Hauser Globalization Colloquium Fall 2010

Professors Ryan Goodman & Robert Keohane

Furman Hall 900, Pollack Colloquium Room
Wednesdays 2:00 pm-3:50pm
(unless otherwise noted)

Schedule of Sessions (subject to modification)

September 15	**Professor Eric Posner** *Human Rights, the Laws of War, and Reciprocity*
September 22	**Professor Michael Doyle** *A Global Constitution? The Struggle over the UN Charter*
October 6	**Professor Mary Dudziak** *Law, War, and the History of Time*
October 13	**Professor Tim Buthe** *Standards for global markets: domestic and international institutions for setting international product standards*
October 20	**Professor Kal Raustiala** *Information and International Agreements* **Background Readings:** *Police Patrols and Fire Alarms in the NAAEC* *The Rational Design of International Institutions*
October 22 (Friday)	**Professor Peter Katzenstein** *The Transnational Spread of American Law: Legalization as Soft Power*
November 10	**Professors Oona Hathaway & Scott Shapiro** *Outcasting: Enforcement in Domestic and International Law*
November 17	**Professors Ann Marie Clark & Kathryn Sikkink** "Information Effects and Human Rights Data: Is the Good News about Increased Human Rights Information Bad News for Human Rights Measures?" **Background Reading:** Emilie M. Hafner-Burton, & James Ron, Seeing Double: Human Rights Impact Through Qualitative and Quantitative Eyes, World Politics, 2009.
December 1	**Professors Kevin Davis & Benedict Kingsbury** *Obligation Overload: Adjusting the Obligations of Fragile or Failed States*
December 3 (Friday)	**Professor Beth Simmons** *Inter-subjective Frames and Rational Choice: Transnational Crime and the Case of Human Trafficking*

Obligation Overload: Adjusting the Obligations of Fragile or Failed States

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Abstract

As the volume and burden of non-financial obligations imposed on states by global governance institutions continues to grow (anti-terrorism, anti-money laundering, anti-trafficking, investment protection, environmental and human rights monitoring and reporting…), 'obligation overload' is becoming an increasingly serious concern. Fragile and failed states, in particular, may be simply unable to meet all of their obligations. Yet international institutions, foreign states and courts may insist on performance. There is no system for prioritizing obligations and managing overloads. We argue that international law, and global governance practice, must be developed to deal expressly with the problem of obligation overload. Using insolvency law as a model, we identify some relevant considerations, explore some of the interactions between partly-competing considerations which complicate any solution, and set forth a range of institutional proposals which may contribute to reform in this area.

1 Introduction

The risk of obligation overload is becoming a serious concern in global governance. This concern is particularly acute for the states whose capacity to govern is the most limited. The concern is that these "fragile states" will find they are subject to such an extensive and demanding array of formal international legal obligations, and requirements imposed by various global governance institutions, that they have no possibility whatever of meeting all of them. As they fall behind, the demands of international organizations and powerful states become ever more insistent, the legion of foreign consultants and technical assistance missions sent to help becomes ever larger, and scarce resources and talent are redeployed abruptly from sector to sector to respond to the greatest clamor, major donor funding, or patronage interests. The failing state becomes also a flailing state. The results can be highly perverse: the government cannot give priority to things that are truly important for the country, much of the effort produces no lasting results,

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pseudo-compliance based on form and appearance rather than real substance is common, hastily staffed national institutions established according to a global template can make it harder to build strong institutions over a long period.[1] The grounds for concern will become increasingly serious as the volume and 'weight' of non-financial obligations imposed on states continues to grow.

Unlike overloads of debt and mass claims, overload of non-financial obligations is not the subject of unified body of practice or legal doctrine.[2] In this article we argue that the problem of obligation overload merits urgent attention, and requires the crafting of creative legal doctrines and institutional mechanisms. The current draft outlines the nature of the problem and sketches some possible solutions as a preliminary step toward a more far-reaching and systematic paper.

The article is organized as follows. Section 2 describes the problem of obligation overload. Section 3 provides an overview of how it is dealt with under existing international law. Section 4 explains, in schematic form, several possible methods of adjusting state's obligations so as to either avoid or mitigate the problem. Section 5 discusses justifications for such adjustments and section 6 identifies and addresses objections. Section 7 lists several institutional mechanisms that might be used to implement and support the kinds of adjustments described in section 4. Section 8 concludes.

2 Components of the Problem of Obligation Overload

2.1 Which obligations?

The risk of obligation overload has emerged as the total volume, and the demandingness, of non-pecuniary international law and governance obligations of states has increased dramatically in recent decades. Many of these obligations arise from global governance regimes, with centralized or decentralized institutional supervision and regulatory negotiation (give-and-take between the regulator and the regulated). Some are accompanied by substantial incentives for compliance or the potential for considerable pressure or costs for certain forms of non-compliance.

[1] For example, international donors may insist that the government establish an anti-corruption unit on the model of the Hong Kong Independent Commission Against Corruption – but in a fragile state, a hastily established unit may have to be staffed largely by poorly trained and unsuitable personnel who then occupy the space ineffectually for decades and may indeed provide new channels for corruption.

[2] The issue is not addressed in the 2007 OECD Principles for Good International Engagement in Fragile States and Situations, nor (thus far, although it could very usefully be added) in the OECD's survey monitoring these principles in specific fragile states pursuant to the 2009 Accra High Level Forum. Some emphasis is laid on prioritization in the declarations of the G7+ group of countries experiencing conflict and fragility, including the April 2010 Dili Declaration and statement, and the July 2010 Accra Declaration on Achieving the MDGs in Crisis Settings. The Accra Declaration calls on development partners to provide "risk tolerant and more flexible resources". But nothing is said about the structure of obligations or obligation overload in these or in other existing general normative and policy guides on fragile states issues.

Our focus is on obligations of the state that are:

1. *Non-pecuniary*. That is, obligations that are not sovereign or external debt or mass claims; some obligations we address may however be capable of monetization, including obligations toward foreign investors. Overload of pecuniary (financial) obligations has long been a theme of international law and politics. Nineteenth century techniques of forcible debt collection, gunboat diplomacy, or direct management by foreign states of the country's major revenue sources (such as the international administration of the Dominican Republic's customs house at the beginning of the 20th century) have been partly although not wholly displaced; and an intricate structure exists for compromising and rescheduling sovereign debt owed to external creditors, through the Paris Club and the Bretton Woods institutions as well as exit-consent bond issuance, collective action clauses, and other strategies. A different body of practice addresses mass claims against a state, often arising from mistreatment of foreigners or their property in contexts of civil war or revolution where the state has to some extent failed or been radically reconstructed. Where colorable claims vastly exceed the funds realistically available, they may be compromised by a lump sum agreement. An international claims tribunal (such as the United Nations Compensation Commission in relation to claims against Iraq from the 1990-91 conflict) or a national tribunal (e.g. the U.S. Foreign Claims Settlement Commission) may test and value each claim in the pool; in some cases, as with the controlling Security Council resolution on clams against Iraq which gave some priority to small claims, rules may be set to establish priorities among different classes of claims.

2. *Affirmative*. We focus on the state's affirmative obligations to take certain actions. This includes obligations to achieve certain results, and obligations that specify particular institutional or programmatic steps a state must take. It is sometimes suggested that obligations which include prescriptions of this latter sort ('obligations of conduct' as they are sometime referred to in the international law literature), especially when combined with obligations to report and to achieve certain results, may be disproportionately more burdensome for fragile states than would be the equivalent obligation couched simply as an 'obligation of result'. We do not address these issues. States also have many negative obligations – not to militarize Antarctica, develop nuclear weapons, etc – but for the fragile states of interest to us here, complying with most of these is easy, by simply taking no action at all. Some negative obligations may however require substantial positive action; for example, the obligation not to interfere in neighboring states requires government action against rogue army units, or the obligation not to dump certain wastes in the ocean may require government action to register, monitor, and act against private dumpers operating from the country's ports. We subsume requirements of this kind into the category of affirmative obligations.

3. *Legally binding, or de facto obligatory even if not binding de jure.* We thus include both obligations that are prima facie binding on the state as a matter of

international law, and normative requirements and regulatory templates set by global governance institutions which the state has little practical choice but to accept, whether or not there is a formal international legal obligation. We distinguish obligations from pure political pressure, even though this line is not always very clear. We accept that individual obligations may vary in terms of the costs of non-compliance and correlative incentives to comply. All we require is that an obligation has its origin in an accepted source of normative standards, is based on first-order or second-order reasons which are of general applicability and not purely self-serving, and generates an internal sense that it should be complied with that would have some force independent of the structure of external sanctions and incentives that may accompany it. Many international obligations are grounded in some way in the consent of the obliged state, although the consent basis is often tenuous, and for fragile or failed states in particular, many global governance obligations cannot plausibly be traced to their consent at all.

4. *Not possible for the state to meet in aggregate.* Although individual sets of obligations may be demanding to comply with, our focus is on the aggregate burden of all the obligations borne by any given state. It is likely that governments in most states feel some overload of international obligations in relation to available governmental resources. We are not here concerned with any such general phenomena. We assume as a baseline that most states can manage their obligations adequately, even while recognizing that the problems for very small and very poor states can be very substantial, for example even to collect all the data and prepare and defend the innumerable reports they are required to file with international organizations, let alone to meet multiple donor reporting requirements and conditionalities if the country is aid-dependent. While obligation overload may occur for a state that is not fragile, our analysis focuses on the special situations of fragile or failed states, terms we define more precisely in the next section.

Examples of the kinds of obligations which, in fragile or failed states, can in aggregate come to constitute a situation of obligation overload are the following.

1. The *United Nations Security Council's Counter-Terrorism Committee* (CTC) conducts in-depth reviews of each country's anti-terrorism arrangements, and makes detailed 'recommendations'. Much of this work is undertaken by a group of experts seconded by member states to the CTC for this purpose. The CTC and its experts tend to expect states to attach supreme importance to these requirements, even when facing other vital and perhaps prior issues. Timor L'Este, for example was pressed to adopt detailed anti-terrorism laws before even having in place a criminal code and fully functioning constitutional and law-making arrangements.

