Reflections on the Role of the State in the Legal Regimes of International Aid

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Abstract

Humanitarian and development aid are governed by different sets of rules and principles that constitute them as distinct but related legal regimes. In particular, the rules and principles governing humanitarian and development aid foresee a different role for the recipient state. The extent to which a state's formal sovereignty effectively translates into ownership and participation in the allocation, design, and implementation of international aid thereby differs strongly. In practice, however, a clear distinction between humanitarian and developmental fields of action is no longer viable. Therefore, the increasing overlap of different types of foreign aid interventions in protracted emergencies, post-conflict, and fragile states has led to normative conflict and uncertainties about the applicable legal framework. The emerging legal grey area threatens to compromise the function of rules to stabilize normative expectations.

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I. Introduction

When engaging in the insecure and highly politicized environments of post-conflict or fragile states, international aid actors confront what *Robert Zoellick*,[1] President of the World Bank, has called the "toughest development challenge of our era".[2] Since aid effectiveness is understood to require state effectiveness, it is extremely difficult for humanitarian and development actors to deliver aid to states that lack basic institutional structures and capacities.[3] Moreover, international actors face the delicate question of how to relate to governments that fail to assist and protect their own populations: they are challenged to respect the formal sovereignty of a recipient state, while dealing with the consequences of its empirical fragility. In this context, technical considerations of aid effectiveness and political concerns regarding the legitimacy of a government[4] come to intersect with the requirements of the international legal doctrine of state sovereignty.[5]

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[1] In this contribution, the term "international aid" is used to encompass both humanitarian and development interventions.

[2] *R. B. Zoellick*, Fragile States: Securing Development, Survival 50 (2009), 67, 68. Though the World Bank initially approached the phenomena of fragile and conflict-affected countries under different portfolios, they now constitute one agenda. See http://www.worldbank.org.

[3] The growing recognition of the interaction and interdependence of state institutions and markets can be traced in the World Bank's yearly publication, the World Development Report (WDR): WDR 1997 "The State in a Changing World", WDR 2000-2001 "Attacking Poverty", WDR 2002 "Building Institutions for Markets", WDR 2004 "Making Services Work for Poor People", and subsequent WDRs available online, http://www.worldbank.org.

[4] The role of state or governmental legitimacy in aid relations has been highlighted in a recent OECD report: OECD, The State's Legitimacy in Fragile Situations. Unpacking complexity, 2010, 59: "In fragile situations, a lack of legitimacy undermines constructive engagement between the state and society, which weakens state capacity and thus contributes to fragility"; and *R. B. Zoellick* (note 2), 69: "Yet these situations require looking beyond the analytics of development to a different framework of building security, legitimacy, governance and economy."

[5] International legal scholarship has taken a growing interest in the phenomenon of state failure and the international community's response in the form of military intervention and state-building. See, for example, *D. Thürer/M. Herdegen*, Der Wegfall effektiver Staatsgewalt: "The failed state", 1996; *R. Geiß*, Failed States. Die normative Erfassung gescheiterter Staaten, 2005; *G. Kreijen* (ed.), State, Sovereignty, and International Governance, 2002; *C. Giorgetti*, A Principled Approach to State Failure. International Community Actions in Emergency Situations, 2010; *B. Bowden et al.* (eds.), The Role of International Law in Rebuilding Societies after Conflict. Great Expectations, 2009. In contrast, fragile statehood, a much more frequent phenomenon than complete state failure, has attracted less attention in legal scholarship. A notable and very recent exception is *B. Kingsbury/K. Davis*, Obligation Overload: Adjusting the Obligations of Fragile or Failed States, 2010, unpublished work, available online, http://www.iilj.org.

Humanitarian and development aid suggest different approaches to deal with the "sovereignty gap" that has been ascertained with regard to post-conflict or fragile states.[6] The distinctiveness of humanitarian and development interventions is thereby not only reflected in the choice of instruments, *modi operandi*, and partners. Rather, this contribution argues that humanitarian and development aid are increasingly governed by different sets of rules and principles that constitute them as distinct legal regimes. In particular, the extent to which the sovereignty and collective autonomy of a state is respected and translated into ownership and participation in the planning and implementation of foreign aid interventions may differ strongly between humanitarian and development aid. Accordingly, how donors assess a state's capacity and will to protect and assist its population has not only practical consequences for the choice of instruments and modalities with which they relate to the recipient state, but also significant normative implications.

Since in practice, however, a clear distinction between humanitarian and developmental fields of action is no longer viable, a legal grey area has occurred with regard to international engagement in post-conflict or fragile states.[7] Therefore, this contribution further holds that the blurring distinction between different types of foreign aid intervention has led to uncertainties with regard to the applicable rules and principles, conflicting competencies at the national and international level, and simultaneous but incompatible commitments on donor agencies. Such normative conflicts threaten to compromise the function of rules to stabilize normative expectations.[8]

To emphasize the distinct role foreseen for the recipient state in the legal regimes of international aid, this contribution proceeds by conceiving humanitarian assistance and development co-operation as two separate but

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[6] *A. Ghani/C. Lockhart*, Fixing Failed States. A Framework for Rebuilding a Fractured World, 2008, 21, calling a sovereignty gap "the disjunction between the de jure assumption that all states are 'sovereign' regardless of their performance in practice – and the de facto reality that many are malfunctioning or collapsed states, incapable of providing their citizens with even the most basic services".

[7] *Joanna Macrae* from the Overseas Development Institute (ODI) has pointed out that "[t]he problem for the aid community is that the pace of experimentation in political relations with 'quasi-states' has outstripped that at which the basic legal and institutional framework of the international political and aid relations has been modified. This has left aid actors, particularly the United Nations, in the uncomfortable position of having only very crude instruments with which to engage with 'quasi-states' …", *J. Macrae*, Aiding Peace … and War: UNHCR, Returnee Reintegration, and the Relief-Development Debate, New Issues in Refugee Research 14 (1999), 17.

[8] On the function of law to stabilize normative expectations, see *J. Habermas*, Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats, 1992, 90 et seq., 146; *N. Luhmann*, Das Recht der Gesellschaft, 1993, 150 et seq.

related legal regimes (II. 1.), which are consolidated by the proliferation of different rules and principles that condition the role of the recipient state in aid relations (II. 2.). As the traditional fields of action of humanitarian and development actors increasingly overlap (III. 1.), these principles may clash, creating substantial operational difficulties and normative tensions (III. 2.). Finally, in light of its normative implications, it is proposed that the process by which bilateral and multilateral donors assess the capacity and will of recipient states in order to decide on the type and modalities of aid intervention still warrants further research (IV.).

