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TRADITION AND JUSTICE

- **Indigenous and State Justice in Latin America: Cooperation or Coexistence?**
Susanne Käss / Christian Steiner

- **Politics, Chieftaincy and Customary Law in Ghana**
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- **The European External Action Service – A Difficult Start of an Innovative Institution**
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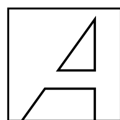

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EDITORIAL

Dear Readers,

Syria is embroiled in a civil war with no end in sight. Protests against the ruler Bashar al-Assad began in March 2011 with demands for greater opportunities of political participation, civil rights and economic reforms. Demonstrations soon escalated into unrest, which then turned into a civil war that is now racking the entire country. While objectives were initially of a political and economic nature, the situation has now turned into a conflict fought out predominantly along confessional lines. The United Nations puts the number of those killed at over 100,000. This is all occurring in the European neighbourhood, yet the European Union is still working on a common approach.

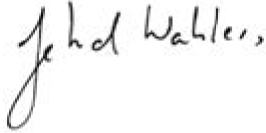
All initiatives towards a peaceful conflict resolution over the last few months have come to nothing. This is not least due to the diverging and intransigent stances taken by the regional actors and within the international community. Furthermore, the power structures are not clear, nor are the objectives of the groups involved in the civil war and the relationships between them. The opposition has become so fragmented that joint representation in any peace talks would be impossible. At an international level, taking a firm common stand would require a modicum of common interests. What is happening instead is that the cementing of ideological and interest-based lines of conflict in Syria and in the international community is resulting in a stalemate, which is becoming increasingly more difficult to resolve, and is also giving rise to blurred fronts and unlikely alliances. Syrian Christians, for example, see themselves under greater threat from Islamist rebels than from Assad's troops, although it is the latter that receive support from the Islamic Republic of Iran.

Apart from the question as to whether or not there still is the need for a military intervention: The international community urgently needs to aid the growing number of Syrian refugees that is already staggering. For some time now, the conflict has also had a massive impact beyond the country's borders. The United Nations has described the developments as the worst refugee crisis since the genocide in Rwanda. In his article, Otmar Oehring describes the situation of the refugees in the region's countries, in Egypt, Iraq, Jordan, Lebanon and Turkey. He wrote the following about the enormous numbers of people fleeing their homes: "This means that approximately 27.5 per cent of the Syrian population have fled; just under 19.4 per cent as internally displaced persons and more than eight per cent as refugees – and these numbers are increasing by the day." Last month I visited the refugee camp of Zaatari in Jordan where I got an impression of the dimensions that the Syrian refugee crisis took on. The camp has grown to the size of a major city, with all the challenges involved in such a development: health care, education, crime prevention.

It is incumbent upon the international community to support the region's countries in their endeavours to improve the situation of the refugees. And this does not solely require the provision of funds. That will not be sufficient in itself. Efforts will also have to be made to strategically strengthen the structures of the state, in the health and education systems for instance, so that they will be capable of absorbing the massive streams of refugees. Interchange and cooperation between the countries also represent important elements in improving the situation.

The article written by our Resident Representative also illustrates the large conflict potential that masses of refugees in other countries hold. Different ethnic and religious groups are thrown together, local people feel they are being disadvantaged through the financial support given to the refugees or they lose their jobs because of an influx of illegal workers. It is therefore crucial to initiate a dialogue between the different groups and to encourage mutual understanding. The Konrad-Adenauer-Stiftung has

a permanent presence in the region with seven offices. Through their work, they promote development, democratic structures and the rule of law and offer a platform for interchange and dialogue at all levels.



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INDIGENOUS AND STATE JUSTICE IN LATIN AMERICA

COOPERATION OR COEXISTENCE?

Susanne Käss / Christian Steiner

In 2007, in the Mexican state of Oaxaca, Eufrosina Cruz Mendoza stood for the position of mayor in her Zapotec home community. Although the majority of citizens voted for her, the election outcome was not accepted by traditional authorities in the village because women had traditionally not enjoyed active or passive voting rights in Santa Maria Quiegolani. Although Eufrosina was able to convince the majority of people in her community of her suitability, she could not convince the courts that had jurisdiction in the area. Reason being, when she attempted to exercise her individual rights, the courts decided that the collective right of the indigenous community to autonomy had priority over the political rights of the individual. It was therefore lawful for Eufrosina to have been discriminated against on account of her gender in spite of the fact that she was a Mexican citizen.

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There are over 500 ethnic groups in Latin America, whose members speak approximately 900 languages from over 100 language families. 40 to 50 million people in Latin America are of indigenous descent, making up eight to twelve per cent of the total population.[1] The ethnic diversity of the continent represents a unique cultural treasure, but also presents major challenges to Latin-American societies. After centuries of cultural, social, economic and political marginalisation of indigenous peoples, awareness grew amongst these societies in the second half of the 20th century that there was a need to acknowledge and maintain

1 | United Nations Children's Fund (UNICEF), *Atlas Sociolingüístico de Pueblos Indígenas en América Latina*, FUNPOEIB Andes, Cochabamba, 2009.

Diversity is seen as valuable. But in practice, clashes between world views and traditions are giving rise to complex sociocultural, political and legal questions.

the cultural heritage of the original inhabitants. Today, this diversity is seen as an opportunity and as valuable. But in practice, clashes between world views, traditions and ways of life are giving rise to complex sociocultural, political and legal questions. Inevitably, conflicts arise. On the one hand, these have functional implications. How can different legal traditions and systems and the associated responsibilities be delimited and coordinated within the borders of a country? On the other, there are fundamentally different views about the universal applicability of human rights, not least in situations where collective indigenous rights potentially clash with the civil liberties of the individual.

One aspect that should not be underestimated is that these problems are further complicated by historic claims relating to the need to come to terms with the past. Occasionally these are laced with revanchist overtones (key phrase: cultural and legal decolonisation), and an underlying tendency to criticise globalisation in societies which, following the Spanish-Portuguese colonisation and preservation of European forms of government (even after gaining independence in the early 19th century), have over the past several decades frequently been subject to liberal economic policies that were incapable of ensuring that large sectors of the population would benefit from economic progress. The situation has been exacerbated by the fact that, unlike in Europe, the democratic constitutional states modelled on the European nation state, which were formally established in the 1980s and 1990s, have not been successful in achieving social stability and prosperity for the majority of the populace including the indigenous population. The European idea of the democratic and social constitutional state thus has a credibility problem, not so much because its fundamental beliefs could not possibly flourish in Latin America, but because they were not implemented effectively on the first attempt.

This lack of credibility is producing an interpretational vacuum amongst marginalised groups (and the intellectuals representing them). In their search for the "right" social and state structures, they proved receptive to the influence of new, partly populist leadership figures, whose neo-socialist policies appeared to defend indigenous

interests. It is true that demands for greater indigenous autonomy, legal pluralism and intercultural interpretation of human rights, which have already been recognised in instruments of international law, have been incorporated into the constitutions of the Andean countries in particular. But governments once again lack the will or at least the capability to enforce these pluralist demands in practice because they appear to run counter to economic development along Western lines. It therefore appears that the efforts of the continent's indigenous movement towards restructuring the social, political and economic order may once again be thwarted.

RISE OF PLURI-ETHNIC SOCIETIES IN LATIN AMERICA[2]

After Columbus' discovery of the American continent, the existing indigenous empires as well as tribal and segmentary societies were decimated by the wars of conquest in the 15th and 16th centuries. During colonial rule up to the 18th century, the indigenous peoples were considered vassals of the Spanish Crown. The application of their own legal traditions was condoned as long as only indigenous people were involved and there was no open opposition to the enacted laws and doctrines of the Catholic Church.

During colonial rule, the indigenous legal traditions were condoned as long as there was no open opposition to the enacted laws and doctrines of the Catholic Church.

Following their independence in the 19th century, the original inhabitants were intended to become integrated into existing societies as their cultures were considered backward. The aim was to build nation states with a common culture, language and jurisdiction. From the middle of the 20th century onwards, the poverty that was rife amongst the indigenous population was recognised as a serious problem and became the subject of various political strategies. With a view to their integration and assimilation, attempts were made to integrate the indigenous peoples into the markets,

2 | On the subject of the development of indigenous politics and on legal pluralism cf. for instance: Bartolomé Clavero, "Geografía Jurídica de América Latina: Pueblos Indígenas entre Constituciones Ladinas"; Raquel Yrigoyen Fajardo, "Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas y el constitucionalismo andino", in: Mikel Berraondo (ed.), *Pueblos indígenas y derechos humanos*, Universidad de Deusto, Bilbao, 2006, 537-567.

thereby offering them a way out of poverty. However, the original legal traditions persisted during this period as well, which was mainly due to the state lacking the resources to penetrate into the huge and mostly unexplored territories. For centuries, indigenous and state legal systems existed side by side with hardly any intersection; as of the second half of the 20 century, however, massive migrations to the cities resulted in increased clashes of different traditions. Confrontations forced the states to address the "otherness" of the indigenous cultures and to develop potential solutions for people coexisting in plural societies.

WORLD VIEW: HARMONY AS THE GUIDING PRINCIPLE

Although the indigenous cultures on the subcontinent are quite diverse, there are basic elements which share striking similarities. For instance, most of the peoples refer to their world view, on which they base their human interaction and legal traditions, as cosmovision: the way they view, feel, understand and project the world. Their cultural identity arises from a strong connection to the environment, particularly to nature, which is referred to as Mother Earth. The ultimate objective is *vivir bien*, which means something like "living well" and is derived from the terms *sumak kawsay* in Quechua and *suma quamaña* in Aymara. These terms describe striving for harmonious coexistence, first and foremost between man and nature. Nature and its elements (animals, rivers, forests, etc.) as well as humans within their community have both rights as well as responsibilities. *Vivir bien* therefore encompasses the idea of the common good, but includes explicitly all life and nature. Belief that nature possesses an animate quality is an important element of indigenous spirituality.

In communities characterised by the coexistence of humans and nature collective rights apply. The ultimate goal of conflict resolution is to retain or restore harmony. Decisions are made in community assemblies by consensus, not majority decision. There is no tradition of competition between different fundamental viewpoints, an essential characteristic of Western democracies, and it is most often unwanted. Of course there are also numerous conflicts in traditional indigenous communities. But traditionally, conflict resolution is based on the above-mentioned guiding

principles. The idea is for the jurisdiction to restore balance within the community. During the resolution process, collective rights frequently run counter to the rights of the individual. Due to increasing contact with liberal legal tradition, which is based on the rights of the individual, these tensions are now arising more frequently.

Convention of the Zapotec in Ayoquezco de Aldama in Oaxaca, Mexico: community assemblies deliver their mandate to the traditional authorities. | Source: © KAS Bolivia.

ORGANISATION OF INDIGENOUS COMMUNITIES

Indigenous communities are structured differently depending on their ethnic composition. The descriptions below therefore represent examples and are not universally applicable. The customs and conventions of each indigenous people vary from one community to the next.

In most cultures, the community assembly is of prime importance. This is where all important decisions are taken. In some cultures, only men are entitled to attend community assembly meetings, in others women are allowed to attend but are not permitted to be involved in discussions, and in yet others women do play a part in the decision-making. In many cultures the community assembly gives the traditional authorities their mandate. Frequently, a person must have progressed through a hierarchy of positions before being allowed to hold high office. This is true among the Zapotec and Mixtec in Mexico, for instance. In the culture of the Quara Quara Suyu in Bolivia, this

is referred to as *thakhi*, which is equivalent to "path" in Quechua. People embark on this path by holding positions of modest responsibility before going on to positions of greater responsibility. Each post can only be held once, and they are honorary and unpaid. The rotation of positions is meant to prevent cronyism and corruption. Only those who have proved themselves in simple roles are honoured by being allowed to hold a public office entailing greater responsibility. In other cultures, the head of the community is determined for life. This applies to the *longko* among the Mapuche in Chile. Only a person who is respected by the entire community and has already rendered good services can hold this high office. The candidate must undergo a number of physical, spiritual and intellectual tests. He must prove his knowledge of the history of the Mapuche people, for instance, the history of his own family and his eloquence in the *mapudungun* language. In the culture of the Guarani in Bolivia, the highest office of the Capitán Grande can be held both by women and men. Originally it was conceived as a position for life that was passed down within the family; however, this tradition is currently in flux.

In many cultures, the organisational structure is restricted to the particular community; in others, however, there is a national administrative structure.

Respect for the wisdom of old age is a further common element of indigenous cultures. Many communities consult a council of elders before taking decisions. In many cultures, the organisational structure is restricted to the particular community; in others, however, there is a national administrative structure. The Guna people in Panama, for instance, have a General Congress, which acts as a representative body of all Guna and thus as the highest-ranking body of administration and political decision-making.

In many areas, indigenous traditions and state structures have become enmeshed. In 418 communities of the Mexican federal state of Oaxaca, the mayor is elected according to local customs and conventions. This avoids conflicts of competence and coordination such as those occurring in numerous communities of the Bolivian highlands, where structures of state administration exist in parallel with indigenous office holders.

CUSTOMS AND CONVENTIONS AS A BASIS OF INDIGENOUS JUSTICE

All citizens are called upon to contribute on a voluntary basis within limits of their physical capabilities. Anybody who refuses to contribute is fined.

In indigenous cultures, the community plays a prominent role. Each member must serve the community and individual members of the community. Land is generally owned collectively and managed jointly. The Zapotec in Oaxaca practice *tequio*. When there is work to be done, all citizens are called upon to contribute on a voluntary basis within limits of their physical capabilities. They participate in the construction of public infrastructure, play in bands or teach crafts and other skills. Anybody who refuses to contribute is fined in minor cases or threatened with expulsion from the community in the most extreme cases. All members of the community contribute to making traditional celebrations a success by donations in kind or of money and by performing some of the work involved. For the Guarani in Bolivia, the *faena* is of great importance. The entire community helps on a voluntary basis, for instance with the construction of a house or preparation of a piece of agricultural land of a member of the community, who repays them with food and chicha, a traditional fermented maize drink. Serving on the community assembly and holding public office also comprise the duties of members of the community. Refusal to perform these duties is punishable.

Following this logic, the purpose of indigenous jurisprudence is to restore balance and harmony within the community after breaches of the rules. It is usually the responsibility of the highest authority to dispense justice. In some cultures, decisions about sanctions are made in the community assembly. By tradition, indigenous justice deals with all violations, which is partly due to the fact that the state justice system did not reach most of the indigenous communities until sometime in the 20th century and still has no presence in some isolated cultures. The indigenous justice systems deal with cases of neighbourly dispute, marital dispute and infidelity, conflicts over land and boundaries, theft as well as bodily harm, rape and murder. Over the last few decades, the justice systems of the state and of the indigenous peoples have become increasingly enmeshed. Since the passing of legislation on the coordination of state and indigenous justice systems in Bolivia in

2010, for example, certain criminal cases (such as murder and rape) must be handed over to the state justice system. There are defined procedures to be followed, for instance with respect to the questioning of suspects and hearing of witnesses.

Yampara people dancing in Tarabuco, Bolivia: All members of the community contribute to traditional celebrations by donations in kind or of money. | Source: © KAS Bolivia.

Any sanctions are aimed at rehabilitating the perpetrators to reintegrate them into the community. According to this traditional concept of justice, physical and psychological damage to the community or the victims (and their family) requires restitution. In many cultures, adultery is thus punished harshly as it damages the structure of the family and thereby of the community. But reconciliation between the spouses remains the principal aim in many cultures to ensure that the children continue to be well cared for. The spreading of rumours is also punished heavily as it can be very detrimental to harmony within the community.

To avoid expulsion, the perpetrator must show remorse and the will to reform. Recidivism results in considerably harsher sanctions. There are economic, physical and moral punishments. Fines are imposed for minor violations. The most common sanction is community service. Physical labour is meant to be cleansing for the soul. Corporal punishment such as beating and flogging is also thought to have a purging effect and to act as a deterrent at the same

time.[3] Many cultures still have the death penalty for particularly serious offences. Moral punishments include some that expose the perpetrator to humiliation by the community. A cattle thief from the Quehue-Quechua community in Peru was thus made to parade around all the communities with the animal's hide around his neck, which bore the inscription: "I am a cattle thief".[4] Members of the Marka Yaku in the La Paz Department in Bolivia who have committed serious crimes are locked up in burial houses with the remains of their ancestors.[5] Anyone among the Achuar people in Ecuador who has wrongly accused a fellow member of the community is regarded as worthless, shunned from that time onwards and no longer allowed to perform any community services, which is considered one of the worst possible penalties.[6] In all cultures, the most severe sanction is expulsion from the community.

Anyone among the Achuar people in Ecuador who has wrongly accused a fellow member of the community is, shunned from that time onwards and no longer allowed to perform any community services.

The above-mentioned legal traditions predominantly represent customary law, which is generally not set down in writing. This allows the indigenous justice systems to adapt to changing traditions. But due to intensified contact with other cultures, and in particular Western culture, members of indigenous communities are increasingly demanding their individual rights. In many communities, active political rights for women have thus been introduced over the last few years. In Santa Maria Quiegolani, Eufrosina Cruz's village, women now have voting rights. Increased interaction with the Western legal tradition is probably also the reason why acceptance of corporal punishment is slowly diminishing. This type of punishment is gradually being replaced by fines and community service.

3 | Oswaldo Ruiz Chiriboga, "Indigenous Corporal Punishments in Ecuador and the Prohibition of Torture and Ill-Treatments", in: *American University International Law Review*, No. 4, Vol. 28, 2013, 976-1016.

4 | Jean-Jaques Decoster and Eliana Rivera Alarcón, "Estado del relacionamiento en Perú", in: Eddie Cóndor Chuquiruna (ed.), *Estado de relación entre justicia indígena y justicia estatal en los países andinos. Estudio de casos en Colombia, Perú, Ecuador y Bolivia*, Comisión Andina de Juristas, Lima, 2009, 88.

5 | Eduardo Rodríguez Veltzé and Farit Rojas Tudela (eds.), *Pensar este tiempo: Pluralismo jurídico,* Konrad-Adenauer-Stiftung, La Paz, 2010, 83.

6 | Fernando García Serrano, "Estado del relacionamiento en Ecuador", in: Chuquiruna (ed.), n. 4, 116.

TENSIONS BETWEEN COLLECTIVE AND INDIVIDUAL RIGHTS

Women's rights are a good example to illustrate the conflicts between individual rights guaranteed under the constitution and equally protected collective rights of indigenous peoples. In many cultures, women have no rights or only indirect rights to political participation. The cultures of the Aymara and Quechua in the Bolivian highlands apply the principle of dual office holding, the *chacha-warmi*. Only married men can hold offices and they exercise their duties in collaboration with their wives. While the wife is present in public meetings, the man has the sole right to speak. In many communities in Mexico and Guatemala, women hold offices on behalf of their husbands or sons who have emigrated to the USA.

Violence against women is a common occurrence in many cultures. Among the Triqui in Mexico, young girls are forced into marriage at the age of around twelve.

Violence against women is a common occurrence in many cultures, but by no means restricted to the indigenous groups. Among the Triqui in Mexico, young girls are forced into marriage at the age of around twelve. Among the Matsiguenga in Peru, repeated adultery by a woman is punished by death.[7] If a man from the Achuar people in Ecuador does not kill his adulterous wife and her lover, he becomes the laughing stock of the community.[8] In various indigenous communities of the Bolivian highlands, the sanction for an unmarried man raping an unmarried woman is for the two to be married. That way, both the honour of the woman's family and harmony in the community are restored and a child potentially produced by the rape is taken care of. Among the Quehue-Quechua, domestic violence against women was not covered by indigenous justice until several years ago as a husband was accorded the right to chastise his wife. In many cases there is thus a contradiction between women's rights guaranteed by the constitution and by international law and the reality of everyday life. Indigenous women suffer double discrimination on account of their ethnicity and their gender. Draconian sanctions that are occasionally carried out within

7 | Jean-Jaques Decoster and Eliana Rivera Alarcón, "Estado del relacionamiento en Perú", in: ibid., 66.

8 | Fernando García Serrano, "Estado del relacionamiento en Ecuador", in: ibid., 118.

the framework of indigenous justice, such as corporal punishment resulting in death, are in clear contradiction to human rights enshrined in international law.