2. The *Financial Action Task Force*, a non-treaty inter-governmental network organization dedicated to promoting policies designed to counter money

laundering as well as financing of terrorism and nuclear proliferation. Those policies are embodied in FATF's 40 recommendations on measures to counter money laundering and 9 recommendations on measures to counter financing of terrorism. Although its recommendations are not legally binding the FATF has been very successful in inducing compliance with them. It has accomplished this by making concerted efforts to identify instances of non-compliance and calling on its members to discourage their financial institutions from dealing with institutions from particularly uncooperative jurisdictions. The FATF has only 36 members (including two regional organizations) but over 120 more countries are members of 'FATF-style' regional organizations such as the Asia/Pacific Group on Money Laundering and the Caribbean Financial Action Task Force, which are also committed to implementing the FATF recommendations. Historically the FATF and its affiliated organizations have made few special concessions to fragile or conflict-affected states.[3] They regularly issue reports that document the regulatory shortcomings of countries such as Haiti and Sierra Leone, and make very strongly phrased 'recommendations' about what is needed.[4] For example, the CFATF recommended to Haiti (the year before the devastating earthquake) that its anti-money laundering agency should be expanded by adding 16 extra personnel, although considerable doubt existed that this would make any improvement to weaknesses the agency faced which had other causes. Those reports are then used as bases for pressuring countries into enacting legislation, creating new agencies, and increasing the staffing of existing agencies.[5]

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[3] *See*, FATF-GAFI, GUIDANCE ON CAPACITY BUILDING FOR MUTUAL EVALUATIONS AND IMPLEMENTATION OF THE FATF STANDARDS WITHIN LOW CAPACITY COUNTRIES (29 February 2008) ("It should be emphasised that this Guidance is not intended to alter the commitment to one global standard for AML/CFT as established in the FATF Recommendations and to the FATF Methodology applicable to assessing compliance of all countries with this standard."), 3.

[4] *See*, World Bank, MUTUAL EVALUATION / DETAILED ASSESSMENT REPORT ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM: REPUBLIC OF HAITI (June 23, 2008) available online at http://www.cfatf-gafic.org/downloadables/mer/Haiti_3rd_Round_MER_%28Final%29_English.pdf ; Inter-Governmental Action Group Against Money Laundering in West Africa, MUTUAL EVALUATION REPORT ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM: REPUBLIC OF SIERRA LEONE (12th June 2007) available online at: http://www.giaba.org/media/M_evalu/SIERRA_LEONE_Mutual%20Evaluation%20Report%200607.pdf.

[5] See, for example, CFATF-GAFIC, FIRST FOLLOW-UP REPORT: MUTUAL EVALUATION ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM: HAITI (May 2009), available online at: http://www.cfatf-gafic.org/downloadables/Haiti_1st_Follow-up_Report_%28English%29_Final_.pdf ("Haiti's effort at curing the deficiencies noted by the Examiners have been the creation of a commission to review its AML/CFT legislation; the constitution of a "National Fund to Fight Drug"; the drafting of legislation, which has been submitted to Parliament; the increase, by 16 members, the staff of the Financial and Economic Investigation Bureau (BAFE) and the drafting of new customs legislation."); THIRD FOLLOW-UP REPORT: MUTUAL EVALUATION ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM: REPUBLIC OF SIERRA LEONE (May 2010) http://www.giaba.org/media/M_evalu/Sierra%20Leone%203rd%20Follow%20Up%20Report%20%20dev052010%5B1%5D.pdf (describing progress represented by proposed amendments to Anti-Money Laundering Act 2005 and need to address remaining deficiencies through guidelines and commitment of additional resources to law enforcement and collection of statistics).

3. The *World Trade Organization* ("WTO") requires states that wish to accede to the WTO Agreement to make wide-ranging commitments to reduce tariff and non-tariff barriers to trade. Fulfilling those commitments often entails significant legislative and administrative reforms and demands substantial human and financial resources. Accordingly, when poorer countries accede to the WTO it is not uncommon for them to be granted several years to implement the reforms demanded in the accession protocol and for donors to provide them with technical assistance for that purpose. However, even the best-laid plans and timetables sometimes require revision as unanticipated obstacles to reform emerge. For example, when it acceded to the WTO Agreement in October 2004 Cambodia agreed to implement no less than 47 legal reforms by 2007 but by the end of 2007 had adopted just 24 of them. Nepal acceded to the WTO in the same year and was to enact 10 new laws and amend 25 others. By the end of 2007 Nepal had enacted only 3 of the new laws and adopted 8 of the amendments.[6] Political turmoil in Nepal and lack of administrative capacity in both countries were cited as principal causes of the delay.[7]

4. *Investment treaties* typically empower foreign investors to bring binding arbitral claims against states for breach of treaty standards. No comprehensive list exists of arbitrations initiated or culminating in an award as publicly available information on many arbitrations is limited or non-existent. Therefore, it is not possible to accurately quantify the significance of threatened or actual arbitration for fragile and failed states. However, for the past 15 years definitive public information is available on at least ten arbitrations initiated by investors against Georgia, eight against the Democratic Republic of the Congo, four against Indonesia, four against Yemen, three against the Central African Republic, two against Burundi, two against Togo, and one each against Chad and several other fragile states. This may be only a small part of a growing phenomenon of legal pressure to meet actual or alleged obligations toward foreign investors.

   Investment treaties typically require states to afford to foreign investors, among other things, "fair and equitable treatment" and "full protection and security". The "fair and equitable treatment" obligation has increasingly been used as a basis for investor-state arbitral tribunals to define a set of norms of good administration, with a set of prescriptions about due process, reason-giving, transparency, and the proper conduct of administrative proceedings, with regard to matters such as issuing of operating licenses, imposition of environmental restrictions, and contract renegotiation in situations where an investor is not able fully to perform the contract due to changed circumstances.[8] For a fragile or failed state to maintain administrative operations to that standard may be impossible, but while

[6] Heike Baumüller, Ratnakar Adhikari and Navin Dahal, MAKING WTO MEMBERSHIP WORK FOR LEAST-DEVELOPED COUNTRIES: LESSONS FROM NEPAL AND CAMBODIA (Trade Knowledge Network, September 2008) at p. 7.
[7] Ibid.
[8] B. Kingsbury and S. Schill, Investor-State Arbitration as Governance, in A.J. Vandenberg ed, THE NEW YORK CONVENTION AT FIFTY, International Congress of Commercial Arbitration, (Kluwer, 2009), pp. 5-68.

this point is sometimes acknowledged in relation to what an investor could reasonably expect, no coherent special regime for states of limited governance capacity has been established. The prevalent interpretation of the "full protection and security" requirement is that host states must exercise due diligence to protect investors from physical harm, but some tribunals have gone further (partly related to differences in language among different treaties) and treated this as requiring protection and security from certain economic disruptions and harms.[9] Moreover, according to some authorities, deciding whether a state has exercised due diligence involves taking into account "what should legitimately expect to be secured for foreign investors by a reasonably well organized modern state."[10] States experiencing war or other armed conflict are held to this "objective standard" even when it is manifestly clear that they are unable to perform at the level of 'a reasonably well organized modern state.'[11] For example, in 1990 an arbitral tribunal found that Sri Lanka breached this obligation by failing to protect a shrimp farm owned by a foreign investor from harm during a 1987 raid aimed at rooting out rebel forces. The tribunal noted that at the time the area in which the farm was located was "practically out of the Government's control."[12]

5. The *US State Department* is required by US legislation to assess each country's laws and performance in combating human trafficking. This is a form of unilateral monitoring and enforcement of standards in an international treaty against trafficking, but applied whether or not a particular state has ratified that treaty. Countries that rank poorly are potentially subject to US sanctions, although the US President can waive these in particular cases for reasons that include the US national interest. The State Department has in practice established a structure of not giving a ranking to countries facing certain forms of turmoil or governmental incapacity, and acts as a kind of regulator in determining when a country warrants this treatment and when a country has sufficiently exited from such a situation that ranking should resume.

As these examples illustrate, most of the obligations we address in this paper do not apply exclusively to fragile or failed states but are also applicable to numerous other states. Our focus in this paper is on how they apply to fragile or failed states (defined below), not globally. We also do not consider in any detail the exact burdens that particular sets of obligations create for fragile or failed states or whether such burdens can be reduced by better tailoring the obligations in question to the circumstances faced by fragile or

[9] For a review of the jurisprudence on variants of this clause in a range of investment treaties, see *Suez, Sociedad General de Aguas de Barcelona S.A.* and *Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability of July 30, 2010, paras 158-179.

[10] *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3 [*hereinafter* "AAPL"] ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL 526, 538.

[11] It is far from obvious that this is the correct interpretation of the relevant treaties. For instance, the treaty at issue in AAPL contained provisions that can be read to limit liability for losses owing to "war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot". On this point see the persuasive dissenting opinion of Dr. Samuel K.B. Asante in AAPL. However, the approach taken in AAPL has been followed in some later cases.