II. Two Regimes of International Aid

1. Humanitarian Assistance and Development Co-operation

In principle, Humanitarian Assistance and Development Co-operation constitute two different regimes. Despite sharing common grounds and in particular common objectives – to ease human suffering and protect human life and dignity – they have different origins, actors, structures, and *modi operandi*.[9] Moreover, many of the "principles, norms, rules and decision-making procedures around which actors' expectations converge" are not the same for development and humanitarian aid.[10] Accordingly, it seems adequate to speak of two separate but related legal regimes, and of the structure of international aid as largely dualistic. For example, the European Union distinguishes between development co-operation and humanitarian aid with regard to goals, principles, and implementation arrangements. The Treaty on the Functioning of the European Union (TFEU) for the first time regulates development cooperation and humanitarian aid under different arti-

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[9] See, for example, *A. Harmer/D. Basu Ray*, Study on the Relevance and Applicability of the Paris Declaration on Aid Effectiveness in Humanitarian Assistance, Overseas Development Institute, 2009; *P. Harvey*, Towards Good Humanitarian Government. The Role of the Affected State in Disaster Response, 2009; on the different *modi operandi*, see *N. Leader/P. Colenso*, Aid Instruments in Fragile States, UK Department for International Development, Poverty Reduction in Difficult Environments Team (PDRE) Working Paper 5 (2005). In light of the common objectives of humanitarian and development aid, *Hugo Slim* holds that the dichotomy between them is artificial. *H. Slim*, Dissolving the Difference Between Humanitarianism and Development: the Mixing of a Rights-based Solution, Development in Practice 10 (2000), 491.

[10] *S. Krasner* (ed.), International Regimes, 1983, 2; *A. Bradford*, Regime Theory, in: R. Wolfrum (ed.), The MPEPIL, 2008 online edition, www.mpeil.com. On the different sets of principles, see below, section II. 2.

cles, thereby providing a distinct legal basis for humanitarian aid in the Union's primary law.[11]

This dichotomy is most apparent in view of the different roles foreseen for the recipient state. In short, development aid is designed to achieve long-term, sustainable development by addressing the root causes of poverty and strengthening state structures. Aid is provided by bilateral or multilateral donor agencies in co-operation with the recipient state government and generally on the basis of a national development plan.[12] Humanitarian or emergency assistance seeks to provide immediate short-term relief to fulfill the essential needs and ensure the survival of all victims of conflict or disaster, through material assistance or protection. Humanitarian aid is for the most part implemented by international governmental or non-governmental actors that operate in the affected state's territory, but not necessarily on the basis of its national strategies.

Accordingly, whereas both development and humanitarian actors uphold the formal sovereignty of the recipient state and engage only upon approval of the government in power,[13] development agencies generally work with the recipient state's government as a partner in programming and implementation,[14] and are thus more likely to buttress its empirical statehood.[15]

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[11] Whereas Article 208 TFEU establishes that development co-operation "shall have as its primary objective the reduction and, in the long term, the eradication of poverty", Article 214 TFEU regulates that humanitarian aid "shall be intended to provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs".

[12] This is a simplification sufficient for the purposes of the present article, but glossing over the diverse interests on the side of both donors and recipient states. With a call for disaggregating donor and recipient countries, *J. K. Boyce*, Unpacking Aid, Development and Change 33 (2002), 239.

[13] General Assembly (GA) Resolution on Strengthening of the coordination of humanitarian emergency assistance of the United Nations, A/RES/46/182, 19.12.1991, para. 3 "with the consent of the affected country and in principle on the basis of an appeal by the affected country"; on the different rules of engagement of, for example, the Office for the Coordination of Humanitarian Affairs (OCHA), the World Food Programme (WFP), and the United Nations Children's Fund (UNICEF), see *C. Giorgetti* (note 5), 157 et seq.

[14] *H. V. Morais*, Testing the Frontiers of their Mandates. The Experience of the Multilateral Development Banks, Proceedings of the Annual Meeting (American Society of International Law) 98 (2004), 64, 69, criticizing that the large part of Multilateral Development Banks' lending flows to governments "which invariable results in the politicization of such lending".

[15] The concept of empirical statehood as opposed to juridical statehood is borrowed from *R. H. Jackson*, Quasi-states, Dual regimes, and Neoclassical Theory: International Jurisprudence and the Third World, International Organization 41 (1987), 519. *R. H. Jackson* has argued with view to African states after decolonization that many of them are "juridical artifacts of a highly accommodating regime of international law", possessing juridical statehood or negative sovereignty "without yet possessing much in the way of empirical state-

Humanitarian agencies tend to by-pass the state and deliver aid directly to the individuals in need, potentially undermining the state's sovereignty.[16]

Viewed through a different and simplifying lens, development actors could be seen to favor the collective autonomy of the recipient state's government, whereas humanitarian actors prioritize the individual autonomy of the beneficiaries within the recipient state.[17] For example, development agencies usually plan their interventions on the basis of a nationally owned Poverty Reduction Strategy Paper (PRSP),[18] whereas in the humanitarian sector, aid agencies generally plan, implement and coordinate their activities on the basis of a Common Humanitarian Action Plan (CHAP), a planning tool based on agency assessments.[19] Meanwhile, accountability mechanisms in the humanitarian sector are arguably less state-directed and more centered on individual beneficiaries or civil society organizations than in development co-operation,[20] although responsibility of international aid actors in general to affected individuals in recipient countries remains weak.[21]

hood, disclosed by a capacity for effective and civil government", 529; in detail *R. H. Jackson*, Quasi-states. Sovereignty, International Relations and the Third World, 1990.

[16] *Heintze*, however, stresses that humanitarian aid in emergency situations is not to be understood to limit a state's sovereignty, but to contribute to the creation of circumstances wherein the state is again able to effectively exercise sovereignty. *H.-J. Heintze*, Humanitäre Hilfe - Instrument zur Schaffung geordneter Staatlichkeit? Handlungsempfehlungen vor dem Hintergrund der Haiti-Katastrophe, Stiftung Entwicklung und Frieden Policy Paper 32 (2010), 2.

[17] On the principles of collective and individual autonomy in the law of development co-operation, see *P. Dann*, Entwicklungsverwaltungsrecht. Theorie und Dogmatik des Rechts der Entwicklungszusammenarbeit, untersucht am Beispiel der Weltbank, der EU und der Bundsrepublik Deutschland, 2011, forthcoming, § 14 and § 15. Collective autonomy is based on the principles of sovereignty, formal equality, and non-intervention, individual autonomy refers to the human rights of individuals.

[18] PRSPs describe "the macroeconomic, structural, and social policies and programs that a country will pursue over several years" and "are prepared by governments in low-income countries through a participatory process involving domestic stakeholders and external development partners, including the IMF and the World Bank". International Monetary Fund (IMF), Factsheet on Poverty Reduction Strategy Papers (PRSPs), 22.9.2010, available online, http://www.imf.org. Critical of the PRSPs and the concept of ownership in practice are *W. Easterly*, The Cartel of Good Intentions, Center for Global Development, Working Paper Nr. 4/2002; *W. Eberlei*, Stakeholder Participation in Poverty Reduction, Institut für Frieden und Entwicklung, INEF Report Nr. 86/2007.

[19] On the CHAP as part of the Consolidated Appeals Process (CAP), the major tool for planning, implementation, monitoring, funding and co-ordination in the humanitarian planning cycle, see online http://ochaonline.un.org/humanitarianappeal.