THE RIGHT TO EXISTENCE AND OFFICIAL RECOGNITION OF LEGAL PLURALISM

Particularly where issues of corporal punishment, discrimination against women or legal sanctions to punish violations of moral codes are concerned, indigenous justice immediately rouses indignation among advocates of liberal civil rights – human rights for which Western cultures spent centuries fighting at great cost. However, while criticism of excesses may be justified, examination of the matter is imperative and appropriate if done in a careful manner and need not be subjected to the accusation of boundless cultural relativism. For a start, one must not overlook the fact that over the centuries the indigenous communities have probably implemented their customs and conventions for the purpose of resolving internal conflicts, for instance, with no more or less awareness and acceptance of violating the rights of the individual than the state justice systems did. Occasional cases of conflict between collective and individual rights are outweighed by generally consensual and effective conflict resolution. This is also the reason indigenous communities have survived for centuries: They were able to develop and maintain appropriate rules of behaviour and mechanisms for conflict resolution. Not least, the indigenous communities have undergone some development, for instance in the area of political participation of women.

Indigenous communities have survived for centuries. They were able to develop and maintain appropriate rules of behaviour and mechanisms for conflict resolution.

One must also bear in mind that Western values, which have become enshrined in the protection of human rights in constitutions and international law, were negotiated predominantly without the involvement of the indigenous communities of (not just) the Latin-American continent. These cultural communities asking the question as to why they must conform to these sets of values, which are held to be universal, is therefore not altogether unjustified in light of democratic principles or the concept of social contract. Added to this is the fact that international law and national constitutions do not only protect the civil liberties

of the individual but also the collective rights of indigenous societies. The right to social, economic, political and institutional autonomy, to the preservation and maintenance of their traditions and methods of conflict resolution and therefore also to an interculturally modulated interpretation and application of (Western) state justice can thus be found in articles 1 I, 2 I, 4 I, 5, 6 I, 8 I, 9 I of the 1989 ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, which the majority of the continent's states have ratified.[9] Essential recommendations for action in line with the recognition of plural – including legal – structures in the relationship between the states and indigenous communities can also be found in articles 4, 5, 20, 34 of the United Nations Declaration on the Rights of Indigenous Peoples from 2007. Also, several states have enshrined pluralism and corresponding rights relating to autonomy including the right to autonomous conflict resolution according to the communities' own customs and conventions in their constitutions[10] and developed them further in their legal decision-making on constitutional matters.[11] The Inter-American Court of Human Rights has also dealt repeatedly with the rights of indigenous groups and demanded an intercultural interpretation of the rights protected by the American Convention on Human Rights, for instance by expanding the protection of private property to the communal property of indigenous communities.[12]

9 | The following individual countries have ratified the agreement: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, Venezuela; by contrast, the following countries have not: Cuba, El Salvador, Haiti, Panama and the Dominican Republic. The ratification is not necessarily an indication of the progressiveness of policy on indigenous matters. Practices in Panama, for instance, are far more cooperative and constructive than those in Guatemala.

10 | Cf. for instance article 75 of the Argentinian constitution; articles 1, 2, 11, 26, 30, 98, 178, 179, 190-192, 289-292 of the Bolivian constitution; articles 1, 7, 246, 330 of the Columbian constitution; article 2 of the Mexican constitution as well as articles 16, 112 of the constitution of the Mexican federal state of Oaxaca; article 90 of the constitution of Panama (where the extensive autonomy of the indigenous peoples was mainly implemented via legislation and government decrees); articles 89 and 149 of the Peruvian constitution; article 171 of the Ecuadorian constitution; article 260 of the Venezuelan constitution.

11 | A precedent in this area was set by judgement T-523/97 (15 Oct 1997) of the Colombian Constitutional Court.

12 | Cf. Oswaldo Ruiz Chiriboga and Gina Donoso, *Sección Especial. Pueblos Indígenas y la Corte Interamericana,* in: ‣

The cultural contextualisation of human rights does not represent a backward step in terms of the values and principles that continue to be observed by westernised sectors of the population. Instead, it represents a necessary concession, taking into account the legally acknowledged fact that various cultures are living together as collectives – and not just as congregations of individuals who feel bound to a particular culture – within the territory of a single state, whose world views and ways of life have developed differently through human history. To the degree that the state and society (or societies) acknowledge and respect this diversity as a fundamental value and wish to ensure its continued existence, a certain degree of tension and asymmetry must be accepted as well.[13] Such differences are in actual fact not unknown in the European cultural landscape either. The acknowledgement of cultural diversity is expressed in the subsidiarity principle, for instance, which is an attempt to organise the regulating and administrative responsibilities within the European Union in such a way that decisions are taken as sensitively to the needs of the citizen as possible and by no means uniformly in all cases. In the area of human rights protection, the European Court of Human Rights affords the Member States of the European Council a certain amount of leeway at national level where the interpretation and application of the European Convention on Human Rights is concerned in order to allow for the special cultural makeup of each country.

The acknowledgement of cultural diversity is expressed in the subsidiarity principle, in such a way that decisions are taken as sensitively to the needs of the citizen as possible and by no means uniformly in all cases.

STRIKING A BALANCE IN INDIVIDUAL CASES

The question is therefore not as to "whether" cultural differences are permitted, but as to "how" matters are handled within borderline areas. There are two such areas. Firstly, there is the question of how to manage conflict situations in the cultural grey areas, that is in the areas where different

Christian Steiner and Patricia Uribe (eds.), *Convención Americana sobre Derechos Humanos Comentada,* Suprema Corte de Justicia de la Nación and Konrad-Adenauer-Stiftung, Mexico City, 2013 (in press).

13 | On the phases of the recognition of legal pluralism in Latin-America cf. "Introducción y explicación previa", in: Eddie Cóndor Chuquiruna (ed.), *Los Derechos Individuales y Derechos Colectivos en la Construcción del Pluralismo Jurídico en América Latina*, Konrad-Adenauer-Stiftung, 2011, 10 et sqq.

cultural traditions clash, for instance when members of one cultural community move temporarily or permanently into the territory of another. This frequently happens in the course of the rural exodus, which results in the meeting not only between people from indigenous cultures and members of a westernised cultural community in the cities but also between members of different indigenous communities. Maintaining the ideal of consistent legal pluralism in this scenario, i.e. treating everybody according to their own customs and conventions, would demand enormous resources and be the nightmare of any judge. The principle applied in practice in these situations is that of territoriality, which is already provided for under some constitutions or coordination laws, whereby the reach of the jurisdiction of the indigenous authorities is restricted to the territory of the particular community or people. While academics regard the principle of territoriality as viable (assuming the territories of the indigenous groups are clearly delimited), as an alternative they also propose the establishment of inter-cultural bodies of jurisprudence of mixed composition.[14] In keeping with the personnel principle – and on the basis of current coordination legislation[15] – one could envisage cases where even a legal dispute between two indigenous persons arising far from their communities could be decided by authorities from their communities.

In practice, however, legal disputes more usually relate to conflicts on indigenous territory between indigenous customs, traditions and collective rights on the one hand and the basic civil liberties of Western tradition on the other. These situations can arise when non-indigenous citizens enter the territory of an indigenous community or when indigenous people themselves attempt to claim the rights of the individual enshrined in the constitution. There has been a rise in the latter cases as contacts between members of indigenous groups and Western culture have been on the increase. When dealing with the ensuing fluid transitions between culturally totally unaffected indigenous people and those who can no longer be regarded as indigenous due to continuous or prolonged contact with Western

14 | Juan Carlos Martínez, "La jurisdicción", in: Juan Carlos Martínez, Christian Steiner and Patricia Uribe, *Elementos y técnicas de pluralismo jurídico. Manual para operadores de justicia,* 39 et seq.

15 | See also references p. 30.

culture, the Columbian Constitutional Court grants the indigenous community a large degree of autonomy, which the rights of the individual must cede to if this is necessary to maintain the conditions underpinning the existence of the people's culture. The idea is that the stronger the cohesion and self-control of the ethnic group the greater the permitted degree of autonomy needs to be to ensure that their customs and conventions are protected. In the event of conflict between the legal tradition of an indigenous group and the standards of public order, the former need not automatically cede; it only needs to do so if rights protected under constitutional law are deemed to be of greater value than ethnic diversity and the integrity of the indigenous group.[16] With respect to the claim of the universal applicability of human rights, the Constitutional Court does, however, maintain the proposition that the country's constitution adopts neither an extremely universalist attitude nor one of uncompromising cultural relativism.[17]

Even though both the instruments of international law for the protection of the rights of indigenous groups and the national constitutions link indigenous conflict resolution to basic rights, internationally recognised human rights and partly even to common law,[18] the resolution of potential conflict situations is not as simple as the principle of priority of fundamental rights would suggest if one takes into account the demands for pluralism and interculturalism that are also enshrined in international and constitutional law. Knowledge about the scope and content of indigenous autonomous rights, including the right to autonomous conflict resolution based on the communities' own customs and conventions, has not yet found its way into many state institutions and courts of law. Consequently, decisions by indigenous authorities are being ignored, with the result, for instance, that a perpetrator already punished by the

Knowledge about the scope and content of indigenous autonomous rights, including the right to autonomous conflict resolution, has not yet found its way into many state institutions and courts of law.

16 | Rosembert Ariza Santamaría, "Derecho aplicable", in: Martínez, Steiner and Uribe, n. 14, 51 et seq.

17 | See Rosembert Ariza Santamaría, *Teoría y práctica en el ejercicio de la jurisdicción especial indígena en Colombia,* in: Rudolf Huber and Juan Carlos Martínez, *Hacia sistemas jurídicos plurales,* Konrad-Adenauer-Stiftung, 2008, 262.

18 | Cf. the overview in José Antonio Regalado, *De las sanciones y las penas en la justicia indígena,* in: Martínez, Steiner and Uribe, n. 14, 106 et seq.

appropriate indigenous authorities is sentenced a second time (in a state court) in contravention of the principle of *ne bis in idem*. Also, indigenous authorities themselves are occasionally prosecuted for unlawful assumption of authority.[19]

Indians of the Ngäbe tribe in Panama: the Supreme Court conducts regular coordination meetings with indigenous authorities. | Source: © KAS Bolivia.

That said, some of the highest legal bodies of several countries have begun to address the highly complex task of devising a functional system of legal pluralism over the last few years, including for instance the administrative chamber responsible for the dispensation of justice at the Supreme Court of Colombia, a country that has a high degree of diversity with 102 (!) different indigenous groups.[20] Another undertaking in this country, which is considered exemplary, consists of efforts made by the state justice system to coordinate its activities with those of the Superior Indigenous Tribunal of Tolima, the Tule people and the Regional Association of Indigenous Authorities AZCAITA; this involves training opportunities for both state and indigenous representatives as well as regular

19 | Cf. the examples for Guatemala: "Introducción y explicación previa", in: Chuquiruna (ed.), n. 13, 15; for Peru: Mirva Aranda Escalante, "La coordinación entre sistemas de justicia en Colombia, Ecuador y Perú", in: ebd., 136 et seq.
20 | Cf. Sala Administrativa del Consejo Superior de la Judicatura, "Acuerdo No. PSAA12-9614 (19 Jul 2012) por el cual se establecen las medidas de coordinación inter-jurisdiccional y de interlocución entre los Pueblos Indígenas y el Sistema Judicial Nacional".

coordination meetings.[21] The Mexican Supreme Court has also addressed this problem area by drawing up a protocol for the observance of the rights of the indigenous peoples.[22] The Supreme Court of Peru has been making intensive efforts to enhance the coordination between state and indigenous justice systems and published a roadmap for "intercultural justice"[23] in 2012; the Supreme Court of Panama similarly conducts regular coordination meetings with the country's indigenous authorities. These and other state institutions have not only realised that maintaining their own legal traditions by indigenous groups is an undeniable reality. They also see an opportunity here to allow constructive cooperation with the indigenous authorities to relieve the burden on a state justice and court system that to date has been largely inefficient and ineffective. In frequently remote areas, where there is neither a judge nor public prosecutor, the indigenous justice system generally represents the only available mechanism for conflict resolution. It is also fast, effective and tailored to the concrete needs and circumstances of these communities.[24]

In frequently remote areas, where there is neither a judge nor public prosecutor, the indigenous justice system generally represents the only available mechanism for conflict resolution.

21 | This is described by Rosembert Ariza Santamaría, *Coordinación entre sistemas jurídicos y administración de justicia indígena en Colombia,* Instituto Interamericano de Derechos Humanos, San José, Costa Rica, 2010, 43 et sqq.

22 | Cf. Suprema Corte de Justicia de la Nación, "Protocolo de actuación para quienes imparten justicia en casos que involucren derechos de personas, comunidades y pueblos indígenas".

23 | Cf. Corte Suprema de Justicia de la República (Peru), "Resolución Administrativa No. 499-2012-P-PJ que aprueba la Hoja de Ruta de la Justicia Intercultural del Poder Judicial". See also the experiences of the public prosecutor's office of Canas, Cusco (Peru): Eddie Cóndor Chuquiruna, Mirva Aranda Escalante and Leonidas Wiener (eds.), *Experiencias de coordinación y cooperación entre sistemas jurídicos en la Región Andina,* Comisión Andina de Juristas, Lima, 2010, 38 et sqq.

24 | See practical examples of the dispensation of indigenous justice on Colombia: Esther Sánchez Botero, "Principios básicos y formas de funcionamiento de la justicia que se imparte entre los paeces y los wayú como forma cultural adecuada, legítima y viable para resolver conflictos y coaccionar a sus sociedades particulares", in: Huber and Martínez, n. 17; on Guatemala: Guillermo Padilla, "La historia de Chico. Sucesos en torno al pluralismo jurídico en Guatemala, un país mayoritariamente indígena", in: Huber and Martínez, n. 17; on Panama: Aresio Valiente López, "La jurisdicción indígena en la legislación panameña", in: Huber and Martínez, n. 17; on cases of collisions between communal property and private ▸

The Colombian Constitutional Court established benchmarks for the resolution of specific cases of intercultural conflict back in the nineties, which are gradually being accepted in the other countries. Initially, the Court derived two fundamental principles for the relationship between the state and indigenous justice systems from the state goal of cultural plurality and the indigenous peoples' rights to autonomy. According to these principles, indigenous justice enjoys maximum autonomy. The state has very limited rights to overrule in the indigenous system for the purpose of safeguarding legally protected rights deemed to be of greater value, while always giving priority to that of several possible interpretations best matched to the circumstances and the cultural situation of the indigenous group and the individual.[25] With respect to potential conflicts between the collective right to autonomous conflict resolution and the curtailment of the rights of the affected individual that this might entail (due to an obligation to perform community service, corporal punishment, limitation of the freedom of religion), the Court has set up a catalogue of absolute restrictions to the interference with individual rights. Such restrictions are derived, in the opinion of the Court, from an international and ideologically universal consensus where specific rights cannot even be curtailed in a state of emergency. According to this catalogue, life is inviolable. Torture, mutilation and slavery are prohibited, and proceedings to impose sanctions must satisfy the principle of legality. In addition, the Court is of the view that human dignity demands that the indigenous authorities should not be allowed to violate the essence of the basic rights of the members of the indigenous community.[26]

Within these absolute limits, the Colombian Constitutional Court grants the indigenous groups extensive freedoms in how they structure their conflict resolution mechanisms. As the great diversity would make it impossible for state judges to be familiar with the particular traditions involved,

property in Paraguay and Surinam see Oswaldo Ruiz Chiriboga, "Propiedad comunal vs. propiedad privada e intereses estatales", in: Huber and Martínez, n. 17.

25 | Cf. Rosembert Ariza Santamaría, "Teoría y práctica en el ejercicio de la jurisdicción especial indígena en Colombia", in: Huber and Martínez, n. 17, 263.

26 | Cf. ibid., 263 et seq. with references to the court decisions.

expert reports by anthropologists assume a special significance in the evaluation of individual cases.[27]

The absolute limits to the dispensation of indigenous justice set by the Colombian Constitutional Court may seem far too generous to some liberals, seeing that they permit the unequal curtailment of the civil liberties of citizens within a state. Others question even this minimum catalogue, pointing out that the supposed universal consensus does not in fact exist. These people maintain that the indigenous groups in Latin America had not been able to participate in the drafting of the instruments of international law for the protection of human rights and that the Colombian Constitutional Court had not consulted the indigenous people to find out whether they did indeed share these convictions. The proponents of the two extreme positions try to assert their respective pure tenet, but this is simply not feasible in a country with a plural cultural reality. However, the situation does not preclude rapprochement and learning processes taking place within a genuine intercultural dialogue between these cultures with the potential to enrich Western culture as well as effecting changes in indigenous traditions which are essential from the perspective of universal human rights. In exactly the same way as Western cultures had to and were able to progress in small steps through the centuries, particularly where non-discrimination against certain groups of the population was concerned, the customs and conventions of indigenous communities should not be set in stone either. But cultures need to undergo such processes by their own efforts. Members of other cultural circles, particularly the majority culture, can only provide impulses and support the actors of internal change. Attempts at forcing cultural adaptation have little likelihood of success; as history has shown, they actually tend to be counterproductive.[28]

Western cultures had to progress in small steps through the centuries, so the customs and conventions of indigenous communities should not be set in stone either.

27 | Cf. for instance Cécile Lachenal, "Las periciales antropológicas, una herramienta para la hermenéutica intercultural y la justicia plural", in: Huber and Martínez, n. 17, 187 et sqq.

28 | Interesting on this topic: Michael Pawlik, "Wie allgemein sind die Menschenrechte?", *Frankfurter Allgemeine Zeitung*, 27 Nov 2009, 11.

In the majority of the continent's societies, the impressive cultural diversity invariably entails ideological differences in political, economic, social and moral questions, for which socially acceptable solutions need to be found by legal means in order to facilitate social peace and "living well" within and between the cultural communities. This is an immensely complex task for several reasons.

CLIMATE OF DISTRUST

As was already mentioned at the beginning, the search for solutions is characterised on the one side by the indigenous groups' distrust of the descendants of the "discoverers" and conquerors and their power structures, whose historic guilt has not yet been forgotten. But neither has the more recent offering of Columbus's heirs in the form of the democratic but culturally homogenous constitutional state been able to fully convince the continent's original inhabitants. This is because they have enjoyed little of the promised benefits of a globalised market economy and because the current development model, based on the mining of natural resources mostly located on their territories, is even having negative impacts, to the point where it has posed a threat to their cultural and physical existence.

On the other side, i.e. on the side of the white immigrants and even among children of mixed marriages, the so-called mestizos, contempt for the indigenous cultures and ways of life, which are regarded as "primitive" and "backward", is rife. Indigenous justice is incorrectly equated with lynch-justice.[29] And the opposition of indigenous communities to major infrastructure projects or the mining of natural resources on their ancestral lands, which are protected formally by legal title, elicits little sympathy from the rest of the population. A genuine and constructive dialogue aimed at mutual cultural enrichment, delimitation of responsibilities and agreement on coordination mechanisms is difficult in such a climate.

The opposition of indigenous communities to major infrastructure projects or the mining of natural resources on their ancestral lands, which are protected formally by legal title, elicits little sympathy from the rest of the population.

29 | Cf. Eddie Cóndor Chuquiruna, "Introducción y explicación previa", in: idem (ed.), n. 13, 16 et sqq.

REGULATING LEGAL PLURALISM – A PARADOX

While indigenous interests may currently still be able to count on the support of the majority of the indigenous groups in most cases, this is based mainly on a post-colonial or anti-imperialist discourse, where people wish to distance themselves from the prevailing (power) relationships of previous decades and centuries. But even this cannot totally hide the diverging, and sometimes even opposing, interests that obviously exist with such a large number of peoples and communities on the continent and even within individual countries. The spectrum ranges from the Indian tribe in the Amazon Basin numbering a few dozen members, which is still totally isolated, to well organised peoples with complex structures in the Andean highlands (e.g. the Aymara in Bolivia) to communities such as the Nasa in Colombia, who hardly differ from the mostly Western urban population in appearance and way of life. And there are also some indigenous communities that seek to rule over others to which they are superior in terms of organisation and numbers.

