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Conflict Resolution and the Political Process

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Conflict Resolution and the Political Process

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Editorial[1]

This first Special Issue of Political Science Applied investigates the relationship between conflict resolution on the one hand and various political processes on the other hand. It is motivated by the observation that there are many examples of conflicts of varying magnitude and impact, which the political process intends to resolve: mainly through elections, political decision-making, education, or the provision of a justice system.

It was the editors' intention to keep the interpretation of the terms "conflict resolution" and "political process" fairly open so as to allow authors from different academic disciplines and geographic regions to present their specific approach to the topic. As a result, the selection of articles in this issue reflects a wide range of case studies and conceptual explorations that are not only relevant to political, economic, and social scientists, but also to the community of practitioners.

The articles selected for the issue illuminate questions such as:

- What are examples of conflict resolution mechanisms that the political process provides? How do those mechanisms work in practice?
- How good is the political process at preventing or resolving certain types of conflict (e.g. violent conflicts, commercial conflicts, minority conflicts, family conflicts, etc.)?
- Which roles, functions, and professions does the political process provide for conflict resolution practitioners (e.g. negotiators, mediators, peace workers etc.)?

Consistent with the overall aim of *Political Science Applied*, the Special Issue focuses on concrete, practical examples of conflict resolution mechanisms related to the political process. It includes six case studies (articles 3 to 8) preceded by two theoretical explorations (articles 1 to 2).

The issue starts with Andreas Exenberger's institutional exploration of the relationship between conflict and institutions. Exenberger illustrates his exploration of the role of conflict and conflict settlement in the framework of limited and open access orders with a number of examples and finishes with some concluding remarks about the institutional perspective on conflicts.

The second article by Jan Pospisil investigates the conditions under which peace negotiations can be successful and enable a conflict-transformative direction. Pospisil argues that peace processes must have a long-term perspective rather than a focus on short-term negotiation results and the signing of peace treaties in order to be successful. To strengthen his argument he provides a comparative study of peace processes in the Philippines, Colombia and the Sudan/South Sudan.

In the third article, Sarah Craze uses the Indonesian government's experience with a Somali pirate hijack as an example to discuss Indonesia's robust state-based response to piracy, despite unchecked and ongoing piracy events in its own waters. Craze argues that Indonesia's response to the attack differed from other states affected by Somali pirate hijacks because of the public participation of the Indonesian government in the payment of a ransom.

Hélène Gandois's article focuses on the role played by the Economic Community of West African States (ECOWAS) in Côte d'Ivoire and explores the limitations and obstacles the regional organization ran into when handling the post-election crisis. Gandois's case study illustrates the difficulties of enforcing election results deemed free and fair by the international community but not by one of the contenders.

The fifth article by Ewane Fidelis Etah discusses the question of whether the holding of regular elections and power alternation are sufficient for sustaining a democratic system. Using Mali as a case study, Etah argues that the holding of regular elections and power alternation are not adequate solu-

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[1] For reasons of better readability, we avoid using different gender-specific spelling. It goes without saying that the used male form is to be understood in the sense of gender-neutrality. Es wird darauf hingewiesen, dass aus Gründen der besseren und flüssigeren Lesbarkeit im gesamten Journal auf eine genderspezifische Schreibweise verzichtet wird. Alle Bezeichnungen gelten sinngemäß für beide Geschlechter.

tions. Instead, so Etah, a broad and all inclusive political process is necessary for Mali to emerge out of its prevailing political crisis.

A further case study is provided by Thomas Spielbüchler in his examination of the post-genocide period in Rwanda under the Kagame administration. Spielbüchler identifies the unification of the Rwandan society and security as the dominant items on the country's political agenda. He argues that the exclusive focus on security issues has weakened other important initiatives such as good governance, reconciliation, sustainable development, and modernisation.

In the seventh article, Ahmed Hassin discusses the extent to which familial affiliations can contribute to community-based reconciliation processes in the Middle Eastern Arab countries. By looking at both state-based and community-based reconciliation and conflict management efforts in countries such as Iraq, Syria, Libya, Yemen, Egypt the Middle East, Hassin illustrates how strong social ties in Arab societies can play a positive role in post-conflict reconstruction and reconciliation.

In the last paper, Frieder Lempp, argues that there has been a shift over the last two decades in the way states fulfill their conflict resolution function. Lempp argues that states are increasingly using Alternative Dispute Resolution (ADR) processes, such as mediation, arbitration, conciliation, etc. as a complement to their traditional judicial systems. Using examples from the New Zealand jurisdiction he investigates the reasons for this change and illustrates how it is implemented in practice.

We would like to sincerely thank all authors and the entire editorial board for their contribution and support to this Special Issue and the excellent and fruitful cooperation. We wish all readers an interesting and enjoyable reading.

Frieder Lempp and Angela Meyer

Content/ Inhalt

Conflict and Institutions
Andreas Exenberger

Andreas Exenberger is assistant professor of Economic and Social History at the Faculty of Economics and Statistics of the University of Innsbruck. He has a background in economics and political science and his research focus is on globalization history as well as institutional political economy and development, especially poverty and inequality issues.

Introduction

In 2009, Douglass C. North, John J. Wallis and Barry K. Weingast (in brief: NWW)[2] somehow revolutionised the institutional perspective on long-run economic and political development by introducing a focus on violence to explain the evolution and functioning of different institutional orders. Their framework is departing from the fundamental challenge of containing violence (to reduce societal risk), rests on the basis of patterns of rent distribution within the ruling elite (to sustain control) and results in a spectrum of orders from more or less limited to open access. This perspective is supplemented by Daron Acemoglu, Simon Johnson and James A. Robinson (in brief: AJR),[3] who introduced the dichotomy of extractive versus inclusive institutions, resulting in vicious or virtuous cycles of social, political and economic development.

These concepts are interdisciplinary in nature[4] and directly related to the school of "new institutional economics".[5] They follow a line of argument which is connected to the concepts of (political) realism and (economic) rationality, which seem to be particularly fruitful to understand historical as well as recent patterns of (or the lack of) development. By that, it offers a long-run perspective on the question of violence containment and its connection to institutional patterns and developments, and hence to conflict (resolution) and the political process. At the very basis of the NWW-argument is the existence of institutions as solutions to the problem of violence, while the AJR-argument is more broadly (and less precise) about the interplay of institutions and economic growth. While both are "grand theories" and "world models", they are not abstract but highly applicable to actual conflict formations and very concrete and historically informed about societal patterns.

On the following pages, (1) the basic NWW-typology will be explained and slightly extended by the AJR-argument; (2) the role of conflict and conflict settlement in the framework of limited and open access orders will be discussed, including some examples; and (3) concluding remarks about this institutional perspective on conflicts will be presented.

Violence and social orders

NWW depart from the insight that "all societies must deal with the problem of violence. In most developing countries, individuals and organisations actively use or threaten to use violence to gather wealth and resources, and violence has to be restrained for development to occur."[6] While actual violence may be an exception, less and less regularly used to organise a society the more improved its institutions are, conflict is a constant feature of all social orders, no matter how improved. The essential question consequently is how successful societies are in regulating conflict to avoid regular or large-scale violence to occur. The answer of NWW is that this is largely dependent on the credible institutionalisation of

[2] See especially North, Douglass C. / Wallis, John J. / Weingast, Barry R. (2009): Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History (Cambridge University Press) and North, Douglass C. / Wallis, John J. / Webb, Steven B. / Weingast, Barry R. (eds.) (2013): In the Shadow of Violence: Politics, Economics, and the Problems of Development (Cambridge University Press).

[3] See especially Acemoglu, Daron / Robinson, James A. (2012): Why Nations Fail: The Origins of Power, Prosperity, and Poverty (Crown Publishers), but also Acemoglu, Daron / Robinson, James A. / Johnson, Simon (2002): Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution. In: Quarterly Journal of Economics 117(4), 1231-1294.

[4] NWW as well as AJR are groups with scientific backgrounds in economics and political science, but also sociology and psychology play a role.

[5] This school of thought is particularly connected to the works of the Nobel laureates (in Economics) Ronald Coase (1991), Douglass C. North (1993), Elinor Ostrom and Oliver Williamson (2009).

[6] North et al. (2013), 1.

arrangements between people and groups with violence potential.

In their resulting typology of orders, NWW distinguish the historical rarity of open access orders (OAOs), which have developed only in the last century in a limited number of countries, and the "natural state" of limited access orders (LAOs). OAOs are characterised by the rule of law (formalized and strictly non-discriminatory), perpetuated political and economic organisations with low entry barriers (resulting in democracy and free markets) and a public monopoly of violence (state-controlled army and police). These are also "doorstep conditions", which LAOs have to achieve for transforming to open access. Consequently, LAOs lack at least some of these characteristics and are further distinguished into "fragile", "basic" and "mature", a sub-division connected to decreasing degrees of top-down control of private organisations and increasing degrees of control of groups with violence potential.

At the basis of these orders is the distribution of rents, i.e. the collection of resources by the ruling elite, understood as a "dominant coalition", and their redistribution within society.[7]

Here, AJR-typology can be used to describe the pattern in brief: the more fragile the order is, the less of these resources (and of public goods) will actually be produced and supplied, but the more of what is actually available will be extracted by the dominant coalition. In contrast, the more open an order is, the more people will participate in supplying resources (and providing or financing public goods), but also in redistribution. Hence, institutions are more and more "inclusive", the more open the respective order is, and more and more "extractive", the more fragile. The resulting trade-off between the absolute value of total wealth produced in society and the relative value per capita in the dominant coalition after redistribution, is also the explanation, why extractive orders can be sustained. While better institutionalised and hence less risky orders always provide more in absolute terms for all, they possibly provide less in absolute terms (and certainly in relative) for elites. The

best rational choice for a warlord may be to stay at war, certainly as long as this is the basis of his power and thus his share of resources, while, with respect to the provision of public goods and hence from a societal perspective, this is certainly the least favourable option. However, a bigger piece from a smaller cake may be preferable to a smaller piece from a bigger cake – with the people with violence potential as factual deciders what kind of cake is produced and certainly as first to choose their pieces.

Hence, a crucial prerequisite of actual development and improvement of the institutional order is to provide incentives of the kind that it is in the interest of the people with violence potential to join the dominant coalition and abstain from using violence (because this would partially destroy the cake) and at a later stage to include more and more people (because this makes the overall cake bigger). Only these kinds of developments (and people actually acting in accordance) give less extractive institutions the credibility necessary to be sustainable.

Conflict in limited and open access orders

In economics and political science, usually not conflict is the problem, but irregular conflict settlement and its connection to violence. While conflicting interests are practically inevitable in a society, their escalation is posing large societal and personal risks.

The NWW-perspective is targeted at this problem. There are two main elements directly related to conflict resolution: one is that it is essential for development that groups with violence potential abstain from using it; the other is that agreements need to be credible to be sustainable. In both respects, LAOs and OAOs differ greatly, although both provide a specific institutional environment specifically designed for solving these (and some other[8])

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[7] For clarification: It is not necessary that these resources are actually "collected", but it is crucial, who controls access and how the actual use is organised.

[8] The most prominent of these "problems" is usually to assure as much rents as just socially acceptable (to avoid regime collapse) for members of the dominant coalition. Limiting violence, implementing the rule of law, perpetuating organizations, all this is a possible way to extend rents – a good one in the sense that it results in socially desirable outcomes, but also a risky one because this may include the disempowerment of at least parts of the dominant coalition.

problems. The political process is an important tool, how this kind of "designing" is actually done – with economic interactions being another powerful force.

If we look at the problem of conflict resolution from that perspective, we come up with some radical deductions how to organise the political process. In an ascending order from recipes for rather fragile to recipes for rather mature orders:

- Bring as many people with violence potential as patrons into relationships with one another to form a dominant coalition (consider that it has to be in their interest to do so, hence incentives are crucial).

- Bring as many people as possible into patron-client relationships, because this is what offers a basic form of protection from violence threats of other groups in the dominant coalition.

- Increasingly formalise the relationships within the dominant coalition to further impede the actual use of violence, for example in form of a state (consider that formalisation and state-building must pay to serve the interests of the members of the dominant coalition). Only at a later stage, the rule of law (and access to the state) may diffuse to the broader public.

- A necessary element for further improving institutions is that credibility has to become impersonal. While at earlier stages, commitments may be confinable to "families" and people who know each other (well), it is crucial to finally overcome strictly personal relationships.

- Not necessarily, but likely late-coming elements of this recipe book are: to install a monopoly of violence for the state; to enlarge the non-discriminatory rule of law at least within the elite; and to tolerate dissenting and competing organisations to assure that groups will accept temporary political defeat.

Overall, "helping LAOs to make their organizations more durable and rule-based is more useful for development than trying directly to promote the appearance of fully open economic and political competition in societies where threats of violence perpetuate limited access arrangements."[9] In this context, recent

events in a country like Afghanistan may appear in a slightly different light: while it is generally good to have elections, to sustainably stabilize a fragile LAO it is necessary to develop a non-violent consensus at first; for this, some kind of arrangement with the Taliban is as important as is the installation of an all-party-government (share of power between Ghani and Abdullah); only if all relevant groups with violence potential are included in the political arrangements, the order will be stabilized and may be further improved in the direction of a true multi-party electoral democracy and strictly non-violent settlement of conflicts. However, the recent situation is still very fragile and overall success far from secured.

On the other hand, the contemporary histories of countries like Korea and Taiwan are very telling, especially compared to an example like Mexico. While Mexico was clearly better off in economic terms during most of the 20th century, it did so on the basis of strictly limited access. Hence, its institutions are continuously under pressure, which limits development prospects. Particularly, "Mexico has not solved the challenge of violence because the arrangement that curtails it from surfacing is a deal among entrenched insiders who have protected their political and economic privileges".[10] On the other hand, Korea and Taiwan did not only manage to establish sustainable growth, but also transformation towards increasingly open access. In the case of Korea (which also holds for Taiwan), "the role of land reform in opening access to economic opportunities and establishing state monopoly of violence was critical to a later economic and political development".[11] However, neither Korea nor Taiwan provides a simple model of development, but especially this comparison calls attention to idiosyncratic patterns and the role of contingency. In the end, no development path, neither virtuous nor vicious and however logical and compelling it may seem in

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[9] North et al. (2013), 340.

[10] Díaz-Cayeros, Alberto (2013): Entrenched Insiders: Limited Acces Order in Mexico. In: North et al. (2013), 233-260, here 259.

[11] You, Jong-Sung (2013): Transition from a Limited Access Order to an Open Access Order: The Case of South Korea. In: North et al. (2013), 293-327, here 324.

retrospect, is inevitable, and human intentionality is often illusive.

Conclusions

This contribution strongly argues for a realistic, institutional perspective on conflicts, which particularly takes the incentive structure faced by the actors into account. Because this is very different in different orders, a simple transplant of first-best-solutions from advanced states (OAOs) is not suitable in the institutional environment of less developed countries (LAOs) and hence endangered to result in failure. In contrast, the NWW-perspective allows finding more appropriate answers.

In this respect, third party enforcement (by military interventions, development policy or foreign investment) may help, but particularly if the third party lends credibility to local actors and if the enforcement measure is designed in a way to fit the actual institutional environment. If it comes as an easy solution from heaven, all will end up in a muddle, while context-sensitive interventions and the recognition on contingency are needed.

Open questions remain. The NWW-approach is very elite-driven, thus the relevance of bottom-up pressure and subaltern resistance and especially the complex relationship between elite and mass is certainly underscored. Further, the question of justice does not figure prominently in the framework, which has its focus on the instrumental use of power to serve personal interests also at social costs. Finally, the approach is strong on the effects of country-specific differences, but cannot explain much about their actual origin.

However, while it does not offer the final clue to the problem of violence, it is an informative and helpful analysis to adequately acknowledge this existential threat and to understand possible ways out and their capacities and constraints. By that it brings conflicts and the political (and economic) process together in one framework and argues for a reorientation of development policy priorities: policy has to target continuous improvements within limited access orders, not the fast-track to open societies.

Peace and the difficult environment: Conflict mediation in complex "political settlements"
Jan Pospisil

Dr. Jan Pospisil is Senior Researcher at the oiip - Austrian Institute for International Affairs and Lecturer at the Institute for Political Science at the University of Vienna. His particular research interests are resilience, state legitimacy, state fragility and statebuilding, and peace processes. He works also as a policy consultant (e.g. for the Austrian Development Agency).

Introduction

Since the 1990s at the latest, peace research has accepted and promoted the insight that peace processes – as their name already suggests – have a process-related and long-term character. This has led to a substantial critique of the focus of particularly international actors on concrete negotiation results and the signing of peace treaties. Comparative studies have questioned and are questioning such a limited approach, as, for example, Stedman, who for this reason proposes an "implementation perspective"[12] when doing research on peace processes. This applies especially to peace processes in contexts in which several non-state armed groups are active – and a concentration on just two conflicting parties in the course of a peace process will, thus, hardly be sufficient.