[20] *A. Harmer/D. Basu Ray* (note 9), 10.

[21] A notable exception is the World Bank Inspection Panel, a quasi-judicial body that allows individuals to claim that they have been adversely affected by a Bank-financed operation due to the non-compliance of the Bank with its own policies and procedures. See, for example, *G. Alfredsson/R. Ring* (eds.), The Inspection Panel of the World Bank. A Different

These structural differences are also reflected in terminology. In the development community, there has been a notable shift in language from development assistance to development *cooperation,* and from donor-recipient relations to development *partnerships.*[22] Meanwhile, there is no such trend in the humanitarian community, where the common term to describe emergency relief activities remains humanitarian *assistance.*

More importantly, however, the structural differences that inform the dichotomy between development cooperation and humanitarian assistance are increasingly being consolidated through the proliferation of rules and principles in the international aid system.

2. The Proliferation of Aid Principles

Since the mid-1990s, humanitarian and development actors make efforts to overcome the limitations of an aid architecture that had proven increasingly inept as a framework for engaging in challenging new environments,[23] namely complex emergencies and post-conflict or fragile states.[24] With volumes of aid declining and the aid system facing a crisis of legitimacy and a growing sense of frustration in view of unsatisfactory results, they seek to respond to calls for more effectiveness and accountability.[25] In the wake of a

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Complaints Procedure, 2001; *A. Orakhelashvili*, The World Bank Inspection Panel in Context. Institutional Aspects of the Accountability of International Organizations, International Organization Law Review 2 (2005), 57.

[22] On the terminology of development aid, see, for example, *A. Escobar*, Encountering Development, 1995, 30; *P. Berger*, Speaking to the Third World, in: P. Berger/M. Novak (eds.), Essays on Development and Democracy, 1985, 20.

[23] See, for example, *D. D. Bradlow/C. Grossman*, Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF, Hum. Rts. Q. 17 (1995), 411; on the politicization of aid in the context of protracted emergencies and fragile states, *A. De Waal*, The umanitarians' Tragedy: Escapable and Inescapable Cruelties, Disasters 34 (2010), 130; *D. Curtis*, Politics and Humanitarian Aid: Debates, Dilemmas and Dissension, HPG Report 10 (2001), 13: the "expansion of the sphere of humanitarian work to include conflict resolution, peacebuilding and peace enforcement gives rise to ambiguities and necessitates the abandonment of neutrality".

[24] According to the Overseas Development Institute (ODI), the substantial majority of humanitarian expenditure currently occurs in complex emergencies (http://www.odi.org.uk). The World Bank reports that "fragile states account for a sixth of the world's population of 6.5 billion, but for half of all the worlds' infant deaths, and a third of all people surviving on less than US$1 a day"; see online, http://www.worldbank.org.

[25] See, for example, *N. Van de Walle*, Aid's Crisis of Legitimacy: Current Proposals and Future Prospects, Afr. Aff. 98 (1999), 337.

wide-ranging trend of legalization in the international system,[26] their efforts result in a mushrooming of initiatives generating principles, and a formalization of the rules and procedures that govern the allocation and implementation of aid by different donors.[27]

International aid agencies, Non-Governmental Organizations (NGOs), bilateral donors and, to a lesser extent, developing countries together set rules and principles that condition the role of the recipient state in aid relations. They are adopted, for example, in the form of multilateral declarations, sectoral codes of conduct, or organizational guidelines. The proliferation thus concerns mostly soft law, that is, rules and principles that are not formally binding under international law.[28] However, where rules or principles derive from more general hard law or have acquired customary status, they can give rise to legal obligations.[29] In particular, many principles have entered into the secondary law of international organizations like the World Bank, where they are concretized and become rules that are binding on the staff of the respective organization.

In the realm of humanitarian aid, the decades-old principles of humanitarian action that evolved from the context of the Red Cross Movement are being reaffirmed and substantiated in various initiatives, for example the Red Cross Code of Conduct[30] and the Oslo Guidelines (both 1994);[31] the

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[26] On the concept of legalization, see *J. O. Goldstein et al.*, Introduction: Legalization and World Politics, International Organization 54 (2000), 385; *K. O. W. Abbott et al.*, The Concept of Legalization, International Organization 54 (2000), 401; and *M. Zürn/B. Zangl*, Make Law, not War: Internationale und transnationale Verrechtlichung als Baustein für Global Governance, in: M. Zürn/B. Zangl (eds.), Verrechtlichung – Baustein für Global Governance?, 2004, 267. In line with these authors, this contribution understands legalization as a process that leads to the gradual institutionalization of informal social norms to formal legal norms through an increasing formalization of the procedures of rule-setting, interpretation, and implementation, and thereby to the imposition of international legal constraints in a policy field *M. Zürn/B. Zangl* (note 26), 6.

[27] In detail, see *P. Dann* (note 17).

[28] Accordingly, the terms "rule" and "principle" as employed in this contribution do not exclusively refer to formally binding international law in the sense of Article 38 of the Statute of the International Court of Justice.

[29] On the interaction between hard law and subsequent soft law on the same subject matter in detail, see *M. 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, VRÜ 42 (2009), 502, 506 et seq.

[30] The Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, 1994, available online, http://www.ifrc.org.

[31] Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines"), 1994. The Oslo Guidelines emanated from a collaborative effort of major bilateral donors, governmental and non-governmental aid agencies, and policy experts, and were overhauled and re-launched in November 2006.

Sphere Project and Humanitarian Charter (1997);[32] the Good Humanitarian Donorship Initiative[33] and the Humanitarian Accountability Partnership (both launched in 2003).[34] The core principles of humanity, neutrality, independence and impartiality that are grounded in international humanitarian law are thus being concretized and transferred into rules that are applicable to the conduct of humanitarian agencies, and not only in traditional armed conflicts.[35] Bilateral or multilateral agencies are committed to deliver aid on the grounds of purely *humanitarian* considerations, *neutral* towards the conflicting parties, *independent* from political considerations, and *impartially* and non-discriminative to all victims. In line with these principles, the humanitarian community generally adopts a "state-avoiding model of international assistance". Humanitarian actors, however, are not only keen to operate independently of the state in the context of conflicts, but frequently also of disasters, where strong and capable national authorities may well be present.[36]

In the realm of development, donors and recipient states within the framework of the OECD Development Assistance Committee (DAC), for example, adopted the Paris Declaration on Aid Effectiveness in 2005. The Paris Declaration sets out principles for the delivery and management of development aid that put national "ownership" of the development process first.[37] Ownership, which can be understood as a regime-specific concretization of the international legal principle of sovereignty,[38] suggests that developing countries must take the lead over and the responsibility for their

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[32] The Sphere Project is an initiative launched in 1997 to define and uphold the standards by which the international aid community responds to disasters. The Sphere Project set out a set of guidelines for humanitarian action (the Humanitarian Charter) and established quantifiable minimum standards in disaster response (the Sphere Handbook). See online, http://www.sphereproject.org and on the background *P. Walker/S. Purdin*, Birthing Sphere, Disasters 28 (2004), 100.