This anthropological and social heterogeneity is reflected in the fact that some communities are more intent on autonomy than others and in the complexity of the legal standards, traditions and customs as well as the internal organisation. Any efforts to establish a universal set of rules to delimit responsibilities are therefore unlikely to succeed unless they wish to dispense with the central demand for pluralism. That is, because legal pluralism in its ideal form, as envisaged by experts in legal theory, does not consist of numerous independent legal systems existing in isolation from each other. Instead, what is needed is an overall system of varying sets of rules capable of undergoing constant adaptation and change.[30] It is therefore not surprising that staunch legal pluralists and indigenous

30 | See the description in Farit L. Rojas Tudela, "Del monismo al pluralismo jurídico: interculturalidad en el estado constitucional", in: Chuquiruna (ed.), n. 13, 29 et sqq.; Alfredo Sánchez Castañeda, "Los Orígenes del Pluralismo Jurídico", in: Nuria González Martín (ed.), *Estudios jurídicos en homenaje a Marta Morineau. Derecho romano. Historia del derecho*, Vol. 1, Mexico City, 2006, Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México (UNAM), 2006, http://biblio.juridicas.unam.mx/libros/4/1855/29.pdf (accessed 4 Sep 2013).

Since the Colombian constitution came into force in 1991, indigenous associations have fought successfully against any attempt to curtail legal pluralism via the law.

people consider the Bolivian 2010 law to delimit the justice systems (*Ley de Deslinde Jurisdiccional*) as a step backward compared to the ambitious regulatory framework of the Bolivian constitution. In Ecuador, a similar draft law has been awaiting approval for several years.[31] A few aspects, however, have been regulated by legislation on judicial authority.[32] In Venezuela, the scope of indigenous jurisdiction and coordination with the state justice system have so far only been regulated by a general law dealing with indigenous peoples.[33] Specific legislation on coordination is currently being drafted.[34] Since the Colombian constitution, which envisages coordination legislation, came into force in 1991, indigenous associations have fought successfully against any attempt to curtail legal pluralism via the law. Nevertheless, representatives from the state justice system and indigenous associations have developed various mechanisms to further indigenous justice and its coordination with state institutions.[35]

To a legal positivist, a generally applicable system to regulate the delimitation of responsibilities by subject matter, person and territory and to determine applicable law in the manner of international civil law can hardly be avoided if legal certainty is to be ensured. But developing collaboration and coordination between the different legal systems further on the basis of case orientation and constitutional principles might also work. That would be more akin to the Anglo-Saxon legal tradition. One could also interpret the survival of the indigenous legal traditions over the last 500-plus years as indicating that they do not require any legal embodiment at all, and that an attempt to regulate them may even spell their demise.

31 | See Ecuadorinmediato.com, "Proyecto de Ley de Coordinación entre Justicia Indígena y Justicia Ordinaria será una de las prioridades de la Comisión", 31 May 2013, http://ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=198089 (accessed 4 Sep 2013).
32 | Art. 343 et sqq. of the Código Orgánico de la función judicial.
33 | See "Ley Orgánica de Pueblos y Comunidades Indígenas", article 133 et sqq.
34 | Cf. Agencia Venezolana de Noticias (avn), "Estiman presentar Ley de Jurisdicción Especial Indígena ante la AN el próximo año", 4 Dec 2012, http://avn.info.ve/contenido/estiman-presentar-ley-jurisdicción-especial-indígena-ante-próximo-año (accessed 4 Sep 2013).
35 | Cf. detailed Ariza Santamaría, n. 21.

Coordination of state law and indigenous law: As Vice Minister for Indigenous Justice, Isabel Ortega worked on the legal pluralism in Bolivia. | Source: © KAS Bolivia.

INDIGENOUS PEOPLES AND INTERNATIONAL LAW OF NATION STATES

It is no secret that the borders between Latin-American states have little or nothing in common with the ancestral spheres of the continent's original inhabitants. But even the new constitutions with their distinctly pluralist rhetoric do not question the territorial integrity of its states. Neither the enigmatic right to self-determination in international law (as applicable to nation states) nor the pluralist constitutions emphasise the right of the ethnic collective to autonomy to the extent that this might result in sovereign national borders being questioned. This does not prevent indigenous peoples whose members straddle national borders from debating this aspect of the colonial heritage. It makes it all the more urgent for the state and its institutions to answer the question as to what added value the state provides to the asymmetrical conglomerate of peoples and communities on its territory. Based (loosely) on a federal model, it will be necessary to integrate indigenous communities, autonomous areas and self-governed units into the central state administration so as not to lose track of the common project in spite of all the diversity.

One has to acknowledge, though, that after centuries of forced cultural homogenisation and exclusion from the power structures of the state, the search for common interests does not figure very highly on the list of priorities of the indigenous groups. In view of this, the societies in Latin-America have a long way to go before they will achieve the aim of peaceful coexistence in mutual respect and recognition of the other parties even in these days of pluricultural statehood. After centuries of living separate lives, the prejudices against "the other" are still deeply rooted in the socio-historic consciousness. To allow a rapprochement between the cultures will require tolerance and respect as well as the willingness and courage to learn from one another. And that goes for both sides.

POLITICS, CHIEFTAINCY AND CUSTOMARY LAW IN GHANA

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Ghana has been recognised internationally in recent years as a country whose democratic reform efforts have not only been emblematic of successful democratisation, but which also have brought significant benefits to the country. However, the country continues to cherish and maintain ancient values and tradition, exemplified most strongly by the institution of Chieftaincy. Chieftaincy is the custodian of the customary values and norms in the country: defined as customary laws that regulate civil behavior in traditional governance. However, over the years, politics have influenced the institution of chieftaincy and customary law.

THE CHIEFTAINCY INSTITUTION IN GHANA

Chieftaincy is one of the few resilient institutions that have survived all the three political phases of Ghana's history: pre-colonial, colonial and post-colonial times. It has also endured the turbulence of the three post-independence phases of modern Ghana: one party rule, military control, and multi-party regimes, regardless of the leaderships' attitude towards the chiefs and the broader institution. This is in contrast to other African countries, such as Uganda, where the titles of chiefs were reinstated in 1986, but without any political power, after the 1966 Constitution of Uganda abolished kings and kingdoms.

Chieftaincy is the primary substratum of Ghanaian society; consequently the political leadership dares not undermine its credibility without experiencing political and socio-cultural repercussions. According to the Centre for Indigenous Knowledge and Organizational Development (CIKOD), a local Non-Governmental Organisation which focuses on the development of indigenous institutions in Ghana, 80 per

cent of Ghanaians claim allegiance to one kind of chief or another.[1] The institution is considered to be the repository of history and traditional ways, as well as the custodian of the indigenous traditions, customs, and society of Ghana. The institution is further considered to be the bond between the dead, the living, and the yet unborn. It is a revered institution in Ghana which occupies the vacuum created by Ghana's modern political structures in terms of customary arbitration and law and enforcement at the communal level.

A critical feature of chieftaincy in Ghana is gender. The responsibilities and positions of men and women are well-defined in the institution in accordance with the tradition and custom of the people. In Northern Ghana, especially among the Dagombas three "skins" Kukulogu, Kpatuya and Gundogu are purposely reserved for women. The modes of succession to these skins are also well-defined. Among the matrilineal Akans, the top leadership positions and responsibilities are divided between men and women. For example, the heir to the stool normally is a man, but a woman shall nominate him.

Paramount chiefs in Accra: The title "chief" has a long historical trajectory. Colonial and post-independence Constitutions and military regimes have provided various definitions to suit the exigency of the regime and the time. | Source: © Isaac Owusu-Mensah, KAS.

1 | A study conducted by Centre for Indigenous and Organizational Development in 2006.

Also, positions in the Traditional Councils in Southern Ghana, with the exception of executioners, have male and female equivalents who complement each other in traditional governance. Against this backdrop, it seems necessary to explain who is a chief in Ghana. The title "chief" has a long historical trajectory. Various colonial and post-independence constitutions and military regimes have provided definitions to suit the exigency of the regime and the time. But, these changes and re-definitions share one key element, which is the recognition of the custom and tradition of the people.

The Fourth Republic Constitution and the Chieftaincy Act, 2008 Act 759, defines a chief as "a person who hailing from appropriate family and lineage, who has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queenmother in accordance with the relevant customary law and usage". The Act further sets the minimum qualification for a chief to be a person who has never been convicted of high treason, treason, high crime or for an offence dealing with the security of the State, fraud, dishonesty or moral turpitude.[2] Section 58 of the Act stipulates various levels of chiefs permissible in the country into "Asantehene and Paramount Chiefs; Divisional Chiefs; Sub-Divisional Chiefs; Adikrofo; and Others Chiefs reorganized by the National House". Any person upholding himself or herself as chief must belong to one of these categories outlined by the Act to ensure that appropriate privileges and responsibilities are assigned to him or her in accordance with the Chieftaincy Act.

CHIEFTAINCY IN PRE-COLONIAL GHANA

Ghanaians were organised into ethnic states. The paramount chief served as the executive head with the support of a council of elders.

The present day geographic location of Ghana, with its system of administrative structures, where the executive president is supported by ten regional ministers and 216 district chief executives, was naturally not the same during pre-colonial times. Ghanaians were organised into ethnic states. The paramount chief of the ethnic group served as the executive head with the support of a council of elders. These states included the Asante State, the Dagomba State, the Gonja State, the Anlo State and many others.

2 | Chieftaincy Act 2008, Act 756, Assembly Press, Accra, 2008.

The states were geographically different from the current regional demarcations. For example, the Asante state spanned four different regions of the contemporary Ghana.

Chieftaincy in the pre-colonial era was the main system of governance that administered combined legislative, executive, judicial, religious, and military responsibilities. These functions were vested in a chief and the Council of Elders of the community, which in turn were subject to the paramount chief or the king of the area. The lower level chiefs received instructions from the higher chiefs in all aspects of administration. The communities and divisional chiefs had responsibility to report to paramount chiefs the state of affairs of the community during an annual meeting to deliberate on the state of affairs. Although these types of institutions were not the same as those of Western institutions, in terms of structure and administrative procedures, and the substance of the responsibilities, as well as the privileges attached, they created a similar level of social and political cohesion in their respective communities as were found in Western countries at the time.

In terms of structure and administrative procedures, Ghanaian chieftaincy structures created a similar level of social and political cohesion in their respective communities as were found in Western countries at the time.

Pre-colonial Africa of course was no golden age and one should be hesitant to recommend the pre-colonial social and political system wholesale to modern Ghana; the system however exhibits a high level of democracy and protection of human rights and freedom within the context of the traditional values and cultures of the people.[3] The newly founded Alternative Dispute Resolution (ADR) is a recast of time-tested pre-colonial conflict resolution mechanisms administered through the chieftaincy institution, which sought to reconcile individuals and communities as well as improve social relations beyond mere settlement of disputes of conflicting parties.[4] The chieftaincy institution during the pre-colonial period was not regulated by any external legislation beyond the respective traditional

3 | Alexander Kaakyire Duku Frempong, "Chieftaincy, Democracy and Human Rights in Pre-Colonial Africa: The Case of the Akan System in Ghana Chieftaincy in Ghana: Culture, Governance and Development", in: Irene K. Odotei and Albert K. Awedoba (eds.), *Chieftaincy in Ghana: Culture, Governance and Development*, Sub-Sahara Publishers, Accra, 2006.

4 | Ibid.

councils. The Traditional Councils were considered independent entities with apposite sovereignty.

CHIEFTAINCY IN THE COLONIAL ERA

The chieftaincy institution during the colonial period was refined, restructured, and integrated into the British Colonial administrative hierarchy. This was for the British a cost-efficient means of facilitating control and governance. The colonial period served as the genesis of the legal framework to regulate the institution. Prior to this period, the chiefs with the support of and recommendations from their council of elders enacted laws to regulate their jurisdictions.[5]

There were three main guidelines that determined legislation regarding chieftaincy. First, the institution was tailor made to suit the British colonial requirement at the time. Secondly, attempts were made to practice a colonial policy before ordinances were introduced to legalise such practices, (ex post facto rationalisation of government action) and finally, chiefs who resisted laws of the colonial administration were deposed or deported out of the country.[6]

The colonial legislation on chieftaincy was stimulated by the necessity to deal with growing social discontentment which was increasingly threatening the position of the chief. It emanated from the agitations of the educated elites and the youth against colonial policies which were meant to exploit the indigenous population as well as to pilfer the mineral wealth of the communities through their chiefs as Colonial agents. Chiefs in these communities consequently lost the long held community reverence because they were considered traitors.

Consequently, the stability of the social order, of which the chiefs were amongst the foremost constituents, became a concern for the colonial regime.[7] The Gold Coast (present day Ghana) became an official British Colony in 1874

5 | Henry Saidu Daannaa, "History of Chieftaincy Legislation in Ghana", a paper presented at a seminar organized by Eastern Regional House of Chiefs, 2010.
6 | Ibid.
7 | Kwame A. Ninsin, "Land, Chieftaincy, and Political Stability in Colonial Ghana", *Research Review* 2, 1986, 2.

following the Order in Council of 1856. The Order in Council defined local norms, customary law, practices, and usages. The Order became the genesis of customary law in the new British colony.

Amongst the first major legislation regarding the chieftaincy institution was the Chiefs Ordinance 1904. The preamble of the ordinance reads: "An Ordinance to facilitate the proof of the election and installation and the deposition of chiefs according to native custom."[8] A major inroad made into the authority of the chieftaincy institution was to align their position to be dependent upon British recognition through vetting by the colonial government. The colonial regime set out to modernise the indigenous institutions and redesign them according to the British models of monarchy.[9]

Chieftaincy was dependent upon British recognition through vetting by the colonial government. The colonial regime set out to modernise the indigenous institutions and redesign them according to the British models of monarchy.

Although the British had promulgated the appropriate legislative instruments meant to give legal legitimacy to colonial activities, the native custom was highly respected and recognised by the colonial regime. The appreciation of customary law in Ghana was further fulfilled with the enactment of Native Authority Ordinance in 1932 which provided that "The Chief Commissioner may by Order made with approval of the Governor

a) constitute any area and define the limits thereof;
b) assign to that area any name and description he may think fit;
c) appoint any chief or other native or group of natives to be a native authority for any area for the purpose of this ordinances; and may by the same or any subsequent order similarly made declare that native authority for any area shall be subordinate to the native authority for any other area."

The ordinance enabled the Colonial regime to create more chiefs and head chiefs. For example, some parts of current Upper East, Upper West and Volta Regions were

8 | The Chiefs Ordinance, 1904.
9 | C.E.K. Kumado, "Chieftaincy and the law in modern Ghana", *University of Ghana Law Journal*, Vol. XVILL, 1990-1992, 194-216.

considered acephalous societies, communities without any central authority system. Social controls were accomplished by communal consensus. Family units were very strong in protecting and providing for the sustenance and needs of individuals. The colonial authorities created and established "chiefs" as heads of empires, kingdoms and principalities and ascribed them with native authority for the purposes of implementing the colonial policies.[10]

The emergence of colonial rule in the Northern Ghana concurred with the devastation of the major centralised states of Mamprugu, Dagbon and Gonja. The slave raiding and trading activities of Samory and Babatu pushed the three main kingdoms to the verge of disintegration.[11] These chiefs subsequently and enthusiastically signed agreements of protection with the British. During the pre-colonial era, people were captured and sold as slaves from two main sources, that is, where the chiefs served as collaborators and sold slaves and where slave masters raided communities and took captives as slaves. Babatu and Samory activities in the case of Mamprugu, Dagbon and Gonja kingdoms were part of the latter. The British restored peace, order and confidence among the people. The colonial regime restructured and legitimised relations between various ethnic groups and chiefdoms within these three states.

The British restored peace, order and confidence among the people. The colonial regime restructured and legitimised relations between various ethnic groups and chiefdoms within the states of Mamprugu, Dagbon and Gonja.

Five ethnic groups, Mamprugu, Kusasi, Grunshi, Frafra and Builsa, were merged with Nayiri (Chief of Magprugu) as the paramount chief.[12] In the North West (present day Upper West Region) Wala, Dagarti and Sissala were combined under the leadership of Wa Na. Several unassimilated ethnic groups such as Nchummuru, Nawuri, Mo, Vagala were subsumed under the Gonja Chiefs. The Konkombas and Chokosis were made subjects of Ya Na[13] of the Dagomba Kingdom. In spite of these compulsory integrations of different independent ethnic groups, each of them

10 | Nana Arhin Brempong, "Chieftaincy An Overview", in: Odotei and Awedoba (eds.), n. 3.
11 | N.J.K. Brukum, "Chieftaincy and Ethnic Conflicts in Northern Ghana, 1980-2002", in: Odotei and Awedoba (eds.), n. 3.
12 | P.A. Ladouceur, *Chiefs and Politicians: The Politics of Regionalism in Northern Ghan*a, Longman, London, 1974, 35.
13 | Ibid.

continued to maintain their customary laws on issues such as marriage, divorce, and widowhood rites. However, major issues such as access to and ownership of land has generated unwarranted conflicts in the Northern Ghana.

CHIEFTAINCY IN POST-COLONIAL GHANA

After independence the relationship between the chiefs and the central government became uncertain. The question arose as to whether chiefs should be allotted the same powers they possessed during the pre-colonial past or whether they would be accorded the same treatment granted them during the colonial period. Some schools of thought argued for the complete abolishing of the institution because of their role in aiding the colonial regime to oppress the indigenes. The political leadership at the time examined the space occupied by the institution and appreciated the need to maintain it, but also to exercise a form of state control over it.

After independence, the political leadership examined the space occupied by the institution of chieftaincy and appreciated the need to maintain it, but also to exercise a form of state control over it.

While the constitutions of 1957 and 1960 guaranteed the institution in accordance with custom and usage, the nature of the relationship between the central government and the chiefs was more complicated. The personal idiosyncrasies of the socialist President Kwame Nkrumah surfaced strongly; he had very little reverence for the chiefs, and the perception that some Asante and Abuakwa chiefs supported the opposition party during the struggle for independence fuelled his hostility. The regime passed Act 81 which defined a chief as an individual who has been nominated, elected and installed as a chief in accordance with customary law, and is recognised by the Minister responsible for Local Government.[14] The Act guaranteed powers to the Convention Peoples Party's (CPP) Government to meddle in chieftaincy matters without recourse to the Regional and National Houses of Chiefs. Chiefs were to conduct their affairs in a manner that suited the Government of the day. President Nkrumah stated that "Chiefs will run away and leave their sandals".[15] However, the opposite occurred. The chiefs did not "run away". Instead, they have had the opportunity to witness changes in political

14 | Chieftaincy Act 1961, Act 81, Assembly Press, Accra, 1961.
15 | Brempong, n. 10.

leaderships while continuing to contribute to state building; indicating a highly resilient and deep-rooted institution.

The overthrow of the CPP regime gave chieftaincy a long respite. The 1969 Constitution recognised the institution with the Traditional Councils, Regional and National Houses of Chiefs. All chieftaincy matters were to be handled by the respective constituent bodies of the institution. The recognition was further enhanced with the passage in September 1971 of Chieftaincy Act, 370. The Act remained as the most substantive legal instrument regarding chieftaincy until the 2008 Chieftaincy Act was passed. The respective military regimes also embraced the institution and granted its rightful dignity, in spite of the initial skirmishes that occasionally ensued between the institution and the government. The military accepted and supported the institution as a means of acquiring political legitimacy.

The 1992 Constitution of the Fourth Republic also guaranteed the institution of chieftaincy. Article 270(1) states: "Parliament shall have no power to enact any law which

a) confers on any person or authority the right to accord or withdraw recognition to or from a chief for any purposes whatsoever; or
b) in anyway detracts or derogates from the honour and dignity of the institution of chieftaincy."

Articles 271 to 274 focus on the establishment, role, and jurisdictions of the Regional and National Houses of Chiefs with their corresponding functions and responsibilities. Article 276 however departs from the previous constitutions and legal frameworks on chieftaincy. It repudiates chiefs from "active" engagement in party politics. Consequently any chief who wishes to participate in "active" party politics must abdicate his or her stool or skin. The objective of this provision is to uphold the sanctity of the traditional values enshrined in the Ghanaian culture of the chieftaincy institution and protect the institution from the rancour and wrangling associated with partisan politics.

The constitution however provides an avenue to involve the chiefs in the management of the state on issues that relate to the custom and tradition of the people. Subse-

quently, chiefs are appointed to serve on various statutory boards and commissions such as the Forestry Commission, National Aids Commission, Constitutional Review Commission, Ghana National Petroleum Corporation Board, and many more. They are appointed on an ad hoc basis to serve on emergency circumstance and planning committees. Furthermore, there is a constitutional requirement that the President of the National House of Chiefs must be a member of the Council of State, the only institutional representation on the Council of State. A representative of the National House of Chiefs in the Prisons Council, the Regional Co-ordinating Councils, and in the Land Commission, as well as the Regional Land Commission.[16] The constitution is silent on the voting rights of members of the commissions, councils and boards. The members consequently work on consensus basis to ensure that all members bring along their experiences and expectation to fore and collectively responsible for the decisions of the entire panel.