[12] AAPL, supra, 561.

failed states. The phenomenon of 'obligation overload' as we define it, exists only where the aggregate effects of a multitude of obligations make it impossible for the state to fulfill all of its obligations, Obligation overload can exist even where no single obligation imposes inherently excessive burdens.[13]

An overloaded state's inability to fulfill its obligations can manifest itself in different ways. In some situations overload will preclude even the semblance of compliance. In other situations though, the consequence of obligation overload will be partial or superficial compliance. For example, Sierra Leone at the end of the civil and regional war was urged by the World Bank and IMF in their joint Reports on Observance of Standards and Codes (ROSCs) to adopt without modification the highly sophisticated International Financial Reporting Standards for its banks and financial institutions, but neither these entities nor the Bank of Sierra Leone as supervisor had anything like the necessary capacity to make these workable. Whether it made sense to invest scarce personnel and the resources for training and implementation of these obligations at that time may be questioned. A different problem arises where inability to meet some part of an obligation can alter the essential balance of a bargain. For example, the Government of the Democratic Republic of Congo agreed in the Sun City Accords to integrate rebel groups into the national army, while international agencies insisted on the stipulation that perpetrators of mass atrocities be excluded. But in practice the capacity for such vetting does not exist on the ground among most of the international agencies and foreign governments involved, making the obligation of integration quite different in practice from its agreed form. Similar dynamics occur under some United Nations Security Council sanctions regimes, where certain states either bear an unduly high cost from enforcing sanctions against their neighbor, diverting resources from other priorities, or do not devote resources to the task, making the obligatory sanctions regime materially different in practice from what is specified in the resolution

2.2 Which states?

The term "fragile state", along with its close relatives, "failed state" and "failing state", has been defined in several different ways and for at least two distinct purposes.[14] In the

[13] We acknowledge though that lack of tailoring of general global obligations to the circumstances of states which face serious capacity or resource limitations can contribute to obligation overload. This is a much broader issue which we address in separate work, but not in this paper. The well-known anecdotes of unsuited development assistance (e.g. a donated cargo of snow ploughs arriving in snowless Ghana) have some parallels in incongruous or mismatched obligations undertaken by developing countries at the behest of global governance institutions. Often this results from hasty or ill-considered use of templates. Templates can have many advantages in digesting learning from other places, using standards on which training and precedents are already readily available, and greatly reducing the transaction costs and delay involved in crafting a new set of standards for the local context. Weighing the advantages of local suitability and a locally-controlled process of political expression and control, as against the costs, can be a complex assessment which must often be undertaken in a very short time. In some fragile state situations, the short-term implications of foreign templates are obviously problematic. Thus elaborate public procurement laws and procedures following internationally-prescribed standards are often insisted upon by donors, but in Kosovo after the 1999 NATO invasion, the new procurement documents were available only in English, making it almost impossible for small local companies to bid on contracts.

[14] Here we draw on as yet unpublished research by Nehal Bhuta.

world of development assistance the term was originally used to denote states which were experiencing or had recently emerged from severe internal conflict and so lacked the kinds of state structures usually treated as pre-requisites to receipt of development assistance. So for instance the OECD Development Assistance Committee defines states as fragile "when state structures lack political will and/or capacity to provide the basic functions needed for poverty reduction, development and to safeguard the security and human rights of their populations."[15] Meanwhile, in the military and intelligence arenas, the terms "failed state" and "fragile state" have been defined in similar ways but for the purpose of denoting states whose internal weaknesses pose potential security threats to major powers such as the United States or Great Britain.[16] Fragile states are sometimes also described as states that have experienced severe internal conflict or poverty, are unable to secure their borders, or are ruled by illegitimate governments.[17] Paradigmatic contemporary examples of fragile or failed states are Somalia and Afghanistan.

The common element of all definitions of fragile states, and the central component for our purposes, is lack of capacity to perform basic functions ordinarily performed by states. Similarly, states described as "failed states" seem to be those which face the most extreme limits on their capacity to fulfill their most fundamental obligations. Obligation overload is a particularly grave risk for states that face these kinds of severe limits on their capacity to fulfill affirmative obligations. None of the other characteristics sometimes associated with fragile or failed states is essential for our purposes. In particular, when we speak of failed states although we mean to say that their governments are incapable of performing many kinds of international obligations, we do not mean to endorse the controversial proposition that those governments might properly be displaced by foreign actors. Our definitions of state fragility and failure refer to states' capacity, not their sovereignty.

We are not here addressing the situations of states which simply lack the capacity to fulfill certain isolated international obligations, even though this incapacity may cause

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[15] OECD DAC, PRINCIPLES FOR GOOD INTERNATIONAL ENGAGEMENT IN FRAGILE STATES AND SITUATIONS (Paris: OECD, 2007), 2. Similarly, the World Bank characterizes fragile states as states facing "particularly severe development challenges: weak institutional capacity, poor governance, political instability, and often ongoing violence or the legacy of past conflict." In identifying fragile states the World Bank relies heavily on quantitative criteria: a rating of 3.2 or worse on the harmonized average Country Policy and Institutional Assessment (CPIA) ratings (set by the World Bank, and comparable regional institutions such as the African Development Bank, and the Asian Development Bank), or the presence during the last three years of a UN or regional peace-keeping or peace-building mission other than simply for border monitoring.. See http://go.worldbank.org/38IERKDDM1 updated Sept 2010 (visited Nov 22, 2010). For earlier discussion of the World Bank's approach to these issues, see WORLD BANK INDEPENDENT EVALUATION GROUP, ENGAGING WITH FRAGILE STATES: AN IEG REVIEW OF WORLD BANK SUPPORT TO LOW-INCOME COUNTRIES UNDER STRESS (LICUS) (2006), pp. 3-4.

[16] National Security Council, NATIONAL SECURITY STRATEGY OF THE UNITED STATES, Washington DC, September 2002, 1; NATIONAL SECURITY STRATEGY OF THE UNITED STATES, March 2006, pp. 37, 44; NATIONAL SECURITY STRATEGY OF THE UNITED STATES, May 2010, 8, 11, 13; Cabinet Office, NATIONAL SECURITY STRATEGY OF THE UNITED KINGDOM, London: Cabinet Office, March 2008, 13, 14; Robert I. Rotberg, "Failed States in a World of Terror," FOREIGN AFFAIRS, July/August 2002.

[17] Rotberg, supra. The World Bank for some purposes groups fragile with conflict-affected states (denoting the category as FCS). See e.g. World Bank Institute, Focus on Fragile and Conflict-affected States (2010).

serious problems for the state concerned or for other states or people.[18] Our focus here is on states which have more general problems complying with rafts of international obligations. Typically those states lack compliance-enabling resources that are fungible across many different international obligations. So for instance, the states we have in mind typically have limited access to people with training in law or public administration. At the organizational level they typically do not have available internally the collective knowledge or organizational structures required to successfully interpret international norms, or to draft, enact or implement corresponding laws or policies.

An important insight from longitudinal studies of specific fragile states is that these states typically remain fragile for many decades (or even longer). A massive natural disaster in a rich and stable country, or the loss of a major war such as experienced by Germany and Japan in 1945, may precipitate short-term fragility from which recovery may be rapid. But these are exceptional rather than standard cases of fragility. It is rare (not unprecedented, but rare) for a state to develop adequate robust governance institutions and socio-economic and political conditions to exit comprehensively from a condition of fragility within 15-20 years. This underpins substantial problems of time-inconsistency of preferences. The time horizon considered by a fragile state's leaders in deciding to undertake a new and demanding international obligation may be very short. Yet many international obligations persist over multi-decade periods (or one obligation is replaced by a successor obligation as a global governance regime evolves, with successor obligations often more demanding than their predecessors.) The significance of the aggregate burdens that may be imposed on a fragile state by long-duration obligations may also be underestimated by international development institutions. These institutions, with their commitments to 'development', may tend to work with relatively optimistic long-run scenarios about possible development paths; and they may also underestimate the demands imposed by non-pecuniary obligations, partly through inattentiveness to these costs in contrast to more careful calculations made about financial obligations, and partly due to a loose and insufficiently-explored assumption that demanding global governance obligations are likely overall to have pro-development effects.

A major concern about obligation overload is that it may itself heighten fragility over time. A state is understood as being fragile, certainly in terms of the World Bank's CPIA criteria, in considerable part because it lacks the capacity to meet many obligations. Policies that encourage a fragile state to undertake yet more demanding obligations, or obligations which it will be costly not to comply with, may well not be matched by rapid development in the state's capacities. As the state's degree of non-compliance becomes higher, pressures on the state will rise further. These include external pressures, disparagement of the state, and even demands for intervention, but also a further loss of legitimacy of the state and its institutions among key internal constituencies, possibly accompanied by more self-help or aggrandizement and returns to social violence.

[18] For example, a state lacking the veterinarians needed to certify its livestock free of disease may suffer severe losses to its exports; and inability of extra-local veterinarians to operate in some conflict zones in Africa made it difficult to eradicate rinderpest globally, until test and vaccination kits were developed which could be used by local 'barefoot vets' among nomadic cattle-herding communities.

2.3 Why obligation overload occurs

A fragile state may find itself in a situation of obligation overload in many different ways.

1. *Change of circumstances.* A state's decline into fragility may reduce its ability to meet obligations undertaken in better times. Or it may lose a patron or guarantor whose support had hitherto made its obligations manageable, either through providing resources and expertise to enable compliance, or by fending off demands for compliance.

Such declines in the state's capacity to govern or to cope with the demands of its obligations may render some of its obligations less beneficial than previously. International obligations are often associated with benefits that offset any burdens they impose. For example, the burdens imposed by investment treaties and free trade agreements are offset by benefits that include lower risks and greater rewards to investing in local industries. However, the magnitude of those benefits is likely to depend on the capacity of the local state. Few investment opportunities are likely to be pursued in a country where the state is unable to guarantee a certain minimum level of security for its inhabitants and their property. Consequently, as a state fails, the benefits of complying with these sorts of international obligations will decline.

Decline in a state's capacity can also make complying with its obligations more costly. Sometimes the additional costs take the form of direct costs. For example, dramatic increases in poverty rates might make it significantly more costly to fulfill obligations to prevent human trafficking. In other cases, however, the additional costs of compliance take the form of opportunity costs. That is to say, it may become more costly to devote resources to fulfilling international obligations rather than to some other use. This problem can stem from either decline in the resources available to the state or increase in the demands on those resources. Consider for example a state whose tax base has disappeared and whose civil service has been undermined by a combination of underinvestment in education, emigration, and low salaries. Suppose that the same state also has to deal with the challenges of satisfying the basic needs of internally displaced people, integrating former combatants, and rebuilding physical infrastructure damaged during the conflict. In these circumstances the opportunity costs of devoting human and financial resources to compliance with international anti-money laundering obligations will be relatively high.

