dialogue established in the Resolution on the ACP-EU political dialogue (Article 8 of the Cotonou Agreement), OJ C 80/17 (1.4.2005).
69. Cotonou Agreement, Art. 8 (4) and Art. 9 (4). Similar commitments are included in Art. 3 (1) of the DCI Regulation, and in separate partnership and cooperation agreements concluded with non-ACP-countries.
70. Cotonou Agreement, Art. 8 (5).
71. Communication from the Commission to the Council, Towards an EU Response to Situations of Fragility, para. 4.7, stating that addressing fragility demands "promoting political will for reform through dialogue and incentives, rather than through conditionality and sanction".

72. Cotonou Agreement, Art. 96 (2) lit. a), which also establishes some procedural requirements for consultations. Good governance is not an essential element, but only a 'fundamental element' of the Agreement, and violations in this regard—namely cases of corruption—are dealt with under Art. 97 of the Agreement, establishing a similar procedure that has rarely been used. Specific suspension clauses are also included in partnership and cooperation agreements with non-ACP countries.
73. There are Council Conclusions for each case under Article 96, so what countries are subject to special measures is publically available information.
74. Cotonou Agreement, Art. 96 (2) lit. c).
75. Cotonou Agreement, Art. 8 (2) and Art. 96 1a and (2) lit. a).
76. James Mackie & Julia Zinke, European Centre for Development Policy Management, Discussion Paper No. 64A, '*When Agreement Breaks Down, What Next? The Cotonou Agreement's Article 96 Consultation Procedure*' (2005), 5. Since the mid-term review of the Cotonou Agreement in 2005, the ACP group as a whole can assume a role in the consultations, so that individual ACP states are no longer alone in negotiating with the EU.
77. Article 96 procedures were used mostly in response to alleged violations of democratic principles (often coup d'états) and human rights, for instance, in Zimbabwe and Sudan, Cote d'Ivoire and Liberia, Guinea, Togo, Haiti and the Fiji Islands. See Evaluation Services of the EU, Evaluation of Co-ordination and Coherence in the Application of Article 96 of the Cotonou Partnership Agreement, 2007; and with an overview and discussion of cases between 1996 and 2004, Andrew Bradley, European Centre for Development Policy Management, Discussion Paper No. 64D, '*An ACP Perspective and Overview of Article 96 Cases*' (August 2005).
78. The case of Zimbabwe, for instance, is often cited as a negative example. In Zimbabwe, the EU invoked Art. 96 in 2002, but its measures have remained without impact and only negatively affected EU-Africa relations prior to the 2002 elections. On the factors that are seen to contribute to successful consultations, see Mackie & Zinke, '*When Agreement Breaks Down, What Next? The Cotonou Agreement's Article 96 Consultation Procedure*', 8.
79. For a detailed analysis and evaluation of OP 7.30 see *supra* Sect. 2 in Chap. 5.
80. Further latitude consists in the fact that World Bank staff can practically invoke OP 7.30 without making a final decision on the continuation of operations for indefinite times. Somewhat similarly, the EU is not required

to establish the duration of 'appropriate measures' ahead, to provide an exit plan, or to resume consultations before measures are prolonged.

81. For a detailed reconstruction and analysis of the EU's engagement in Somalia, see Emma Visman, European Center for Development Policy Management, ECDPM Working Paper Number 66, '*Cooperation with Politically Fragile Countries: Lessons from EU Support to Somalia*' (1998).
82. On the National Authorising Officer, see Cotonou Agreement, Art. 35. During the 1995 mid-term amendment of Lomé IV, a provision was added to enable Somalia to accede the Convention as soon as it had formed a government—and in that case, to postpone the application of certain rights and obligations under the Convention in the interest of Somalia. See Agreement Amending the Fourth ACP-EC Convention of Lomé, November 1995, Art. 364a.
83. Cotonou Agreement, Art. 93 (6).
84. Cotonou Agreement, Annex IV (Implementation and Management Procedures), Art. 3 (3). In fact, this arrangement was not only used in the absence of a central government in Somalia, but also in Sudan, where the EU was unwilling to engage with the government for political reasons. See Sophie Gomes, et al., European Center for Development Policy Management ECDPM Discussion Paper No. 31, '*The EU's Response to Conflict Affected Countries Operational Guidance for the Implementation of the Cotonou Agreement*'.
85. ACP-EC Council of Ministers Decision No 3/2001 on the allocation of resources to Somalia from the 8th and 9th European Development Fund, OJ L 56, 27.2.2002, p. 23.
86. Cotonou Agreement, Annex IV, Art. 4 (5).
87. The World Bank has adopted OP 2.30 to enable engagement in the absence of a government, at the request of the international community, and OP 10.00 to permit the use of alternative implementation arrangements in weak-capacity environments. See *supra* Sects. 2.1 and 3.1 in Chap. 5.
88. On the differences between development and humanitarian aid concerning the role of the state, see Marie von Engelhardt, 'Reflections on the Role of the State in the Legal Regimes of International Aid', 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 451 (2011); or Paul Harvey, Overseas Development Institute, HPG Report 29, '*Towards Good Humanitarian Government. The Role of the Affected State in Disaster Response*' (September 2009), pp. 21–24.
89. Cotonou Agreement, Art. 72 (6)
90. Communication from the Commission to the Council, Towards an EU Response to Situations of Fragility, para. 4.2.

91. Cotonou Agreement, Art. 58 (2). Arguably, the above-cited provision in Annex IV of the Cotonou Agreement, Art. 3 (4) could be referred to in order to circumvent the requirement of approval in such situations.
92. Though laid out in the DCI Regulation, Thematic Programmes are cross-cutting and can also be used in cooperation with ACP countries. They are subsidiary to the EU's Geographic Programmes. See Sandra Bartelt, 'The Institutional Interplay Regarding the New Architecture for the EC's External Assistance', 14 *European Law Journal*, 655 (2008), 672.
93. DCI Regulation, Art. 6 (2) lit. a) and Annex II B. See also the Commission Communication on the Thematic Programme "Non-State actors and local authorities in development cooperation", which establishes the particular suitability of the Programme for "difficult partnerships", post-conflict or fragile states.
94. See EU Regulation No. 235/2014 on establishing a financing instrument for democracy and human rights worldwide and EU Regulation No. 236/2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action (22 March 2014), Art. 11 on eligibility. The EIDHR is managed by the European Commission and its delegations in the field.
95. E.g. Will Hout, 'Between Development and Security: the European Union, Governance and Fragile States' 31 *Third World Quarterly*, 147 (2010), 154–55, criticizing the EU's focus on government actors and formal institutions in the context of development cooperation with fragile states.
96. On the challenges of engaging particularly with local non-state actors in Somalia, see Visman, '*Cooperation with Politically Fragile Countries: Lessons from EU Support to Somalia'*.
97. The external evaluation commissioned by the EU Commission, Evaluation of EC Aid Delivery Through Civil Society Organizations" (December 2008), identifies major gaps between the EU's commitments towards civil society participation and actual implementation practices.
98. For instance, the Communication from the Commission, Towards an EU Response to Situations of Fragility—Engaging in Difficult Environments for Sustainable Development, Stability and Peace, Brussels, 25.10.2007, COM(2007) 643; and Council Conclusions on a EU Response to Situations of Fragility, 2831st External Relations Council meeting in Brussels, 19–20 November 2007. See also *supra* Sect. 3.2 in Chap. 3.
99. For instance, the World Bank's regime for project lending is particularly front-loading in terms of requirements that concern the institutions and policies of potential recipient countries, requirements that have proven unrealistic and inadequate for engaging with fragile states. See *supra* Sect. 3 in Chap. 5.

100. This is true both for the Cotonou Agreement and the Regulations that govern EU assistance to non-ACP states. For a comprehensive analysis of the EU's legal regimes for project lending and budget assistance, see Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 383–397.
101. Eligibility criteria for budget assistance broadly refer to the "relevance" and "credibility" of a proposed government strategy. See the EU Commission's Budget Support Guidelines, Executive Guide (September 2012).
102. See *supra* Sect. 3.1 of this chapter, where I elaborate how the EU makes use of the discretion accorded under Art. 96 of the Cotonou Agreement.
103. Cotonou Agreement, Art. 2. Also DCI Regulation, Art. 3 (2); and the European Consensus on Development, paras. 56–66. On the meaning and scope of differentiation in EU development cooperation, see also ECDPM, European Centre for Development Policy Management, Discussion Paper No.134, '*Differentiation in ACP-EU Cooperation. Implications of the EU's Agenda for Change for the 11th EDF and Beyond*' (October 2012).
104. Cotonou Agreement, Annex IV, Art. 3 (1) and DCI Regulation, Art. 3 (2).
105. A similar pattern can be found in the Cotonou Agreement. Art. 56 (1) lit. b) contains, first, a general commitment to flexibility and adaptability for all ACP states, Art. 56 (2) requires, second, special treatment specifically for LDCs, and third, acknowledges and differentiates with regards to the specific needs of post-conflict countries.
106. E.g. DCI Regulation, Art. 3 (2), whereby "countries most in need", including in particular countries in fragile situations, "shall be given priority in the resource allocation process"; and Art. 12, establishing special provisions for programming in countries or regions in crisis, post-crisis, or situations of fragility.
107. Regulation No. 230/2014 establishing an Instrument contributing to Stability and Peace (March 11, 2014), OJ L77/1, hereinafter IcSP Regulation. The IcSP succeeds the Instrument for Stability (IfS) of 2006. The EU has further established an African Peace Facility, under which development funds of the EDF are used to support African-led peace-keeping operations and capacity-building initiatives on the African continent.
108. IcSP Regulation, Art. 1 (4) and Art. 3 specify the objectives and types of support in response to situations of crisis, emerging crisis, or to prevent conflicts. It is complementary to the EU's other financial instruments, and applicable where other instruments cannot be used within the necessary timeframe.

