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The Salting of Carthage and the Responsibility to Rebuild

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Abstract In the past, war was characterized by enormous brutality and often the victor attempted not only to subdue the enemy but to destroy him once and forever. Much has changed in the meantime and the introduction of the "Responsibility to Rebuild" as a branch of the "Responsibility to Protect" gives the best proof of this development. According to this concept, the vanquished shall be helped to recover to become a peace-loving, politically, economically and legally stable member of the international society. Many sincere attempts have been made in order to make this aspiration come true. Even though there were also several larger setbacks in this endeavour still hopes run high that these initiatives will further be carried on so that the ruthless destruction of the enemy, epitomized by the account of the salting of Carthage (whether this account may have been true or not) becomes definitely a relic of the past.

Keywords Responsibility to Protect, Responsibility to Rebuild, *jus post bellum*, International humanitarian law, Carthage

Die Versalzung Karthagos und die Schutzverantwortung

Abstract Kriege waren in der Vergangenheit von unendlicher Grausamkeit geprägt und die Sieger begnügten sich nicht damit, den Gegner niederzuringen, sondern ihn endgültig zu vernichten war ihr Ziel. In der Zwischenzeit hat ein grundlegendes Umdenken stattgefunden und die Einführung der „Verpflichtung zum Wiederaufbau" als ein Teilgebiet der Schutzverantwortung liefert Zeugnis davon. Danach ist dem Besiegten Hilfe zu leisten, um ein friedliebendes, politisch, rechtlich und wirtschaftlich stabiles Mitglied der Staatengemeinschaft zu werden. Die Bemühungen, dieses Vorhaben in die Tat umzusetzen, sind vielfältig. Trotz aller Rückschläge, die in diesem Bereich immer wieder zu verzeichnen sind, ist nach wie vor die Hoffnung ausgeprägt, dass diese Anstrengungen fortgeführt werden, sodass die rücksichtslose Vernichtung des Gegners, die in den historischen Erzählungen über die Versalzung Karthagos (mögen diese nun Dichtung oder Wahrheit darstellen) bildhaften Ausdruck fand, endgültig der Vergangenheit angehört.

Keywords Schutzverantwortung, Verantwortung zum Wiederaufbau, *jus post bellum*, Humanitäres Völkerrecht, Karthago

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"Buildings and walls were razed to the ground; the plough passed over the site, and salt was sown in the furrows made."[1]

1 Introduction

Historians accused the Romans of an extremely cruel, unhuman act: After the Third Punic War (149–146 BC) they not only destroyed Carthage completely and sold the remaining population into slavery but they made sure that Carthage would never be rebuilt by sowing salt over the earth thereby making the ground infertile forever.

Later historians argued that this episode is not proven[2] but reports like this are not isolated in history: They can be found in the Bible[3] and they remember the policy of the "burned earth" practised inter alia by the German Wehrmacht in the Russian campaign started in 1941.[4] Events like these demonstrate the will of the aggressor to annihilate the opponent once and for all times.

War as we know it from historic accounts was often aimed at total destruction, an act that should deny any future to the vanquished whose only justification to survive was seen in their suitability to serve as slaves. Fortunately, later history, notwithstanding repeated fallbacks into darkest situations of barbarity, saw a continuous change of perspective for the better: The progressive outlawing of war was associated with the introduction of restriction in warfare in case war happens again notwithstanding its illegality in the first place. The introduction of the "Responsibility to Rebuild" within the broader concept of the "Responsibility to Protect" (R2P) can be seen as the last step in this process, a step, however, whose direction, dimension and definiteness is not yet fully clear. Should a modern Carthage be brought to blossom again in such a setting? And if the answer is yes, whose is the responsibility to make this happen? In the following some of the questions surrounding these issues shall be addressed.

2 Sovereignty as a Barrier to Effectuate a Holistic Peace Policy

At the moment when states lapse into conflict, be it of a national or an international nature, international law is expected to enter into action, either to contain the effects of death and destruction stemming from the conflict or, if possible, even to stop the conflict altogether. While in peacetime state sovereignty has traditionally widely impeded international interference in national politics the eruption of a conflict lowers this barrier dramatically and what shortly before had to be considered to make part of the *domaine reservée* of the state concerned transforms spontaneously into an issue of international concern.

Alas, such an erratic attitude according to which international law gains paramount importance when peoples are confronted with extreme threats only to be reduced to a vanishing relevance as soon as guns become silent is surely not an effectual policy. Usually, the moment when conflict erupts is only the latest episode in a chain of events characterized by

1 B. Hallward, Chapter XV: The Fall of Carthage, in: Cambridge Ancient History (8) (1930), p. 484.
2 See R. T. Ridley, *supra* note 1.
3 See Judges 9:45: "And Abimelech fought against the city all that day; and he took the city, and he slew the people that was therein, and beat down the city and sowed it with salt."
4 See M. Levene, The Crisis of Genocide Vol. 2, Oxford 2013, pp. 240 f.

missed opportunities to avoid a further intensification of the controversy. As soon as political discussion and diplomacy leave the floor to armed struggle the sensibility for arguments of law has become minimal. In such a situation, international law is confronted with a task that is nearly unsolvable. Issues of power become overwhelming. It is not that international law would be totally useless in such a situation but it has to play cards that are in many senses of a primordial character: thus, for example, reciprocity becomes pivotal or also the fear of possible international criminal persecution if crimes according to the Rome Statute of 1998 are committed. For the immediate victims of conflict these instruments are of little avail. It therefore becomes clear that international law has to come into operation at a much earlier time if irremediable harm shall be avoided.

But even this enlarged perspective delivers only part of the picture we have to keep in mind if the destructive effects of conflict shall be reigned in.

