
INTERNATIONAL REPORTS



STATEHOOD

Between Fragility
and Consolidation

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Editorial

Dear Readers,

A state has to fulfil certain basic criteria if it is to be considered a functioning state. It has to ensure the security of its citizens, provide public utilities, and prevent arbitrary actions and corruption. If we take a look around the world, it is clear that – unfortunately – many countries are still far from achieving this. In extreme cases, they cannot even guarantee a minimum level of law and order, and the state’s monopoly on the use of force is replaced by terrorist groups, warlords, or organised crime. In other countries, the situation is less clear-cut. They may be functioning states in certain areas, but are failing to adequately fulfil their duties in others. There is a broad continuum between consolidation and disintegration.

It is the local people who suffer most when states are fragile. Their personal and economic development is hampered, and they may even suffer physical threats. However, fragile states also harbour risks at global level, as conflicts can spread well beyond national borders and regions. A local power vacuum can be exploited by actors who also present a threat to geographically more distant countries.

This is currently happening in West Africa, where the African offshoot of so-called Islamic State in particular is gaining strength. Instability continues to increase in countries like Mali and Burkina Faso, whose state structures are far too weak to effectively counter this development. The crisis also threatens to spread to other, comparatively stable, countries in the Gulf of Guinea. This could entail serious consequences: more violence, fewer opportunities for people to improve their lives, more refugees. In their article, Anna Wasserfall and Susanne Conrad therefore call on Germany and the EU to make a stronger commitment to preventing such a scenario.

The situation is also serious in South Sudan, a state that was founded with high hopes in 2011, but which regularly occupies one of the worst positions in some of the most widely recognised fragility rankings. Mathias Kamp discusses why this fledgling state has descended into chaos and violence and failed to create a resilient polity. He describes South Sudan’s statehood as a “story of failure”.

Along with asserting its monopoly on the use of force and providing basic public utilities, a state’s stability also depends on maintaining legitimacy in the eyes of its population. States are built on a more solid foundation when the majority of their people have confidence in them, and generally view them in a positive light. Since the military coup in February 2021, Myanmar provides a good example of what happens when a state almost completely loses this legitimacy among its people. In her article, Annabelle Heugas describes the junta’s seizing of power as both a consequence and a catalyst of state fragility, and highlights how people have been trying to defend themselves against their illegitimate rulers through civil disobedience and parallel political structures.

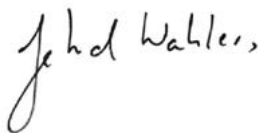
In their article, Pavel Usvatov and Mahir Muharemović turn the spotlight on Bosnia and Herzegovina. This Western Balkan country may not be considered fragile in many respects, but deficiencies in the rule of law, a low level of trust in institutions, and ethnic-nationalist special interests are impeding its path to becoming a truly stable state. Although it initially made progress in its consolidation since 1995, more recently it has been in the throes of a serious political crisis, partly brought about by the wilful actions of its political elites.

However, even when they are generally effective, states can still lose control over parts of their territory through no fault of their own. Ukraine has been experiencing this since 2014, even before Russia's imperialism called its whole existence into question with the invasion of February 2022. Against this backdrop, Brigitta Triebel, Hartmut Rank, and Daria Dmytrenko describe how, over the past eight years, the judiciary has developed into an important pillar of Russian-influenced arbitrary rule in the so-called Donetsk and Luhansk People's Republics, which declared independence from Ukraine. In doing so, they also look ahead to what could happen in territories that have been newly occupied by Russia.

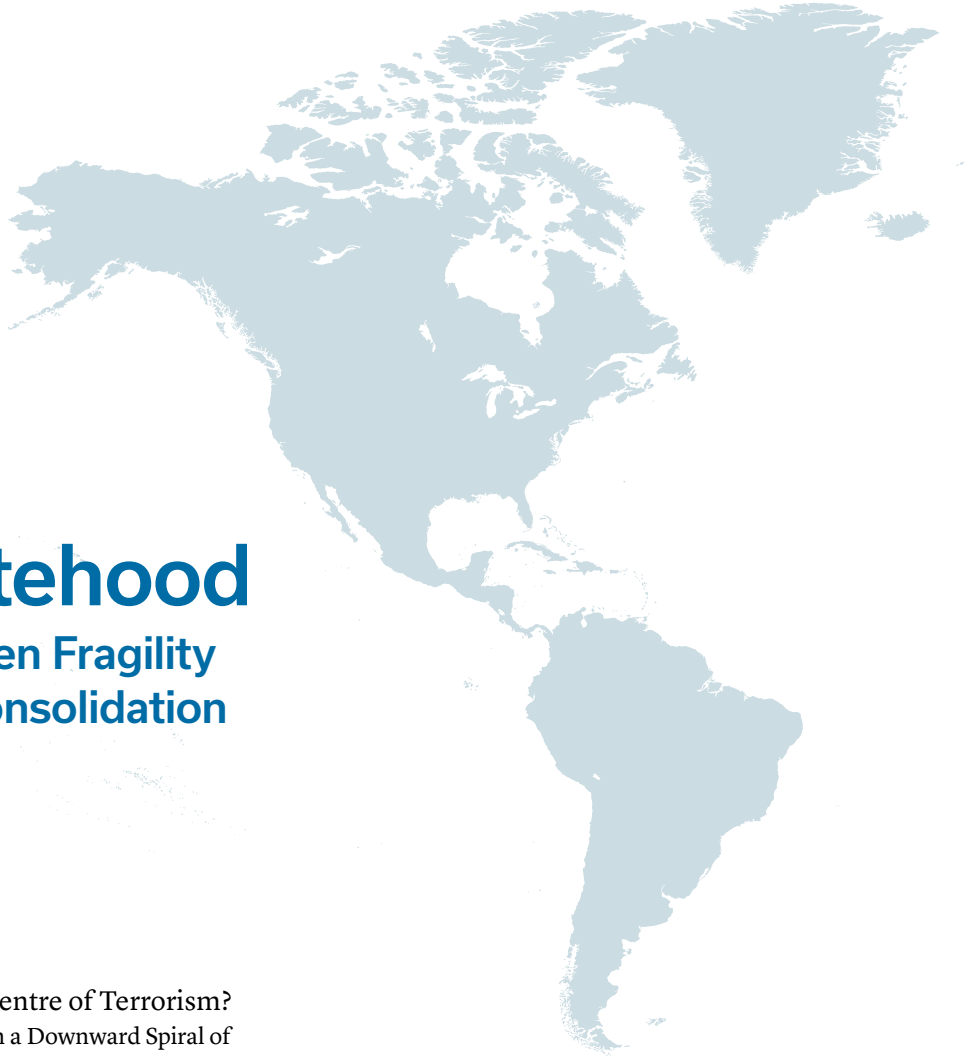
“Our lives have become so interwoven that the effects of state fragility, of crises and bloodshed, can be felt even in Germany.” This sentence is from former Chancellor Angela Merkel's foreword to the German government's policy guidelines on preventing crises, resolving conflicts, and building peace, published in 2017. It illustrates a key aspect: events that may seem “far away” can have consequences extending beyond their immediate location. This is why a wise foreign policy is focused on crisis prevention, but also has to be able to respond to conflicts and contribute to stabilising the situation. Whatever happens, simply standing on the sidelines is not an option – not only from a humanitarian perspective, but also for reasons of self-interest. The mistakes that have undoubtedly been made in the past will hopefully lead to effective and lasting consequences.

I hope you will find this report a stimulating read.

Yours,

A handwritten signature in black ink that reads "Gerhard Wahlers," written in a cursive style.

Dr. Gerhard Wahlers is Editor of International Reports, Deputy Secretary General and Head of the Department European and International Cooperation of the Konrad-Adenauer-Stiftung (gerhard.wahlers@kas.de).



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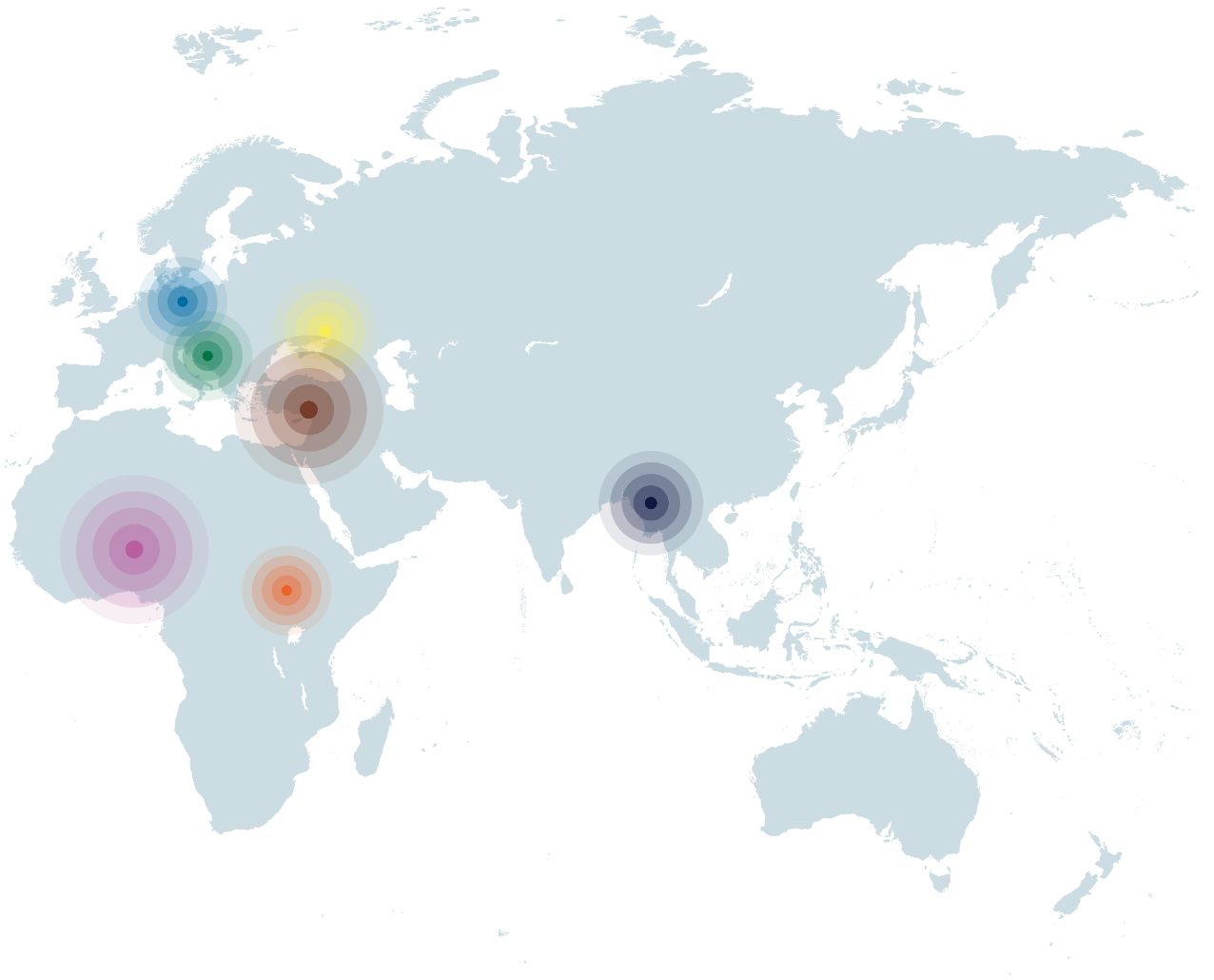
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Statehood – Between Fragility and Consolidation

A New Epicentre of Terrorism?

West Africa in a Downward Spiral of
Extremism and Fragile Statehood

Anna Wasserfall/Susanne Conrad

The interplay of fragile statehood and the spread of extremism and organised crime is destabilising more and more countries in West Africa. While most Western actors are predominantly focused on Mali and Niger, terror and instability are spreading southward. The example of Burkina Faso shows just where this can lead.

Fragility, Conflict, and Violence in West Africa in 2022

The security situation is deteriorating with alarming speed in West Africa, a region replete with fragile states.¹ The 2021² Fragile States Index, issued by the Fund for Peace, a US NGO focusing on conflict assessment and early warning systems, shows just how widespread weak governance is in West Africa. The farther up the list a state is, the more at risk it is of deteriorating state structures. Of a total of 179 countries, there are a number from Central and West Africa near the top: the Democratic Republic of the Congo (5), the Central African Republic (6), Chad (7), Nigeria (12), Cameroon (15), Mali (19), Niger (21), and Burkina Faso (36). The governance vacuum prevalent in these countries gives rise to a phenomenon familiar in terrorism research, of which the fragile security situation in West Africa provides an almost textbook example: Islamist and other extremist groups exploit the existing power vacuum and state incapacity, presenting themselves as alternative providers of state services to the local civilian population. The line where weak legitimate governance starts, and increasing power of terror networks ends, is blurry. This speeds the deterioration of the security situation and political stability in many West African countries. But what triggers this vicious cycle?

Organised crime players and armed non-state groups are gaining power and influence among the population of many West African countries. This is especially true of ISWAP (Islamic State West Africa Province), the West African offshoot of Islamic State (IS), but also of countless militant groups in the border regions, which are

sometimes difficult to distinguish from each other. IS' reach now extends to large parts of Africa.³ After its decline in Iraq and Syria, the terrorist group is experiencing a renaissance on the neighbouring continent, where it is competing successfully against Boko Haram and al-Qaeda. According to the 2022 Global Terrorism Index (GTI), compiled by the Institute for Economics & Peace (IEP) and covering 163 countries and thus 99.7 per cent of the world's population, Sub-Saharan Africa is becoming the global epicentre of terrorism. For instance, 48 per cent of global terrorism-related deaths occur in Sub-Saharan Africa, with the Sahel as the region with the fastest-growing terrorist groups, led by ISWAP, which has become the deadliest terrorist group in the world.⁴

IS appears to be spreading unchecked across the continent – with a regional terror hotspot in West Africa – and is challenging all countries in the region for the exercise of executive power. The countries of the Sahel are most affected by this socio-political emergency. But this situation also threatens to infect the coastal countries of Benin, Côte d'Ivoire, Ghana, and Togo, which are all still stable by comparison. Such a development would harm the stability of the entire region. Moreover, the political and security policy effects would not be limited to West Africa, but would affect Europe, the immediate northern neighbour of the Sahel and Maghreb regions.

Unprecedented Escalation of Violent Conflicts: Causes of Collapsing State Legitimacy

Since the beginning of the current conflict in Mali in 2012, many countries of the Sahel have

been in the grip of an escalating chain of violent conflicts. This situation is documented strikingly by data from the Armed Conflict Location & Event Data Project (ACLED)⁵ on the number of attacks on population groups. This NGO specialises in the collection, analysis, and crisis mapping of disaggregated global conflict data. This data shows that violent attacks increased in Mali by 230.3 per cent between March 2012 and March 2022, with a rise in deaths of 1058.1 per cent. The data for Burkina Faso in this period is scarcely better: according to ACLED, the number of attacks there rose by 442.9 per cent, and the number of deaths by 438.8 per cent.⁶ The wider consequences of this can be seen, for instance, in the number of internally displaced persons in Burkina Faso, which had risen to more than 1.8 million by March 2022 amid the sustained waves of violence, ongoing since 2012.⁷

These numbers are a drastic statement on the blatant lack of state presence and ability to act in the affected parts of the countries. No country in the Sahel appears even remotely capable of exercising the state's monopoly on the use of force to protect the population throughout its territory. The state security structures – especially in the politically neglected margins beyond the urban centres – are too weak to intervene effectively in the event of attacks by extremist actors, or intercommunal or interethnic conflicts, to guarantee the security of the civilian population. If the military or police do intervene, it is often with indiscriminate violence – which repeatedly results in many civilian deaths, and exacerbates the existing mistrust and rejection of state authority by the local population.

This erodes traditional resilience mechanisms, social cohesion, and the security situation in rural areas. The same is true for educational and training opportunities, or the funding of economic growth connected with income opportunities. Here, too, domestic approaches and efforts are largely limited to the capitals and urban centres, so young people in rural regions have few opportunities to finish school and acquire decent prospects for their lives.

The toxic combination of poverty, political marginalisation, lack of prospects, and distrust provides an ideal opportunity for armed non-state groups and actors to establish themselves among the rural civilian population as guarantors of security. Additionally, terrorist and extremist networks are able to offer concrete income opportunities through smuggling and other criminal activities, and are thereby able to recruit many members.

The social downward spiral in Burkina Faso began back in 2014.

Case Study: Burkina Faso – Extremism as a Driving Force of Instability

Burkina Faso is a highly topical example of how state fragility and the increasing influence of extremist groups reinforce each other. In the West African country, this development was ultimately even used as an argument to overthrow the democratically elected government.

Since 2016, extremist groups with connections to al-Qaeda and IS, coming largely from Burkina Faso's northern neighbour, Mali, have begun to build new bases in Burkina Faso's northern territory from which they can spread throughout the country. The presence of armed terrorist groups has grown significantly in all of the country's peripheral areas. Terrorist groups have bases primarily in the border regions with Mali, Niger, and Côte d'Ivoire.⁸ Although Burkina Faso has long had the reputation of being one of the more stable West African nations, the above-mentioned 2021 Fragile States Index ranks the country in 36th place on a list of 179 nations.⁹ Despite recurring conflicts over land and resources, Burkina Faso was known for the peaceful coexistence of various ethnic and religious groups, by regional standards. It has only been since the arrival of al-Qaeda and IS fighters, infiltrating local communities, that serious tensions have arisen.¹⁰

Fig. 1: Security Situation in Burkina Faso, Assessment by the French Ministry of Foreign Affairs



■ Explicit travel warning ■ Travel only for very urgent reasons ■ Increased caution ■ Usual caution Source: Own illustration based on Ministère de l'Europe et des Affaires étrangères 2022: Burkina Faso. Sécurité, n. 8, map: Natural Earth ©.

Compaoré government's inability to combat the growing number of extremist training camps in Burkina Faso, and the deteriorating security situation in the country may well have been the last straw.¹¹ Compaoré's resignation was followed by a phase of political uncertainty, leading to increasingly fragile state structures, and ultimately to a power vacuum. The extremist and militant actors in the northern part of the country used this situation to their advantage, expanding their power base and developing new spheres of action in the country.

Extremist actors in Burkina Faso are adept at exploiting existing social or ethnic tensions for their recruitment efforts.

Power Vacuum Creates Opportunity

The social downward spiral in Burkina Faso began back in 2014, when President Blaise Compaoré was forced to resign after sustained protests. Having ruled the country for 27 years, Compaoré was, at the time, one of the most senior incumbents in Africa. He came to power in 1987 after the murder of his former political companion and then head of government Thomas Sankara, who many still call "Africa's Che Guevara". At the time, many thought that Compaoré was responsible for the death of Sankara, a national hero – and this perception was strengthened in April 2022, when a court ruling found the former president, who now lives in exile, guilty of complicity in Sankara's murder, sentencing him to life imprisonment.