History shows that under such conditions state actors prefer to use a non-simultaneous – or, as Galtung has called it, "diachronic"[13] – approach to peace negotiations. Against this background, a key question is what conditions must be met in order to give such negotiations a successful and hence conflict-transformative direction. This paper discusses this question on the basis of results of a research project, which compared various peace processes in the Philippines, Colombia and the Sudan / South Sudan.[14]

Possibilities and limitations of peace processes in violent multi-actor conflicts

Especially in light of diachronic strategies in conflict mediation, the question of what affected – or potentially affected – actors should be included in a peace process, and in what form, is of utmost importance. Moltmann argues for an inclusion of all actors who are able to "effectively undermine or destroy"[15] a peace agreement. Against the background of the South African peace process, Darby and Mac Ginty develop the principle of a "sufficient inclusion"[16], which is a bit more precise, but principally similar to Moltmann's approach. They argue for an inclusion of "all actors who represent a significant proportion of their community, and all actors who have the ability to destroy an agreement."[17]

The concept of the so-called "spoilers"[18] – still very popular in peace and conflict studies and within the community of conflict mediation

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[12] Stedman, Stephen John, 2002, "Introduction", in Stedman, Steven J., Donald Rothchild and Elizabeth M. Cousens, Eds., 2002, Ending Civil Wars: The Implementation of Peace Agreements, Boulder: Lynne Rienner, 1-40, 2.

[13] Galtung, Johan, 1996, Peace by Peaceful Means: Peace and Conflict, Development and Civilization, London: Sage-PRIO, 100.

[14] The project results highlight the ambivalent consequences of the evident trend to separate negotiations by the government with the non-state armed groups: while focusing on just one group at a time, processes are easier to handle, but on the other hand the results are not only subject to counteraction by those who are not included, but also strongly connected to the respective government administration in place, with, in most cases, unsufficient guarantees of continuity beyond that.

[15] Moltmann, Bernhard, 2004, ",Um des lieben Friedens willen …' Chancen und Risiken von Friedensprozessen", in Christoph Weller, Ulrich Ratsch, Reinhard Mutz, Bruno Schoch, and Corinna Hauswedell, Eds., Friedensgutachten 2004, Berlin, Hamburg, Münster: LIT Verlag, 68.

[16] Darby, John, and Roger Mac Ginty, Eds., 2003, Contemporary Peace Making: Conflict, Violence and Peace Processes, New York: Palgrave Macmillan, 267.

[17] Ibid.

[18] Stedman, Stephen John, 2002, "Introduction", in Stedman, Steven J., Donald Rothchild and Elizabeth M. Cousens, Eds., 2002, Ending Civil Wars: The Implementation of Peace Agreements, Boulder: Lynne Rienner, 1-40.

practitioners – is used to label conflict parties who want to derail peace processes by targeted armed actions. In the context of the debate on inclusion, however, "spoilers" in most cases might be better interpreted as a phenomenon of an apparently insufficient inclusivity of the process.

Another phenomenon, as observable in Colombia or in the Philippines, is the separation of included groups or organisations in the course of a peace process, most commonly along political or economic cleavages. Such separations too are commonly interpreted along the "spoiler"-concept, due to the short-term focus on peace agreements and the formal arrangements formulated therein. A "whole-of-transformation"[19]-approach that is proactively taking up a long-term perspective of social change, as suggested by Dudouet et al., is missing in most cases.

It is an exception that peace processes actually lead to a significant and also sustained reduction of violence, in a short-term as well as mid-term perspective. This is neither observable in the case studies underlying this paper (Colombia, the Philippines, the Sudan / South Sudan), nor does it correspond with the experiences in other regions (like in Central America, to name just one example). Elaborating on this challenge, the World Development Report 2011 has rightly pointed out that a peace process – in explicit contrast to the negotiated peace treaty – is not a project of a few years, but a project of generations[20].

Therefore, the often violent forms that post-conflict situations can take cannot be interpreted just as a lack of inclusivity (or, along Stedman, as a "spoiler"-problem). On the contrary, this problem seems hardly avoidable (and, most often, near to impossible to tackle with even well-targeted measures); for this reason, it is an inherent phenomenon of conflict transformation, which has to be dealt with in a systemic manner.

Peace processes in complex „political settlements": empirical insights

What is lacking, however, is a theoretical approach which is able to include these empirically observable phenomena into a single analytic framework. The still dominant strand of peace and conflict research is looking for explanations by focusing on the identification of structural and triggering factors of violent conflicts. Without doubt, such an approach is useful, but any concentration on isolated causes has severe limitations when taking on a process perspective.

For this reason, new analytical concepts have been developed in recent years mainly in the analysis of violent conflict settings in Sub-Saharan Africa, which combine a process perspective with the necessary reflection of the incomplete (or even non-existing) development of statehood. Following the fundamental work by Joel Migdal on a "state-in-society"[21] approach, particularly the concept of the so-called "political settlement" appears promising for the purpose of examining the socio-economic and political foundations of peace processes.

The concept of "political settlements", as proposed by Di John and Putzel, in this case represents specific "bargaining outcomes among contending elites", which materialise in a "structure of property rights and entitlements"[22]. They manifest themselves in the three elements of elite-actors, their interests, and formal as well as informal institutions[23]. Such a setting has to be understood as being in a constant flux, in a permanent process of renegotiation, as it is the agreed framework of the balance of interests of all involved actors.

The main assumption in this regard is, firstly, that no violent conflict will erupt on a large scale as long as the (re-)negotiation processes

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[19] Dudouet, Véronique, Hans J. Giessmann, and Katrin Planta, Eds., 2012, Post-War Security Transitions: Participatory peacebuilding after asymmetric conflicts, London, New York: Routledge, 262-266.

[20] Cf. WDR – World Development Report, 2011, Conflict, Security, and Development, Washington, DC: The World Bank, 2.

[21] Migdal, Joel, 2001, State in Society: Studying How States and Societies Transform and Constitute One Another, Cambridge: Cambridge University Press.

[22] Di John, Jonathan, and James Putzel, 2009, "Political Settlements", GSDRC Issues Paper, Birmingham: Governance and Social Development Resource Centre, 4.

[23] Cf. Parks, Thomas, and William Cole, 2010, Political Settlements: Implications for International Development Policy and Practice, Occasional Paper No. 2, The Asia Foundation, 6-10.

among the contending elites work in the context of such a "political settlement". Secondly, all relevant elite actors will accept their place in the settlement as long as it is satisfactory for them to the extent that any violent denunciation of the settlement appears disadvantageous. If such a termination of an ongoing "political settlement" is forced by one or more of the participating actors, however, a violent renegotiation is the most probable consequence.

The empirical case studies underlying this paper confirm this assumption. This can be exemplified by the recent events in South Sudan, in particular the abrogation of the so-called "big tent approach"[24] – the even explicit involvement of all relevant actors in a state-administrated patronage network – through the South Sudanese president Salva Kiir in June 2013. This evidently underpins the "settlement"-assumption, as Kiir's actions preceded the almost instant outbreak of a bloody civil war.

Empirical insights point to close and problematic interrelations of "political settlements" and the state. This interrelation is characterised by strong tensions – especially in highly conflictive environments. The comparison of the three case studies Colombia, the Philippines, and Sudan / South Sudan shows a correlation between the duration of peace processes and the term of one specific government administration. This indicates a common, fundamental problem concerning the relation between "political settlements" and peace processes: the contradictory role of the state as a strongly involved actor in the "political settlement" on the one hand, and as an internationally recognised guarantee of the peace process on the other hand. Such a dual capacity usually works just in one specific context – as it is set by one presidential term – but is hard to be transferred to the different environment after a change of government.

Therefore, the decisive question remains how a "political settlement" can be operationalized in a legitimate and resilient way, short-term, but at the same time also along a long-term, strategic perspective. Currently, the analytical

capacity of the concept enables us to explain, why a peace process or concrete mediation measures have succeeded or failed – but just ex-post. The current state of research is lacking in two important aspects: firstly, the elaboration of an analytical strategy that brings about results implementable on a policy level, and secondly, an empirically well-funded understanding of the relationship between inclusivity and the legitimacy in a particular settlement. While the first challenge can just be addressed in its practical application in the field, the second issue raises more fundamental theoretical questions.

Currently, "well-intentioned" normative implications are dominating the debate when it comes to addressing the legitimacy and inclusivity, assuming that more legitimacy would always come with more inclusivity. Such a linear relationship, however, is doubtful and supported by neither empirical evidence nor practical experience. Since every peace process – along this theoretical approach – is always reflecting the informal "political settlement" on a formal level, the challenge of the relation between inclusivity and legitimacy applies in the same manner.

Concluding thoughts

For international actors involved in conflict mediation, the "political settlement"-approach is an uncomfortable framework of analysis, for two reasons: firstly, by accepting this approach, international actors are forced to understand themselves as an integral part of such a "settlement". All measures they set, all policies they apply are, thus, neither neutral nor without risk, but are strongly influencing the settlement just like the actions of the conflict actors do.

Secondly, when intervening in violent conflicts, international actors, like Barnett and Zürcher have demonstrated, are often in a state of "organised hypocrisy"[25]: most of the times, they tend to enter a situation of an

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[24] Cf. Garang, James Alic, 2013, "The Question of Big Government, and Financial Viability: The Case of South Sudan", Policy Brief, The Sudd Institute, Juba, 4-5.

[25] Barnett, Michael, and Christoph Zürcher, 2009, "The Peacebuilder's Contract: How External Statebuilding Reinforces Weak Statehood", in Roland Paris and Timothy D. Sisk, Eds., The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations, New York: Routledge, 23-52.

implicit mutual agreement of accepting a pragmatic solution in the contradiction between the given needs of an informal elite-pact on the one hand, and internationally agreed norms and expectations on the other. While all actors openly agree on the latter, they in fact practically follow a pragmatic route – a "compromised peacebuilding"[26]. While this contradictory approach is working in many occasions, it still implies a moral dilemma, as well as a concrete clash between various sources – and standards – of legitimacy: particularly between the output-legitimacy, as it is often produced by "political settlements" in a given social setting, and the input-legitimacy of an accountable political process that is closely interwoven with the legitimacy of international norms.

This contradiction is difficult to resolve; in any case, as mentioned above, the currently dominating hypothesis of a linear correlation of legitimacy and inclusivity has no empirical foundation. The actual relationship is probably complex. Along existing theoretical insights, from "political settlement"-concepts as well as from peace research, it seems promising in that regard to work with a threshold-perspective. Systemic approaches, also from resilience theory, point to the advantage of a certain level of complexity and redundancy for the resilience of a certain system. Still, at some point, systemic collapse becomes more likely, as the vulnerability of the system for stresses and shocks increases.

Therefore, the right level of inclusiveness is pivotal for a successful peace process, as is the inclusion of the proper actors. It is important to note that inclusivity in this case does not mean (at least not necessarily) representativeness. If such a resilience threshold is accepted from those involved in conflict mediation and aimed for by targeted measures and process designs, compromises which seem to be just pragmatic at first glance also could gain in terms of legitimacy, locally, nationally, but also on an international level. At the same time, such an insight helps to critically abstain from the two convenient – and equally problematic – extremes regarding the inclusivity of peace processes: both "the more inclusive the better" and "the more exclusive, the easier (and more feasible)".

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[26] Ibid.

A matter of national pride: Indonesia responds to a Somali pirate attack
Sarah Craze

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Introduction[27]

For decades, foreign owners have complained of ships targeted by criminals while traversing the important international shipping route, the Malacca Strait.[28] Before the Indonesian bulk cargo carrier *MV Sinar Kudus* was hijacked by Somali pirates in March 2011, the Indonesian government's anti-piracy efforts weighed heavily towards combatting copyright, software and music piracy. Suppressing maritime piracy has always been enormously difficult when stymied by lack of political will, resources, insufficient tools, intelligence, tactics and technology. Indonesia was no exception. By the 1990s, the International Maritime Bureau's Piracy Reporting Centre would report pirate attacks originating from Indonesia were up, the ship-owners would call for state intervention, the Indonesian government would dutifully announce an increase in naval patrols, piracy would subsequently decline, only to reappear elsewhere and the cycle would begin again.[29]

Today, piracy is defined by international law as an act of depredation or violence against a ship on the high seas.[30] Before colonial expansion in the mid-19th century, sea-raiding contributed to European economies as well as the diverse maritime cultural fabric of Southeast Asian regencies and states.[31] The outlawing of privateering in 1856 solidified the illegality of piracy in Europe while Dutch and British colonisers' endeavours to suppress it in Southeast Asia were often a disguise for their political and economic ambitions. It took decades of diplomacy and naval force to suppress indigenous sea-raiding across the archipelagic re-

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[27] Two illustrating maps are provided in the annex of this article.

[28] The Malacca Strait divides the northern Indonesian islands from mainland Malaysia and Singapore. For examples of piracy in Southeast Asia from the late 20th century, see: Pamela G Hollie, "Piracy in the South China Sea." *New York Times*, 18 January 1982. Richard Haitch, "Singapore piracy." *New York Times*, 17 October 1982. Foreign Desk, "Increased attacks on 'boat people' reported." *New York Times (Special)*, 19 May 1985. Anonymous, "According to the IMO, European ships are failing to take enough precautions to avoid pirate attacks in the Malacca Strait between Indonesia and Malaysia." *Lloyd's List International*, 28 November 1985. Phillip Melchior, "Modern pirates rule the waves in Southern Philippines." *Reuters News*, 29 January 1988. Jose Katigbak, "Piracy still a problem in South-east Asian waters." *Reuters News*, 4 May 1988. Jonathan Sikes, "Daring pirates in sea lanes off Asia evoke dread in sailors and refugees." *Toronto Star*, 1 January 1989. Michael Grey, "Armed police in bid to stamp out piracy." *Lloyd's List International*, 31 January 1992. Brendan Pereira, "Piracy : Shippers seek govt help." *Straits Times*, 5 January 1992. Anonymous, "Malaysia, Indonesia and Singapore join war against piracy." *Agence France-Presse*, 16 June 1992. Anonymous, "Piracy issue raised with International Maritime Organisation." *The Business Times*, 7 July 1992. Charles Batchelor, "Piracy returns to plunder the high seas." *Financial Times*, 14 July 1995. Reuters, "Indonesian Navy denies piracy a major problem." *Reuters*, 28 September 1995.

[29] Founded in 1992, the International Maritime Bureau "provides a free service to the seafarer" to "raise awareness within the shipping industry of the areas of high risk associated with piratical attacks or specific ports and anchorages associated with armed robberies on board ships." The IMB-PRC is based in Kuala Lumpur, Malaysia. See http://www.icc-ccs.org/piracy-reporting-centre

[30] The full definition is set out by Article 101 of United Nations: Oceans and Law of the Sea. "United Nations Convention on the Law of the Sea." 1982. For discussions on the history of the development of this definition, see Alfred P Rubin, *The law of piracy*, Second ed. (Transnational Publishers Inc., 1998). Daniel Heller-Roazen, *The Enemy of All: Piracy and the law of nations* (New York: Zone Books, 2009).

[31] Historical perspectives of Southeast Asian piracy are discussed by Nicholas Tarling, *Piracy and politics in the Malay World: A study of British imperialism in 19th century South-east Asia* (Melbourne: FW Cheshire, 1963). Joseph N F M Campo, "Discourse without Discussion: representations of piracy in colonial Indonesia, 1816-25," *Journal of Southeast Asian Studies* 34, no. 02 (2003): 199-214. Esther Velthoen, "Pirate in the Periphery: Eastern Sulawesi 1820-1905," in *Pirates, ports, and coasts in Asia: historical and contemporary perspectives*, ed. John Keinen and Manon Osseweijer (Singapore: Institute of Southeast Asian Studies, 2010). Adrian B. Lapian, "Violence and armed robbery in Indonesian Seas," in *Pirates, ports, and coasts in Asia: historical and contemporary perspectives*, ed. John Keinen and Manon Osseweijer (Singapore: Institute of Southeast Asian Studies, 2010), 139. Adam J Young, *Contemporary Maritime Piracy in Southeast Asia: History, Causes and Remedies*, Maritime Issues and Piracy in Asia (Singapore: ISEAS Publishing, 2007).

gion. Piracy in Indonesia today is commonly a reaction to ecological degradation and commercial overfishing, loopholes and shortcomings in maritime laws and regulations, and exploitation of these issues by transnational crime syndicates.[32]

Somali piracy also originated from the exploitation of fishing resources. Post-colonial Somalia has been a failed state since the early 1990s. Somali people have formed the semi-autonomous regions of Somaliland and Puntland along the northern coast while the south degenerated into long-running civil conflict. With no international recognition and scant resources for adequate security and coastline protection, organised piracy thrived throughout the 2000s.

This article will use the Indonesian government's experience with a Somali pirate hijack to discuss its robust state-based response, despite unchecked and ongoing piracy events in its own waters. The article argues that Indonesia's response to the attack differed from other states affected by Somali pirate hijacks because of the public participation of the Indonesian government in the payment of a ransom. This and Indonesia's decision to send its own military forces to deliver the ransom was designed to exploit the hijack and to add to Indonesia's prestige amongst its neighbours and citizens. The article concludes that Indonesia prioritises a short-term response to a public outcry over a long-term solution to piracy affecting its maritime sovereignty.