[33] The Good Humanitarian Donorship (GHD) initiative is an informal donor forum and network to uphold a set of commonly agreed humanitarian standards, the 23 GHD Principles and Good Practices; see online, http://www.goodhumanitariandonorship.org.

[34] The Humanitarian Accountability Partnership is a self-regulatory body of the humanitarian sector, whose members commit to meeting common standards of accountability to beneficiaries, specified in the HAP Humanitarian Accountability and Quality Management Standard (2007); see online, http://www.hapinternational.org; and the article in the periodical The Economist, Weighed and found wanting, 24.5.2007, online edition, http://www.economist.com.

[35] On the legal status of the principles, see; *N. Leader*, Proliferating Principles; Or How to Sup with the Devil without Getting Eaten, Disasters 22 (1998), 288.

[36] *P. Harvey* (note 9), 1.

[37] The Paris Declaration on Aid Effectiveness, OECD, 2005, paras. 14 and 15. See also the Accra Agenda for Action drawn up in 2008.

[38] *P. Dann* (note 17), §14.

own development, whereas donors assume the role of partners. Other principles stipulate that donors should align with the recipient state's development strategy and systems, and harmonize their efforts accordingly.[39] The Paris principles thus reflect the conviction that development can only be successful where it builds on and fosters state institutions. Other instances of legalization in the realm of development cut across several levels of legal order to include initiatives and instruments as diverse as the Millennium Development Goals within the context of the United Nations;[40] at the regional level the European Consensus on Development (2006);[41] or the Operational Policies of the World Bank.[42]

Since the partnership model of development, however, assumes what most difficult environments lack[43] – basic levels of state capacity and commitment on parts of the recipient state – donors within the framework of the OECD DAC have subsequently come up with a specific set of development principles,[44] the Principles for Good International Engagement in Fragile States.[45] Fragile states pose a particular challenge for humanitarian and development actors, because governments are often too weak to serve as a counterpart in implementing aid effectively, to draft a national development plan, or even to issue a formal request for humanitarian assistance in form of an appeal.[46] Donors are challenged to respect the collective auto-

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[39] The Paris Declaration on Aid Effectiveness, paras. 16-31 (on alignment) and paras. 32-42 (on harmonization).

[40] United Nations Millennium Declaration, GA Res. 55/2, 18.9.2000; and Road Map Towards the Implementation of the United Nations Millennium Declaration, Report of the Secretary-General, UN Doc A/56/326, 6.9.2001, Annex.

[41] The European Consensus on Development, Joint Statement 2006/C 46/01, 24.2.2006.

[42] For example, World Bank OP 4.01 Environmental Assessment (1999); OP/BP 2.30 Development Cooperation and Conflict (2001); OP/BP 8.00 Rapid Response to Crises and Emergencies (2007); and OP 14.40 Trust Funds (2008). Operational Policies "provide explicit requirements for the design, appraisal, and implementation of Bank-financed development projects" and "are mandatory for Bank staff"; *G. A. Sarfaty*, The World Bank and the Internationalization of Indigenous Rights Norms, 2005, 1798; see also *B. Kingsbury*, Operational Policies of International Institutions as Part of the Law-Making Process. The World Bank and Indigenous Peoples, in: G. S. Goodwin-Gill/S. Talmon (eds.), The Reality of International Law. Essays in Honour of Ian Brownlie, 1999, 323.

[43] On the challenge of applying a partnership model of aid to situations where the state does not have the jurisdiction, authority, or capacity to exercise effective control, see *M. Anderson/M. M. Torres*, Fragile States: Defining Difficult Environments for Poverty Reduction, UK Department for International Development, Poverty Reduction in Difficult Environments Team (PDRE) Working Paper 1 (2004), 10 et seq.

[44] This contribution does not frame aid to fragile states as a separate legal regime of international aid, but as a subset of rules and principles of development aid adapted to situations of state fragility.

[45] Principles for Good International Engagement in Fragile States, OECD, 2007.

[46] See note 13.

nomy of the fragile state while not legitimating repressive governments, or inadvertently creating societal divisions. Thus, the fragile states principles advocate state-building as the central objective in order to create the conditions for the state to exercise ownership.[47] At the same time, they incorporate elements of the principles of humanitarian action. In response to situations where sole reliance on the central government as a partner could prove detrimental to fulfilling the needs of its citizens, the fragile states principles recognize the need to align with *local* priorities in different ways in different contexts and to work with national reformers in civil society.[48]

The emerging picture is highly complex. Composed of rules and principles of different legal quality, with various degrees of specificity, and emanating from the national and international legal order, the aggregation of principles is exemplary of the nonhierarchical and multi-level nature of the legal regimes of international aid.[49] Certainly, internal policies of the World Bank, code of conducts signed by international NGOs and UN agencies, and informal commitments and declarations of principles by donor states cannot easily be accrued and conceptualized as a coherent, let alone a homogenous system. Yet from a substantive point of view, they converge into an increasingly dense network of rules and principles governing the delivery and management of international aid. The proliferation of aid principles and an increasing formalization of the rules and procedures that regulate the programming and implementation of humanitarian and development aid can be seen to condense into related and overlapping legal regimes. Despite being complementary for the most part, however, the principles set forth in these regimes may at times be conflicting.[50]

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[47] Principles for Good International Engagement in Fragile States, para. 3, setting out that "strengthening the capability of states to fulfill their core functions is essential in order to reduce poverty".

[48] Principles for Good International Engagement in Fragile States, para. 7. *Harmer* and *Deepayan Basu Ray* argue that the fragile states principles were "designed to allow development activities in difficult partnership contexts and to ensure that humanitarian aid was not being used inappropriately to support long-term welfare needs in protracted crises"; *A. Harmer/D. Basu Ray* (note 9), 13.

[49] See *P. Dann* (note 17), § 8.

[50] An exemplary study on the communalities and differences of the Paris Declaration on Aid Effectiveness and the Good Humanitarian Donorship Principles was commissioned by the Norwegian Ministry of Foreign Affairs and drafted by *A. Harmer/D. Basu Ray* (note 9).

III. Mandate Expansion and Normative Conflict

1. Mandate Expansion

The dichotomy between humanitarian assistance and development co-operation traditionally corresponded to a rather clear division of labor between humanitarian and development actors. Since the mid 1990s, however, it has become clear that a simple distinction between the humanitarian and the developmental realm is no longer viable.[51] There can be no linear transition from crisis to development, and complex emergencies in particular require a comprehensive response of humanitarian and development actors, sometimes all at ones. Complex emergencies (or protracted crises) are characterized by a collapse of central government authority, extreme levels of poverty, and ongoing conflict and/or human rights violations, that is, a combination of factors like state fragility, poverty, and insecurity over extended periods of time.[52] Accordingly, the relief-development nexus has become widely acknowledged in practice and has entered into the standard vocabulary of relevant UN resolutions.[53]

At the operational level, this realization resulted in a mandate expansion on both sides of the humanitarian-development divide, in a classic case of "mission creep".[54] Humanitarian agencies have become more "developmental" in that they integrate a longer-term perspective and structure-building component into their work, and development actors increasingly engage in conflict, post-conflict and fragile states or situations.[55]

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[51] *A. Harmer/J. Macrae*, Beyond the Continuum. The Changing Role of Aid Policy in Protracted Crises, 2004; *B. Munslow/C. Brown*, Complex Emergencies: The Institutional Impasse, TWQ 20 (1999), 207; on the history of the relief-development debate, see *J. Macrae* (note 7), 5 et seq.