109. See the 2011 EU Agenda for Change; and the Instructions for the Programming of the 11th European Development Fund (EDF) and the Development Cooperation Instrument (DCI)—2014–2020 (Brussels, 15 May 2013), prepared by the EEAS and EuropeAid. Both documents highlight that EU support in the future will focus on those countries most in need, including fragile states, and therefore increase the flexibility and context-specific differentiation of aid levels, instruments, and modalities.
110. See the Communication (October 2011) and corresponding Council Conclusions (May 2012) on "The Future Approach to EU Budget Support to Third Countries", which is reflected in the Commission's Budget Support Guidelines (*supra* note 101), p. 10.
111. On the World Bank's approach to risk-management particularly in fragile states, see *supra* Sect. 3 in Chap. 5.
112. EU Agenda for Change, p. 5.
113. *Supra* note 44.
114. Boisson de Chazournes, 'Partnerships, Emulation, and Coordination: Toward the Emergence of a Droit Commun in the Field of Development Finance', 175.
115. Fernanda Faria & Andrew Sherriff, European Centre for Development Policy Management, '*EU Policies to Address Fragility in Sub-Saharan Africa. European Report on Development Background Paper*' (2009), 11.
116. Sub-national conflicts are, however, widespread in the region, and considered to lead to regionally confined situations of fragility. See Thomas Parks, et al., The Asia Foundation, '*The Contested Corners of Asia—Subnational Conflict and International Development Assistance*' (2013).
117. For example, Asian Development Bank, '*Working Differently in Fragile and Conflict-affected Situations—The ADB Experience: A Staff Handbook*', para. 22. On the ADB's institutional culture, see also J. Jokinen, Balancing between East and West. The Asian Development Bank's Policy on Good Governance, in: Morten Boas & Desmond McNeill (eds), *Global Institutions and Development. Framing the World?* (Routledge, 2004), pp. 137–150. The authors show how the ADB's approach to good governance was influenced by its specific political and institutional environment, and the importance given to its apolitical mandate in particular.
118. The culture of risk-aversion is so dominant at the World Bank and other MDBs that it hardly matters that fragile states most often receive funding from the IDA, which does not invest on global financial markets itself, or from other sources such as trust funds.
119. Moreover, the EU maintains a strong focus on security aspects in development cooperation with fragile states. See Will Hout, 'EU Statebuilding

Through Good Governance', in David Chandler & Timothy Sisk (eds), *Routledge Handbook on International Statebuilding* (Routledge, 2013).

120. In contrast, the AfDB has "a large and dispersed ownership with no single member or group playing a pivotal role", which can also be said for the ADB. E. Philip English & Harris M. Mule, *The African Development Bank* (Lynne Rienner Publishers, 1996), pp. 1, 39–48.

CHAPTER 7

Formalizing Fragile States? Of Emerging Patterns and the Potentials and Perils of Regulation

When engaging in development cooperation with fragile states, international organizations come across a problem that to some extent concerns the functioning and effectiveness of the international legal order as a whole. International organizations operate on the basis of rules that presume the existence of an effective government, in a de jure and in a de facto sense. But in many fragile states, a formal government may be nonexistent or at least lack the capacity to fulfil its most basic rights and obligations. In previous chapters, we have seen how various development organizations have therefore adapted their premises. We have considered the rules that govern how the World Bank, the AfDB, the ADB and the European Union (EU) provide development assistance, and how they have been modified to support the increasing engagement with a large variety of fragile states.

Having demonstrated that fragile states are a phenomenon beyond law, but the evolving response of international development organizations is not, we are left with two questions. First, what are the broader patterns that emerge from the rule-making activities of different organizations? Certainly, there are important variations concerning the specifics of how organizations change their legal and policy frameworks to deal with fragile states. But regarding both the processes of adaptation and the results, we have also seen notable similarities, from which we can start identifying certain patterns. These emerging patterns—though not very systematic

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and only partly formalized—illustrate how different organizations have sought to respond to the refutation of the effective government premise that traditionally underscores their legal and policy frameworks.

The second question that remains to be addressed is of interest to legal scholars and development practitioners alike. What are the potentials and perils of using rules to instruct a differentiated approach to dealing with fragile states—and perhaps to formalize this very notion? There appears to be demand within international development organizations for more appropriate rules—rules that can provide guidance and serve as a basis for a more transparent and consistent manner of aiding fragile states. Yet we have also seen that the notion of fragile states is analytically imprecise and comes with a dubious political agenda—and that endeavours to formalize a differentiated approach must hence be met with caution.[1] This involves scrutinizing the processes whereby international development organizations make or modify rules, and set—often unilaterally—the terms and conditions upon which fragile states receive ODA.

In addressing the two questions, this chapter synthesizes and discusses the key findings of the preceding analysis of the World Bank, the AfDB, the ADB and the EU. I begin by tracing patterns in the way organizations are dealing with fragile states, and by illustrating how state-building emerges as a new development paradigm—and what is more, a regulatory theme (Sect. 1). On this basis, I identify the potentials and perils of endeavours to regulate a differentiated approach to fragile states, be it through adopting or modifying rules that govern the transfer of ODA (Sect. 2). To conclude, I draw on legal approaches to governance activities of international organizations to propose some design considerations and procedural requirements that could enhance the potential of a legal response (Sect. 3).

1 Emerging Patterns: State-Building as a Regulatory Theme

International organizations have increasingly found that fragile states put basic premises of the traditional, state-centric development paradigm into question. In response, they have reinforced efforts at establishing, reforming, or strengthening state institutions in recipient states—in other words, at creating or fostering those conditions found necessary for aid to be effective. As effective government turns from a precondition into an

objective or outcome of development cooperation, state-building, in the sense of strengthening effective government, gains importance as a paradigm for development cooperation.

State-building was proclaimed a central objective in the OECD's Fragile States Principles and in the New Deal, and reverberates throughout organizations' strategies and policies for fragile and conflict-affected states. As a general objective, it is *prima facie* in line with the mandate of international development organizations. After all, functioning state institutions and state-society relations are increasingly understood as preconditions for sustainable and equitable development. This is not to say that all activities that contribute to state-building are also compatible with the mandates of international development organizations. State-building is a rather ill-defined undertaking that regularly involves cross-sectoral approaches, and hence activities that fall outside of the scope of a traditional development mandate. The line between quintessential development activities and more political state-building activities can be difficult to draw in practice, but it is not meaningless—not least since the comparative advantage of development organizations in highly politicized, domestic processes of state-building remains contentious.[2]

But next to being a high-level objective and priority of development cooperation with fragile states, state-building has also become a regulatory theme. For acknowledging that an effective government counterpart cannot always be taken for granted has led international development organizations not just to refocus their activities on the objective of strengthening state institutions. To some extent, it has also led organizations to revisit rules that were designed for more stable, high-capacity countries—and that, broadly speaking, assume the existence of an effective government.

As a regulatory theme, state-building describes the underlying motive of how development organizations modify their legal and policy frameworks to engage with fragile states. Behind the move to differentiated approaches for fragile states essentially lays an endeavour to adapt rules to the present capacity constraints of state institutions, while making sure that their capacity is strengthened in the long term. The objective of strengthening the capacity of states to fulfil certain functions—as well as the acknowledgement that achieving this objective may require trade-offs in the short term—form the core of the state-building concept and agenda.[3] Already the term state-*building* suggests that certain premises first need to be established for the state to be able to take on the full range of rights and responsibilities—in this case, in the development process.

Understanding state-building as a regulatory theme provides a framework for analysing the patterns that emerge in the way international development organizations adapt their legal and policy frameworks: differentiation, flexibility and substitution. The first pattern refers to the move towards greater differentiation in the rules that govern the transfer of ODA to countries with different capacities. We have seen that the rules that normally govern the approval and implementation of development projects and programs can, if strictly enforced, significantly delay, disrupt, or prevent engagement with countries that presently lack the capacity to comply.[4] Alternatively, they are ignored and hence remain ineffective. Therefore, many organizations have sought to better tailor the substantive and procedural requirements they attach to the approval and implementation of development assistance to the different capacity of recipient countries.

Differentiation can be achieved through various techniques. The easiest way is to differentiate at the level of conditionalities that are negotiated individually with each country in connection with development projects or programs, and which are not established as abstract, general rules in the law of development organizations. In fact, most organizations have committed to better tailor conditionality to the capacity of different countries.[5] Another technique that does not require adapting existing rules is the establishment of specific financial instruments or trust funds, which are subject to different rules concerning project approval and implementation and can thus facilitate engagement in fragile states.[6] Further, we have seen that the ADB relaxes substantive and procedural requirements for fragile states by waiving general policy requirements or making extensive use of its emergency policy.[7]

Yet international development organizations have also introduced differentiated obligations at the level of those abstract, general rules of their legal and policy frameworks that *prima facie* apply equally to all countries. The EU has made differentiation a general principle in the Cotonou Agreement and DCI Regulation.[8] The World Bank has reduced or postponed certain fiduciary, environmental and social standards for countries facing capacity constraints through revising the legal framework for project lending, OP 10.00. Moreover, the World Bank, the AfDB and the EU have adopted exceptional provisions and mechanisms that enable the use of budget assistance in countries with institutions and policies that do not meet the usual, pre-approval requirements in terms of good governance. Importantly, where *ex ante* requirements have been reduced to

acknowledge that the capacities necessary for compliance first need to be established, or that standards need to be achieved progressively, development organizations usually put more emphasis on supervision and other *ex post* controls that come to bear during the implementation stages.[9]

Next to differentiating with regards to requirements for the approval of projects or programs, development organizations also differentiate at the level of implementation, for instance, by providing targeted capacity-building or implementation support. The World Bank's revised OP 10.00, for instance, requires the use of alternative implementation arrangements in weak-capacity countries to be accompanied by capacity-building measures. Strengthening the institutional capability of recipient countries has always been a centrepiece of development cooperation, and the idea of capacity development has experienced a resurgence of interest over the last decades, not only in fragile states.[10] In these contexts, however, capacity-building is often targeted precisely at strengthening the state's capacities in areas where they are insufficient to achieve the usual *ex ante* requirements for aid.[11] Accordingly, certain *ex ante* requirements of development organizations no longer constitute criteria for exclusion if not met, but instead become benchmarks for identifying areas where capacity-building is required during implementation.[12]

How international development organizations tailor rules to the weak capacity of fragile states or differentiate at the level of implementation is reminiscent of a familiar concept in international law: differential treatment. Most commonly known in international environmental and international trade law, the concept refers to the use of differentiated standards to accommodate empirical differences between states in the design or implementation of rules.[13] Differential treatment rests on the acknowledgment that strict legal equality can actually cause inequality, given that states have very different levels of capacities, including factual capacities, to exercise rights and obligations. At the same time, differential treatment—be it through lowering standards, focusing on progressive realization, or providing implementation support—can also contribute to increasing the effectiveness of rules where implementation is currently weak.[14] Arguably, both are also motives for international development organizations in adapting their legal and policy frameworks vis-à-vis fragile states.