Indonesian piracy

Indonesian 'pirates' – often disgruntled fishermen reacting to the depletion of fishing

stocks by industrial fishing – are not a security priority for the Indonesian government. As Indonesian Navy Chief-of-Staff Tanto Koeswanto summed up neatly in 1995, 'we must differentiate between usual crime and piracy which does not only take possessions but also life. The crime which we have is only snatching. The same as if you had something taken in the street.'[33]

Apart from official apathy to piracy, the other prime reason for the failure of the Indonesian state to suppress the perceived piracy in its waters was the weakness of its maritime defence capacity. Despite being an archipelagic state, Indonesia does not have a coastguard and its security apparatus is primarily land-based.[34] Even by 2009, an equipment serviceability audit by the Indonesian government found that only 62 per cent of army vehicles, 31 per cent of aircraft and 17 per cent of naval vessels were serviceable.[35] Fortunately for Indonesia, by 2005, international attention was so diverted by the large scale of Somali piracy that the small-scale opportunists operating in Indonesia paled in comparison, providing Indonesia some relief from the glare of global condemnation.[36]

The hijack of the MV *Sinar Kudus*

The Indonesian *MV Sinar Kudus* was on its way to Rotterdam carrying US$174 million worth of ferronickel from Sulawesi when it was hijacked in the Indian Ocean in March 2011. The pirates reportedly sought a US$3.5 million ransom for the ship, cargo and 20 Indonesian

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[32] Carolin Liss, *Oceans of Crime: Maritime Piracy and Transnational Security in Southeast Asia and Bangladesh* (Singapore: ISEAS Publishing, 2011). For readings on 21st century piracy in Indonesia, see also Adam J Young, "Causative factors of contemporary piracy," in *Contemporary maritime piracy in Southeast Asia: History, causes and remedies Maritime Issues and Piracy in Asia* (Singapore: ISEAS Publishing, 2007). Graham Gerard Ong-Webb, ed. *Piracy, maritime terrorism and securing the Malacca Straits*, IIAS/ISEAS series on maritime issues and piracy in Asia (Singapore: ISEAS Publishing, 2006). Stefan Eklöf, *Pirates in paradise : a modern history of Southeast Asia's maritime marauders / Stefan Eklöf*, Studies in contemporary Asian history (Copenhagen : NIAS, 2006., 2006).

[33] Reuters, "Indonesian Navy denies piracy a major problem." *Reuters*, 28 September 1995.

[34] International Institute for Strategic Studies, "Chapter Eight: East Asia and Australasia," *The Military Balance* 110 (2010). Naval personnel made up 43,000 of 285,000 military personnel in a defence budget of approximately US$1.35 billion. Naval staffing dropped to 8 per cent in the 2000s.

[35] International Institute for Strategic Studies, "Southeast Asia and Australasia," *The Military Balance* 110 (2010): 384. Indonesia had disastrously purchased thirty-nine ships of various types, including sixteen corvettes, from the former East German navy. Most were in ill-repair, not suited to the tropics and spare parts were not available.

[36] Gray Page. "Piracy in Southeast Asia: organised criminal syndicates or small scale opportunists?" 2013.

sailors on board. From the lack of Indonesian media coverage of the event, the hijack attracted about as much interest as if it had happened in Indonesian waters – very little at all. But one day, almost a month later, a columnist from the prominent and influential Jakarta Post criticised the government's lack of concern for the plight of his countrymen and the country's malaise over an attack he perceived to be on its national security. He called the incident, 'a perfect moment to project our power – a time to show that we are neither unfaltered nor deterred by a bunch of gangsters in a lawless land. Show them the fury of Indonesia!'[37] Other commentators quickly chimed in with criticism of the government for its sluggish handling of the case and its failure to send in a rescue mission like the US and South Korea had for their kidnapped citizens, despite injury and loss of hostage life during these missions.[38] The government defended itself by reiterating its concern for the welfare of the hostages and its continued track record of using diplomacy and negotiation to resolve international crises, even refusing an offer of military assistance from India.[39] This did little to abate commentators.

Before long, the government's failure to launch a military operation had become a matter of national pride.[40] Negotiating with pirates was deemed playing by their rules, as evidenced by the alleged increase in the ransom demand. Pointing out that Indonesia's

lack of military capability for global power projection made negotiating the only option available proved fruitless.[41] Ultimately, in April, President Susilo Bambang Yudhoyono and his cabinet announced a ransom payment delivered by the Indonesian military was the best way to resolve the situation. [42] This course of action is highly unusual, risky and a notably different state response to a Somali piracy hijack for a number of reasons.

Ransom payment and military intervention

When a ship is hijacked, it is the responsibility of the ship's owner to determine a response. By the 2011 peak of Somali piracy, evidence showed that paying ransoms was an effective way of obtaining the release of the ship, cargo and crew. Some ransoms were paid swiftly, others as a result of drawn-out negotiations and on occasion, some were not paid at all, leaving the ship and crew at the mercy of the pirates. Once the ransom drop was made, the pirates usually abandoned the ship and the crew would be responsible for its return to port.

Governments were not inclined to publicly announce involvement in negotiating the ransom.[43] The common view was that this was on par with negotiating with terrorists and was not to be done under any circumstances as it could be seen as acceptance of liability for a debt.[44] Some governments deferred to the

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[37] Ristian Atriandi, "Free MV Sinar Kudus, show Indonesia's fury." *Jakarta Post*, 13 April 2011.

[38] Imanuddin Razak, "Hostages safety: what to do about the kidnapped Indonesian shipmen?" *Jakarta Post*, 13 April 2011. Tangguh Chairil, "Freeing ship a mission possible." *Jakarta Post*, 16 April 2011. The US Navy intervened during the hijack of the *Maersk Alabama* and rescued the ship's captain in April 2009 but its intervention in the *SV Quest* hijack in February 2011 was complicated by the deaths of the four American hostages and several pirates. The South Koreans had intervened in the hijack of the *Samho Jewelry* in January 2011, rescuing the crew and killing eight pirates. The ship's captain was shot during the siege and a bullet retrieved during surgery was found to be from a naval weapon.

[39] Adianto P. Simamora and Erwida Maulia, "Government pursuing diplomacy to free hostages." *Jakarta Post*, 12 April 2011.

[40] Jaleswari Pramodhawardani, "Between national pride and hostages' safety." *Jakarta Post*, 27 April 2011.

[41] Freeman Prometheus, "Comment: Don't negotiate with pirates " *Jakarta Post*, 25 April 2011.

[42] Anonymous, "Legislator appreciates release of Somali pirates." *Organisation of Asia-Pacific News Agencies*, 2 May 2011.

[43] Adianto P Simamora, "Money ready to pay ransom for 20 RI hostages, govt says." *Jakarta Post*, 20 April 2011. See also: Anonymous, "Minister to disclose ransom amount to pirates." *Jakarta Post*, 4 May 2011. For example, the British Government's Foreign Offices states, 'Giving in once would reward a serious crime, make it much harder to resist a second time, and would turn many parts of the world into "no-go" areas for British nationals.' Keith Bloomfield. "The kidnapping business - launch event speech." The Foreign Policy Centre, 2001 Available from: http://fpc.org.uk/articles/101.

[44] For a discussion on the question of government responsibility or liability for ransom payment from a British perspective, see Martin Blinkhorn, "Liability, responsibility and blame: British ransom victims in the

ship-owner's decision on whether to pay, while working discreetly behind the scenes.[45] Other governments have left the matter entirely in the hands of the ship-owners and refused to provide any assistance whatsoever, even when faced with very public criticism from the families of crew.[46]

Yet, despite public criticism of being seen to capitulate to pirates, the Indonesian government's response is in keeping with moves to protect the rights of Indonesian workers overseas, particularly the previously unsung plight of Javanese maids in Saudi Arabia. Worker remittances in 2004 (US$1.9 billion) were steadily increasing (US$6.9 billion by 2012) providing a significant foreign exchange earner that required protection.[47] This fledgling sense of justice extended to a willingness to pay compensation to victims' families (or *diyya* in *Sharia* law) to halt the executions of Indonesians in Saudi Arabia, despite its own ongoing support of the death penalty.[48] Since the government had publicly paid blood money to save alleged criminals' lives, it faced a

backward step and potential embarrassment if it failed to support the payment of a ransom to others for the lives of innocent seafarers. On the other hand, the crew of the *Sinar Kudus* were not the first Indonesians to be hijacked by Somali pirates. Indonesians working on the hijacked Taiwanese *Jih Chun Tsai* and the Singaporean *MT Gemini* had been left to languish for months before the *Sinar Kudus* was taken.[49] The main point of difference was the *Sinar Kudus* crew had the privilege of being onboard an Indonesian-flagged ship with a valuable cargo, while the others were onboard foreign-owned fishing vessels.

A significant international naval response to Somali piracy was in full swing by 2011 and focused on escorting, deterrence and assistance to ships after release.[50] Direct military intervention carried a significant risk, both to the hostages and to Indonesia's reputation. Of over 900 Somali pirate attacks and attempted attacks undertaken since 2005 until the *Sinar Kudus*, only 34 had benefited from direct military intervention.[51] Of these, 16 ship attacks had been intercepted by naval forces; seven had been rescued without ransom payment and nine had received assistance after an at-

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Mediterranean periphery, 1860-81," *Australian Journal of Politics and History* 46, no. 3 (2000): 336-56.

[45] For example, the German government provided investigative assistance in the hijack of the *Merida Marguerite* as was discovered in the US trial of the ransom negotiator, Mohammad Ali Shibin. In the trial of two Somalis for the hijack of the Spanish-flagged fishing vessel, *Alakrana*, the Spanish court judgement specifically noted the ample evidence of the Spanish government's involvement in paying the ransom, despite its denials. Anonymous, "Pirates' trial reveals 'Alakrana' payoff was made." *El Pais*, 3 May 2011.

[46] The multinational crew of the Malaysian-flagged *Albedo* languished in Somalia from November 2010 to June 2014 after shipowner abandoned them when the ship sunk in July 2013. They were eventually released without ransom payment.

[47] John McBeth, "Jakarta gets protective of its workers abroad." *Straits Times*.

[48] Non-Islamic countries have also been involved in the payment of blood money in Saudi Arabia. A prominent case from the 1980s concerned the alleged murder of Australian nurse Yvonne Gilford by two British friends. The friends were convicted of her murder and sentenced to death unless Ms Gilford's family accepted compensation. After intense pressure from the British and Australian governments, Ms Gilford's family reluctantly agreed. See C R Pennell, "Law as a cultural symbol: the Gilford murder case and the presentation of Saudi justice," *The International Journal of Human Rights* 10, no. 2 (2006): 121-42.

[49] See Nugroho. "Indonesian Sailors' One-Year Ordeal." *Jakarta Post*, 8 June 2011. Eleven Indonesian men working aboard a Taiwanese fishing vessel *Jih Chun Tsai* were captured on 30 March 2010 and held for a year while their ship was used as a mother ship in other attacks.[49] Eventually, they were exchanged by the pirates in return for medical treatment from the US Navy for two wounded colleagues, so were ultimately released out of pure luck rather than any intervention. Two months later, three pirates and the hijacked ship's captain were killed by the US Navy (the *USS Stephen W. Groves*) during a rescue operation on 10 May 2011.

[50] In 2011, the international community had three coordinated operations to combat Somali piracy under the auspices of NATO, the European Union and the Combined Maritime Forces. Under the Law of the Sea (UNCLOS) this includes political foes. A US warship provided medical assistance to the crew of the North Korean vessel Dai Hong Dan when it came under attack in 2007 and Dutch and Spanish warships (as part of EUNAVFOR) assisted the crew of the North Korean vessel Rim after they had managed to regain control of the ship four months after it was pirated.

[51] Figures drawn from data obtained from the International Maritime Bureau. It cannot always be ascertained the nationality of the military intervening as well as the flag state of the ship as often reports only provide the umbrella operation force, such as the European Union or NATO.

tack was aborted. Most notably, 42 people were reported to have died during the interventions, 27 of them hostages.[52]

Somali pirate ransom delivery was commonly a clandestine affair orchestrated by discreet private contractors, but Indonesia decided to send its military to deliver the ransom in its longest-range operation in thirty years. It occurred despite the availability of military escort and assistance in the area. The Indonesian press often rallied for militaristic responses to security threats and sending its military to engage with the pirates was an opportunity to gain prestige and indicate naval strength within its region, even though a flurry of piracy off its own coastline had risen again and remained unchecked (see Image 2 in the annex). Regional neighbour and fierce maritime rival Malaysia had previously sent naval support to the Gulf of Aden in response to the hijack of two of its ships in 2008.[53] India

and South Korea enjoyed the prestige of participating in the anti-piracy efforts of the Combined Maritime Forces.[54] Indonesia now had an opportunity that Malaysia had not taken: to personally engage with the pirates and rescue the ship and cargo.[55]

The ransom drop

Whatever happened between the ransom drop and the release of the *Sinar Kudus* left four pirates dead at the hands of Indonesian armed forces (TNI). Chief Admiral Agus Suhartono was quoted as saying, 'the pirates were leaving the ship one by one, and when the last four got their turn to leave, the TNI personnel opened their attack, killing the four.'[56] The Admiral also suggested the military's engagement was an attempt to recover the ransom money, rumoured to be US$4.5 million, 'we took out four pirates [but] we did not find the ransom money, because the pirates had already distributed it between themselves when

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[52] Fifteen crew died in the one incident, the 2008 attempt by the Indian navy to rescue a Thai fishing vessel. Under international law, a ship is considered part of the territory of the flag state and any foreign military engagement or armed boarding could be construed as a violation of sovereignty by the flag state. As a result, international military forces were reluctant to send personnel to board a ship to engage with pirates, preferring to fire warning shots or provide assistance to crew after an attack. On the rare occasion a state's military is on hand during a hijack, offers of medical assistance, fuel, food and water have been accepted by some pirates, who effectively surrendered in exchange, for example the US military's negotiations with pirates who seized the *Maersk Alabama* and *SV Quest*.

[53] Anonymous, "Somali pirates release hijacked Malaysian tankers after ransom paid." *Agence France Presse*, 30 September 2008. Three privately owned Malaysian flagged vessels were hijacked in the Gulf of Aden in 2008 and the Royal Malaysian Navy were sent to provide a convoy for vessels. It was the first international peacetime mission the RMN had engaged in since Malaysia was founded. The ships were sent before the UN resolutions on international intervention in December 2008. In 2003, Indonesia lost an International Court of Justice case to Malaysia over the Sipadan-Ligitan islands which fuelled tension over ownership of the nearby, oil-rich Ambalat region. Malaysia considers it part of its territory while Indonesia counters this claim was based on a self-made map from 1979. The dispute caused a naval confrontation in 2005 and has continued to flair up since. The Indonesian media give extensive coverage to the Ambalat claim, while it attracts little coverage in Malaysia. One bemused Malaysian correspondent described the resulting nationalist fervour in Indonesia as 'the mischievous goadings of our neighbour's famously free and courageous media.' Anonymous, "Love means

never having to say sorry." *New Straits Times*, 3 April 2007. For a sample of Indonesia's perspective on the dispute, see: Ffabiola Desy Unidjaja, "Warships deployed close to disputed territory." *The Jakarta Post*, 2 March 2005. Meidyatama Suryodiningrat, "RI must make presence felt on islands." *The Jakarta Post*, 13 March 2006.

[54] Southeast Asian states were keen to participate in anti-piracy ventures in the Gulf of Aden as participants in the Combined Maritime Forces taskforce, one of three maritime collaborations. Malaysian forces successfully prevented the hijack of a St Vincent and Grenadines-flagged ship *Zhen Hua 4* in December 2008 and a Panamanian –flagged ship the *Bunga Laurel* in January 2011. Chinese forces intervened in the attempted hijacking of the *Eleni G* in January 2009 and Japanese forces intervened in an attack on the *Grain Express* in April 2009. Thai naval forces rescued hijacked crew members of a Thai fishing vessel the Or Sirichainava 11 in November 2010 in Yemeni waters. All the while, piracy in these states' home waters was beginning to climb again, from 42 attacks in 2009, to 97 by 2012.

[55] Imran Imtiaz Shah Jacob, "'Crush Malaysia' trauma and the zero sum game." *The Jakarta Post*, 14 June 2007. Tony Hotland, "Ambalat issues: RI says int'l court not necessary." *The Jakarta Post*, 30 January 2008. Yemris Fointuna, "No country should tamper with RI sovereignty: SBY." *The Jakarta Post*, 11 February 2011.

[56] Anonymous, "TNI claims to have killed four Somali pirates." *Organisation of Asia-Pacific News Agencies*, 3 May 2011.

they were still on board the MV *Sinar Kudus*.'[57] Both quotes suggest an unprovoked attack on the pirates. Within hours, reports of the deaths of the four pirates suggested justifiable homicide in an 'exchange of gunfire' and a 'firefight', with one commentator claiming insider knowledge that the four Somalis were killed because they were part of a second group of pirates who were attempting to re-capture the ship.[58] The validity of this claim is questionable as a visible military presence has been shown to be a sufficient deterrent to pirates in the past. While pirated ships have been known to change hands amongst pirate groups, a second pirate group would know there is little chance of a ransom being paid again, therefore would be more concerned with obtaining the ransom money, rather than the ship.