There is a constitutional requirement that the President of the National House of Chiefs has to be a member of the Council of State, the only institutional representation on the Council of State.

The chieftaincy institution has regularly received budgetary support from the central government to meet its recurrent expenditure, including payment of an allowance for sitting chiefs as well as a monthly stipend of 80 euros per paramount chief and 60 per paramount queenmother. Every Traditional Council and Regional and National House of Chiefs is provided with administrative and technical staff who are also employees of the Civil Service of Ghana. These staffs are responsible for the management of the respective secretariat of the chiefs, as well as for providing technical guidance to the chiefs in respect of customs and traditions, the law and various instruments which may impact the work of the chiefs. They conduct research to help in conflict resolution as well as in the settlement of disputes. They further serve as the public relation officers of the chiefs.

The Ministry of Chieftaincy and Culture was established in the year 2006 to demonstrate the government's commitment to the institution. Even though the relationship between the chiefs and Government of Ghana has been

16 | Ibid.

cordial with the inception of the Fourth Republic, a recommendation by the African Peer Review Mechanism necessitated such a giant step in favour of the chiefs. The creation of the ministry afforded the chiefs direct representation in the cabinet meetings to bring issues that obstruct the workings of the institution as well as programmes and projects which will promote the institution to the attention of the government.

CUSTOMARY LAW[17] AND THE LAW IN GHANA

Native law or custom was not authoritatively defined in any general statute until 1960, when the Interpretation Act defined common law as "comprised in the laws of Ghana, consist of rules of law which by custom are applicable to particular communities in Ghana, being rules included in common law under any enactment providing for the assimilation of such rules of customary law suitable for general application".[18]

Customary law has distinguishing traits from other forms of laws such as the common law. Amongst these are adaptability, popularity, flexibility and communal focus.[19] The scope of customary law in Ghana includes: chieftaincy, access to and ownership of lands, marriage rites, spousal rights, and succession rights. Each traditional area in Ghana has a form of customary laws that are applicable to communities in the area. The complexity of the application of customary laws has given rise to forms of adjudication that focus on the interpretation of traditional laws and norms. Woodman argues that the most trustworthy evidence in these disputes over customary law consist of previous decisions of the court.[20]

The scope of customary law in Ghana includes: chieftaincy, access to and ownership of lands, marriage rites, spousal rights, and succession rights. Each traditional area in Ghana has an applicable form of customary laws.

17 | Customary law is defined here as sets of established norms, practices and usages derived from the lives of people. Julie A. Davis and Dominic N. Dagbanja, "The Role and future of Customary Tort Law in Ghana: A cross-Cultural Perspective", Arizona Journal of International and Comparative Law, Vol. 26, No. 2, 2009, 303.
18 | Interpretation Act 1960, Assembly Press, Accra 1960.
19 | Ibid.
20 | Gordon R. Woodman, "Customary Land Law in the Ghanaian Courts", Ghana Universities Press, Accra, 1996.

To ascertain the validity of a customary law, witnesses such as chiefs, linguists and other elders learned in custom are called into court to testify on elements of the particular custom subject at issue.[21] Local customs, which are related to natural justice, equity, and good conscience, are considered part of the customary law. For a custom to be considered in harmony with natural justice, equity and good conscience, it must not be incompatible either directly or indirectly with any law currently enforced and it must not be contrary to public policy.[22]

Article 11 of the 1992 constitution stipulates the sources of law in Ghana. These are: the constitution; enactments made by or under the authority of the Parliament established by the constitution; existing laws; orders, rules and regulations made by any other authority under a power conferred by the constitution and the common law of Ghana. The common laws of Ghana include customary laws. The constitution defines customary law as rules of law which by custom are applicable to particular communities in Ghana.[23]

The challenge emanating from the definition is "applicable to particular communities in Ghana". Woodman contends that courts have declared a huge number of customary rules applicable throughout Ghana.[24] For example the process of installing a chief must conform to the established norms and customs of the people in the traditional area. Ollennu maintains that these rules of general applicability should not be considered components of customary law but must constitute a core part of the common laws of Ghana.[25] Woodman contests Ollennu's argument, instead declaring that although these customs of general applicability may not be appropriately integrated into the customary law, its integration into the common law will be much more difficult.

21 | N.A. Ollennu and G.R. Woodman. "Ollenu's Principles of Customary Land Law in Ghana", Carl Press, Birmingham, 1985, xxv.
22 | C. Ogwurike, "The Sources and Authority of African Customary Law", *University of Ghana Law Journal* III, No. 1, 1966, 11-20.
23 | *Constitution of the Fourth Republic of Ghana*, Assembly Press, Accra, 1992.
24 | Woodman, n. 20.
25 | N.A. Ollennu, *The Law of Testate and Interstate Succession in Ghana*, Sweet and Maxwell, London, 1966.

The constitution, functioning as a mechanism for including the appropriate customary laws of the country, has additionally involved the National House of Chiefs in the development of customary law. Section 49 of the Chieftaincy Act instructs the National House of Chiefs to undertake progressive study of the various Traditional Councils through the respective Regional Houses of Chiefs in order to interpret and codify customary laws with a view to better understanding the appropriate cases for a unified system of rules of customary laws in Ghana.[26] The National House of Chiefs through the Research Committee has over the years consulted key stakeholders to undertake this constitutional mandate.

EMERGING ISSUES

Some inter- and intra-ethnic conflicts are fuelled and perpetuated by the institution of chieftaincy itself. From 1980 to 2002, Northern Ghana has recorded twenty-two inter-ethnic and intra-ethic conflicts led by their chiefs.

One of the main features of the institution of chieftaincy in the post-colonial era is the manifestation of inter- and intra-ethnic conflicts fuelled and perpetuated by the institution itself. For example from 1980 to 2002, Northern Ghana has recorded 22 inter-ethnic and intra-ethic conflicts led by their chiefs. In 1980, Gonjas attacked Bator and Vagala. Gonjas engaged in ethnic war against the Nawuris and Nchumurus in 1991, 1992 and 1994. In 1992 and 1994, the Gonjas engaged in intra ethnic conflicts amongst themselves in Yapei, Daboya and Kusawgu. Nanumbas fought Komkombas in 1980, 1994 and 1995. During the period of 1988 to 1994, Mamprusi and Kusasis fought four times. The Bimobas went to war with Komba. In 2002, the Dagombas fought amongst themselves over chieftaincy succession. The primary source of these inter-ethnic conflicts has been the question of which chiefs control what land with what traditional rights. In Southern Ghana, chiefs and their elders avail themselves of the state judicial systems to settle the chieftaincy related conflicts rather than initiating and stimulating conflicts.

Although there were pockets of inter-ethnic conflicts during the pre-colonial era as mechanisms to extend the territories of an ethnic group at the expense of another ethnic group, these post independence intra/inter ethnic

26 | Chieftaincy Act 2008, n. 2.

conflicts are disquieting. They have considerably affected the membership of the Regional Houses of Chiefs, thereby creating vacancies and other disorders.

Consequently, the National House of Chiefs with the support of the Konrad-Adenauer-Stiftung and the UNDP has undertaken several projects to ensure that the appropriate lines of successions are well defined to circumvent the problems that currently bedevil this revered institution. The death of a chief opens another avenue for chieftaincy dispute, which should be mitigated in any way possible.

Queenmothers in Sunyani, Ghana: Kingmakers including queenmothers seek protection under the customary law to perpetuate chieftaincy conflicts when it is in their interest. | Source: © Isaac Owusu-Mensah, KAS.

Hagan explains three critical issues that may account for litigations and disputes in respect to stools and skins. The position of a chief in modern Ghana is a prestigious enterprise because of the social, political and cultural powers they possess although the extent of economic power is dependent on the location of the traditional council. The chiefs control and hold in trust several tracks of land for their people.

1. Affluent personalities in society with ambiguous claims to royal stools and skins often fiercely contest positions with the (legitimate) poor royal families who often refuse to succumb to the interest of the illegitimate

contestants. This generates perpetual litigation in the selection of the occupant of the stool or skin.[27]

2. The number of legitimate royals has increased over the years and the competition has become highly intensified and divisive among various family lineages. Consequently some royal members are trained to use arms to settle disputes to elect the occupants to stools and skins.[28]

3. The life tenure of chiefs has generated unrest among legitimate royal members who are potential candidates to the stools and skins. This unrest has led to frivolous and wasteful litigations and strife in the communities, to the extent that selection of rightful candidates to occupy vacant stools and skins is assessed on the basis of irrelevant criteria.

Table 1
Distribution of vacant seat in Regional Houses of Chiefs

Region	Number of seats of per regional house	Disputed seats per Regional House	Percentage
Ashanti	39	4	10.3
Brong-Ahafo	49	16	32.6
Central	34	3	8.8
Eastern	11	3	27.2
Greater Accra	22	3	13.6
Northern	20	12	60.0
Upper East	17	4	23.0
Upper West	17	5	29.0
Volta	32	8	25.0
Western	22	6	27.2
Total	263	64	24.0

Source: National House of Chiefs, Jun 2013.

27 | George P. Hagan, "Epilogue", in: Odotei and Awedoba (eds.), n. 3.
28 | Ibid.

In spite of these explanations of the sources of chieftaincy conflicts, the role played by customary law cannot be understated. Kingmakers including queenmothers and learned custom elders in the respective traditional areas seek protection under the customary law to perpetuate the conflicts when it is in their interest. The state is completely barred from interfering in the traditional succession customs of the people. Still, there is a certain extent of disharmony within the Regional Houses (table 1). A total of 64 seats are vacant out of 263, or 24 per cent of the national total of chiefs, as a result of litigation. This clearly requires state intervention, but each traditional area seeks to protect its customary law on chieftaincy and succession, which insulates them from state intervention.

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REFLECTIONS FOR THE FUTURE

Chieftaincy as an institution has been integrated into the governance structures of Ghana. It is incumbent on the institution to find its relevance in the midst of westernisation of the Ghanaian youth, and the eroding of the Ghanaian culture due to growing sophistication via the evolution of and access to modern technology. In light of these challenges, the ability of the institution to be recognised transcends legal privileges and the status quo to command of reverence from the urban and rural Ghanaian.

According to Appiah[29], for chiefs and queenmothers in Ghana to be visible in the public sphere amongst the next generations of Ghanaians, the chieftaincy institution must develop an appropriate peer review mechanism, a system which will authorise a paramount chief from a traditional area to monitor and evaluate the custodian responsibility and programs of another traditional area, with the objective of invigorating the progress of that area. The peer review system will curtail wanton sale of stool lands to unscrupulous investors who connive with mendacious chiefs to exploit the resources of their communities.

29 | Francis Appiah, "Chiefs and African Peer Review Mechanism", speech delivered at the Upper West Regional House of Chiefs, at a seminar organised by the Upper West Regional Coordination Council, 2006.

The chieftaincy institution is encumbered with a wide array of disputes at all levels of the institution: from the small hamlet or village head to the paramount chief across the entire ten regions of the country. These flippant and costly chieftaincy disputes are the main sources of recurring and devastating conflicts in Ghana. Although political parties occasionally trigger conflicts which raise societal tensions, these incessant conflicts in the eyes of modern Ghanaians compel them to declare the chieftaincy institution to be outmoded and conflict-oriented. This corroborates the view held by Frempong[30] that the institutions ought to convince the people of Ghana of their relevance and make efforts to curtail this menace by resolving these superfluous conflicts.

Odotei[31] continues to advocate for a sustainable financial arrangement and framework for the institution. According to her, this will empower the state to provide relevant resources for the institution of chieftaincy in order to insulate the institution from direct political manipulation and control. The current arrangements where the National House of Chiefs is treated similarly to any other government agency is unhelpful. The meager allowance of 80 euros per month for paramount chief must be adjusted upwards to ensure that the reverence Ghanaians have for their traditional leaders are maintained.

Customary law is a very useful source of law in Ghana; it protects communities' customs and values handed down over the centuries. This explains the constitutional responsibility entrusted to chiefs to engage their indigenes on continuous legal and traditional education regarding the relevance of respective customs within the Traditional Areas.

The historical evidence demonstrates that each political regime, from colonial engagement with the chiefs up to the Fourth Republic, has had a unique place for the institution of chieftaincy. The institution went through turbulent times in the early independence years but currently possesses latent, but considerable political, social and cultural space in the Ghanaian political system. From the

30 | Frempong, in: Odotei and Awedoba (eds.), n. 3.
31 | Brempong, n. 10.

pre-colonial era through the colonial regime and all other regimes of the Republic, the essence of customary law has been respected, recognised and promoted to be a major source of law in Ghana, especially laws in respect of land acquisition, ownership and distribution. The promotion and reform of this institution is a noble endeavor which will not only support Ghanaian democracy, but the strength, prosperity, and traditions of the Ghanaian people.

INFORMAL JUSTICE IN THE PALESTINIAN LEGAL SYSTEM

CONFLICT OR COEXISTENCE BETWEEN LEGAL ORDERS?

Jamil Salem / Ilona-Margarita Stettner

The Palestinian Legal System is often characterised as complex, since it consists of different layers of colonial codes and rules: Ottoman, British, Jordanian, and Egyptian laws, Israeli military orders and Palestinian legislation. Complicating matters further, there are at least two segments of legal and judicial life that coexist in Palestine:[1] Codified laws and regulations, which include the religious laws (i.e. Sharia), and an informal system of conflict resolution based on customs (*urf*).

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In recent years, both the Palestinian Authority and the International Community have put effort into building and strengthening the formal justice system in the Palestinian Territory. Today, there are 20 Magistrates courts (14 in the West Bank and six in Gaza), eleven Courts of first instance (eight in the West Bank and three in Gaza), three Courts of Appeal (in Ramallah, Jerusalem and the Gaza Strip), the Higher Courts (Courts of Appeal and Cassation, High Court of Justice), as well as religious family courts (i.e. Sharia and Ecclesiastical courts). Yet, if a crime has been committed or a civil dispute needs to be settled, the state courts are not the only means of dispute resolution that come into play: In most of the criminal and civil cases, alternative dispute resolution mechanisms work hand in hand with, or parallel to, the formal justice system.

1 | The term "Palestine" if used in this article refers to the historic Palestine before the creation of the State of Israel. If today's situation is discussed, the authors will use the term Palestinian Territory or West Bank and Gaza Strip.

Half of the public does not trust the formal judicial system (for reasons such as ineffectiveness, corruption and a lack of fair trial), while they still believe in tribal law.

According to a survey conducted by the Palestinian Center for the Independence of Judiciary and Legal Profession (MUSAWA), half of the public does not trust the formal judicial system (for reasons such as ineffectiveness, corruption and a lack of fair trial), while they still believe in tribal law. More than 60 per cent of Palestinians say they would seek alternative dispute resolution mechanisms if it became necessary.

Should the coexistence of two legal segments in today's Palestinian society be described as impracticable under political objectives of the Palestinian Authority (PA) since the Oslo Accords? Although the two systems are considered to be "conflicting", that neither creates a necessity for a complete separation between two legal orders nor implies an incapability to integrate both orders in the same centralised political system.

INFORMAL JUSTICE IN PALESTINE

Informal justice refers to the social phenomenon widespread throughout the West Bank and Gaza Strip (similar to a number of Arab and non-Arab countries) of settling disputes between litigants outside the framework of state courts and the formal justice system. The methods used to settle disputes in the informal justice system are often referred to as "tribal" or "customary" laws. The principles of informal justice stem from various sources: general Arab and in particular Palestinian historical, social and cultural heritage.[2]

Tribal Justice refers in this context to an ancient judicial system with Bedouin roots. It includes tribal *sulh* (reconciliation) and tribal law. Tribal *sulh* is a method of dispute resolution through conciliation, based on the accommodation of custom, religion and tribal traditions. It has gone through different stages of development throughout history. As for tribal law, the rules are drawn from the dominant tribal traditions in the area where it is practised.[3]

2 | Institute of Law, Birzeit University, *Informal Justice: Rule of Law and Dispute Resolution in Palestine,* 2006, 14, http://lawcenter.birzeit.edu/iol/en/project/outputfile/5/a391785614.pdf (accessed 21 Aug 2013).

3 | Ibid.

The difference between *sulh* and tribal law can best be explained by looking at their respective representatives: A tribal judge, representing tribal law, is a person who specialises in solving disputes presented to him, through issuing a final verdict to both parties that is based on tribal *urf,* and through the accreditation of proofs and conjectures presented to him by the parties to the disputes. An *islah* man, representing the tribal *sulh*, is a person who seeks to solve conflicts between two parties through bridging the gap between their points of view, utilising his personal qualities such as the ability to convince, eloquence and good reputation in order to achieve a conciliatory outcome to the demands of the parties to the disputes, relying on a number of sources, mostly *urf*. The term *islah* stems from the *sulha* (reconciliation). The final settlement of the case is then called *Saq Al-Sulh*.

Bedouin woman herding goats: The inhabitants of the Gaza Strip were influenced by the informal justice widely practiced by the Bedouins of the Northern Sinai. | Source: monika.monika, flickr ⓒⓘ.

Today tribal judges are still active only in the Gaza Strip and in the rural area around Hebron. This is explained by the mass forced movement of Palestinian people from the Beersheba area (whose residents were mostly Bedouins) to the Gaza strip and Hebron in the aftermath of the 1948 war taking with them their social and cultural heritage. The inhabitants of the Gaza Strip were additionally influenced by the informal justice widely practiced by the Bedouins of

the Northern Sinai. Tribal *sulh* on the other hand is widespread throughout the Palestinian Territory.[4] *Islah* men are often appointed by the President.

The societal need for and the acceptance of an informal justice system next to the state laws is often described as the result of the shortcomings of the formal justice system due to external factors, and also the consistency of pre-modern patriarchal structures that are based on clans and tribes rather than on the individual. Tribal law implies a tribal world order, in which the tribe or the clan plays the central role, and not, like in modern justice systems or in religious laws, the individual. If a member of one group violates the property, physical integrity or the honor of a member of another group, a case will erupt between the two tribes to which perpetrator and victim belong, and not between the two individuals themselves.[5]

To say that a particular society is a tribal society means that tribalism is a main or significant regulator of social relations in that society, or that it is a basic determinator for the life opportunities in that society.

No doubt tribal law still plays a role in the Palestinian society, but Palestinian society at large can no longer be considered tribal. To say that a particular society is a tribal society means that tribalism is a main or significant regulator of social relations in that society, or that it is a basic determinator for the life opportunities in that society. In tribal societies, the tribe determines opportunities for education, work, income, medical treatment, location and type of housing, migration, marriage and social and legal rights, as well as other aspects. In Palestinian society, kinship structures based on families are still important, but their role is contained. They are not in control of economic resources, political authorities, or social and educational activities and positions and institutions.[6]

Why, then, does the informal justice system still play such a significant role in Palestinian society? The weakness of the overall state system, particularly the judiciary, which may be partly explained by external factors, such as a history of changing alien authorities and the still ongoing

4 | Ibid., 63.
5 | Thomas Frankenfeld, "Die Macht der Familien-Clans in Palästina", *Hamburger Abendblatt*, 21 Jun 2007, http://abendblatt.de/politik/ausland/article865411 (accessed 21 Aug 2013).
6 | Birzeit University, n. 2, 140.

Israeli occupation, has certainly had an influence on the significance of alternative dispute resolutions in the Palestinian Territory.

The perceived advantages of the informal system over the formal system are often explained as: lower cost of services, speedier, more efficient proceedings, and easy access in all regions of the Palestinian Territories.[7] With regard to cost, however, the widely held perception that the informal system is less costly in the long run is not as clear cut. Although the informal system is supposed to be free of cost to the parties involved, as regards the work of the mediators, it was confirmed by many respondents that some mediators do ask for compensation for their work. This is despite the fact that all the mediators interviewed frowned upon such practices and denied their own culpability.[8] In addition there is a general misunderstanding about costs incurred by bringing a case to the courts. While civil cases, such as land and property issues, incur certain administrative expenses and require both parties to hire lawyers, this is not so in criminal cases. Here the state prosecutor is responsible for representing the public right of the state, and the defendant has the right to legal representation provided by the state.