The discussed examples of differentiation are still too rudimentary and sporadic to amount to a coherent regime of differential treatment of fragile states. They also illustrate that differential treatment in the law of

development cooperation does not necessarily target and hence apply exclusively to fragile states as a distinct group of countries with common characteristics or needs. Quite to the contrary, we have seen repeatedly that definitions or classifications of fragile states or situations assume a relatively minor role as a trigger for differentiation. More often, differentiated *ex ante* requirements or implementation target post-conflict countries (for example, the World Bank), countries affected by emergencies (ADB), or still more generally, by crisis (EU).

On the one hand, the fact that none of the organizations I analysed attaches particular importance to the classification of fragile states as a trigger for differential treatment reflects that the notion is generally considered too reductionist to be of operational value. Most organizations prefer an approach that is tailored to specific situations or circumstances and thus more fine-tuned, not to mention politically correct. On the other hand, the limited role of the fragile states classification indicates that many of the changes that development organizations have made to their legal and policy frameworks are perhaps inspired by, or addressed to challenges associated primarily with fragile states. But they are also very much linked to broader trends in the law of development cooperation, which are not limited to fragile states.

One such trend is the move towards greater flexibility in regulating the transfer of ODA, which also points to a second pattern in how development organizations adapt their rules for fragile states. Flexibility is increasingly valued as essential in steering processes of development cooperation in immensely different countries and circumstances. Importantly, it is not the antithesis of regulation. Flexibility refers to the possibility of adapting rules not only in line with a country's capacity, but also, for instance, changing circumstances over time. It can thus be achieved through the specific design of regulation.

Further, though flexibility can still result in differentiation, it is *prima facie* not aimed at differentiation. On the contrary, flexibility (for all) may eventually replace differentiation (for a few) in the law of development cooperation.[15] What I observe, however, is that international organizations deem rules that provide for flexibility to be particularly suitable for regulating development cooperation in the context of political volatility and quickly evolving needs, and thus in fragile states.

The techniques for inducing flexibility into substantive and procedural rules again vary, and to what extent they involve modifying the existing legal and policy framework naturally depends on how much flexibility

exists in the first place. For example, we have seen that the EU's legal framework is less somewhat rigid when it comes to *ex ante* requirements. Still, the organization has introduced provisions that facilitate the adjustment of ongoing projects and programs in response to "crisis, post-crisis, or situations of fragility". The AfDB has reformed the eligibility criteria of the Fragile States Facility to allow for more flexibility in addressing extremely heterogeneous and evolving situations of fragility.

At the World Bank, the move towards greater flexibility in the regulation of development cooperation also surfaces in the debate about the advantages of principles-based over strictly rules-based approaches.[16] This debate shows that flexibility goes beyond specific provisions that establish in what regard, and to what extent, normal processes and procedures can be deviated from. Flexibility can also be built into the form of regulation, for instance, detailed and precise rules versus broad principles that leave room for discretion.

For example, while the Bank's project lending is traditionally quite strictly regulated and contains a number of requirements for recipients to meet, the Program-for-Results financing instrument created in 2012 deliberately focuses on a less prescriptive and more condensed version of social and environmental standards. The AfDB and ADB have reformed the entire system of safeguard policies, moving to a principles-based approach that can more easily be adapted to the different constraints and capacity-building needs of each country.[17] Further, the ADB's Emergency Policy broadly establishes that standard policies and procedures should "be liberally interpreted to ensure speedy and effective rehabilitation".[18] In this case, flexibility stems from a guideline concerning the (liberal) interpretation of rules, rather than from the formulation of the rules themselves.

The patterns of differentiation and flexibility mostly concern international organizations' adaptation strategies for fragile states that have insufficient capacity to fulfil certain obligations. But states with very weak or no effective government may equally lack the capacity to assume certain rights and responsibilities in the development process. We have seen that development organizations usually require national governments to have the capacity to express consent, to sign international agreements and to assume a decisive role in planning and implementing development projects and programs.[19] Rules that protect the sovereignty and, more specifically, ownership of recipient countries are contained in the legal and policy frameworks of all development organizations and apply to all countries

equally. Are there patterns in how development organizations have sought to engage with countries deemed incapable of exercising sovereign rights or assuming ownership?

At the general policy-level, the OECD Fragile States Principles, the New Deal, and the fragile states strategies of various organizations reiterate that national ownership is essential for supporting development in fragile states. If anything, it appears even more important that governments not only buy in, but also take the lead in decision-making where development cooperation concerns intrinsically political processes of state formation. From a more operational perspective, too, working through state institutions is considered crucial if the objective is to enhance the state's capacity to provide basic services, and eventually its legitimacy in the eyes of the population.[20]

However, there appears to be a certain shift in thinking about ownership in fragile states, which has also found its way into the legal and policy frameworks of international development organizations. It might be too much or too early to speak of an actual pattern. But there are several examples where organizations have developed rules and mechanisms through which they can temporarily substitute or bypass governments that lack the capacity assume full ownership of the development process.

For example, we have seen that international development organizations have been prepared to circumvent legal constraints if needed to deliver aid through non-state actors instead of the government in fragile states. AfDB's Fragile States Facility can channel resources directly to non-state actors without any government involvement required, an option that is not available for regular resources and aid instruments. Its Fragile States Strategy explicitly recommends such support to non-sovereigns for situations where effective government has broken down—or where there is no legitimate or consenting government counterpart.[21] The World Bank has modified OP 10.00 to allow projects to be implemented through international organizations, national actors other than the government, or to implement itself if governmental capacity is insufficient. Such alternative arrangements must be limited in time, and be accompanied by capacity-building measures to allow the transfer of responsibilities to the government as soon as possible. The EU is generally committed to participation, but has also established a financial instrument particularly to render assistance to non-state actors and local authorities where there is no effective government—or no government the EU agrees with.[22]

Arguably, development cooperation thus come closer to the *modi operandi* of humanitarian assistance, which is mostly implemented through international organizations and non-government organisations (NGOs), often in by-passing state institutions and delivering aid to the population directly.[23] At least in the long run, such implementation strategies could also undermine the overall objective of state-building if they strengthen non-state actors at the expense of the central government.

Perhaps more interesting from a legal perspective, international development organizations have also sought alternative ways to authorize their engagement in fragile states. The World Bank's Operational Policy 2.30 is certainly the most striking, though not necessarily representative example. The internal rule formulates how the Bank can engage in the absence of a government capable of expressing consent, namely, by relying on a request of the international community.[24] We have found similar provisions in the Emergency Policies of the ADB and the AfDB, whereby emergency assistance can be provided upon request of an internationally legitimate authority (ADB), or a UN appeal (AfDB).[25] The Cotonou Agreement between the EU and ACP states allows the transfer of aid to countries with no effective government, and hence no government official able to act as National Authorizing Officer and approve and manage allocated resources.

To provide assistance to a population in need where the government is unable to do so, some development organizations are thus prepared to dispense with the requirement of state consent. The relevant provisions in their legal frameworks could be seen to reflect the spirit of the emerging legal concept of the responsibility to protect, or responsibility to rebuild.[26] Unlike these abstract concepts of contested legal nature, however, the described arrangements are established in the legal frameworks of development organizations—in more or less formalized, internal rules, or in the case of the Cotonou Agreement, an international legal treaty.

It is too much to speak of a complementarity regime in the law of development cooperation, whereby certain roles and responsibilities of recipient states automatically move to international organizations or other implementing agencies if the state is found unable or unwilling to fulfil them.[27] Under exceptional circumstances, however, international development organization can use the said provisions to *de facto* limit the sovereignty or ownership of recipients, based on the perceived degree of government capacity.

In sum, the emerging patterns in dealing with fragile states—differentiation, flexibility, substitution—do not necessarily suggest that the

law of international development organizations has become less state-centric. Quite to the contrary, the emergence of state-building as a development paradigm and regulatory theme entails that the project of statehood remains central, and thus the formal commitment to sovereignty and national ownership. Yet the growing engagement of development organizations with fragile states has highlighted a peculiar paradox—development cooperation is premised on the existence of effective government, and simultaneously concerned with strengthening government effectiveness.[28] Development organizations have therefore sought to adapt the premises and the rules on which they operate.

How to deal with governments that are unable or unwilling to authorize, lead and own processes of development policy-making and implementation remains a complex and delicate questions. The emerging response of development organizations has regularly involved substituting, at least temporarily, for roles and responsibilities traditionally accorded to recipient governments. Arguably, ownership thus turns into an objective of development cooperation, which to achieve requires certain adjustments in the short term.

Finally, although we have seen certain patterns emerge, it is important to note that the regulatory approach of international development organizations to fragile states is overall not very systematic, and only partly formalized. Some challenges that development organizations (in remarkable unanimity) associate with engaging in fragile states have been addressed much more systematically through legal and policy reforms than others. For instance, all organizations have simplified procedural requirements to facilitate more rapid engagement. In contrast, the majority of questions that concern how development organizations engage in the absence of effective government counterparts have not been subject to comprehensive regulation. Moreover, the same issue has sometimes been addressed by one organization through the formal adoption or modification of rules, and by another through the use of less formal rule-making processes, or on an *ad hoc* basis.[29]

The resulting impression of a regulatory piecemeal approach and half-way formalization is partly owed to the fact that the processes analysed are still very much ongoing. It can also be intentional. Either way, it raises the question as to the value of (more) regulation in guiding a differentiated approach to dealing with fragile states.

2 Potentials and Perils of Regulating Development Cooperation with Fragile States

To engage differently with fragile states, international development organizations have increasingly modified rules that govern how development cooperation is normally planned, managed and implemented. Evaluating the developmental effects of such adaptations—their potential to make development cooperation with fragile states more effective or sustainable—exceeds the scope of this book.[30] Nor can I provide a clear answer to the fundamental question whether fragile states indeed constitute a challenge of a different kind, warranting a specifically tailored response.[31] On the one hand, the comparatively poor track record of development cooperation in weak-capacity and politically unstable environments in the past speaks for the need to reconsider unrealistic premises, and to develop more adequate approaches and aid instruments. On the other hand, the concern with fragile states rests on a vastly ambiguous concept, which fails to capture the immense diversity of causes, symptoms and consequences of instability and underdevelopment in these countries.