A second perspective to this issue is opened up at the moment when the conflict ceases. According to a traditional vision this is the moment when the relevance of international law again diminishes dramatically while sovereign national powers regain the dimensions they had before the conflict. Thus international law had little to say about the attempts to clean up the mess left by the previous conflict, about the endeavours to overcome possible root causes of the conflict and about the need to fight injustice contributing to the eruption of violence or being the immediate consequence of it.

This "stop-and-go-approach" ended up in a situation where international law was considered only at intermediate steps and the holistic sight for the conflict, its causes and consequences where lost. The result was not only that international law was unable to cope with the challenge in such situations but also that dissatisfaction grew with this field of law as it seemed to be generally inadequate to provide any meaningful help.

In the meantime, much has changed in this area and the conviction is consolidating that both the period before conflict breaks out as also the aftermath should be of direct concern for international law if conflict is to be addressed and to be avoided effectively.

As will be shown, proposals for such a "comprehensive" "holistic" view on the reasons of conflicts and the need to approach them more effectively date far back into history but only recently they have been taken up in the international norm creating process. The resulting concepts do not yet fulfil all the requisites of a "hard" international law norm but nonetheless they constitute now an important tool in the international peace-building and conflict-avoidance policy. In this, a decisive contribution has come from the "Responsibility-to-Protect"-approach started at the dawn of the new millennium.

3 The Antecedents – a Short Review

The "jus post bellum" concept is a relatively new one. Only in recent years has academic interest been drawn to this subject. The ideas behind this concept are, however, much older,[5] as the idea itself is closely related to the "just war"-discussion. We could therefore refer to

5 See C. Stahn, 'Jus ad bellum', 'jus in bello' … 'jus post bellum'? – Rethinking the Conception of the Law of Armed Force, in: The European Journal of International Law 17 (5) (2007), pp. 921–943. As C. Stahn writes, the concept of "jus ad bellum" was first used by Giuliano Enriques (G. Enriques, Considerazioni sulla Teoria della Guerra nel Diritto Internazionale, in: Rivista di Diritto Internazionale 7 (1) (1928), p. 127.). The distinction between jus ad bellum and jus in bello came of widespread usage only after the end of WW II. See C. Stahn,

St. Augustine, Thomas Aquinas, Francisco de Vitoria and Hugo Grotius as forethinkers in this field.[6] It was, however, Immanuel Kant, who developed this concept full-circle when he looked for the conditions of "Perpetual Peace". The continuous alternation between war and peace should be stopped and give way to a world society where peace would become a constitutional element. It goes by itself that such an approach would require the elimination of all elements that would foster a return to war. The importance, Immanuel Kant attributes to the post bellum period is evidenced by the fact that he refers to it already in Article 1 of his "Preliminary Articles for Perpetual Peace Among States" of 1795:

> 1. "No Treaty of Peace Shall Be Held Valid in Which There Is Tacitly Reserved Matter for a Future War";
> Otherwise a treaty would be only a truce, a suspension of hostilities but not peace, which means the end of all hostilities — so much so that even to attach the word "perpetual" to it is a dubious pleonasm. The causes for making future wars (which are perhaps unknown to the contracting parties) are without exception annihilated by the treaty of peace, even if they should be dug out of dusty documents by acute sleuthing. When one or both parties to a treaty of peace, being too exhausted to continue warring with each other, make a tacit reservation (reservatio mentalis) in regard to old claims to be elaborated only at some more favorable opportunity in the future, the treaty is made in bad faith, and we have an artifice worthy of the casuistry of a Jesuit. Considered by itself, it is beneath the dignity of a sovereign, just as the readiness to indulge in this kind of reasoning is unworthy of the dignity of his minister. […]

While conducting war, each state should have the subsequent status of peace already in mind, so as to make peace possible, as Kant points out in Article 6 of his "Preliminary Articles":

> 6. "No State Shall, during War, Permit Such Acts of Hostility Which Would Make Mutual Confidence in the Subsequent Peace Impossible: Such Are the Employment of Assassins (percussores), Poisoners (venefici), Breach of Capitulation, and Incitement to Treason (perduellio) in the Opposing State".[7]

As we know, however, Immanuel Kant´s considerations were highly appreciated in theory but not on the practical level where thinking in terms of absolute sovereignty prevailed within the great powers of the 19th and the first half of the 20th century.

Immanuel Kant himself seemed to have foreseen this development when he stated the following in the second paragraph of Article 1: "But if, in consequence of enlightened concepts of statecraft, the glory of the state is placed in its continual aggrandizement by whatever means, my conclusion will appear merely academic and pedantic."

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supra note 5, (note 19, referring to L. Kotzsch, The Concept of War in Contemporary History and International Law 1956, pp. 86, 89.).

6 And this attitude informs also modern just war theory. See, for example, the final sentence of R. E. Williams / D. Caldwell, *Jus Post Bellum*: Just War Theory and the Principles of Just Peace, in: International Studies Perspectives 7 (4) (2006), p. 319. "Because what happens once the fighting stops is also critical to the moral evaluation of war, a concept of *jus post bellum* is important to inform both our postwar policies and the final judgments we make concerning wars."

7 See the English translation at: The Constitution Society, Perpetual Peace: A Philosophical Sketch, http://www.constitution.org/kant/perpeace.htm (accessed on 4. February 2020).