The premeditated murder of criminals by po-lice or other security forces in Indonesia was historically common during the Suharto re-gime and still enjoys public support.[59] While courts are now convicting police for similar crimes, recent trials have attracted significant public support for the perpetrators.[60] What media coverage was given to the deaths of the pirates was either that their deaths were justi-fied by their crime, or demonstrative of Indo-nesia's military strength. The inclusion of Is-lamic concepts like *qisa* (law of retaliation) in street justice is not uncommon in Indonesia, but the Indonesian Penal Code does not man-date the death sentence for piracy (only a 15 years maximum imprisonment penalty) unless the act itself had caused death, which did not occur in this incident.[61] Most likely, the deaths of the Somalis probably occurred out of frus-tration or revenge at the inability to regain the ransom money.

In the end, nobody cares about the deaths of four Somali pirates at the hands of the Indo-nesian military. Only nine of the 54 articles obtained about the resolution of the *Sinar Kudus* hijack mentioned the combination of ransom payment, military operation and the deaths of the four Somali men. Ultimately, it is up to the home state of the victims to con-demn and draw attention to the matter. Nei-ther Somalia, 'Somaliland' nor 'Puntland' has indicated these or numerous other deaths of its countrymen at the hands of foreign forces have caused any kind of international incident. With no navy, air force and limited armed security capacity, Somalia is unwilling to take on other states over the criminal actions of a small number of its inhabitants. Moreover, Indonesia's history of support for retribution against its own criminals meant the military would be unlikely to face any scrutiny for the decision to shoot the four men.

The 20 men on the *MV Sinar Kudus* were the first hijacked crew to benefit from direct gov-ernment intervention to return them home. Previous returned hostages had found them-selves denied the wages owed throughout their captivity.[62] Moreover, government in-tervention in the plight of Indonesians held by local pirates is non-existent, with ransoms of US$10,000 for fishermen expected to be paid by impoverished families.[63]

Conclusion

The case of the *Sinar Kudus* shed a brief, new light on Indonesia and its relationship to pira-cy. For the first time, piracy had provoked a

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[57] Anonymous, "Indonesian troops kill four Somali pirates after ransom paid, 20 hostages freed." *BBC (Jakarta Post)*, 3 May 2011.

[58] Anonymous, "TNI urged to cooperate on piracy." *The Jakarta Post*, 3 May 2011; Anonymous, "Editorial: a different success story." *The Jakarta Post*, 3 May 2011. John McBeth, "Indonesia shows resolve against Somali piracy." *The Straits Times*, 30 May 2011; John McBeath, "Jakarta gets protective of its workers abroad." *The Straits Times*, 2 January 2013; Anonymous, "TNI: four pirates killed in gun battle." *Jakarta Post*, 2 May 2013.

[59] Michael Bachelard, "Trial draws a vigilante crowd." *The Age*, 5 September 2013.

[60] Slamet Susanto and Bambang Muryanto, "Support for Kopassus continues as verdicts read." *Jakarta Post*, 6 September 2013. Bachelard, "Trial draws a vigilante crowd."

[61] Article 438, Penal Code of Indonesia. Available from http://www.humanrights.asia/countries/indonesia/laws/legislation/PenalCode.pdf

[62] D Nugroho, "Indonesian sailors' one-year ordeal." *Jakarta Post*, 8 June 2011. , International standards entitle monthly pay and 200 per cent compensation be paid in such cases. See also International Transport Workers' Federation (Seafarers). "ITF Standard Collective Agreement." 2012.

[63] Apriadi Gunawan, "Pirate attacks still haunt fishermen." *Jakarta Post*, 20 July 2012.

passionate local media and public response that prompted a defensive government into direct action, despite Indonesians working on non-Indonesian ships being hijacked previously. Somali piracy was real piracy, while the hijacks and robberies happening for years in local waters were inconveniences that passed by largely unnoticed. In its response to the *Sinar Kudus* hijack, the Indonesian government found an opportunity to publicly protect its citizens, for once not from each other, but as victims of 'real pirates'. Rescuing the ship from pirates was a visible and public way to demonstrate Indonesia's position as a military force in the region. It provided a clear story of success to add to the state's prestige in its region – certainly more than coordinating mundane patrols did.

After the furore had died down, the *Sinar Kudus* did not prompt a renewed focus on Indonesia's piracy numbers, despite the IMB reporting increases in the years since. Assistance to victims of piracy continues to be non-existent. The media occasionally reports an attack or a successful police intervention, with little interest. Patrols are systematically promised, undertaken and then fade away. For the local seafarers, pirates continue to stalk them but for the government, life on the waterways of Indonesia continues and piracy remains the minor inconvenience it has always been.

Annex (Maps)

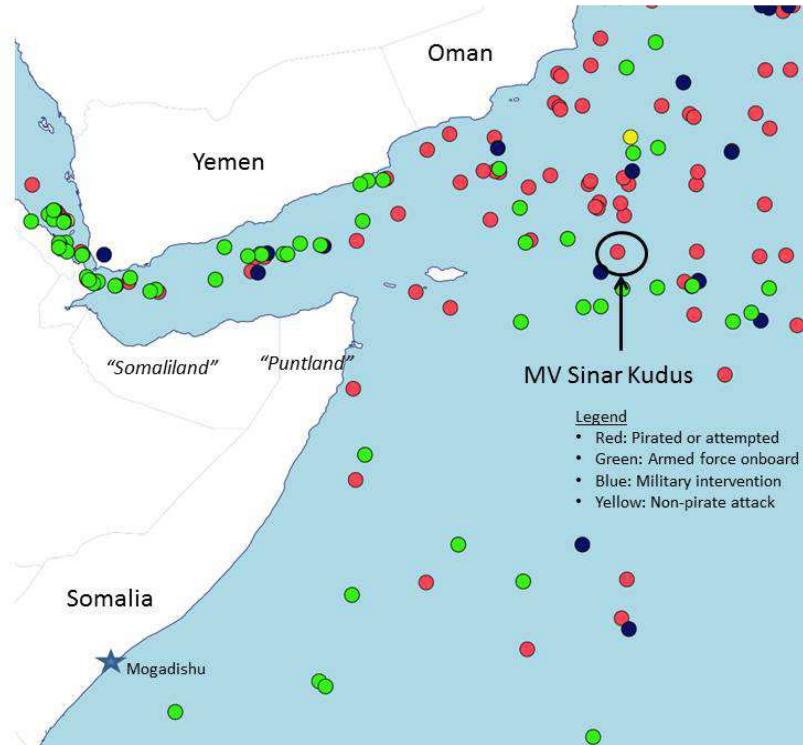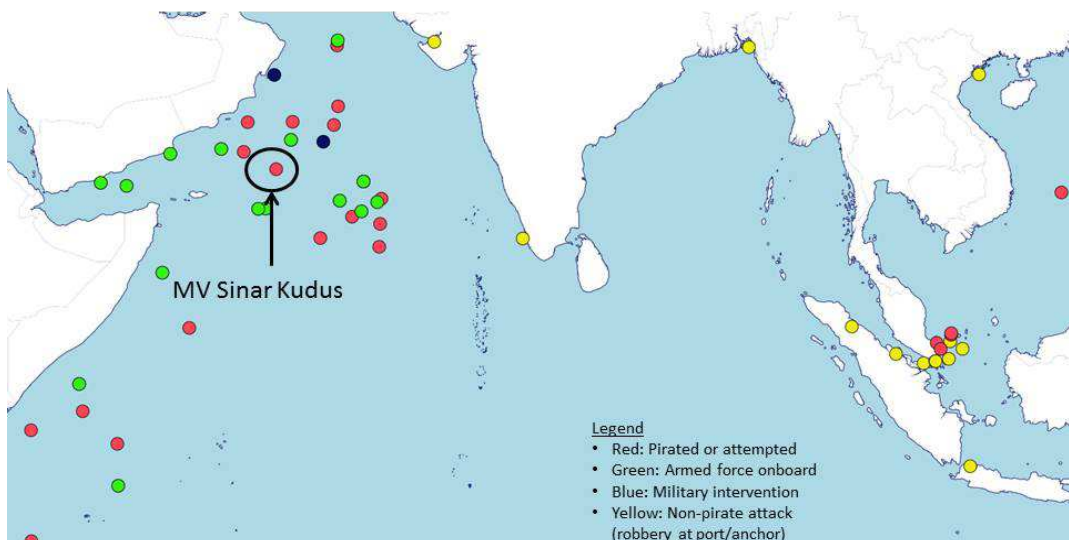*Image 1: 2011 piracy reports attributed to Somali pirates[64]*

Image 2: Indian Ocean piracy activity in March 2011[65]

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[64] This map was created by the author using information from ICC International Maritime Bureau. "Piracy and armed robbery against ships" 2011.

[65] This map was created by the author using information from ICC International Maritime Bureau. "Piracy and armed robbery against ships" 2011.

The limits of post-election crisis management by ECOWAS in Côte d'Ivoire
Hélène Gandois

Hélène Gandois currently works at the United Nations. Her research interests include comparative regionalism, regionalism and security in Africa and democratization by regional organizations.

International conflict resolution mechanisms increasingly aim at providing solutions to internal conflicts and at influencing political processes by organizing elections. Of the 97 conflicts in Africa listed by the 2013 Conflict Barometer of the Heidelberg Institute for International Conflict Research, only 13 list two sovereign states as conflict parties.[66] The majority of African conflicts are thus internal conflicts often linked to secessions, conflicts over national power and/or subnational predominance.[67] International conflict resolution mechanisms often consider free and fair elections as a possible solution to these conflicts and the Economic Community of West African States (ECOWAS) is no exception. But the relationship between elections and conflicts is not one-dimensional as elections are sometimes themselves catalysts or crisis points for latent conflicts, Côte d'Ivoire being a case in point. This is reflected in the definition of security adopted by ECOWAS. ECOWAS has defined inter- and intrastate conflicts, massive violations of human rights, the (attempted) overthrow of a democratically elected government, cross-border crimes, international terrorism, the proliferation of small arms and anti-personnel mines, anti-corruption and money laundering as security threats. ECOWAS' worldview also considers that the protection of democracy is necessary to maintain security in the region and other elements related to human security are also part of the West African conception of security.[68] Howev-

er, only a war (civil or not), massive violations of human rights, a humanitarian disaster and the *overthrow of a democratically elected government* can trigger a military intervention.[69]

This article focuses on the role played by ECOWAS in Côte d'Ivoire and explores the limitations and obstacles the regional organization ran into when handling the post-election crisis. It shows the difficulties of enforcing election results deemed free and fair by the international community but not by one of the contenders. By focusing on Côte d'Ivoire, this article attempts to rethink the role of regional organizations as mediator after a post-election crisis and asks whether regional organizations are the best actors to solve electoral crises.

For decades a beacon of stability in West Africa, Côte d'Ivoire was plunged into protracted civil strife after the death in 1993 of its founding leader, Félix Houphouët-Boigny. The situation kept on deteriorating until the 1999 coup d'état by General Robert Gueï who toppled President Henri Konan Bédié. Military and civilian unrest continued under his short rule. Presidential elections were organized in October 2000, but were marred by controversies over the citizenship law (with the idea of "Ivoirité") and over who can run for President, with several key political leaders being deemed unfit to run, including Alassane Ouattara. Laurent Gbagbo was thus announced by the Supreme Court as having won the presidential elections. But the state of unrest continued. ECOWAS decided to intervene in the conflict after an attempted coup on September 19, 2002. Mediation efforts by the United Nations and ECOWAS succeeded with the signature of an October 2002 ceasefire agreement that was then followed by the January 2003 Linas-Marcoussis peace agreement. In January 2003, the leaders of ECOWAS decided to deploy the ECOWAS Mission in Côte d'Ivoire (ECOMICI) alongside the French troops already there as part of Operation Li-

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[66] See http://hiik.de/de/downloads/data/downloads_2013/ConflictBarometer2013.pdf, pp. 45-47.

[67] Ibidem

[68] See Gandois, H., 'Security Regionalism in West Africa: Conceptions and Practices' in Regional Organisations and Security: Conceptions and Practices (Routledge, 2013).

[69] See 1999 Protocol Relating to the Mechanism for Conflict, Prevention, Management, Resolution, Peacekeeping and Security

corne. While the implementation of the peace agreement proved challenging, renewed fighting was in fact avoided. ECOMICI was later joined by the United Nations Mission in Côte d'Ivoire (MINUCI). In April 2004, the ECOWAS Mission was rehatted under the United Nations Operation in Côte d'Ivoire (UNOCI). The French troops of Operation Licorne remained outside the UNOCI framework and were authorized to use all necessary means to support UNOCI.

Since 2004, UNOCI has been working with ECOWAS and the French troops stationed in the country to avoid any resumption of conflict, to help return solders to civilian life and hold elections. Holding of elections has proved to be the main difficulty since 2002. Elections have repeatedly been scheduled and postponed, leading to a succession of peace deals. The 2007 Ouagadougou accord tried to address some of the root causes of the civil war, seeking, for example, to improve conditions of military service and to specify what it means to be an Ivoirian citizen in a country with a large and enduring presence of foreign workers (mainly from Burkina Faso). Laurent Gbagbo, who had become president in 2000 and remained in power though his term officially ended in 2005, repeatedly postponed elections until October 2010. But, with the registration list finally established, the first round of elections took place on October 31, 2010, with a record turnout of approximately 80%. As expected, the second round of elections pitted Laurent Gbagbo against Alassane Ouattara. Gbagbo claimed he had won the second round of elections, while, at the same time, the Independent Electoral Council announced that Alassane Ouattara had won with 54.1% of the votes. Post-election violence quickly ensued. In the months following the election, Gbagbo conducted a campaign of terror against Ouattara's supporters in order to stifle protest. Ouattara then allied himself with the Forces Nouvelles – a short hand for the rebel side of the civil war – and launched a countrywide military offensive on 28 March 2011. His victory that led to Gbagbo's arrest on 11 April was facilitated by the direct intervention of UN and French Force Licorne helicopters, as authorized by Security Council resolution 1975

(2011), to prevent the use of heavy weapons against the civilian population.

The crisis in Côte d'Ivoire that erupted following the contested results of the second round of presidential elections is an excellent case study to assess how much ECOWAS can really claim ownership (and control) of post-election crisis management in the country. The crisis in Côte d'Ivoire gathers all the elements of the puzzle, notably all the key actors of security regionalism in West Africa: Côte d'Ivoire, the former economic engine of the region; neighbours that interfere in the country's internal affairs, such as Burkina Faso that was accused by the Ivorian authorities of being behind the rebellion/coup of September 19, 2002; a partner country like France that had troops positioned in the country under a UN mandate; a rehatted UN peacekeeping operation and a mediation process that involved ECOWAS, the African Union (AU) and the UN.

Based on the description of the crisis above, ECOWAS leaders seem to have assumed ownership and taken control of the mediation and crisis management in Côte d'Ivoire. The UN Security Council waited for ECOWAS to take a decision before it issued an official statement and the AU did the same. The understanding of the crisis on the international scene was thus strongly influenced by ECOWAS. ECOWAS came very quickly to the conclusion that Laurent Gbagbo would not relinquish power and had to be ousted by force. If ECOWAS leaders thought that a military intervention was warranted as early as January 2011, the other partners, most notably the AU, had not reached the same conclusion and were still hoping to see their mediation attempts bear fruit. It was only when the AU's attempts at mediation failed that a forceful solution could be envisaged. However, in late March 2011, ECOWAS itself refused to take the lead and waited for Security Council resolution 1975 co-sponsored by France and Nigeria in which the Security Council "urges all the Ivorian parties and other stakeholders to respect the will of the people and the election of Alassane Dramane Ouattara as President of Côte d'Ivoire, as recognized by ECOWAS, the African Union and the rest of the international

community" and "urges him [Mr. Laurent Gbagbo] to immediately step aside".[70]

The outcome of the crisis in Côte d'Ivoire shows first and foremost the lack of preparedness of the international community – including ECOWAS – to deal with post-election violence and the absence of contingency planning from all actors. Throughout the crisis, elections were seen as the only valid political process and solution with no questioning of the validity of this approach. During the crisis in Côte d'Ivoire, ECOWAS has not been able to act independently in its own region and, maybe, did not have the necessary legitimacy to enforce election results. In the end, conflict management was a multi-level game as one level, most notably the regional one, cannot act without the others. ECOWAS' understanding of the actors of the conflict, of Laurent Gbagbo in particular in the case of Côte d'Ivoire, proved especially insightful. Indeed, local knowledge remains a comparative advantage of the regional organization. Ultimately, the regional organization turns out to be a necessary, but not sufficient actor, of post-election conflict management. ECOWAS alone could not have resolved the crisis, but the crisis would not have come to an end without ECOWAS.

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[70] See S/RES/1975 (2011) of March 30, 2011, paras 1 & 3.