2. *Voluntary acceptance of overloading obligations by an already fragile state.* Obligation overload can stem from voluntary decisions taken after a state has descended into the ranks of fragile states. The fragile state may take on obligations that are too demanding due to miscalculation, including overly discounting possible future problems. Or its executive government may find that the only way to change laws, or to attract sufficient attention from the legislature to get relevant laws or budgetary allocations approved, is first to undertake an international obligation to precipitate external pressure. The political economy of obligations may also play a part: a foreign donor may offer to fund the full cost of accepting new demanding obligations, in such a way that it is attractive to local politicians to do so; but the donor may not in the end cover the true

cost. This cost may be disproportionately high (indeed, performance may be impossible), if there is substantial political or juridical opposition within the state to the measures necessary to meet the obligation, or if very low capacity means competent persons and institutions are a scarce and costly resource.

3. *Imposition of obligations*. The fragile state may have imposed on it obligations that are very demanding, or that are very costly not to comply with. Such impositions may occur in many ways: for example, through UN Security Council resolutions, World Bank loan conditions, foreign or international court decisions, import regulations set by key foreign markets; or they may be through the operation of general principles of customary international law, such as obligations concerning the use and protection of shared rivers. Obligations set by international institutions may result from obligations that the institution or its managers owe, either externally, or owed under its governing instruments or policy decisions of its inter-governmental bodies.[19] Similarly, obligations may be imposed by a foreign state, not because its executive branch thinks this desirable, but because this is required by national legislation. Obligation overload may in practice arise from a not easily separable mixture of impositions from a variety of sources along with efforts to satisfy external constituencies such as donors or others on whom the state depends.

4. *Signaling through assumption of obligations*. Yet another possibility is that the fragile state, particularly if emerging from a recently-settled civil conflict or upheaval, may deliberately undertake a raft of international obligations as a signal to markets that it is "open for business". This signaling function may be unaccompanied by a serious calculation of the burdens associated with these obligations. Such scenarios may occur where a post-conflict state borrows from the IMF or the World Bank, and undertakes many obligations they require of the state in order to borrow, in order to convince other lenders and investors that the country has received the imprimatur of an international institution respected by markets. Insofar as market actors may not investigate the details of many of the obligations undertaken, nor closely assess the non-financial burdens that go with these obligations, it is likely that unnecessarily burdensome obligations are being undertaken for signaling purposes. With some re-design of approaches (including by international institutions), overly costly signaling might be avoided.

2.4 An illustration: Liberia

In the aftermath of a protracted civil war and a two year period of United Nations-supported transitional government, elected government in Liberia was re-established late in 2005. Liberia remains heavily reliant upon foreign aid. According to the OECD, in 2008 Liberia received a total of US$1,250 million in official development assistance;[20]

[19] For example, the World Bank's managers may be unable to deviate from imposing a locally-unworkable procurement or accounting regulation on a fragile state when disbursing funds to it, because these regulations are imposed by its Board, whose members may themselves in some cases be acting under instructions from national legislatures setting criteria for use of their taxpayers' funds.

[20] Development Assistance Committee of the Organisation for Economic Co-operation and Development database, available online at: www.oecd.org/dac/stats/idsonline.

by way of comparison, the national budget for 2008-2009 was just US$276 million.[21] The low (though increasing) level of donor funding channeled through the Government of Liberia reflects international concern about "generally weak technical and financial capacity as well as a challenging political environment".[22] It is reported that in 2007 there were only 275 lawyers registered with the Liberian bar, out of a population of 3.5 million, and that the criminal justice system was suffering from a severe shortage lawyers.[23]

Nonetheless, as it emerged from its period of conflict Liberia assumed many significant international obligations. For instance, in order to qualify for debt relief the government was required to implement a range of reforms, particularly in relation to management of public finances.[24] Moreover, on September 16, 2005 Gyude Bryant, Chairman of the National Transitional Government of Liberia endorsed 103 international treaties, on subjects "ranging from human rights to international trade" in a single afternoon, 83 of which took immediate effect.[25]

Since then, although it has been found in compliance with conditions required to qualify for debt relief, Liberia has struggled to fulfill some of its international obligations. For instance, in 2009 the regional FATF-style organization, GIABA, judged Liberia's anti-money laundering and legislation against financing of terrorism laws to be "far behind the other countries in the region". GIABA urged Liberia to "prioritize its limited resources towards building a strong legal framework and establishing [a Financial Intelligence Unit] as soon as possible."[26] There have been complaints that the Liberia Anti-Corruption Commission is under-staffed and under-funded. From 2004 through 2006 the US State Department did not rank Liberia in its annual Trafficking in Persons reports. It is now on the "Tier 2 Watch List", based on the assessment that its government "does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so, despite limited resources."[27] Finally, Liberia's application for accession to the WTO has languished since mid 2007.[28]

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[21] Republic of Liberia, NATIONAL BUDGET FOR THE FISCAL YEAR JULY 1, 2008 TO JUNE 30, 2009, available online at: http://www.mof.gov.lr.

[22] International Development Association and International Monetary Fund, LIBERIA - ENHANCED HEAVILY INDEBTED POOR COUNTRIES (HIPC) INITIATIVE: COMPLETION POINT DOCUMENT AND MULTILATERAL DEBT RELIEF INITIATIVE (MDRI), 9 June 2010, 13.

[23] Tobias van Gienanth and Thomas Jaye, POST-CONFLICT PEACE BUILDING IN LIBERIA: MUCH REMAINS TO BE DONE (2007), 48-50, 65, available at http://www.zif-berlin.org/fileadmin/uploads/analyse/dokumente/veroeffentlichungen/Liberia_Report_final_3_6_08.pdf. A more recent report puts the figure at 300. See, Prison Fellowship International 2010 Report on Liberia, available at http://www.pfi.org/national-ministries/africa/liberia

[24] IDA and IMF, supra.

[25] UN News Centre, "Liberia submits record number of treaty actions at World Summit event," 16 September 2005.

[26] GIABA ANNUAL REPORT 2009, 196, available online at: www.giaba.org.

[27] United States Department of State, TRAFFICKING IN PERSONS REPORT 2010, 212.

[28] WTO, *Accession Status: Republic of Liberia, available at* http://www.wto.org/english/thewto_e/acc_e/a1_liberia_e.htm (last visited August 31, 2010) (reporting that Liberia submitted its application on June 2007, "[t]he General Council established a Working Party to examine the application of the Republic of Liberia on 18 December 2007" but "Liberia has not yet submitted its Memorandum on the Foreign Trade Regime").

3 Developing Legal Approaches to the Problem of Obligation Overload

International lawyers have been much concerned with conflicts between legal obligations: true conflicts between absolutely irreconcilable legal commitments, the management of overlapping obligations from different regimes by techniques of interpretation, the crafting of rules of priority such as Article 103 of the United Nations Charter or rules concerning legal effects of successive treaties on the same subject matter. Little explicit attention has been given, however, to what may in practice be a more significant problem than true legal conflicts of obligations: the problem of obligation overload.[29]

3.1 Obligation overload in existing international law doctrine [to be extended]

A diverse group of international law doctrines address aspects of the problem of obligation overload, but in a highly fragmented way. Necessity and force majeure can preclude the wrongfulness of a state's breach in certain cases. War and some fundamental changes of circumstances may justify the suspension or termination of certain treaty obligations. The general law of treaties provides for termination, withdrawal from or suspension of performance in situations of impossibility of performance or fundamental change of circumstances, but frames those concepts narrowly. Some treaties specifically allow derogation from or non-application of their obligations in times of emergency. Some treaties limit the obligations they impose on developing countries as a whole, by differentiating the applicable obligations (as with the principle of common but differentiated responsibility in the UN Framework Convention on Climate Change of 1992), and delays before some obligations become applicable to developing countries, as with the TRIPS Agreement of 1994. Wholesale extensions of time may be granted, as has in effect happened under the 1982 UN Convention on the Law of the Sea with regard to claims by coastal states to areas of continental shelf extending beyond 200 nautical miles from their territory. Extensions of time may be granted to an individual state, as has happened in several cases under the Ottawa Convention on Landmines, where a plan of action may also be required to show how the state will come into compliance over the extended period. With less structure for formal extension of time, compliance committees under international treaties may in effect excuse non-compliance for a certain period as part of an agreement on steps to move into compliance over several years, as happens to some extent under the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987.[30] Supervisory bodies for global treaties are usually reluctant, however, to be seen to countenance sustained non-

[29] Obligation overload may also be a more fundamental problem than conflicting obligations; overload may impair states' ability to avoid becoming subject to conflicting obligations.

[30] Thus the Meeting of the Parties in November 2009 accepted Bangladesh's plan of action under which its consumption of chlorofluorocarbons, which had been much above its permitted levels in 2007 and 2008, was permitted to remain high in 2009 but would return to compliance in 2010. MoP Decision XXI/17, in UNEP/OzL.Pro.21/8, 21 Nov 2009, This consumption related to Bangladesh's production of metered-dose inhalers, accompanied by claims that technology for production of such inhalers without CFCs was mainly owned by multinational companies, and that production of inhalers by local companies was important for keeping prices of medications down.. UNEP/OzL.Pro.20/9, 27 Nov. 2008, paras 130-137.

compliance even for war-torn or otherwise fragile states where actual compliance would place prohibitive demands on resources or is obviously unrealistic.[31]

The insufficiency of these structures in relation to the problem of obligation overload is due in great part to the feature that global governance supervisory bodies, and many of the legal doctrines, deal with each specific set of obligations separately. Supervisory bodies in most instances do not have the capacity or mandate to take account of obligations across many sectors, nor to set priorities. Nor is there any mechanism to structure approaches to a wide set of obligations that are worked out between the fragile state and those to whom each particular obligation is owed or who benefit from it.

3.2 Obligation overload: analogies to insolvency

Overload of affirmative non-pecuniary obligations has intriguing commonalities with overload of pecuniary obligations. At a conceptual level there are promising analogies between mechanisms for managing overloads of debt and of monetized claims. Furthermore, on a more practical level, failed and fragile states often suffer from both financial and non-financial overload at the same time. Consequently, it is useful to consider whether institutional mechanisms designed to address debt or claims overload should also address overload of non-financial obligations, especially if,ability to manage existing non-financial obligations is closely tied to the availability of financial resources flowing to the government or the society. We see this connection whenever debt relief is conditioned on performing other non-financial obligations, or on undertaking new non-financial obligations. For example, in the case of Liberia's efforts to retire its debts through the Heavily Indebted Poor Countries (HIPC) program, the World Bank-supervised 'decision-points' along the way involved meeting a raft of governance requirements, but with no procedure to balance these against other obligations or priorities.