But international legal scholars are well-placed to explore the potentials and perils of regulating a differentiated approach towards fragile states—a question that is also of great relevance for development practitioners. Regulating means that international development organization specifically adopt new rules or modify existing rules of their legal frameworks to guide their engagement with fragile states.[32] A look at the rule-making activities of various organizations is enough to show that there is demand for guidance in dealing with fragile states, including more formalized guidance. But the analysis of the World Bank, AfDB, ADB and EU, has also revealed a number of potentials and perils involved where international organizations adopt or modify rules that govern the transfer of ODA to fragile states.

In exploring the value of regulating a specific approach to fragile states, we need to consider different sorts of arguments. On the one hand, there is the fundamental tension between changing existing rules, and stability as an inherent characteristic and value of law given its counterfactual nature. International development organizations already operate on the basis of rules—do they have to be adapted *vis-à-vis* fragile states? On the other hand, we need to consider the pros and cons of using rules to guide and control conduct in general. For even if we accept the premise that fragile states may require some sort of differentiated approach, a number

of arguments speak for and against using rules to formalize such an approach.[33]

On this basis, the lawyer and optimist starts with the potentials of adapting existing rules to state fragility, and using regulation to consolidate a differentiated approach. There is much to be said about law's counterfactual nature, and that of the principle of sovereign equality in particular. To some extent, however, law needs to take into account differing and changing circumstances.[34] Development organizations that assume that all recipient governments have the same, basic capacity to fulfil an array of requirements may find that these requirements pose an excessive burden on the already weak capacities and limited resources of fragile states, or simply cannot be met. Adapting particularly demanding requirements to account for the different implementation capacity of certain states is thus a matter of equity and fairness—central ideas of the concept of differential treatment.[35] According to David Bradlow, development organizations are even required by the general legal principle of non-discrimination to apply the same rules "in a way that is responsive to similarities and differences in the situation of each member state".[36]

Adapting rules to empirical differences between recipient countries can also increase the effectiveness of rules, that is their ability to achieve regulatory objectives. For example, where countries simply lack the capacity to meet fiduciary, environmental, or social standards that are regularly preconditions for aid, they may not receive ODA—but the respective standards are also not implemented and remain ineffective. Accordingly, better tailoring those rules that create obligations for recipient countries to the different capacity of state institutions can ultimately enhance compliance, particularly if complemented with targeted technical assistance and capacity-building to strengthen implementation.[37]

Law may also need to be adapted to take into account changing circumstances over time. Particularly the statutes of the Multilateral Development Banks (MDBs) often date back to the early years of development cooperation post-World War II, and contain rules that are not suitable for guiding the activities of development organizations in a global political environment that has substantially evolved since then.[38] Certainly, it is highly doubtful whether state fragility itself is a new phenomenon, and thus a product of changing circumstances.[39] Some of the circumstances that are commonly associated with fragile states have long constituted the normal state of affairs in many countries. What has clearly changed, however, is how international development organizations conceive and address

underdevelopment and inequality in countries with weak institutions, poor governance and political instability. With the evolving understanding of what development entails, organizations have taken on an expanding range of activities related to building or strengthening state capacities in areas well beyond economic affairs. If the legal frameworks of international development organizations do not sufficiently reflect this evolving role, their ability to guide and constrain relevant activities is diminished.

The World Bank has therefore adopted internal rules to clarify the boundaries of its mandate in the context of post-conflict and humanitarian assistance.[40] This example also shows that adapting rules of the legal framework to changing circumstances does not necessarily require a formal amendment of the statute. A more common tool is interpretation, and of particular importance in the practice of development organizations, the adoption of internal rules.[41] What form of adaptation is the most appropriate depends on each case. In some cases, formal amendments can be preferable over an excessive use of interpretation, particularly informal, implied interpretations.[42] Generally speaking, however, adapting rules is preferable over an excessive use of exceptions where differing or changing circumstances lead to structural problems for which existing rules are systematically inadequate.[43]

Another set of arguments concerns the advantages of international organizations using regulation, rather than more *ad hoc* approaches, to instruct development cooperation with fragile states. Rules—if appropriate and relevant—quite simply provide guidance. They provide guidance through establishing limits, but also in the more positive sense of steering conduct, for example, specifying how and by whom a certain issue or situation is supposed to be addressed. International organizations often have an interest in the internal rationalization of decision-making processes.[44] They adopt rules to regulate processes and procedures to be followed, and define the roles and responsibilities of different actors. Particularly where such guidance is stipulated in rules that are at least partly formalized and considered binding, it comes with the promise of enhancing clarity, transparency, consistency and accountability in decision-making concerning fragile states.

Firstly, regulation provides *ex ante* clarity. Considering that international development organizations are often huge bureaucracies with more or less decentralized structures, clarity and legal certainty can be essential to reducing transaction costs.[45] A rule that establishes clearly in what situation and to what extent environmental and social standards can be

postponed for fragile states reduces transaction costs that result from uncertainty, for instance, in terms of staff time that is lost going through a difficult debate about the appropriate response. Lower transaction costs also enable a speedier and more efficient response, which can be particularly crucial in addressing time-sensitive needs in conflict-affected and fragile states.

Secondly, regulation enhances transparency by laying open the decision-making criteria, processes and responsibilities to those involved and those affected by decision-making, or the interested public at large. With the publication of guidelines that regulate dealings with *de facto* governments, for instance, the World Bank, African Development Bank (AfDB) and the Asian Development Bank (ADB), have disclosed who, on the basis of what criteria, decides whether cooperation continues with a government that came to power by unconstitutional means.[46] Besides, published rules that provide transparency regarding an expected behaviour constitute a condition for basically any form of review or broader public scrutiny.

Particularly were rules are linked to enforcement and review mechanisms, they also lead to more consistent decision-making—a third, inherent promise of regulation. More consistent decision-making results in greater predictability, which again reduces transaction costs. Further, consistent decision-making is a matter of fairness, reduces the risk of discrimination, and increases legitimacy. For example, if the AfDB provides additional resources to certain countries outside of its performance-based system of resource allocation, the stipulation of clear eligibility criteria leads to more consistent decisions, which are more likely to be perceived as equitable by all member countries. In contrast, inconsistent decision-making, whether real or apparent, eventually weakens the legitimacy of an organization.[47]

Fourthly, rules that are linked to mechanisms of review also result in greater accountability of decision-makers. The MDBs have established quasi-judicial review mechanisms that can investigate staff compliance with binding, internal rules.[48] Such mechanisms are of particular relevance given that the avenues to hold international development organizations to account for their actions are generally limited.[49]

In addition to these attributes, a further potential of regulation lays in the process whereby rules are made. In principle, rule-making can be understood as a deliberative process, whereby international development organizations need to reflect, to consider and balance different view and arguments, and ultimately to take an informed decision. The adoption of

rules to regulate different aspects of engaging with fragile states can thus *prima facie* enhance the rationality as well as legitimacy of subsequent decision-making. Obviously, this is more likely to be the case where the process of formulating and adopting regulation follows a transparent and formalized process, in which at least the affected, if not all interested stakeholders can participate. The World Bank's internal rule-making process has become gradually more public and participatory, even if the relevant administrative procedures are yet to be codified.[50]

But regulating a differentiated approach to fragile states also comes with a number of perils, considering what is at stake: the sovereign equality of all states, which development organizations are bound to respect. In fact, the emerging practice of different development organizations provides a number of arguments that speak against the use of regulation, as opposed to more *ad hoc* approaches in dealing with fragile states.

First of all, it is worth asking whether the adaptation of existing rules always serves to accommodate differing circumstances or needs of fragile states. One obvious alternative are wider political motivations. The capacity of state institutions is generally not easy to measure.[51] Many fragile states may appear weak with regards to some state functions, but rather strong with regards to others. Even if we acknowledge that the capacity of state institutions in fragile states is typically weak, it is not necessarily weaker than that of other LDCs, nor are the needs of fragile states always that different. Against this background, what is presented as differential treatment to account for the disadvantaged position of fragile states could also unjustifiably disadvantage other recipient states.

When development organizations lower or postpone established environmental, social, or other standards for fragile states, for example, the reason may be to facilitate engagement in countries that are of particular interest to the organization or its donors. This suspicion arises where the respective rules leave it essentially to the discretion of political organs of the organization to decide what countries are subject to differentiated treatment.[52] Besides, it is striking that the preoccupation with the weak capacity of fragile states has rarely led development organizations to adopt specific measures to ensure weaker countries enjoy a meaningful level of procedural participation in the organizations' structures of decision-making.

The adaptation of existing rules to changing circumstances over time also deserves a second glance. Stability and continuity of established rules in light of changing circumstances are qualities that should not be easily

discarded. The global political environment in which international development organizations operate has certainly changed considerably since the end of the Cold War, and again since the terrorist attacks of 11 September 2001. But there is also a certain tendency to define everything as new development challenge, and to justify an expanding array of activities in response.[53]

To some extent, the growing concern of development organizations with fragile states reflects this pattern, and leads organizations to take on a range of activities from justice and security sector reforms to strengthening state-society relations. There is not always a bright-line test to answer what activities correspond to an organization's original objectives and purposes. But the mandates of international development organizations are still the most potent instrument in setting limits to the phenomenon of mission creep.[54] For example, the political prohibition clause of the MDBs, though sometimes perceived as anachronistic, still constitutes the most important protection of member states' sovereignty—and helps to focus limited resources on core competences.[55]

Further, there are arguments speaking against the specific value of regulation in guiding development cooperation with fragile states, as opposed to more *ad hoc* approaches. Generally speaking, the central argument against regulation is that it reduces flexibility. Whether rules establish limits or otherwise guide conduct, regulation *prima facie* reduces the room for decisions to be tailored to the specific circumstances of each case. We have seen that fragile states are characterized by extremely heterogeneous conditions that are hardly amenable to one-size-fits-all approaches.[56] Moreover, the value of regulation is reduced considering that fragile states are commonly associated with volatile circumstances and quickly evolving needs.[57] It is thus extremely difficult for rule-makers to design rules and regulations that are adequate not only for a large variety of countries and situations, but also to anticipate all kinds of future scenarios and challenges.