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However, the expedience of informal mediation becomes more evident when one considers the current inefficiency of the courts. It is widely known that backlog in the courts results in cases being held up for months if not years. Mediation, on the other hand, is initiated as soon as a conflict occurs, and measures are taken to secure a truce directly with the parties involved and thus prevent retaliation by the victim's family for the crime committed. It is this immediate and personalised response that the state authorities, whether it be the police, the state prosecutor or the courts, are unable to provide, especially in the current

7 | The Palestinian Center for the Independence of Judiciary and Legal Profession (MUSAWA), *The Second Legal Monitor for the Situation of Justice in Palestine*, Apr 2012, http://musawa.ps/publication/annual/20120621081113.pdf (accessed 21 Aug 2013).

8 | We refer here to a report drafted by the Institute of Law at Birzeit University entitled *Informal Justice: Rule of Law and Dispute Resolution in Palestine* from 2006. Cf. n. 2.

circumstances. On the other hand, the formal court system is inherently more time-consuming for reasons relating to procedural requirements, such as investigation of a crime and the collection of sufficient evidence to prosecute an individual. However, these procedures are ultimately necessary to ensure the highest degree of justice, guarantee a fair trail and safeguard basic procedural rights. The speediness of the informal system is therefore often at the expense of these fundamental rights and principles.[9]

THE PAST AND THE PRESENT: LEGISLATIVE DEVELOPMENTS IN PALESTINE

To understand the legal basis of informal justice in Palestine, one has to examine the legislative developments and the chronology of several legislative authorities which created the Palestinian legal system under the different regimes that have ruled Palestine over the past five centuries. From the Ottoman rule in Palestine (1516-1918) onward, successive political authorities have sought to control informal justice, i.e. to organise and limit its expressions. The process of law codification (*taqnîn*) has been at work since the Ottoman Reform and was variously modified thereafter. Informal justice progressively – and partly – flowed back towards the south of Palestine. The British Mandate that followed the Ottoman rule practically maintained all of the informal judicial structures and practices inherited from past periods. Still, the British attempted to regulate it by issuing laws which formed the legal basis of tribal courts and limited their application to customs that did not violate natural justice or morality such as a 1935 law aimed at weakening the *târ*-system, the vengeance codes.

In 1948, following the end of the British Mandate, Palestine was fragmented and the state of Israel was created. The West Bank (including East Jerusalem) fell under Jordanian rule, while the Gaza Strip was under Egyptian control. Both authorities maintained most of the inherited informal justice structures in their respective territories.

9 | Jamil Salem, "Informal Justice: The Rule of Law and Dispute Resolution in Post-Oslo Palestine", 15 Oct 2009, http://lacs.ps/documentsShow.aspx?ATT_ID=2044 (accessed 21 Aug 2013).

In 1967, the West Bank and the Gaza Strip came under Israeli occupation. A multiplicity of military declarations and orders were issued, and the Palestinian formal court system was further weakened by the creation of separate Israeli military courts.[10] After 1967, the distinction between the state courts and the informal justice became crucial for Palestinians. The "official" justice system was controlled by the occupation forces and seen as suspicious by the people. Where possible, Palestinians therefore resorted to informal dispute mechanisms and only criminal cases, where the accused was detained by Israeli security forces, were brought to trial in front of Israeli controlled courts, The Palestinian informal justice (West Bank and Gaza) therefore became a growing alternative to the judiciary.

Even though legally speaking the PA itself is not a state, it started to produce laws and bylaws and reorganised the court system which was similiar to that of a state court system.

Since the Oslo Accords and the establishment of the Palestinian Authority (PA) in 1994 the Palestinian Government has initiated a process of legal unification. Even though legally speaking the PA itself is not a state, it began producing laws and bylaws and reorganised the court system which was similiar to that of a state court system. A High Constitutional Court was established by law,[11] Sharia and ecclesiastical family courts kept their independence.[12] At the same time the PA encouraged informal justice, both through the whole system of government as well as specifically by backing their actors. It tolerated existing tribal judges and *islah* men and encouraged their work. Its executive body established official conciliation committees and paid salaries. PA officials took part in the conciliation and contributed financially by compensating the parties to the conflict. Governors, police and security forces often facilitated the work of conciliation committees.[13]

Fittingly, the first legislative elections held in 1996 were carried out by districts and encouraged voting according to tribal and kinship lines, as it gave better chances to

10 | Asem Khalil, "Formal and Informal justice in Palestine: Dealing with the Legacy of Tribal Law. La tribu à l'heure de la globalisation", *Revue Etudes Rurales*, No. 184, 2010, 8.
11 | The law was issued in 2006 but the court is not yet established. The High Court is supposed to function as a constitutional court, until the Constitutional Court is established.
12 | Khalil, n. 10, 9.
13 | Ibid., 16.

candidates who relied on their personal reputation, family relations or tribal connections, rather than on political programs or party affiliation.

One of the reasons for the PA to encourage tribal justice might have been to enhance their local standing and to influence and strengthen their power and social control. But it is also important to examine the structure, authority and jurisdiction that form the reality of the PA: It has no sovereign jurisdiction over a majority of its territories, like Area C (around 60 per cent of the West Bank) and East Jerusalem, to which its security and administrative apparatus does not even have access. Therefore some might argue that customary law and informal justice served the PA as an informal space through which it could extend its authority, given the impossibility of controlling the formal or state system which is still largely under Israeli control in these territories.[14]

According to Hamas, disputes should be solved by way of Sharia rulings only, and not by informal justice mechanisms.

As for the Gaza Strip, Hamas promotes the creation of an Islamic state and the application of Sharia law. According to Hamas, disputes should be resolved by way of Sharia rulings only, and not by informal justice mechanisms. But in light of the absence of an Islamic state for the time being, they resort to an informal judiciary to resolve disputes, as the concept of *sulh* is also one of the principles that Sharia calls for and encourages.[15]

Against the backdrop of the historical and political situation of Palestine and a still ongoing absence of reliable state structures, tribal and customary laws continue to play a significant role in the West Bank and the Gaza Strip, even though in some areas, especially in Hebron, the number of people availing themselves of official courts has increased.[16]

14 | Ibid., 17.
15 | Birzeit University, n. 2, 104.
16 | "The south of Hebron area faces a decrease in tribal dispute solutions and is moving more towards regular courts." Maannews.net, http://maannews.net/arb/ViewDetails.aspx?ID=598538 (in Arabic) (accessed 21 Aug 2013).

LEGAL PLURALISM – CONFLICTING LEGAL SYSTEMS OR INTERACTIVE LEGAL PRACTICES?

The existence of *urf* and the growing field of informal justice in Palestine since the Oslo Accords have been quoted in several studies as relevant and crucial for the development and evolution of the Palestinian legal system. On a strict legal level of the analysis, it is a key issue because it provides opportunity to raise the question of legal pluralism. This discussion is all the more profitable as professional jurists rarely take the time to envisage the sociological history of law and the coexistence of several legal orders inside a centralised system which leads to a singular and monolithic interpretation of law. A pluralistic approach is all the more legitimate and indispensable when the legal system needs to be strengthened. This is especially the case in Palestine, where a permanent military occupation has damaged the legal and judicial institutions inaugurated under the Oslo Accords.

When launching the *Tanzîmât*, the process of reform, in the middle of the 19th century, the Ottoman Empire opened a vast field of social, political, legal and judicial reform.

In any given historical period and spatial location, it is important to go beyond the legal text in order to understand how law is shaped and centralised. Such a centralised legal system has existed at different times in Palestinian history. When launching the *Tanzîmât*, the process of reform, in the middle of the 19th century, the Ottoman Empire opened a vast field of social, political, legal and judicial reform. A renewal of administrative practices and institutions was expected from the process in the Arab societies of the Middle East. As for law and the judiciary, the reformers aimed at homogenising courts and law schools, believing that the process could help the Sultan to strengthen his sovereignty over the various provinces of the Empire. Some decades later, the British Mandate for all Palestine, and after the 1948 war and the division of Palestine into three parts, Jordanian rule in the West Bank as well as the Egyptian administration over the Gaza strip took various forms of legal centralisation. However, despite the reform, the Palestinian people seem to have been often suspicious of administrative centralisation in part because of the alien origin of the political authorities in charge of these new institutions.

Tomb of Yasser Arafat in Ramallah: The recurrent interventions of Arafat and his successors have in some ways undermined the "official" court system. | Source: amerune, flickr ©①.

From this point of view, it can be noted that local customs and *urf* are authentically native, and it has been universally considered in Palestine as a significant part of the national identity. It is probably because of the strong historical legitimacy of the Palestinian system of dispute resolution that since the Oslo Accords, former President Yasser Arafat and the current PA government have invested their hopes in the informal justice which they believed to be a main – if not the first – judicial authority able to maintain public order when violent conflicts arise between Palestinian families and groups. It can be observed in the daily lives of Palestinian people that informal, socially-sanctioned methods of resolving disputes are integral to Palestinian notions of justice and play a vital role in easing societal tensions resulting from disputes between individuals.

At the same time, it is agreed among Palestinian political and social representatives, as well as among lawyers and legal representatives, that the customary style of dispute resolution can also be seen as problematic from the three perspectives of equity, equality and freedom. There exists a serious contradiction between customary style of dispute resolution and the basic principles on which modern states and their laws are built. Principles such as the individual nature of punishment, the presumption of innocence (which is undermined by the weight of accusation in informal justice, where the issue of responsibility is left to be determined not by evidence but by the capacity of

each party to convince the other of its position) as well as the principle of equality before the law are undermined, as parties are not equal as far as informal justice is concerned. Economic and social status, political affiliation and gender matter for the determination of the outcome of the conciliation procedure.

Yet it is quite impossible to assess the weight of informal justice without considering the efficiency of the "state courts" or at least of the PA's judicial system organised in the framework of the Oslo Accords. The recurrent interventions of Yasser Arafat and his successors, the participation of security organs as well as deputies of the Palestinian Legislative Council (PLC) in informal justice have in some ways undermined the "official" courts system. Viewed from this angle, the independence of the judiciary is threatened, and the rule of law is subject to false interpretation. Nevertheless this observation should not lead us to conclude that both systems are absolutely conflicting or even incompatible, socially and politically speaking; instead let us focus on the complementary aspects of both systems rather than on points of disagreement.

The Palestinian legal sphere is not so much confronted with two separate systems coexisting within the same society as it is with a situation of perpetual compromise between different ways of dispute resolution. It can be observed that informal justice has a tangible impact on formal judiciary. This is possible because of the space left in the legal system for the discretion of judges that allow for informal justice to influence formal justice. According to the penal laws in force in both the West Bank and Gaza Strip, the judge has discretionary authority in mitigating the penalty as stipulated by the law, according to the circumstances of the crime and the social context of which the judge considers it to be a part.[17] Also, according to articles 52 and 53 of the 1960 penal code adopted under the Jordanian rule, the pardon given to the aggressor by the victimised group puts an end to the public action. The same code allowed the judge of a state court to award extenuating circumstances to the defendant in honour crime cases, when a *sulh* (conciliation) had intervened.

17 | Khalil, n. 10, 18.

Such examples can help us to understand that even if two antagonistic legal systems coexist, they are not necessarily in permanent conflict. Practically, the judiciary cannot gain people's confidence if it does not take into account long-standing social values and norms. In that sense, the coexistence of two separate legal orders is perhaps less a question of political conflict than of historical inheritance.

CONCLUSION

In the Palestinian Territory, one cannot deny the existence of a very strong legal pluralism. The work of informal justice is as widespread as the work of the formal justice system in terms of both prevalence and the size of the disputes it resolves.

There exists an urgent need to harmonise the system and draft new laws that take into account the needs of the population. The state is not and cannot be indifferent to non-state law.

The specific issue in Palestine is that of the inheritance of different laws from past colonial periods which create complexities and disharmony within the legal system. There is an urgent need to harmonise the system and draft new laws that take into account the needs of the population. The state is not and cannot be indifferent to non-state law. The coexistence of two prominent legal systems is even positively assessed by stakeholders, *urf* being praised as the expression of positive social values. Nevertheless, it cannot be denied that there is a strong contradiction between customary style of dispute resolution and the rule of law, personified by the state courts.

The Palestinian legislature has so far not developed a clear legislative policy in dealing with informal justice. It has not demonstrated a policy towards codifying, controlling or containing the work of informal justice. There is a need to rehabilitate and increase the impact of the formal judiciary, restructure it and reorganise it, and to strengthen the rule of law. At the same time the current social and cultural reality must be incorporated in the states legal apparatus, as long as it does not contradict the rule of law.

The reform of the system is contingent on many factors. Firstly, there is a need for a clear political will to reform the system, which is currently lacking. In order for judicial reform to take place, a reform of the executive is necessary,

and the legislature must likewise be willing to undertake a reform of certain laws. Nevertheless, whatever willingness for reform there is within Palestinian society, it will be meaningless with the ongoing Israeli occupation of the West Bank and the Gaza Strip and without the existence of an independent, sovereign and viable Palestinian state.

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THE SYRIAN REFUGEE CRISIS AS A RESULT OF THE UNRESOLVED CONFLICT IN SYRIA

Otmar Oehring

The ongoing conflict in Syria that began in early 2011 has not only spread death and destruction across the country, but has also led to a refugee movement of enormous proportions among Syrian citizens. Of Syria's 21.9 million inhabitants, approximately 4.25 million have become internally displaced persons (IDPs),[1] or people who, although they still live in Syria, no longer live in their original place of residence. In addition, the conflict has led a further 1.76 million people[2] to flee Syria for neighbouring countries, according to the United Nations' Refugee Agency (UNHCR). This means that approximately 27.5 per cent of the Syrian population have fled; just under 19.4 per cent as internally displaced persons and more than eight per cent as refugees – and these numbers are increasing by the day.

According to the governments of Syria's neighbouring countries, the number of Syrian refugees who have sought asylum within their borders is already well over two million. According to official reports, Egypt has taken in 160,000[3]

1 | Internal Displacement Monitoring Centre (IDMC), "Syria: A full-scale displacement and humanitarian crisis with no solutions in sight", http://internal-displacement.org/8025708F004CE90B/(httpCountries)/9F19CC00280C471C802570A7004CE12F (accessed 12 Jul 2013).

2 | Cf. United Nations High Commissioner for Refugees (UNHCR), Syria Regional Refugee Response, Inter-agency Information Sharing Portal, "Regional Overview", as at 9 Jul 2013, http://data.unhcr.org/syrianrefugees/regional.php (accessed 12 Jul 2013).

3 | Cf. UNHCR, as at 24 Apr 2013, http://data.unhcr.org/syrianrefugees/country.php?id=8 (accessed 10 Jul 2013).

refugees, Jordan approximately 600,000,[4] Lebanon one million,[5] and Turkey 490,000[6] – no corresponding reports are available for Iraq. The difference between the governments' reports and those of the UNHCR is due not least to the fact that these countries are seeking to utilise these figures in raising funds from international organisations and third countries – the higher the number of refugees, the higher the expected proceeds for their efforts, according to the simplest calculations.[7]

SYRIAN REFUGEES IN EGYPT, IRAQ, JORDAN, LEBANON AND TURKEY

The Syrian refugees in Iraq can primarily be found in the greater Dohuk area – in the refugee camp at Domiz, where approximately 40,000 people are housed.

The majority of Syrian refugees in Egypt live in the Cairo area, primarily in the 6th of October City; beyond that they live in the suburbs of Giza, in the cities of Obur, Nasr City and Rehab, and are also scattered across the governorates of Alexandria, BeniSuef, Sohag, Minia and Luxor.[8] The Syrian refugees in Iraq can primarily be found in the greater Dohuk area – in the refugee camp at Domiz, where approximately 40,000 people are housed.[9] Two additional refugee camps are to be constructed in the

4 | Cf. UNHCR, as at 7 Jul 2013, http://data.unhcr.org/syrian refugees/country.php?id=107 (accessed 10 Jul 2013).
5 | Cf. UNHCR, as at 11 Jul 2013, http://data.unhcr.org/syrian refugees/country.php?id=122 (accessed 12 Jul 2013).
6 | Cf. UNHCR, as at 11 Jul 2013, http://data.unhcr.org/syrian refugees/country.php?id=224 (accessed 12 Jul 2013).
7 | The UNHCR's figures are well below these. According to them, so far 596,936 refugees have fled Syria for Lebanon, 501,330 have gone to Jordan, 402,176 to Turkey, 160,632 to Iraq and 88,460 to Egypt. The discrepancy between the UNHCR's figures and those of the various governments can be accounted for, at least partially, by the fact that not all refugees seeking asylum in neighbouring countries register with the UNHCR. Lebanon: http://data.unhcr.org/syrianrefugees/country.php?id=122 [04.08.2013], Jordan: http://data.unhcr.org/syrianrefugees/country.php?id=107 (accessed 4 Aug 2013), Turkey: http://data.unhcr.org/syrianrefugees/country.php?id=224 (accessed 4 Aug 2013), Iraq: http://data.unhcr.org/syrianrefugees/country.php?id =103 (accessed 4 Aug 2013), Egypt: http://data.unhcr.org/syrianrefugees/country.php?id=8 (accessed 4 Aug 2013), all as at 9 Jul 2013.
8 | Hend El-Behary and Luiz Sanchez, "Syrian Refugees: No work, no home", *Daily News Egypt*, 19 May 2013, http://dailynews egypt.com/2013/05/19/syrian-re (accessed 13 Jul 2013).
9 | UNHCR, as at 9 Jul 2013, http://data.unhcr.org/syrian refugees/country.php?id=103 (accessed 10 Jul 2013)

greater Erbil and Sulaimaniyya areas with space for 15,000 refugees each.[10] The refugee camp at Zaatari in Jordan has meanwhile become the country's fifth largest city.[11] In order to meet the demand for space, supervision and security and to be able to manage the steadily increasing electricity needs for refugees in the future, two further camps were opened in April: Zarqa and Mirajeb Al-Fohoud.[12] Furthermore, both transit camps, King Abdullah Park and Cyber City in Ramtha, which were established directly on the Syrian border in April 2012, have come into operation.[13]

Fig. 1
Flows of refugees from Syria[14]

Source: UNHCR, © Lesniewski / Fotolia, racken.

10 | Abdel Hamid Zebari, "Iraqi Kurdistan Region Struggles To Cope With Syrian Refugees", *Al-Monitor Iraq Pulse*, 12 Jun 2013, http://al-monitor.com/pulse/originals/2013/06/iraq-kurdistan-syrian-refugees-aid.html (accessed 13 Jul 2013).
11 | Cf. UNHCR, as at 9 Jul 2013, http://data.unhcr.org/syrian refugees/country.php?id=107 (accessed 12 Jul 2013).
12 | Ebd.
13 | Ebd.
14 | Mismatch of data in the article compared to this map is due to an earlier submission date of the text. Cf. UNHCR, "Stories from Syrian refugees. Discovering the human face of a tragedy", http://data.unhcr.org/syrianrefugees/syria.php (accessed 22 Aug 2013).

The UNHCR was originally meant to oversee the establishment of a total of 18 refugee camps in Lebanon[15] – twelve with a capacity for 100,000 people, a further six with a capacity for 15,000 people. This has so far not been carried out for political reasons. The Shia Hezbollah is likely not only to fear that the majority Sunni refugee population will remain in Lebanon for a long time and has prevented the camps from being built. Given the overwhelming number of Syrian refugees, the UNHCR is now considering opening three refugee camps: one camp near Chaat in the northern Bekaa Valley and two others near Joub Janine and Tall Zhoub in the western Bekaa Valley. These plans are not without problems given the fact that the Bekaa Valley is dominated and controlled by Hezbollah.[16]

Tents in the Zaatari refugee camp: the camp, comprising more than 120,000 inhabitants, is Jordan's fifth largest city. | Source: © Vera Voss.

The approximately 200,000 Syrian refugees who fled to Turkey are living there in 21 refugee camps, nearly all of which are in provinces directly on the Syrian border. They are getting on with their lives here as best they can; nearly 30,000 Syrian children and young people attend school in

15 | According to reports from the UNHCR, 200,357 Syrian refugees are living in the Bekaa Valley, 196,279 in northern Lebanon in the area near the city of Tripoli, 124,097 in the Beirut and Mont Liban areas, and 76,203 in South Lebanon.