In light of these parallels between overloads of financial and non-financial obligations, we regard insolvency law, together with related practices for dealing with overloads of sovereign debt and monetized claims, as a potential model for ways of dealing with problems of overload of affirmative non-financial obligations. In national law, and to

[31] Somalia's self-reported excess halon and chlorofluorocarbon consumption was discussed by the Montreal Protocol's Implementation Committee in 2008, which noted that Somalia "of course faced significant challenges as a result of the extensive political and economic disruption it faced:, and the Committee "had taken due consideration of Somalia's special situation." UNEP/OzL.Pro.20/9, 27 Nov. 2008, para 121. However, the 2009 Meeting of the Parties decision XXI/23 on Somalia made no reference to this, and instead used its standard formula referring to the possibility of trade sanctions in the event of continuing non-compliance. The resolution noted with appreciation Somalia's introduction of a system for licensing the imports and exports of ozone-depleting substances (which had been called for in an earlier MoP decision), without any comment on the improbability of this being effective when the government controlled only a very limited part of the national territory. UNEP/OzL.Pro.21/8, 21 Nov 2009. A comparable example is provided by the 2002 Report of the Committee under the UN Convention on the Rights of the Child, dealing with the obligations of the Government of Sudan in Khartoum at the time of the north-south war: "While noting the de facto control by non-state actors of areas of the State party's territory, notably in southern Sudan, the Committee emphasizes the full responsibility of the state party; it invites all other parties to respect child rights within the area under their control." UN doc CRC/C/121, 11 Dec 2002, para 225.

some extent in international law and international practice, insolvency law provides a mechanism and a set of principles to suspend, modify and restructure the legal obligations of an entity which cannot meet all of its obligations. Those obligations can include not only monetary payments due to creditors, but also forward-looking contractual obligations, obligations to workers, certain regulatory obligations supervised e.g. by an environmental or securities regulator, and in some cases wider responsibilities affecting other beneficiaries of essential roles performed by the entity. In some national systems insolvency law is used to adjust the obligations of municipalities as well as private firms, and the largest municipalities are comparable in size to some fragile states.[32]

The parallels between overloads of financial and non-financial obligations suggest that insolvency law may offer useful ideas on how to resolve difficult questions that will have to be confronted in deciding how to adjust non-financial obligations. Those questions include: Should obligations be discharged or simply restructured? Should adjustments to obligations be specified through ex ante mechanisms, such as the explicit terms of loan agreements, or ex post in bankruptcy proceedings? What forum is suitable for proceedings involving an obligor whose counterparties and beneficiaries are scattered around the world? Should the leaders of the overloaded organization be allowed to remain in power while its obligations are being restructured? Should those leaders be sanctioned if they have behaved recklessly or fraudulently in assuming obligations?

States are of course vastly different from even the largest and most prominent of firms. A state is a sovereign entity, with general legislative, adjudicative, taxing and military capacity and a comprehensive responsibility for territory and to its public that are quite unlike the features of any firm. Even the most extreme case of a collapsed and failed state is not, in the United Nations era, comparable to the situation of a firm or a small municipality: recognized states cannot be dissolved, or dismembered, or folded into other states (although it is not so long ago that such occurrences were frequent, as with Indian princely states, and numerous indigenous polities in the Americas and Africa). Nonetheless, the management of obligations of failing firms and municipalities through or in the shadow of insolvency law, and the principles and practices developed internationally for managing overloads of sovereign debt and monetized claims, provides a valuable set of legal ideas for dealing with overloads of affirmative non-financial obligations of fragile or failed states.

4 Potential Responses to Obligation Overload: Ex Ante and Ex Post Adjustments

4.1 Overview

In schematic form, at least five distinct methods of adjusting a state's obligations to avoid or mitigate the problem of obligation overload may be distinguished. Two of those methods involve setting the terms in which obligations are originally formulated in ways which make them unlikely, in the aggregate, to become overly burdensome. These

[32] For an overview and critique of U.S. law on point see, Michael McConnell and Randal C. Picker, When Cities Go Broke: A Conceptual Introduction To Municipal Bankruptcy, 60 U. CHI. L. REV. 425 (1993).

methods involve what we will call *ex ante adjustments*. The other three methods involve modification of obligations at some point after the risk of obligation overload has become manifest. In these cases the obligations a state facing obligation overload will bear going forward are not determined until after the problem manifests itself, even if a process for doing so has been specified in advance. Accordingly we will say that these last three methods involve *ex post adjustments*.

In order to be meaningful, adjustment must involve not only removing any broadly accepted reason to comply, but also relieving the overloaded state from any sanctions that would otherwise accompany failure to fulfill its obligations, including non-legal sanctions such as withholding of foreign aid. 'Adjustment' here must be understood broadly as also including tolerated non-performance (or tolerated breach), which is almost certainly the approach that is most frequently taken to obligation overload of fragile states. This latter form of adjustment can be theorized as suspension, under-enforcement, deformalization, necessity, force majeure, impossibility, or in several other ways. However, in this section of the discussion we will consider it as within the general rubric of formal (if temporary) adjustment, along with more explicit arrangements for permanent or temporary adjustment.

Although we discuss these methods of adjustment separately, in practice they can certainly be found in combination. In the first place, the various obligations of a state suffering from obligation overload may contemplate different methods of adjustment. Second, any single obligation can be subject to two or more methods of adjustment.

4.2 Possible methods of adjustment

1. *Flexible obligations*

The most straightforward way of ensuring that obligations do not become unduly burdensome is to formulate them so that they can be satisfied by even the most fragile of states. So for example, states might be required to report whatever elements of a prescribed set of data they can 'reasonably' provide in light of their administrative capacity. Or states might be required to take 'reasonable' steps to protect the interests of foreign investors, where reasonableness is determined subjectively, that is to say, in light of the capabilities of the host state. The obvious drawback of this method of avoiding obligation overload is that it is also likely to relax the obligations of states that are fully capable of complying with them, possibly to the detriment of other parties.

2. *Contingent obligations*

Another ex ante response involves making states' obligations expressly contingent on future events, and in particular, by linking to events that signal decline in a state's capacity to comply with its obligations to reductions in these stringency of those obligations. In the sovereign debt context an example of a contingent obligation is a GDP-indexed bond, where the interest payable depends on the rate of growth of the issuing country's GDP. For non-financial obligations, a treaty might specify an expansive set of obligations for states with ordinary levels of competence, suspended obligations for states experiencing severe conflict, and minimal obligations for states that have recently emerged from conflict. This is done for example in Article 2 of the

International Covenant on Economic, Social and Cultural Rights, which defines a state party's obligations by reference to available resources. International treaties providing for special and differentiated responsibilities of developing countries set limits on obligations by reference in part to capacity to perform the obligation, although these provisions typically treat developing or least-developed countries as a largely undifferentiated group, and they do not specifically address fragile or failed states. Some treaties contain derogation provisions that a state may trigger in times of emergency, or they contain more general exceptions that limit the reach of obligations where e.g. essential security interests of the state may be impaired.

This kind of ex ante adjustment is only suitable to the extent that it is possible to foresee the obligations that will be suitable in various scenarios. The process of formulating obligations to cover a range of remote scenarios can be costly. Moreover, when it must be done in the context of international bargaining the risk of breakdowns in negotiations may increase.

It can be particularly difficult to ensure that ex ante adjustment mechanisms contained in separate legal instruments are consistent with one another.

3. *Unilateral modification*

Another way of reaching much the same result is to permit states to modify their obligations ex post whenever they believe that supervening events render them unsuitable. For example, bilateral investment treaties often contain provisions that excuse breaches caused by measures that states consider necessary to, for example, protect their "essential security interests". In some treaties those provisions are "self-judging" in nature, at least if they are read literally.[33]

Permitting unilateral modification is functionally very similar to making obligations flexible ex ante and has the same drawbacks. Permitting unilateral modification also risks misleading observers who register the existence of the principal obligation but fail to appreciate the ease with which it can be modified.

4. *Modification by mutual agreement*

Some international obligations can be modified with the consent of recognized counterparties. This is particularly clear in respect of obligations owed between states. The International Law Commission's Articles on State Responsibility make the sweeping statement that "Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent."[34]

[33] See, for example, US-PERU FREE TRADE AGREEMENT, Art. 22.2n: "For greater certainty, if a Party invokes Article 22.2 [Essential Security] in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies."

[34] International Law Commission, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, Article 20 (2001).

Securing the consent of counterparties to an obligation can be challenging, but securing consent of the true beneficiaries of an obligation or their proper representatives may be utterly infeasible. The true beneficiaries of many international obligations are firms or individuals rather than states. Consider, for example, investment treaties or anti-trafficking norms. In some cases they are also widely dispersed; consider, for example, the beneficiaries of anti-money laundering conventions. These kinds of beneficiaries are often poorly represented by states yet are impossible to communicate with directly.

Even when beneficiaries are properly represented by states they may be so numerous that familiar collective action problems—particularly the problems of holdouts and free riders—make it difficult to secure the consent of all affected parties. The obligations created by multilateral bodies such as the World Trade Organization or the FATF and its affiliated bodies are cases in point. Multi-party negotiations might even be required to modify the obligations created by bilateral investment treaties because many host states are parties to multiple treaties of this kind and some investors are capable of taking advantage of several of them.

On the other hand, collective action problems can be mitigated by provisions that permit modification with something less than unanimous consent of the counter-parties. The analogue in the world of pecuniary obligations is a bond indenture containing a 'collective action clause' that permits specified terms to be modified with the consent of a super-majority of the bondholders. This method of securing consent may require policing by an independent third party to ensure that counter-parties in the minority are not abused.