However, the protests against Compaoré were triggered primarily because he planned to pass a constitutional amendment that would allow him another term in office. Frustrated with the high unemployment, widespread poverty, and lack of prospects, the largely young Burkinabe population demanded real and lasting political change. In addition, accusations of corruption against the president, his family, and his inner political circle were repeatedly raised. Ultimately, the

Glaring Weaknesses in State Security Structures

In October 2015, Roch Marc Kaboré finally took office as the new president of Burkina Faso. Given the growing threat and the increasing number of terrorist attacks in urban areas, Kaboré made improving the security situation his political priority. He increased the national defence and security budget by a whopping 271 per cent between 2016 and 2021.¹² The additional funds were intended to improve the operational capabilities and the living and working conditions of Burkina Faso's security forces. These forces were often deployed for extended periods to border areas, where they were sometimes neither adequately supplied with food, nor with necessary military equipment. Low pay, missing paychecks, and high casualties from attacks by militant groups targeting patrols or bases eroded the fighting morale of the already disillusioned security forces. The most prominent example of this is the terrorist attack on the Inata military base in northern Burkina Faso in November 2021, in which 49 military policemen and four civilians were killed.¹³

One among almost two million: The number of internally displaced persons fleeing extremist violence has risen sharply during the last decade in Burkina Faso. [Source:](#) © Zohra Bensemra, Reuters.

Shocking deficiencies in public budget management, as well as corruption in the country's political and military structures meant that the massive budget increase did not significantly contribute to improvement in the security situation. The chasm between political leadership and the military played a role here as well: since the dissolution of Blaise Compaoré's presidential guard, which was involved in an attempted counter-coup in September 2015, the political leadership's trust in the military has been fundamentally damaged. Against this backdrop, any significant strengthening of the country's military structures can be viewed as a double-edged sword.

Fighting Causes Instead of Effects

But even improving military capacity would ultimately only address the effects of the problem, not its root cause, i.e. the blatant weakness of the government in Burkina Faso. The lack of state presence at the sub-national level not only enables extremist and militant groups to develop ever larger spheres of action in the territory of Burkina Faso, but also repeatedly contributes to bitter, often violent, conflicts between communities over the use of resources and land.¹⁴ Since the state cannot fulfil its protective function, this increasing violence has led to the establishment of numerous local self-defence militias, often based on ethnicity, multiplying the number of actors, and thereby further confusing matters. As in Mali, extremist actors in Burkina Faso are adept at exploiting existing social or ethnic tensions for their recruitment efforts, and exacerbating existing conflict lines to their own advantage. The spiral of violence, of mutual attacks and retaliations between local communities, triggered by these processes,

sometimes takes on more drastic and deadly dimensions than the attacks by extremist actors themselves.¹⁵ The country's military is also a violent actor: as the attacks on security forces increase, so too does the severity with which soldiers approach the civilian population in the context of the fight against terrorism. In addition to arbitrary arrests and torture, there are repeated reports of executions, including mass executions. These actions are taken not only against extremist actors, but also against their supporters, or suspected supporters, in the civilian population.





Military Coups – A Current Trend in West Africa?

The catastrophic operational conditions of the security forces, the large number of casualties, the increasing loss of control, and the escalating violence were ultimately the precursors of the coup on 24 January 2022, in which President Roch Marc Kaboré was deposed by the military. In a speech, a spokesman of the new military government cited the country's security crisis as one of the reasons justifying the violent overthrow of the government.¹⁶ The military

takeover of the government found broad support among the population, suffering as it was from the escalating situation and prevailing poverty. Burkina Faso thus joins a number of other West African countries that have experienced an undemocratic change of government in the last two years. It is true that most of these military governments have established firm schedules for a democratic transition. But the example of Mali shows clearly that such schedules cannot necessarily be taken seriously, and that current transitional governments are very much interested in maintaining power. The increasing

number of coups is not just a trend, but also an expression of a severe crisis of West Africa's political systems.¹⁷

State Fragility on the Rise – Including outside the Sahel

This societal development is not limited to states in the Sahel. The events in Burkina Faso do not bode well for the country's southern neighbours – Côte d'Ivoire, Togo, Benin, and Ghana – which may currently be at the beginning of comparable developments. These coastal countries on the Gulf of Guinea are struggling with similar structural challenges and state fragility – especially in the north, where

they border Mali, Burkina Faso, and Niger. These states suffer from a number of geographical and socio-economic factors which further encourage the spread of extremist actors: long borders that are difficult to control, with close family and economic ties on both sides, and various national parks in the border areas. The dense vegetation makes them hard to access with motorised vehicles, rendering area-wide control by state authorities virtually impossible. The vegetation also provides effective protection against air reconnaissance and attacks. The protected status of the areas means that hardly anyone lives there, so they are ideal for extremist actors to operate from. From Burkina Faso in particular, such actors move across the borders



Military coups as a last hope? When taking power – as happened in Burkina Faso in early 2022 – West African armed forces today enjoy the support of large swathes of a violence-stricken population. [Source: © Vincent Bado, Reuters.](#)

to establish areas of refuge. These spots provide them with sources of income in the form of smuggling and illegal resource extraction, and recruitment grounds in the local population.¹⁸

Even though the situation in Burkina Faso is not identical with that of the coastal states of the Gulf of Guinea, there are sufficient parallels to show what a worst-case scenario for those states might look like. If the security situation were to develop in the same direction as in Burkina Faso, important regional anchors of stability would cease to function. This would have far-reaching long-term effects for all of West Africa, such as escalating violence, exploding numbers of refugees, and a sustained loss of democratic structures.

Europe and Germany would certainly feel the effects of such destabilisation. For one thing, Côte d'Ivoire, Togo, and Ghana are three reform partnership countries of Germany, with whom the latter cooperates closely, and to whom large financial flows are sent in the context of development policy. There are also commercial ties. Above all, however, a sustained destabilisation of these countries would trigger migration movements whose scope may well greatly exceed the capacities of neighbouring African states, and of European countries.

France remains a core security policy actor in the region.

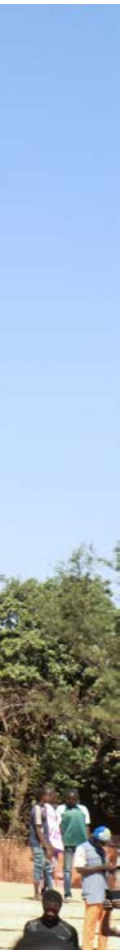
Unlike Mali and Burkina Faso, the states on the Gulf of Guinea still have options they could pursue to avert such a scenario. The example of their northern neighbours has created awareness of how quickly control over national territory can be lost. In the meantime, governments in the Gulf of Guinea have all taken measures to counter the growing security threat. For instance, efforts are being made to increase intelligence and the capacities of security services; military operations and patrols in border areas are being stepped up, and the presence of

security forces is being intensified. There are also increasing initiatives aimed at improving relations between the civilian population and state security forces – a result of the growing awareness that effective prevention and countermeasures are not possible without the support and participation of the local population.

A Strategy for Germany and the EU

The severe security crisis in West Africa – of which Burkina Faso provides an instructive example – is potentially a massive regional destabilising force. It will force Western partners to develop new, pragmatic methods of cooperation. This will require a strategic partnership that pursues approaches at both the regional and local levels. Resilience mechanisms against fragility, conflict, and violence cannot be achieved with security policy and military intervention alone, as the impotence of external security missions in Mali has sufficiently shown. There must also be targeted socio-political and economic support measures at the local and regional levels to re-establish trust between citizens and governments, while at the same time pursuing a regional solution to overcome the transnational security crisis.

Germany should therefore work with the EU to develop more regionally-focused perspectives and support stabilisation measures of West African countries, which focus on an integrative strategy of regional and local measures. There are a number of options and approaches. They should focus primarily on improving basic services and municipal infrastructure, restoring resilient livelihoods, and strengthening state and democratic structures in the long term.¹⁹ From a regional perspective, a further goal could be supporting regional initiatives such as the Accra Initiative, which was launched by Ghana in 2017, and now includes Benin, Burkina Faso, Côte d'Ivoire, and Togo (Mali and Niger have an observer status). Its goal is preventing terrorism from spreading from the Sahel and to jointly combat cross-border organised crime and violent extremism in the member countries' border regions.



Germany remains a respected partner in the region despite increasing anti-Western sentiment, and should view this as an opportunity in the process of reorienting German security policy to become more involved in West Africa. The extent to which heightened German security policy engagement in the region will have a supporting effect can be estimated from the Bundeswehr's "Gazelle" operations in Niger – a model that could be transferred to other countries in the region. Strengthening intelligence services would be a sensible approach to support the countries concerned in the fight against extremism and organised crime. An information advantage – especially at the external borders – would be important in order to implement targeted countermeasures.

Both Germany and other European and international actors must invest in long-term measures, both in concept and implementation. It is important to build on existing successes and to use the accumulated experience to render cooperation with partners on the ground more efficient, targeted, and inclusive. The debate over greater conditionality cannot be avoided here. The current situation in West Africa must be seen in this context for what it is: the result of decades of complex development, not a short-term crisis that can be solved with one-dimensional, time-limited approaches and strategies. In the same way, overarching processes, such as climate change, which is already exacerbating resource-related conflicts in the region, cannot be addressed effectively on the time scale that underlies most development cooperation measures today.

With this in mind, Western actors will have to change their perspectives and prove their staying power if they desire to be a sustainable, effective part of a lasting solution. The prerequisite for this is greatly improved coordination among the various states and organisations in West Africa, whose current activities betray a severe lack of consultation and coordination. Attempts to correct this deficit, such as the creation of a "Sahel Alliance", have so far proven ineffective. Improved coordination also requires an increased degree of transparency and

openness – among external actors, but also with West African partners. This would also help to overcome the growing scepticism and rejection of Western intervention within the populations of West Africa. This sentiment is based on the ineffectiveness and short-term nature of measures, and on the fear that Western partners have a hidden agenda in the countries in question.

For Germany, it would be particularly necessary and advantageous to increase complementary engagement with France, which remains the largest and most important European actor in West Africa. Despite all prevailing resentment, France remains present in the region with extensive military structures, and thus remains a core security policy actor. Nevertheless, Germany should also develop sufficient foreign policy confidence to state its own interests within the framework of an Africa strategy, which should include approaches towards the stabilisation of West Africa, and the resolution of the migration issue from the Sahel towards Europe. Given the changed framework conditions in Mali, Germany's role and objectives in the region must be reassessed – this would be an opportune moment. Whatever the future shape of Western engagement in the region, one thing is certain: given West Africa's current trajectory towards becoming a new terror hotspot, inaction, both in the short and long term, is not an option. And even though Russia's war of aggression against Ukraine is, from a European perspective, the current focus – it should not be overlooked that a major security crisis is brewing in West Africa, with as yet unforeseeable implications for Europe.

- translated from German -

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[Statehood – Between Fragility and Consolidation](#)

Of the Child Who Never Learned to Walk

South Sudan's Statehood: A Story of Failure

Mathias Kamp

When South Sudan became the 55th African country to march into independence in July 2011 following five painful decades of conflict with (North) Sudan, there was a great sense of euphoria. But less than three years later, South Sudan was the frontrunner in an unfortunate category: the 2014 Fragile States Index ranking identified it as the most fragile state in the world.¹ In the meantime, a brutal civil war broke out after the first government collapsed. It was not until 2018 that the warring parties were able to agree on a shaky peace treaty, the implementation of which continues to be difficult to this day. South Sudan's statehood is a story of failure. A search for explanations.

A Country Devastated

Usually overshadowed by other (violent) crises around the world, a look at the current situation in South Sudan reveals a catastrophic picture. People's lives are marked by poverty, hardship, and fear. The economy is in ruins; infrastructure is completely inadequate. Years of civil war have further exacerbated the country's already disadvantaged starting position and left deep scars. An estimated 383,000 people lost their lives during the civil war from 2013 to 2020.² Poverty and violence have driven over four million South Sudanese to flee their homes. Over 2.3 million people have sought refuge in neighbouring countries, while another two million live as internally displaced persons in their own country. According to the United Nations, 8.9 million people in South Sudan depend on humanitarian aid – over two thirds of the population.³ Droughts and floods as well as the repercussions of the COVID-19 pandemic have further aggravated the situation. The consequences of the war in Ukraine on the supply situation also threaten to worsen the food shortage.

On top of all that, violence and massive human rights violations continue to occur behind the façade of fragile peace. The United Nations reported, among other things, repeated attacks and fighting in South Sudan's Unity state, where

at least 72 civilians lost their lives between February and April 2022.⁴ In the state of Western Equatoria in 2021, hundreds of people were killed and some 80,000 people displaced in fighting between opposition and pro-government militias.⁵ Aid agencies repeatedly report attacks on their staff. Human rights organisations as well as the UN describe atrocious human rights violations: torture, executions, sexual violence.⁶ Speaking of peace in this context seems cynical.

Collapse of the State

This catastrophic situation is confronted by a government and public administration that scarcely seem capable of effectively meeting the immense challenges. The state apparatus is only functional to some extent, and suffers from a tremendous degree of corruption. Rule of law proceedings are rarely reliable; arbitrariness and impunity are the order of the day. The closely interwoven political, economic, and military power in the country is hardly subject to any control.

The list of government failures is long and can probably best be summarised as follows: no basic services, no peace, no justice. And accompanying all that: a glaring lack of state legitimacy.⁷

The German government's 2017 guidelines on cooperation with fragile states distinguish between six fundamental fragility profiles. South Sudan evidently falls into the first category of "failing or dysfunctional states with considerable weaknesses in all dimensions, often marked by violent conflicts culminating in civil war"⁸. In the past, the category of "failed states" was often used here, but has been increasingly replaced in the debate by different levels of fragility. The label "failed" is inappropriate in its absoluteness insofar as, even in the extreme examples of dysfunctional and disintegrating states such as Syria, Yemen or Somalia, the state still fulfils certain minimal functions.⁹ Incidentally, in the current Fragile States Index (Report 2021), the three examples mentioned are ahead of South Sudan, which is "only" in fourth place among the most fragile states.¹⁰

The roots of the conflict between the north and the south of Sudan go back to colonial times.

Yet how could South Sudan drift from independence straight into fragility? Why did the hoped-for success story of national self-determination turn into such a tragedy? In the search for explanatory factors, it is worth first looking back at the history of the state's founding.

Bloody History

The statehood of South Sudan has a bloody history. Decades of civil war between the marginalised south and the dominant north of Sudan had cost millions of lives and meant a de facto developmental standstill for the South.

The roots of the conflict between the Arab-Muslim north and the Christian-dominated south of Sudan go back to the colonial era, during which the British colonial administration entrenched separation and marginalisation of the South within the framework of a divide-and-rule

approach. Already with independence from the Anglo-Egyptian Condominium in 1956, efforts emerged to secede the South and led to the first civil war, which lasted until 1972. A ceasefire agreement that granted the South a certain degree of autonomy lasted eleven years. From 1983, the conflict escalated again. In light of oil discoveries in the South, the North had begun to gradually encroach on regional autonomy. What is more, the government in Khartoum introduced Sharia law for the entire country. This led to the founding of the SPLM (Sudan People's Liberation Movement) and its militarised arm, the SPLA (Sudan People's Liberation Army), under the leadership of Colonel John Garang, who succeeded in taking over extensive control of the South. Nascent hopes for a peace process towards the end of the 1980s were dashed in 1989, when Omar al-Bashir seized power in Khartoum with a coup d'état. It would take another 15 years before a peace agreement was finally reached. The long period of civil war had devastating consequences: famine, displacement, and enslavement, along with a total death toll estimated at over two million.

Peace Accord and Independence: Phase of Hope

Due to international pressure, especially from the United States, al-Bashir's government agreed to peace talks with the SPLA in 2003, which led to the conclusion of a peace agreement in 2005. Among other things, this agreement provided for the creation of an autonomous region under SPLM administration, the non-validity of Sharia law in the South, the sharing of revenues from the southern oil deposits, and the establishment of a Government of National Unity with an SPLM-appointed vice president. After a transitional period of six years, a referendum was then to decide on the independence of the South. John Garang was appointed vice president, but died within weeks in a helicopter crash. To this day, the circumstances have not been fully clarified. In contrast to Garang, his successor Salva Kiir vehemently advocated the secession of South Sudan.

The optimism of the international partners at the time of independence was naïve from today's perspective.

When the citizens of South Sudan were finally called to a referendum in January 2011, almost 99 per cent voted for independence. Some reasons for this overwhelming vote are a deep antipathy towards the North, the feeling of deprivation, and the unifying nature of the common struggle for liberation.

The step towards independence triggered great enthusiasm and hope for a better future among the population. Optimism also prevailed among international partners, and with it the goal, naïve from today's perspective, of transforming this newcomer to the community of states from a beacon of hope into a model pupil. But even then, some observers expressed scepticism when considering the extremely difficult starting conditions.

As an example, we refer to the assessment by the Konrad-Adenauer-Stiftung at the time:

“Whether South Sudan can establish itself as a functioning and independent state depends, [...] beyond relations with Northern Sudan, on several factors at the local level. Key areas of tension include the relationship between the centre and the periphery, the development of a pluralistic democracy with strengthened civil society forces, and the establishment of an effective state apparatus. Currently, there is a concentration on defence tasks at the expense of creating a corruption-free civil administration capable of providing infrastructure and services throughout the country. A long-term dependency on the international community is foreseeable.”¹¹

Looking at the sobering reality eleven years after independence, it can be stated: the necessary progress has not been made in any of the points mentioned.

The “Lost Decade” Following Independence

Hopes for peace and stability after the step towards independence were soon bitterly disappointed. Old internal conflicts quickly erupted. At the end of 2013, a long-simmering power struggle between President Salva Kiir and his deputy Riek Machar escalated and led to a bloody civil war. Now it was no longer North and South Sudan that were hostile towards each other, but two political camps within the South.

The ostensible starting point of the conflict was an armed confrontation between the respective bodyguards of Kiir and Machar, unleashing a spiral of violence. The ensuing civil war was fought primarily along ethnic lines. The two political protagonists mobilised support from their respective ethnic groups. President Kiir counted on the Dinka ethnic group, which he himself belongs to and which remained largely loyal to government forces. Machar, meanwhile, mobilised representatives of his ethnic group, the Nuer, most of whom left the SPLA and formed the breakaway SPLA i.O. (in opposition).¹² Numerous attempts to implement peace agreements initially failed. An agreement that was finally reached in August 2015 had already become invalid by July 2016, after the transitional Government of National Unity collapsed. Then UN Secretary General Ban Ki Moon clearly expressed the international community's frustration in view of these developments: Kiir and Machar were interest-driven repudiators of human rights. “They pour scorn on any promise of peace. Rarely has a country squandered so much opportunity so quickly.”¹³

In September 2018, a new attempt finally succeeded in signing the peace agreement that is still in force today. In the meantime, the conflict dynamics had become increasingly complex. The longer the war lasted, the more the two camps frayed into numerous splinter groups and militias. The 2018 agreement was eventually signed by a total of twelve armed and political groups.¹⁴ This complexity and ongoing deep mistrust between Kiir and Machar make effective implementation of the peace



Masters of deception: President Kiir (left) and former Vice President Machar (right) have repeatedly agreed on peace treaties over the years. In practice, however, they and their respective armed supporters continue to obstruct a genuine peace process in South Sudan. Source: © Jok Solomun, Reuters.

agreement tremendously difficult. Deadlines for milestones set out in the agreement towards a sustainable solution have been missed on regular occasions. The formation of a new inclusive transitional government only succeeded in February 2020 under growing international pressure. Since then, the war has been regarded as over, but there has hardly been any real peace. The situation remains tense and volatile, and the suffering of the population continues. People are still on the run. Violence occurs time and again, especially since the conflict has shifted more and more to the communal level, and there are regular localised clashes between different communities and ethnic groups.