While the coalition of states fighting against Napoleon was prepared to concede peace conditions to France that allowed for a swift reconstruction of this vanquished state, this was no longer the attitude by Prussia when it dictated the peace conditions to France in 1871 and even less so the position taken by the Entente in the Treaty of Versailles imposing harsh peace conditions on defeated Germany in 1919. The treatment of Germany after WWII was somewhat different, most probably, however, less out of a new insight into the legal and moral imperatives of a just war but rather as a consequence of a totally changed strategic environment in which the two parts of Germany were needed as a partner by her former enemies, now separated by a new divide.[8]

Without doubt, after WWII, a whole set of rules was in place or was in the process of being adopted that stood against the continuing application of the ancient tradition of "vae victis":

- First of all, the Stimson doctrine of 1932 should make wars of conquest futile as it barred recognition of any situation, treaty or agreement brought about by non–legal means.[9] In principle, neither the aggressor nor the victim should suffer any territorial loss as a consequence of the war and the state community should refrain from any recognition of territorial annexations. Jus post bellum required the restoration of the situation ex-ante.[10]
- The outlawry of war by the Kellogg'-Briand Pact of 1928 in combination with the general prohibition of the use of force by Article 2, paragraph 4 of the UN Charter should render the whole post bellum issue widely obsolete. Only in the exceptional situations of a war of self-defense or an UN authorized military operation according to Chapter VII of the Charter the jus ad bellum issue should still arise.

8 Already US President F. D. Roosevelt had in mind to provide incentives to Germany, Italy and Japan in order to re-start their economies after the war. See G. Craig/A. L. George, Zwischen Krieg und Frieden, Munich 1984, p. 120 (transl. from "Force and Statecraft", Oxford 1983). After the Cold War had broken out, the primary motivation to provide economic help was less the unselfish intent to build up peaceful nation states than to preserve peace by propping up one's own allies.

9 See M. N. Shaw, International Law, Cambridge 2008, p. 468. See also the resolution by the League of Nations Assembly of 11 March 1932: "[I]t is incumbent upon the members of the League of Nations not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris." League of Nations (LN), Official Journal, Special Supp. No. 101, 11.03.1932, p. 87.

10 It cannot be overlooked, however, that the peace arrangements after WW II were in apparent contrast to this rule, in particular with regard to the treatment dealt to Germany and Japan. It might be argued that the territorial losses these two countries had to suffer were sort of a compensation for wartime damage caused to the allies. For references to this position see C. Stahn, Jus Post Bellum: Mapping the Discipline(s), in: American University International Law Review 25 (3) (2007), p. 319. This stance is, however, problematic as it risks undermining the very substance of the Stimson doctrine. While as to WW II there is no serious discussion about who is to blame as the aggressor in other cases the aggressor might hope that an eventual victory will attribute him the position to deliver the respective verdict. It seems to be commendable (and the wording of the Stimson doctrine seems to leave no other option) that the territory of the vanquished state – whoever is to blame for the war – is to be left out of the compensation bargaining.

– International humanitarian law has created a series of obligations for the warring parties that applied post bellum, in particular with regard to the treatment of prisoners of war[11] and civilian persons.[12]

It cannot be denied, however, that the jus post bellum provisions in place in the middle of the 20th century had been created primarily for situations arising out of international conflicts.[13] To a certain extent it would perhaps be possible to qualify the Mandate System after WWI and the Trusteeship System after WWII as a post bellum system of rules as they were created in the aftermath of two world conflicts and they reflected the outcome of these wars but primarily these regimes allowed for a smooth transition from colonial domination to independence.

On the other hand, however, it has also to be mentioned that there are reservations to refer to concepts such as the Mandate or the Trusteeship system when discussion about modern post bellum comes up these days. In fact, notwithstanding the fact that these systems at that time were valuable instruments in the attempt to overcome colonialism they have become somewhat tainted by the very historic situations they were intended to supersede.

Thus it can be stated that the jus post bellum in the sense as it is applied today is rather the result of the "new international law"[14] and the "new international relations" that resulted from the end of the Cold War. Now the state community could act more boldly in cases of a breakdown of governmental structures and in the face of broad human suffering resulting from previous conflicts. And there was ample necessity to do so in view of a rising number of failed or failing states, of secessionist movements and civil wars prompted by ethnic, racial and religious motives.[15]

4 Creating and Applying Modern Jus Post Bellum

4.1 Yugoslavia as a Testing Ground

Yugoslavia became the main, although by far not the only testing ground for the new jus post bellum. While there is still no agreement in theory and practice about the exact contours of this concept, if we try to devise a mainstream definition it will become clear to what extent the international community was confronted with jus post bellum issues in Yugoslavia. In this sense we could define jus post bellum as the body of provisions, both of a legal and of a

11 See, for example: Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Art. 118, according to which prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

12 See, for example: Convention (IV) relative to the Protection of Civilian Persons in Time of War of 1949, Geneva, 12 August 1949, which contains inter alia a series of obligations on behalf of the occupying power towards the civilian persons in the occupied territories. See also Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Art. 46. "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."

13 Art. 3 of the Geneva Convention (IV) of 1949 is, as it is well known, applicable to civil war but this provision does not address directly post-conflict issue.

14 See H. Neuhold / B. Simma (eds.), Neues europäisches Völkerrecht nach dem Ende des Ost-West-Konflikts?, Baden-Baden 1996.

15 These conflicts were in part not new but the juxtaposition of two great ideological blocs had frozen them down for years. This held in particular true for the conflict of Yugoslavia.

soft law nature, of best practices and recommendations, be they binding in a strict sense or not, that regulate the process of the transition from armed conflict to sustainable peace that is felt to be just by the main parties involved.[16]

For at least two reasons it would not seem appropriate to consider for this category only hard legal norms. First of all, the body of jus post bellum norms would thereby be reduced to a rather small set of rules that would only very insufficiently be suited to deal with this complex and at the same time extremely serious challenge of these days. Second, in view of the "sliding scale" of normativity of international legal norms[17] it would be hard to find a dividing line within all the rules that effectively apply to such transition processes and to distinguish accordingly between legal norms on the one hand and non-legal norms on the other.[18]

The jus post bellum provisions are by their nature future-oriented but this should by no means exclude them from redressing past injustice as this could be of primary importance for the peace, both to be lasting and to be felt as just.