[52] The Inter-Agency Standing Committee (IASC) has defined complex emergency as "a humanitarian crisis in a country, region or society where there is total or considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency and/or the ongoing United Nations country program". Working Paper on the Definition of Complex Emergencies, IASC Secretariat, 9.12.1994.

[53] GA Res. A/RES/46/182 (note 13), paras. 8-11; for more examples, see OCHA's Compilation of United Nations Resolutions on Humanitarian Assistance, 2009, Chapter II on the Linkage between Emergency Assistance, Disaster Reduction and Transition, available online: http://ochaonline.un.org.

[54] *J. von Bernstorff*, Procedures of Decision-Making and the Role of Law in International Organizations, GLJ 9 (2008), 1939, 1945.

[55] *A. Harmer/J. Macrae* (note 51), 8. The mission creep is, however, also owed to external (or donor) pressure. Humanitarian agencies, for example, felt pressured to adapt while fearing the compromise of humanitarian principles. *C. Götze*, Von der humanitären zur

In justifying their mandate expansions, humanitarian agencies like the Office for the Coordination of Humanitarian Affairs (OCHA) advocate for transcending traditional definitions of what is "humanitarian" and what is "developmental". For example, OCHA's Strategic Framework for 2010-2013 identifies the challenge of understanding how the intersection of non-traditional threats beyond traditional conflicts – from resource scarcity to structural trends and extreme poverty – can lead to humanitarian emergencies.[56] Accordingly, it advocates broadening notions of vulnerability and identifying what triggers an international humanitarian response.[57] The World Bank as a classical development agency in turn argues that "conflict within and between countries adversely affects the Bank's core mission of poverty reduction".[58] The Commission of the European Union summarized that "[b]etter development can reduce the need for emergency relief; better relief can contribute to development; and better rehabilitation can ease the transition between the two".[59] Development is thereby re-conceptualized as structural form of conflict prevention in the wake of a "rhetorical repacking" on both sides of the relief-development divide.[60]

Consequently, agencies often push the limits of their legal mandates attempting to justify new areas of engagement, but also new approaches and implementation arrangements. For example, the World Bank has had for a long time no competence to lend to non-member countries or stateless authorities and no official means of holding dialogue with such external and non-state actors.[61] Further, the Bank is not allowed to make political con-

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Entwicklungshilfe. Entwicklung, Konflikt, Nothilfe und die ambivalente Aktualität des Kontinuum-Ansatzes, WZB Discussion Paper (1999), 26.

[56] OCHA Strategic Framework 2010-2013, Introduction, available online http://ochaonline.un.org. On the construction of "emergencies" in terms of social imagery, see *C. Calhoun*, A World of Emergencies: Fear, Intervention, and the Limits of Cosmopolitan Order, Canadian Review of Sociology & Anthropology 41 (2004), 373.

[57] OCHA Strategic Framework 2010-2013, Introduction (note 56). On the question of what triggers humanitarian action, see also a recent blog on the website of the Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP) by *K. Scriven*, Urban Disasters – A Conversation Starter, 9.12.2010, see online, http://www.alnap.org.

[58] World Bank, Toward a New Framework for Rapid Bank Response to Crises and Emergencies (12.1.2007, revised 22.3.2007), Annex, Legal Opinion on Peace-Building, Security, and Relief Issues under the Bank's Policy Framework for Rapid Response to Crises and Emergencies (22.3.2007), para. 13. On the World Bank's mission creep, see *H. V. Morais* (note 14).

[59] Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on Linking Relief, Rehabilitation and Development. Brussels, 30.4.1996, CLOM (96) 153 final.

[60] *P. Uvin,* The Development/Peacebuilding Nexus: A Typology and History of Changing Paradigms, Journal of Peacebuilding and Development 1 (2008), 5; *C. Götze* (note 55), 23 et seq.

[61] *A. Harmer/J. Macrae* (note 51), 36 et seq.

siderations when deciding whether to engage in a country.[62] As a basis for engaging in new environments such as conflict and disaster, however, the Bank adopted a number of Operational Policies, particularly OP 2.30 on "Development Cooperation and Conflict" in 2001, and OP 8.00 on "Rapid Response to Crises and Emergencies" in 2007.[63] They are part of the Bank's secondary law and are thus binding on its staff.

On the one hand, both Policies uphold the primary responsibility of the recipient state and make any foreign aid intervention conditional on its approval.[64] On the other hand, OP 2.30 on Bank assistance in conflict sets out that "[i]f there is no government in power, Bank assistance may be initiated by requests from the international community, as properly represented (e.g., by UN agencies)".[65] Thus, the approval required for the Bank to take action may be enunciated by the international community assuming a subsidiary role. Further, OP 8.00 on emergency response provides a legal basis for the Bank to engage with civil society actors through subsidiary implementation arrangements that "may include grants to any public or private entity operating in the affected territory as well as […] other international or national agencies (including NGOs)".[66] Further, the emergency response OP permits the Bank to "support, in partnership with other donors, an integrated emergency recovery program that includes activities outside the Bank's traditional areas, such as relief, security, and specialized peace-building."[67]

The World Bank, like many other aid agencies, has thus increased the reach and depth of its activities through a broad interpretation of its man-

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[62] International Bank for Reconstruction and Development (IBRD) Articles of Agreement, Article IV Section 10 and International Development Association (IDA) Articles of Agreement, Article V Section 6: "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. Only economic considerations shall be relevant to their decisions ...". IBRD and IDA (together referred to as "World Bank") are discrete subjects of international law that share, however, organizational structures (through personal union), staff, and headquarters.

[63] See note 42.

[64] OP 2.30 (note 42), Art. 3 lit. b: "the Bank does not operate in the territory of a member without the approval of that member"; Legal Opinion on Peace-Building, Security, and Relief Issues (note 58), para. 20: "any involvement by the Bank, within the boundaries of its mandate, […] must be based on clear country ownership of the proposed activities, as evidenced by a specific request from the member country."

[65] OP 2.30 (note 42), Art. 3 lit b.

[66] OP 8.00 (note 42), Art. 9.

[67] OP 8.00 (note 42), Art. 5. Interestingly, a previous version of the Emergency response Policy, OP 8.50 on "Emergency Recovery Assistance" (1995) still stated explicitly that "immediate relief activities are best carried out by […] specialized international relief organizations", while the Bank should focus exclusively on the main objectives of restoring "assets and production levels in the disrupted economy" (Art. 2).

date and on the basis of the doctrine of implied powers.[68] Consequently, the traditional fields of action of humanitarian and development actors increasingly overlap, as do the principles applicable to the different forms of foreign aid interventions.