16 | Jamie Dettmer, "It's About Time: United Nations Plans Refugee Camps for Syrians in Lebanon", *The Daily Beast*, 12 Jun 2013, http://thedailybeast.com/articles/2013/06/12/it-s-about-time-united-nations-plans-refugee-camps-for-syrians-in-lebanon.html (accessed 13 Jul 2013).

the camps. By 21 June 2013, field hospitals and mobile health care centres carried out more than one million medical treatments in the refugee camps. Furthermore, 3,664 babies have been born in the camps.

SYRIAN REFUGEES' LEGAL STATUS

The Geneva Convention relating to the Status of Refugees[17] has not been signed by Iraq, Jordan or Lebanon and thus has also not been ratified. Though Turkey signed the Geneva Convention relating to the Status of Refugees in 1951 and ratified it in 1962, it largely only employs it for refugees from member states of the Council of Europe, to which Syria does not belong.[18] Egypt ratified the Convention in 1981 but it does not make full use of it either.[19] To that effect, Syrian refugees do not enjoy refugee status in terms of the Geneva Convention relating to the Status of Refugees in Iraq, Jordan, Lebanon or Turkey.

Syrian refugees do not enjoy refugee status in terms of the Geneva Convention relating to the Status of Refugees in Iraq, Jordan, Lebanon or Turkey.

The consequences of these circumstances have already been studied extensively through the example of Iraqi refugees after 2003. Even entry into the above-mentioned countries was a problem. Turkey demanded entry visas, as did Jordan and Syria; only in Lebanon could one enter without having a visa. Jordan and Syria's visa rules have also continually changed, quite obviously with the goal being to deter the influx of refugees. In Jordan, Lebanon and Syria, Iraqi refugees were treated as *wafidin*, as guests. No consideration was given over how to handle them in the long term. Iraqi refugees did not enjoy a secured status in Jordan, Lebanon, Syria or Turkey. They received no documentation and ran the risk of being sent back to Iraq should they be picked up by the police. Even registering with the UNHCR did nothing to change these circumstances.

17 | UN, Geneva Convention from 28 Jul 1951, entered into effect on 22 Apr 1954, http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSONLINE&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en#EndDec (accessed 5 Aug 2013).

18 | Mehmet Atakan Foça, "Turkey Sticks to ‚Limited' Application of the Geneva Convention", BIA News Center, 1 Aug 2011, http://bianet.org/english/world/131856-turkey-sticks-to-limited-application-of-the-geneva-convention (accessed 12 Jul 2013).

19 | Cf. UN, n. 17.

Because the refugees were considered virtual illegal immigrants, they were also unable to work. However, at the same time they had to earn money to be able to survive. In many cases it was the women and under-age children who went to work because it was considered too risky for men to take up work. They were paid a pittance and were often not even compensated at all. Appealing to the police was pointless because refugees would then have had to reveal themselves and, under the circumstances, would then have been sent back to Iraq, which occurred time and again. Access to state-run education and health care was initially unregulated and therefore difficult. The longer the Iraqi refugee crisis lasted, the more pragmatically the authorities in Jordan, Syria and Turkey conducted themselves. Refugees were now entitled to time-limited residency that could be extended under certain circumstances – though they were not legally secure. However, in the process Jordan restricted the influx of refugees to those who could save a part of their assets. In the course of this development, refugees were then allowed largely unlimited access to state-run education and health care services in these countries. Only Lebanon's policy toward the Iraqi refugees did not further develop at any point in time, which can be ascribed to Lebanon's leading denominational groups' – Muslims and Christians – conflicting and absolutely incongruous interests.

The longer the Iraqi refugee crisis lasted, the more pragmatically the authorities in Jordan, Syria and Turkey conducted themselves. Refugees were now entitled to time-limited residency.

The Iraqi refugee crisis has meanwhile made history; its consequences are clearly still felt in Iraq's neighbouring countries. Several thousand Iraqi refugees are still living in Jordan, Lebanon, Syria and Turkey. They have either built a new life in their receiving country – this applies for example to a multitude of Iraqis in Jordan – or, for certain reasons, could not or would not return to Iraq and who have yet to gain admittance into a third country. Among those people are most notably members of religious minorities – e.g. Christians, Mandaeans – but also Sunni-Shiite spouses and their children and grandchildren who are afraid to return either to now distinctly Sunni or Shia dominated parts of Iraq.

The Syrian refugee crisis reached the extent of the Iraqi refugee crisis long ago. The Iraqi refugee crisis saw four million people become refugees,[20] but with the Syrian conflict one can speak of more than six million refugees.[21] Jordan and Turkey's handling of Syrian refugees indicates that these countries have learned little from their experience with the Iraqi refugee crisis.

STATUS OF SYRIAN REFUGEES IN EGYPT

Up until very recently, Egypt was accessible to Syrians without a visa and was considered by many Syrian refugees to be a safe haven. Though hardly any support was expected from the Egyptian authorities, those who had made it to Egypt and were not completely without means could eke out an existence there.

The military coup in Egypt has only further complicated the situation for Syrian refugees who wanted to temporarily establish themselves in Egypt. Egypt is now demanding that Syrian citizens have visas.

But the severance of diplomatic ties between Egypt and Syria by the Morsi regime brought with it great difficulties for Syrian refugees who had hoped to journey on to a secure third country because they could no longer obtain travel documents at the Syrian embassy in Cairo. The military coup in Egypt has only further complicated the situation for Syrian refugees who wanted to temporarily establish themselves in Egypt. Egypt is now demanding that Syrian citizens have visas and justifies this, for example, by saying that Syrians who reside in Egypt would participate in the country's current disputes on the side of the Muslim Brotherhood. Against this backdrop, 20 organisations aiding Syrian refugees in Egypt have recently signed a memorandum calling for all Syrians in the country to remain neutral with regard to Egypt's internal matters. Prior to this, two television commentators from the anti-Morsi camp, Youssef el-Husseini and Tawfiq Okasha, had warned Syrians against interfering. Okasha even went so far as to call on Egyptians to apprehend Syrians as soon as they set eyes on them. UNHCR now not only fears that it will become very difficult for Syrians to obtain an Egyptian visa, but also that Egypt may no longer be considered a place of refuge for Syrians.

20 | Cf. UNHCR, http://unhcr.org/461f7cb92.html (accessed 5 Aug 2013).
21 | Cf. UNHCR, n. 2; IDMC, n. 1.

STATUS OF SYRIAN REFUGEES IN IRAQ

With the Syrian refugees in Iraq, to a large extent it is a matter of Syrian Kurds from all parts of Syria, but particularly from the Al-Hasakah and Deir-ez-Zor governorates on the Syrian-Iraq border who have fled to the Kurdistan Autonomous Region of Iraq.[22] The fact that fewer than 0.5 per cent of Syrian refugees who have fled to Iraq reside outside the Kurdistan Autonomous Region is associated with the fact that entry into parts of the country controlled by the Iraqi central government is difficult and residency in these parts of the country depends on residence permits that are difficult to obtain and are time-limited. This also explains why 7,000 Syrian refugees have recently returned to Syria from the Qaim district in the Iraqi governorate of Anbar. In contrast, Syrian refugees are able to enter the Kurdistan Autonomous Region without issue. Here they are permitted to work and have access to state-run education and health care.[23]

STATUS OF SYRIAN REFUGEES IN JORDAN[24]

At the start of the Syrian conflict, which began in Deraa, close to the Jordanian border, scores of Syrians fled the areas near the border for Jordan to temporarily stay with relatives. Many of them did not consider themselves refugees as their families had always lived on both sides of the border. As the conflict expanded and the violent disputes intensified in Syria, more and more Syrians entered the country who did not have family ties on that side of the border and who were dependent on the aid of third parties. Until summer 2012, only local non-governmental organisations were looking after refugees, organising accommodation and supplying material aid.[25]

22 | Mohamed Salman, "Assessment of the situation of the Syrian refugees in Kurdistan region Iraq", *MPC Research Report* 2012/15, http://migrationpolicycentre.eu/docs/MPC%202012%2015.pdf (accessed 13 Jul 2013).
23 | Zebari, n. 11.
24 | For further details, see: Sarah van der Walle, Simone Hüser and Otmar Oehring, "Syrischer Massenexodus nach Jordanien. Auswirkungen und Folgen", KAS Country Report, http://kas.de/jordanien/de/publications/35012 (accessed 28 Aug 2013).
25 | Migration Policy Centre, "Syrian Refugees. A Snapshot of the Crisis – In the Middle East and Europe", http://syrianrefugees.eu/?page_id=87 (accessed 10 Jul 2013).

Only in summer 2012 – by this time 1,000 refugees were coming to Jordan from Syria every day – the Jordanian state established the refugee camp at Zaatari where today more than 120,000 people are living. The influx of Syrian refugees increased in early 2013 in connection with the bombing of villages and cities near the border by the Syrian army to more than 3,000 refugees per day at times. The transit camps at King Abdullah Park and Cyber City in Ramtha directly on the border to Syria and the refugee camp at Zaatari reached their capacity and two further camps had to be established at Zarqa and Mirajeb Al-Fohoud; a total of approximately 200,000 people live in these camps.[26] By far the largest portion of refugees are scattered across the country, making them hard to reach and chronically undersupplied, the more so as the lion's share of state and international aid is going to the refugee camps.[27] In fact nothing has changed in terms of the status of Syrian refugees compared to those who fled Iraq for Jordan approximately ten years ago. While Jordan acted quite restrictively in terms of accepting refugees at the time, even as of now no official considerations have been made concerning whether to slow or even completely halt the influx of refugees by closing the border to Syria. The unchecked influx of Syrian refugees poses a great challenge to the country's economy, its infrastructure – particularly its water and electricity supply – and the health and education systems. This has been made especially clear in Amman and the two less economically developed border provinces of Irbid and al-Mafraq where the vast majority of refugees reside.

Since the transit camps at King Abdullah Park, Cyber City and the refugee camp at Zaatari reached their capacity, two further camps had to be established.

In many places the native population witnessing this is becoming resentful that the refugees are receiving support which has been denied them. This resentment will surely increase further if the influx of refugees continues unchecked through the end of the year and the number of refugees reaches one million or even 1.5 million. At the same time, Jordan can count itself fortunate that the Syrian refugees who are at least partially heavily polarised

26 | UNHCR, n. 2.
27 | Taylor Luck, "Influx of Syrian Refugees raises tension in Jordan as resources are stretched", *The Guardian*, 23 Apr 2013, http://gu.com/p/3faf7 (accessed 10 Jul 2013).

and highly politicised and who carry with them the conflict, which has unloaded the denominational differences present in their Syrian homeland, have at the very least come to a religiously homogeneous country, Jordan,[28] where such denominational differences do not exist as they do in Syria.

UNICEF is providing a box for each school class in the refugee camp. The unbridled inflow of Syrian refugees is a formidable challenge for the Jordanian educational system. | Source: © Vera Voss.

STATUS OF SYRIAN REFUGEES IN LEBANON

Without a doubt the situation of Syrian refugees in Lebanon is the most difficult and abstruse. It is the most difficult situation because half a million to one million people are living as refugees in a country that, according to reliable estimates, has a population of only approximately 4.5 million,[29] in which the question of how to handle refugees is deeply divided along religious lines (Sunni and Shia), which despite decades of experience in refugee crises does not know how to handle them, and at the same time will receive neither counsel nor aid from international organisations

28 | King Abdullah II expressly spoke of this in an interview on 26 Jun 2013 published in the London newspaper *Asharq Al-Awsat*. Cf. Adel Al-Toraifi, "King Abdullah II: The View from Amman", *Asharq Al-Awsat*, 26 Jun 2013, http://m.asharq-e.com/content/1372267502482820700 (accessed 5 Aug 2013).
29 | Cf. United Nations Department of Economic and Social Affairs (UNDESA), "Lebanon", http://esa.un.org/unpd/wpp/unpp/panel_population.htm (accessed 5 Aug 2013).

such as the UNHCR. The victims of this attitude are the refugees and the native population who are suffering due to the unchecked influx of refugees. Syrian refugees who enter the country officially are at least tolerated, while the steadily growing group of those who cross the Green Line are treated as illegals. Officially, at least those Syrians who entered legally have open access to state education and health care facilities.[30]

Any nation would face problems by accepting a refugee population that makes up between eleven and 22 per cent of its own population. Also worth considering is that Syrian refugees are entering a country which is just as deeply polarised along the same religious borders as their own country. The developments in Arsal and Tripoli, where Sunnis and Alawis are fighting each other, however, have just as little to do with the influx of Syrian refugees as the conflicts between the Shia Hezbollah in southern Lebanon or the Bekaa Valley and the Sunni population in other parts of the country. Yet the influx of so many Syrian refugees stokes fears that the civil war in Syria could spark a new civil war in Lebanon. In addition, the influx of refugees and the fact that they are crowding the labour market in Lebanon – even though they may be illegals – is stirring up bad memories of the post-1990 era when Lebanon was virtually occupied by Syria for years and was forced to accept an army of approximately one million Syrian labourers.

Only a small proportion of refugees has the material capability of affording suitable housing. Many Syrian refugees are tending to live under the same degrading conditions Iraqi refugees were faced with.

The lack of adequate structures to house such a large number of refugees – i.e. refugee camps – has in most instances led refugees to seek shelter in approximately 1,200 closed settlements. In reality, however, only a small proportion of refugees has the material capability of affording suitable housing. Because of this, many Syrian refugees are tending to live under the same degrading conditions Iraqi civil war refugees were previously faced with. At the same time, they are not permitted to work and have no access to state-run educational and health care services.

30 | Cf. UNHCR, "Lebanon Response Plan", http://unhcr.org/51b0a6059.html (accessed 15 Jul 2013).

STATUS OF SYRIAN REFUGEES IN TURKEY

In Turkey in 2009, several agencies were legally[31] consolidated under the umbrella of the Disaster and Emergency Management Presidency of the Turkish Prime Ministry (AFAD): the General Directorate of Civil Defence under the Ministry of Interior, the General Directorate of Disaster Affairs under the Ministry of Public Works and Settlement and the General Directorate of Turkish Emergency Management under the Prime Ministry.[32] It has been officially stated that the Presidency was formed after the experiences associated with the earthquake catastrophe at the Sea of Marmara in 1999. However, the fact remains that Turkey also had a truly difficult time with the effects of the Iraqi refugee crisis after 2003. The AFAD alone is now responsible for the coordination of all measures relating to the Syrian refugee crisis and it appears that this has led to a marked increase in the efficiency of all corresponding measures. But Turkey has not only made significant progress from an organisational point of view with regard to coping with relevant crises; numerous specialised civilian organisations have been pressuring the Turkish legislature for years to overhaul and improve the immigration and refugee laws in effect to date. In addition, the EU and EU member states have called upon the Republic of Turkey to further develop their immigration and refugee laws. On 20 March 2013, a bill for a new law regarding foreign nationals and international protection (Yabancılar ve Uluslararası Koruma Kanunu) was finally introduced in the Turkish parliament that, according to appraisals by experts on Turkish refugee law, will broadly improve the situation of refugees in Turkey. However, it is likely that it will be another two years at least

Specialised civilian organisations have been pressuring the Turkish legislature for years to overhaul and improve the immigration and refugee laws in effect to date.

31 | Cf. T.C. Başbakanlık Afet ve Acil Durum Yönetimi Başkanlığı (AFAD), Afet ve Acil Durum Yönetimi Başkanliğinin Teşkilat ve Görevleri Hakkinda Kanun, 17 Jun 2009, http://www.afad.gov.tr/UserFiles/File/5902%20say%C4%B1l%C4%B1%20afet%20ve%20acil%20durum%20y%C3%B6netimi%20ba%C5%9Fkanl%C4%B1%C4%9F%C4%B1n%C4%B1n%20te%C5%9Fkilat%20ve%20g%C3%B6revleri%20hakk%C4%B1nda%20kanun.pdf (accessed 10 Jul 2013).

32 | See also: AFAD, http://afad.gov.tr/EN (accessed 5 Aug 2013).

after the passage of the law on 4 April 2013[33] before it can be implemented.[34]

The Turkish administration's handling of the Syrian refugees can be positively evaluated overall. Refugees have access to state-run educational and health care services.

Irrespective of the specified legal framework and the expected improvement, the Turkish administration's handling of the Syrian refugees can be positively evaluated overall. Refugees are registered as soon as they enter the country by representatives from the AFAD – they are able to register with the UNHCR later; they then receive a residence permit (*ikamet*), are permitted to work and have unrestricted access to state-run educational and health care services. Nevertheless, Turkish policies towards Syrian refugees have also been criticised. Taner Kılıç, head of the refugee organisation Mülteci-Der,[35] criticised the state bureaucracy's conduct in an interview with the newspaper *Hürriyet.* According to Kılıç, this has created the impression that Turkey does not need any support from the UNHCR. He says the administration's lack of willingness to make use of the UNHCR's expertise regarding the organisation of refugee camps is based on false pride. Additionally, he says that Syrian refugees are asked to wait on the Syrian side of the border for flimsy reasons, which makes it clear that an open door policy is no longer in place.[36]

ECONOMIC CONSEQUENCES OF THE REFUGEE CRISIS

The refugees who are seeking to flee the situation in Syria and leave their existence behind in the process are paying a high price. The costs adding up for the receiving countries through the refugee crisis are similarly high. So far it is clear that only the costs being generated by the operations supporting the refugees from national and international

33 | Cf. Haber Merkezi, "Yabancılar ve Uluslararası Koruma Yasası Kabul Edildi", *Bianet*, 5 Apr 2013, http://bianet.org/bianet/insan-haklari/145625-yabancilar-ve-uluslararasi-koruma-yasasi-kabul-edildi (accessed 12 Jul 2013).

34 | Dersim Yabasun, "Turkey: Establishing a new asylum system", The Foreign Report, 28 Mar 2013, http://theforeignreport.com/2013/03/28/turkey-establishing-a-new-asylum-system (accessed 12 Jul 2013).

35 | Cf. Mülteci-Der, http://multeci.org.tr (accessed 5 Aug 2013).

36 | Cf. interview with Taner Kılıç, the head of the Association for Solidarity with Refugees (Mülteci-Der): Barçın Yinanç, "Poor transparency shadows Turkey's Syria refugee policy", *Hürriyet Daily News*, 27 May 2013, http://hurriyetdailynews.com/?PageID=238&NID=47639 (accessed 12 Jul 2013).

organisations have been calculated. The UNHCR estimates that all the necessary measures in support of the Syrian refugees in Egypt, Iraq, Jordan, Lebanon and Turkey will amount to a total of 2,981,640,112 U.S. dollars in 2013, of which only 1,038,381,164 U.S. dollars has been committed so far.[37] The percentage of costs associated with admitting Syrian refugees taken on by the respective receiving countries is quite variable and is not clearly documented in every case.[38]

By the end of 2012, approximately 100,000 Syrian refugees had entered Egypt – the Egyptian authorities at the time assumed that number would be 140,000 refugees. By June 2013, there had been another heavy influx of Syrian refugees, which, under the circumstances, will now likely decline sharply due to changes in the political situation since the beginning of June 2013 (the severing of diplomatic ties with Syria, the military coup). According to the Regional Response Plan assembled by the UNHCR together with all the international and domestic organisations working with refugees and with the Egyptian government, the total costs for Egypt in connection with the influx of Syrian refugees in 2013 is expected to reach 66,705,984 U.S. dollars, which must be raised entirely by national and international organisations. The costs to the state accrued by accepting Syrian refugees were not specified in the UNHCR's Regional Response Plan. It was merely indicated that Syrian refugees have, for example, access to state educational and health care services free of charge.[39]

37 | Cf. UNHCR, n. 2.

38 | In Egypt, the costs of all the measures taken in support of Syrian refugees in 2013 was estimated at 66,705,984 U.S. dollars, 310,858,973 in Iraq, 976,576,971 in Jordan, 1,216,189,393 in Lebanon and 372,390,514 in Turkey. These figures are accompanied by commitments of 14,352,998 U.S. dollars (22 per cent) in Egypt, commitments of 63,927,143 (21 per cent) in Iraq, commitments of 397,841,029 (41 per cent) in Jordan, commitments of 394,549,946 (32 per cent) in Lebanon and commitments of 97,042,393 (26 per cent) in Turkey. Each as at 15 Jul 2013: Egypt: http://data.unhcr.org/syrianrefugees/country.php?id=8 (accessed 15 Jul 2013); Iraq: http://data.unhcr.org/syrianrefugees/country.php?id=103 (accessed 15 Jul 2013); Jordan: http://data.unhcr.org/syrianrefugees/country.php?id=107 (accessed 15 Jul 2013); Lebanon: http://data.unhcr.org/syrianrefugees/country.php?id=122 (accessed 15 Jul 2013); Turkey: http://data.unhcr.org/syrianrefugees/country.php?id=224 (accessed 15 Jul 2013).