Yet another obstacle to consensual modification is the fact that in many cases it will be necessary for the state which benefits from the modification to make some sort of side-payment to beneficiaries, especially (though not exclusively) when they will be prejudiced by the modification. However, failed states may not be able to make such side-payments immediately and their commitments to make payments in the future may not be credible.

5. *Modification subject to approval of third party*

A second ex post response is to permit modification only with the approval of a third party, such as a court. This can be accomplished through legal doctrines or treaty language that excuse or suspend compliance with obligations when specified circumstances arise, without specifying how the original obligations will be replaced. The doctrine of necessity and its treaty-based analogues work in this way.

Modification with the approval of a third party can also be implemented in a more ad hoc fashion, that is to say, through processes devised after the problem of obligation overload has become salient. An example of such a process from the sovereign debt context is the suspension of the rights of Iraq's creditors pursuant to a resolution of the United Nations Security Council.[35]

[35] Security Council Res No 1483, UN Doc S/RES/1483 § 22 (May 22, 2003).

The efficacy and legitimacy of this method of modification depends heavily on the characteristics of the third party selected to implement it. So, for example, proponents of a Sovereign Debt Restructuring Mechanism (SDRM) to facilitate modifications of countries' financial obligations have struggled to find a third party 'referee' with the requisite combination of expertise, disinterestedness and leverage over sovereign debtors.[36]

5 Justifications for Adjustment

5.1 Benefits to the obligated state and its inhabitants

Adjusting some or all of a failed state's obligations can yield significant benefits for the state and its inhabitants. Meeting affirmative non-financial obligations is expensive: they require expenditures of money, the deployment of skilled officials who may be in very short supply, as well as the commitment of time and attention by senior members of the government who have much else to do that may be more valuable for the country. Adjustment can also avoid the potentially undesirable effects of partial or superficial compliance with international obligations.

Adjustment may be beneficial even in situations in which foreign actors are willing to provide resources targeted to offset the burdens of complying with international obligations. In some cases, there may be direct foreign commercial interests in funding such compliance; for example, a foreign oil company may pay the whole (substantial) costs of a state's submission to the United Nations Commission on the Limits of the Continental Shelf, because it already has or hopes to obtain rights to exploit the oil once that outer boundary is formalized. Acting without any profit motive, international organizations seeking to maintain the integrity of their own regimes or to make them more beneficial may fund compliance activities. Thus the WTO in concert with a number of other international organizations provides assistance with trade-related reforms under the auspices of the Integrated Framework (IF) for Trade-Related Technical Assistance to least-developed countries;[37] and UNICEF in some cases essentially wrote the national reports of some fragile states that were required under the UN Convention on the Rights of the Child, hoping thereby to help build an internal constituency for the Convention obligations within the country.

While foreign donors regularly provide financial and technical assistance designed to help fragile states, and other conflict-affected states, comply with their international and global governance obligations, it is unlikely that assistance from foreign actors under existing arrangements can adequately alleviate the problem of obligation overload for fragile states. First, recent experience suggests that foreign-sponsored compliance with international norms or standards is not a good substitute for compliance initiated and sponsored by local actors. Foreign actors often find it relatively easy to induce formal

[36] Brad Setser, "The Political Economy of the SDRM," in Barry Herman, José Antonio Ocampo, and Shari Spiegel, OVERCOMING DEVELOPING COUNTRY DEBT CRISES (New York: Oxford University Press, 2010), 317, 333-334.
[37] *See*, http://www.integratedframework.org/.

steps toward compliance, such as the enactment of legislation and the creation of new government bodies. However, the engagement of actors with knowledge of the local legal and political context, and who are trusted by local stakeholders, is typically required to adapt international norms to be effective in the local context, as well as to ensure that the relevant government bodies are staffed with honest and capable individuals and that someone is willing and able to enforce legislation. Local support for implementation of commitments to fulfill international obligations is especially important in the face of local opposition.[38] It also seems plausible that local actors will remain in the country longer and so will have more opportunities to disseminate their expertise to other local actors. Second, having foreign actors sponsor compliance with international obligations is less than ideal where the opportunity costs of those resources are high. Consider the situation of a typical impoverished post-conflict state with many pressing demands on its resources. Even if a foreign donor is willing to finance the creation of a new anti-money laundering agency its money might be better spent elsewhere.

5.2 Benefits beyond the obligated state and its inhabitants

The international regime for dealing with fragile and failed states is designed in part to preventing failed states from becoming a threat to the international community. Adjustment of a fragile or failed state's obligations can be justified on these grounds as well. Somewhat counter-intuitively, adjustment of fragile or failed state's obligations can help the beneficiaries of those obligations as well as the obligated state.

This is an instance where an analogy to corporate insolvency law may be helpful. Much of the law of corporate reorganizations is premised on the idea that even if a firm is unable to fulfill its original obligations to its creditors it may be able to fulfill a modified set of obligations that are equally valuable to its creditors but give the firm an opportunity to regain its footing. The simplest example is where the firm faces a temporary liquidity crisis that prevents it from paying its debts as they come due. In this case it may well be possible to come up with a plan of reorganization that simultaneously extends the time for repayment and increases the interest rate to the point where creditors' new claims are equivalent in economic value to their original claims. Similarly, a state that is unable to fulfill its current international obligations may be able to defer compliance in a way that allows it to devote scarce resources to the process of rebuilding both state and society, yet, over the long term, leaves the beneficiaries of its international obligations no worse off.

Sometimes a firm's problems go beyond lack of liquidity and are so severe that it will never be able to fulfill all of its obligations to its creditors, in either a formal or an economic sense. Such a firm might still benefit from reorganization that gives it time to change its management structures and business plan free from the distraction posed by creditors' uncoordinated efforts to satisfy their claims. This kind of reorganization may also allow the firm's creditors to recover more value than if they retained and pursued their original claims, even if they recover less than they were originally owed. Similarly, a failed state that is unable to satisfy all of its international obligations might benefit from

[38] Terence C. Halliday and Bruce G. Carruthers, BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS (Stanford University Press, 2009).

a respite from the international community's demands, even if those demands are simply to 'do the best that it can.' A state that is given such a respite might develop more capacity to fulfill both domestic and international obligations than one that is held to its original obligations.

In principle it should be possible to effect these kinds of mutually beneficial adjustments with the consent of beneficiaries. That consent could be provided either ex ante, such as in the form of provisions for special and differentiated treatment, or ex post, in the form of a modification by mutual agreement. However, as we have already discussed, lack of foresight, the costs of negotiations and collective action problems may make these kinds of adjustments impractical. These are the basic reasons why firms sometimes find it necessary to resort to formal insolvency procedures such as Chapter 11 of the US Bankruptcy Code to effect reorganizations that ultimately enhance their creditors' collective welfare. For the same reasons, non-consensual ex post modification might be required to effect adjustments that enhance the collective welfare of beneficiaries of a fragile state's obligations.

6 Objections to Adjustment

6.1 Prejudice to beneficiaries

The most intuitive objection to permitting adjustment of states' international obligations is that it will be unduly prejudicial to the beneficiaries of those obligations, assuming those beneficiaries are not able to alter their dealings with the fragile state in anticipation of such adjustments. As we have seen, those beneficiaries will include foreign firms or individuals such as foreign investors or exporters who benefit from investment treaties and the WTO; more diffuse groups of foreigners, such as everyone who is harmed by the ability of drug traffickers to use a fragile state to launder their money; and domestic actors, such as potential victims of human trafficking.

For international obligations that are considered to be founded upon or modifiable by agreement (in contrast say to jus cogens understood as natural law obligations, or to purely imposed obligations), obtaining consent from the affected parties will typically justify any prejudice caused by adjustments of a state's obligations. In such cases objections will usually only be raised if the adjustments impose externalities on others or are accompanied by an unacceptable quid-pro-quo. To deny the effectiveness of such adjustments requires denying beneficiaries' authority to dispose of their entitlements, which implies a significant challenge to their status as autonomous actors. In addition, it can often be presumed that beneficiaries will only consent to adjustments that enhance their welfare.

In some cases where consent has not been obtained, as noted above, adjustments can be defended on the grounds that they enhance the collective welfare of beneficiaries.

Non-consensual adjustments that do not enhance the collective welfare of beneficiaries have to be defended on the grounds that any prejudice to beneficiaries is outweighed by positive effects on the interests or rights of the fragile or failed state and others.

6.2 Moral objections to adjustment

The idea that it can be justifiable to adjust the obligations of overloaded fragile states generally implies, at least in cases of non-consensual adjustment, that it is justifiable to abandon international obligations when the potential benefits (broadly defined) outweigh the costs. International lawyers differ sharply as to whether, and to what extent, it is proper to think of the enduring obligatory weight of existing international legal obligations of a state in terms of costs and benefits. On one view, costs and benefits should be weighed before a state decides to take on an obligation, but thereafter, the obligation has a moral force (e.g. as a promise) that prevails over any mere increase in costs or decline in benefits from what was originally expected or hoped for. An obligation can be terminated or modified pursuant to the relevant legal instrument which created it or to a background legal rule against which that instrument operates, but otherwise the obligation continues to be binding and should be respected. Moreover, if breach of legal obligations is inevitable, strategies should be adopted to minimize them and come back as quickly as possible into compliance. An opposing view draws from normative arguments for 'efficient breach' of contract, that aggregate welfare is enhanced by tolerating breach of an obligation which has become overly burdensome, provided the innocent parties are suitably compensated for the breach. On this view, moral considerations about the sanctity of promises or the obligatory force of rules have no or little weight. The European Union approaches WTO rules in this 'breach-and-pay' way in deciding not to allow beef fed with growth hormone in the US to be imported into the EU, despite WTO rules and rulings, and instead simply to accept that the US is entitled to take some compensatory actions within WTO rules and processes.