Against this background, there was little or nothing to celebrate on the tenth anniversary

of independence in July 2021. The South Sudan Council of Churches summarised the prevailing mood in a public statement: the years since independence have been a “wasted decade”¹⁵.

On the Way to Democratic Elections?

According to the peace agreement, the stipulated transition period is to end in February 2023 – after democratic elections have been held. However, the implementation of other important elements of the agreement is still a long way off. This concerns, among other things, issues of reconstruction, economic and political reforms, and strengthening of the rule of law. The urgently needed work on developing a new constitution has been neglected to a large extent.

The Panel of Experts mandated by the UN Security Council on the situation in South Sudan pronounced a scathing verdict.

Both sides are accused of a lack of will to implement the agreement consistently. Particular criticism is levelled against Kiir's SPLM that it has taken a path that contradicts the basic character of the peace agreement. The SPLM i.O. complains of repeated attacks on its bases by government troops and pro-government militias. Critical observers see a deliberate strategy by Kiir to weaken the SPLM i.O. and marginalise Machar.¹⁶ There are also complaints of ongoing human rights violations, corruption, impunity, and an excessively authoritarian approach towards critical voices in the media and civil society.

The Panel of Experts mandated by the UN Security Council on the situation in South Sudan pronounced a scathing verdict in its latest report of April 2022: in essence, almost the entire peace agreement package has deteriorated into a "hostage to the political calculations of the country's military elites". These used "a combination of violence, misappropriated public resources and patronage to pursue their own narrow interests".¹⁷

To adhere to the timetable, elections would have to be held by the beginning of 2023 at the latest. Under the current circumstances, this seems extremely unrealistic. There are deficits in all relevant areas. Citizens eligible to vote are not systematically registered, especially since many of them are still on the run. The necessary political reforms to regulate political competition are still pending, and there is a lack of basic infrastructure, personnel, and financial resources needed to prepare and conduct elections. Without swift and intensive preparations and massive external support, free and fair elections can hardly be realised, and chaos would be inevitable. Not only do continuing volatility and recurring violence jeopardise the smooth conduct of

elections – the elections themselves also entail the risk of contributing to a renewed widespread escalation of the conflict, whose fundamental problems remain unresolved. The closer the country gets to the planned elections and the end of the transitional phase, the clearer the failures of the past will become and the louder the voices calling for an adjustment of the timetable. And even that might fall short of the mark. General scepticism is in order. Without a fundamental rethinking of the approaches taken so far, it is difficult to imagine sustainable progress in the spirit of the peace agreement.

Search for Explanations

The continuously sobering reality in South Sudan raises the question: what went wrong? How can this story of failure be explained? There is no simple answer here. Rather, it is about an interplay of different factors:

- *Historical heritage and challenging conditions for development:* South Sudan's troubled history has left deep scars. Decades-long conflict and exploitation by the North have stymied any developmental progress. At the end of the civil war against the North, the south of Sudan was considered the least developed region worldwide. The existing foundations for building an independent state were more than meagre. Apart from oil deposits, the region had hardly any resources of its own to speak of. Due to its historical marginalisation, there was a lack of basic infrastructure, social services were catastrophic, education levels were extremely low, and the qualified personnel needed to build a functioning state administration were almost non-existent.
- *Lack of civil structures and processes:* the lack of autonomy and dependence on Khartoum, as well as the logic of resistance and armed conflict that dominated for decades, meant that barely any civil structures developed in South Sudan. There was a lack of experience with civil conflict management, participatory processes, and democratic

self-government. The perpetual experience of violence and militarism is difficult to overcome. In the shadow of the structures developed primarily for armed struggle, there was hardly any room for developing pluralistic forms of organisation.

As is so often the case, oil has proven to be more of a curse than a blessing.

- *Ethnicity and national identity:* South Sudan is a multi-ethnic state. As part of Sudan, like many states in Africa, it is to some extent an artificial construct of the somewhat arbitrary demarcation of borders by the colonial powers at that time. This was often overlooked during the war against the North. The idea of a unifying national identity was fed almost exclusively by the all-encompassing struggle for autonomy, and to a much lesser extent by religion. The conflict between the Muslim North and the predominantly Christian South largely concealed the lines of conflict that existed within South Sudan. These then became even more apparent following independence, and led, among other things, to an escalation of the elites' power struggle along ethnic lines. A positive national identity has hardly been able to develop in the newly independent state.
- *Resource curse and a rentier economy:* in theory, South Sudan's oil deposits would be a good basis for making the young state viable after independence and for developing the country. But as is so often the case, in practice, oil has proven to be more of a curse than a blessing. Mismanagement and greed have led to a small corrupt elite rather than the country itself benefiting from the revenues. Moreover, a rentier economy has developed with the combination of oil revenues on the one hand, and the massive development aid funds, on the

other. And while oil revenues end up in private pockets and fuel the war economy, the necessary spending on basic services and developmental projects is left to the international donors.

- *Corruption:* the corruption mentioned above has assumed proportions in South Sudan that almost constantly drive the state apparatus to the brink of collapse. So much money seeps into the neo-patrimonial kleptocracy that it is almost impossible for the state to fulfil its basic tasks. In the past, President Kiir made headlines with his repeated calls for corrupt government officials and civil servants to return misappropriated funds, as the public administration was on the verge of collapse.
- *Economy of violence:* with an eye on oil and other natural resources and in the context of a weak public order, a lucrative war economy has been established during long years of civil war. The enrichment of elites with the potential for violence from these resources has become not only a goal in its own right, but the dominant logic of war. Unfortunately, the peace processes to date have not offered a solution to break through this logic. Rather, critics see the design of peace talks as part of the problem, since it is primarily those actors who demonstrate their potential for violence through acts of war who are invited to the negotiating table. It is thus also part of the uncomfortable truth that pending and ongoing negotiations may fuel the spiral of violence themselves.
- *Lack of demobilisation and integration of the security forces:* a key sticking point remains the demobilisation and reintegration of the various troops into a unified national army. This was a condition of the peace agreement, but has scarcely been achieved to date. Tens of thousands of ex-combatants are waiting to be drafted into the army. Most of them wait in various military camps and seek alternative survival strategies for lack of pay and employment.



These include arms smuggling and cattle theft, which fuels the violent escalation of local conflicts.

- *Individuals over institutions*: it seems astonishing that, even after eleven years of independence, events continue to be dominated by the two protagonists Salva Kiir and Riek Machar, who have repeatedly demonstrated their lack of will and ability to lead the country for the good of the population towards peace and development. Time and again, external pressure has forced them to make unwelcome compromises, but failed to overcome this personalisation.
- *Lack of accountability and impunity*: the weakness of democratic institutions also means that it is hardly possible to hold those politically responsible to account. Extensive impunity is not only a massive problem regarding corruption, but also for human rights violations and war crimes. A reappraisal of the atrocities of war would be a central prerequisite for sustainable, peace.

External Influences

Besides the factors mentioned above, there is also the question of the role of external actors. First, the problematic immediate neighbourhood



Cheering too soon: People in the capital Juba celebrate the independence of South Sudan in July 2011. But the new state quickly went from being a beacon of international hope to becoming a problem child. Source: © Thomas Mukoya, Reuters.

should be highlighted here. The countries surrounding South Sudan, some of which are dealing with conflicts and instability themselves, often did not engage constructively. On the contrary, especially Sudan in the north and Uganda in the south have at times unilaterally supported conflicting parties, thus contributing towards the expansion and prolongation of the civil war.

But it is not only the neighbouring countries that play an important role. Since its independence, South Sudan has been a focus of the international community as the youngest state and “problem child”. Upon independence in 2011, the UN Security Council deployed the UNMISS peacekeeping mission with the aim of consolidating peace and security in the country and ensuring stable conditions for the country’s development. After the civil war broke out, priorities were redefined in favour of protecting the civilian population, monitoring the human rights situation, supporting the delivery of humanitarian aid, and monitoring the ceasefire. Time and again, the mission was accused of failing to protect the civilian population. Despite an expansion of the mandate and troop strength (currently up to 17,000 blue-helmet troops), the mission still does not meet expectations. Nevertheless, the renewal of the mandate for another year by the UN Security Council in March 2022 can be considered a success.

The international community must also accept criticism regarding its diplomatic engagement. After immense pressure was exerted to get the peace agreement signed, implementation was not promoted with the same vehemence. The focus shifted away from South Sudan, and the mediating role of the regional organisation IGAD (Intergovernmental Authority on Development) was neglected. The fact that the failure to implement the central provisions of the peace agreement has so far had very few consequences is problematic, too. An arms embargo was only imposed in July 2018 after several failed attempts. Options to use sanctions, especially against the elites responsible for corruption and violence, have hardly been exhausted.

The involvement of external actors, foremost the United States and China, must of course also be seen in the context of geostrategic competition. However, attempts to interpret the crisis in South Sudan as a “proxy war” are misguided. China, too, has no interest – not least in view of the oil business – in further inflaming the conflict in South Sudan from the outside. In fact, South Sudan is one of the few examples in which China has somewhat deviated from its publicised principle of non-interference and, among other things, is actively participating in the UN mission with troops. Nevertheless, there is no united front by the international community to speak of. For example, China and Russia abstained in voting on extending the UN mission and the arms embargo.

The fundamental criticism that independent South Sudan is a completely defective construction does not help.

Conclusion: International Partners Have a Duty to Act

The failure in South Sudan is without doubt primarily due to the actions of the country’s political elite, which – it can be clearly said – continuously commit treason against their own country. But it is also a failure of the international community. South Sudan’s independence was supported with much euphoria and massive financial aid – especially from the United States. However, various problems that became apparent early on were ignored or underestimated. The historical burdens and complex dynamics in South Sudan were misjudged. The international community must accept criticism not only for missed opportunities in building democratic structures, but also for the way it has handled the crisis since 2013. For too long, the dynamics of the conflict were underestimated, and the scope for influencing developments through positive measures, diplomatic pressure, and sanctions was not fully exploited.

At the moment, it remains completely open whether it will be possible to turn the tide in South Sudan and create stable conditions in the foreseeable future. Scepticism is called for following the numerous disappointments in the past. Critics have long raised the question of whether South Sudan was ready for independence at all and whether the elites who took over leadership of the country are even capable and willing to build a functioning state. The fundamental criticism that the independent state of South Sudan is a completely defective construction does not help in the crisis. What does help, however, is the realisation that a peaceful and democratic state is scarcely viable with the current strategy and the prevailing dominant elite.

The occasional radical proposal of an international “trust government” overshoots the mark and would also be unfeasible. But in the end, the international community has no choice but to engage longer and more intensively on the ground so as to prevent more war and chaos, and enable development opportunities. Otherwise, in the worst case, the state could disintegrate without ever having functioned properly.

The priorities for engagement must continue to include humanitarian aid to alleviate the population’s ongoing suffering, as well as participation in the peacekeeping mission to ensure the silencing of weapons. Beyond that, however, it is also a matter of political dialogue and diplomatic pressure to hold the domestic political elite more accountable and, if possible, to successively reduce the influence of the previous protagonists. This also means that the almost exclusive focus on the Kiir and Machar camps must be overcome in favour of a more inclusive process. A continued focus on a purely technical solution to power-sharing will not suffice. Economic factors providing incentives for the perpetrators of violence also need to be more strongly addressed.

Key projects to be tackled include, above all: an inclusive national dialogue; a reappraisal of the atrocities of the war; a strengthening of the rule of law and law enforcement; an effective

disarmament and demobilisation programme and a fundamental reform of the security forces; and comprehensive political reforms with the development of a new democratic constitution. The holding of democratic elections is currently a particular milestone in this regard. However, without the appropriate logistical and political investments, there is a high risk of renewed conflict escalation. In this respect, the timetable set for the beginning of 2023 now seems unrealistic.

As difficult to impossible as the task may appear: the international partners who have acted so massively as South Sudan’s midwife, have a duty to help that child finally learn to walk. The fundamental mistakes made on the road to independence can hardly be corrected in retrospect. But they should be a lesson for the future handling of autonomy and secession efforts in regions of conflict, and for new approaches to building functioning structures in the context of fragility and weak statehood.

– translated from German –

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Statehood - Between Fragility and Consolidation

Symptoms and Outcomes of a Fragile State

Myanmar before and after the Coup d'État

Annabelle Heugas

When on 1 February 2021, the Burmese army – the Tatmadaw – seized power in yet another coup d'état, the event caught some observers by surprise. Yet it did not emerge out of the blue. Resulting from state fragility only superficially concealed by economic growth and a top-down political liberalisation, the military's seizure of power in turn eroded what was left of stability in Myanmar's state institutions.

On 1 February 2021, the Tatmadaw, led by Commander-in-Chief Min Aung Hlaing, seized power and detained members of the democratically elected government, including State Counsellor Aung San Suu Kyi (ASSK). The military regime now faces civil and armed resistance, economic decline, and a lack of domestic and worldwide recognition. The shaky pedestal of the Myanmar State shows more signs of fragility than ever before. From 2018 to 2020, it ranked 22nd out of 179 countries in the Fund for Peace's Fragile States Index (the first position being the most fragile state), but then dropped to the position of tenth most fragile country in the aftermath of the coup, scoring worse than it did in the mid-2000s.¹ Did Myanmar's environment exhibit elements of fragility conducive to the military coup? And which factors exacerbated that fragility in the aftermath of the military's power grab? With the door to democracy now (temporarily) closed, what is the current situation in the country and how does the international community react to it? And how can development projects respond to the Myanmar people's democratic and federalist aspirations?

Elements of Fragility Leading to the Coup

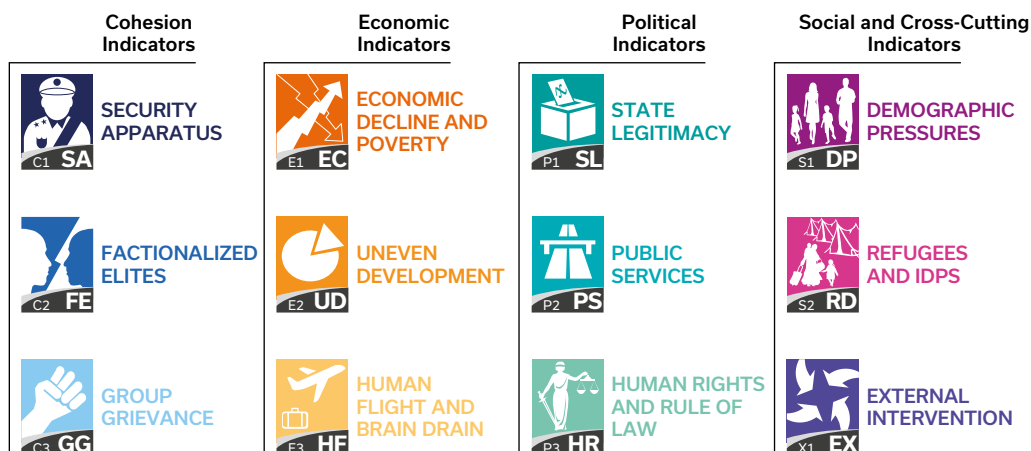
The criteria for defining a state as fragile differ from one organisation to another. In this article, the Fund for Peace think tank's Fragile States Index will be taken as reference as its twelve indicators provide a comprehensive understanding of a country's fragility. We shall start by analysing some of the most relevant indicators to the Myanmar context, and examining how they may have contributed to the coup.

The Security Apparatus indicator evaluates, among other issues, whether the military and police abuse their power, and if there is armed resistance in the country. In the case of Myanmar, it has played a major role in the coup.

One of the strongest cases of the military's abuse of force to capture the international community's attention were the exactions committed by the Tatmadaw against the Rohingya, a Muslim minority in Myanmar, causing around 700,000 of them to flee the country in 2017.² For most of Myanmar's population, the plight of the Rohingyas represents only one among other less mediated ethnic conflicts in the country. There are officially 135 recognised ethnic groups in Myanmar, among whom the Barmars constitute the ethnic majority at 68 per cent. Since Myanmar's independence 74 years ago, a longstanding armed conflict has been waged between the military, predominantly Bamar, and ethnic armed organisations (EAOs) that demand self-determination. Thus, despite an upsurge in violence in recent months following the 2021 coup, having led the UN to worry about Myanmar's progression towards civil war, in reality, the country had already been fragile in this regard. After all, its domestic insurgencies led it to being dubbed the state with the "longest ongoing civil war in the world".³

Moreover, the military had launched a coup d'état twice prior to 2021: in 1962 and in 1988. It violently suppressed the subsequent peaceful protests. The history of violence at the hands of the Tatmadaw increased the likelihood of similar circumstances re-occurring.

Fig. 1: Indicators of the Fragile States Index



Source: Own illustration based on The Fund for Peace: Indicators, in: <https://fragilestatesindex.org/indicators> [6 Aug 2022].

The Factionalized Elites indicator evaluates whether there is a social class with power that is divided from the rest of the population either by ethnicity or religion, if nationalistic rhetoric is prevalent and if the nation’s wealth is evenly distributed. Myanmar’s fragility in this respect largely explains the coup.

With the coup, senior serving and retired generals can continue to profit from the theft of public assets.

The Tatmadaw is an insular institution, primarily composed of the country’s majority ethnic group. It perceives itself as the guardian of the Union of Myanmar, which it fears would otherwise “disintegrate” or divide itself based on ethnic or political lines. This nationalistic belief propagated by the army since independence, was used to justify the 2021 coup as it invoked Article 417 of the 2008 Constitution. This states that the president has the power to declare a one-year state of emergency if the country may face the disintegration of the Union or of national solidarity “due to acts or attempts to take over the sovereignty of the Union by

insurgency, violence or wrongful forcible means”. There is no evidence that the scenario described in this Article bore any resemblance to the actual events in Myanmar. A state of emergency was nevertheless declared by the military and its newly designated acting president, enabling the Tatmadaw to utilise the sweeping powers granted under the Constitution.

The generals wished to preserve their elitism to retain a political and economic grip on the country. As self-declared prime minister of Myanmar following the coup, Min Aung Hlaing was no longer obligated to retire from his position of commander-in-chief on his 65th birthday in 2021, as per the Defence Services Act.

As well as being the most powerful institution in the country, the Tatmadaw also enforces control over the majority of the nation’s wealth from its direct and indirect participation in various sectors, especially from national resources (e.g., mining, oil, and gas industries). With the coup, senior serving and retired generals can continue to profit from the theft of public assets by remaining in control of two military conglomerates, the Myanmar Economic Corporation (MEC) and the Myanmar Economic Holdings Limited (MEHL). The MEC and MEHL own, wholly or partially, at least 133 companies.



The Group Grievance indicator evaluates, among other related issues, whether there are groups that have been historically oppressed, whether they have been compensated in the framework of a reconciliation process, and whether war criminals were prosecuted or if amnesty was granted. This indicator had an important influence on the events leading up to the coup. The people of Myanmar did not receive compensation for the misery they suffered under the military's almost five-decade rule (1962 to 2010). Moreover, the generals who ruled with an iron hand were never

prosecuted. A look at the background of Myanmar's democratic transition will help us understand why.