2. Normative Conflict

Due to the high level of abstraction and non-binding nature of most of the principles governing humanitarian and development aid, examples of normative conflict that leads to "logical incompatibilities between obligations upon a single party" – in the sense that following one obligation necessarily leads to the breach of another obligation – do not occur frequently.[69] This is even more true since the proliferation of aid principles described above has been inferred from a kaleidoscope of standards of different legal quality and pedigree.[70]

Yet to approach the issue of normative conflict, the International Law Commission in its Report on the Fragmentation of International Law settled for a wider notion of conflict as "a situation where two rules or principles suggest different ways of dealing with a problem".[71] The principles of humanitarian and development aid are not only informed by the distinct institutional cultures and approaches of each regime, but also by distinct views on the root causes and dynamics of conflict. Accordingly, they suggest different response strategies that foresee a different role and, arguably, degree of autonomy for the recipient state. For example, the humanitarian principle of neutrality and the requirement for aid agencies to operate independently of the state conflict with the principles of ownership and state-building that require agencies to build on or strengthen existing state structures.[72]

Normative conflicts between different aid regimes have posed less of a problem as long as they corresponded to a clear division of labor between humanitarian and development actors. But as their fields of action increasingly overlap, competencies may conflict and donors may be required to

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[68] On the doctrine of implied powers, see *J. Klabbers*, An Introduction to International Institutional Law, 2009, Chapter 4.

[69] International Law Commission, Fragmentation of International Law (Rapporteur *Martti Koskenniemi*), UN-Doc A/CN.4/L.682 (13.4.2006), para. 24.

[70] See above, section II. 2.

[71] Fragmentation of International Law (note 69), para. 25.

[72] *R. Muggah*, The Effects of Stabilisation on Humanitarian Action in Haiti, Disasters 34 (2010), 444, 444.

work in accordance with diverse sets of principles, sometimes all at once.[73] For example, Germany has pledged to adhere to the Good Humanitarian Donorship Principles and the Paris Declaration on Aid Effectiveness;[74] its aid portfolio is divided between the Federal Ministry of Foreign Affairs, responsible for humanitarian assistance, and the Federal Ministry for Economic Co-operation and Development. When Germany provides bilateral aid at the nexus between relief and development, its "development-oriented emergency and transitional aid" (*Entwicklungsorientierte Not- und Über-gangshilfe),*[75] what set of principles should be applicable and how should competencies be delineated between ministries?

Similarly, with multilateral aid agencies engaging in new environments and taking on new tasks, the risk is not only one of competing competencies, but also of uncertainty with regard to the applicable legal framework. The question arises, for example, whether and to what extent the World Bank or the United Nations Development Programme (UNDP) are bound to respect principles of humanitarian action when they engage in conflict or post-conflict environments. In countries in crises, making aid conditional on the sanctioning of local authorities as suggested by UNDP's Emergency Response Unit could be incompatible with the principles of humanitarian action.[76] Balancing simultaneous commitments may be difficult and the function of rules to stabilize normative expectations is thereby challenged.[77]

One reason for the emergence of normative tensions between aid principles lies in the spontaneous and fragmented nature of the legalization process. This is of course a general feature of international law,[78] but one that is enhanced in the present context because there is little appetite on parts of humanitarian and development agencies for radical organizational change and a comprehensive reform of the aid architecture as a whole.[79] Rather, ac-

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[73] *P. White/L. Cliffe*, Matching Response to Context in Complex Political Emergencies: 'Relief', 'Development', 'Peace-building' or Something In-between?, Disasters 24 (2000), 314.

[74] On the membership of the GHD, see online, http://www.goodhumanitariandonorship. org; on countries, territories and organizations adhering to the Paris Declaration on Aid Effectiveness, see online, http://www.oecd.org.

[75] Development-oriented emergency aid in Germany encompasses emergency assistance, preventive reconstruction, and disaster precaution. In contrast to the humanitarian assistance portfolio being managed by the Foreign Office, development-oriented emergency aid is managed by the Federal Ministry for Economic Cooperation and Development.

[76] *C. Götze* (note 55), 40; and UNDP, Working for Solutions to Crisis: The Development Response, 1998, 7.

[77] On the function of law to stabilize normative expectations, see note 8.

[78] See, for example, *M. Koskenniemi*, Fragmentation of International Law? Postmodern Anxieties, LJIL 15 (2002), 553.

[79] However, it should be noted that the complexity and singularity of each (post-conflict or fragile) situation makes the development of coherent policies and a distinct legal frame-

tors across the relief-development divide engage in decentralized initiatives setting rules and principles. Often out of fear of external regulation, individual agencies prefer to self-regulate pre-emptively.[80] These tendencies are supported by the fact that the aid architecture is also dualistic at the national level. Development and humanitarian aid are often situated under different ministries or different ministry portfolios, and "diplomacy for development and humanitarian action is divided between Paris and Geneva."[81] Thus, the dualistic structure of aid at the international and national level facilitates the consolidation of two separate legal regimes whose rules and principles may clash as the regimes converge in response to evolving challenges on the ground.

At the same time, normative tensions between different aid principles result in tangible operational difficulties partly due to the absence of a clear distinction, let alone a legal definition of what situations trigger a humanitarian, a developmental, or a concerted state-building response. Certainly, considerations regarding the potential effectiveness of different aid instruments in a specific context require a degree of flexibility, case-by-case analysis, and political assessment that are not easily accommodated in legal terms. Still, in light of the substantial differences between international aid regimes, the identification of a humanitarian emergency, the classification of a state as fragile, or the decision to suspend development co-operation and provide only humanitarian assistance in response to a coup d'état may have notable legal consequences, particularly in terms of how much autonomy is granted to the recipient state.[82] Therefore, the process of assessment by which aid agencies decide how to relate to recipient states warrants a closer look. It should be noted that the arguments that will be raised in this context are of a succinct and tentative nature.

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work for engaging in such situations a futile task. "As one expert warns, the worst thing the development community could do is develop a step-by-step hand-book for dealing with fragile states", *R. B. Zoellick* (note 2), 68.

[80] Regarding the motivation behind the Sphere Project, for example, see *M. L. Sattherthwaite*, Indicators in Crisis: Rights-based Humanitarian Indicators in Post-Earthquake Haiti, Draft (2010), 14.

[81] *A. Harmer/D. Basu Ray* (note 9), 19.

[82] For example, when Hamas won the 2006 elections in Gaza, the European Union suspended its development aid and continued delivering only humanitarian aid. Similarly, after a coup d'état in Honduras in 2009, the United States, the European Union, and other major donors suspended their development assistance pending the recognition of the government in power.