We stress that the core scenario we address is distinct from ones in which non-compliance is justified exclusively by reference to the obligor's preference for avoiding increased costs or reduced benefits. In our core scenario the failed or fragile state *cannot* meet all of its obligations. In these settings non-compliance is not a preference but an unavoidable fact. This is the kind of situation with regard to non-pecuniary obligations that an arbitral tribunal addressed in relation to Venezuela's war-induced inability to meet financial obligation to the French Company of Venezuelan Railroads at the end of the nineteenth century "The appeal of the company for funds came to an empty treasury, or to one only adequate to the demands of the war budget."[39] (Accordingly, the government was excused from the consequences of its non-performance of the obligation, on grounds of necessity.)

A fundamentalist might hold that impossibility of performance is not in itself a justification for excusing a state from its legal obligations. A less stringent moralist might hold that even if modification is justified in situations of obligation overload, considerations such as which obligations are most beneficial to the obligor should not play a role in the analysis of which obligations take priority. On this view binding

[39] *French Company of Venezuelan Railroads (France/Venezuela)*, Award of 31 July 1905, 10 RIAA 285, pp. 353-4 (quoting from the ruling of the Umpire, which begins on p. 335).

obligations of the state should take precedence over all other norms and priorities among binding obligations should be resolved by hermeneutic means.[40]

Even if the international obligations that have overloaded a fragile state generate corresponding moral reasons to obey them, we are unwilling to rule out the possibility that those reasons can be overridden by other reasons. There are ongoing debates about the nature of states' moral obligations to obey the law, particularly as those debates relate to the particular features of collective entities such as states and the special questions that arise with international law. There are also questions about the moral status of particular kinds of obligations that might bind a state, such as promises as opposed to impositions, or legally binding obligations versus obligations (in the broader sense in which we use the term) that are not legally binding but exert strong normative pull. However, we do not believe it is necessary to engage in any those debates here. Standing against any reasons for action provided by international obligations are moral reasons to help a fragile state to secure basic needs, protect human rights and generate economic growth. We find it eminently plausible that there are situations in which the reasons for complying with international obligations are outweighed by competing moral considerations. Moreover, as far as the setting of priorities is concerned, the considerations that weigh against compliance may be more compelling in relation to some international obligations than to others. Consequently, it seems only logical to take such considerations into account when setting priorities among obligations.

6.3 Perverse incentives for beneficiaries

As we have already hinted, the prospect of material ex post modification of a state's obligations diminishes beneficiaries' incentives to rely on those obligations being performed. For example, if foreign investors come to believe that fragile states' obligations under investment treaties are prone to modification, they may either reduce their level of investment or demand higher returns on the investments they do make. This kind of reaction adversely affects the states in question as well as the prospective investors. Consequently, obligations designed to induce this kind of reliance should be modified with caution. However, many beneficiaries will not be in a position to make take such measures, particularly in the short term.

6.4 Perverse incentives for obligors

So far we have considered how adjustment affects the legal rights or the welfare of various parties at the time the adjustment is effected. In the case of ex post adjustments, it is also important to consider the effects at earlier points in time. Specifically, there are at least three distinct incentive effects that might offset the positive ex post effects of a modification.[41]

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[40] If taken seriously this is likely to be a complex task as each state or inter-governmental organization or private governance entity dealing with the fragile state will itself be subject to complex sets of constitutive rules and external obligations, and the fragile state will be subject to its own national law and perhaps to local (e.g. tribal) customary rules and inter-group normativities.

[41] These effects parallel the incentive effects associated with ex post adjustment of contractual obligations. See, Kevin E. Davis, *The Demand for Immutable Contracts: Another Look at the Law and Economics of Contract Modification*, 81 NYU L. REV. 487 (2006), 494-504; Oren Bar-Gill and Kevin E. Davis, *Empty Promises*, 84 S. CAL. L. REV. 1 (2010).

First, the prospect of modification reduces an obligor's incentive to disclose unflattering information about its ability to fulfill its obligations. Consider, for example, a state that knows its fiscal situation is more perilous than is generally appreciated. As a result the financial markets under-estimate the risk that the state will be forced to impose currency controls that breach its obligations under bilateral investment treaties. If modification is possible that state has less incentive to disclose the true risk of breach. With or without the prospect of modification the state is likely to attract more investment by withholding the information. But if modification is feasible the state may hope to use the modification process to escape obligations to compensate those additional investors.

Second, once the prospect of modification is on the table, obligors keen to capture the benefits of modification have incentives to bluff about and exaggerate their willingness to breach. So for example, at some point the state in our previous hypothetical may have an incentive to exaggerate the likelihood that its economy will collapse in the absence of currency controls in the hopes of bolstering its case for modification. These kinds of misrepresentations, as well as efforts to detect them, can be very costly for all concerned.

Third, when modification is feasible, obligors have less incentive to take precautions against breaching their obligations. So for instance, the easier states expect it to be to modify their obligations ex post, the weaker their incentives to adopt ex ante adjustment mechanisms. Similarly, making ex post adjustment easier diminishes states' incentives to refrain from incurring obligations in the first place. So for example, if modification is possible our hypothetical state has less incentive to sign investment treaties or to adopt austerity measures that will stave off the fiscal crisis.

The existence of these potential incentive effects demands a cautious approach to modification of fragile states' obligations. At the same time, there are ways of permitting modification while mitigating perverse incentives. One particularly promising technique is to permit fragile states, their inhabitants and counterparties to benefit from modification but to sanction individuals or groups who appear to have responded to incentives for opportunistic behavior. This would entail, for example, conditioning eligibility for modification on the ouster of specific officials, or even an entire government. One approach would be to impose this kind of condition in cases where misrepresentations or mismanagement are suspected. If this proves to be impractical, an alternative approach is to apply these kinds of conditions universally. In the extreme case, regime change could be made a pre-condition to adjustment. Needless to say these techniques may have prohibitively negative effects on the quality of governance and national sovereignty, particularly if applied indiscriminately.

7 Institutional Mechanisms for Managing Obligation Overload

Building on this abstract analysis, we turn now to outline some possible approaches to the actual management of obligation overload for fragile states. The unevenly and thinly

institutionalized environment of global governance means that there are many possibilities.

There will inevitably be sharply divergent views as to what the policy objectives of any such arrangement should be. Some political forces within the fragile state will attach great importance to autonomy in the state's decision-making, for reasons which in political theory terms might range among interest representation, non-domination, self-determination, and democracy. Counterparties of obligations owed by the state (for example, private foreign investors) will attach great importance to the performance of the obligations immediately or after some period of recovery. Some foreign states may wish to obtain some advantage for themselves, or for commercial interests they represent, from the disarray of the fragile or failed state. Many foreign actors, including international organizations, will wish to see particular obligations performed as fully and effectively as possible (for example, anti-terrorism or anti-trafficking or protection of forests and endangered species), or more generally will attach importance to measures that protect basic welfare and rights of the people and which help to rebuild an effective state. Different institutional approaches will balance these competing policies in different ways. We presume that particular importance ought to be given to human welfare, rights-respecting state reconstruction, non-domination, basic environmental values, and minimization of negative externalities, in ways that produce the best human outcomes and provide a strong basis for long-term development.

7.1 Ex ante adjustment

Given the vast number of sources of international obligations and the range of issues they cover, there is little to be said at the general level about how they might be framed to anticipate and avoid obligation overload. For the time being we will make four general comments about the kinds of institutional mechanisms that might support these efforts.

First, mechanisms that encourage creators of norms to evaluate and minimize the burden they impose on states will, at the margins, help to reduce the risk of obligation overload. This would involve requiring the analogue of a regulatory impact analysis when international institutions consider urging fragile states to undertake new obligations (or obligations that are more demanding, or more costly to not comply with).

Second, institutional mechanisms that prompt the creators of norms to adopt ex ante methods of adjustment, disseminate model terms, or conduct studies evaluating the impact of particular methods, are likely to play an important role in supporting and encouraging their use. These kinds of mechanisms serve to reduce the transaction costs that might otherwise discourage the use of such methods.

Third, there is also a role for institutions that help states coordinate the use of ex ante measures across different legal instruments. For example, if a state is party to a number of treaties which provide for differential treatment of "fragile states" it might be helpful for them to define that term in a common fashion. This kind of harmonization promises not only to reduce drafting costs for the obligated state, but also to reduce any transaction

costs associated with triggering adjustment provisions. The institutions that perform these roles can range from government agencies within potential fragile states, parties to treaties with those states, international organizations to NGOs.

Fourth, further consideration should be given to mechanisms that combine ex ante and ex post responses to obligation overload. Examples would be legal instruments that provide rough ex ante guidance on how to respond to obligation overload but stop short of providing detailed binding rules, thereby leaving much to be resolved ex post. For example, provisions of a national constitution might state that in the event of obligation overload fulfillment of obligations that serve to protect members of historically disadvantaged groups should take priority over other fulfillment of other obligations, without specifying how those other obligations ought to be adjusted.

7.2 Ex post adjustments

There is also a range of institutional mechanisms that might support ex post responses to obligation overload. In what follows we enumerate possibilities arrayed from situations in which the fragile state itself is the principal institutional actor, to situations in which one or more other states has the principal role, to situations in which obligation overload is managed primarily by international institutions. This division is artificial; real situations will typically involve a blend of these. Several of these strategies would be repugnant and indefensible in most circumstances (military occupation is an obvious example), but we include reference to them because in practice such situations occur and are addressed by international law.

The tasks performed by these institutions will depend in part on the method of adjustment being employed, i.e. unilateral modification, modification by mutual agreement, or modification with the approval of a third party. In general though, in any situation involving ex post modification it is necessary for someone to determine *eligibility* (which states are eligible for obligation overload remedies), *initiation powers* (who has the power to place an eligible state into a situation of obligation overload management), *scope* (what obligations are covered), and *remedies* (how is each obligation to be adjusted).

Our intuition is that institutional design and choice will make a major difference: in any given situation some approaches or combinations are likely to be much more cost-effective and produce better outcomes than others. To perform these tasks successfully an institutional mechanism must have the capacity to take some account of different obligations the state has in different sectors, to set some priority among these obligations, and to manage any adverse consequences of prioritization vis-à-vis third states and perhaps other third parties.