With regard to peace-building pivotal insights can be found already in the 1992 Agenda for Peace[19] whose drafting was also influenced by the experiences during the Yugoslav conflict.

Peace-building is identified as a cornerstone for any effort to create a durable peace order and to prevent further conflicts.

In the paragraph 55 f. of this "Agenda" it is made clear that peace-making and peace-keeping efforts may be valuable instruments to stop an ongoing war and to prevent a renewed break-out of hostilities in specific conflict areas but to secure a lasting peace much more is required:

- In the immediate aftermath of an international conflict, cooperative projects linking the parties previously at war may contribute to economic and social development in a mutually beneficial way and thereby also restore confidence. Cultural exchanges and youth educational programmes are mentioned to forestall a re-emergence of tensions that could, in the worst case, spark new hostilities.

16 This definition is based on that provided by J. Iverson, Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics, in: The International Journal of Transitional Justice (7) (2013), p. 420. But it has been considerably extended.

17 As is well known, this concept of a "sliding scale of normativity" is closely associated on the one hand with the introduction of communitarian values and with the broad acceptance of "soft law" on the other. For a strong contrarian position to the concept of "relative normativity" see P. Weil, Towards Relative Normativity in International Law?, in: American Journal of International Law 77 (3) (1983), pp. 413–442. See also D. Shelton, International Law and 'Relative Normativity', in: M. Evans (ed.), International Law, Oxford 2014, pp. 137–165.

18 It is debatable whether the corpus of jus post conflict norms should comprise both international and national norms. I. Österdahl / E. van Zadel, What will Jus Bellum Mean? Of New Wine and Old Bottles, in: Journal of Conflict and Security Law 14 (2) (2009), pp. 175–207. For example, argue for a broad concept that should encompass legal elements from international humanitarian law, international human rights law, international criminal law, national criminal law, national administrative law, national constitutional law and national military law, see p. 182. From the viewpoint of practical application, this perspective is correct. From a source-oriented standpoint it seems, however, preferable to include only international norms as the national norms mentioned are merely implementation norms (though usually of a higher precision than the international ones).

19 See UN Secretary-General B. Boutros Ghali, An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping, A/47/277, S/241111, 17 June 1992. See also the so-called "Brahimi-Report": Report of the Panel on United Nations Peace Operations, A/55/305–S/2000/809, 21. August 2000; which extensively deals with "peace-building".

- Peace-building is identified as the counterpart of preventive diplomacy and as the necessary step following peacemaking and peace-keeping. In fact, preventive diplomacy, peacemaking and peace-keeping can tackle only the exterior side of conflicts that usually have far deeper roots and may concern economic, social, cultural and humanitarian issues.[20] "Preventive diplomacy is to avoid a crisis; post- conflict peace-building is to prevent a recurrence."[21]
- The Agenda for Peace further addresses a very specific problem confronting efforts for peace-building in many areas of (former) conflict: land mines. Often it is next to impossible to re-construct a functioning economy (in particular with regard to agriculture) and an orderly life in regions (especially rural ones) that are scattered with hidden land mines.[22] Since 1992 this problem has been taken up forcefully by the international community. While the Anti-Personnel Mine Ban Treaty of 1997[23] became effective on 1 March 1999, considerable diplomatic efforts were necessary to persuade a larger number of states to ratify this comprehensive ban on antipersonnel landmines. Now 164 states are parties to this convention and so a major contribution in the ongoing efforts to enhance the responsibility to rebuild has been made.[24]

The dissolution of Yugoslavia and the ensuing civil strife and broad-scale human rights abuses prompted the state community to devise and to implement a series of jus post bellum concepts and instruments. Of a path-breaking nature were the creation of an International Criminal Tribunal for the Former Yugoslavia in 1993[25] and the international administration of Bosnia introduced by the Dayton Agreement of 1995. But it was the former Yugoslav (and Serb) province of Kosovo where jus post bellum was most intensively tested and developed. In 1999 widespread human rights abuses perpetrated, first of all, by Serb militia forces, prompted 17 NATO states to intervene. As this intervention, though being necessary from a human rights point of view, stood in blatant contrast to existing international law, the Canadian government created an international study commission that looked for appropriate ways for the international community to deal with challenges of this kind. The results were presented in 2001[26] and this study gave birth to the concept of the Responsibility to Protect (R2P). Within this concept, the Responsibility to Rebuild is one of the central pillars (together with the Responsibility to Prevent and the Responsibility to React).

In the meantime, by SC Resolution 1244 an administrative regime for the province of Kosovo, with a civil and an administrative presence, had been established. Thereby, the international community had assumed responsibility for this province and this responsibility

20 B. Boutros Ghali, *supra* note 19, para. 57.
21 *Ibid*.
22 *Id.*, para. 58.
23 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (or Ottawa Convention), Oslo, 18 September 1997.
24 Unfortunately, important military powers, such as the United States, Russia and China, remain outside this regime.
25 UNSC, Resolution 827 (1993), S/RES/827, 25 May 1993.
26 International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect, Ottawa 2001.

was both a responsibility to prevent as well as a responsibility to rebuild. In the years before, the UN had acquired considerable experience with such forms of territorial administration of conflict regions, for example in Namibia, Cambodia, Bosnia-Herzegovina and Eastern Slavonia.[27]

The pivotal importance of the combined effort both to prevent and to re-build transpires clearly from the primary functions attributed to the civil presence and the military presence.

The civil presence was based on four pillars for which different international organisations were responsible:

- the UNHCR for the area "humanitarian affairs";
- the UN for the "Interim Civil Administration";
- the OSCE for "Institution Building" and
- the EU for "Reconstruction".