When the generals established a roadmap to democracy in 2003 with a milestone of free elections to be held in 2010, this seemingly sounded the death knell for Myanmar's military dictatorship. Several elements explain the regime's motivation for engaging in such a process: the generals wanted Western powers to lift the sanctions imposed after the brutal



Untouchable: Despite decades of oppression and human rights abuses, the Burmese military has always enjoyed impunity. Source: © Reuters.

in strengthening Myanmar's ties with China, such that the military wanted to rebalance its relations with Western nations. However, the military would only allow the country to open with the implied notion that it would not suffer prosecution at the hands of a population it had oppressed for decades.

The Constitution gives the military a veto power on all possible constitutional amendments.

In order to achieve this, it created the National Convention after ignoring the victory of ASSK's pro-democracy party, the National League for Democracy (NLD), in the 1990 multi-party general elections, the first held in 30 years. This body was in charge of drafting a constitution that would permanently safeguard the military's power over any institutions, and guarantee their impunity if the country engaged in a democratic transition. The 2003 roadmap to democracy and the 2008 Constitution are based on the National Convention's work. The culture of impunity, created by the military for its own benefit, laid the foundation for a possible coup. Moreover, the unaddressed grievances felt by large swathes of the population led to the call for constitutional amendment of the articles that grant the Tatmadaw a predominant role in Myanmar politics. The amendment of the Constitution became a campaign promise of the NLD during the 2015 general elections. Fearing the possibility of such a threat becoming reality after the NLD won elections for a second time in 2020 (faring better than it did in the 2015 elections), the military launched a coup.

Thus, Myanmar's democratic path was initiated top-down, with the guarantee that the generals

crackdown against student-led protests in 1988. They were willing to get rid of Myanmar's pariah status and re-integrate into the global economy. What is more, international criticism towards the junta, led by the US, fuelled fears of a foreign invasion among the Burmese generals. This reached its apogee after the US invasion of Iraq in 2003 and the Bush Administration's open condemnation of the junta. The military regime thus considered it to be in their best interest to make concessions towards the international community. Moreover, the sanctions resulted

would benefit from impunity. As a result, Myanmar's democracy was always at risk of being revoked by the same institution that gave rise to it, should its privileges be called into question.

The Economic Decline indicator considers, among other elements, the country's GDP, its unemployment rate, and its business climate. In the case of Myanmar, it had been continuously improving from 2010 until the coup in early 2021, with an average GDP growth of 7.1

per cent during this last decade.⁴ Despite some local economic issues, the country maintained a constant FDI (foreign direct investment) level with an annual average of six billion US dollars in the years prior to the coup.⁵ This indicator was thus not a deciding factor behind the power takeover. We could even assume that the country's economic development with the support of FDI gave ASSK's government some (over-)confidence in believing that Myanmar's political and democratic transition would remain stable.



The call for democracy cannot be silenced: A street in Yangon weeks after the February 2021 military coup.
Source: © Reuters.

The State Legitimacy indicator considers numerous factors such as people’s confidence in state institutions, the composition of government, the integrity of elections, and political assassinations. Myanmar’s fragility in this regard has been a leading cause of the coup.

Although Myanmar’s State Legitimacy indicator improved during the NLD’s term (2015 to 2020), it still remained fragile partly due to the general population’s distrust of the role of the military as

enshrined in the 2008 Constitution. The Constitution enables the military to undemocratically maintain political influence by reserving 25 per cent of parliamentary seats to serving military representatives. This gives it a veto power on all possible constitutional amendments since 75 per cent of parliamentarians’ votes are needed to pass a motion. It also states that the army’s commander-in-chief nominates the heads of three key ministries: Defence, Home Affairs, and Border Affairs. The military’s lasting hold



on power through the Constitution continued to be a hindrance to Myanmar's young democracy and a major component of the country's fragility. For this reason, the NLD promised to amend it as was fervently desired by the majority of the country's population. However, the 2017 assassination of Ko Ni, a Muslim lawyer advocating for constitutional reform, highlights the dangers of undertaking such a project, and Myanmar's political fragility.

Regarding the conduct of the latest general elections in November 2020, the NLD won a landslide victory, securing 82 per cent of all elected constituencies, which translated into 396 of the 498 available seats.⁶ On the other hand, the army-backed Union Solidarity and Development Party (USDP) won only 33 seats. Humiliated, the military accused the NLD of election fraud and called for a recount of votes. On 27 January 2021, the Union Election Commission (UEC) flatly replied that it had seen no evidence of voter fraud, and denied the request. Faced with the unwavering popularity of ASSK, the army feared being side-lined for good. On 1 February 2021, it staged the coup before the newly elected government's first parliamentary session. The Tatmadaw declared a state of emergency and could thus use its sweeping powers granted under the Constitution. This put an end to the ten-year experiment with democracy in the country.

The coup caught many observers by surprise as they underestimated the extent to which the generals viewed these results as an existential threat. Still, the army was able to topple a democracy that was built on shaky foundations in a country whose state legitimacy was already highly fragile.

Prior to the coup, the Human Rights and Rule of Law indicator was already high in Myanmar (22nd out of 179 countries for three consecutive years since 2018), indicating serious problems. Rule of law was weak, and, in practice, the military was already exempt from trial. Freedom of speech was often violated by those in power, with the Constitution having been invoked to

justify these violations. Thus, an environment of impunity created by the military since 1962, along with its disregard for the rule of law, were conducive to the possibility of a third coup.

Nationwide protests were held, gathering hundreds of thousands of people and effectively paralysing the country.

Regarding the External Intervention indicator, there is no proof that it played a part in the military's power takeover. The Tatmadaw was confident that if it launched a coup, China and Russia would abstain from condemning it at the UN Security Council (UNSC), however. Indeed, Myanmar's and Russia's Defence services maintained bilateral relations over the years. Min Aung Hlaing had visited Russia more than five times before the coup, while the Russian Defence Minister Shoigu had, a few days before 1 February 2021, supplied the Tatmadaw with surveillance drones, missile systems, and radar equipment. As for China, Beijing authorities have geostrategic and economic interests in Myanmar such as the China-Myanmar Economic Corridor (CMEC).⁷

Domestic and International State of Affairs Post-Coup

In the aftermath of the military coup, all of Myanmar's twelve indicators of fragility according to the Fragile States Index ranking have worsened (from 23rd position in 2021 to 10th in 2022). We shall highlight a few that have been heavily impacted.

The worsening of the State Legitimacy and Public Services indicators were some of the most noticeable on the ground. The state in Myanmar lost its political authority with the army's power grab, while the military government's efforts to continue providing

public services were met with fierce resistance. Immediately after the coup, the military proclaimed its own governing body, the State Administration Council (SAC). On the same day, health workers started a Civil Disobedience Movement and refused to work under the regime. They were soon joined by teachers and other civil servants, followed by people from every sector and across age groups. In the following weeks, nationwide protests were held, gathering hundreds of thousands of people and effectively paralysing the country.

While the SAC continues to strive for legitimacy by attempting to carry out state functions, citizens boycott state services in protest since they perceive a failure of the state to be linked to a failed power takeover by the military. Following the coup, citizens and a number of businesses have refused to pay government taxes in order to weaken the junta's revenue. People had also stopped paying their electricity bills, causing the regime to lose around one billion US dollars in income over seven months. Millions of students and parents of school-aged children have chosen not to attend university, or to keep their children out of school to boycott the "military slave education".⁸ As a way to voice their disapproval of the regime, a large share of people even refused getting a COVID-19 vaccine in the first months following the coup, as the junta had taken over the former government's vaccination programme.⁹

The SAC's legitimacy is contested by the general population, but also by the emergence of a shadow authority of deposed MPs, party representatives from the NLD, and also different ethnic groups. The Committee Representing Pyidaungsu Hluttaw (CRPH)¹⁰ acts as the legislative body, the National Unity Government (NUG) as the executive branch and the People's Defence Force (PDF) as the armed forces of this shadow structure. Former NLD members appointed people from ethnic minorities in ministerial positions to demonstrate their intention of prioritising federalism, which is an unresolved and contentious issue in the country. In this respect, the CRPH published its own

Federal Democracy Charter, which states the principles and broad policies of a conceived democratic and federal union of Myanmar. The representatives of the shadow state also hope to receive support from the EAOs, already in conflict with the junta.

Since the coup, Human Rights and Rule of Law have been breached time and again. The military reacted to the peaceful protests with brutality. The UN Office of the High Commissioner on Human Rights has recorded more than 1,600 killings and over 12,500 arbitrary detentions by security forces and their affiliates in the year following the coup.¹¹ Torture and arson attacks against civilians are rampant. In July 2022, for the first time in over 30 years, the junta carried out capital punishment by executing four pro-democracy activists.

The worsening of the Security Apparatus indicator is also clear. In September 2021, the shadow government declared a "people's defensive war" against the military. More people from all walks of life joined or sent financial support to the PDF, which has been fighting the army's troops mostly through guerrilla-style attacks across the country. Although the NUG has nominally established a command structure, not all armed groups follow its command or even consider themselves part of the PDF, despite sharing its cause.

The political turmoil, security threats against citizens, and withdrawal of FDI have led to an increased economic decline in the country.

While the Tatmadaw purchased its weapons mainly from Russia and China,¹² members of the opposition have bemoaned the lack of support from other countries. To win the revolution, the resistance is hoping for more desertions from the Tatmadaw and police forces.

According to the NUG, these desertions have reached over 10,000 people, a number difficult to verify.¹³ In urban areas, sporadic attacks in the form of bombs or assassinations have also taken place against military members or their supporters. Only rarely do underground resistance groups claim responsibility for these attacks, which indicates a decentralised resistance movement.

The political turmoil, security threats against citizens, and withdrawal of FDI have led to an increased Economic Decline in the country, to the point of near-collapse. According to the International Labour Organization, as of 2022, around 25 million people in Myanmar are living in poverty and 1.6 million jobs were lost the previous year.¹⁴ The World Bank forecasted an 18 per cent contraction of the economy for the 2021 fiscal year.¹⁵ Tourism, the industrial sector, and the construction industries were among those hit particularly hard. Daily life has become increasingly difficult for the average person due to rising food costs, as well as regular power and water shortages. The banking sector also struggled as the junta implemented desperate measures to save the Central Bank's foreign currency reserves. Businesses and individuals were forced to convert their US dollars into local currency, while transactions and cash withdrawal are still restricted.

The total number of Internally Displaced Persons in the country has risen to around 890,000.

Contrary to the aftermath of the 1988 protests, during which US-led economic sanctions were broad and thus also negatively affected the general population, sanctions imposed in 2021 – including visa bans and assets freezes – target high-level military officers as well as businesses associated with the Tatmadaw. Although these measures aim to penalise the regime, their ultimate goal to discourage atrocities cannot be

achieved as long as the Tatmadaw can turn to other countries for support, some of which have vested interests in Myanmar.

Although China and Russia have been blamed for blocking resolutions at the UNSC and for their seeming support for the SAC, no government has yet taken the step of formally recognising the NUG. All have adopted a wait-and-see position so as not to burn bridges with either opposing parties and to keep a foothold in Myanmar. The European Parliament and the French Senate have, on the other hand, recognised the NUG. As for ASEAN, it refused a political representative from Myanmar at its last summit in October 2021, which constituted an unprecedented move for the organisation despite its negligible impact.

Owing to enduring political violence, crumbling institutions, and an increasing poverty rate as a direct consequence of the economy's downfall, humanitarian assistance is necessary for the deprived population of Myanmar. In December 2021, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) estimated that 6.2 million people were in urgent need of humanitarian assistance, an increase of 5.2 million in only one year.¹⁶ Basic needs include staple food, water, electricity, shelter, and clothing. Furthermore, according to OCHA, domestic conflicts since the coup had led to the displacement of around 520,000 people by March 2022.¹⁷ The total number of Internally Displaced Persons in the country has risen to around 890,000.¹⁸

EU countries could contribute to the UN's 2022 humanitarian response plan for Myanmar given that currently only six per cent of the plan's declared 826 million US dollars is accounted for.¹⁹ The opposition forces to the junta have asked the international community to refrain from distributing humanitarian assistance via the military regime, but instead through legitimate institutions, e.g., local humanitarian networks, community-based organisations, non-governmental organisations, and agencies.

Conclusions and Outlook

Prior to the coup, Myanmar ranked high in the Fragile States Index. However, concerns over its fragility were overshadowed by the enthusiasm among domestic and international actors surrounding its democratic transition, following half a century of military rule. Although the coup caught many by surprise, in reality, Myanmar's fragility paved the way for a power grab by the military. These elements of fragility worsened after the coup, as the people of Myanmar continue to resist the Tatmadaw who, in turn, underestimated the relentless defiance it would face.

In the midst of a revolution against a military regime, state institutions are not providing proper public services, since they either do not have the capacity or the trust from the population to do so. It is therefore imperative to support the initiatives of local organisations or democratic movements in Myanmar seeking to fill such a gap.

With NGO activities being subject to scrutiny by the military, and embassies being bound by diplomatic protocol, other organisations such as political foundations may have more scope for implementing projects to help people's daily lives. Education is one of the hardest-hit sectors by the coup due to the closure of universities, and hence educational initiatives such as vocational online learning courses should be supported. For example, digital and entrepreneurial skills may be an effective way to improve individuals' expertise. This type of support gives some prospects to people deprived of professional perspectives.

Organisations could also support projects that focus on the economic development of Myanmar's regions by, for example:

- holding workshops to identify current challenges in specific business segments with the intervention of experts;
- focusing on the development of SMEs and young entrepreneurs, giving them the tools

to establish business plans with an assessment of their activities in the value-chain;

- supporting start-ups and roll-out through business incubation centres in which newly created enterprises could get operational support in market strategy, human resources and recruitment, accounting and financing, distribution, and partnership.

Regarding Myanmar's political outlook, the NUG presented a draft of its vision of a future Myanmar. It committed to a federal state under a Federal Democracy Charter to gain the support of ethnic armed groups. Albeit an important initiative, the draft lacks a few details and directives on how to engage in the process. Subject to the need and request of the democratic movement, several members of the international community, in particular those experienced in federalism, may have the capacity to provide some insights on how to implement a comprehensive constitution. Harmonious relations with regional authorities, tax and budget, education, police and security, and the healthcare system are strategic areas where the democratic movement within the country may seek support in the long term. Today, federalism in Myanmar still proves to be a hurdle that all successive authorities have so far failed to overcome. The plight of ethnic groups must genuinely be understood if national reconciliation is to be achieved. beforehand, workshops, seminars, and educational online tuition may need to be conducted with stakeholders from different ethnic groups in order to establish understanding and trust as the pillars of a united Myanmar.

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Statehood - Between Fragility and Consolidation

A Gridlocked State

Bosnia and Herzegovina between
EU Aspirations and Politically Induced Paralysis

Pavel Usvatov / Mahir Muharemović

Bosnia and Herzegovina was essentially given its constitution from the outside in 1995. As part of the Dayton Peace Agreement, its main aim was to keep the peace by dividing power along ethnic lines – at the expense of efficiency. The state functions to the extent that its political elites want it to. The recent years and months, however, have been marked by blockade and increasing ethno-national egoism.

A Fragile State in Europe?

The German Federal Ministry for Economic Cooperation and Development (BMZ) defines fragile states as those “in which the government is unwilling or unable to fulfil fundamental state functions in the areas of security, rule of law, and basic social services”. State institutions are weak or at risk of collapse, and the population suffers from abject poverty, violence, corruption, and political despotism. Moreover, fragile states are often affected by violent conflicts and thus represent a regional and international security risk.¹

Bosnia and Herzegovina (BiH) is a state with a troubled past and a challenging present and future. As with various other countries in the region, people’s daily lives are characterised by political and economic instability, and developments regarding the rule of law and the fight against corruption and organised crime continue to be fraught with difficulties. Nevertheless, although BiH displays characteristics of a fragile state in certain aspects, it does not fall into the fragile state category as a whole. In addition to corruption and deficits in the rule of law, state institutions are inefficient; yet, we cannot speak of an erosion of state power, rampant insecurity, political arbitrariness, or excessive poverty. Bosnia and Herzegovina, which is on NATO’s doorstep, is also not affected by any violent conflict and therefore does not pose an international security risk. The causes of the Bosnian state’s dysfunctionality, especially at national level, lie primarily in the political unwillingness of the ruling elites to build a fully functioning state.

Structural Factors of Instability

Following the conclusion of the Dayton Peace Agreement in 1995, Bosnia and Herzegovina experienced a long period of stability and relative progress. With the assistance of the international community, new institutions were created and existing ones reformed and modernised. The country finally officially applied for EU membership in 2016. By this time, it had become evident that BiH could make progress even within the highly complex constitutional construction in place since the 1995 Dayton Agreement. The prerequisite for this has always been the existence of a basic consensus among the local political actors. This basic consensus among the leading political forces on the path to be taken for BiH’s continued development has increasingly eroded over recent years. In the autumn of 2021, this led to the most serious political crisis since conclusion of the treaty, which has further intensified this year.²

The political crisis also has ramifications on the general functioning of state institutions and the rule of law in BiH, since structural weaknesses in the Bosnian state’s legal and institutional spheres are interrelated with the political factor. These structural weaknesses often enable political elites to paralyse the state and its institutions legally, and usually without serious consequences. This article aims to highlight these weaknesses in order to help identify possible solutions. These shortcomings are primarily divided into three areas: the constitutional framework, the inefficient state institutions, and the tame or even dysfunctional rule of law.

Annex IV to the peace treaty, which was drafted in the US city of Dayton, Ohio, and signed by the warring parties in Paris on 14 December 1995 (Dayton Agreement), contains the “Constitution” of BiH. Constitution is in quotation marks, because it does not correspond to an ideal constitution in the sense of the “constitutional concept of the European-American world of states”.³ Although it has the character of a state-constituting framework and contains provisions on state organisation, fundamental rights, etc., it lacks an important constituent feature: the BiH Constitution did not come into being as a result of an internal constitutional process, but was drafted and put into force owing to the Dayton peace negotiations as part of the peace treaty. Although it was not adopted in an exclusively external process,⁴ the Bosnian people or their representatives did not directly adopt it either.⁵

In drafting the constitutional text, care was taken to ensure that no ethnic group could outvote the other.