Further, to what extent regulation in fact enhances the clarity, transparency, consistency and accountability of international organizations' decision-making varies greatly. Rules that are formulated in broad terms or leave considerable discretion to decision-makers—though perhaps desirable in terms of flexibility—provide less *ex ante* clarity. For instance, the internal rules that the World Bank and the AfDB have adopted to regulate dealings with *de facto* governments require staff to assess whether a government exercises effective control, a test that is difficult for staff to

apply in practice. The EU has made differentiation a fundamental principle of cooperation with ACP and non-ACP countries, but to what extent concrete rules can be tailored to the different circumstances of recipient countries is often not clear.

Transparency, in turn, certainly increases where the rules that inform decision-making criteria, process and competences are published. But the actual process whereby rules are applied and decisions made all too often remains obscure. Again, the example of the World Bank's *de facto* governments policy is instructive. Though the decision-making criteria are stated in the policy, staff assessments and weighting of different criteria take place behind closed doors, and transcripts are not publically available. This lack of transparency and hence public scrutiny can also be seen to hamper processes of institutional learning, and reduce "the guidance that precedents can provide when new and difficult situations arise."[58]

Knowledge about precedents could also help to make decision-making processes more consistent—for consistency, too, does not necessarily follow from the existence of rules *per se*, but from their application in practice. The potential of rules to enhance the consistency of decision-making outcomes depends on their ability to trigger compliance, which is generally more likely if they are linked to enforcement and accountability mechanisms. With regard to the organizations we have examined, this is only partly the case, as available mechanisms are usually not geared towards allowing recipient states to call for a compliance review or challenge specific operational decisions.[59]

Moreover, rules lead to more consistent decisions when they provide clear guidance, and to more consistent decision-making processes in the sense of procedural regularity if they formulate procedural requirements. In contrast, rules that are vaguely formulated, without decision-making criteria or procedural requirements for decision-making, may still result in arbitrary decision-making. For example, the provision in Operational Policy 2.30 that permits the World Bank to engage outside the territories of member states if deemed for the benefit of members is so subjective that it does little to prevent decision-making to be perceived as arbitrary.[60] Certainly, organizations do not always aspire to consistency. The Art. 96 procedures of the Cotonou Agreement leave it deliberately open for the EU Commission to decide when to trigger sanctions against a country, and it is no secret that the decision is guided by political considerations.[61]

Finally, processes of rule-making might entail deliberations and potentially enhance the rationality of subsequent decision-making, but to what

extent they do once again varies greatly. As illustrated before, a large part of the rule-making processes of international development organizations are in fact internal, allowing for little or no participation of those potentially affected, not even member states.[62] Particularly internal rules often emerge from relatively informal processes, and are subject to few legal constraints. Through such internal rule-making, often in combination with informal or implied interpretations, regulation can perhaps be adopted (or adapted) more easily. But it does not necessarily add to the broader legitimacy of subsequent decision-making.

The World Bank's Operational Policy 2.30 is a striking example. Apparently based on an interpretation that is not, however, publically available, the World Bank has therein adopted a provision establishing that in the absence of a government in power, a request from the international community can replace an official government request. Besides the question whether the provision would have required a formal amendment of the Articles of Agreement, the rule-making process clearly lacked transparency and participation.[63] Looking at the rule-making processes of the EU, in turn, we see two extremes. Whereas the rules that govern development cooperation with ACP countries result from formal, multilateral treaty negotiations, cooperation with all other countries is governed by a set of EU Regulations. These were certainly adopted in a formalized process, but without the participation of recipient countries.[64]

Finally, understanding the perils of formalizing a differentiated approach to fragile states requires a look at the rule-making actors. International organizations generally suffer from weak democratic legitimacy and accountability.[65] But international development organizations are furthermore in a position to wield considerable power *vis-à-vis* recipient states that are structurally dependent on aid.[66] Development organizations also wield power in making or adapting rules that set the terms upon which fragile states receive ODA—activities that constitute a significant form of governance.[67] Not least to make this exercise of public power less arbitrary, I conclude with some recommendations concerning the rule- and decision-making processes of international development organizations.

3 Conclusion and Recommendations

In this chapter, I synthesized and discussed the key findings of how the World Bank, the AfDB, the ADB and the EU have adapted their legal and policy frameworks *vis-à-vis* fragile states. I argued that the central objective

of state-building in fragile states also informs the adaptation of rules that govern development cooperation—to reflect the limited capacity of state institutions in the short term, while remaining committed to strengthening state capacity in the long term. All organizations have introduced more differentiation and greater flexibility in the rules that govern the transfer of ODA, responding to the capacity constraints and volatile circumstances associated with fragile states. To deal with situations where there is no capable government, all organizations have developed substitutional arrangements that to some extent qualify requirements of state consent and protections of ownership, at last in the short term. Acknowledging that the identified patterns are not very systematic and only partly formalized, I examined the value of international development organizations using (more) regulation to guide their dealings with fragile states.

Ultimately, the practice of the World Bank, the AfDB, the ADB and the EU provides ample evidence of both, the potentials and the perils of using regulation to instruct and formalize a differentiated approach to fragile states. Whether we want more or less regulation is thus difficult to say in general. The answer depends on the content and design of the relevant rules, and on the process whereby rules are made.

Legal scholars have an inherent bias towards law, which I cannot defy. Based on the preceding analysis, there are a number of instances where regulation in fact appears desirable in terms of more clarity, transparency and consistency. Rules can guide decision-makers in how to adapt overly unrealistic and stringent *ex ante* requirements when engaging in countries with weak capacities, without compromising environmental, social or fiduciary standards altogether. Rules can assist staff in balancing short-term substitution with long-term capacity-building support, and respond to time-sensitive needs without violating the principle of sovereignty or abandoning the idea of national ownership. Rules could also require international development organizations to engage more systematically with local stakeholders particularly in countries with no effective government, an area that is currently subject to little regulation, if any.[68]

Importantly, such rules do not have to hinge on a clear definition or classification of fragile states, an ambiguous notion of little analytical or operational value. They do not need to be overly prescriptive concerning the outcome of decision-making either—and can still be useful in creating an analytical and procedural framework for informed decision-making, and in determining who decides and can be held accountable.

If there is *prima facie* reason to believe in the potential of regulation to make development cooperation with fragile states more transparent, consistent and ultimately principled, however, it is not without conditions. Considering the ambiguity and sometimes questionable agenda behind the notion of fragile states, it is of utmost importance that regulation that is used to instruct and formalize a differentiated approach is not a mere façade for political, or rather politicized decision-making.

This objective first of all requires that rules be formulated in a way that provides a minimum level of clarity and predictability both to decision-makers within development organizations, and to countries affected by their decisions. Certainly, broadly formulated rules or principles are sometimes preferable over narrow rules, because they leave decision-makers the necessary discretion to address individual cases. However, discretionary powers can still be counterbalanced with procedural requirements that aim to ensure the transparency and rationality of decision-making. The same is true for requirements that pertain to the process whereby rules are made or modified in the first place.[69]

What can be done to enhance the rule- and decision-making processes of international development organizations? Emerging legal approaches to governance activities of international organizations such as Global Administrative Law (GAL) provide a useful starting point.[70] According to GAL, how development organizations make or modify rules to engage with fragile states constitutes a form of regulatory administration. But though rule- and decision-making in international organizations show similarities with domestic administrative processes, they largely lag behind the structures and procedural standards available in domestic administrative law.[71] The GAL approach therefore advocates that international organizations should adhere to administrative law principles that are familiar from domestic legal orders, such as, standards of transparency, reason-giving, procedural participation and review.[72] The report of the International Law Association (ILA) on the accountability of international organizations further suggests that decision-making should respect principles like procedural regularity, or objectivity and impartiality.[73] In fact, such principles are increasingly expressed in the legal and policy frameworks of international organizations, too.[74]

What would this mean, for example, for the World Bank's regulatory activity concerning fragile states? Many of the internal rules that we have analysed were formulated in relatively broad terms, with few objective decision-making criteria or procedural requirements. To reduce the risk

that discretionary powers are abused, decision-makers could be required to provide written justifications for their decisions, which needed to be published and available to the public. The World Bank's 2010 Access to Information Policy actually already recognizes the fundamental importance of transparency and accountability in decision-making. But the Bank is not required to disclose certain deliberative information—an exception that is apparently often used to keep decision-making that concerns the application of rules like OP 7.30 secret.[75]

In some contexts, such as when Bank staff decide about continuing operations with a *de facto* government, affected governments could be granted the possibility to have their views considered prior to the decision being taken, or to challenge a decision once taken. So far, particularly recipient countries have very few avenues to request a review of the application of internal rules, let alone to demand accountability for wrongful decisions.[76] A legal basis for demanding more consistent decision-making could come from the political prohibition clause in the Articles of Agreement. The clause requires the Bank to be impartial in its considerations, and this should also concern the application of internal rules to different countries.[77] It is also important to note, however, that the analysed rules concerning fragile states often grant the ultimate decision-making authority to the Executive Directors, not the Bank's staff. Accordingly, the problem is not necessarily that staff members take inconsistent decisions, but that the Executive Board makes decisions that appear to be influenced by the political and strategic interests of its major shareholders, which hold the majority of votes.

Concerning the process of making Policies, the World Bank has increasingly published drafts of its internal rules and invited affected or interested parties to comment on them. In practice, the process has thus become more transparent and participatory already. But the World Bank should codify this process in order to grant potentially affected member states, groups, or individuals a formal right to procedural participation, and to guarantee minimum procedural benchmarks.[78] In adapting existing rules of the legal framework, in turn, the organization should reconsider the appropriate use of implied interpretation, an informal practice of interpretation that is "certainly not a model of transparency", as Hassane Cissé confirms.[79]

Considering such proposals to enhance the design of rules and processes of rule-and decision-making within organizations, regulation indeed has the potential of making dealings with fragile states more transparent,

consistent and not necessarily less flexible.[80] At the same time, the measures I discussed could help reduce some of the identified perils—namely, that regulation entrenches a form of discrimination on the basis of a government's perceived effectiveness, or becomes a mere façade for political decision-making.

In the end, avoiding that regulation becomes a mere façade also requires an acknowledgment of the limits of regulation. Not all of the questions that development organizations encounter when seeking to engage in fragile states can be resolved on the basis of clear rules. Where regulation is nonetheless sought, decision-makers need to be open about the often inherently political nature of the questions faced when dealing with fragile states—for example, concerning the recognition of governments or the identification of non-state actors to engage with—rather than making that the political nature could be neutralized using regulation. This is true for even the most technical international development organizations, which are not value-neutral and do respond to political and other agendas defined by their member states.