IV. Assessing State Capacity and Will – Determining the Role of the State

Decisions on the choice, modalities and sequencing of aid instruments depend on how donors assess a government's capacity and will to protect and assist its citizens and to co-operate with international partners in development.[83] For instance, the OECD's Fragile States Principles stipulate that "[i]t is essential for international actors to understand the specific context in each country", and in particular "to recognize the different constraints of capacity, political will and legitimacy".[84] With view to humanitarian agencies, *Fiona Terry* has pointed out that "the very need for their intervention and the impact of their assistance depend upon the extent to which higher-order responsibilities have not been met",[85] i.e. the affected state has been incapable or unwilling to respond to an emergency. As regards development co-operation, there is a perceptible trend in financial and technical assistance towards supporting states that have an institutional structure sufficiently capable of absorbing and implementing aid effectively and that are committed to good governance.[86]

Accordingly, to adapt aid strategies to the specific context of a country, multilateral and bilateral donors rely on taxonomies like grading scales and time lines to group countries according to their capacity and commitment, their willingness to engage with the international community, or their stage in an apparently linear process of transition from conflict to development.[87] The capacity of a government is determined in complex equations that seek

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[83] *P. Harvey* (note 9), 7; *A. Harmer/J. Macrae* (note 51), 1; *N. Leader/P. Colenso*, Aid Instruments in Fragile States (note 9), proposing different aid instruments according to a state's capacity and commitment; or *L. M. Hilker et al.*, Strategic Framework for Engagement in National PRSs in Conflict-affected Countries. Attachment to Briefing Note 6 (2003), PRSP Monitoring and Synthesis Project, available online, http://www.prspsynthesis.org.

[84] OECD Fragile States Principles (note 45), para. 1.

[85] *F. Terry*, Condemned to Repeat? The Paradox of Humanitarian Action, 2002, 17. See also GA A/RES/46/182 (note 13), Annex, Guiding Principles 4 and 5.

[86] In particular, *C. Burnside/D. Dollar*, Aid, Policies, and Growth, American Economic Review 90 (2004), 847; on the necessary requirements for a partnership model of aid, see *M. Anderson/M. M. Torres* (note 43), 10.

[87] OECD, Donor Approaches to Governance Assessments. Guiding Principles for Enhanced Impact, Usage and Harmonisation, March 2009; further examples of governance assessments include the Governance Matters Index of the World Bank, the Bertelsmann Transformation Index (BTI), Transparency International's Corruption Perception Index, or the Failed States Index of the periodical Foreign Policy.

to measure its performance in different policy fields.[88] For example, the World Bank uses Country Policy and Institutional Assessments (CPIA) as a diagnostic tool to capture the quality of a country's policies and institutional framework; the numerical CPIA score of a country matters in the allocation of IDA resources to good performers,[89] and in the classification of a state as fragile.[90] The German Ministry responsible for development employs a catalogue of criteria to evaluate the "development orientation" (*Entwicklungsorientierung*) of a government.[91]

Such governance assessments appear technical but necessarily involve political considerations, in particular when it comes to assessing a government's commitment to following a certain path to development, or a government's legitimacy.[92] Considerations of the internal or external legitimacy of a government become apparent, for instance, when development agencies

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[88] On governance assessments, see *N. K. Dutta*, Accountability in the Generation of Governance Indicators, Institute for International Law and Justice, Emerging Scholars Paper 17 (2010).

[89] Country Policy and Institutional Assessments' 2009 Assessment Questionnaire, 10.9.2009, see online, http://www.worldbank.org; for an evaluation, see the Report of the Independent Evaluation Group, The World Bank's Country Policy and Institutional Assessment. An Evaluation, 30.6.2009; for a critique, see *N. Alexander*, The Country Policy and Institutional Assessment (CPIA) and Allocation of IDA Resources: Suggestions for Improvements to Benefit African Countries, Study commissioned by Development Finance International, 2010.

[90] The World Bank's definition of fragile states covers low-income countries scoring 3.2 and below on the CPIA; see online, http://www.worldbank.org. *Oeter* points out that the classification of a state as fragile always involves a normative statement, since it implies that a state fails to fulfill the functions that are commonly ascribed to a modern state. In that sense, the term also has the character of an attribution by the international community. *S. Oeter*, Prekäre Staatlichkeit und die Grenzen internationaler Verrechtlichung, in: R. Kreide/A. Niederberger (eds.), Transnationale Verrechtlichung, 2008, 90, 82.

[91] Kriterienkatalog für die Bewertung der Entwicklungsorientierung, Annex 1 of the Federal Ministry for Economic Cooperation and Development. Concept Paper 172, Förderung von Good Governance in der deutschen Entwicklungspolitik. Germany measures the standard of governance (*Governance Niveau*) on a scale from 1 to 5, assessing governance in terms of poverty reduction policies, protection of human rights, democracy and rule of law, efficiency and transparency of state institutions, and co-operation with the international community. In countries with low standards of governance, certain aid instruments like budget support are usually not employed.

[92] Besides general trends in aid policy, it is often a political decision about the perceived legitimacy of a government and the degree to which donors want to cooperate that influence the modalities of aid. *P. Harvey* (note 9), 7; *A. Harmer/J. Macrae* (note 51), 1. In a similar vein, see *C. Steinorth* in this volume. Furthermore, the processes pertaining to these assessments are seldom transparent. Critical with view to the classification of fragile and failed states is *A. Bendana*, Fragile Premises and Failed States: A Perspective from Latin America, in: Canadian Development Report 2008, Fragile States or Failing Development?, available online http://www.nsi-ins.ca.

determine how to relate to de facto governments after an unconstitutional transition of power.[93] In deciding on new operations in a country with a de facto government, the World Bank's OP 7.30 requires the Bank's management to weigh not only "whether the government is in effective control of the country", but also whether it "enjoys a reasonable degree of stability and public acceptance" and "the number of countries […] that have recognized the government".[94]

Governance assessments that serve as a basis for deciding on the modalities of aid entail concepts that are familiar to international legal scholars. For instance, the capacity of a government plays a role in determining its ability to exercise effective control over a territory, thereby alluding to the principle of effectiveness that is relied upon, *inter alia*, in the doctrines of statehood and recognition.[95] Further, a number of concepts in international law refer to a government as being "unable" or "unwilling". In many cases, they appear in the context of questions of complementarity in a multi-level system of governance, to determine the point where responsibility passes from one level to the next. For example, the complementarity regime of the International Criminal Court,[96] the concept of the Responsibility to Protect,[97] or the regime for the protection of Internally Displaced Persons[98] make the collective autonomy of a state contingent upon the fulfillment of certain responsibilities pertaining to the criminal persecution or protection of individuals respectively. Thus, there is a certain structural parallel to the regimes of humanitarian assistance and development co-operation: As a re-

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[93] *M. Nesbitt*, The World Bank and De Facto Governments. A Call for Transparency in the Bank's Operational Policy, Queen's L. J. 32 (2007), 641.

[94] OP 7.30 Dealings with De Facto Governments (2001), Article 5 lit. b and d.

[95] In detail, see *G. Kreijen*, State Failure, Sovereignty and Effectiveness. Legal Lessons from the Decolonization of Sub-Saharan Africa, 2004; *N. Akpinarli*, The Fragility of the 'Failed State' Paradigm. A Different International Law Perception of the Absence of Effective Government, 2010.