Elections and Conflict Resolution in Mali

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Introduction

In the past decades, conflicts in Mali have resulted mainly from a complex configuration of fundamental factors such as the state system, volatile regional environment and deep-rooted grievances amongst political actors. The current state system in Mali can be attributed to a number of factors: the centralisation of authority in Bamako at the expense of other administrative areas, the dominant role of the military in the power constellation, the marginalization, relative under-development and exclusion of large sections of the Malian populace from the political and economic processes[71]. Mali has experienced three political regimes or state systems from the time of its independence in 1960 until today. While the founding father of the nation, Modibo Keita opted for a socialist inspired authoritarian rule, President Moussa Traoré who came to power in a military coup in 1968 established an unchallenged dictatorship which lasted till March 1991. Democracy came after the military coup led by Amadou Toumani Touré (popularly known as ATT) and was further consolidated under the reign of President Alpha Oumar Konare. However, the foundation of the Malian democracy was seriously shaken in March 2012 when a group of aggrieved soldiers who had fought against Tuareg insurgents in the North of the country mutinied and overthrew the government. With the elections of July 2013 it was hoped to restore Mali's shattered democracy and to

set in motion a process of national reconciliation as a necessary step towards resolving the country's vicious circle of conflict. This paper analyses the extent to which these elections have impacted on conflict resolution in Mali. It begins by reviewing the political context in Mali that preceded the 2013 elections with emphasis on the mounting discontent among the population, the rebellion led by the National Movement for the Liberation Azawad (MNLA) and the military coup of March 2012. The paper argues that the holding of democratic elections alone is not enough to resolve Mali's recurrent conflict. A broad political process is necessary to address all the structural and social inequalities that have undermined constitutionality and democratic legitimacy in the country in recent history.

Political Context from 2002 – 2012

Since 1991, Mali has opted for a pluralistic and democratic political system. This process has generated an increasing demand by the Malian population for transparent governance and better quality of public services. Democratic governance, public service reform and the fight against corruption have ever since remained important components of the country's development policies. The period from 2002 to 2012 was marked by political consensus unprecedented in the history of the country. After the overthrow of Moussa Traore in 1991, the new Malian President ATT paving the way for multipartism, endowed the country with a new constitution and organised presidential elections in which Alpha Omar Konaré emerged victorious. ATT who assumed interim leadership of the country since his putsch voluntarily handed over power to the President-elect. This gesture was unprecedented in the continent and ATT was hailed as a messiah of Malian democracy.

ATT resigned from the army to embark on a political career and won the 2002 presidential elections with the willingness to work with everybody as his sole political agenda. He pushed forward an agenda for political consensus thus paving the way for a new era of collective bandwagoning or herd mentality in Malian politics. All political parties aligned behind the President and the opposition systematically disappeared. For 10 years the

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[71] Francis, David. J (2013) The Regional Impact of the Armed Conflict and French Intervention in Mali. In NOREF Report, April 2013, p.5

country enjoyed relative stability as all political parties agreed with the government of ATT. However, consensus led to mounting social discontent as the state progressively controlled everything including the media, and those who opposed the regime were systematically denounced. The situation of the common man did not improve. Corruption and poverty was widespread. The President was accused of putting in place a neo-patrimonial system of governance in which members of his family occupied important positions.

In March 2012 a new political crisis sparked when Tuareg secessionists of the National Movement for the Liberation of Azawad (MNLA) launched a rebellion in the North of the country. The separatists who accused the government in Bamako of neglecting the northern regions of Timbuktu, Gao and Kidal fought for the establishment of an independent state of Azawad in northern Mali. The government's failed strategy to deal with the rebellion and the poor capacity of the Malian army led to disgruntlement amongst the Malian forces which felt serious humiliation. Dissatisfaction within the ranks of the army provoked a mutiny and, on 21 March 2012, a military coup was organised by non-commissioned and mid-ranking officers of the Malian army under the leadership of Captain Amadou Sanogo. The soldiers accused President ATT of not doing enough to tackle Islamist extremists, drug trafficking and the needs of the armed forces[72]. President ATT was overthrown and constitutional rule was suspended and the presidential elections scheduled to be held in April 2012 were canceled.. This was a heavy blow to Malian democracy as the country which had developed a reputation as a showcase democracy in West Africa. ATT who was hailed as a messiah after the end of the long regime of Moussa Traore in 1991 was put to disgrace in 2012.

The prevailing instability in the country led to the formation of a transitional government of national unity which was headed by Prime Minister Cheick Modibo Diarra in August 2012 and included five close allies of the junta leader, Captain Sanogo. The primary aim of the transition was to re-impose state control over the North and lead the country to elections. However, the Tuareg MNLA along with the Islamist fighting groups Ansar Dine and MU-JAO (*Mouvement pour l'unicité et le jihad en Afrique de l'Ouest*) took advantage of the unstable atmosphere in Bamako to consolidate their positions ceasing important towns in the North and threatened to move onto Bamako. Their advance was only stopped after their difficult alliances finally broke down. Subsequent fights among the rebels themselves led to Islamist control over large parts of northern Mali and in January 2013 a second military push towards Bamako. This military threat to the capital was only reduced after France hastily intervened and organized a regional military alliance mainly from ECOWAS countries swiftly pushing the rebels to the North.

Elections and Peace Consolidation

In 2013 Mali organised presidential and legislative elections with the expressed support of the international community in order to reinstate democracy and reinforce peace and stability in accordance with the Ouagadougou Accord[73]. The presidential elections which saw Ibrahim Boubakar Keita (IBK) being elected in the second round in August 2013 with an overwhelming majority of 77.62%, took place amidst a multidimensional crisis with serious regional implications[74].

Elections are generally considered to be one of the most basic and important institutions of democratic governance. Thus, in the context of a democratic transition like in the case of Mali, the judgments that people make about these elections may have a significant effect on levels of support for democracy. Additionally, elections in new or emerging democracies are likely to be particularly critical. According to Bratton, Mattes, and Gyimah-Boadi (2005), elections help determine which party is able to create formal institutions and determine the way these institutions function in

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[72] Francis, 2013:2

[73] Accord Préliminaire à l'Election Presidentièlle et aux Pourparlers Inclusifs de Paix au Mali, Ouagadougou 2013

[74] Theroux-Benoni, Alori-Anne and Baba Dakono (2013) Mali's Post-Elections Challenges, Institute of Security Studies, Pretoria,

transitioning systems[75]. These decisions greatly affect the nature of the political system, meaning that the first few elections have higher stakes than those that take place after democracy has become institutionalized. Diamond argues that democratic survival requires that "all significant political actors, at both the elite and mass levels, believe that the democratic regime is the most right and appropriate for their society, better than any other realistic alternative they can imagine".[76] Support for democracy in undemocratic or quasi-democratic countries probably reflects discontent with the status quo and a desire for a system of government that provides for greater political accountability and responsiveness to ordinary citizens.[77] The 2013 presidential and parliamentary elections have helped restore constitutional order and inaugurated a period of hope for peace, stability and development with a democratically elected President and deputies in Mali. The elected President enjoys the legitimacy necessary in order to speak and negotiate on behalf of the people of Mali. The elections have enabled the country to come out of the political impasse and offered an opportunity to the elected President to elaborate his plan on how to get the country out of the crisis. As a consequence, he has been able to deploy administrative and social service officials in the North as a means of extending the government's authority throughout the national territory.

An important outcome of the elections is that they have given birth to a new sense of national pride among political actors who have now agreed to place Mali above any other consideration. As a consequence of the two elections held in 2013, previously enemy factions have now agreed to sit on the negotia-

tion table to seek common solutions to the Malian crisis. The current rounds of peace talks or the inter-Malian dialogue going on in Algiers between the Malian government, the MNLA and representatives of some northern communities clearly support this argument[78]. International partners and donors now have a legitimate partner with whom they can facilitate peace talks and negotiate necessary support for the economic revival of Mali. Following the successful elections representatives of Germany, Portugal, Spain, the Netherlands, the World Bank (WB), the International Monetary Fund (IMF) and the Islamic Development Bank have been participating in the inter-Malian Dialogue.

However, there is growing consensus among the Malian populace that elections only give birth to beautiful campaign slogans and are therefore not an appropriate means of addressing the needs of the increasingly dissatisfied masses. Interviews with NGO representatives in Mali and citizens in the streets of Bamako showed that many Malians believe that elected officials once in office quickly forget campaign promises and resort rapidly to a neopatrimonial system of governance. Almost a year after being elected into office, the people of Mali changed President Ibrahim Boubakar Keita's popular campaign slogan of "*le Mali d'abord*" into "*ma famille d'abord*".[79] The population's revolution against the 20 year dictatorship of General Moussa Traore in 1991 was a clear expression by the Malian people of their long quest for freedom and better living conditions[80]. The mounting discontent with the way in which Ibrahim Bouba-

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[75] Bratton, M., Mattes, R., & Gyimah-Boadi, E. (2005). *Public opinion, democracy, and market reform in Africa.* Cambridge: Cambridge University Press.

[76] Diamond, L. (1999). *Developing democracy:* Toward consolidation. Baltimore: Johns Hopkins University Press, p. 65

[77] Robbins, Michael D. H. & Mark Tessler (2012) The Effect of Elections on Public Opinion Toward Democracy: Evidence From Longitudinal Survey Research in Algeria, Comparative Political Studies, October 2012 vol.45, pp.1255-1276

[78] The inter-Malian dialogue was launched at the request of the Malian parties for Algeria to lead mediation between the government of Mali and movements in northern Mali with strong representation of Africa and the international community. In June 2014, the third consultation session of the dialogue opened in Algiers with participants from Mali, Algeria, Burkina Faso, Niger, Chad, Mauritania, the African Union (AU), the United Nations and representatives of different Malian communities.

[79] Literally translated as Mali first and my family first

[80] Coulibaly, Hawa et Stéphanie Lima (2013), La Crise de l'Etat et territoires de la crise au Mali, *EchoGéo*, sur le Vif http://echogeo.revues.org/13374;DOI:10400/echgeo.13 374 accessed 20.09.2014

kar Keita is conducting government affairs could undermine the legitimacy of his government. This is particularly true because a political leader is legitimate to the extent that people regard the leader as satisfactory and believe that no available alternative would be vastly superior. Lack of legitimacy is a major contributor to state fragility because it undermines state authority, and therefore capacity[81]. Although there have been regular elections and changes of government in Mali, the culture of government has remained practically the same and main factors of instability have systematically been ignored by the respective governments.

Conclusion

The Malian experience has clearly demonstrated that the holding of regular elections and power alternation are not enough to sustain a democratic system. The holding of democratic elections and alternation in government are not adequate solutions but a broad and all inclusive political process is necessary in order for Mali to emerge out of the prevailing crisis. The March 2012 military coup was foreseeable although Mali had persistently held elections and changed governments. Mali has always falsely been treated as the bastion of democracy in Africa despite the fact that Malian democracy was built on a brittle foundation. Grievances that have been the source of discontent and social unrest were not properly addressed by successive governments. The fact that grievances of underprivileged groups such as the Tuaregs were simply ignored prepared the grounds for future conflicts. Organising democratic elections has proven insufficient to resolve conflict or consolidate peace in Mali but any elected government needs to seriously address fundamental grievances that fueled discontent and extremism in the country. The government must profoundly tackle issues of poor governance, marginalization of the North, poverty, illiteracy and exclusion of some Malians from the country's political and economic life. The

government still faces enormous challenges such as Security Sector Reforms, consolidation of political gains and establishment of solid democratic institutions, strengthening of the civil society and empowerment the Malian woman.

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[81] OECD (2010), The State's Legitimacy in Fragile Situations: Unpacking complexity, OECD Publications

Reconciliation in Ruanda – gefangen in einem Teufelskreis?
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Reconciliation in Ruanda – gefangen in einem Teufelskreis?

Betrachtet man das Ende der Kampfhandlungen in Ruanda nach dem Völkermord 1994 als Nullpunkt, so sind die Fortschritte, die der ostafrikanische Staat in den letzten zwanzig Jahren erzielen konnte, beeindruckend: Exekutive und Legislative gelten als demokratisch legitimiert, die persönliche Sicherheit der Menschen scheint gegeben, Wirtschaft[82] und Entwicklung[83] präsentieren sich mit passablen Kennzahlen, die medizinische Versorgung ist beinahe flächendeckend organisiert,[84] Korruption wird offiziell als Staatsfeind Nummer 1 betrachtet und der soziale Zusammenhalt in dem Land, das vor zwei Jahrzehnten einen Völkermord erlebte, wirkt für jeden Besucher intakt. Paul Collier oder Bill Clinton überschütten Ruanda – neben einer Reihe von Wirtschaftsgrößen und Journalisten – mit Lob und Anerkennung ob dieser Leistungen.[85] Ein genauerer Blick auf einzelne Parameter diverser Indizes macht zwar Schwächen Ruandas auf den verschiedensten Gebieten deutlich, die Geschwindigkeit der Modernisierung ist aber atemberaubend. Stellt Ruanda tatsächlich ein „Wunder" dar – oder manifestiert sich im Land der 1000 Hügel ein Teufelskreis, der eine gesellschaftliche, politische und wirtschaftliche Modernisierung mittelfristig untergräbt?

Paul Kagame ist das unumstrittene Epizentrum der Macht in Ruanda. Er kontrolliert das Land de facto seit 1994 und sowohl Anhänger als auch Kritiker sind sich einig, dass der Erfolgskurs Ruandas zum allergrößten Teil dem charismatischen Politiker geschuldet sei. 2000 wurde er vom Parlament zum Präsidenten gewählt, und bei den Präsidentschaftswahlen 2003 und 2010 in diesem Amt bestätigt. Diese zweite und verfassungsgemäß letzte Amtsperiode endet 2017.

Unmittelbar nach dem Völkermord 1994 bestand Kagames größte Herausforderung zunächst darin, die Situation zu stabilisieren. Diese Notwendigkeit wurde erschwert durch die Bedrohung aus der Demokratischen Republik Kongo (DRC), wohin zahlreiche Völkermörder hatten fliehen können. Sicherheit stellte also eine primäre Notwendigkeit unmittelbar nach dem Morden dar. Parallel dazu wurde auch einer Wiederversöhnung der Gruppen höchste Priorität eingeräumt. Im Jahr 2000 präsentierte Kagame die *Vision 2020*, ein Regierungsprogramm, um Ruanda nach dem Genozid in ein modernes Land mit mittlerem Einkommen umzuwandeln. Wichtigste Säulen dieser Vision sind: Good Governance, Human Resource Development, ein starker Privatsektor zur Entwicklung, Ausbau der Infrastruktur, Modernisierung der Agrarwirtschaft sowie regionale und internationale Integration.[86]

Die politischen Ziele des Präsidenten lassen sich mit drei Schlagworten umreißen: Einheit, Modernisierung und Frieden. Kagame formuliert jedoch vorsichtig: „My vision of Rwanda is a united country […] that is developed and has eradicated poverty, a country that is democratic, and, above all, a stable country at peace with itself as well with its neighbours."[87]

Die Umsetzung der ambitionierten Vision 2020 führt aber zu Konflikten zwischen den einzelnen Feldern, die realpolitisch nur sehr schwer – wenn überhaupt – zu lösen sind: Das Primat des Sicherheitsdenkens und das Streben nach politischer Stabilisierung kollidieren

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[82] Edward Batte Sennoga/Bernis Byamukama (2014): African Economic Outlook. Country Notes: Rwanda, <http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2014/PDF/CN_Long_EN/Rwanda_EN.pdf> (9. Nov. 2014).

[83] UNDP (2014): 2014 Human Development Index. Table 2: Human Development Index Trends, 2008-2013, <http://hdr.undp.org/en/content/table-2-human-development-index-trends-1980-2013> (9. Nov. 2014).

[84] Sennoga/Byamukama: African Economic Outlook, S. 13.

[85] Patricia Crisafulli/Andrea Redmond (2012): Rwanda, Inc. How a devastated nation became an economic model for the developing world, New York, Klappentext.

[86] Republic of Rwanda (2000): Vision 2020, S. 8, <http://edprs.rw/sites/default/files/docs/vision-2020.pdf> (9. Nov. 2014).

[87] Paul Kagame (o. D.): Vision formuliert auf der Homepage der *National Unity and Reconciliation Commission*, Rwanda, <http://www.nurc.gov.rw/index.php?id=85> (9. Nov. 2014).

immer wieder mit Vorstellungen einer verantwortungsvollen Regierungsführung, beide Bedingungen sind aber wichtig für den wirtschaftlichen Aufschwung des Landes. Erschwert wird die Situation durch eine zerrissene und traumatisierte Gesellschaft, die den Wahnsinn eines Völkermordes überwinden muss. Reconciliation ist also gleichzeitig Vorbedingung und Ziel dieses Weges zu einem neuen Ruanda und bildet den entscheidenden Schlüssel im post-Konflikt Szenario. Bereits 1999 wurde dazu eine *National Unity and Reconciliation Commission* (NURC) gegründet, die 2003 Verfassungsrang bekam. Ihr obliegt nicht weniger als die Ausarbeitung, Durchführung und Evaluierung von Reconciliation-Programmen sowie die Überwachung von Aktivitäten, welche diesem Ziel zuwiderlaufen. Im Folgenden soll das Augenmerk auf den Wiederversöhnungsbestrebungen in Ruanda liegen.