According to paragraph 9 of Security Council Resolution 1244 the military presence exercised by KFOR had the following tasks:

- deterring of renewed hostilities;
- establishment of a secure environment;
- ensuring public safety and order until the international civil presence can take responsibility for this task,
- conducting border monitoring duties.

Security Council Resolution 1244 of 1999 and the UN administration of Kosovo, introduced on the basis of this document, became an experiment of epochal dimensions as far as the ambition by the international community is concerned to rebuild a war-torn society from scratch. As is well known, these efforts succeeded in their preventive dimension: Kosovo became a comparatively peaceful region.[28] The efforts to rebuild a functioning society with a self-sustaining economy were, on the other hand, more or less a failure. This was analysed very perspicaciously by UN Special Envoy Martti Ahtisaari nominated in 2005.[29] In his Comprehensive Proposal for the Kosovo Status Settlement presented on 15 March 2007 to the UN Secretary-General and forwarded on 26 March 2007 to the Security Council[30] the UN Special Envoy was very outspoken about the fact that the chance to rebuild had been missed. There was the sense that the international society had shown too much commitment, for a too long time, often at the wrong place and offering no vision for the future while the Kosovar society had remained inert vying only for independence:

27 *Ibid*.

28 It is also known, however, that sporadic outbreaks of violence could nonetheless not be impeded. This time, primary victims were Serb Kosovars as well as members of other minorities, in particular the so-called RAE-minorities (Roma, Ashkali, Egyptians).

29 UNSC, Statement by the President of the Security Council, S/PRST/2005/51, 24 October 2005.

30 See UNSC, Letter from the Secretary-General addressed to the President of the Security Council, Addendum, Comprehensive Proposal for the Kosovo Status Settlement, S/2007/167/Add.1, 26 March 2007.

> "Almost eight years have passed since the Security Council adopted resolution 1244 (1999) and Kosovo's current state of limbo cannot continue. Uncertainty over its future status has become a major obstacle to Kosovo's democratic development, accountability, economic recovery and inter-ethnic reconciliation. Such uncertainty only leads to further stagnation, polarizing its communities and resulting in social and political unrest. Pretending otherwise and denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole."[31]

Athisaari's main theses were that Kosovo's reintegration into Serbia was not a viable option that continued international administration was not sustainable and that independence with international supervision was the only reasonable road to go. At first look, these findings might appear puzzling: How can it be that within rebuilding activities carried out by the international community less is more? Apart from the problem of funding, which is always to consider if the international community has to finance rebuilding activities, care should be taken that the assumption of a responsibility to rebuild will not de-responsibilize the immediate beneficiaries of these activities. At some point exactly this situation happened in Kosovo: The Kosovar people had become dependent on funding by the international community and had made too little effort to stand on their own feet again. As is well known, the aftermath of the independence of Kosovo has not been brought about exactly according to Athisaari's plan but the declaration of independence of 18 February 2008, as problematic as it might seem when looked at from the viewpoint of Resolution 1244 (1999) which required a consensual solution, nonetheless set in motion a new state-building process which returned ownership of this process to the Kosovar people (or at least to the vast majority of it).

In sum, important lessons can be drawn from this episode: Initial efforts by the state community to appease and rebuild a war-torn region and society might be indispensable as the respective region or society might not find the force on its own to return to the path of peace and stability. This help shall, however, never become patronizing or otherwise de-responsibilize the beneficiary. The responsibility to rebuild comprises also the responsibility to rebuild the capacity of the beneficiary to stand on its own feet and this capacity is not only to be interpreted in a material sense but also intellectually and psychologically. In other words: The beneficiary of help must know from the very beginning that this help is limited in time. No new dependencies shall be created that would in anyway not be affordable and not be in the interest of any side.

4.2 The ICISS report of 2001 and the Ensuing Development

As to the Responsibility to React the 2001 Report forcefully argued that after military intervention "there should be a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development. Conditions of public safety and order have to be reconstituted by international agents acting in partnership with local authorities, with the goal of progressively transferring to them authority and responsibility to rebuild."[32]

31 *Id.*, para. 4.
32 *Id.*, para. 5.1.

The idea of R2P was simple and revolutionary at the same time.[33] In order to make its way from a simple concept in a study by an independent research group to a universally accepted principle of international law a series of hurdles had to be overcome – and this happened in an astonishingly swift and forceful manner so that already in 2005 at the UN World Summit R2P got universal recognition and support. But what happened to the Responsibility to Rebuild? While governments reveal in general a high degree of sensibility when the state community sets activities in either of the three pillars, at first look one might be inclined to assume that the Responsibility to Rebuild is the least delicate field. In reality it proved to be quite the opposite. In fact, the Responsibility to Prevent and, even more so, the Responsibility to React, although having considerable impact on sovereignty, apply only in rather exceptional circumstances where the state community has to fear even much worse developments if no action is taken within the short run. The Responsibility to Rebuild has also preventive aspects but they are less visible. Rebuilding usually takes place in a situation where the immediate danger of conflict, death and destruction has passed. The respective state is in the process of re-instating its sovereignty and in this highly sensitive phase states fear intervention most. This seems paradoxical as international support to rebuild is actually intended to re-establish effective and sustainable sovereignty but the fear is, that sovereignty installed with outside help is spurious, that it is contaminated by the ideology and the interests of the intervening powers. A state-building process carried out with strong foreign assistance may run the risk of being qualified as the result of a foreign intervention and therefore be denied recognition. On the other side, no incentive shall be given to favour foreign intervention disguised as help for state-building. As a consequence, the attitude of the most prominent stakeholders involved in the formation process of R2P was divided when talk came about the Responsibility to Rebuild.