[96] Article 17 of the Rome Statute of the International Criminal Court, 17.7.1998, 2187 UNTS 3; the meaning of "unable" and "unwilling" is probably most elaborated in the complementarity regime of International Criminal Law. See, for example, *J. K. Kleffner*, Complementarity in the Rome Statute and National Criminal Jurisdiction, 2007.

[97] International Commission on Intervention and State Sovereignty, The Responsibility to Protect, 2001, para 2.30 and 2005 World Summit Outcome, UN Doc. A/60/L.1 (15.09.2005), para. 138. *Focarelli* points out that "the doctrine of the responsibility to protect" has not "clearly specified the criteria for measuring a state's lack of capacity and unwillingness to protect its own citizens". *C. Focarelli*, The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine, Journal of Conflict & Security Law 13 2008, 191, 211.

[98] See Principles 3 and 25 of the Guiding Principles on Internal Displacement, UN Doc. E/CN./4/1998/53/Add.2 of 17.4.1998 and commented by *W. Kälin*, Guiding Principles on Internal Displacement. Annotations, Studies in Transnational Legal Policy 32 (2000), 1.

view of proliferating aid principles has yielded, different degrees of collective autonomy or sovereign rights are conceded to a recipient state in aid relations, depending on its capacity and will.

In sum, it appears that in post-conflict or fragile states, the concept and requirements of aid effectiveness converge with the international legal doctrine of sovereign statehood. On the one hand, even donors that deal with very weak and/or illegitimate governments are held to respect the recipient state's primary responsibility and attain its approval for engagement.[99] On the other hand, donors constantly assess a state's policies, institutions, and "development orientation" when deciding on the instruments and modalities of aid, allowing for varying degrees of collective or individual autonomy.[100] In that the reality of state fragility is reflected in the largely donor-set rules and principles governing the delivery and management of aid, the regimes of humanitarian and development aid and their conflicting principles are interesting examples of how a legal regime reflects and responds to the empirical fragility of certain states. In light of this, the common assumption that International Law is blind to empirical statehood in that it assumes a functioning state may be challenged.[101]

V. Concluding Remarks

In keeping with the theme of the special edition, "International co-operation from peace-building to sustainable development", this contribution has sought to emphasize the relational dimension of international co-operation. The multitude of actors engaging in activities from military intervention and humanitarian assistance to state-building and development co-operation employ a wide range of approaches and instruments that foresee a different role for the state concerned. Humanitarian and development aid, despite their affinity and intersections, have been conceptualized as two regimes that differ in the extent the formal sovereignty and autonomy of recipient states is sustained in the allocation and implementation of international assistance. It has been argued that this difference is not only reflected in the choice of approaches and instruments, but can be inferred from the

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[99] See note 13 and Section III. 1 with an example from the World Bank; *H.-J. Heintze* (note 16), 8, stating that even in failed states, aid must in principle be delivered in accord with "the [fictitious] government".

[100] The "development orientation" of a government is considered, for example, by the Federal Ministry of Economic Co-operation and Development (note 91).

[101] In this line, *S. Oeter* (note 90); *C. Giorgetti* (note 5).

rules and principles that increasingly govern the substance and procedures of humanitarian and development aid. For this purpose, humanitarian and development aid have been sketched as two separate but related legal regimes.

Further, this contribution has drawn attention to the legal grey area occurring in transition from conflict and peace-building to sustainable development. Since the distinction between different types of foreign aid interventions is increasingly blurring, the potential for normative conflicts between international aid regimes augments. Against this background, and in light of their potential normative implications, it has been deemed important to revisit the process based on which donors decide on how to relate to a recipient state.

In line with the tentative nature of some of the arguments raised in this contribution, it seems adequate to end with a proposal for further research rather than definite conclusions. With view to the different regimes of international aid and the potential for normative conflict, there is a lot of room for exploring the synergies of the key humanitarian, developmental and fragile states principles.[102] The limited reference to the role of the state, for instance, reflects a long-lasting theme and ongoing challenge for humanitarian actors in conflict or other difficult political contexts.[103] However, humanitarian actors make too little differentiation between conflict-related emergencies and natural disasters or prolonged crises, where strong and capable national authorities may be present or emerging. In many situations, the affected state could well have a greater say in the way humanitarian assistance is governed and conducted.[104] India's response to the 2004 Tsunami and Mozambique's response to the floods in 2007, for example, are signals of a growing trend whereby national governments even of poor countries increasingly assert their own responsibility for crisis management.[105] They are wary of humanitarian actors undermining state structures

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[102] However, *Harmer* and *Basu Ray* estimate that "incentives for identifying and building commonality […] remain weak". *A. Harmer/D. Basu Ray* (note 9), 19.

[103] Most recently, the 26th Annual Meeting of the Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP) conveyed in November 2010 under the heading "The role of national governments in international humanitarian response". For oral statements and documentation, see www.alnap.org.

[104] It should be noted, however, that in many cases of humanitarian emergency, the governments of affected states are "reluctant to acknowledge the extent of their own incapacity to respond", because even "[a]dmitting the existence of a crisis may be tantamount to saying 'we can't cope'". See *J. Darcy*, A State of Denial, Public Service Review: International Development 10 (2008).

[105] For more detail, see the case studies on the role of the state in disaster response, available online, http://www.odi.org.uk.

by ignoring local capacities and authority. Meanwhile, humanitarian agencies are more familiar than development agencies with engaging in difficult situations where there is no capable or legitimate state as a counterpart. The principles of humanitarian action were developed precisely to help humanitarian agencies "navigating these difficult waters",[106] and applying humanitarian principles to development aid may help dealing with a "sovereignty gap".[107] Finally, the fragile states agenda has introduced a categorization of states and thus drew attention to the question of state capacity and will as a lynchpin for deciding how much ownership can be expected and may be desirable.[108]

It follows that the different role foreseen for the recipient or affected state in the legal regimes of international aid is often owed to the exigencies of a situation, and to decades of experience in dealing with states that often lack capacity, and sometimes lack the will to foster development for the benefit of their peoples. For the same reasons, however, there appears to be room for international aid actors to take context and not only institutional culture as a starting point, now that the distinction between humanitarian and developmental fields of action is increasingly blurring. The complexity and singularity of each crisis, post-conflict or fragile situation do not call for the development of clear-cut policies and distinct legal frameworks for engaging in specified situations.[109] But where humanitarian and development actors engage beyond the confines of their traditional scope of duties and at the limits of their mandates, merely holding on to the rules and principles of humanitarian or development aid may not only prove impedimental in light of the logical incompatibilities, but ultimately lead to outright normative conflicts and potential legal infringements.

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[106] *P. Harvey* (note 9), 23.
[107] *A. Ghani/C. Lockhart* (note 6).
[108] *P. Harvey* (note 9), 15: "The growing literature on fragile states provides a useful typology for analyzing state roles in disaster response."
[109] See note 79.