The text can be characterised as a classic *realpolitik* compromise between the warring parties at that time, drafted under strong pressure from the international community led by the United States of America, and attached as an annex to the peace treaty after being negotiated and formulated within a short period of time. Nevertheless, representatives of most of the population in the entity assemblies (the National Assembly of the Republika Srpska and the Parliament of the Federation of BiH) and the then still existing Republic Assembly subsequently approved the text, which is why the legal assessment seems justifiable that formal deficiencies should “not affect” the validity of a constitution that came into being under the conditions of an “international legal crisis”.⁶ However, this weakness of the BiH Constitution is likely to be the subject of repeated controversy, which is not conducive to

the country’s stability. In its 1997 decision, the Constitutional Court of BiH expressed the legal opinion (*obiter dictum*), which was not crucial in the case decided at the time, but was important for legal classification of the annexes, that the BiH Constitution must not collide with the Dayton Treaty and its other annexes and was on the same legal hierarchical level.⁷ It may be that the court consciously avoided adopting a position on the question of the legal quality of the BiH Constitution and the formal legality of its realisation. However, the decision allows the reading that the court indirectly attests the same legal quality to the BiH Constitution as to the other annexes of the Dayton Treaty.⁸ This, mind you, for a law that by definition has the highest rank in a constitutional state.⁹ Finally, a factor that seems of lesser importance at first glance, but which can scarcely be underestimated for the perception and impact of the document, is the fact that the legally binding original language of the constitutional text is not Bosnian/Serbian/Croatian, but English.¹⁰

The agreement’s primary goal, and thus also the content of the BiH Constitution, was the restoration of peace and the preservation of the status quo, i.e., more or less the legalisation of facts created by armed force. This did not resolve the conflict, though. Instead, it froze it in the hope that this new constitutional framework would foster greater integration of all parts of the country and ethnic groups in the future. This new constitutional framework is predominantly based on the construct of the “constituent peoples” (Bosnian Serbs, Croats, and Bosniaks). It has led to a constitutional system that emphasises the ethnically based division of power and grants the three constituent ethnic groups (too) many veto and blocking possibilities. In drafting the constitutional text, special care was taken (for understandable reasons) to ensure that no ethnic group could outvote the other.¹¹ This applies directly to the federal legislature and to the executive at almost all levels of government and indirectly affects the judiciary, too. As a result, the principle of unanimity and parity is preferred in voting and appointments to office. It is therefore not surprising that there is often

complete gridlock in decision-making processes at all levels, insofar as this principle applies.

The ethnically based constitutional framework also determines the state's territorial organisation. BiH became a highly complex and extremely decentralised state comprising three parts: the Federation of Bosnia and Herzegovina, populated by a majority of Bosniaks and Croats and in turn divided into cantons (three cantons with a Croat majority, five with a Bosniak majority and two without a clear majority); the Republika Srpska, populated by a majority of Serbs and organised in a centralised manner; and the Brčko District, a special self-governing body with far-reaching autonomy. The first two are also referred to as "entities".

The High Representative can make individual decisions, including dismissing state presidents, in order to maintain peace and stability.

Finally, in the 27 years since concluding the Dayton Treaty, cracks have also emerged in the construct of "constituent peoples" as a result of several decisions taken by the European Court of Human Rights (ECtHR) in Strasbourg.¹² In these decisions, since 2009, the Court has repeatedly established the illegality of discrimination against persons belonging to groups other than the constituent peoples in BiH, or belonging to one of the constituent peoples but residing in the territory of an entity in which they do not form a majority, regarding their right to stand for election to the "House of Peoples" (second chamber of the BiH Parliament) or for the federal presidency. Despite the ECtHR's decisions, which are binding on BiH, the ethno-national political elites have thus far failed to implement the court's requirements by amending the constitution and electoral law accordingly. Instead, decisions of the ECtHR have been used as an opportunity to further

undermine the constitutional foundations. Bosnian Croats, for example, are now demanding more extensive institutional and constitutional rights going beyond a mere change in electoral law, including the creation of a contiguous Croat-dominated constituency for elections to the federal presidency, with some voices even calling for a separate, third "entity".¹³ Should they succeed in this, it would mean a division of the state and further consolidation of the ethnic-national principle.

In light of the complex nature of the constitutional system, it is not surprising that the Dayton Agreement (Annex X) created the Office of the High Representative (OHR). This institution is supposed to ensure civilian implementation of the peace treaty and, equipped with the "Bonn powers"¹⁴, effectively secure peace by maintaining and strengthening the functionality of BiH institutions. The High Representative may regulate abstract as well as concrete and specific legal issues in a binding manner by issuing laws and regulations, culminating in amendments to the constitutions of the entities. In order to maintain peace and stability, he can also take individual decisions, including dismissing state officials, even state presidents, and recalling elected representatives. The High Representative made use of these powers on multiple occasions in the early years after the war's end, but the intensity of use of the "Bonn powers" under Paddy Ashdown as incumbent (2002 to 2006) in particular, provoked much criticism. As a result, the Venice Commission of the Council of Europe found that the "Bonn powers" were "fundamentally incompatible with the democratic character of the state and the sovereignty of BiH".¹⁵ It qualified the powers of the High Representative as emergency powers and stated that emergency powers must "cease together with the emergency originally justifying their use".¹⁶ Most jurists, however, characterise the powers of the OHR differently. The majority believe that the powers derive from the position of the OHR as a kind of international territorial administrator or trustee,¹⁷ while others even speak of a protectorate or quasi-protectorate.¹⁸ This means that the OHR's powers would





Remembering the victims of the bloody war: According to estimates, over 11,000 people were killed in the siege of Sarajevo alone between 1992 and 1995. The Bosnian Constitution must be seen above all as an attempt to ensure peace in this multi-ethnic state. [Source: © Dado Ruvic, Reuters.](#)

not cease with the end of a state of emergency, which would be difficult to define and determine, but only with the formal dissolution of the OHR; this would have to be accompanied by the abrogation or termination of Annex X to the Dayton Agreement.

On the other hand, there is almost unanimous agreement with the 2005 finding of the Venice Commission of the Council of Europe that “[t]he combined effect of these [constitutional] provisions makes effective government extremely difficult, if not impossible. Hitherto the system has more or less functioned due to the paramount role of the High Representative.

This role is however not sustainable.” Finally, the Commission recommended that the use of the “Bonn powers” “should gradually be abandoned, preferably in parallel with a constitutional reform making the legislative process in BiH more efficient”.¹⁹ Over the past 15 years, the “Bonn powers” have indeed scarcely been used by the incumbents Schwarz-Schilling (2006 to 2007), Lajčak (2007 to 2009), and Inzko (2009 to 2021), to strengthen local ownership.²⁰ While the concomitant relative passivity of the OHR²¹ consequently left the institution “toothless”²², the constitutional reform strongly recommended by the Venice Commission, the Council of Europe,²³ and the international community has

not yet been implemented. Instead, there has been a slow erosion of the constitutional order, which the OHR has so far been unable to halt.

Institutions in the Existing Political-Social Framework

It is clear that the existing constitutional construction not only favours the creation and preservation of ethno-national political elites,

but essentially encourages it. The distribution of political power thus runs along ethnic lines, and the glue that holds the “political” parties together is primarily the ethno-national component and not, or only to a far lesser degree, political ideas. The political actors and their parties (usually in this order) do not focus on the well-being of the population, but rather pursue the particular interests of their own ethnic or interest group or, as is often unfortunately



the case, purely personal concerns. The existing constitution does not protect the rights and interests of the individual ethnic groups as intended, but rather protects the ruling elite from accountability.²⁴

Thus, the parties organised in this way, which play a decisive role in BiH's democratic constitutional system, and the correspondingly staffed governments, shape the entire organisation of

the state. Subsequently, the state institutions are not used as instruments to secure and promote the common good, but serve to enforce and defend the above-cited interests and concerns. Sometimes, therefore, the institutions are referred to as the "prey" of the ruling elites.²⁵ This infiltration and strong control of democratic institutions by the political parties and governments is one of the reasons why BiH is also characterised as a "hybrid regime"²⁶, a kind of tripartite ethnocracy.

The emigration of young and educated people abroad further strengthens the ethno-national power structure.

The population's trust in the institutions is accordingly low,²⁷ which, in turn, negatively impacts the development of the rule of law.²⁸ To better understand these processes, it is necessary to include and consider the socio-psychological background: Bosnian society is a (fear) society still marked by war and its repercussions. Such societies live with a collective social trauma accompanied by low social trust, which is also passed on to the next generation.²⁹ This is exacerbated by the young and educated, including democratically educated, migrating abroad,³⁰ strengthening the ethno-national and at times nationalist power structure over the short and medium term. Especially considering the assumption that precisely the population group with a lower level of education tends towards authoritarian political views,³¹ emigration of the educated increases the relative share of the population with illiberal and less democratic attitudes.

Protests against corruption and political gridlock: The elites in Bosnia and Herzegovina have made the state and its citizens increasingly hostage to their personal interests. Source: © Dado Ruvčić, Reuters.



The role and extent of organised crime must also be considered in this political-social context: BiH has one of the highest rates in Europe.³² Besides corruption in the political and economic spheres,³³ the level of corruption in public administration has recently increased, too.³⁴ The interdependency between politics and organised crime is alarming,³⁵ especially because it means that state institutions no longer serve the public, but rather the interests of criminal groups along with those of the political parties.

The weakening of the order established in Dayton began as early as 2006.

Rule of Law: A Justice System without Significant Results

A functioning and independent judiciary is invariably one of the most important prerequisites for the rule of law. BiH has regressed in this area in recent years, as evidenced in both quantitative³⁶ and qualitative³⁷ analyses.³⁸ The EU attested to BiH's judiciary in 2021 that the "[p]ersistent and evident signs of deterioration continue to require urgent measures to strengthen the integrity of and regain citizens' trust in the judiciary. Lack of commitment to judicial reform from political actors, and the poor functioning of the judicial system continued to undermine the citizens' enjoyment of rights and the fight against corruption and organised crime."³⁹ Former EU Special Advisor to the Bosnian Judicial Council Kees van der Weide has pointed out that some 75 million euros has gone into reforming Bosnia's judiciary over the past 15 years, with no tangible results.⁴⁰

The reasons for this situation are multi-faceted. In most cases, political influence on the work of the judiciary,⁴¹ and the complex and fragmented legal system are cited as explanations.⁴² These factors certainly play a major role, but the mentality and underlying attitude of those

working in the judiciary is also crucial. Some of the informal structures in the BiH administration and judiciary still function according to the old socialist patterns of the pre-war period. Politicians and holders of public office submit to discipline as in the times of the nomenklatura. This attitude is deeply rooted in the judiciary and has its origins in the socialist legal tradition, in which judges and prosecutors do not see themselves as organs of justice and servants of the population, but as loyal wielders and executors of state power. Numerous changes in the law and reforms initiated by the international community have not yet led to a rethink in the way public officials deal with the law and citizens: there continues to be a positivist⁴³ and inflexible adherence to procedural formalities, a rigid and dogmatic-formalist interpretation and application of the law, and an eschewal of substantive decision-making through merely cursory examinations of legal issues, as was common in the outdated socialist legal practice.⁴⁴

Drivers of Dysfunctionality: The Ethno-National Political Elites

The weakening of the system established by the Dayton Constitution and its institutions began as early as 2006, when two of the three major parties, the Croatian Democratic Union in BiH (HDZ BiH, led by Dragan Čović and elected by a majority of Bosnian Croats) and the Alliance of Independent Social Democrats (SNSD, led by Milorad Dodik and elected by a majority of Bosnian Serbs) articulated their calls for reversing some state-building reforms and for more autonomy, including secession. An important aspect of their policy was to remove international judges and prosecutors from the highest courts and from the BiH prosecutor's office. With success: only the Constitutional Court of BiH has three of its nine judges appointed by the international community ("hybrid court"⁴⁵). The removal of international actors from the judiciary correlates with the gradual regression of the Bosnian rule of law.

The OHR's annual reports to the UN Security Council⁴⁶ illustrate that since 2006, Dodik has

reinforced his threat of secession with claims that the central government has “stolen” the authority of the Republika Srpska against the will of the Bosnian Serbs. His rhetoric has become increasingly aggressive since the end of 2021. He and his party took concrete legislative steps in the local parliament of the Republika Srpska that unconstitutionally curtailed the central BiH state’s authority. Among other things, the High Representative had to repeal a new law regarding state property of the Republika Srpska, which was in clear violation of the Constitution, as determined by the BiH Constitutional Court.

Besides Dodik, the OHR’s reports also name HDZ BiH leader Čović, who is urging an independent Croat entity in Bosnia. For years, HDZ

BiH has pursued a strategy of attacking certain laws at state level. It challenged several legal provisions from the Criminal Procedural Code, which included an effective approach to prosecuting organised crime, before the Bosnian Constitutional Court. The Constitutional Court subsequently declared some of them (arguably correctly) unconstitutional. While lawsuits before the Constitutional Court are legitimate in principle and warranted in certain cases, there are indications they are being used by the HDZ BiH as a tactical tool for delegitimising the legislature.⁴⁷ A party involved in the government, which also took part in the legislation itself, should constructively pursue legislative changes in parliament and only appeal to the Constitutional Court as a last resort.



Putin’s man in Bosnia: Bosnian Serb leader Milorad Dodik is destabilising the heterogeneous Western Balkan state from within under Kremlin guidance. Source: © Mikhail Klimentyev, Sputnik, Kremlin via Reuters.

In the BiH parliament, HDZ BiH and SNSD are also blocking legislative reforms that are important for EU accession or further rapprochement, including reforms to electoral law and the Judicial Council.⁴⁸ Finally, the Party of Democratic Action (SDA, the largest Bosniak party led by Bakir Izetbegović) is not free from blame either when it comes to undermining BiH institutions. It has been represented as a governing party at all state levels almost continuously since BiH's independence and, similar to other parties mentioned, is involved in nepotistic and clientelist machinations,⁴⁹ which further weaken the rule of law.

Owing to their destructive activities and corruption, the United States has placed high-ranking officials of HDZ BiH, SNSD, and SDA on its sanctions list.⁵⁰ Among others on this list is Dodik, who is also considered "Putin's man" in Bosnia and Herzegovina. He is accused of permanently destabilising BiH at the behest of the Kremlin.⁵¹ Thus far, he has successfully prevented BiH from introducing sanctions against Russia through his ministers and parliamentarians and with the support of the HDZ BiH. Dodik also firmly opposes the country's potential accession to NATO, of which Bosniak and Croat politicians as well as corresponding sections of the population are in favour.

External Drivers of Instability

BiH's instability is not only homemade. The above-mentioned structural challenges are compounded by Russia's efforts to further destabilise BiH. Russia's influence is based on two pillars. The first pillar is investment. For example, in 2018 and 2019, Russia ranked first in direct foreign investments in BiH.⁵² Russia remains one of the biggest investors, with most investments having been made in the energy sector. For example, one major investment was in an oil refinery in Brod, a town in the Republika Srpska. Such investments expand Russia's political influence, but are also a source of income for tycoons in Putin's entourage, who often act as financiers in BiH.⁵³ What is more, BiH is heavily dependent on gas imports from Russia. Finally,

there are economic ties between individual influential persons from BiH and oligarchs and state actors in Russia; Dodik, in particular, is rumoured to have such ties to Moscow.⁵⁴

The second pillar is the political influence on politicians in the Republika Srpska and on local pro-Russian voices in BiH. Russian propaganda is also carried into BiH, for example, by the Serbian Orthodox Church and disseminated through dubious organisations such as the biker association Night Wolves and so-called humanitarian associations.⁵⁵ As a result, Russia can be seen as the biggest external disruptive factor in BiH.

It has recently become clear that the ethno-national political elites do not want a functioning Bosnian state.

Besides Russia's influence, it is important not to underestimate the destabilising effect of certain policies from the immediate neighbouring countries. Serbia and Croatia, who view themselves as advocates and protectors of the Bosnian Serbs and Bosnian Croats, respectively, are increasingly interfering in the country's internal affairs. Serbia, whose policy is supported by Russia, relatively openly promotes Dodik and his ethno-national policy.⁵⁶ Croatia, meanwhile, supports the ethno-national policy of Čović and the Bosnian HDZ in BiH, who seek to establish their own autonomous region (entity) detached from the Federation of Bosnia and Herzegovina.⁵⁷

Outlook

BiH is a complexly organised state, with numerous levels of government and long decision-making processes. However, formally this state has all the necessary institutions to guarantee the rule of law. So far, what has been lacking is the political will to do so. In recent years, especially in recent months, it has become clear that the ethno-national political elites do not want a functioning Bosnian state. The dominant parties

disagree about which path the common state of BiH should embark on. Rather, they are also contesting the minimal consensus that exists in the form of the Dayton Constitution. The weak and partly politically influenced judiciary cannot counter this dismantling of the Bosnian state and rule of law.

An analysis primarily focused on rule of law issues can only identify the relevant problems and point out their reasons; the solutions must be worked on by politicians. In every sovereign state, the government and parliament are responsible for this. Yet, BiH is in a special situation: the international community, especially the United States and the EU, but also other states, have exerted such a great influence on the country's development since conclusion of the peace treaty that a purely internal solution hardly seems possible. The country is not only economically highly dependent on other states and external donors, but also politically. It is doubtful whether the political elites see any reason to further develop the rule of law under these conditions. In any case, an intrinsic motivation to do so cannot emanate from the legal tradition of the former socialist country. The lack of motivation may also be due to the lack of external incentives or pressure from the Western partners, while the incentives and pressure coming from Russia and China seem to be effective to some extent.

If the Bosnian decision-makers do not give up their blockade attitude, the High Representative will again have to resort to the “Bonn powers” more often.

One major challenge is the lack of a common strategy and common goals among external players, which is also obvious to the people of BiH. This not only refers to the EU and the United States on one side, and Russia and China on the other; there is also no clear consensus

among Western partners on the development paths BiH should take, nor does the EU seem to have developed a clear concept for its policy towards BiH, even after Russia's attack on Ukraine. The legal reforms in BiH are a case in point. While the EU strongly promoted continental European civil law, which is mainly based on the Roman-Germanic legal system, when developing the Bosnian legal system, the United States and Great Britain successfully “exported” their legal institutions, established in common law, to BiH. That means different legal systems apply in various areas within BiH.

In this situation, the international community, above all embodied in the institution of the OHR, has more than just the duty arising from the Dayton Treaty and the self-imposed responsibility to secure peace and ensure the stability and functionality of constitutional institutions. That BiH continues to need the presence of the international community became clear most recently in June 2022, when Čović and Dodik blocked funding for the elections scheduled for October 2022. High Representative Christian Schmidt had to use the “Bonn powers” to mandate sufficient funding.⁵⁸

If the Bosnian decision-makers and parliament do not give up their blockade attitudes, which is unlikely at present, the High Representative will again have to resort to the “Bonn powers” more often so as to stabilise the country and ensure that proper elections are held. Only in this way will the ethno-national rhetoric be quietened and moderate political forces able to push through a different (especially economic, rule of law, and social) agenda. In the next step, institutions such as the judiciary in particular must be depoliticised.

Schmidt, meanwhile, had a difficult start in BiH. As soon as he assumed office, he inherited a conflict from his predecessor, Valentin Inzko, whose last official act was to enact a penal provision criminalising the denial of the genocide. Dodik used the OHR's decision, supposedly directed against the Bosnian Serbs, as a template for intensifying his secessionist rhetoric, and the

Republika Srpska parliament declared its intention to withdraw from the national judicial system. Meanwhile Russia, and with it Dodik, has not recognised Schmidt's appointment and does not consider his decisions legitimate.⁵⁹ Schmidt's attempt to start a constructive dialogue has thus far been met with separatist rhetoric in the Republika Srpska.