39 | Cf. UNHCR, n. 30.

Currently more than 140,000 Syrian refugees are living in Iraq. By the end of the year, up to 350,000 refugees are expected, of which approximately 300,000 will reside in the Kurdistan Autonomous Region. According to the Regional Response Plan prepared by the UNHCR together with all the international and domestic organisations working with refugees and with the Iraqi authorities, the total costs for Iraq in connection with the influx of Syrian refugees in 2013 is expected to reach 310,858,973 U.S. dollars, which must be predominantly raised by national and international organisations.[40] According to Dindar Zebari, the deputy head of Kurdistan's Department of Foreign Relations, the Kurdistan Autonomous Region, which receives 17 per cent of Iraq's budget and can expect to receive 18 billion U.S. dollars in 2013, has provided 20 million U.S. dollars for the support of Syrian refugees since the beginning of the year.[41]

The Kurdistan Autonomous Region has provided 20 million U.S. dollars for the support of Syrian refugees since the beginning of the year.

By the end of 2012, approximately 300,000 Syrian refugees had entered Jordan. The costs associated with this have amounted to 251 million U.S. dollars, according to official reports. The Jordanian government is expecting costs of up to 851.5 million U.S. dollars in 2013 on the premise of an influx of up to one million Syrian refugees.[42]

By the end of 2012, approximately 570,000 Syrian refugees had entered Lebanon. According to the Regional Response Plan prepared by the UNHCR together with all the international and domestic organisations working with refugees and with the Lebanese government assuming an influx of up to one million refugees by the end of 2013, the total costs for Lebanon in connection with the further

40 | Cf. ibid.
41 | Zebari, n. 11.
42 | Of that, 178.8 million U.S. dollars are allocated to the energy sector, 91.3 million to the supply of water, 26.2 million to education, 93.6 million to the public health sector, 9.8 million to additional costs for communities and 80 million for costs relating to the admission and safety of refugees. A further 371.8 million U.S. dollars are expected in pro rata subsidies for electricity (275.85 million U.S. dollars), water (52.15 million U.S. dollars), household gas (27.7 million U.S. dollars) and flour (16.1 million U.S. dollars). Cf. UNHCR, "Syria Regional response Plan. Annex 1: Response Plan for Hosting Syrians by the Government of Jordan", 1 Apr 2013, http://unhcr.org/51b0a6ff9.html (accessed 15 Jul 2013).

influx of Syrian refugees in 2013 is expected to reach 1,665,824,257 U.S. dollars, of which 449,634,864 U.S. dollars fall to the state.[43]

In Turkey, a further increase in the influx of Syrian refugees is expected by the end of 2013. By the end of the year, up to one million Syrian refugees are expected to enter the country, of which 300,000 would then be housed in camps while the other 700,000 would live outside of the camps. The total costs for the measures taken by specialised UN organisations in connection with this are estimated at 372,390,514 U.S. dollars for 2013. Precise information on the costs to the Turkish government associated with admitting Syrian refugees is not available. According to official statements, however, the influx up to May of this year alone has cost approximately 800 million U.S. dollars.[44]

OUTLOOK

As long as the Syrian conflict remains unsolved – and it seems it will remain so for now – the influx of Syrian refugees into neighbouring countries will increase further. It is possible that by the end of the year more than 300,000 Syrian refugees will reside in Egypt, one million in Lebanon, 350,000 in Iraq and approximately one million each in Jordan and Turkey.

It is possible that by the end of the year more than 300,000 Syrian refugees will reside in Egypt, one million in Lebanon, 350,000 in Iraq and approximately one million each in Jordan and Turkey.

Turkey will likely bear the brunt of this, both as regards the costs as well as the ratio of its own population to the refugee population. Supposedly reasonable or politically motivated misgivings that Syrian intelligence agents could enter the country with the refugees and from there foster unrest by, for example, encouraging the Alawis[45] in the Hatay province to fraternise with the Alawi-supported Assad regime have so far proved unfounded. Of course, further attacks are anticipated after the series of bombings in Reyhanlı in May 2013, and it is still not conclusively clear who carried them out. These developments will certainly

43 | Cf. UNHCR, n. 30.
44 | Cf. ibid.
45 | The Alawis in Syria are not the same as the group by the same name, although transcribed differently as Alevis, who predominantly live in Turkey.

not destabilise Turkey, but they may further complicate the Syrian refugees' already difficult living conditions.

Lebanon is likely to have the greatest problems in coping with a further influx of Syrian refugees – not only due to economic reasons, but also because some of the refugees bring the conflict from their homeland into Lebanon and in doing so they hit upon a corresponding population profile. Though conflicts between Sunnis and Shias are still reported on a local level, to some extent – e.g. in Arsal and Tripoli – they have already displayed characteristics of a regional civil war. The answer to the question of how long the Lebanese state can continue to limit these conflicts will also decide whether or not the country will descend into a new civil war.

The pressure on the Jordanian economy will further increase with the ongoing unchecked influx of Syrian refugees because the burden on the state would likewise increase with such an influx. Someone will have to pay the bill. Failing all else, that someone will once again be those donor countries who have ensured over the past twenty or thirty years that Jordan remained a safe haven in an unstable region. However, the donors' current welcome engagement in terms of the refugees will not contribute to setting about making urgently needed reforms in Jordan.

The influx of Syrian refugees into Egypt and Iraq will have essentially no effect on the circumstances in these countries. From an economic viewpoint, Iraq and particularly the Kurdistan Autonomous Region, where most Syrian refugees move to, can afford the influx. And in the Kurdistan Autonomous Region, the influx of primarily Kurdish refugees from Syria was by all means initially desirable, at least for political reasons. To date, Syrian refugees have left for Egypt because the conditions are seen as less problematic than those in Lebanon, for example. Should these circumstances change again, the Syrian refugees will reorient themselves.

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THE EUROPEAN EXTERNAL ACTION SERVICE

A DIFFICULT START OF AN INNOVATIVE INSTITUTION

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The European External Action Service, created in December 2010, has the potential to become an innovative foreign policy instrument and to strengthen Europe's global role. The EEAS has the potential to make European foreign policy more coherent and efficient and may be a vital contribution to the development of a European strategic culture. Nevertheless, it has had a difficult start and is still struggling for recognition by other foreign policy actors. It has so far been unable to fulfil the high expectations placed upon it. This year's evaluation of the EEAS, carried out by its own head, Catherine Ashton, the High Representative of the Union for Foreign Affairs and Security Policy, offers an opportunity to improve upon the EEAS' structure. For the EEAS to function successfully, the Commission and member states must take a constructive approach towards the new institution.

THE EUROPEAN EXTERNAL ACTION SERVICE'S DIFFICULT GENESIS

One of the most innovative suggestions to come out of the 2002 Constitutional Convention was the creation of a European External Action Service (EEAS) with an EU Foreign Affairs Minister at its fore.[1] Approximately nine years prior to this, the Common Foreign and Security Policy (CFSP)

1 | Article III-296 of the Constitutional Treaty verbatim: "In fulfilling his or her mandate, the Union Minister for Foreign Affairs shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff ‣

was launched. Initially, the CFSP was in the hands of various Directorates-General of the European Commission and the General Secretariat of the Council.

The establishment of an EU Foreign Affairs Minister and an External Action Service was intended to bundle the foreign service expertise that was scattered over several institutions and directorates. First, future European foreign policy should take into account the various dimensions of external action (civilian, military, development, humanitarian). Second, it should improve foreign policy coherence between the EU and its member states. The third objective was a greater degree of foreign policy continuity; until then, it was predominantly the Presidency of the Council of the European Union with a six-month rotation period that set the foreign policy agenda. The results were constantly changing priorities and a lack of continuity in the EU's external actions.

High Representative Ashton: The nomination of the Briton was approached with great scepticism. | Source: Jay Louvion, Studio Casagrande, Welthandelsorganisation (WTO) 🅭🅯⊜.

seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a European decision of the Council. The Council shall act on a proposal from the Union Minister for Foreign Affairs after consulting the European Parliament and after obtaining the consent of the Commission."

However, in the years that followed, enthusiasm among the member states for the External Action Service waned considerably – not least because of the collapse of the constitutional treaty following two negative referenda and due to the outbreak of the economic and financial crisis. The Lisbon Treaty, which came into force on 1 December 2009, thus worded it more cautiously: the office of the Foreign Affairs Minister became now that of a High Representative. But the heads of states and governments clung to the European External Action Service itself.[2] Aside from the reference to the High Representative, the text is identical to that of the Constitutional Treaty. According to the Lisbon Treaty, the EEAS' function is to support the High Representative in his or her work and to cooperate with the member states' diplomatic services. The EEAS should comprise officials from the General Secretariat of the Council, the Commission and staff seconded from national diplomatic services. The exact function or detailed layout of the EEAS, however, was not remarked upon in the Lisbon Treaty. The detailed stipulations regarding the EEAS' organisation and function should be determined by a Council decision – after a European Parliament hearing and approval by the European Commission.

According to the Lisbon Treaty, the EEAS' function is to support the High Representative in his or her work and to cooperate with the member states' diplomatic services.

Accordingly, the Lisbon Treaty's phrasing left some maneuvering room for the organisation of the EEAS. If the political will was still great enough to establish as comprehensive and powerful an instrument as possible during the Constitutional Convention, the political conditions now seem to be worse. In the twelve months that followed the adoption of the Lisbon Treaty, a heavy tug-of-war ensued between the member states, the European Parliament and the European Commission regarding the function, scope and infrastructure of the EEAS. The British Labour politician appointed as High Representative, Ashton, faced the Herculean task of reconciling widely divergent views.

2 | Article 27 TEU, Lisbon Treaty, http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-european-union-and-comments/title-5-general-provisions-on-the-unions-external-action-and-specific-provisions/chapter-2-specific-provisions-on-the-common-foreign-and-security-policy/section-1-common-provisions/116-article-13a.html (accessed 16 Aug 2013).

Overall, the establishment of the EEAS took place under difficult circumstances: Unlike in 2002, the EU now found itself in the midst of an economic and financial crisis. Accordingly, scrutiny of the financial aspects of establishing the EEAS also intensified. The overall enthusiasm for the EEAS had waned. Additionally, the domain of foreign policy is a bastion of national sovereignty. The member states' very divergent foreign policy traditions collided during the conception of the EEAS.

High Representative Ashton had shown only a small amount of foreign policy experience; her appointment was occasionally received with great scepticism and she had little credit with many foreign policy decision makers. Finding a common denominator for the interests of the many actors who were involved in establishing the EEAS – member states, the Commission, the High Representative, but also the European Parliament – proved to be another enormous challenge.

The European Parliament advocated that the EEAS should be as closely connected to the Commission as possible. In doing so the Parliament hoped to have the maximum possible influence on the EEAS' strategic decisions.

The European Parliament[3] quickly presented itself as the greatest advocate of a strong EEAS with the most extensive capacity possible. At the same time, they advocated that the EEAS should be as closely connected to the Commission as possible. In doing so the Parliament hoped to have the maximum possible influence on the EEAS' strategic decisions and its personnel.

The European Commission also wished to see the EEAS located alongside it. However, at the same time, it tried to maintain as much sovereignty as possible over the most important financial instruments of foreign policy, e.g. the European Neighbourhood and Partnership Instrument (ENPI) or the Development Cooperation Instrument (DCI). The Commission's motivation not only lay in protecting its own authority, but also in its fear of increased intergovernmentalism in other policy areas, such as development policy.

3 | The European Parliament (EP) had only to be consulted according to the Lisbon Treaty, but influenced the establishment of the EEAS through its budgetary powers. Consequently, it was impossible to establish the EEAS without the EP's approval.

Most member states categorically disapproved of an EEAS tethered to the Commission. Among other things, this was due to the fear that too close a dependence on the Commission would soften the CFSP's intergovernmental nature through the back door. While the member states were largely united in their disapproval, they had diverging interests in terms of the organisation of the EEAS: Germany and Italy, for example, were supporters of the EEAS from the start, but saw it primarily as a think tank for elaborating on foreign policy strategies. Great Britain, however, was more sceptical. France supported the EEAS, but wanted it to be modelled after a French ministry. Many smaller and medium-sized member states saw the EEAS as a multiplier of their own influences at the global level and generally regarded it positively. However, they feared a devaluation of the six-month Council Presidency that had also made it possible for the smaller member states to place their own foreign policy interests at the highest level. Furthermore, the member states were competing over key positions in the EEAS.

There was no blueprint whatsoever for the EEAS, the more so as the member states stressed from the beginning that they did not wish to establish a 28th foreign ministry.

In all respects the establishment of a new institution was uncharted waters for the actors involved. There was no blueprint whatsoever for the EEAS, the more so as the member states stressed from the beginning that they did not wish to establish a 28th foreign ministry. Given these circumstances, it was ultimately unsurprising that it took a year of the toughest negotiations and fiercest conflicts over the EEAS' authority, objectives, control and financial endowment before the EEAS was established in December 2010 and was able to officially begin its work in January 2011. The fact that, given these hurdles, the EEAS saw the light of day after "only" one year of negotiations should even be seen as a success in hindsight.

THE EUROPEAN EXTERNAL ACTION SERVICE'S AUTHORITY AND ORGANISATION

A critical compromise between the member states and the European Parliament was reached in a meeting in Madrid in June 2010. The legal basis for the EEAS is Council decision 427/2010 from 26 July 2010. The crucial points:

The EEAS' position and that of the High Representative: The European External Action Service is linked neither to the European Commission nor the Council, but rather is an institution *sui generis*. The High Representative presides over the EEAS, but at the same time is associated with both institutions. This is reflected in a triple role: The High Representative is the head of the CFSP, and is simultaneously the Vice President of the European Commission and presides over EU Foreign Minister's meetings of the Foreign Affairs Council.

On the one hand, elements of a diplomatic service are lacking in the organisation; on the other, the EEAS considerably exceeds the role of a foreign ministry.

The organisation of the EEAS: The EEAS cannot be compared to a "classic" national foreign affairs ministry. On the one hand, elements of a diplomatic service are lacking; on the other, the EEAS considerably exceeds the role of a foreign ministry. Thus the External Action Service does not solely comprise diplomatic personnel, it also brings together military, development and humanitarian expertise that would be found either in member states' ministries for defence or ministries for development cooperation. Various units concerned with crisis management, e.g. the Civilian Planning and Conduct Capability (CPCC) or the Crisis Management and Planning Directorate (CMPD), are under the High Representative's direct control. The military expertise is located within the EU Military Staff (EUMS), which is also subordinate to the High Representative. With the help of this broad scope of expertise, the EEAS should have the necessary tools at its disposal to face a crisis comprehensively considering all military, civilian, humanitarian and development aspects.

The function of the EEAS: The EEAS' objective is to provide support to the High Representative in conducting the Common Foreign and Security Policy and ensuring the coherence of European foreign policy. A further core function is the coordination of all aspects of European foreign policy – under the European Commission's prerogatives. In concrete terms, this means coordinating the member states' policies and positions. However, the management of the financial instruments remains with the European Commission. But general decisions, such as the orientation of enlargement or development policy, should be worked out by the European External Action Service and the

European Commission together. Furthermore, the European External Action Service should also support the work of the President of the European Council, the President of the European Commission and the European Commission as a whole in this area. Thus, the preparation of a summit meeting, for example, has devolved to the EEAS' purview. Given this complexity between the EEAS and the Commission, the Council decision foresees that all policy areas be subject to mutual consultation. This should prevent opposing objectives being pursued in different policy areas. At the same time, the EEAS should propose its own initiatives in the policy process. Overall, the EEAS has turned out to be smaller and narrower than many – the European Parliament, among others – had hoped for.

The Council decision foresees that all policy areas be subject to mutual consultation. This should prevent opposing objectives being pursued in different policy areas.

Staffing: At least one third of the staff should come from the member states,[4] at least 60 per cent from EU institutions. In the process, incredibly varied ways of thinking assemble within the EEAS; representatives of EU institutions, who are most familiar with the Brussels machine, and experienced diplomats, who take a considerably more political tack to their work. This means that a large portion of the officials who were previously responsible for the regulation of financial instruments are now undertaking political duties. However, national diplomats must return to service in member countries after a certain amount of time. The objective is to strengthen understanding for cultures of foreign policy through this kind of intermixing. In short: In doing so, the EEAS is supposed to represent a platform of socialisation in the medium-term and contribute to the development of a combined culture of European foreign policy strategies in the long-term.

Establishment of EU delegations: One of the most important innovations introduced with the establishment of the EEAS was the reorganisation of Commission delegations in third countries to EU delegations whose head is subordinate to the High Representative and the European External Action Service. The delegations' task is now not only the

4 | Council of Europe, Council Decision from 26 Jul 2010 (2010/427/EU), Art. 6, para. 9, http://www.eeas.europa.eu/background/docs/eeas_decision_en.pdf (accessed 16 Aug 2013).

implementation of EU programmes and financial instruments, but also the coordination of the work of the member states' embassies in particular countries. In addition, the delegations should be "politically" active by maintaining political and economic contacts, as well as contacts in civil society in their country of assignment and carry out political reports for the EEAS. The heads of the delegations have the entire delegation staff at their disposal, regardless of whether they are Commission representatives or diplomats (Article 5). They preside over both the political personnel and the Commission personnel responsible for implementing various Commission programmes. Regardless of this, the Commission is still the only one who may provide specification, e.g. if it is a matter of financial instruments administered by them. This should be conducted under the authority of the head of the delegation.

The role of the European Parliament in monitoring the EEAS: At the same time, the European Parliament has been granted considerable rights to be heard, therefore the High Representative must discuss policy guidelines with the European Parliament. In addition, important personnel appointments (e.g. directors or future delegation heads) are summoned to a hearing in the European Parliament.

Given this complexity, it is clear just how dependent the EEAS is on good cooperation with the Commission and the member states. It also shows both the potential and how complex its structure is.

MIXED RESULTS

The EEAS has been observed critically from the start. Further complicating the situation was the fact that it was confronted with one of the greatest foreign policy challenges in the CFSP's history shortly after its establishment, the Arab Spring. Particularly in its first twelve months, the development of the EEAS proceeded rather disenchantingly for several reasons.

Slow-moving crisis management

Despite the new structures, the EU still took too long to prepare and implement its input. The swiftness of action is still in dire need of improvement, as the protracted planning process for the training mission for Mali in 2013 made quite clear. In some cases, the EEAS' crisis management was not even really deployed. Plans for a humanitarian mission in Libya had been prepared but were never put into practice because Lady Ashton insisted upon waiting for a UN request that never came.

Lack of political leadership and visibility

At the outset of the Arab Spring, either the heads of state or foreign ministers thrust themselves into the spotlight and, in doing so, undercut the High Representative's coordination efforts.

Another reason for the anticlimax of the External Action Service was the High Representative's weak profile and the EEAS' lack of external visibility. From the beginning, the EEAS was in a difficult position; at the outset of the Arab Spring, either the heads of state or foreign ministers thrust themselves into the spotlight and, in doing so, undercut the High Representative's coordination efforts. That was ultimately not conducive to the EU's overall view on the crisis and generated confusion regarding its real position. Having said that, it was also often not possible for the EEAS to bring this to bear because the member states could not come to a consensus on certain issues; the member states preferred the High Representative to comment solely on those issues on which they had come to a consensus. The EEAS was also limited in its right of initiative.

In addition, the EEAS' influence and visibility stand and fall with the High Representative. From the start, Catherine Ashton was entrusted with a multitude of tasks and authorities (Head of the Foreign Affairs Council, Vice President of the European Commission, a vast number of trips, and regular presence before the EP). Her foreign policy visibility suffered from this. Many of the causes of her frequently criticised balance are structural; the High Commissioner's job description is excessive and all of the duties cannot be fulfilled by one person alone. Ultimately it proved to be too great of a balancing act to oversee the establishment of the EEAS on the one hand and to provide a presence

and decision-making powers on an international level on the other. Some criticism her work has received is either unjustified or excessive. Nevertheless, other shortcomings can be traced back to the High Representative, for example her initial disregard for the military components of foreign policy. To some extent Ashton operates too hesitantly, for example in the case of Libya within the context of the Arab Spring. However, the member states never wanted the High Representative to play a more active role. They had intentionally chosen Catherine Ashton as a candidate who was known for her negotiating skills but who did not yet have any distinctive profile in the international arena.

