A Continent
Learns Democracy

Conflict, corruption, crime – these negative attributes have become clichés for Africa. The continent seems essentially unable to find peace. For years, the Max Planck Institute for Comparative Public Law and International Law has acted as adviser and intermediary in the process of restoring peace and constitutional rule in the Sudan. The institute is also involved in the constitutional process in Somalia. But how can an institution committed to research on the legal foundations of public authority help bring peace to countries like these? A report on work in progress.

TEXT **JOHANNA MANTEL AND RÜDIGER WOLFRUM**

Democracy? Dem all crazy!" railed the renowned, late Nigerian musician Fela Kuti once when BBC journalists, reporting on a demonstration in his homeland, asked for his opinion on elections in Africa. German observers, too, tend to shake their heads or resort to cynicism when they hear "democracy" and "Africa" in the same sentence. The public perception

## Africa is losing on all development policy fronts

of Africa as a continent in crisis stubbornly persists. Whether wars, droughts or coups d'état: the vast majority of reports from the "Heart of Darkness" transmit catastrophes to the German public.

Africa is losing on all development policy fronts – and earning distinctions that are almost exclusively negative: the lowest standard of living, the shortest life expectancy and the highest crime rates, along with corruption, famine and economic paralysis,

Aids and civil war. Not to mention democracy. The annual *Freedom in the World* report by the American organization Freedom House, which analyzes the status of political rights and civil liberties in 193 countries, reveals a positive global trend. According to the regional report *Freedom in Sub-Saharan Africa 2009*, however, the continent is headed in the opposite direction.

While 46 percent of countries worldwide are classed as free, 32 percent as partly free and 22 percent as not free, the figures in sub-Saharan Africa are reversed, with just 21 percent described as free, 48 percent as partly free and 31 percent not free. Only 18 out of 53 countries on the African continent have democratically elected governments. Of the 17 countries worldwide classed as the most repressive – the worst of the worst – 8 are in Africa.

But what do these statistics tell us, and how does one actually measure democracy? Governmental and non-governmental agencies cooperating in international development are at pains to come up with meaningful assessment criteria. But these criteria are not without their detractors. One criticism is that the donor countries acknowledge only Western achievements, while ignoring the "unmeasurable" values of
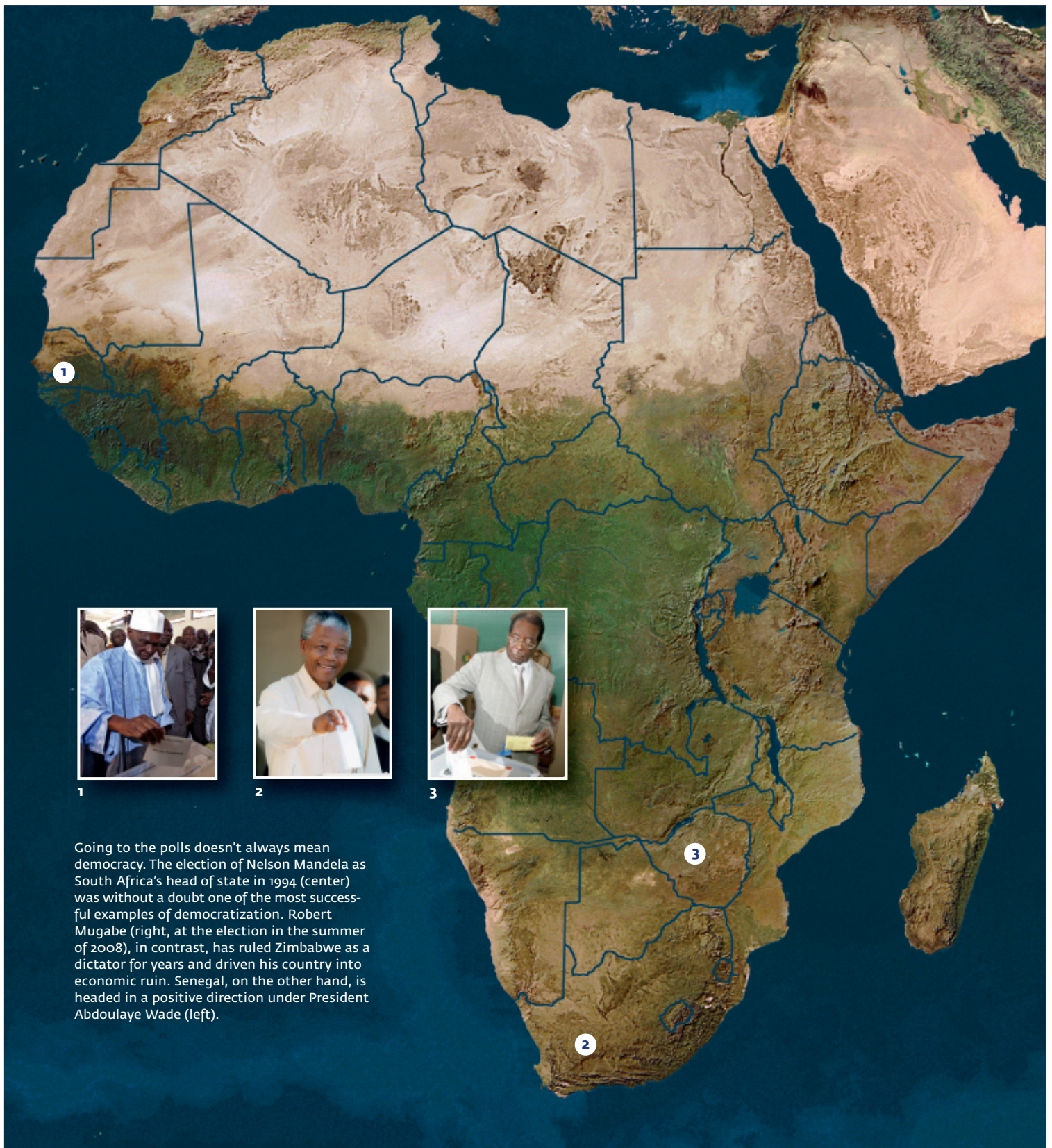
Going to the polls doesn't always mean democracy. The election of Nelson Mandela as South Africa's head of state in 1994 (center) was without a doubt one of the most successful examples of democratization. Robert Mugabe (right, at the election in the summer of 2008), in contrast, has ruled Zimbabwe as a dictator for years and driven his country into economic ruin. Senegal, on the other hand, is headed in a positive direction under President Abdoulaye Wade (left).