To enable opportunities for action in BiH and to achieve real progress in democracy and under the rule of law, what the country needs more than new reforms and legislative changes is a shift in mentality and strategy. This change in mentality is necessary on both sides, because too often in BiH there is an impression that external players with considerable influence on Bosnian politics do not sufficiently understand Bosnian society and politics, that their approach towards BiH is superficial and overly bureaucratic, to the point of feeling that there is no international political interest in further developing BiH or resolving its conflicts. The average Bosnian citizen's hope that Western democracies want Bosnia "in Europe" at all has come under pressure. This is not a good environment for bringing a state closer and binding it to the EU in the long term. The EU – in cooperation with international partners – must develop a strategy that corresponds to the new geopolitical situation and especially to the needs and mentality of BiH and its people.

- translated from German -

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Statehood - Between Fragility and Consolidation

“Justice” in a Lawless Space

The “People’s Republics” of Donetsk and Luhansk as
Examples of Dispute Resolution in Rebel Areas

Brigitta Triebel/Hartmut Rank/Daria Dmytrenko

For the people living in areas of Ukraine controlled by separatists since 2014, beyond the sphere of influence of Kiev’s state power, rule of law is a pipe dream. The “people’s republics” can try as they might to construct the façade of an orderly legal system – behind it is the arbitrariness of Russia’s whims, while human rights violations are systematic.

Dispute Resolution in Unrecognised States and Rebel Areas

The problem of effective jurisdiction within lawless spaces is much more extensive than one might assume at first glance. Nor is it limited to the last eight years, or merely to the Ukrainian territories in the Donets Basin not under Kiev’s control. On the contrary, a brief (and by no means exhaustive) overview of the last fifty years suggests that this is a recurring phenomenon. Legal uncertainty and areas with a legal vacuum exist, and have existed, on almost every continent: the so-called Islamic State controlled parts of Syria and Iraq for a time, the Tamils ruled areas of Sri Lanka for years, and the FARC in Colombia controls entire regions¹ – and all of them had so-called legal organs that dispensed “justice”.

Legal decision-making in disputed territories is of relevance even outside those territories. For instance, will judgements by administrative authorities or courts in Northern Cyprus (the so-called Turkish Republic of Northern Cyprus) concerning property there be recognised internationally either now or in the future?

The longer central governments exert no effective control over parts of what is internationally recognised as their own territory, the greater the unresolved legal questions become. Even if we limit ourselves to the post-Soviet space, the sheer number of quasi-states, which are not recognised or recognised by only a handful of other states, is significant. Abkhazia (the so-called Autonomous Republic of Abkhazia) and South Ossetia (the so-called Republic of South Ossetia) in the territory of Georgia; Nagorno-Karabakh (the

so-called Republic of Artsakh) in the territory of Azerbaijan; the territory of Transnistria (the so-called Pridnestrovian Moldavian Republic) in the territory of Moldova; and, more recently, the parts of Ukrainian territory in the eastern Donbas (the so-called Luhansk People’s Republic and the Donetsk People’s Republic) and the so-called Autonomous Republic of Crimea not under the control of the central Ukrainian government. Thus, even prior to the Russian attack on the entire Ukrainian territory, there were several cases in the region in which existing state boundaries were violated or an attempt was made to shift them, which arose after the dissolution of the Soviet Union in 1991. Since the expansion of the Russian war of aggression and the occupation of further Ukrainian territories, these legal questions have arisen in other areas of the country, too. The following Ukrainian administrative districts are, or have been, occupied, in whole or in part: Kherson, Zaporizhzhia, Kharkiv, Dnipro, Sumy, and Mykolaiv.

The spectrum of associated legal problems is no less extensive: it ranges from the “major” area of criminal law, and specifically the question of which criminal and procedural codes are valid, to the “minor” questions of civil and administrative law that impinge upon the daily lives of those affected, and are thus no less important. Are certificates of marriage and divorce valid if they are issued by de-facto authorities which are not recognised internationally? What rules apply to property titles, notices of pension, or other certificates? In Transnistria, which has existed for three decades (!) as an unrecognised de facto state, this affects questions such as the following: can “local” licence plates, issued by agencies in an unrecognised territory, be used to

travel to neighbouring countries?² Is a diploma from a university in an unrecognised territory comparable with other diplomas? And can such a diploma receive an apostille or other documentation of authenticity to enable its holder to use it as the basis of professional activity in other countries?

Since 2014, Russian leadership has used violence to maintain influence in Ukraine.

Back to criminal law: what is punishable under one set of rules or another, and what is not? Is the death penalty in force or not? What statutes of limitation apply? This article will outline the major legal problems and highlight the developments in the so-called people's republics of Donetsk and Luhansk since 2014, since Russia seems poised to repeat the strategy it used in the Donbas in the newly occupied territories in the east and southeast of Ukraine.

Russian-Style “Justice”: The Donetsk and Luhansk “People’s Republics”

Since 2014, Russian leadership has used violence and military intervention to maintain or regain influence in Ukraine. Viktor Yanukovich's presidency seemed likely to see further Ukrainian integration into the Russian sphere of influence, but the situation changed fundamentally for Moscow with the Euromaidan movement and the “Revolution of Dignity”. Large parts of the political elites, and an active part of Ukrainian society, now favoured a European, democratic path for their country. Fearing loss of control over its neighbour, Russian leadership commissioned a covert military operation in February 2014 in Crimea that culminated in the annexation of the peninsula.

During those weeks of revolution and political turmoil in Ukraine, the Kremlin used the power vacuum to consolidate support for anti-Maidan forces in the eastern part of the country, which

then attempted to seize power in many cities in the region, including Kharkiv and Odessa. They failed in most cases, but succeeded in the Donbas. The pro-Russian anti-Maidan rebels gained control of large swathes of the Donbas and, in the spring of 2014, proclaimed the “Donetsk People’s Republic” (Donezskaya Narodnaya Respublika, or DNR) and the “Luhansk People’s Republic” (Luganskaya Narodnaya Respublika, or LNR).³ The ideological foundation was the concept of the “Donetsk Republic” (Donetskaja Respublika) and “New Russia” (Novorossiya) in which an autonomous Donbas, and close ties between the region and Russia, were justified both historically and culturally. These ideas had been disseminated in eastern Ukraine since the 2000s with Russian backing, and resonated especially well with groups that associated an independent Ukraine with the economic and social decline of what used to be the most important industrial region in the Soviet Union.⁴

The Ukrainian transitional government deployed its own military forces against the separatist rebellion in Donetsk and Luhansk in April 2014. After a chaotic initial phase, in the summer of 2014 the so-called Anti-Terror Operation succeeded in winning back some territory from the rebels, who were nevertheless able to hold the two “people’s republics”, even if only with Russian support. In August 2014, a defeat of the “DNR” and “LNR” loomed, and Russian troops intervened directly in combat operations near Ilovaisk.⁵ This escalation of the war prompted Germany and France to intervene diplomatically and mediate a peace treaty. After the Minsk agreements were concluded (Minsk I in September 2014, and Minsk II in February 2015), fighting focused on the so-called line of contact dividing the Donets Basin into two areas – one controlled by the Ukrainian government, the other not. During negotiations in Minsk, the Russian leadership denied any responsibility for combat actions, and was able to avoid being named in the agreement as a party in the conflict by sticking to the narrative that the fighting was an internal Ukrainian conflict.

Shortly after the founding of the “DNR” and “LNR” in April 2014, the rebels attempted to establish a monopoly on the use of force, and develop quasi-state structures. At first, the take-over seemed to proceed quickly and with negligible resistance, since many local politicians, administrative staff, and security forces in elevated positions had fled, and the locally dominant party, Yanukovich’s “Party of Regions”, had lost control of the anti-Maidan forces.⁶ After the proclamation of the “people’s republics”, further steps were taken to simulate legitimacy and democratic structures in the pseudo-states. First, the rebels organised a “referendum” on independence from Ukraine with the unsurprising result that 90 per cent of votes went for independence. Then they constructed a “People’s Soviet” as a parliament with a mock opposition, and reconstructed security forces and a justice system. Symbols of nationality (anthem, flag, and crest) were introduced. The choice of colour

and symbol was to indicate both proximity to Russia (“DNR”: Russian double-headed eagle) and regional location (“LNR”: crest framed in ears of wheat). In the following years, the two “republics” made attempts to establish a foreign policy. At a low level, they fostered contacts across their “national borders” through proxies in Russia, but also via associations and individuals in Western Europe.

Russian influence was critical in these processes, and greatly increased, especially during the power stabilisation phase. The local players of the early days were increasingly replaced by “delegates” from Russia. By now, leading personnel in the administrative structures are either appointed directly by Moscow or approved by Russian authorities; in any case, their decisions are dependent on the Kremlin.⁷ Since 2014, the budgets of the “republics” have been dependent on Russian payments.⁸ Special



Unsurprising result: The May 2014 “referendums” for the East Ukrainian separatist areas produced the outcome favoured by local rebels and the Kremlin alike: independence from Ukraine. Source: © Sergei Karpukhin, Reuters.

bilateral commissions were created through which the majority of the budget of both “republics” was (and still is) financed from Russia.⁹ Officially, such commissions serve only to coordinate humanitarian aid from Russia. Moreover, structures in the two pseudo-states follow the Russian model: in many cases, modified Russian legislation is in force, and the territories are integrated into the Russian (shadow) economy. The procedure for issuing Russian Federation passports has also been simplified.¹⁰

The justice systems in the so-called people’s republics are quite similar to the Russian justice system.

The “people’s republics” thus emerged as de-facto states exercising power over the territory and population of one third of the Donbas. They are entirely dependent on Russia.¹¹ These close ties to Russian structures are particularly pronounced in the judiciary, which serves as a decisive instrument for establishing and securing authoritarian rule in such pseudo-states. While the Crimean Peninsula was quickly integrated into the dominion of the Russian Federation, the “republics” proclaimed by the rebels were not. These pseudo-state constructs enjoyed no international recognition. According to international law, they are illegally founded states not recognised by the international community.

The Russian Judiciary as a Blueprint: Legal Systems in the “DNR” and “LNR”

The justice systems in the so-called people’s republics are quite similar to the Russian justice system, especially with respect to structures and personnel. Only a few months after the “DNR” was proclaimed, the first legal decisions had already been reached. In August 2014, the “Council of Ministers”, acting as a government, passed an ordinance concerning military courts in the “Donetsk People’s Republic”, and in

October 2014 passed a resolution entitled “On justice” regarding the establishment of judicial structures.¹² In the “LNR”, it took about a year for the “People’s Council”, acting as a parliament, to pass its first law regarding the justice system, which it did in April 2015.¹³ Here, we see great differences between the two self-proclaimed republics, which are due to the greater importance of the “DNR” for Moscow. The “DNR” commands a much larger and economically more robust area in the Donbas, around the Donetsk metropolis. Therefore, establishing pseudo-state structures quickly there seems to have been a Russian priority.

In a transitional phase following the founding of the pseudo-states in 2014, Ukrainian law remained largely in force, at least in cases in which it was useful for the “republics” in establishing their own state structures and did not conflict with military and political objectives. Gradually, legislation was transformed, and in many cases replaced by Russian and Soviet laws. First, the newly created government organs of the “republics” enacted wartime legislation. The next step was passing criminal law and procedures based on the 1961 USSR code.¹⁴

As of March 2020, the “Donetsk People’s Republic” had a pseudo-state jurisdiction with various organs: a supreme court, general-jurisdiction courts (district, municipal, and inter-district courts), arbitration courts, and a military court.¹⁵ A similar justice system emerged in the “Luhansk People’s Republic”.¹⁶ The two “republics” also established a system for legal training. Qualification and recognition of judges is carried out through formally independent structures, which are, however, affiliated with Russian ones.

Who Dispenses Justice in the “People’s Republics”?

Part of the personnel in the justice systems of the two de-facto states are judges and officials who already held those positions in the towns and cities of the Donbas prior to the 2014 change of power. Among them are employees of the Ukrainian justice system suspected of

corruption before 2014 who nevertheless (or precisely thereby) could reasonably hope to rise further under the Yanukovich presidency (2010 to 2014). Yanukovich's removal and the "Revolution of Dignity" left them susceptible to prosecution. The remainder of the justice system personnel was appointed after the "republics" were proclaimed, with leadership positions in particular frequently filled by Russian nationals.¹⁷ This demonstrates a common practice in separatist areas in various countries in the post-Soviet space (not only the Donbas) which is also evident in their respective legal systems: those who supported pro-Russian parties in the region before the 2014 change of power, and were prepared to adapt, continued to have good professional prospects. This said, the deployment of Russian jurists to key positions in the two "people's republics" indicates that Moscow wants direct control of developments in the Donbas, and does not fully trust even supposedly loyal Ukrainian personnel. Ukraine responded with legal action to some of its legal personnel shifting to the service of the "people's republics": according to Ukrainian law, service in the unrecognised "republics" is classified as high treason, and several judges have received corresponding convictions in absentia.¹⁸

The international public is scarcely conscious of the wide variety of consequences for the Ukrainian justice system since the Donbas war began in 2014.

Justice as an Instrument of Authoritarian Rule

Legislation and the practice of jurisprudence in the separatist "republics" are primarily subordinate to the interests of power consolidation within the "republics", and to the military and ideological confrontation with democratic Ukraine. This is reflected in both criminal law, which allows prosecution for political reasons, and practical investigative techniques.

Furthermore, it is difficult to obtain independent information about prosecutions in the so-called republics, and most information come from people in prison.¹⁹ Within the "republics", a sizeable number of victims are soldiers who have been captured, or civilians suspected of cooperating or sympathising with Ukrainian authorities. The crackdown on alleged political opponents is aimed at intimidating the population and substantiating their own propaganda, which claims that the "republics" are threatened by aggressive Ukrainian policies.²⁰ According to the Ukrainian security services, about 300 Ukrainian citizens were considered political prisoners in Russia, the two so-called people's republics in the Donbas, and Crimea until 24 February 2022. At the same time, several major trials were held in Russia and Crimea. The trials of Ukrainian director Oleg Sentsov and military pilot Nadiya Savchenko attracted international attention.²¹ Other political prisoners, such as journalist Stanislav Aseyev and scientist Igor Kozlovsky, were sentenced in the "republics".²² From there, former prisoners report systematic torture, unacceptable detention conditions, and unfair trials.²³

According to the Prosecutor General of Ukraine, law enforcement agencies had, by the end of 2020 (i.e. well before the extensive Russian invasion of February 2022), initiated more than 2,000 criminal proceedings against individuals in the law enforcement agencies and justice institutions of the "republics" who issued these political verdicts and carried them out. These cases primarily involve war crimes, most of them illegal detention, torture, and murder.²⁴

The international public is scarcely conscious of the wide variety of consequences for the Ukrainian justice system since the war in Donbas began in 2014. The Ukrainian state prison service reports that with the loss of part of its territory, the Ukrainian state lost control of 28 prisons housing 16,200 people. These institutions are now controlled by an unjust regime. Just a few hundred inmates have been transferred to territory controlled by the Ukrainian government in the last few years to serve their time.²⁵ Others find themselves subjected to a different "legal





“Welcome to Slaviansk”: Pro-Russian separatists symbolically execute an effigy of a Ukrainian soldier in the Donetsk region in May 2014 – a foretaste of the arbitrary rule that has affected inhabitants of the “people’s republics” ever since and which now threatens to spread to newly occupied territories in Ukraine. [Source:](#) © Yannis Behrakis, Reuters.

system” in which the death penalty was instituted shortly after the “republics” were proclaimed. So far, few death sentences have been issued, most of them for serious violent crimes. Other means have been used against political prisoners, however. Ukrainian sources say that repeated extrajudicial executions of hostages have been documented.²⁶

Ukraine’s Reaction – Between Non-recognition and the Search for Pragmatic Solutions

For the last eight years, Ukraine has refused to recognise judicial decisions reached in the so-called people’s republics, or in Crimea. From

the Ukrainian point of view, all judicial authorities still operating in the occupied territories have been stripped of their powers, which are now exercised by courts in government-controlled areas. Nevertheless, successive Ukrainian governments have attempted to provide citizens in the occupied territories with access to public services, and with legal protection. For instance, a special procedure for confirming dates of birth and death has been introduced for residents of the occupied areas. Ukrainian courts approve the issuance of birth and death certificates for relatives residing in the occupied territories on the basis of documents issued by administrative agencies of the “people’s republics”.

School graduates in the occupied territories can undergo an external test in territory controlled by Ukraine so as to obtain their university entrance qualification, without having to have their diplomas or school certificates recognised.²⁷ Additionally, pension funds, social protection services, migration services, tax services, and courts and law enforcement agencies in the areas controlled by the government also provide services to residents of the occupied territories. Because a large number of public services are digitalised,²⁸ some documents can be issued, and services provided, without the recipient leaving the occupied territories. Most legal services require travel to areas controlled by Ukraine, however.²⁹ This means that some citizens, especially mobility-impaired or low-income individuals, for whom travel across the so-called line of contact was practically impossible, had limited access to the justice system. The European Court of Human Rights recognised the problem as early as 2018, and certified that Ukraine had done everything possible.³⁰

The legal situation in the “people’s republics” is different from that in Crimea.

Thus, the justice systems of Ukraine and of the separatist “republics” exist side by side, with absolutely no interaction. Ukraine does not recognise verdicts from courts in the so-called “people’s republics”. At the same time, pragmatic solutions have been found in individual cases. Until 24 February 2022, both sides accepted de facto verdicts by the other side on “political” issues – frequently charges of treason or terrorism – by officially recognising the condemned person as a prisoner, and putting them on the lists of people to be exchanged.³¹

Nonetheless, successive Ukrainian governments faced a dilemma. Necessity dictated that practical solutions be found for the unsettled legal situation, since Ukrainian citizens in the territories occupied by pro-Russian separatists were the

ones suffering. At the same time, any de facto recognition of the justice system in the pseudo-republics had to be avoided. The challenges involved in any future reintegration of rebel-occupied territory into the Ukrainian justice system seem even greater. Before February 2022, the Ukrainian government had taken the first steps towards establishing a transitional justice system. The Ukrainian Ministry of Reintegration of Temporarily Occupied Territories had begun to develop a legislative package as part of the state transition policy encompassing criminal liability, lustration (the examination and, if necessary, removal of politically charged or corrupt persons from office), prosecution and justice, prisoner release, inter alia.³² The Konrad-Adenauer-Stiftung’s Ukraine office in Kharkiv had, since 2020, been organising international conferences in cooperation with the Kharkiv Law Academy, which considered the German experience of reunification, and, alongside Ukrainian experts, discussed its potential implementation in the Ukrainian case.³³ It should be noted that the starting situation for legal questions in the “people’s republics” is different from that of territories occupied by Russia directly. The residents of separatist areas in the Donbas are issued birth certificates, driving licences, and certificates of inheritance from an unrecognised government, so they are unable to use these documents almost anywhere outside the “republic”. In Crimea, Russia created an occupying administration issuing documents in the name of the Russian Federation that are therefore internationally recognised. However, in such cases, the Ukrainian government attempts a uniform response: as such, no decisions are recognised.