Notes

1. See *supra* Sects. 1 and 2.2 in Chap. 2.
2. The complex challenges that international development organizations face when seeking to engage in state-building have been aptly described by the Independent Evaluation Group when assessing the World Bank's LICUS initiative in 2006, which remains equally relevant today. Independent Evaluation Group, The World Bank, '*Engaging with Fragile States. An IEG Review of World Bank Support to Low-Income Countries under Stress*' (2006). See also Todd Moss, et al., 'An Aid-Institutions Paradox? A Review Essay on Aid Dependency and State Building in Sub-Saharan Africa' *Center for Global Development Working Paper 74* (January 2006), highlighting the potentially negative effects of aid dependence on state institutions; or Daron Acemoglu & James Robinson, *Why Nations Fail. The Origins of Power, Prosperity, and Poverty* (Crown Business, 2012), criticizing the ignorance hypothesis with which development agencies approach local actors, assuming they do not know what good institutions should look like; and on for a critical assessment of the state-building in general, see the references in *supra* note 30.
3. Zaum, *The Sovereignty Paradox: The Norms and Politics of International State-Building*, 4–5.
4. *Supra* Sect. 2 in Chap. 3.

5. For example, The World Bank & African Development Bank, '*Providing Budget Aid in Situations of Fragility: A World Bank – African Development Bank Common Approach Paper*', 10, stating that "There is broad consensus among the three institutions that core conditionality in fragile states should be limited in number" (the three institutions being the World Bank, the AfDB and the EU). To what extent international development organizations have actually been using more or less stringent obligations in their contractual agreements with fragile states, exceeds the scope of the present study. It requires analysing and comparing a large number of different kinds of financing agreements and project-level contracts concluded with fragile and non-fragile countries.
6. *Supra* Sect. 2 in Chap. 5 on the World Bank's use of country-specific or thematic trust funds; and *supra* Sect. 2 in Chap. 6 on the AfDB's Fragile States Facility. On the legal specificities of trust funds in general, see Ilias Bantekas, *Trust Funds under International Law. Trustee Obligations of the United Nations and International Development Banks* (TMC Asser Press, 2009).
7. *Supra* Sect. 2 in Chap. 6. Most development organizations have emergency policies that once triggered, permit reducing or postponing certain (mostly procedural) requirements to respond swiftly to emergencies.
8. See *supra* Sect. 2.3 in Chap. 6, where I also show how the general principle is further concretized in a number of provisions that provide a basis for differential treatment.
9. This is the case, for instance, for budget assistance to fragile states provided by the World Bank, the AfDB, and the EU. See The World Bank, '*Good Practice Note for Development Policy Lending. Development Policy Operations and Program Conditionality in Fragile States*', paras. 47–50; and The World Bank & African Development Bank, '*Providing Budget Aid in Situations of Fragility: A World Bank – African Development Bank Common Approach Paper*', p. 11.
10. OECD, '*The Challenge of Capacity Development. Working Towards Good Practice*' (2006).
11. For instance, World Bank operations in fragile states often include a capacity-building component, mostly with a focus on public expenditure management, procurement, civil service, or revenue collection reforms. See Independent Evaluation Group, '*World Bank Assistance to Low-Income Fragile- and Conflict Affected States*', p. 37.
12. This approach underscores the World Bank's Program-for-Results Financing instrument. Government programs are assessed against a condensed version of the Bank's safeguards. Where shortcomings are identified, they do not automatically lead to the exclusion from financing, but are addressed during the implementation stages, with the Bank providing support through capacity-building. See *supra* Sect. 3.3 Chap. 5.

13. For a comprehensive treatment of the concept and forms of differential treatment in international law, see CULLET, *Differential Treatment in International Environmental Law*. Cullet defines differential treatment as "situations where the principle of reciprocity of obligations gives way to differentiated commitments, for the purpose of fostering substantially more equal results than what is achieved through the principle of formal equality, in situations where actors are not equal" (p. 1). According to Cullet, the concept is "intrinsically linked to the search for substantive equality" (p. 19).
14. Ibid., 16.
15. With regard to differential treatment in the field of environmental law where it is most common, Rajamani already makes out a trend whereby more flexible rules for all countries are increasingly preferred over differentiated obligations for specific groups of countries. LAVANYA RAJAMANI, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law', 88 *International Affairs*, 605 (2012).
16. See LEROY, 'The Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the Solutions Bank: An Essay'; and *supra* Sect. 1.1 in Chap. 5.
17. See PHILIPP DANN & JOCHEN VON BERNSTORFF, Gesellschaft für Internationale Zusammenarbeit (GIZ) '*Reforming the World Bank's Safeguards. A Comparative Legal Analysis*' (July 2013), pp. 17–24 on the use of a principled and outcome-based approach, together with a greater use of country systems and capacity support.
18. ADB's Operational Plan also emphasizes the importance of flexibility in project processing and implementation in fragile states. ASIAN DEVELOPMENT BANK, '*Operational Plan for Enhancing ADB's Effectiveness in Fragile and Conflict-Affected Situations*', para. 18,
19. *Supra* Sects. 2.1 and 2 in Chaps. 3 and 4.
20. The relationship between a state's performance in providing basic services to the population and its legitimacy, however, is not necessarily linear. See CLAIRE MCLOUGHLIN, 'When Does Service Delivery Improve the Legitimacy of a Fragile or Conflict-Affected State?', Forthcoming in *Governance* (2014).
21. AFRICAN DEVELOPMENT FUND, '*Strategy for Enhanced Engagement in Fragile States*', 2.
22. See *supra* Sect. 1 in Chap. 6 on the principle of participation in the EU's legal framework; and *supra* Sect. 2.2 in Chap. 6 on the Thematic Program on Non-State actors and local authorities in development cooperation and other instruments for providing support to non-state actors, e.g. humanitarian assistance.

23. I unfold this argument in von Engelhardt, 'Reflections on the Role of the State in the Legal Regimes of International Aid'.
24. *Supra* Sect. 2.1 in Chap. 5. In the absence of a formal government in power, the World Bank has also entered into legal agreements with entities other than the government, e.g. UNTAET in East Timor and UNMIK in Kosovo.
25. *Supra* Sect. 2.1 in Chap. 6.
26. The responsibility to rebuild refers specifically to the responsibility of international actors to assist in post-conflict reconstruction following an intervention. On the international community's responsibility to rebuild institutional structures and social cohesion in fragile states, see Bernd Ladwig & Beate Rudolf, 'International Legal and Moral Standards of Good Governance in Fragile States', in Thomas Risse (ed) *Governance Without a State: Policies and Politics in Areas of Limited Statehood* (Columbia University Press, 2011).
27. Complementarity exists, for instance, in the Statute of the International Criminal Court, the regime for the protection of Internally Displaced Persons, and in the law on the use of force, to determine the lawful scope of extra-territorial self-defence *vis-à-vis* non-state actors. At what point a state is found unable or unwilling is generally ill-defined and varies from one legal regime to another, depending on the state's respective obligations.
28. On this paradox, see *supra* Sect. 2.1 in Chap. 3.
29. For instance, in *supra* Sect. 2.1 in Chap. 6, I show that all MDBs have prepared guidelines for dealing with *de facto* governments, but each has chosen a different form.
30. It would first of all require an assessment of how development organizations apply and implement the relevant rules in practice, based on empirical information that not even the organizations themselves necessarily have or publicise.
31. More than one decade after fragile states started becoming a key concern for the international development community, this question remains relevant and controversial. See, for instance, Woolcock, '*Engaging with Fragile and Conflict-affected States. An Alternative Approach to Theory, Measurement and Practice*'; Chandy, '*Ten Years of Fragile States. What Have We Learned?*'; or Simone Bertoli & Elisa Ticci, 'A Fragile Guideline to Development Assistance', 30 *Development Policy Review*, 211 (2012); and with a more positive perspective on the results of differentiated approaches in fragile states, Joel Hellman, Surprising Results from Fragile States, World Bank Blog (15 October 2013), at http://blogs.worldbank.org/futuredevelopment/surprising-results-fragile-states .

32. On the legal nature of the rules that govern the conduct of international development organizations, see *supra* Sect. 1 in Chap. 4. In this chapter, I focus on rules that are contained in the statutes or in other international legal treaties (namely, the Cotonou Agreement), as well as on secondary rules, including internal rules that are relatively formalized and considered binding on the organizations' staff. As noted in *supra* Sect. 1 in Chap. 4, however, non-binding rules can also be effective at steering an organization's conduct.
33. For example, an organization with a legal framework that *prima facie* poses fewer barriers to engaging with fragile states may not have to change existing rules, but still needs to decide whether or not to adopt specific rules to guide operations in fragile states.
34. For a general discussion of the challenge of ensuring international law's flexibility in light of evolving societal preferences or realities, see Isabel Feichtner, *The Law and Politics of the WTO Waiver. Stability and Flexibility in Public International Law* (Cambridge University Press, 2012), Part I, Chapter 2; and on the stability versus change debate in the law of treaties, Christina Binder, 'Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited', 25 *Leiden Journal of International Law*, 909 (2012).
35. On the concept of differential treatment, see *supra* section 1 of this chapter.
36. Bradlow, 'The Reform of Governance of the IFIs: A Critical Assessment', at 47. The use of differential treatment for LDCs, and increasingly for conflict-affected countries, in the EU's legal framework for development cooperation provides an example. See *supra* Sect. 3.3 in Chap. 6.
37. See Abram Chayes & Antonia Handler Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements* (Harvard University Press, 1998) on the managerial (as opposed to enforcement) model of treaty compliance. To some extent, this model is already reflected in the World Bank's new Program-for-Results Financing instrument, and the AfDB's and the ADB's reformed system of environmental and social safeguards.
38. The legal framework governing the EU's development cooperation is mostly set out in more recent, legal sources and not just the founding treaties. It is thus easier to adapt to changing circumstances than those of the MDBs.
39. In *supra* Sect. 1 in Chap. 2, I argue that the growing concern with fragile states in the international community is equally the product of changing circumstances and changing perceptions.
40. *Supra* Sect. 2 in Chap. 5. In contrast, for AfDB and ADB, available guidance is scattered throughout several, mostly non-binding rules.