Former UN GS Kofi Annan and the High-level Panel on Threats, Challenges and Change (HLP), a study group of eminent persons created by the GS, were most sanguine about the third pillar. The HLP rightly identified the preventive nature of peacebuilding when it stated that "[r]esources spent on implementation of peace agreements and peacebuilding are one of the best investments that can be made for conflict prevention"[34]. Kofi Annan took up with great enthusiasm the proposal by the HLP to institute a Peacebuilding Commission[35] although he might have sensed the looming opposition against such an institution when he took a much more limited stance in comparison to the HLP and lobbied for a Commission that should have no preventive and only post-conflict functions.

In the Outcome Document of the World Summit of 2005, which unexpectedly by many adopted the concept of R2P, no explicit mention was made of a Responsibility to Rebuild[36],

33 For more details see, inter alia R. Thakur / T. G. Weiss, R2P: From Idea to Norm – and Action?, in: Global Responsibility to Protect 1 (1) (2009), pp. 22–53; A. J. Bellamy, The Responsibility to Protect – Five Years On, in: Ethics & International Affairs 24 (2) (2010), pp. 143–169 and P. T. Stoll, Responsibility, Sovereignty and Cooperation – Reflections on the "Responsibility to Protect", in: D. König *et al.* (eds.), International Law Today: New Challenges and the Need for Reform?, Heidelberg 2007, pp. 1–16.

34 UNGA, Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, A/59/565, 2 December 2004, para. 221.

35 See the Report by Kofi Annan: UNGA, In Larger Freedom: Towards Development, Security and Human Rights for All, A/59/2005, 21 March 2005.

36 *Id.,* para. 138 f.

although an indirect reference to this concept can be found in this document in paragraph 139[37] and peacebuilding is mentioned in paragraph 97:

> "Emphasizing the need for a coordinated, coherent and integrated approach to post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace, recognizing the need for a dedicated institutional mechanism to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development, and recognizing the vital role of the United Nations in that regard, we decide to establish a Peacebuilding commission as an intergovernmental advisory body."

By two resolutions of equal content the General Assembly and the Security Council instituted together this Peacebuilding Commission.[38] This Commission fell, however, short of most expectations: It was not created as an independent international organisation but as an intergovernmental organ with merely consultative functions.[39] Consultations about country-specific measures take place in apposite meetings with the involvement of a very large number of stakeholders, comprising in particular also regional representatives.[40] In sum, this institution has become a forum for discussing and organizing peacebuilding activities rather than a directly operative instrument. Nonetheless, this achievement must not be underestimated. Creating more transparency and providing for a clearing forum for peacebuilding activities can be of decisive importance in order to launch effective measures in this field but in particular, to create moral pressure to assist such initiatives.

International institutionalization of peacebuilding activities is of essential importance for their prospects of success and with the Peacebuilding Commission an important step has been made towards this aim. While the intergovernmental nature of this Commission still makes success of single initiatives largely dependent upon the individual contribution of participating states the trend is clearly directed towards the affirmation of a greater responsibility of the state community as a whole in this field. While in some cases specific obligations to rebuild may lie on single parties, which bear primary responsibility for the preceding conflict, most often it is not possible to attribute a specific responsibility to individual states in this respect and it is up to the state community to assume this task.[41] Erga omnes obligations come to life.[42]

37 "We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity […]."

38 UNSC, Resolution 1645 (2005), S/RES/1645 (2005), 20 December 2005; UNGA, Resolution 60/180 The Peacebuilding Commission, A/RES/60/180, 30 December 2005.

39 See F. Battaglia, La commissione per il consolidamento della pace: l´attività svolta e le prospettive di rilancio, in: N. Napoletano / A. Saccucci (eds.), Gestione internazionale delle emergenze globali: regole e valori, Naples 2013, p. 81.

40 *Id.*, p. 80.

41 See J. Pattison, Jus Post Bellum *and the Responsibility to Rebuild*, in: British Journal of Political Science 45 (3) (2013), pp. 1–27, who takes a clear stance against what he calls the "Belligerents Rebuild Thesis".

42 See on this concept P. Picone, Comunità internazionale e "obblighi erga omnes", Naples 2013. According to Art. 48 of the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts of 2001 the following rules apply in this field:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
   (*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
   (*b*) the obligation breached is owed to the international community as a whole.

5 The Case of Libya as a Warning Example

The military intervention carried out by a coalition of Western states and under NATO command in spring 2011 has long been hailed as a success. And from a military viewpoint it surely was. Security Council Resolution 1973 of 17 March 2011, after having condemned "the gross and systematic violation of human rights, including arbitrary detention, enforced disappearances, torture and summary executions" had given a clear mandate for intervention. Some controversy exists, however, about the reach of this mandate as the wording of Security Council Resolution 1973 (2011) is rather ambivalent.[43] On the one hand, there can be no doubt that the establishment of a no fly zone stood at the centre of this document[44] as this was perceived to be the most efficient way to protect civilians against Gadhafi's troops that in the previous weeks and months had slaughtered thousands of rebels and civilians alike. On the other hand, however, Resolution 1973 (2011) went far beyond when it authorized member states "to take all necessary measures", excluding only "a foreign occupation force of any form on any part of Libyan territory".[45] A broadly held opinion can be found in literature that this Resolution cannot be interpreted as an authorization for regime change, but regime change was exactly one of the primary goals of the intervening Western alliance. According to others, such a regime change might not have been a legitimate goal in itself but it could be qualified as a necessary means to protect civilians effectively, as with the Gadhafi regime in power this would not have been possible.[46] Be that as it may, there can be no doubt that the intensity of the NATO led intervention, which swept away all governmental structures existing in Libya[47], placed an enormous responsibility on the intervening forces for the rebuilding of the country – a responsibility, the intervening states had probably not anticipated and were in any case not willing to assume. The consequences are known: After a first stabilization as an immediate result of intervention the security situation began to deteriorate steadily, finally ending up in a chaotic situation that left the country in the hands of armed gangs, contracted militias and Islamists. The Human Rights Watch Report on Libya of the last years has conveyed an appalling picture about the human rights situation in this country.[48] The rich weaponry arsenals left

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
   (*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
   (*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

43 See, e. g. E. Cannizzaro, Responsabilità di proteggere e intervento delle Nazioni Unite in Libia, in: Brazilian Journal of International Law 94 (2011), pp. 821–824.