African societies. It thus seems important that appropriate indicators be found that also encompass other social advances.

The criteria by which the rule of law is measured, in contrast, are more straightforward. The Heidelberg-based Max Planck Institute applies concrete

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standards, such as guaranteed access to courts, the observance of human rights by administrative authorities, and the enforcement of judicial rulings. However, it also takes into account the traditional mechanisms by which disputes are settled without resorting to the courts.

Of course there are also definitive events that can serve as benchmarks for democratization – such as the first democratic elections in the history of South Africa on April 27, 1994. The overthrow of the apartheid regime, the introduction of elections and the establishment of functioning institutions in support of the rule of law make the country at the southern tip of the continent the most prominent example of successful democratization.

Overshadowed by South Africa, other democratic success stories are often forgotten. Zambia, for example, has been a multi-party democracy since the country held its first elections in 1991. Although the opposition parties were subjected to blatant threats at the polls in 1996 and the elections of 2001 suffered from serious administrative problems, the last vote in 2006 gave no cause for complaint.

In neighboring Malawi, the winner of the presidential elections in 2004 succeeded in thwarting his predecessor's efforts to extend his terms of office, and was again victorious at the polls in 2009. From a democratic perspective, these countries, too, are positive examples. In the mid-1990s, it seemed as though democracy had gained a foothold. In addition to

South Africa, the tyrannous regimes in Benin, Ethiopia, Liberia and Mali were brought to an end, and many others saw their supremacy under threat.

Opposition activists in Francophone Africa organized national conferences to call their state leaders and politicians to account for corruption and the use of force. Activists in Ghana and Nigeria intensified their campaigns for democracy. One-party systems, such as in the Ivory Coast, Kenya and Zambia, collapsed.

Today, however, the prospects are less bright again: civil war has split the Ivory Coast in two, and a precarious power-sharing compromise has prevailed since 2007. The president's nominal term of office expired in 2005 and, after several extensions at the behest of the United Nations, elections were due in March 2010. This deadline was not met, and the country is currently again in the throes of bloody unrest.

Allegations of vote-rigging led to mass riots in Kenya in December 2007 and served to inflame ethnic conflicts. Extensive negotiations and mediation by former UN Secretary General Kofi Annan finally produced a coalition government that is still teetering on the brink of collapse as all sides continue to accuse each other of corruption.

So what is the democratic outlook for Africa? Has democracy failed in Africa? Or is it making slow gains? The question is not easy to answer. Of course there are undisputable successes, as in Ghana, Mali and Senegal, where opposition parties and coalitions with popular support have triumphed in multi-party elections. But there are also still plenty of examples of failed attempts at democratization, like the bloody conflict in the Democratic Republic of Congo, the failure to bring government to Somalia, Mugabe's tyrannical rule in Zimbabwe, or the conflict in Darfur that constantly threatens to spill over into neighboring states.