Repeat of Russia’s 2014 Strategy: Administering “Justice” in the Newly Occupied Territories of Ukraine

The developments of the past weeks and months indicate that the Russian leadership intends to use similar strategies to establish and stabilise its power in the newly occupied territories in the east and southeast of Ukraine. Both options – founding pseudo-independent

“republics” and direct integration into Russian territory – seem to be on the table. The legal system will once again be a decisive instrument for legitimisation and stabilisation of Russian power. Shortly after the Russian capture of the Ukrainian units remaining in Mariupol, which had barricaded themselves in the Azovstal steel works in the preceding weeks, “DNR” agencies announced the initiation of legal proceedings. The Rossiyskaya Gaseta, a Russian newspaper, quoted Denis Pushilin, chairman of the “People’s Council” of the “Donetsk People’s Republic”, speaking of a tribunal that awaited the Azovstal prisoners.³⁴ In the “LNR”, official sources announced similar actions in the interest of (according to an online portal in Luhansk) sanctioning supposed human rights violations and war crimes that the “Kiev regime” had committed in the Donbas since 2014.³⁵ It can be assumed that these planned “tribunals” were the result of direct instructions from Moscow, and intended to confirm the propaganda line that Ukrainian “fascists” had planned and executed a genocide in the Donbas. If such proceedings go forward in the so-called people’s republics, they will provide additional support for the Russian narrative of a Ukrainian civil war. Ukrainian human rights activists have been expressing grave concerns about the fate of prisoners facing the threat of being turned over to the “courts” of the “people’s republics”. Given the experience of political prisoners over the last eight years, the Ukrainian side expects further severe human rights violations.

In the “people’s republics”, the mere appearance of the rule of law is what counts.

Lawlessness as an Instrument for the Usurpation of Power

There can be no true administration of justice as we understand it, either currently or in the future, in the areas in the east and southeast of Ukraine that are not under the control of the

central government in Kiev. Many fundamental rules, such as the right to due process, are being disregarded. In the so-called people’s republics, quasi-judicial institutions and procedures are intended, instead, to create the mere appearance of the rule of law. Regardless of the designation of persons or institutions involved in the de facto administration and enforcement of “justice”, the provisions applied in the “people’s republics” have no proper legal basis. Eight years after the proclamation of the so-called people’s republics, their legal systems remain fragile.

The judiciary personnel, if they are Ukrainian citizens, have been convicted in absentia in Ukraine. Verdicts by “courts” and enforcement organs of the “people’s republics” are not internationally recognised, and it is difficult to see how these problems can be retroactively solved. The justice systems of the two “people’s republics” conform to Russian structural, personnel, and financial requirements, and parts of them even follow Soviet legal traditions. It is clear that independence, rule of law, and democracy in both “republics” are only window dressing.

The opposite of rule of law is arbitrary rule. The affected population lives in quasi-states without legal security. Cross-border commuters felt this clearly even before the most recent major Russian invasion of Ukraine at the end of February 2022. In the free and the occupied parts of Ukraine, there are de facto two different, incompatible justice systems. This is especially true of criminal law, which is often used as a weapon to combat political opponents. Numerous charges and proceedings for treason or terrorism in the “people’s republics” demonstrate this. Before the current war broke out, document circulation had benefitted from a certain pragmatism on the part of Ukrainian authorities, especially in the area of civil status certificates; however, after the all-out Russian attack, no continuation of this approach can be expected. Any Ukrainian recognition of the “legal system” or “authorities”, to say nothing of “statehood”, of the so-called people’s republics remains out of the question. Instead, it is to be expected that arbitrary rule and lawlessness

will again be instruments of power propagation in the territories newly occupied by Russia.

Many problems, including those of legal nature, are currently insoluble, and will have to be dealt with later in the event of a peace process. Past reunification processes show how difficult it is to solve transitional legal issues. In the alignment of the legal systems of the GDR and the Federal Republic in 1990, the scope of the German Reunification Treaty alone highlights how complex an adjustment of two partly colliding legal systems can be, even under peaceful conditions. In any case, the situation in the disputed territories of Ukraine remains very dynamic, which makes it difficult to make any statements about likely future developments. This is true not only of the war as a whole, but also regarding any future peace process, and subsequent resolution of the legal questions highlighted here.

- translated from German -

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Source: © Michele Tantussi, Reuters.

under discussion

Other Topics

“Defending What Matters to Us”

60 Years of International Work by the Konrad-Adenauer-Stiftung and the Foreign Policy Challenges Facing Us Today

An Interview with Dr. Johann Wadephul, Member of the Bundestag

As vice-chair of the Christian Democratic CDU/CSU parliamentary group and a foreign policy expert, Johann Wadephul is clearly the ideal person to talk to about the Konrad-Adenauer-Stiftung's international work – a fact further underscored by his schedule: arriving at his office, we find him coming out of a meeting with a delegation of Latin American politicians who have travelled to Europe at the invitation of our institution. Of course, besides the question of what the foundation's international work can achieve, the interview also addresses the foreign policy challenges arising from the invasion of Ukraine.

International Reports (IR): Dr. Wadephul, for many years you have been one of the Christian Democrats' foremost foreign policy experts, and you spend much of your time traveling around the world. The Konrad-Adenauer-Stiftung has been working on the international stage for even longer – 60 years. Can you remember when your paths first crossed?

Johann Wadephul: That was in my first parliamentary term as member of the Bundestag, from 2009 to 2013, namely in the Western Balkans. I was already closely involved with the region at that time. We had set up the Western Balkans Working Group in the CDU/CSU parliamentary group, which I have the honour of chairing today. On one visit to the region, we participated in a conference that was also attended by Heads of the Konrad-Adenauer-Stiftung's offices in the countries involved, and they briefed us parliamentarians. And it is no different today – all the international work of our parliamentary group, not just in the Western Balkans of course, but in every conceivable region, is hard to imagine without the support of Konrad-Adenauer-Stiftung's staff.

IR: Is there a particular trip or discussion that is stuck in your mind?

Wadephul: Yes, I particularly remember a trip to Serbia and Kosovo. I think that was also during my first term as an MP. The foundation organised a tour of the region by car, which gave me a completely different access to and a different feeling for the countries. On most trips abroad it's a case of fly in, have talks, fly out. But when you get the chance to spend a little more time in a country you find that – despite all the major conferences you've attended around the globe – this has an even greater impact.

*IR: Over the decades, the Konrad-Adenauer-Stiftung's international work has been shaped by major global political constellations and seismic shifts such as the East-West conflict and then the fall of the Iron Curtain. Today, Russia's invasion of Ukraine has put the word *Zeitenwende* on everyone's lips. Do you think that, in future, people will actually say 2022 marked such a turning point?*

Wadephul: *Zeitenwende* is the right word insofar as we now *understand* that something has changed. But this change started earlier. Putin didn't suddenly become who he is on 24 February. Russia has been trying to disrupt or even destroy what is important to us – the rules-based world order – and establish its own sphere of influence for longer than just this year. But it was this shock event that really brought it to our attention, and now we have to derive immediate political consequences. In this respect, however, we are still at the very beginning.

IR: In 1956, Konrad Adenauer said: "In today's world, force is still more respected than law." Do we simply have to accept that this still applies in 2022?

Wadephul: For us, the two things always have to go hand in hand: force must be based on the law. That's why we're saying that Ukraine, for example, has a legitimate right to defend itself under international law – and we have the right to support it in doing so. But the opposite also applies: we have to learn that, in some cases, we have to defend the law with force – that is, military force.

IR: What tasks does this situation entail for Germany?

Wadephul: For Germany, a key task may indeed be the learning process that I have just described. Because if there is one country that needs to relearn this enlightened approach to the use of military force, it is Germany. We're doing so, even though it's a slow and painful process. Contrary to what the German government is portraying, Ukraine is not the first instance of having supplied weapons to a conflict zone. We did so in 2014 when we armed the Kurdish Peshmerga for their fight against the so-called IS, albeit on a smaller scale, of course. But yet we are still trying to resist the realisation that Germany, as in many other respects, will once again have to step into a leadership role. We must assume this leadership role if we are to defend what matters to us.

IR: So why are we resisting this?

Wadephul: Of course, it's linked to the fact that learning the lessons of 20th century German history – quite rightly – occupies a broad space in our education and social discourse. It is understandable that such a society does not want to push into the leadership role or even to exercise state power, including internationally. But we have to reconcile both. We shouldn't simply jettison the conscious way we deal with our own past and the restraint this engenders, but we also have to see that appeasing an aggressor is more likely to lead to an expansion of the conflict. This is a lesson that can and must be learned from 1938; even for us as Germans. But there is still a lack of will to do this.

IR: Who can help with this?

I remind you of the famous words of Poland's former Foreign Minister Radek Sikorski when he said he feared German power less than German inaction. But we also need actors at home to accompany and drive forward this discourse and learning process. This is where the Konrad-Adenauer-Stiftung can certainly play a positive role.

Wadephul: International actors can help us with this. For example,

IR: This brings us back to the work of our foundation. These kinds of party-affiliated political foundations scarcely exist outside Germany. Therefore, in international work, the question arises in particular about the relationship between political foundations and traditional diplomacy. How do you view this relationship?

Wadephul: On the one hand, of course, traditional diplomacy remains at the heart of our foreign policy, including the parliament's. Yet, the international work of political foundations has become an almost indispensable



"Force must be based on the law": Johann Wadephul during the interview in his office in the Bundestag.
Source: © Fabian Wagener, Konrad-Adenauer-Stiftung.

complement to this. We could even say that, with their international activities, party-affiliated foundations have specific advantages over state diplomacy. The Country Directors of these foundations can often provide a more unvarnished picture of the situation in their particular country. I have also always found it highly beneficial to talk to representatives of other foundations. The Konrad-Adenauer-Stiftung, however, naturally has a distinct advantage because it is uniquely placed to address the special issues and interests that are especially relevant to Christian Democratic foreign policy. This is another reason why we as members of the CDU/CSU parliamentary group rarely undertake a trip abroad without involving the Konrad-Adenauer-Stiftung in the preparations. I simply can't imagine not working together.

IR: The foundation often focuses on structural work, including abroad. Therefore, the results of its work are often not immediately tangible. But are there certain successes that you associate with the Konrad-Adenauer-Stiftung?

Wadephul: It's true that the results of this type of foundation work often only become apparent in the longer term, but nevertheless, it has had many successful projects. Let me come back to the region we talked about at the



"We mustn't overlook the signs of hope": The democracy movement in Belarus (as pictured) and the clear choice of the Ukrainian people for the West show that freedom continues to be a highly important value for many in Eastern Europe. Source: © Vasily Fedosenko, Reuters.

beginning of this interview. For many years, the Konrad-Adenauer-Stiftung has been successfully engaged in bringing the Western Balkan states closer to the European Union, as well as preserving the corresponding spirit in the societies and an understanding of what the European Union means to us. And I can say that the same applies to other parts of the world as well. For example, when it comes to maintaining dialogue with our party-political partners in Latin America, where the foundation's work began in the 1960s, or organising security policy talks with our partners from the Asian region – none of these contacts and discussion formats would exist without the foundation. And all these meetings initiate and advance political developments.

IR: One objective that lies at the heart of our foundation's work, at home and abroad, is promoting democracy. A look at the relevant indices on the state of democracy worldwide reveals that many countries have experienced a negative trend over recent years. Do you share this impression?

Wadepful: I'm less pessimistic in this respect. If we look at the development of humankind over the millennia, there has probably barely been a time when democracy has been in better shape overall. Yes, of course there are setbacks. But it will always be the case that certain people and groups in society oppose democracy, and unfortunately some of them will be successful. In the past, we have perhaps made the mistake of taking it for granted that the movement towards greater freedom and democracy in the world would happen more or less of its own accord. But a look at the history of our own Western democracies shows that the development has rarely been linear.

IR: So, it is still necessary to promote democracy?

Wadepful: Definitely. And, despite all the negative examples, we mustn't overlook the signs of hope. Look at the democracy movement in Belarus – it's very much alive! Or look at Ukraine. Despite the terrible war, we have one thing to cling onto: ten years ago, we still worried that the majority of the country might voluntarily decide in favour of closer ties with Russia, which in effect would have meant an anti-democratic development. That's off the table today.

IR: The focus of international cooperation, also for the Christian Democratic Union, is cooperation with sister parties in the EPP, the European People's Party. What impression do you have of the state of this party family?

Wadepful: A mixed impression. There are undoubtedly problems in the traditional core countries of Western Europe. It's naturally a cause of concern when the westernmost capital with a government led by an EPP party is Zagreb. The *Républicains* in France have been struggling for years, and with the Tories in the United Kingdom, we have lost an important partner from the EPP. Of course, first and foremost the parties have to deal with their problems at home, but I would also like to take this opportunity to emphasise the importance of regular dialogue among these sister parties. Here, too, the Konrad-Adenauer-Stiftung can make an important contribution. In recent years, the foundation has become increasingly

involved in other regions of the world, and for good reason. Right now, it would be important and wise to breathe new life into the dialogue with our core partners in Europe – in countries such as France, the UK, Poland, and Italy.

IR: Let's once again take a look towards the East and at the conflict with Russia. Many observers believe that this conflict will only be resolved structurally through political and social change within Russia itself. But at the moment it is extremely difficult to exert any external influence on Russian society. Do you think this will even be possible in the near future?

Wadephul: At least, I really hope so. Despite being in favour of a consistent political and military response to Russia's aggression – more consistent than the German government's response so far – I also firmly believe that in the long term, in a post-Putin era, we will have to reopen our communication channels and restore relations, though of course under certain conditions. That's why I disagree with those who want to permanently cut our ties with Russia. Russia is a European country, and it cannot be in our interest to permanently cut ourselves off from it. Although we agree on other current issues of foreign policy, this is where we diverge from the Greens. I think this point is important, if only because Russia's future options should not solely depend on China. Russia will once again need to have political and economic alternatives, and Europe should be one of them.

IR: More generally, do you fear that the pendulum in Germany will swing to the other extreme, towards autarky, now that we have established that "change through trade" is not so simple – in other words that globalisation will be reversed?

Wadephul: I think that would be neither possible nor desirable. But it's clear that we need a degree of adjustment and must avoid certain economic sectors becoming unilaterally dependent on single countries.

IR: On China, for example?

Wadephul: Of course, also on China. But at the same time, we have to remain realistic. Europe will not be able to manufacture chips on the scale that we see in East Asia today, at least not in the short-to-medium term.

IR: So, diversification, not decoupling...

Wadephul: Exactly. After all, our goal is not protectionism, but rather the opposite: global free trade.

The interview was conducted by Sören Soika and Fabian Wagener – translated from German.



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Different and Yet the Same?

Prospects for a New Start in Israeli-Turkish Relations

Philipp Burkhardt/Nils Lange

Relations between Turkey and Israel are thawing. Historic visits by foreign ministers and Israel's president have highlighted the desire of both countries for rapprochement. However, this process may be impeded by domestic politics and the Middle East conflict. Turkey, as the driving force, has a strong interest in an energy partnership, whereas Israel is approaching the Turkish charm offensive with a degree of caution. However, if the rapprochement succeeds, both Brussels and Berlin should be supporting this process.

Regional Panorama

After fifteen years of tense diplomatic relations, it was a landmark moment when Isaac Herzog became the first Israeli head of state to visit Turkey once again, on 9 March 2022. The two countries had once enjoyed close strategic ties, but relations between Turkey and Israel had deteriorated, particularly after an incident, in 2010, in which nine Turkish citizens were killed when Israeli Defence Forces raided a Turkish ship, the Mavi Marmara, part of a humanitarian flotilla bringing aid to Gaza. As a result, Ankara expelled the Israeli ambassador, withdrew its own ambassador, and all bilateral military agreements were suspended.

An agreement was reached over the Mavi Marmara incident in 2016, but that first attempt at reconciliation ground to an abrupt halt in 2018 when a dispute escalated regarding the opening of the US embassy in Jerusalem.

Today, the signs are once again pointing to détente and, each in its own way, Turkey and Israel both seem to be working to relaunch the old partnership. But how sustainable can such a revival of relations be? And what impact will it have on Germany and Europe?

Despite the longstanding diplomatic stalemate, both sides have a strong interest in rapprochement. The geopolitical climate in the Middle East and eastern Mediterranean is changing rapidly. Over recent years and months, geopolitical shifts

and, above all, the war in Ukraine have led to unprecedented rapprochements and normalisations between very different actors in the region. There are many reasons for this.

The first of these is the diminishing involvement of the United States in the region, with the chaotic US withdrawal from Afghanistan being the latest factor that has changed mindsets in the region. Regional actors are realising that they have to find a new direction, preferably cooperatively, in order to deal with today's challenges.¹ Second, the region faces major economic difficulties², partly caused by the COVID-19 pandemic and the resulting economic shocks. Third, the Middle East is facing the implications of climate change, which can only be addressed collectively. Fourth, the threat posed by the hegemonic and nuclear ambitions of the Islamic Republic of Iran represents a security challenge to many countries, and it requires a coordinated response. And finally, Russia's war in Ukraine also poses major problems for the region. On the one hand, many countries in the region rely on food supplies from Ukraine but, on the other hand, Russia is a regional player that cannot be ignored due to its presence in Syria. As a result, many countries in the region are facing a complicated balancing act.

Ambivalent Bilateral Relations between Turkey and Israel

Israel and Turkey are particularly affected by these developments and are, each in its own way, striving to realign themselves within the

region. Turkey is currently trying to normalise its relations not just with Israel, but also with other countries in the region. This has been fuelled by Turkey's financial and economic crisis, and the upcoming elections in 2023. Furthermore, Ankara views rapprochement with Israel as a step towards normalising relations with the US. Ankara is seeking, at record speed, to repair relations with its neighbours and other regional powers, which have been damaged over the past decade, and to restore its reputation in the region. Turkey also remains a key state in the region for Israel, although relations between the two countries have seriously deteriorated in recent years. Back in 1949, Turkey was the first Muslim-majority country to recognise the Jewish state and it sent an ambassador to Israel in 1950, even before the US. These two non-Arab powers in the Middle East were long considered natural allies, cooperating at various levels and pursuing common interests in their neighbourhood. Relations between Turkey and Israel reached a high point in the 1990s after hopes for a lasting peace between Israelis and Palestinians were fuelled by the Oslo Accords. In 1996, Turkey and Israel signed a free trade agreement³ and a comprehensive military cooperation agreement. Perhaps the most visible component of this formalised Turkish-Israeli defence agreement was the opportunity for Israeli pilots to conduct training flights from Turkish air bases and gain experience in long-range overland missions.⁴

In nearly seven decades of bilateral relations with Israel, Turkey has downgraded them three times.

However, the Israeli-Turkish relationship has been characterised by regular ups and downs. In nearly seven decades of bilateral relations with Israel, Turkey has downgraded them three times, most recently in 2016.⁵ After a decade of close cooperation, the first fractures in relations appeared back in 2007, when the rapprochement between Turkey and the Muslim Brotherhood,

and Hamas in the Palestinian territories was met with great scepticism. High-ranking members of Hamas made frequent visits to Turkey, attracting strong criticism from Israel.