44 UNSC, Resolution 1973 (2011), S/RES/1973 (2011), 17 March 2011, para. 6.

45 *Id*., para. 7.

46 See M. Payandeh, The United Nations, Military Intervention, and Regime Change in Libya, in: Virginia Journal of International Law 52 (2) (2012), pp. 387 f. It also has to be remarked that with Resolution 1973 the Security Council for the first time in history authorized military intervention without the consent of the state against which it took place. See A. Bellamy / S. McLoughlin, Human Protection and the Politics of Armed Intervention: With Responsibility Comes Accountability, in: Global Responsibility to Protect 11 (3) (2019), p. 349.

47 This happened also because no governmental structures with some autonomy from the Gadhafi regime existed in Libya. With the ousting of Gadhafi also government disappeared.

48 For the latest report available, see Human Rights Watch, Libya, Events of 2018, https://www.hrw.org/world-report/2019/country-chapters/libya (accessed on 30 June 2019).

behind by the Gadhafi regime, which were in many cases looted in the immediate aftermath of the intervention, are now destabilizing not only Libya but also neighbouring countries. Efforts to establish a democratically elected government with effective power over the country were undertaken but they have widely failed. Events in Libya have demonstrated again that the Responsibility to Protect is a comprehensive concept that for good reason has been distinguished from that of humanitarian intervention. It has become evident that there may be situations where military intervention has been successful while, seen from the perspective of R2P, the whole endeavour becomes a failure in its entirety. Obviously, each situation is different, but it seems that Libya, due to the particularities of this country's governmental structure, that under Gadhafi had left no space for any independent administrative capacity to develop, was a case where the third pillar of R2P, the Responsibility to Rebuild, was of paramount importance. The authority to intervene flowing from Security Council Resolution 1973 (2011) has been interpreted by the intervening states in an extremely extensive way and so they should have understood their responsibilities resulting from their intervention. The intervening states had, however, no experience with such a rebuilding task and even if they tried more adamantly, due to broad cultural diversities and strong suspicion by the state community wary of any form of neo-colonialism, they would probably have been ill-equipped to engage successfully in such an activity.[49] The Libya case reveals that more research has to be undertaken to better understand the particular responsibilities flowing from an intervention in such a complex situation and to find ways to implement such responsibilities successfully.

6 Stock-taking

Viewed from the standpoint of the initial proposals the outcome of the endeavours to establish a responsibility to rebuild may appear to be meagre. This impression is, however, deceptive as the proposals tabled at the beginning of the millennium were very far-reaching and are probably utopian for the time being. It should not be overlooked that in the meantime much has been achieved. The Jus Post bellum is no longer a mere academic creation but it has been filled with life and substance.[50] Of course, to a large extent, we are not faced here with "hard" treaty norms or with provisions having an uncontested customary law nature. Nonetheless the obligation to rebuild, together with R2P as a whole, has received so much endorsement by the state community that the respective norm can be seen as an expression of very broad state consent.[51] The state community has become aware of the fact that jus ad bellum, jus in bello and jus post bellum are closely interlinked. The attitude to identify these three concepts with three successive temporal stages leading from war to (definite) peace proves to be mistaken as each and every stage bears in itself elements both for progress and

49 Some – weak – attempts in this direction were furthermore opposed by Libya's National Transitional Council. See A. Bellamy / S. McLoughlin *supra* note 46, p. 354.

50 At the same time, however, much work is still to be done in this field. As Adrian Gallagher writes, "[T]here is a striking disconnect between the importance of pillar II on the one hand and the lack of research into it on the other." See A. Gallagher, The Promise of Pillar II: Analysing International Assistance under the Responsibility to Protect, in: International Affairs 91 (6) (2015), p.1274.

51 As is well known, the true source of international law is not what we find in Art. 38 of the ICJ Statute but state consent. See B. Simma, Zur völkerrechtlichen Bedeutung von Resolutionen der UN-Generalversammlung, in: R. Bernhardt *et al.* (eds.), Fünftes deutsch-polnisches Juristen-Kolloquium, Die Bedeutung der Resolutionen der Generalversammlung der Vereinten Nationen, Vol. 2, Baden-Baden 1981, pp. 45–76.

for regress. These three stages rather make a full circle. Particular attention has been given here to the post-war period where adequate measures have to be taken to avoid a relapse into war.[52] More and more elements have become identified as part and parcel of a just arrangement that should qualify just post bellum in a positive sense.[53]

Of course, not any detail of this jus post bellum has found uncontested recognition and as a whole jus post bellum remains a category of uncertain contours. Nonetheless, this category has solidified in the meantime to such an extent that it is here to stay as a genuine concept of international law. To a considerable measure it consists of cooperative instruments of an informal nature that are nonetheless widely obeyed by the parties[54] and which are destined, as it seems, to coalesce into obligations of the state community in its entirety.

In general, it can be said that any attempt to single out specific states as the main bearer of such a duty would be counterproductive. Such an endeavour could end up in the demise of this concept even before it is firmly established. The idea of a responsibility to rebuild is intimately related to that of international solidarity whereby any state making up part of the international community is asked to contribute. It is no coincidence that such a responsibility could come up only at the moment when the idea of a jus ad bellum, the very negation of solidarity, was definitely banned. As long as a jus ad bellum was alive, regularly the opposite than a responsibility to rebuild was proclaimed and practiced. The call "*Ceterum censeo Carthaginem esse delendam"* by Marcus Porcius Cato (234–149 BC) most drastically gave voice to this attitude – and, as we know, it was put into practice in the ambit of the third Punic War (149–146 BC).