Above all, it is a question of differentiating, of considering the entire spectrum of possible developments – from Senegal's long-established multi-party democracy to the creation of functioning institutions in support of the rule of law in Mali and Benin and the democratic facades in Ethiopia and Guinea to states such as Ivory Coast and DR Congo, which are threatened by war. A thorough analysis of the widely differing processes in different countries is of the
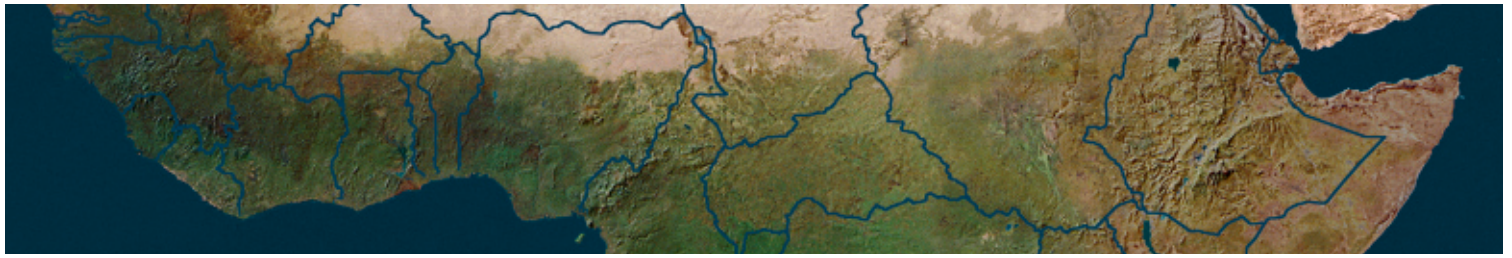
essence. Against this backdrop, the discussion of potential reform of Germany's development cooperation effort leading to the formation of "focal countries" is to be welcomed.

Irrespective of the answer to the question posed above, the negative cliché of Africa as a continent of crisis and catastrophe is harmful. To take this view is to stigmatize all 53 African nations as one, regardless of their differing cultural traditions and political development; it ignores the fact that the most fundamental conditions vary in the extreme from one country to the next. As a result, the entire continent has come to be seen as an annoyance, and even experts on Africa regard any improvement as impossible.

This image is also widely perceived among political decision makers; there are few votes to be won with policies on Africa. Even at the level of international power politics, there would appear to be no advantage to be gained from a commitment to Africa. The continent has no priority in foreign policy terms. By comparison, countries and regions such as Iraq, Afghanistan, Israel/Palestine and the Balkans are always more pressing.

Many of the fundamental problems of the African countries derive from their division along former colonial lines. The members of the African Union accept the *uti possidetis* principle (the retention of stable borders in the aftermath of armed conflict), thus preventing many more disputes between states. However, the fact that these borders fail to take account of ethnic distributions has led to many violent and bloody civil wars.

The Cold War, too, has left its mark on Africa. Dictatorships were largely the product of the conflict between East and West, which impeded the formation of healthy political and economic nationalism. Most African countries are grappling with the legacy of their former clientelistic structures. Their political systems are generally afflicted by fundamental problems that obstruct the rule of law. Their institutions of state are marked by the dominance of the executive branch. Political power is widely seen as a personal possession unlimited in time or reach.

Institutions that support the rule of law, primarily parliaments, remain largely powerless and often fail to exercise their political control functions sim-

ply for lack of material and human resources. In some cases, the lack of control over the executive is compensated for by the extensive jurisdiction of a constitutional or supreme court. However, this leads to the problem of democratic legitimacy.

A definitive increase is required in democratic checks and balances. Parliaments must be enabled to play a stronger role. In Somalia, for example, the Max Planck Institute is supporting the creation of a parliamentary system. In advance of the upcoming elections in the Sudan, the institute is currently provid-

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ing training in electoral law and is actively advising on legislative issues in both the north and south of the country.

In doing so, the institute team is able to build on existing structures. Customs and traditions should not be ignored. There may not have been such things as constitutions in pre-colonial Africa, but there were social structures that made governing regimes accountable to the people. The kings of the Oyo Empire, which encompassed present-day Benin, Nigeria and Togo, were, for example, obliged to abdicate or commit suicide if the council of elders so decided. The Ashanti rulers, too, whose territory occupied today's Ghana, could be deposed by their subjects.

Functioning structures based on customary law exist even today in many African countries. In South Africa, for instance, the traditional chiefs are recognized by the constitution and integrated into the country's legal system. A chief's decision is legally binding and can be contested in a court of law. The institute thus intensively studies and analyzes structures based on custom, and uses the results of this research in implementing its projects. An administrative system closely based on local structures is expedient for Somalia's segmented society. In the Sudan, it is a question of integrating the existing web of traditions into the country's legal system.   >

The Heidelberg-based institute's commitment to Africa began with its work in the Sudan. The institute played a major role in the peace process that in 2005 brought an end to the longest-running conflict on the African continent; for almost a decade now, it has intensively supported the reforms taking place in this, the largest country in Africa.