41. I elaborate the role of internal rules in adapting the legal frameworks of development organizations in *supra* Sect. 1 in Chap. 4.
42. In *supra* Sect. 2.3 in Chap. 5, I argue that World Bank engagement at the request of the international community instead of the government in power would have required an amendment of the Articles of Agreement, rather than an internal rule in combination with an implied interpretation of the Executive Directors.
43. Feichtner, *The Law and Politics of the WTO Waiver. Stability and Flexibility in Public International Law*, 325.
44. See von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations', 797.
45. See, for instance, Sia Spiliopoulou Akermark, 'Soft Law and International Financial Institutions—Issues of Hard and Soft Law from a Lawyer's Perspective', in Ulrika Mörth (ed) *Soft Law in Governance and Regulation. An Interdisciplinary Analysis* (Edward Elgar, 2004), pp. 68–70; or Göhran Ahrne & Nils Brunsson, 'Soft Regulation from an Organizational Perspective' in ibid.; and as a voice from within, Leroy, 'The Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the Solutions Bank: An Essay'.
46. *Supra* Sects. 2.2 and 2.1 in Chaps. 5 and 6. However, I show later in this section why the *de facto* government guidelines may be seen as a rather imperfect example of transparency.
47. On procedural fairness as a source of legitimacy, see Hunter, 'International Law and Public Participation in Policy-making at the International Financial Institutions', pp. 211–212.
48. Internal rule-making can in fact open up avenues for judicial or quasi-judicial review and thus enhance an organization's accountability. See Bradlow & Naudé Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?'; or Hunter, 'International Law and Public Participation in Policy-making at the International Financial Institutions', p. 236.
49. On the still rudimentary and often insufficient mechanisms of accountability in the law of development cooperation, particularly the World Bank and EU, see Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, Chapter 9.
50. For example, the Bank Policy on PfoR is the result of extensive internal deliberations, as well as broad consultations with governments, parliamentarians, international partners and civil-society organizations.
51. On analytical shortcomings and problems of measurement regarding the notion of fragile states, see *supra* Sects. 1 and 2.2 in Chap. 2.

52. For example, the World Bank's regulatory framework for budget assistance allows certain social, environmental, and fiduciary considerations to be side-lined if there is not sufficient time or country capacity to address them. *Supra* Sect. 3.2 in Chap. 5.
53. Koskenniemi refers to this tendency as the politics of re-definition. MARTTI KOSKENNIEMI, 'The Politics of International Law – 20 Years Later', 20 *European Journal of International Law*, 7 (2009), 10; and *supra* Sect. 1 in Chap. 2.
54. EINHORN, 'The World Bank's Mission Creep'.
55. For a detailed discussion of the pros and cons of maintaining the political prohibition clause, see CISSÉ, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank'.
56. *Supra* Sect. 2.2 in Chap. 2.
57. For example, MARC, et al., *Societal Dynamics and Fragility. Engaging Societies in Responsing to Fragile Situations*, 147–148, arguing that fragile and conflict-affected countries require "more flexible approaches, judgment calls, no rigid, risk-averse planning and sequencing, since institutional change is no linear process"; or WOOLCOCK, '*Engaging with Fragile and Conflict-affected States. An Alternative Approach to Theory, Measurement and Practice*'.
58. NESBITT, 'The World Bank and De Facto Governments. A Call for Transparency in the Bank's Operational Policy', 646.
59. Dann argues that the World Bank is accountable to its richer member states through various mechanisms, but member states that depend on the Bank's loans and grants are in a weak position to challenge its decisions and hold the organization accountable. The EU presents an entirely different case, in that it is generally subject to much more formal forms of judicial review. However, the means for recipients of EU aid to hold the organization accountable are minor compared to those of EU member states. DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 459, 462 and 471.
60. For an analysis of OP 2.30, see *supra* Sect. 2 in Chap. 5.
61. See *supra* Sect. 3.1 in Chap. 6 on Article 96 of the Cotonou Agreement, which regulates the use of sanctions in response to alleged violations of human rights, democratic principles, or the rule of law. Still, the decisions of the EU Commission are public.
62. See *supra* Sect. 1 in Chap. 4 in general, and Sect. 1.1 in Chap. 5 on the World Bank's internal rule-making and use of implied interpretations.
63. Though the World Bank's process of internal rule-making has become more open and participatory in recent years, particularly older OPs were adopted without broader consultations.

64. See *supra* Sect. 1 in Chap. 6 on the different legal nature of the rules that govern EU development cooperation.
65. The accountability of international organizations is widely researched and subject of an ongoing discourse. See, for instance, August Reinisch, 'Securing the Accountability of International Organizations', 7 *Global Governance*, 131 (2001); and International Law Association, '*Final Report on the Accountability of International Organizations*' (2004).
66. On the legitimacy problem of development cooperation in general and rule-making processes in particular, see Dann, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 510–513; and with proposals to enhance the accountability of international development organizations, Mac Darrow & Amparo Tomas, 'Power, Capture, and Conflict. A Call for Human Rights Accountability in Development Cooperation', 27 *Human Rights Quarterly*, 471 (2005).
67. Kingsbury, 'Global Administrative Law in the Institutional Practice of Global Regulatory Governance', 13, arguing with regards to the internal rule-making activities of the World Bank and others that "the drawing, nudging, and redrawing of the lines are themselves a significant form of governance".
68. See also Matthew Saul, 'From Haiti to Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law', 11 *International Community Law Review*, 119 (2009), 147, who criticizes the sole reliance of external actors on state consent to legitimize interventions in states with barely effective governments, arguing that "there is an inherent need for flexibility in relation to who is given a voice", and "this flexibility appears largely unregulated by international law."
69. After all, processes of rule-making essentially constitute processes of decision-making. See von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations', pp. 792, 795.
70. For an overview of legal approaches that have grappled with activities of international organizations that reach beyond traditional sources of public international law, see *supra* Sect. 1 in Chap. 4. I focus here on the GAL approach, since it is particularly problem-oriented, while focusing mostly on enhancing procedures of decision-making. Other proposals are more concerned with the international rule of law and internal constitutionalization of international organizations at large.
71. Benedict Kingsbury, et al., 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems*, 15 (2005), pp. 37–42.
72. See ibid., pp. 37–51; Daniel C. Esty, 'Good Governance at the Supranational Scale. Globalizing Administrative Law', 115 *The Yale Law Journal*, 1493 (2006); or Bradlow, 'The Reform of Governance of the IFIs: A Critical Assessment', pp. 49–50.

73. International Law Association, '*Final Report on the Accountability of International Organizations*', p. 14.
74. See Kingsbury, et al., 'The Emergence of Global Administrative Law', 9; or von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations', 797–798, who shows how international organizations already relay on procedural requirements imported from a domestic rule of law tradition.
75. World Bank Policy on Access to Information, paras. 6 and 16.
76. *Supra* note 59. The World Bank's Inspection Panel offers a quasi-judicial review of staff compliance with mandatory internal rules, but is of limited importance concerning the effects of the Bank's decision-making on specific member states, as its focus is on the infringement of individual beneficiary rights.
77. The requirement to ensure the impartial application of internal rules could be translated into certain procedural requirements such as procedural regularity and due diligence.
78. See also Bradlow & Naudé Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?', p. 59; and Hunter, 'International Law and Public Participation in Policy-making at the International Financial Institutions', pp. 235–237.
79. Cissé, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank', p. 86. Cissé also points out that through interpretation rather than formal amendment, "small shareholders stand to be deprived of 'protection of their interests guaranteed by high majority required for formal amendment.'"
80. More concrete proposals concerning the design of rules, procedural requirements for decision-making, or the rule-making process, can only be formulated with regards to specific organizations and the issues they face. As a matter of principle, though, administrative decision-making with effects that are in fact predominantly internal should be subject to different requirements—e.g. in terms of effectiveness and efficiency—than decision-making with clearly external effects, where standards like participation and review are more important. See also Christian Tietje, 'Comment on the Contributions by Jochen von Bernstorff and by Maja Smrkolj', in Armin von Bogdandy, et al. (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010), pp. 817–818.

CHAPTER 8

Conclusion

Of the 1.5 billion people living in fragile countries, many may not feel like living in a state at all. International law, however, upholds the legal status of states even if the government is barely able to exercise effective authority, and provide basic services to its people. The reasons for maintaining this fictional façade are compelling. Yet it leads to a number of problems in the practice of international cooperation, where international organizations, for instance, expect governments to assume quite substantial roles and responsibilities. For the citizens of fragile states, the lack of a *de jure* and *de facto* effective government can ultimately impede their ability to receive international financial and technical assistance.

Since I started writing this book, some countries managed to transition out of fragility, while others have joined the list of fragile states.[1] Considered as relatively stable up to 2011, Libya threatens to disintegrate. Similarly, Syria's civil war has brought the country close to becoming 'another Somalia' and destabilizes the entire region. The world's youngest state, South Sudan, has descended into civil war 2 years after independence—not least because development organizations have failed to adequately acknowledge and address deep-seated problems of political reconciliation. And, despite vast amounts of ODA, Afghanistan's future remains uncertain.

Against this background, I do not naively suggest that the manifold challenges of aiding fragile states lend themselves to an easy or perfect

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solution, nor that adapting the legal and policy frameworks of international organizations is all that it takes. I do, however, suggest that the legal response of international organizations can and should be analysed in more detail—and that such an analysis can ultimately guide proposals to make their dealings with fragile states less arbitrary, more transparent and more effective.

In this book, I have shown that fragile states are perhaps a factual phenomenon beyond law, but how international development organizations have addressed the challenges of engaging with fragile states is of legal significance. I have developed an approach to engage with the phenomenon of fragile states from a legal perspective, which requires scrutinizing what position fragile states are accorded by other legal subjects, considering formal and informal legal instruments. Focusing on development cooperation, I have analysed how various international organizations have adopted or modified rules of their legal and policy frameworks to engage with fragile states, identified emerging patterns, and discussed the potentials and perils of formalizing a differentiated approach to fragile states.

What is the relevance of my findings beyond the field of development cooperation? The discrepancy between juridical statehood and empirical statehood challenges the functioning and effectiveness of the international legal order in general, and poses concrete problems to all those that operate on its premises and within its confines. International law is built on the assumption that all states have a functioning, effective government that can exercise rights and obligations. In all areas of international cooperation involving states, the government is the sole entity that can formally represent and legally commit the country. And yet our knowledge of how the ensuing problems of dealing with states that have no or only very weak governments are addressed in the practice of international cooperation is still limited.[2] How do other legal subjects engage with governments that exercise no real authority? How are legal rules adapted to accommodate the severe limitation of government effectiveness? And what are the consequences?