Hinsichtlich einer Definition des Begriffs orientierten die NURC-Wissenschaftler sich an Daniel Bar-Tal und Gemma H. Bennink, die darunter „the formation or restoration of genuine peaceful relationships between societies that have been involved in intractable conflict, after its formal resolution is achieved" verstanden.[88] Dazu definierten das NURC-Team sechs Parameter, welche für die Wiederversöhnung der Gruppen in Ruanda von entscheidender Bedeutung sind. Im *Reconciliation Barometer* wurden diese in Hypothesen verpackte Parameter durch empirische Datenerhebung aus einer Befragung von 3000 Erwachsenen überprüft.[89]

Das wenig überraschende, offizielle Ergebnis beschreibt die Situation in Ruanda in weitgehender Übereinstimmung mit den Annahmen. Diese Resultate sollen hier kritisch hinterfragt werden. Dabei gilt zu bedenken, dass die Untersuchungen 2010 abgeschlossen, die Daten aber erst im Juni 2014 auf der Homepage der NURC publiziert worden sind. Die Zahlen aus der Studie sind demnach als Gradmesser zu verstehen.

Politische Kultur

Die erste Hypothese des *Reconciliation Barometer* geht davon aus, dass die Wiederversöhnung gefördert wird, wenn die Bürger eines Landes die politischen Strukturen, Werte und die Führung als legitimiert und effektiv betrachten.

Zum Zeitpunkt der Erhebung hatten über 90% der Befragten sehr großes oder großes Vertrauen in Parlament, Kabinett und Justizsystem und waren davon überzeugt, dass die ruandische Führung die jeweiligen Interessen der Menschen bestens bediene. Immerhin noch 82% stimmten der Aussage zu, die Regierung kümmere sich um alle Menschen gleich.[90] Stellt man diesem Ergebnis den *Fragile States Index* der unabhängigen Forschungseinrichtung *Fund for Peace* gegenüber, der die Situation in Ruanda als „sehr alarmierend" einstuft,[91] entstehen Risse in diesen Teilergebnissen der NURC-Studie. Kritisch bewertet auch die amerikanische NGO *Freedom House* den Status quo in Ruanda: für 2014 lautet die Beurteilung „*Not Free*", wobei die zivilen Freiheiten auf einer Skala von 1 (sehr gut) bis 7 (minimale Freiheit) mit 5 bewertet werden. Hier schneiden vor allem das Organisations- und Vereinigungsrecht sowie die Rechtsstaatlichkeit schlecht ab. Hinsichtlich der Politischen Rechte fallen Defizite im Bereich Wahlprozess und Pluralismus/Partizipation negativ ins Gewicht und Ruanda wird mit einer 6 sehr schlecht beurteilt.[92] Im Britischen *The Economist* wurde der Hintergrund dazu im Zusam-

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[88] Daniel Bar-Tal/Gemma H. Bennink (2004): The Nature of Reconciliation as an Outcome and as a Process, in: Yaacov Bar/Simon Tov (Hrsg., 2004): From Conflict Resolution to Reconciliation, Oxford, S. 11-38, hier S. 14.

[89] National Unity and Reconciliation Commission (2010): The Reconciliation Barometer, Ruanda, <http://www.nurc.gov.rw/index.php?id=70&no_cache=1&tx_drblob_pi1[downloadUid]=16> (9. November 2014).

[90] NURC, Barometer, S. 36-43.

[91] Fund for Peace: Fragile States Index 2014 (2014), <ffp.statesindex.org> (aufgerufen am 4. September 2014).

[92] Freedom House (2014): Freedom in the World 2014. Rwanda, <http://freedomhouse.org/report/freedom-world/2014/rwanda-0#.VCE3ZhbJBbU> (9. Nov. 2014). Internationale Beobachter wie z. B. *Human Rights Watch* meldeten Repressionen gegen die Opposition im Wahlkampf. Human Rights Watch (2010): Rwanda: Silencing Dissidents Ahead of Elections, 2. August 2010, <http://www.hrw.org/news/2010/08/02/rwanda-attacks-freedom-expression-freedom-association-and-freedom-assembly-run-presi> (9. Nov. 2014).

menhang mit der 2003 verabschiedeten Verfassung auf den Punkt gebracht: „*The fear of majority rule*".[93] Ein gelockerter Minderheitenschutz berge die Gefahr einer erneuten Machtübernahme von (radikalen) Hutu-Elementen und – so die Befürchtung der Kagame-Administration – einer Neuauflage von Pogromen gegen die Tutsi bis hin zu einem weiteren Völkermord. Die Legitimität der Regierung ist im *Reconciliation-Barometer* aber nicht explizit abgefragt worden. Der Vergleich macht jedoch deutlich, dass die Angaben der NURC-Studie nicht mit den externen Bewertungen übereinstimmen.

Menschliche Sicherheit

Fühlen sich die Bürger eines Staates materiell, physisch und kulturell sicher, so die zweite NURC-Hypothese, steigt auch ihre Bereitschaft zu einem nationalen Wiederversöhnungsprozess.

Dies ist der Bereich, in dem Ruanda vermutlich die beeindruckendsten Fortschritte erzielen konnte. Bestätigt wurde dies in Gesprächen des Autors mit Ruandern und internationalem Personal diverser NGOs. Im *Reconciliation-Barometer* ist festgehalten, dass über 90% der Befragten eine Verbesserung des Verhältnisses zwischen den Bevölkerungsgruppen empfanden, 86% sehen sich und ihre Familien in keiner Weise physisch bedroht. Hinsichtlich der wirtschaftlichen Sicherheit sinkt die Zustimmung zwar in den Bereich von 60-70%, aber grundsätzlich erkennen die Menschen in Ruanda massive Verbesserungen, die besonders in der letzten Dekade umgesetzt worden sind.[94]

Als Vorbedingung für die Wiederversöhnung ist Paul Kagame bezüglich interner Sicherheitsfragen wenig schuldig geblieben. Trotzdem ist der kleine Staat im Zentrum des gigantischen Konfliktsystems in der Region der Großen Seen – und die dem Sicherheitsgedanken geschuldeten Entwicklungen Ruandas bilden den größten Schwachpunkt in Kagames Governance-Performance.

Nationale Identität

Die dritte Hypothese geht von positiven Effekten der Wiederversöhnung aus, wenn eine gemeinsame nationale Identität auch unterschiedliche Gruppen zulässt. In der NURC-Untersuchung zeigen sich 90% der Befragten überzeugt, dass: „common national values leading to reconciliation are being promoted in Rwanda today." 97,4% bestätigten die Annahme, der zufolge die meisten Ruander Wiederversöhnung als wichtige Priorität einschätzen. Noch höher war die Unterstützung der Aussage: „I want my children to think of themselves as Rwandans, rather than Hutu, Twa or Tutsis."[95]

Nationbuilding, also die Konstruktion eines Wir-Empfindens aus verschiedenen Gruppenidentitäten, stellt eine der größten Herausforderungen im postkolonialen Afrika dar. Ethnische (oder gruppenbasierte) Diversität und die damit verbundenen (angenommenen oder tatsächlichen) Benachteiligungen sind vielfach Teil des Ursachenpakets hinter zahlreichen afrikanischen Konflikten seit dem Ende der Kolonialzeit. In Kagames Vision wird das Trennende überwunden. Damit betont der Präsident einen wichtigen Schritt zur Wiederversöhnung, es bleibt aber fraglich, ob sich seit Generationen eingeprägte Erklärungsmuster per Verordnung überwinden lassen. Diese Frage hängt auch direkt zusammen mit der nächsten Annahme der NURC, jener zum Geschichtsverständnis rund um den Konflikt zwischen Hutu und Tutsi.

Verständnis der Vergangenheit

Mit der vierten Hypothese wagt sich die NURC in ein Mienenfeld: wenn es möglich wird, die historischen Erklärungen der sozialen Spaltung zu hinterfragen, wird Wiederversöhnung leichter. 97,9% der Teilnehmer an der Untersuchung machen den Geschichtsunterricht und darin transportierte Denkmuster vor 1994 für den Genozid verantwortlich. Wichtige Themen dieses Gruppenkonflikts seien mittlerweile aber ehrlich diskutiert und ausgeräumt worden (87%) und die heutige Erklärung der Vergangenheit fördere die Wiederversöhnung

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[93] *The Economist* 29. May/2003, Middle East and Africa Edition <http://www.economist.com/node/1817766> (9. Nov. 2014).

[94] NURC, Barometer, S. 44-53.

[95] NURC, Barometer, S. 54-55.

(94,7%). Rund 39,9% der Befragten zeigten sich aber überzeugt, dass: „some Rwandans would try to commit genocide again, if conditions were favourable."[96] Altes Misstrauen lässt sich offensichtlich nur sehr schwer überwinden.

Diese Problematik ist auch im Report der Organisation for African Unity (OAU) zum Genozid in Ruanda festgehalten. Laut diesem wurde die ruandische Geschichte instrumentalisiert, um den jeweiligen Gruppeninteressen zu dienen. Dabei sind zwei Versionen eines postkolonialen Geschichtsverständnisses zu unterscheiden: während die Hutu von einer Spaltung der Gruppen in vorkolonialer Zeit ausgehen, durch welche die eigene Gruppe unterdrückt wurde, macht die Tutsi-Version europäische Kolonialherrschaft für die Kluft in der Gesellschaft verantwortlich.[97] Die meisten Forscher außerhalb Ruandas gehen heute von einer gesellschaftlichen Gliederung in der vorkolonialen Zeit aus, durch welche eine Gruppe (Tutsi) über die andere Gruppe (Hutu) zumindest tendenziell dominierte. Nach dem Prinzip von *divide et impera* nutzen die Kolonialmächte (zuerst das Deutsche Kaiserreich, dann Belgien) diese Spaltung – ein Vorgehen, von dem auch die Tutsi profitierten und durch das sie bis in die 1950er Jahre ihren Führungsanspruch untermauern konnten. Trotz dieser vorherrschenden wissenschaftlichen Meinung folgt die Historiographie in Ruanda heute der Tutsi-Version, in der allein der europäische Kolonialismus für die gesellschaftliche Spaltung verantwortlich gemacht wird, wie in einem aktuellen Geschichtsbuch für die Oberstufe nachzulesen ist.[98] Diese Form der historischen Darstellung folgt zwar dem primären Ziel der Wiederversöhnung, entspricht aber nicht den wissenschaftlichen Erkenntnissen – und ist damit angreifbar und anfällig für zukünftige politische Instrumentalisierung.

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[96] NURC, Barometer, S. 58. Im Barometer wird explizit darauf hingewiesen, dass diese Sorge im Gegensatz zu der deutlich ausgeprägten, persönlichen Sicherheit steht (siehe oben).

[97] OAU (Hrsg., 2000): Rwanda. The Preventable Genocide. The Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events. Addis Ababa, S. 11ff.

[98] Emmanuel Bamusananire (2012): History of Africa. For Rwanda Secondary Schools, Uganda, 2014, S. 355f.

Transitional Justice

Gerechtigkeit auf beiden Seiten, so die fünfte Hypothese, fördere die Wiederversöhnung. Die juristische Aufarbeitung der Vergangenheit und der individuelle Umgang mit den erlittenen Traumata durch den Völkermord spielen in diesem Zusammenhang eine Rolle. Beinahe 90% der Befragten sprechen generell von einer persönlichen Vergebung gegenüber den Tätern, über drei Viertel geben an, ihre persönlichen Verletzungen überwunden zu haben (78.5%). Ein Viertel der Befragten zeigt sich aber auch überzeugt, dass bei einigen Landsleuten Rachegelüste durchaus vorhanden sind (25,9%). Interessant hinsichtlich einer verordneten Wiederversöhnung ist die Aussage, Reconciliation sei unumgänglich, da man sonst die Konsequenzen zu tragen hätte (34,5%). Großes Vertrauen wird den Richtern der traditionellen gemeindebasierten Gacaca Gerichten ausgesprochen (83,4%), während dem *International Criminal Tribunal for Rwanda* (ICTR) lediglich 59,3% Effektivität attestierten.[99]

Individuelle Traumabewältigung durch verschiedene Programme kann, zusammen mit juristischer Aufarbeitung, zu berührenden Ergebnissen hinsichtlich einer Wiederversöhnung führen, wie der Autor in Ruanda mehrfach erleben durfte. Tatsächlich findet die juristische Aufarbeitung aber nicht umfassend statt. Verbrechen der vorrückenden Rwandan Patriotic Front (RPF) gegen mutmaßliche Völkermörder blieben bisher weitgehend unbehandelt. Diesbezüglich war in verschiedenen Gesprächen des Autors mit Angehörigen der Hutu-Gruppe in Ruanda sowie mit internationalem Personal Unzufriedenheit feststellbar. Wenig überraschend sind zu diesem Themenkomplex keine Fragen in der NURC-Studie formuliert. Das völlige Ausklammern der RPF-Vergehen wird (neben anderen Versäumnissen und Problemen der Kagame-Administration) auch von *Human Rights Watch* kritisiert. In einem dazu erschienen Report beklagt der Verwandte eines RPF-Opfers: „The biggest problem with gacaca is the crimes we can't discuss. We're told that

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[99] NURC, Barometer, S. 61-70.

certain crimes, those killings by the RPF, cannot be discussed in gacaca even though the families need to talk. We're told to be quiet on these matters. It's a big problem. It's not justice."[100]

Sozialer Zusammenhalt

Die letzte NURC-Hypothese geht davon aus, dass Vertrauen zwischen den Menschen in Ruanda wichtig für eine Wiederversöhnung sei.[101] Insgesamt 92,9% der Studienteilnehmer gaben an, seit dem Genozid keine ethnische Befangenheit mehr erlebt zu haben. Gleichzeitig sind 31,5% aber davon überzeugt, dass ethnische Diskriminierung nach wie vor existiere. Passend dazu glauben 30,5%, die Menschen in Ruanda beurteilen sich gegenseitig nach wie vor entlang ethnischer Stereotype. Trotzdem unterstützt man Mitglieder einer anderen Gruppe zumindest manchmal materiell oder finanziell (93,3%).[102]

In ländlichen Gebieten eines sehr dicht bevölkerten Staates macht die kulturelle Struktur den sozialen Zusammenhalt notwendig. Man lädt sich gegenseitig zu Festen ein und unterstützt sich gegenseitig, wenn Kleinigkeiten fehlen. Das Dorfleben funktioniere nicht, wenn man sich nicht gegenseitig Milch oder Zucker leihe, war in Ruanda immer wieder zu hören, sobald das „Wunder" der raschen Wiederversöhnung besonders in rural geprägten Gemeinden thematisiert wurde. Für echte Traumabewältigung, die über eine situationsbedingte soziale Kohäsion hinausgeht, seien aber spezielle Community-basierte Programme notwendig, die bei diesem, oft schmerzhaften Prozess helfen.[103]

Fazit

Grundsätzlich stellt das *Reconciliation Barometer* der ruandischen Regierung exzellente

Noten hinsichtlich der Wiederversöhnung aus. 95,2% der Befragten empfinden den eingeschlagenen Weg Richtung nationaler Wiederversöhnung als richtig.[104] Unterstrichen wird die ruandische Erfolgsgeschichte z. B. auch durch die sagenhafte Reichweite der Radio-Soap *Musekeweya* („Wiedergeboren"), die seit zehn Jahren im staatlichen Rundfunk läuft. 84% der über 16-Jährigen verfolgen jede Woche das fiktive Leben der Menschen in zwei verfeindeten Dörfern, die das Trennende immer wieder überwinden können.[105]

Bei kritischer Betrachtung weist der Erfolg aber potentielle Risse auf, die rasch wieder zu Gräben zwischen den Gruppen werden können: Ausgehend von den Hypothesen des NURC muss festgestellt werden, dass der Status der politischen Kultur in Ruanda ebenso zu hinterfragen ist, wie eine sich manifestierende nationale Identität, der Umgang mit historischen Erklärungen, die juristische Aufarbeitung der Geschehnisse rund um den Völkermord oder der Zusammenhalt in der Gesellschaft. Eine verordnete Wiederversöhnung bei gleichzeitiger Vernachlässigung der Interessen einer Gruppe bringt die angestrebte Einigkeit in Gefahr.

Kagames Ziel nach 1994 war es, Ruanda neu zu erfinden: Gesellschaft und Regierung sollten auf Basis von Einigkeit/Einheit aufgebaut werden, wobei das Trauma einer zutiefst gespaltenen Gesellschaft und die demographische Realität in Ruanda diesem Vorhaben entgegenstanden. Wiederversöhnung musste also einem zentral ausgearbeiteten Masterplan folgen. Sie wurde den Menschen in Ruanda gewissermaßen aufoktroyiert – Widerstand wäre sanktioniert worden (siehe oben).[106] Dieser verordneten Wiederversöhnung müssen sich auch NGOs beugen, so sie in Ruanda tätig werden wollen. Kritische Herangehensweisen, beispielsweise ein Hinterfragen der verordneten Historiographie zur Spaltung der Gesellschaft, werden nicht geduldet, heik-

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[100] Human Rights Watch (2011): Justice Compromised. The Legacy of Rwanda's Community Based *Cacaca* Courts, S. 119.

[101] NURC, Barometer, S. 11.

[102] NURC, Barometer, S. 71-76.

[103] Gespräch mit Theoneste Bizimana, Koordinator von *Healing and Rebuilding Our Community*, einer NGO-Initiative im Konfliktgebiet der Großen Seen. Kigali, Jänner 2014.