Through advisory and training projects in which the Sudanese partners are able to avail themselves of the institute's expertise, the institute's Sudan team is helping government and civil society put their constitution into effect and develop the structures needed for the rule of law. The institute contributes the skills it has acquired through years of experience to translate the content of the constitution into coherent, living practice. Within this framework, the scientists are providing advanced training for judges and staff at the national and south Sudanese ministries of justice, as well as for lawyers.

Since 2008, the team has also been involved in the efforts to bring peace to the Darfur region. In cooperation with local partners, team members are supporting an internal dialog within the civil society of Darfur. The dialog promoted by the institute in Heidelberg embraces all of the ethnic, social and political groups represented in Darfur, thus adding to the legitimacy

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of the resulting outcomes aimed at a peaceful and sustained resolution of the conflict. The institute is making a significant contribution toward giving the civilian population a voice in the official peace talks.

Having risen to prominence in the region through its work in the Sudan, the institute was requested to assist with the constitutional process in Somalia. Following the introduction of Somalia's transitional constitution at the start of 2004, the support offered by the institute was focused on providing legal advice to the constitutional commission established for the interim constitution and appointed by the interim government in 2007. The institute is concerned with the integration of the specific social, cultural, political and religious needs, as well as the interests of the Somali participants in the constitutional debate.

As co-determination and inclusivity are among the basic prerequisites for any successful constitutional process, it is essential for the Somali people themselves to draft their future constitution. The institute's Africa team is thus actively supporting the process – without imposing political structures. At the same time, they also advise on the standards of human rights and democratic legitimation that will enhance the sustainability of the constitutional process and its capacity to bring peace.

Particularly in so-called post-conflict countries, it is a matter of the greatest urgency to resolve issues of fairness and justice, the reintegration of refugees and arguments over land. In countries that already possess established governmental structures, it is also important to introduce judicial processes by which citizens can assert their legal rights against the state. Defects and abuses, such as a lack of enforcement mechanisms, vigilantism and the mistreatment of alleged offenders, unfair trials, corruption among the judiciary and other organs of government, are widespread. Solutions to these grievous problems must be sought on various levels.

On the one hand, the structures of the state need to be strengthened – in a process that must necessarily be accompanied by intensive support for the rule of law. German and European development policies often lack concrete goals for this. Issues of good governance are given preference over strengthening democratic institutions and protagonists. The rule of law and the certainty of the law must first exist if human rights are to be observed and populations given the opportunity to participate. In this respect, an evaluation of the support for democracy provided by the EU from 1995 to 1999 also calls for more funds to be devoted to establishing institutions and fighting corruption rather than simply observing elections.

The new guidelines for German foreign aid policies state that "future development projects sponsored by Germany must be more closely oriented toward

the assertion of human rights." In reality, however, there is all too often a lack of coherence between mandate and implementation. The intention is that human rights should form the normative foundation of German development cooperation, yet this aim is contradicted by the activities directed by those with an investment interest, such as the Federal Ministry of Economics.

All too often, the decision about whether to grant further development aid is also isolated from the issue of compliance with the principles agreed with

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Above all, commitment in Africa requires patience

partner countries. Sustainable action is needed: the observance of human rights and the success of development cooperation projects are closely intertwined. Commitment in Africa requires an assertive and, above all, patient approach. Most African countries are not lacking in initiative or the ability to innovate. What they do lack are the necessary legal, political and economic conditions to allow their individual powers of innovation to unfold.

This is where the Max Planck Institute for Comparative Public Law and International Law has a part to play. Practical experience over many years proves that – thanks to the institute's neutrality and acknowledged objectivity – its contribution is in demand. Conversely, this commitment to foreign countries with independent legal cultures of their own enriches the scientific work of the institute.

Incidentally, despite his comment, Fela Kuti, who was quoted earlier in this article, was not disenchanted with politics. On the contrary, he was a dedicated human rights activist whose song lyrics frequently contained direct attacks on African dictatorships and in particular on the military rulers of Nigeria in the 1970s and 1980s. His opinion of democracy did not prevent him from standing as a presidential candidate in 1979 in the first elections Nigeria had seen in a decade. ◄

THE AUTHORS

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Rüdiger Wolfrum, born in 1941, is a Director at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, and served as Vice President of the Max Planck Society from 2002 to 2006. Professor Wolfrum was also a member of the UN Committee on the Elimination of Racial Discrimination for ten years, President of the International Tribunal for the Law of the Sea and Chairman of the German Society of International Law.

Photos: Private (top), Max Planck Institute for Comparative Public Law and International Law