First of all, the approach of this book is as relevant as the question what state fragility means for the ability of international organizations to fulfil their objectives and functions. Development cooperation is certainly not the only field where interactions between international organizations and states, or among states, are based on the premise that the states involved have effective government. Quite the contrary, it may appear paradoxical that even an area of international cooperation that is largely concerned with enhancing the capacity of state institutions in developing countries

also hinges on the existence of states with capable institutions in the first place.[3]

The problems that arise when the effective government premise is not met become particularly obvious when considering the interaction of international organizations with their member states. Member states are not only required to have a government with the capacity to represent the country in the organization's bodies and proceedings. They need a government with the factual capacity to exercise the rights and obligations that come with membership in the organization, comply with legal obligations arising from treaties concluded with the organizations, and fulfil other regulatory requirements set by the organization, legally binding or not. This holds true even if what level and what types of capacity international organizations require from their member states or the states they engage with varies significantly from one organization to another.[4]

To what extent dealing with fragile states poses challenges for the mandated objectives and ordinary functions of international organizations—or *vice versa*[5]—has, however, barely been addressed systematically in legal scholarship.[6] Nor do we know much about how different organizations respond to such challenges, either *ad hoc* or by modifying their legal and policy frameworks.

For instance, some organizations engaged in humanitarian assistance equally require a formal government request to become active, for instance, the United Nations (UN) Office for the Coordination of Humanitarian Affairs, OCHA.[7] Others can also provide assistance to the population at the request of the UN Secretary General, namely, the World Food Programme (WFP).[8] How humanitarian organizations are thus more or less attuned to dealing with fragile states is a question of great significance, considering that they mostly operate in fragile or conflict-affected states.[9]

Other international organizations and policy fields are not primarily concerned with providing technical and financial assistance to the most needy countries, but have still developed legal approaches that could help dealing with the limited institutional and administrative capacity of certain countries to exercise rights and obligations. Cases in point are the WTO and the WTO agreements, wherein a number of provisions accord developing countries special and differential treatment.[10]

Even if it turns out that international organizations have nowhere sought such a comprehensive response to the challenges of engaging with fragile states as in the field of development cooperation, their response

could serve as a model for other organizations.[11] This is true in particular for organizations that also engage with fragile states on a regular basis, that also need governments with legal and factual capacity—and, importantly, that also have an interest in engaging with states even where these conditions are not met. In as much as they face similar challenges as development organizations, they might consider a similar response.

The regulatory approaches and techniques I identify provide a reference point: for instance, using differentiated and more flexible requirements, shifting from *ex ante* requirements to *ex post* controls, or offering implementation assistance combined with capacity-building. But the practice of development organizations also provides negative examples, for example, of rules that leave unfettered discretionary powers and make decision-making concerning fragile states appear arbitrary and politically selective. Ultimately, formalizing a differentiated approach to fragile states always comes with potentials and perils, which should be carefully considered and weighed.

Speaking of the potentials and perils of formalizing a differentiated approach, my findings also have greater relevance in that they show that the internal rule-making activities of international organizations still deserve more attention particularly from legal scholarship. For many international organizations, internal rules that are usually developed in relatively informal, unilateral processes are not only of crucial significance in guiding their conduct. They can also assume significant external effects on the countries the organizations engage with.

One aspect that deserves specific attention is the relationship between more or less formalized, internal rules of international organizations, and international law's traditional sources.[12] Some internal rules have certainly no bearing on international treaty or customary law, even if they have significant internal and external effects. Examples are the Operational Policies that regulate the World Bank's financing instruments. Others, however, are used to codify interpretations of the founding treaties or emerging organizational practices, and thus affect existing treaty law—for example, the World Bank's OP 2.30 and 7.30.[13] To what extent do the internal rules of international organizations also contribute to the further development of international law, in areas that are important, yet underdeveloped?[14] It would be a bit too far-fetched to state that the World Bank or other organizations have contributed to the transformation of the legal doctrine of statehood or principle of sovereignty. But their rule-making concerning fragile states certainly reflects the evolving understanding of

sovereignty in the 21st century, which manifests itself in the internal legal order and practice of the organizations.[15]

The legitimacy concerns raised by these observations reverberate in a growing body of legal scholarship concerned with the governance activities of international organizations.[16] In this context, the contribution of this book lies in directing attention to a particular constellation—international organizations and fragile states. It is a constellation worth analysing further from the perspective of legal approaches that seek to conceptualize and importantly, to confine the governance activities of international organizations. This would entail asking more normative questions than this book does—an important exercise, given that the legal frameworks of many organizations provide relatively few, effective constraints on their rule-making activities.

With a view to the rules and processes through which international organizations engage with fragile states, there are also a number of conceptual and theoretical questions that have yet to be addressed. For instance, how do we factor in that the determining effects of a formally non-binding rule on some states may be much more substantial than for others, depending on the extent to which states are able to resist the rule's impetus? Further, how should international organizations legitimize their activities when dealing with states that have no government, or one with virtually no capacity to maintain public order and represent the population internationally?[17] Domestic public authority may appear weak in some states, but international organizations are still far from constituting effective and legitimate public authorities themselves.

Finally, I hope that this book inspires further research into the empirical phenomenon of fragile states from the perspective of international law. We can acknowledge the conceptual ambiguity and normative bias of a notion like fragile states, and still ask for the role that states with no or only very weak governments are accorded by different actors, in different legal regimes. In fact, considering the politics invariably involved when it comes to describing and dealing with fragile states, this kind of informed but cautious analysis is highly relevant.

The fundamental problem that state fragility poses to the international legal order will certainly not go away. Quite the contrary, it will become more acute with the increasing intensity of international cooperation and regulation, with states no longer assuming the sole, but still the most important role as law-makers and primary agents of implementation. Statehood will continue to matter, as will state fragility. And for international organizations

to navigate, and ultimately to help reduce the uncomfortable gap between legal status and weak government effectiveness, more practical legal guidance is needed.

Notes

1. Countries and territories that were on the World Bank's list of fragile states in 2012, but no longer in 2016, are: Angola, Republic of Congo, Georgia, Guinea, Nepal and Western Sahara. Countries that were not on the 2012 list, but appear on the 2016 list, are: Gambia, Lebanon, Libya, Madagascar, Mali, South Sudan, Syria and Tuvalu.
2. Some legal scholars have analysed the consequences of a complete breakdown of effective government under international law, but particularly studies concerned with limitations of government effectiveness that fall short of a complete breakdown are largely missing. See *supra* Sect. 3 in Chap. 2.
3. On this paradox, see *supra* Sect. 2.1 in Chap. 3.
4. Probably the highest level of capacity is required from EU member states to observe and implement EU law—and even EU member states may suffer from 'systematic deficiencies' concerning their ability to guarantee the rule of law. See Michael Ioannidis & Armin von Bogdandy, 'Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done', 51 *Common Market Law Review*, 59.
5. *Vice versa*, one could ask to what extent dealing with international organizations—and meeting the regulatory requirements set by international organizations—puts a further strain on the scarce capacity and resources of fragile states.
6. The question has perhaps been raised in abstract, but rarely been addressed in detail, e.g. for individual organizations. An exception is Chiara Giorgetti, who analyses how some international organizations have sought to respond to crisis situations involving governments unable to perform certain obligations—though again with a focus on Somalia, and hence the complete breakdown of government. Giorgetti, *A Principled Approach to State Failure. International Community Actions in Emergency Situations.*
7. UN General Assembly Resolution 46/182 of 19 December 1991 establishing OCHA (UN Doc. A/RES/46/182), Guiding Principle 3 and 4.
8. See Article XI of the General Regulations, the legal framework of the WFP. In addition, based on Article X (2), bilateral donors, UN agencies, and NGOs "may request WFP services for operations which are consistent with the purposes of WFP".
9. With fragile states constituting environments where humanitarian, development, and security actors operate alongside each other, the OECD

Fragile States Principles can be seen as a synthesis approach between humanitarian principles and principles of development cooperation. See *supra* Sect. 3 in Chap. 3.

10. At the WTO, special and differential treatment includes the granting of longer time periods for implementation, but also technical assistance to help developing countries build the infrastructure to undertake WTO work, handle disputes, and implement technical standards. On the concept of differential treatment and its use in the WTO, see Henning Jessen, *WTO-Recht und "Entwicklungsländer"* (Berliner Wissenschafts-Verlag, 2006); and in environmental treaty regimes, Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law'.
11. I outline some of the reasons why the topic has gained so much traction in the field of development cooperation in *supra* Sect. 2 in Chap. 3.
12. On this complex interaction, see Marie von Engelhardt, 'Opportunities and Challenges of a Soft Law Track to Economic and Social Rights. The Case of the Voluntary Guidelines on the Right to Food', 42 *Verfassung und Recht in Übersee*, 502 (2009).
13. In this context, the World Bank's practice of using internal rules as a basis for informal, implied interpretations appears particularly noteworthy and problematic. See *supra* Sect. 1.1 in Chap. 5; and for a detailed analysis of OP 2.30 and OP 7.30, *supra* Sect. 2 in Chap. 5.
14. See Bradlow & Naudé Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?', 7, arguing that institutions can "influence the normative development of international law" when they "are interpreting and applying international law in areas that are particularly under-developed with respect to specific cases or factual situations".
15. See also Weiler, 'Editorial. Differentiated Statehood? 'Pre-States'? Palestine@the UN', 5, reminding us that "in the actual praxis of international life, functionally things look interestingly different, reminiscent perhaps of the tension between the formal existence of a right and its exercise. Statehood, grant me, is not that simple a monolithic concept."
16. See *supra* Sect. 1 in Chap. 4, on the contribution of the GAL and IPA approaches to grasping the potential effects of a variety of normative outputs of international organizations; and *supra* Sect. 3 in Chap. 7.
17. Some inspiration for this question can be sought in Matthias Goldmann, *Internationale Öffentliche Gewalt. Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung* (Springer, 2015), 573; or Ladwig & Rudolf, 'International Legal and Moral Standards of Good Governance in Fragile States', discussing the 'metaproblems of legitimacy' in fragile states.

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