In considering the different strategies listed below, it must be emphasized that the baseline is not substantial-if-stuttering compliance. To reiterate, our focus is on situations where the fragile or failed state cannot possibly comply in an effective way with the raft of obligations The baseline is thus spurious compliance (shell institutions), vast and covertly tolerated non-compliance, episodic and disruptive enforcement, and

lurching of policy and budget allocations among wildly different priorities; all involving misallocation of resources, unpredictability, and opportunities for abuse, opportunism and corruption, and ensnaring international institutions and foreign actors in dubious compromises which may in turn erode their own stature and effectiveness.

Management Primarily by the Overloaded Fragile State

1. Unilateral formally announced suspension or repudiation of obligations by the government of the fragile state.
    - This is consonant with the "clean slate" approach to state succession in respect of treaties that was proclaimed by some post-colonial states in announcing that they would choose which colonial-era treaties they would be bound by. A somewhat comparable approach was taken by the USSR after the 1917 revolution, and by the PRC from 1949. In contemporary practice such an approach has attractions for populist politicians, and for states pursuing autarkic or defiant strategies. But it is rarely viable or prudent for most fragile states.

2. Establishing an independent national commission, perhaps with respected foreign members, to set priorities and future schedules for obligations in consultation with national and foreign stakeholders. A relevant precedent is the Interim Haiti Recovery Commission, set up under a Haitian Government decree in April 2010 at the instigation of a conference of donors to approve and prioritize reconstruction projects following the devastating January 2010 earthquake. It is co-chaired by Haiti Prime Minister Jean-Max Bellerive and former US President Bill Clinton. The fourteen Haitian members of the 27 voting members of the Board represent the legislature, judiciary, executive branch, local government, labor, and business. The thirteen voting 'international' members represent major donor countries and the EU, plus the UN, World Bank, IADB, and CARICOM. Three non-voting members represent national NGOs, international NGOs, and the Haitian diaspora. It was initially established for a period of 18 months. Its significance is heightened by the Haitian government's ability to act under emergency powers, making for potentially rapid implementation in Haitian law and policy of decisions taken in the IHRC, and limiting the scope for effective contestation despite rising disaffection.

3. Establishing a technocratic government (sometimes led by distinguished bureaucrats or public intellectuals, or nationals who have held high-level positions in international organizations), which is able to engage with its foreign and international audience, and sets priorities and future schedules for obligations in consultation with stakeholders.

Management by Foreign States, including Joint Management with the Overloaded Fragile State

4. Control by a single foreign state or a coalition.

- Military occupation provides one often-problematic platform for restructuring obligations, although the traditional international law of occupation deliberately sets limits to the powers of occupying states in this respect. Short of occupation, a dominant foreign state may arrange the restructuring and prioritization of obligations. This may be done for beneficent reasons to maintain basic international order (hegemonic stability theory), but more often a quid-pro-quo will be exacted. Historically this may have included territorial concessions; nowadays it is more likely to include political influence, and economic arrangements such as natural resource concession agreements.

5. Use of collective action clauses
    - Valuable experience is provided by the use of collective action clauses in sovereign bonds, and by national legislation in several countries enabling large majorities of bondholders to override holdouts. As between states, interpretations of "consensus" often enable potential hold-outs to be overridden in practice. But hold-out states are not always overridden – the ICJ's consideration of Macedonia's challenge to Greece's obstruction of Macedonian membership of some organizations if it does not use the FYRM name may illuminate legal approaches to such situations.

International Institutions (Global or Regional) as Principal Actors

6. Subject matter-specific response by an international tribunal:
    - Efforts to adjust a state's legally binding obligations may prompt proceedings before some sort of international tribunal. In some cases the tribunal may go beyond simply declaring the extent to which the parties' conduct was consistent with their legal rights and make efforts to influence the process of determining how to replace their original obligations. The decision of the International Court of Justice in the Hungary-Slovakia case, although not involving fragile states, is indicative of such an approach.[42] A communist-era treaty had provided for the two states jointly to build two dams on the Danube River. After regime change and strong public opposition to the downstream dam, Hungary purported to terminate the treaty and refused to build the dams, and Slovakia breached the treaty by diverting the Danube and building the upstream dam in a different place. Despite the purported termination and major breaches, the ICJ ruled that the treaty continued in force, but directed the parties to negotiate a new modus vivendi to deal with the actual situation.

7. Subject matter-specific response by a single non-judicial international institution
    - Many obligations of fragile or failed states are supervised not by other states, but by an international institution. This applies even if the

[42] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7.

obligation originates directly or indirectly from an inter-state treaty. In practice, problems fragile or failed states have in meeting their obligations are very frequently dealt with by international supervisory bodies. A Compliance Committee under an international environmental treaty may send a technical assistance team rather than find the fragile state to be in non-compliance; the Human Rights Committee may accept a notice of derogation from a state facing a particular emergency; a UN Security Council Sanctions Committee may take no action on violations by a particular state of a sanctions regime; the WTO's Trade Policy review Mechanism may modulate its assessment of a state's performance by reference to a natural disaster. Supervisory bodies often do not have a mandate to do much else than insist upon compliance, so that other approaches they take may be ad hoc and not governed by legal standards. A more fundamental limitation of such practice is that it is focused simply on one small set of a fragile state's obligations – no systematic mechanism exists for assessing the totality of these obligations.

8. Country-specific general responses by a single international institution
    - Theoretically it may be attractive for a single international institution to have the power to assess all of the obligations of an obligation-overloaded fragile state, set priorities among them, and protect the state from legal demands to perform other obligations for a certain period. This function would be analogous to that of a bankruptcy court in national insolvency law. Very powerful international institutions might conceivably achieve this. To some extent, the UN Security Council did this in restructuring Iraq's obligations after 2003. The United Nations territorial administrations were able to arrange many obligations in administering proto-states such as Kosovo and East Timor, and such arrangements could conceivably be extended to a failed state, although this is politically improbable in most cases. The European Union, with considerable economic resources and political leverage, may be able to achieve similar results in countries with which it is centrally concerned, such as Kosovo. It is possible the UN Peacebuilding Commission, which brings together many of the key actors in country-specific committees to deal with specific conflict and post-conflict situations, could undertake the task of managing obligation overload in relations to countries it is dealing with. This is consistent with the ethos, increasingly shared among some prominent individuals involved in the Peacebuilding Commission, for tough-minded setting of priorities in particular countries rather than undertaking too much and dissipating resources ineffectually. Its powers vis-à-vis non-UN actors are only recommendatory, however, and its leverage is often limited. While the Peacebuilding Commission and other existing institutions may have important potential in dealing with certain cases of obligation overload, fragmentation in international politics makes it unlikely in most cases that a single institution will have comprehensive power and leverage. It is more likely in most cases that one institution,

such as the World Bank, might take the lead in inter-institutional arrangements concerning a particular country, in a manner akin to the appointment of lead agencies in different development assistance sectors.

9. Country-specific responses by a coalition of international institutions
    - Where international institutions intervene in the affairs of a fragile state through some sort of inter-institutional arrangement it may be appropriate to vest responsibility for addressing obligation overload in that body. An example of such an institution is the International Contact Group on Liberia (ICGL), whose members are the United Nations, Economic Community of West African States, African Union, World Bank, United States of America, Ghana, Nigeria, United Kingdom, Germany, and Sweden. The ICGL's principal purpose has been to oversee the implementation of Liberia's Governance and Economic Management Programme (GEMAP), an ambitious effort to use extensive foreign intervention to enhance the management of Liberia's public finances. One of GEMAP's signature features is the assignment of foreign experts with co-signature authority to selected Liberian government agencies and state-owned enterprises. The scale of this intervention suggests that a similar inter-institutional body would be capable of assessing and responding to a problem like obligation overload, which also cut across many areas of state activity.

10. Inter-regime coordination or cooperation
    - Some mechanisms for inter-agency coordination or cooperation are already well established, in relation to particular countries under the Paris Declaration and its successors, or more generally through structures such as the OECD's Development Assistance Committee. These have not, however, focused on obligation overload as a distinct problem. Specific inter-institutional mechanisms may be one fruitful way forward. They are likely to be lacking, however, powers to protect a state from denunciations of non-performance in many fora, including international institutions which do not participate in or accept the inter-institutional process, investor-state arbitral tribunals, reports of influential human rights NGOs, foreign government processes such as those of the US State Department in its anti-trafficking reports, and litigation in foreign courts.

8 Conclusion

Enmeshment of post-conflict or other transitional states in a raft of dense and sophisticated external obligations involving remaking of innumerable national regulations has been a broadly successful strategy of European Union enlargement. However, post-conflict or post-disaster fragile states in most parts of the world typically lack the capacity or the external support and incentives to engage in such demanding forms of legalization. War-torn fragile states and others with very weak or precarious governance

clearly have no such capacity. Internationalization, legalization, and fragmentation of obligations are not necessarily pathological for fragile states. More law and more obligations is not necessarily problematic, if these are not demanding and are reasonably tailored or matched to the conditions of the state and the needs of the society. But too many demanding legal and governance obligations owed to and supervised by a plethora of external actors operating in a fragmented fashion, in aggregate becomes a problem of obligation overload. The push for ratification and full implementation of more treaties, internalization of more and more far-reaching global governance standards, and stronger programs of compliance with capacity-building and incentives and sanctions to support each obligation, has the potential to produce pathological results in fragile states while it remains so decentralized and un-unified. If more sophisticated institutional solutions cannot be found, less may be better than more in terms of the aggregate demandingness and volume of obligations of fragile states.

The problem of obligation overload for fragile and failed states is emerging as an increasingly significant one in practice. It has not been identified in this way hitherto, and we believe that a first and essential step is to recognize the problem, so that more systematic research on its scale and parameters can be undertaken. We have framed the problem as having some analogies to insolvency, and have used that model to help identify possible mechanisms and institutional approaches to ameliorate the problem. No perfect solution is plausible at present. However, doctrinal and institutional development in the directions we have sketched may help to reduce some counter-productive allocations of resources and misguided policy lurches that currently beset fragile and failed states and the foreign entities and international institutions that work with them.