[104] NURC, Barometer, S. 51

[105] *Musekeweya* ist eine Produktion von *Radio La Benevolencija*, einer holländischen NGO, die mit wissenschaftlicher Unterstützung versucht, z.B. über Radio-Soaps Wiederversöhnung zu fördern <www.labenevolencija.org> (9. Nov. 2014).

[106] Siehe dazu auch Crisafulli/Redmond, Rwanda, S. 95.

le Themen wie etwa Verbrechen gegen die Menschlichkeit seitens der RPF sind tabu.[107]

Erschwert wird die Umsetzung von Kagames Masterplan durch die Sicherheitslage. Bezüglich der humanitären Sicherheit bekommt das Regime in Kigali von den Befragten im Konflikt-Barometer zwar beste Noten ausgestellt, gleichzeitig ist es aber gerade das ausgeprägte Sicherheitsbestreben, das eine verantwortungsvolle Regierungsführung untergräbt.

Human Rights Watch ist einer der prominentesten Kritiker des „Wunders" von Ruanda. Kenneth Roth, Direktor der NGO bemerkte dazu: "We have no problems, acknowledging [Paul Kagame] has done positive things. But we question whether the world should be closing its eyes to dictatorship."[108]

Derartige Kritik wird für das kleine ostafrikanische Land zunehmend zum Problem. Rund 40% des aktuellen Staatshaushaltes werden von Geberländern finanziert, diese Zuwendungen sinken aber jährlich.[109] In Ruanda reagiert man auf derartige Vorwürfe reflexartig. Die hervorragenden Leistungen des Staates hinsichtlich der Wiederversöhnung werden angepriesen – und der internationale Druck in Richtung Good Governance mit einem radikalen Vergleich zum Völkermord abgewehrt: Vor 1994 galten in der Völkermord-Propaganda die Hutu als Patienten. Die Diagnose: Tutsi. Als Arzt sei die radikale Regierung aufgetreten, die sich sofort der Heilung widmete: Auslöschung der Tutsi. Heute werde die DRC als Patient stilisiert, wobei die Internationale Gemeinschaft als Doktor die Diagnose erstelle: Ruanda. Die Heilung des Patienten liege in Sanktionen gegen Ruanda![110]

Eine geeinte Gesellschaft, so ließe sich die Herangehensweise der ruandischen Führung beschreiben, müsse erst (re-)konstruiert werden, ehe sie all die Freiheiten eines modernen Staates genießen könne. In dieser (Re-)Konstruktionsphase drohe aber ständig Gefahr von außen, was ein bestimmtes Vorgehen der Regierung notwendig mache.

Angesichts dieser Bedrohungen primär aus der DRC, entwickelte sich die Sicherheits-Agenda zur zentralen Frage im post-genozidären Ruanda und beherrscht die Politik bis heute. *Sicherheit* überflügelte als Leitparadigma die *Wiederversöhnung* in Ruanda auf Kosten von Good Governance – was wiederum die Chancen auf echte Reconciliation, nachhaltige Entwicklung/Modernisierung gefährdet und als direkte Konsequenz zu einer noch stärkeren Betonung des Sicherheits-Aspektes führten kann. Ein potentielle Teufelskreis, der zahlreichen afrikanischen Staaten bereits zum Verhängnis geworden ist.

Aber: 91,7% der Befragten zeigen sich in der NURC-Studie mit der demokratischen Regierungsführung des Landes zufrieden.[111] Eine Schwäche bei der empirischen Datenerhebung – oder das Wunder von Ruanda?

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[107] Informationen aus Gesprächen mit NGO-Mitarbeitern in Ruanda, vgl. auch Crisafuli/Redmond, Rwanda, S. 111.

[108] Kenneth Roth, zitiert in: Alex Perry (2010): Rwanda's Rebel Reformer: Paul Kagame, in: *Time magazine*, 09. August 2010 <http://content.time.com/time/magazine/article/0,9171,2007287,00.html> (9. Nov. 2014).

[109] Der neue Fischer Weltalmanach 2014 (2013), Ruanda, Frankfurt/Main, S. 369. Im Jahr 2011 erhielt Ruanda 1,26 Mrd. US$ an Hilfsgeldern, 2012 sank diese Zahl auf 880 Mio. US$. Daten von *The World Bank* (2014): Aid Effectiveness <http://data.worldbank.org/topic/aid-effectiveness> (9. Nov. 2014).

[110] Aloys Mahwa (2014): Beyond Numbers, Vortrag am *Interdisciplinary Genocide Studies Center*, Kigali, 9. Juni 2014.

[111] NURC, Barometer, S. 51

Community-based Reconciliation in the Middle East
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Introduction

With the turn of the twenty first century, the Middle East has witnessed an unprecedented turmoil since the post-colonisation era. The occupation of Iraq by the United States and its allies has triggered internal tensions and violence in Iraq that swept across the region. The US propagated establishing a pro-western, functional, representative democratic system in Iraq that was expected to be a model for other countries in the region towards democratisation and economic growth. Since 2011, Some Arab states embraced democratic and political changes and, simultaneously, encountered some socio-political unrest brought by the "Arab Spring". Various strata of conflict can be recognised in this context driven by political, ideological and sectarian agenda; or, driven by mere struggle for freedom and against repression and dictatorship. Regardless of the trigger of strives, it is obvious that reconciliation and conflict management in Iraq, Syria, Libya, Yemen, Egypt and other countries in conflict is still an issue. Yet, the concept of community-based reconciliation in the Arab World is still nuanced. The social ties in Arab societies are strong. Some of these ties are significantly noted to be recognised in kinship of various familial hierarchies: nucleus family, extended family and tribes. This paper will discuss whether familial affiliations can contribute to community-based reconciliation in the Middle Eastern Arab countries.

Approach to community-based reconciliation

Conflicts can be triggered by social, political or economic factors between individuals or inter-groups and intra-groups; or, between the state and constituents. Post-conflict reconciliation is referred to as the process of social reconstruction and conciliatory accommodation of conflicts between opposing or antagonistic identities (individuals or groups) by involving communications and mutual tolerance to reach peaceful co-existence of victims and offenders in normalised relations[112]. It is a comprehensive strategy which is employed to bridge any social divides; to reconstruct the social tolerance and trust; to exercise dialogue for peaceful settlements of disputes; and, to accept the other by the means of cooperation and social interactions[113]. Various methods are practiced by different social structures to reach reconciliation. For instance, third party consultation and mediation is found to be an effective tool of reconciliation and dispute resolution between individuals as well as groups or even nations.[114] Fisher (1983) proposed a third party consultation model which comprises of three core elements: capable, impartial and recognised leaders referred to as identity; neutral and informal discussions organised by small groups referred to as strategies; and facilitative and diagnostic activities of the leaders referred to as behaviors.[115] Community-based organisations have been found to be key actors in spreading the understanding that the sought sustainable outcomes and lasting impact are reached with community ownership of interventions.[116] Hence, informal community-based organisations in the Middle East can be a key third party conciliatory power.

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[112] Androff, D. K. 2012, 'Reconciliation in a Community-Based Restorative Justice Intervention', *Journal of Sociology& Social Welfare*, Vol. XXXIX, No. 4, pp 73-96

[113] Stefansson, A. H. 2010, 'Coffee after cleansing? Co-existence, co-operation, and communication in post-conflict Bosnia and Herzegovina', *Focaal Journal of Global and Historical Anthropology*, vol. 2010, no. 57, pp. 62-76

[114] Westbrook, F.D. 1985, 'Third-Party Consultation, Mediation, and Coercive Bargaining', *Journal of Counselling and Development*, Vol. 63, pp 535-6

[115] Fisher, R.J. 1983, 'Third party consultation as a method of intergroup conflict resolution', *Journal of Conflict Resolution*, Vol. 27, pp 301-334

[116] Clarke, M. 2008 Poverty: Concepts, Measures, Trends and Responses. In: Kingsbury D, McKay J, Hunt J, et al. (eds) *International Development: Issues and Challenges*. Hampshire: Palgrave Macmillan, pp 152-176.

Community-based initiatives (CBI) have been promoted and implemented by UN organisations in 17 countries in the region since the 1990s in different aspects of health and other social services. However, despite the success of those programmes in addressing some of the community priority needs, there has been no national strategy for implementing the initiatives.[117] CBI programmes aim to enable community empowerment and ownership and inter-sectoral collaboration to reach sustainable social outcomes.[118] In conflict or post-conflict situations, community participation, empowerment and ownership is key in order to meet the needs of the conflict-affected populations and to pave the way for sustainable peace and long-term development processes. In the Middle East and North Africa region (MENA) community-based initiatives were demonstrated to be successful and effective interventions in mobilising community resources.[119] Community-based institutions and movements are sought to be effective players in mitigating and resolving "identity-driven violence" and other forms of internal conflicts between social, religious, ethnic and sectarian groups.[120] It is worth noting that effective community based reconciliation should be based upon strategies that "incorporate traditional or indigenous models of community reconciliation and restoration by combining local culture, religion, and conflict resolution techniques".[121]

Tribes and community-based reconciliation

Community may be defined as people living in a certain spatial (geographic) area who are linked by history, language, culture and social organisation. Notwithstanding, community members may, also, share varying degrees of political, economic and social characteristics, interests and aspirations. In this sense, community can be considered as a "social activity marked by a feeling of unity in which individuals participate willingly and without losing their individuality or personal identity".[122] Therefore, Crishna (1998) sees the community as a structure which has social and power relationships within the family and among community members.[123]

It is true that various state and non-state stakeholders contribute to reconciliation, family, however, is found to be among those most effective as a potential protective element.[124] The household subunit of tribes still represents the "fundamental unit of social, economic, and political action in tribal society".[125]

In other parts of the world, tribes are found to practice some forms of reconciliation including:

avoidance of enemies and enemy territory, development of vagueness and flexibility about genealogies (thereby providing face-saving solutions), social shaming of potential troublemakers, migration to other areas where some form of land or residence rights may be claimed, encouraging traditional religious values, fostering effective leadership, instigating informal dispute settlement processes, and the development of valued relationships and cross-cutting ties such as participation in an exchange system and intermarriage between enemies.[126]

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[117] World Health Organization 2007, *Introduction to the community-based initiatives programme in Iraq,* viewed 20/8/2009,
http://www.emro.who.int/iraq/pdf/cbi_programme.pdf

118 Hassin, A. 2010. Community-based rehabilitation: why not in Iraq? (includes commentary by Kilby, P., D'Errico, C., and Akhurst, J.) International Journal of Therapy & Rehabilitation, 17, 666-676.

[119] World Health Organization 2009, *Countries implementing community-based initiatives, Iraq*, viewed 19/8/2009,

http://www.emro.who.int/cbi/countries_irq.htm

[120] Hoover, K. R., and Vernon D. J. 2003. "Identity-Driven Violence: Reclaiming Civil Society", *Journal of Hate Studies,* Vol. 1, No. 3, pp. 83-94.

[121] Androff, 2012: 81

[122] Peat, M. 1997, *Community Based Rehabilitation,* WB Saunders, London, p. 16-17

[123] Crishna, B. 1998, 'What is community-based rehabilitation? A view from experience', *Child: Care, Health and Development*, Vol. 25, No. 1, pp 27-35.

[124] LeBlanc, M., Self-Brown, S., Shepard, D. & Kelley, M. L. 2011, 'Buffering the effects of violence: communication and problem-solving skills as protective factors for adolescents exposed to violence', J*ournal of Community Psychology*, vol. 39, no. 33, pp. 353–67

[125] Eisenstadt, M. 2008, 'Tribal Engagement Lessons Learned', *Military Review*, pp. 161-76, p. 164.

[126] Young, D. W. 1997, 'Nonviolent alternatives among the Enga of the Papua New Guinea Highlands', Social Alternatives, vol. 16, no. 2, pp. 42-5, p. 42

In most Arab countries, tribes are an intrinsic component of the social fabric of the societies. The traditional structure of Arab societies since pre-Islam is still based on tribal affinity or common descent that determines one's identity.[127] Nowadays, in addition to the prominent status of tribes in the Arab States of Gulf Cooperation Council (GCC) which are ruled by tribal families, in most Arab countries in the Middle East, tribal identity is clearly recognised socially and politically. In rural areas, in particular, the social structures are more attracted to tribes; and tribal values has become the centre for organising the community which builds the political loyalties to those values[128]. In Jordan, for instance, loyalty to the tribe is a very traditional practice by its members and it is a mark of identity and pride (Al Oudat & Alshboul, 2010). Empirical evidence notes the cultural and social characteristics; values and norms; and tribal mores and traditions of Arab societies work significantly on ensuring group solidarity and result in practical socio-political and economic functions.[129] Most notably in countries like "Yemen, Jordan and, to a certain extent, Palestine and rural Lebanon, tribal norms and a blend of civil law with tribal codes have prevailed for decades as intrinsic parts of the justice system".[130]

Iraq is a clear example where tribal systems and laws and strong tribal ties, to a certain extent, have potential impact in bringing peaceful and sustainable solutions at personal, communal and societal levels. Since the collapse of the regime in 2003, Iraqi tribes played significant roles in peace restoration and post-conflict ethno-sectarian reconciliation at individual and national levels by practicing tribal laws.[131] The reconciliation processes are legitimate due to recognition by the disputants as well as by the state; and, they can bring sustainable peace as verdicts are socially and ethically binding. Likewise, tribal ties, governance systems and socio-political roles in Yemen are evident.[132] Shalegh Weir notes that during reconciliation processes, all parties involved have voluntary submission to the process as they "do not see themselves as passively or impotently submitting to judicial authority, but as actively cooperating the maintenance of law and order" (Weir 2007: 173[133]). Libya is another example of significantly old strong tribal ties that have not eroded over decades of urbanisation under Qaddafi. The socio-political status of tribal interaction in political life was officially recognised by the state and institutionalised in the Libyan system in the 1990s.[134] It is noted that if the Libyan state "does not garner the support of the tribes and is not based on the tribal pattern of social organisation" it "will be unable to secure legitimacy".[135] Thus, as Libyan tribes are powerful local institutions in social mobilisation they can expand their power to apply community-based reconciliation. Tribalism in Jordan can be an active and powerful player in political agendas, policy change and pressure on decision makers.[136] Similar to tribes in the other Arab countries, the traditional roles known about tribes in Jordan is mitigation and reconciliation. The tribes in Jordan "enjoy institutional legitimacy

[127] Piggott, L. 2005. Tribalism in the Arab MENA region. Policy, 21, 15-20.

[128] Sbeihi, A. S. 2008. The Future of Civil Society in the Arab Homeland, Beirut, Centre for Arab Unity Studies.

[129] Azkia, M. & Firouzabadi, S.A. 2006. The Role of Social Capital in the Creation of Rural Production Associations: A Case Study of the Karkheh Dam Watershed Basin. Critique: Critical Middle Eastern Studies, 15, 295-315.

[130] Safa, O. 2007, *Conflict Resolution and Reconciliation in the Arab World: The Work of Civil Society Organisations in Lebanon and Morocco*, Berghof Research Center for Constructive Conflict Management - First launch July 2007, http://www.berghof-handbook.net, p. 4

[131] Hassin, A. 2014, 'Non-Government Communications and Conflict Management: The Experience of Iraqi Arab Tribes, In: S. Craze & F. Lempp (Eds.) *Communicating Conflict: A Multidisciplinary Perspective*, Part 1, pp. 113-126, Oxford, UK: Inter-Disciplinary Press

[132] Weir, S. 2007, *A Tribal Order: Politics and Law in the Mountains of Yemen*, University of Texas Press, Austin, TX; and Sbeihi, 2007.

[133] Weir 2007: 173.

[134] Lacher, W. 2011, 'Families, Tribes and Cities in the Libyan Revolution', *Middle East Policy*, Vol. XVIII, No. 4, pp 140-154

[135] Zoubir, Y. H & Rozsa, E. N 2012, 'The End of the Libyan Dictatorship: The Uncertain Transition', *Third World Quarterly*, Vol. 33, No. 7, 2012, pp 1267–83

[136] Al Oudat, M. A. & Alshboul, A. 2010, 'Jordan First.: Tribalism, Nationalism and Legitimacy of Power in Jordan', *Intellectual Discourse*, Vol. 18, No. 1, pp. 65-96

in the legal processes"[137]; and, "have enjoyed a strong political and socio-cultural role" (Al Oudat & Alshboul, 2010: 71).

Concluding remarks

Tribes can simply be described as institutions rather than mere family ties and kinship. During conflicts, social mobilisation according to tribal patterns can be an effective method of conflict management and peace building as a transitional measure. Transitional justice is achievable by inclusion of these community-based institutions in any local and overarching national reconciliation projects. Therefore, community-based reconciliation has a potential in bridging socio-political gaps in the region. The social power of tribes is a solid premise for studying tribe roles in reconciliation. This paper represents an eye-opener for signifying positive roles that can be played by tribes. It points to the potential of expanding further studies about these indigenous community-based organisations and how they can contribute to bringing peace and stability in their societies.