To some extent Ashton operates too hesitantly. However, the member states never wanted the High Representative to play a more active role.

The EEAS' external representation in international organisations was paltry, which may well also have something to do with the EU Representative's inexperience in that area. The member states must also take some credit for the poor image of the EEAS and the High Representative. For example, Great Britain undermined the EU's uniform positioning on international organisations in 2011, largely discrediting the EEAS and the EU. The criticism by some sceptical member states of the EEAS' lack of visibility calls for circles to be squared. On the one hand, they demand that the EEAS provide proof of its added value and demonstrate innovative approaches, but on the other hand are not ready to grant the EEAS and the High Representative the necessary freedom to do so.

Bumpy institutional development

On occasion, the process of appointing staff to the EEAS proceeded chaotically. Conflicts of authority within the EEAS crippled its ability to act. Frequent personnel changes frustrated parts of the civil service and ensured that the work lacked continuity. Some former Commission officials are still having difficulties adjusting to the External Action Service's "political" work. Conversely, some diplomats are having trouble familiarising themselves with the Brussels machine.

In addition, the lack of contact between the geographical departments and the crisis management structures occasionally makes communication within the EEAS somewhat opaque. According to many experts, even the division of responsibilities between the EEAS' top management, the cabinet and the High Representative could be optimised. Just like with any other new institution it can be expected that much is carried out through the principle of trial and error. An example of this is the discussion over the EU Special Representatives for crisis regions: In the first few months, Ashton considered abolishing these positions and only a collective appeal from member states, non-governmental organisations and experts led them to then be appointed. Now strengthening their position further and better integrating them into the EEAS is being discussed.

Difficult relationships with other foreign policy actors in the EU

One of the new service's main problems is its difficult relationship with the European Commission. Despite the meetings that were instituted in 2012 between commissioners whose portfolios have a foreign affairs dimension (in practice, the Commissioners for Development, Enlargement and European Neighbourhood Policy, International Cooperation, Humanitarian Aid and Crisis Response, Trade, Economic and Monetary Affairs), there is still a lot of grit in the gears. Coordination efforts in the areas of trade or economic policy in particular have proved quite difficult.[5]

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Relationships with national foreign ministries are varied. A relatively strong mistrust and a wait-and-see attitude still dominate. Unlike in the case of the rotating Presidency, the organisation of which a particular member state was responsible for, the national diplomatic offices are still wary of the EEAS. Germany, Italy and the majority of the smaller and medium-sized member states are completely

5 | Rosa Balfour and Kristi Raik, "Equipping the European Union for the 21st century: National diplomacies, the European External Action Service and the making of EU foreign policy", *FIIA Report 36*, The Finnish Institute of International Affairs (FIIA), Helsinki, 17 Jan 2013, http://www.fiia.fi/en/publication/309 (accessed 26 Aug 2013).

sympathetic to the EEAS; this can be seen in some of the proposals the Foreign Affairs Minister launched in 2011 and 2013 to strengthen the EEAS' working capacity. However, the national foreign ministries still have an cautious relationship with the EEAS because it is considered competition in the medium-term. So far, Great Britain and the Czech Republic have been most sceptical of the EEAS. Nevertheless, the EEAS' coordinating role in terms of trade policy and sanctions was welcomed by these member states. Small and medium-sized member states in particular accuse the EEAS of being too much under the influence of the larger member states. The exchange of information between national ministries and the EEAS could improve as well.

Development of responsibilities

So far, the EEAS has not lived up to its expectation to forge innovative strategies. As yet, the larger countries with traditional foreign ministries have received little additional insight from the EEAS. In the absence of EEAS initiatives, important foreign policy initiatives often come from a coalition of several member states.

Nevertheless, from the start there have been positive developments that have already indicated the EEAS' added value in its first two and a half years; in the past few months in particular there have been several reports of success. The first positive example was the new strategy for the European Neighbourhood Policy introduced in May 2011 together with the Commission, which led to a policy shift in European Neighbourhood Policy towards a greater degree of political conditionality. It is apparent that the EU has regained some credit within the European Neighbourhood in that the High Representative was able to take on the role of intermediary between the parties involved in the conflict in Egypt. The EEAS' preparations for the discussion regarding the EU's strategic partners (USA, Russia, China, India, etc.) in terms of the European Council were considered extremely helpful by the heads of state and government. Lady Ashton's role in the Middle East peace process and the dialogue with Iran have been rated positively. The

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communication on the future strategy regarding Syria, which the High Representative submitted together with the Commission at the end of June 2013, received relatively positive reviews. In general, coordination with the Commission regarding enlargement policy went well: Ashton and the External Action Service were able to achieve solid success in procuring a settlement between Serbia and Kosovo in April this year. However, it is also significant that such a success was managed in a policy area where entry to the EU certainly also played a role and not just the foreign policy authority of the EU or the High Representative.

The development of EU delegations also provided a ray of hope. Nearly all of the member states have recognised the majority of the EU delegations – despite a few issues; to some extent, parallel command structures are still in place among the diplomatic and Commission staff. Particularly in countries where member states also have a specific interest, acceptance of the delegations is still proving difficult. So far, however, some member states have been willing to grant the EU delegations more rights and greater freedom in terms of formulating policy. But behind this is the fact that all the small and medium-sized EU states and Poland have fewer representatives worldwide than the EU does. As of now there are 139 EU delegations; only France, Great Britain, Germany, Italy and Spain have worldwide more representatives at their command. In many countries, the EU delegations can serve as the eyes and ears of countries that possess no embassy there. The EU delegations in Syria have been informing member states about the situation in the country long after many had already closed their embassies. In addition, there are many examples of pragmatic cooperation involving member states making use of the EU delegations' diplomatic premises. Overall, the office of the delegation heads gained significant importance through the heavy politicisation of their duties.[6] More and more the heads of the delegations are being recognised as EU ambassadors.

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6 | For details on the role of EU delegations from the point of view of the national foreign ministries: Rosa Balfour and Kristi Raik (eds.), "The European external action service and national diplomacies", *EPC Issue Paper* 73, Mar 2013.

The appointment of staff to the EEAS is also proceeding comparatively well. The goal of filling one third of the posts with personnel from member states' foreign ministries has almost been achieved (the proportion of member state diplomats is above that quota in the EU delegations, but still considerably below it at EU headquarters in Brussels). Nevertheless, the distribution of personnel between the member states remains uneven: Central European countries remain comparatively under-represented in the delegations. German diplomats also remain under-represented, although a couple of key positions are occupied by Germans. Overall, the member states are highly interested in occupying key positions, including as heads of the EU delegations. Criticism that the naming of delegation heads would reflect the member states' geopolitical interests have proved true only to a very limited extent and is most likely to be observed in Latin America. Currently, the EEAS has 3,400 employees[7] and thus has fewer members of staff than the diplomatic offices of the six largest member states and the Netherlands each have.[8]

THE REVIEW'S POTENTIAL

Corresponding changes to the original Council decision were to be enacted as needed by 2014 in order to bring the institutional reform process to a close before the new European Commission began their 2014-2019 term of office.

The Council decision envisaged an initial evaluation of the EEAS in 2011 and a comprehensive review by the High Representative in 2013. Corresponding changes to the original Council decision were to be enacted as needed by 2014 in order to bring the institutional reform process to a close before the new European Commission began their 2014-2019 term of office. Given the EEAS' difficult start and the above-mentioned issues, calls for comprehensive reform were quickly expressed. By December 2011, twelve foreign ministers had appealed to the High Representative through a joint letter making suggestions to improve the EEAS' operations – including the German foreign minister. For her part, the High Representative released an initial report on the status of the EEAS at the end of 2011.

7 | EU, European External Action Service (EEAS), *EEAS Review*, 29 Jul 2013, http://eeas.eu/library/publications/2013/3/2013_eeas_review_en.pdf (accessed 9 Aug 2013). To this must be added approximately 3,500 Commission officials which are working in the delegations.

8 | Balfour and Raik, n. 5, 38.

However, the real review will take place this year. In the process, the EEAS' efficiency, structures and its relationships to other institutional actors will be scrutinised. Relevant proposals for changes to be made for the Council Decision should be approved this autumn. This review will be conducted by the High Representative, although the European Parliament as well as the member states have contributed to the process from the start. In doing so, the foreign ministers of 14 member states[9] took a stand in February 2013 with a report initiated by the Germans. The European Parliament has presented its position in terms of the report developed by EPP MEP Elmar Brok and Social Democrat Roberto Gualtieri in April 2013. The High Representative submitted her own report on 29 July 2013.

The reports of the foreign ministers and the European Parliament shared some demands:

1. Both reports demand better coordination between the Commission and the EEAS, but also a stronger role for the EEAS in terms of long-term programme planning for the financial instruments used in European foreign policy. In addition, content management in terms of elaborating on strategies relating to specific regions should lie with the EEAS. The Council report also proposes regular meetings (on a monthly basis at the least) between the Commission and the EEAS.

2. Both reports agree on the need to reform internal structures, particularly in terms of the role of the Secretary-General and coordination among the various leadership bodies.

3. They also call for an increase in the delegation heads' authority and visibility, including as it relates to Commission staff, as well as the creation of a uniform financial cycle. Basically, member state embassies should work more closely with each other, e.g. by exchanging reports, administrative arrangements and joint initiatives.

9 | Foreign Ministries of Austria, Belgium, Denmark, Estonia, Finland, Germany, Italy, Latvia, Luxembourg, the Netherlands, Poland, Slovakia, Spain and Sweden, "Non paper. Strengthening the European External Action Service", 1 Feb 2013, http://eurotradeunion.eu/documents/20130201_nonpaper.pdf (accessed 26 Aug 2013).

4. Reforming the EEAS' crisis management structures in order to achieve more efficient planning and deployment of CSDP missions: The European Parliament has plans to create a crisis board that would incorporate all crisis management instruments.

5. Both reports mention the possibilty that the EEAS could assume consular responsibilities for some member states. The EP and the small and medium-sized member states in particular are interested in this.

However, the reports also set their own priorities. The foreign ministers campaigned to transfer responsibility for European Neighbourhood Policy (ENP) to the EEAS and to strengthen its role in strategic and multi-year programme planning for development policy. In addition, the EEAS should play a greater role in communications with third countries and should, for example, take charge of the negotiations on the association and partnership agreements on behalf of the EU. Some countries, such as Sweden, are advocating a stronger position for the EEAS in policy conception relating to the EU's strategic partners. Additionally, the foreign ministers are calling for national diplomats to have an even stronger presence in the EEAS and that the one-third quota can be taken here to represent only a minimum.

In order to unburden the High Representative, permanent political representatives should be appointed to take over the representative responsibilities of the High Representative.

The European Parliament goes even further with its ideas. In order to unburden the High Representative, permanent political representatives should be appointed to take over the representative responsibilities of the High Representative. Further relief should also occur through a greater degree of inclusion of national foreign ministers. In addition, the EP is calling for improvement in the EEAS' political expertise, e.g. by establishing a political council within the EEAS.

The High Representative released her report on 29 July in which she echoes many of these proposals and which clearly identifies previous shortcomings. One key aspect is the improvement of the working relationship with the European Commission. First, meetings with the other Commissioners should take place more frequently and cooperation

should improve on a working level. The High Representative's authority over those EU Commissioners whose areas of responsibility also concern the European Unions external relations should increase in the medium-term.

Second, Ashton would like to further increase the EEAS' expertise and influence on policy formulation; in doing so the EEAS (and Ashton's successor) should gain a more significant role in the planning of development and European Neighbourhood policy. In addition, the EEAS would like to improve upon its expertise regarding the foreign dimensions of other political areas (energy security, environment, migration, suppression of terrorism, economics). The EEAS should also play a greater role in implementing sanctions and election monitoring missions. Ashton calls for the EEAS' planning capacities to be increased in order to be able to fulfil its core mission of formulating foreign policy strategies.

German soldiers under the symbol of the EU Naval Forces during Operation Atalanta: Rapid reaction and availability were the "raison d'être" of the CSDP. | Source: Rock Cohen ⓒⓘⓢ.

A third key issue is the revision of the EU's crisis management structures. The report proposes that an integrative crisis reaction centre be established, which should be a combination of the Commission's and the EEAS' crisis units. The report calls for a dramatic revision of the rules for preparing CSDP operations. Fourth is the idea to appoint political representatives to relieve the burden

on the High Representative. The report proposes both the appointment of permanent representatives as well as representation based on formal agreements with foreign ministers, commissioners or high-ranking officials in the EEAS. Fifth, the EU delegations' external visibility and position should be strengthened. The report calls for an intensification of logistic cooperation and exchange of information with member state embassies. The report rather cautiously remarks on the EU's role in consular activities, e.g. consular protection; taking charge of such responsibilities must involve a corresponding increase in the EEAS' resources and staff.[10]

ASSESSMENT AND PROJECTIONS

The EEAS will need another few years, if not decades, to reach its full potential. The widespread disappointment about the EEAS is attributable not least to some actors' exaggerated expectations. Occasionally, a downright quantum leap in the EU's capacity to act is expected, particularly with regard to crisis management. However, it would be more appropriate to gauge the EEAS not only by the expectations formulated from the outset, but also by the situation that preceded it: Compared to the rotating Council Presidency, the EEAS now ensures greater continuity, e.g. in the case of the European Neighbourhood Policy. Given the sensibility of the political sphere, it can be seen as a success that no country has challenged the EEAS' existence. Most of the issues and the EEAS' lack of visibility do however present challenges in the medium to long-term.

Compared to the rotating Council Presidency, the EEAS now ensures greater continuity, e.g. in the case of the European Neighbourhood Policy.

Nevertheless, it is wise to conduct a comprehensive evaluation two and a half years on in order to free the successor to Catherine Ashton – who has announced that she will not serve another term – from the dead weight of an over-burdened office. In doing so, a distinction has to be made between which issues can be blamed on the EEAS' structural nature and which simply on its initial and transitional phases. Most experts agree that reforming the crisis management structures, increasing the EEAS' visibility and initiative functions, as well as improving cooperation with

10 | EEAS, n. 7.

other foreign policy actors should take precedence. Initial reactions to the review were positive.[11] At the same time, it sends a clear signal: Despite its difficult start, the EEAS is ready to take on a long-term leading role in formulating and shaping European foreign policy. It remains to be seen how the demands made by the member states, but particularly by the Commission, will be accommodated. The document's rather confident tone is also based on some of the EEAS' successes this year after a very bumpy start. The proposals being discussed in the current evaluation process seem reasonable, especially those concerning civilian and military crisis management. In actual fact, speed and quick employability are the CSDP's *raison d'être*. Should the EU be unable to improve its capacity to act, the CSDP runs the risk of shrinking to a platform of only training missions and small rule of law missions and of completely disappearing from view in the medium-term.

Proposals being discussed in the current evaluation process seem reasonable, especially those concerning civilian and military crisis management.

Unburdening the office of the High Representative and delegating responsibilities to political representatives could further improve capacity to act. In addition, more extensive measures are occasionally required. The administration of consular duties through the delegations should be examined thoroughly. This would be an important step in increasing the EEAS' external visibility, but would also be an example of its specific added value, which could consequently relieve the pressure on smaller and medium-sized member states' diplomatic offices affected by cut-backs.[12] It would be wise for reforms of national diplomatic services to be effected essentially in coordination with the EEAS.

In addition, it is important that the next High Representative is a known figure on the European or international arena. Someone with well-respected foreign policy experience could better bring the EEAS to bear internationally and strengthen Europe's foreign policy profile. The High Representative should also submit his or her own initiatives

11 | See also Jan Techau, "At Long Last, a Sign of Leadership From Ashton", *Carnegie Europe*, 30 Jul 2013, http://carnegieeurope.eu/strategiceurope/?fa=52524 (accessed 9 Aug 2013).
12 | Balfour and Raik, n. 5, 48.

more boldly[13] in cases where there is no completely stable consensus among the member states. In the short-term, this will inevitably lead to rejection, but without the proactive exercise of the office, the EU's visibility as an international actor will hardly be able to increase. Nevertheless, it would be foolhardy to expect that making a personnel change at the head of the EEAS alone could improve Europe's capacity to act or could disguise diverging geographic and topical priorities.

Initiatives set up by a group of member states could become European initiatives with the EEAS' support.

Experts and institutional representatives unanimously agree that ultimately the support by the Commission and the member states is critical for this institution to succeed. They should not view the EEAS as competition, but rather as a possible multiplier of their own influence. In doing so, initiatives set up by a group of member states could become European initiatives with the EEAS' support. Some even go so far as to say that the EEAS could present an opportunity for national foreign ministries to strengthen their own influence in particular member states.[14]

The member states' request to increase service opportunities for national diplomats and enable more long-term careers has been similarly embraced[15] because this could bolster the desired socialisation effects between officials and, in the medium-term, could lead to a convergence of European foreign policy thinking. However, in order to achieve this goal, the member states must send their best and most experienced diplomats to the EEAS and ensure that engaging with the EEAS does not represent a career break. On the one hand, close cooperation between the national foreign ministries and the EEAS and timely integration of the EEAS into the formulation of policy is important. On the other hand, the EEAS must also strive to consult with the member states regularly and, more

13 | Staffan Hamra, Thomas Raines and Richard Whitman, "A Diplomatic Entrepreneur. Making the Most of the European External Action Service", *Chatham House Report*, The Royal Institute of International Affairs, Dec 2011, 13, http://chathamhouse.org/sites/default/files/public/Research/Europe/r1211_eeas.pdf (accessed 9 Aug 2013).

14 | Cf. also Almut Möller and Julian Rappold, "Deutschland und der Europäische Auswärtige Dienst – Perspektiven einer Europäisierung der Außenpolitik", *DGAP-Analyse* 12, Sep 2012.

15 | Balfour and Raik, n. 5.

importantly, in a timely manner, though this is no easy task given that there are 28 member states.

The national sense of responsibility towards the EEAS would increase if national parliaments were better integrated into the interactions with the EEAS. The suggestion to appoint political representatives for the High Representative who could, for example, speak to national parliaments once a year in order to promote the exchange of current foreign and security policy challenges is a step in this direction. However, it is not realistic to expect that the EEAS and the High Representative will be able to define the course of European foreign policy from now on. The member states are not willing to give up their foreign policy prerogatives. And there still seems to be no consensus in many capital cities regarding a long-term plan for how the EEAS should be utilised.

Given its incredibly diverse range of expertise, the EEAS has the potential to present innovative solutions and concepts that could demonstrate significant added value for all the member states.[16] To devise appropriate strategies, clarity regarding what interests European foreign policy consists of is necessary. Institutional representatives have reiterated the demand for the European security strategy from 2003, which defines the most important challenges and instruments for European foreign policy, to be updated.

The EEAS must develop into a foreign policy think tank if Europe truly wishes to outwardly appear to have a unified voice. For this purpose, the EU should increasingly seek unified representation in international organisations.

In the medium-term, however, numerous experts have called for the role of the EEAS to exceed that of such a think tank if Europe truly wishes to outwardly appear to have a unified voice. For this purpose, the EU should increasingly seek unified representation in international organisations. The fear is that a poor (or simply a lack of) image of the EEAS and the High Representative may contribute negatively to the EU and its member states.

Ultimately the belief that a stronger and more capable EEAS lies in the best interests of all member states prevails among experts. On the one hand, because it would enable a more efficient use of resources in terms of foreign and

16 | Hamra, Raines and Whitman, n. 13.

security policy; on the other, because the member states will lose importance and influence in third countries and international organisations if Europe's interests cannot be focussed.

The European External Action Service is in many ways a unique experiment; it unites foreign policy, military, humanitarian and development policy expertise under one roof. This mixture, along with the fact that the staff are bringing with them foreign policy traditions from 28 member states and the foreign policy expertise of the Commission and the Council, allow the EEAS to devise comprehensive foreign policy strategies for the current foreign policy challenges we are facing. These characteristics predestine the EEAS – in close cooperation with the 28 national foreign ministries – to find solutions to the central foreign policy challenges that will be faced in the coming decades.

Many of the EEAS' effects, particularly the socialisation effect, will only be noticeable in the medium-term. Likewise, it will take time for the national foreign ministries to acclimatise to the EEAS and to accept the possible lower visibility in certain countries in the medium-term. The EEAS' strength will critically depend on whether the member states truly want a common European foreign policy.

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