The “golden era” of bilateral relations finally ground to a halt with Operation Cast Lead, the first war in Gaza in 2008. Recep Tayyip Erdoğan, who was Turkey's prime minister at the time, called the military operation a “crime against humanity”.⁶ Shortly thereafter, a panel discussion on the Middle East conflict between Israel's then president, Shimon Peres, and Recep Tayyip Erdoğan escalated at the 2009 World Economic Forum in Davos, casting a lasting shadow over relations between the two countries.⁷ Subsequently, in October 2009, Turkey excluded Israel from the Anatolian Eagle joint military exercise.⁸

Relations reached a low point in May 2010, when the Mavi Marmara was purchased with a view to breaking Israel's naval blockade of the Gaza Strip. Nine Turkish citizens were killed in the confrontation between the (partly extremist) activists and the Israeli commandos who stormed the ship. In September 2011, Turkey downgraded diplomatic relations with Israel and suspended military cooperation after the United Nations published its report on the flotilla incident.

Attempts at rapprochement in 2016 came to nothing, but since 2021 there have been signs that Turkey is once again interested in improving its relations with Israel. Indeed, it is possible to identify a number of common interests that could be the key to rapprochement.

Potential Keys to Rapprochement

Israel and Turkey both neighbour Syria and are keen to see stability in this war-torn country. While both governments supported regime change at the beginning of the war, their main priority now seems to be making Syria as stable as possible. Moreover, both Israel and Turkey oppose Iran's growing influence in Syria, and above all the Islamic Republic's nuclear ambitions. This is linked to the fight against international terrorism, which is of vital interest to



both countries. Turkey’s ambassador to the US, Hasan Murat Mercan, recently published an opinion piece for an Israeli think tank in which he called for more robust cooperation between Turkey and Israel, “with a specific focus on fighting terrorism in all its forms and manifestations.” He also emphasised how Turkey and Israel face similar “malign actors and trends” in the region.⁹ Both countries are also interested in preventing a humanitarian crisis in Gaza, which is why Israel has now welcomed an influx of Turkish humanitarian aid.

Turkey and Israel both provided massive logistical, technical, and operational support to Azerbaijan during the war in Nagorno-Karabakh in 2020. The regional stimulus of rapprochement is also evident here. Israel and Azerbaijan share the perception of Iran as a serious threat and have developed extensive military and energy-related ties in recent years. From the Turkish perspective, the “one nation, two states” doctrine has applied since Azerbaijan’s independence, under which close relations are maintained with Azerbaijan as a brother country.



Signal for a diplomatic ice age: After Israeli security forces stormed the pro-Gaza activist ship Mavi Marmara in May 2010, killing Turkish citizens, Israeli-Turkish relations reached a low point. [Source: © Emrah Dalkaya, Reuters.](#)

perspective, Turkey is a large and important market. The country was Israel's fifth-largest trading partner in 2020.

There is also potential with regard to security cooperation, which represents a priority for both states. In the past, it has repeatedly been made public that the Turkish and Israeli intelligence services cooperate closely on reconnaissance and counterterrorism.¹² Both countries have been targets of Islamist terrorist attacks, not least because of the instability in Syria and Iraq. Turkey is also regularly a location for Iranian espionage missions.

Both countries are eager to play a growing role in diversifying Europe's energy imports and to provide a long-term alternative to Russia.

Israel and Turkey will continue to share security interests on key strategic issues. They are mutually dependent when it comes to stabilising the situation in Syria, as well as containing Iran. A resurgence of strategic intelligence cooperation could restore the strained relationship of trust between the security apparatuses, and significantly boost normalisation efforts.

Energy Security as a Catalyst for Rapprochement

At the centre of current efforts, however, are the common interest in natural gas production in the eastern Mediterranean and the energy implications of the war in Ukraine, which could simultaneously strengthen Israel's role as a gas exporter and make Turkey a key energy transit

Despite diplomatic frictions, Israel and Turkey have maintained solid economic, trade, transportation, and tourism ties over the years, and could benefit still further from closer cooperation. Economic cooperation remained unaffected by the deterioration of bilateral relations, with the volume of trade actually more than doubling in nominal terms from 3.4 billion US dollars in 2010¹⁰ to 8.4 billion US dollars in 2021.¹¹ In 2021, Israel was one of the top ten export markets for Turkey, with a goods value of close to 6.4 billion US dollars. From Israel's

hub for Europe.¹³ Both countries are eager to play a growing role in diversifying Europe's energy imports and to provide a long-term alternative to Russia.

Natural gas production in the eastern Mediterranean was already a focus of the earlier attempt at rapprochement, and the plans for a pipeline between Haifa and Ceyhan attracted a great deal of attention.¹⁴ At the time, however, there were no face-to-face talks between high-level decision-makers, and the attempts failed, unable to withstand the escalating tensions caused by the relocation of the US embassy to Jerusalem.

Instead, with the establishment of the East Mediterranean Gas Forum in 2019, Israel pursued an initiative that included Egypt, Cyprus, France, Greece, Italy, Israel, Jordan, and the Palestinian Territories — but excluded Turkey. In its gas export policy, the Netanyahu government of the time preferred to focus on transcontinental rather than regional cooperation.¹⁵ The construction of an EastMed pipeline was planned to connect Israel's Leviathan and Cyprus' Aphrodite gas fields to Europe via Crete and Greece. However, the project was effectively dealt a death blow when the Biden administration withdrew its support in January 2022.¹⁶ With estimated costs of some 6.5 billion US dollars, the undersea pipeline was never financially viable, but it was nevertheless touted by the Trump administration. As a result, Turkey has been increasingly isolated in the eastern Mediterranean in recent years, and it has been excluded from talks on energy policy.

From Israel's perspective, there is the urgent problem of the profitability of its limited natural gas resources, along with that of viability in the region's volatile security environment. Realistically, the question must be asked whether long-term pipeline projects can actually be planned at all. It is important to consider the route that gas exports can take. An alternative to pipeline projects is liquefied natural gas (LNG). At present, the only LNG terminals in the region that liquefy natural gas with considerable energy

consumption are located in Egypt. Cairo's long-term aim is to make Egypt a regional natural gas hub. The country has already signed agreements with Cyprus and Israel that will result in more gas being liquefied in Egypt.¹⁷ Specifically, this involves the delivery of Israeli gas to Egyptian LNG terminals for liquefaction. The Sharm el-Sheikh summit of September 2021 and the Negev summit in late March 2022 underlined the desire of governments to make "cold peace" a thing of the past. On 15 June 2022, the EU, Israel, and Egypt finally signed a landmark agreement on the export of natural gas to Europe. Under the terms of the agreement, the EU will help Egypt and Israel to ramp up their gas production and increase exploration in their territorial waters. Israel will supply the gas via Egypt, where it will be liquefied for export by sea to Europe. In the medium term, therefore, it is unlikely that an Israeli-Turkish project will attract EU support.¹⁸

Building a pipeline to Turkey would require Israel to make a long-term bet on Ankara's reliability.

Moreover, building a pipeline is a long-term project. Profits can only be expected after many years and the construction requires a huge amount of planning. According to Reuters, Israeli officials have stated that a 500 or 550-kilometre-long pipeline to Turkey would be feasible at a cost of around 1.5 billion euros, which would be significantly cheaper than the planned 2,000-kilometre EastMed pipeline (to Crete), which would cost at least 6 billion euros.¹⁹ However, this would require Israel to make a long-term bet on Turkey's reliability, which would be rather risky in light of the region's domestic political challenges and volatility (see below).²⁰ For Ankara, on the other hand, building an energy partnership with Israel would be a confirmation of its influence in the eastern Mediterranean, and would help to reduce its own energy dependence on Russia.

Russia supplied around 45 per cent of Turkey's gas consumption in 2021 and is also a key trading partner. Despite its stable relations with Russia, the current war in Ukraine has reminded Turkey of the need to continue diversifying its energy sources, and to seek other regional allies. Over recent months, President Erdoğan has repeatedly stressed that Turkey and Israel should work together to supply gas to Europe.²¹ In terms of energy security, for both Turkey and Europe, it is worth highlighting that gas resources in the eastern Mediterranean could complement the Southern Gas Corridor, an energy supply route from the Caspian Sea and Middle East. According to analysts, a new 500-kilometre pipeline could be up and running, supplying Israeli gas to Turkey, within two-and-a-half to three years.

The Cyprus issue remains a major obstacle to the construction of an Israel-Turkey pipeline. There are two conceivable routes for a pipeline between Israel and Turkey. The first and less expensive route would pass through Lebanon and Syria, but this would entail major security risks. The second route would pass through the disputed territorial waters of Cyprus, which in turn would require the consent of the Republic of Cyprus, which is not recognised by Turkey. Without a solution to the decades-long Cyprus conflict, it is currently difficult to imagine how such a gas pipeline could be constructed. Israel's relations with both Cyprus and Greece have also changed in the wake of the Mavi Marmara incident, filling the gap left by Turkey in Israel's regional strategy. In the process, both states took over Turkey's traditional role in joint naval and air exercises with Israel.

Domestic Factors

The rapprochement process could be slowed by the volatile domestic political situation in both Israel and Turkey. At home, Israel's political situation is fragile. In June 2021, after twelve years in office, Benjamin Netanyahu was replaced by an eight-party coalition under Naftali Bennett. However, this experiment was already over by the end of June 2022. The

government was unable to unite the various factions of both left and right, including an Arab party. New elections are scheduled for November 2022, but the outcome is uncertain. There is reason to fear a renewed paralysis of the Knesset, which could lead to yet another round of elections. Accordingly, Israel's interim government – now led by alternate Prime Minister Yair Lapid – is not in a position to make decisions on major pipeline projects with Turkey. Should a government led by Benjamin Netanyahu return to office, there is a danger that the rapprochement efforts will fizzle out. Relations between Turkey and Israel cooled significantly during Netanyahu's last term in office.

The government in Ankara has a window of opportunity to change its foreign policy positions without being perceived as weak at home.

Although Turkey's current government has a stable majority, the domestic political situation is also tense. Turkey is in a deep economic crisis and is just over a year away from the next presidential and parliamentary elections, which will be held in the republic's centennial year. The ruling Adalet ve Kalkınma Partisi (AK Party) is seeking to normalise relations with regional actors such as Israel, the United Arab Emirates (UAE), Saudi Arabia, and even Egypt, not least in light of the current economic situation. Ankara is trying to end its regional isolation and restore investor confidence. Turkey's recent rapprochement with those Arab states that maintain good relations with Israel appears to be promoting normalisation between the two countries. Therefore, the timing of the Turkish initiative to recalibrate relations should not be ignored. In conjunction with the global geopolitical realignment in the wake of the war in Ukraine, the government in Ankara currently has a welcome window of opportunity to make a radical shift in its foreign policy positions

without being perceived as weak at home. Israel will, therefore, expect Turkey to come up with concrete initiatives before it will agree to a genuine relaunch of the “strategic partnership”.


The Importance of the Middle East Conflict

A permanent strain on relations between Turkey and Israel is the Middle East conflict. Over the last year, the Turkish president has repeatedly

stated that he is open to improving relations with Israel under certain conditions. However, he has previously called Israel’s policy on the Palestinians “unacceptable”, and Israel has stressed that relations cannot improve until Turkey expels Hamas.²² Ankara protested against the Abraham Accords²³ by receiving Hamas leader Ismail Haniyeh and his deputy Saleh al-Arouri in Istanbul shortly after the Accords were signed, in August 2020.²⁴



Position of strength: Israel has recently expanded its room for manoeuvre in the eastern Mediterranean by moving closer to Greece and Cyprus, not only in terms of energy policy, and can now afford to treat Turkey’s advances with scepticism. Source: © Louiza Vradi, Reuters.



Then, in December 2021, Erdoğan dangled the prospect of the two countries once again exchanging ambassadors if Israel acted “more sensitively with regard to its regional policy towards Palestine”.²⁵ A few weeks later, after phone calls with Prime Minister Naftali Bennett and President Isaac Herzog, he said that relations with Israel had improved. The phone call with Bennett was the first contact between an Israeli prime minister and Recep Tayyip Erdoğan since 2013. For its part, Israel is likely to want Turkey to tone down its rhetoric on Israel’s conflict with the Palestinians. Yet Turkey, and President Erdoğan in particular, see themselves as the patron saint of the Palestinians and Jerusalem. At a recent AK party conference, he condemned the actions of the Israeli security forces at the Al-Aqsa Mosque²⁶ and described Palestine, Jerusalem and Al-Aqsa as red lines for Turkey.²⁷ Turkish Foreign Minister Mevlüt Çavuşoğlu also told Israeli journalists that Turkey seeks a “sustainable relationship” with Israel, but said it depends on Israel’s policies towards the Palestinians.²⁸ Israel viewed Turkey’s deportation of dozens of individuals identified with Hamas as another positive step. However, a complete normalisation of relations will not be possible as long as Hamas officials are able to operate out of Turkey.

In Israel, there is a widespread feeling that Turkey is no longer a predictable and reliable actor.

In addition, the security situation in Jerusalem and the West Bank is steadily worsening, and a fresh escalation is possible at any time. Regardless of which prime minister is in office in Israel, or the specific form of government coalition, the risk of escalation in the Middle East conflict remains high. In the event of the crisis intensifying, and in light of Turkey’s and Israel’s different interests with regard to the conflict, it hovers like a sword of Damocles over the attempts at rapprochement, including in the area of energy policy.

A New Framework for the Bilateral Relationship

Many variables have changed since the last attempt to recalibrate relations in 2016. Turkey is generally confident that the formerly close relations will be restored, whereas Israel approaches it with more scepticism. In Israel, there is a widespread feeling that Turkey is no longer a predictable and reliable actor. In its 2020 annual security assessment, the Israel Defence Forces for the first time identified Turkey as a strategic challenge to Israel.²⁹ Public and published opinion in Israel is, therefore, cautious or sceptical about Ankara’s charm offensive. In March 2022, the Israeli daily newspaper Jerusalem Post described President Erdoğan as a “wolf in sheep’s clothing”, whose economic woes and impending international isolation were the sole drivers of the sudden about-turn in his policy towards Israel.³⁰ Meanwhile, Ankara is making serious efforts to convince the Israeli public and politicians that its intentions are sincere, and it is working proactively on positive messaging. After his visit to Israel, the Turkish foreign minister said that the normalisation of ties between Turkey and Israel would have a “positive impact” for a “peaceful” resolution to the Palestinian conflict, bringing Turkey’s position on the Middle East conflict closer to that of Morocco, the UAE, and Bahrain.³¹ Nevertheless, the process of rapprochement between the two countries remains sluggish. An announced visit by the Turkish energy minister and foreign minister suddenly disappeared from the calendar.³²

There has also been a shift in terms of arms trade. In 2009, Ankara was Israel’s biggest customer for arms exports, but Israel has found strong buyers in India and Azerbaijan, whose imports of Israeli arms exceed the former volume of Turkish imports many times over.³³

Moreover, following the normalisation of relations under the Abraham Accords with the UAE, Bahrain, Morocco, and Sudan, Israel no

longer relies on its diplomatic presence in Turkey as a base in the Muslim world. Of course, an escalation of the Israeli-Palestinian conflict would also strain relations between, for example, the UAE and Israel in the long run, as shown by recent escalations on the Temple Mount.³⁴ However, the recently signed free trade agreement with the UAE indicates that relations between the two countries are deepening rapidly.³⁵ The historic energy agreement with Egypt and the EU will also help to further stabilise Israel's relations with its neighbours in this respect, and strengthen ties between Egypt and Israel.

Israel has also improved its relations with other Mediterranean actors. It is in the country's interest not to jeopardise its good relations with Greece and Cyprus.³⁶ In this respect, the Israeli government has a number of potential options – both economically and politically. This strengthens Israel's bargaining power vis-à-vis Turkey.

It is in Germany's interest to work to ensure Turkey is included in regional energy formats.

Accordingly, the recent visit of Turkish Foreign Minister Mevlüt Çavuşoğlu to Israel was viewed with a degree of caution, though certain media outlets focused on the positive aspects of the visit.³⁷ However, their coverage tended to ignore a potential energy partnership with Turkey and focused on other issues, such as the likelihood of the two countries restoring their ambassadors, Turkey's position on the Middle East conflict, and above all Turkey's relations with Hamas. The issue of Foreign Minister Çavuşoğlu visiting the Temple Mount in Jerusalem without Israeli officials also dominated the Israeli media. However, there was no mention of a potential energy partnership. Instead, the Director General of the Israeli

Ministry of Energy, Lior Schillat, announced that talks were being held with the EU regarding the export of Israeli gas via Egypt. And indeed, an agreement was signed a few weeks later after a visit by EU Commission President Ursula von der Leyen.³⁸

Consequences for Germany and the European Union

Prospects for improving bilateral relations between Israel and Turkey remain unclear. However, any change in their relation will have implications for Germany and Europe. Rapprochement and enhanced cooperation would make a significant contribution to strengthening regional stability in the Middle East and eastern Mediterranean and would be a step towards de-escalating conflicts in the region. In addition, Israeli-Turkish cooperation would bolster international efforts to contain and, in the long run, conceivably reintegrate Iran into the international community. Rapprochement between Israel and Turkey would make it easier to find a common position with regard to Tehran.

Furthermore, despite the LNG deal with Egypt and Israel, an energy partnership between Israel and Turkey is of particular interest for Europe's energy security. Although the EU has set ambitious climate targets – Europe is to be climate neutral by 2050, which means that the gas fields in the eastern Mediterranean will gradually lose importance³⁹ – natural gas plays an important role in the medium term as a bridging technology to climate neutrality. Its importance has increased due to the need for greater diversification in the wake of Russia's war in Ukraine. In principle, Germany supports the European Green Deal that was presented to the European Council in December 2019 by Ursula von der Leyen. However, the EU is also faced with the urgent task of reducing its dependence on Russian gas in the medium term, for as long as this energy resource is still needed. For Germany (and the EU), this results in conflicting goals. More specifically, the foreign policy goals of regional

integration, conflict containment, and multi-lateralism are in competition with the goal of tackling the global problem of climate change, a priority for Germany's Foreign Office under its Green Party Foreign Minister Annalena Baerbock.⁴⁰ The question of whether Germany and the EU should support a possible pipeline between Israeli gas fields and Turkey should be considered from different angles. Along with climate targets, geopolitical factors such as regional stability, conflict resolution, and the potential for regional integration must be considered.

The prospect of an easing of Israel-Turkey relations, and subsequently a potential easing of the Cyprus conflict, should therefore be taken into account. Israel has established strategic relations with Cyprus in recent years and consequently has an interest in resolving the conflict. In light of the volatile security situation in Israel, the Palestinian territories, and the region as a whole, it is particularly important to seize opportunities for rapprochement, even if this means accepting that it will also involve costs. However, Germany's position will also be influenced by the sensitivities of the Republic of Cyprus due to its EU membership. It is in Germany's interest to find a solution and work to ensure Turkey is included in regional energy formats. This could reduce tensions between Turkey and its neighbours and shift them into an institutionalised framework.

Irrespective of this, it would be desirable for both Germany and the EU to provide positive support for the emerging re-normalisation of relations between Israel and Turkey. The increased contact between the two countries is a welcome sign, and it is good to see them creating channels to identify specific areas of cooperation. As far as Germany is concerned, they are both key states in the region – and rapprochement can only be of interest. While trends towards escalation and reconciliation can be observed in parallel in the Middle East, the possibility of rapprochement between Turkey and Israel is a positive sign. A regionally

reintegrated Turkey, along with Israel and its new partners in the Gulf, can only increase stability in this crisis-ridden region.

– translated from German –

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