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[137] Al Oudat & Alshboul, 2010: 70

Using Alternative Dispute Resolution to Settle Disputes: The Case of New Zealand
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Introduction

States typically play a major role in the prevention, settlement, and resolution of conflicts arising among the natural and legal persons within their territory. There are a number of mechanisms through which states execute this role such as the provision of an electoral system, various forms of political decision-making procedures, the provision of education, social services, and, most importantly, the provision of a legal and judicial system. In most states, citizens can directly access the judicial system for the purpose of adjudicating any civil dispute they face. In the case of criminal matters, it is usually the state itself who acts as a prosecutor against alleged offenders through the court system. This paper argues that there has been a shift over the last two decades in the way states fulfil their conflict resolution function. It is argued that states are increasingly using Alternative Dispute Resolution (ADR) processes, such as mediation, arbitration, conciliation, etc. as a replacement or complement to their traditional judicial systems. This change has predominantly affected the settlement of civil disputes, but to some extent also the way criminal matters are handled. In the paper, I investigate some of the reasons and rationales for this change, illustrate how it is implemented by way of examples from the New Zealand jurisdiction, and evaluate some of the consequences of this change.

An increase in the use of ADR processes as the first approach for resolving disputes is a phenomenon that can be observed across many jurisdictions. While ADR processes have initially been developed out of civil society and the community sector, over the last two decades state governments have increasingly recognised their potential with regards to an effective and cost-efficient alternative to courts. The use of ADR processes is increasingly enshrined in legislation. For instance, through its Mediation Directive from 2008[138] the European Union (EU) provided that member states should authorise the courts to suggest voluntary mediation to litigants. Two further EU Directives on Consumer ADR[139] will come into place in 2015. In the United States of America (USA), the Uniform Mediation Act from 2001[140] was intended to harmonise mediation across the USA. The Act, which aimed at promoting greater confidence in the mediation process and, thus, increasing the number of disputes being resolved by mediation, has been adopted by various states like the District of Columbia, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington.

While statutes such as the EU Directives and the USA Uniform Mediation Act can contribute to the promotion of ADR processes, an increasing use of those processes can also be observed in countries without overarching legislative frameworks for the use of ADR. One such country is New Zealand which has seen a significant increase in the use of processes such as conciliation, mediation, and arbitration over the last two decades. In large parts, this increase can be attributed to an active

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[138] See European Union, (2008), *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*. Available from: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF. [Accessed: 10 October 2014].

[139] See European Union, (2013), *Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC*. Available from: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF. [Accessed: 10 October 2014] and European Union, (2013), *Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC*. Available from: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF. [Accessed: 10 October 2014].

[140] See United States of America National Conference of Commissioners on Uniform State Laws, (2001), Uniform Mediation Act. Available from: http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act. [Accessed: 10 October 2014].

governmental support of ADR processes. Boulle et.al.[141] observe that:

> [u]nquestionably New Zealand government policy, particularly since the early 1990s, has favoured mediation as a primary form of dispute resolution when negotiation has failed. […] Where disputes arise, particularly between citizens and government departments or state related organisations, there is a readiness to adopt mediation as the preferred dispute resolution method rather than any of the other perceived less palatable choices.[142]

In many dispute areas, such as employment disputes, tenancy disputes, or small claims disputes, mediation services are directly provided by core government agencies. In other areas, such as family disputes, the government is providing funding to independent agencies for the provision of mediation services. Finally, in areas such as disputes with financial service providers, disputes about the provision of electricity and gas, or disputes around the provision of telecommunication services, the government has set up mandatory schemes which require respective companies to sign up, and financially contribute to, dispute resolution agencies that independently deal with any disputes arising between the companies and their customers.

It is evident from statements by the New Zealand government that its main rationale for setting up and promoting ADR services is cost-efficiency. However, there is also evidence that government officials recognise the value of ADR processes beyond their financial benefits and consider that some conflicts are not suited for legal battles, but better dealt with by means of ADR services. For instance, referring to disputes in the family area, the former New Zealand Minister of Justice, Judith Collins, noted that:

> [f]or too long too many cases about how children will be cared for have been decided in court when they don't need to be. It's better for children and their families to avoid the conflict, delays and expense of going to court where possible.[143]

In the following, I will describe five examples of government supported ADR services in New Zealand. The examples were selected with the intention of illustrating a wide spectrum of ADR services in New Zealand.

Tenancy Disputes

The first example relates to the system for dealing with residential tenancy disputes in New Zealand. The main mechanism in this area is provided by the New Zealand Tenancy Tribunal which was established under the Residential Tenancy Act 1986 and which employs a team of tenancy mediators. Any dispute between a landlord and a tenant is referred to the tribunal for settlement. If a tenant or landlord makes an application to the tribunal, the dispute is, in the first instance, assigned to a tenancy mediator who conducts a telephone, or face-to-face mediation with the parties. Apart from a nominal application fee, the mediation is free for the parties. Further, the mediation is consensual for the parties, i.e. any decision-making power as to the outcome of the dispute rests entirely with the parties. The role of the independent and unbiased mediator is solely to facilitate the communication between the disputants. While tenancy mediators are generally not legally trained, they can, if asked by the parties, provide information and advice if this is appropriate. For example, a mediator may outline aspects of the law to the parties if that will help their discussion. If the parties reach an agreement during the mediation, the agreement is written down as a legally binding me-

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[141] Boulle, L., Goldblatt, V., and Green, P., (2008), *Mediation: Principles, Process, Practice*, *2nd edition*. Wellington: LexisNexis NZ Limited.

[142] Boulle et.al. 2008, 249

[143] Collins, J., (2014), *More Choice in Family Justice Mediators on Offer, Media Release from 4 June 2014*. Available from: https://www.national.org.nz/news/news/media-releases/detail/2014/06/04/more-choice-in-family-justice-mediators-on-offer. [Accessed: 10 October 2014].

diated order and signed by the mediator and the parties. Mediated orders are fully enforceable. If no agreement is reached at the mediation, each party can apply for a full hearing at the Tenancy Tribunal. There, an adjudicator will make a final and binding decision for the parties.

Disputes about Small Claims

The procedure for settling disputes around small claims that are not legally complex is provided by the New Zealand Disputes Tribunal which was established under the Disputes Tribunal Act 1988.[144] The tribunal has jurisdiction to deal with any claims up to a maximum value of NZ$15,000 (approx. €10,000) or up to NZ$20,000 (approx. €13,000) if both parties agree. The process embraced by the tribunal can be described as a hybrid mediation-arbitration process. In the first instance, a referee acts as a mediator facilitating a settlement negotiation between the parties. To that end, the referee may invite the parties to give their side of the disputes, provide any documents related to the disputes, hear witnesses who can be examined by both the referee and the parties, call for further information, such as expert opinions, and make suggestions as to the settlement of the dispute. If the parties settle their dispute during the mediation, the agreement is written up as a binding and enforceable order. If no agreement is reached, the referee switches to the role of an arbitrator and makes a decision for the parties. The decision needs to be accompanied by oral or written reasons and is also binding and enforceable. The tribunal's decisions are made on the merits and justice of the case and any relevant law. The Disputes Tribunal Act explicitly mentions that referees are not bound to give effect to strict legal rights and obligations or legal forms or technicalities.

Disputes involving Electricity and Gas Companies

Disputes between power companies and their customers are settled in New Zealand through the services provided by the Electricity and Gas Complaints Commissioner (EGCC) scheme.[145] Every power company is required to be a member of the scheme. This implies not only that a company contributes to the funding of the scheme, but also that it is bound by the decisions made by the EGCC. If a dispute arises between a customer and a member company (e.g. in relation to the payment of electricity supplied by the member), the customer can make a complaint which, in the first instance, has to be directed towards the company. If the company does not settle the complaint within 20 days, the customer can refer the complaint to the EGCC which starts a mediation process (typically conducted through phone conversations) encouraging the parties to settle their dispute. The mediation may involve site visits and the request of expert advice. If the dispute cannot be settled during the mediation, the EGCC conducts a formal investigation. In light of the findings of the investigation, the parties, again, have the option of settling their dispute failure of which the investigators makes a preliminary recommendation regarding the settlement of the dispute. Both parties can now either accept the preliminary recommendation or reject it and provide further comments on the recommendation. If the parties do not accept the preliminary recommendation, the Commissioner makes a final recommendation taking into account the parties' comments. The final recommendation is binding on the member company, but not on the customer who, if he or she is still not happy with the recommendation, can pursue other remedies through the court system.

Disputes with Financial Service Providers

Disputes between financial service providers (such as banks, insurance companies, investment providers etc.) and their customers (such as individual consumers or businesses) are dealt with by four schemes which have

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[144] New Zealand Legislation, (1988), *Disputes Tribunal Act 1988*. Available from: http://www.legislation.govt.nz/act/public/1988/0110/latest/DLM133282.html. [Accessed: 10 October 2014].

[145] Electricity and Gas Complaints Commissioner, (2014), *Homepage*. Available at: http://www.egcomplaints.co.nz/home.aspx. [Accessed 10 October 2014]

been specifically set up by the New Zealand Government for this purpose. The services provided by these four schemes are regulated by the Financial Service Providers (Registration and Dispute Resolution) Act 2008[146] which also compels any financial service provider in New Zealand to be part of one of the schemes. The schemes are funded by the financial service providers and are free for any customers who want to use them. Financial Dispute Resolution Service (FDRS), one of the four schemes, provides a three-level complaint process. At the first stage, FDRS facilitates an exchange of information about the dispute between the parties. In many cases this already results in a resolution as the parties are enabled to see each other's perspective on the dispute. If no resolution is achieved, FDRS conducts a mediation process with the parties. This may take place face-to-face, via video or telephone conference, or by email. If the parties don't reach an agreement through the mediation, the mediator provides a non-binding recommendation to the parties as to how they can settle their dispute. Only if at least one party does not accept the recommendation, the process reaches a third, adjudicative stage which is conducted on the papers only. An adjudicator makes a final decision on the basis of all the information gathered during the first two stages as well as formal, written submissions by the parties. In making the decision, the adjudicator can award payments up to an amount of NZ$ 200,000. The adjudicator's decision is binding on the financial service provider. If the consumer considers the decision unsatisfactory, he or she can still take the dispute to arbitration or the court system.

Employment Disputes

The Employment Relations Act 2000[147] enshrines a mandatory mediation scheme for

any dispute between an employer and an employee in New Zealand. Only if mediation was attempted and has been unsuccessful, an employment dispute can be taken to the Employment Relations Authority or the Employment Court. Employment mediations are conducted by mediators who are directly employed by the Ministry of Business Innovation and Employment. They are independent, third-parties whose task it is to assist the disputing parties in identifying the issues between them as well as potential solutions to the dispute. The specific mediation process employed depends on the characteristics of the dispute in question. For instance, mediators may provide early assistance to parties, without legal representatives being present, mediate in a formal mediation meeting, make recommendations, make decisions (at the parties' request), record settlements, or provide information to unions, to community groups and advisors, to employer organisations or employment law seminars. Any agreement reached during a mediation is fully controlled by the parties, i.e. the mediator has no decision-making powers regarding the outcome of the dispute. However, both parties can consent on asking the mediator to make a recommendation which becomes a full and final settlement unless at least one of the parties rejects the recommendation. Also, parties can agree to ask the mediator to make a binding decision. If no agreement is reached, the mediation can be adjourned or ceased. In the latter case, the parties can pursue their dispute with the Employment Relations Authority, which can provide an adjudicative determination of the dispute, or the Employment Court, which acts as an appellate court regarding the decisions made by the Employment Relations Authority. The focus on mediation as the primary method for resolving employment disputes in New Zealand is stressed by the fact that both the Employment Relations Authority and the Employment Court may direct the parties to try mediation again if they believe it should be possible to reach agreement.

Evaluation

The above five examples demonstrate the high level of commitment by past and present New Zealand governments towards the use of

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[146] New Zealand Legislation, (2008), *Financial Service Providers (Registration and Dispute Resolution) Act 2008*. Available from: http://www.legislation.govt.nz/act/public/2008/0097/latest/DLM1109427.html. [Accessed: 10 October 2014].

[147] New Zealand Legislation, (2000), *Employment Relations Act 2000*. Available from: http://www.legislation.govt.nz/act/public/2000/0024/latest/DLM58317.html. [Accessed: 10 October 2014].

ADR mechanisms in a wide range of dispute areas. Notwithstanding the fact that ADR is widely used in New Zealand, the question arises as to whether this is beneficial for all parties affected. Further, one has to ask whether the increased use of ADR poses any risks to the New Zealand society as compared with more traditional forms of dispute settlement through a court system. In the following, I outline two positive consequences of the wider use of ADR in New Zealand and two potential risks.

One positive consequence of using consensual ADR processes rather than adjudicative court processes is the increased empowerment of the parties as to the determination of the outcome that is most suitable for their dispute. In all processes outlined above, it is up to the parties to agree or disagree to any outcome discussed during the process. This means that disputants in New Zealand enjoy a higher degree of control and empowerment regarding the solution of their disputes as compared to countries relying solely on adjudicative forms of dispute resolution. The fact that ADR processes are offered in parallel, rather than instead of, adjudicative processes means that parties who do not have the capacity of determining the outcome of their disputes themselves can still resort to the court system. The transfer of outcome control from an adjudicative, external decision-maker to disputing citizens themselves is not absolute and does not impinge on weak parties' entitlement to protect their rights through the courts.

A second argument for the use of private ADR processes as a means of resolving disputes rather than public court systems arises from the greater efficiency in terms of time and cost savings. As Bryan Caplan[148] pointed out:

> "[…] public courts have clear inefficiencies that both increase the costs of dispute resolution and make settlements more difficult. [The public court system] promotes futile but expensive strategic behaviour. The outcome of a case depends not merely on the facts of the dispute; it is also a function of the respective legal expenses of the two sides. Since the disputants cannot reach a cooperative solution to the dispute itself, it is likewise difficult to agree to limit joint legal expenditures. The result is that both plaintiff and defendant rush to outspend each other, but ultimately the probability of success remains unaltered because the competitive expenditures cancel each other out."[149]

In contrast, disputants participating in an ADR process can control the amount spent on legal costs as well as the time dedicated to resolving the dispute themselves. The expensive strategic behaviour and competitive race to outspend each other described by Caplan are less likely to occur in a consensual, interest-based ADR process, such as mediation, than an adjudicative, rights-based process, such as a court trial that has a clear winner and loser. ADR, thus, provides efficiency gains for both the state who can reduce its expenditure on long and inefficient court processes and the disputants who can reduce their expenditure on lawyers and speed up the process of finding a solution to their dispute.

Apart from the advantages of ADR, there are also risks arising from the increased use of ADR. One risk relates to disputes where there is a significant power imbalance between the parties. In such cases, it can be argued, the weaker party is better served by a formal court process in which the principle of natural justice (i.e. the right to a fair hearing and an unbiased decision-making process) is applied and thus the party's rights are better protected than in an ADR process. This argument holds, undoubtedly, for cases where the parties' legal capacity is an issue (i.e. cases involving minors or mentally ill people). However, there may also be cases where a party has the capacity to participate in an ADR process in the strict legal sense, but is still not mentally and emotionally ready to do so. One can imagine, for instance, an emotionally unstable and inexperienced employee in an employment dispute mediation with an articulate and powerful employer who is a skilled negotiator.

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[148] Caplan, B., (1997), *The Economics on Non-State Legal Systems. Legal Note No. 26*. London: Libertarian Alliance.

[149] Caplan, 1997, p. 5

While the employee may have full legal capacity to participate in the mediation, there is a risk that he or she will agree to an outcome in the mediation that is inferior to one the employee could have achieved through a court process. As mediators are not decision-makers, their ability to directly address power imbalances is limited.

Another potential risk arising from the rapid growth of ADR in New Zealand relates to the supply of qualified and experienced mediators. The high demand for ADR practitioners combined with the fact that accreditation for mediators and arbitrators is not regulated in New Zealand means that ADR services may increasingly be supplied by unexperienced and unqualified persons. This poses a risk for potential clients, the unqualified ADR service providers themselves, as well as the ADR profession as a whole. The risk for the clients is obvious: they receive sub-standard services which, in the case of complex and high-stake disputes, may have long-lasting negative effects on their situation. The risk for ADR providers who prematurely enter the ADR market is not only that they may find themselves in situations which they cannot effectively handle, but also that they may become liable for negligence or the breach of professional duties. Finally, the practice of unqualified and inexperienced ADR providers may negatively impact on the reputation of ADR as a whole as a means for resolving disputes.

Conclusion

This paper used the example of New Zealand to illustrate the increasing use of ADR processes, such as mediation, arbitration, conciliation, etc. by states as a complement to the court system for the resolution of civil disputes. It described five areas within the New Zealand society in which ADR processes have become the default mechanism for settling disputes: tenancy disputes, employment disputes, disputes with financial service providers, disputes involving electricity and gas companies, and small claims disputes. On the basis of those examples, the paper highlighted two positive consequences of the increased use of ADR in New Zealand: party empowerment and efficiency gains. It also pointed out two potential risks arising from the use of

ADR: the issue of situations which involve a significant power imbalance between the parties and the risk of unqualified and unexperienced ADR providers practicing in an unregulated market. Overall, the author is of the view that the benefits of ADR outweigh the risks and that the two risks described can be mitigated.