Having said this, however, a series of differentiations can be made.

- In the context of a war of aggression a responsibility to rebuild may result out of the application of the rules on international state responsibility as they have been set out in the ILC Draft rules on State responsibility.[55] At least this is one possible way reparation can be made for the injury caused.

- In the context of a humanitarian intervention which remains illegal but may be legitimate when it is intended to avert atrocities[56] the intervenor is subject to an enhanced liability to rebuild the country where it intervened. Even if the intervenor meets this responsibility his international responsibility for this violation of

52 For an in-depth discussion of the necessary arrangements after wars, see B. Orend, Justice after War, in: Ethics & International Affairs 16 (1) (2002), pp. 43–56.

53 See, for example, R. E. Williams / D. Caldwell, *supra* note 6. Who distinguish the following elements that should characterize a proper jus post bellum settlement: restoration of order, vindication of human rights, restoration of sovereignty, or self-determination and the punishment of human rights violations. *Id.*, p. 318.

54 See D. Fleck, Jus post bellum: eine neue Disziplin des Völkerrechts?, in Humanitäres Völkerrecht – Informationsschriften 25 (4) (2012), pp. 176–180. According to S. Maus, The Responsibility to Rebuild – Some Remarks on a UN Obligation to Conduct Peacebuilding Activities, in: Humanitäres Völkerrecht – Informationsschriften 23 (2) (2010), pp. 52–61, through the consistent practice of the UN a rule has evolved according to which peacebuilding activities can be expected to be carried out by the UN. If these thoughts are carried further one might say, that here sort of an "estoppel principle" applies, *Id*., p. 60.

55 See Article 31 of the ILC Draft Articles on State Responsibility: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

56 See P. Hilpold, R2P and Humanitarian Intervention in a Historical Perspective, in: P. Hilpold (ed.), The Responsibility to Protect, Leiden/Boston 2015, pp. 60–122.

the prohibition of the use of force is not set aside but possibly his political responsibility will be judged in a more lenient way.[57]

– If the intervenor acts on the basis of an authorization by the Security Council, the question whom the responsibility to rebuild is to be attributed becomes even more complicated. In this case the responsibility to rebuild is owed directly by the United Nations but the intervenor has an obligation of "first help" also in this case: If he was willing and able to act as an agent of the international community for a military intervention he also has to be the first to offer help for reconstruction even if he has a subsequent right to substitution and compensation by the international community.

Of course, such a distinction should not be mistaken in the sense that previous injustice committed by an abusive recourse to force could be wiped out by a later help to rebuild.[58] On the other hand, such help can do much to alleviate the suffering caused and, as exposed here in much detail, it can prevent future conflict. The Responsibility to Rebuild is primarily future-oriented and if international practice distributes the related burden unevenly on different shoulders of the international community then it is only taking notice of the many imperfections of the international system according to which the obligation of solidarity[59] has often been activated in a pragmatic if not haphazard way.

As has been recently stated, it is "of vital importance to reintroduce the responsibility to rebuild into the R2P framework". This author does not go so far to subscribe to the assumption that the Responsibility to Rebuild is no longer part of R2P but he agrees that much more has to be done to revitalize this essential component of R2P if this latter concept shall survive as a whole.

The responsibility to rebuild has already been put to the test of practice and these experiences have revealed many essential elements of this concept that have to be obeyed if reconstruction of a peaceful society is to succeed. As described in this contribution, two cases stand out in this context: Kosovo and Libya. In regard to the first case, the international community has undertaken extraordinary efforts to reconstruct an economy and a society that previously had been suffering under oppression, discrimination and civil unrest. To a certain extent the rebuilding activities were successful but the final success was missed, as it was not possible to actively involve the beneficiaries of this help. Only after the declaration of independence was the Kosovar society prepared (and compelled) to take their lot in their own hands. These events demonstrated how important it is that the responsibility to rebuild is seen as a cooperative task and not a unilateral one. As to Libya, after the military intervention, which was successful in technical terms, the international community has widely failed to engage in rebuilding activities in this country and, as a consequence, Libya is now at the brink of becoming a failed state. This case underscores therefore again that the Responsibil-

57 On the intricacies between the illegality of an intervention and a possible political legitimization, see P. Hilpold, Humanitarian Intervention: Is There a Need for a Legal Reappraisal?, in: The European Journal of International Law 12 (3) (2001), pp. 437–467.

58 See S. Hümmrich-Welt, Responsibility to Rebuild, Tübingen 2016, pp. 352 f.

59 As to the obligation of solidarity, see P. Hilpold, Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with Particular Regard to Monetary Union, in: Yearbook of European Law 34 (1) (2015), pp. 257–285.

ity to Protect is a holistic concept: Military intervention without subsequent rebuilding activities can in sum and from a humanitarian perspective even be counterproductive, the main result being the replacement of a despotic regime with a failed state.

The responsibility to rebuild as a concept no longer needs to be related to a just war discussion, which in any case remains hardly reconcilable with the prohibition of the use of force and which is ill-suited to apply to civil war. All the attempts to restrict it to specific instruments, be it rebuilding activities in the stricter sense, supporting the rule of law in post-conflict societies[60], the obligation to give compensation for losses caused by an intervention or to international criminal justice as an instrument to overcome past injustice[61], have to be rejected. Jus post bellum remains a highly complex subject[62] which cannot be defined in all of its detail due to the singularity of any peacebuilding process and also due to the rapidly changing universal framework that surrounds such processes. But, on the other hand, over the last years the essence of peacebuilding has developed distinguished traits and it is now the time to proceed in this clarifying process and to give further transparency and authority to a set of rules that have proved to be so crucial for overcoming otherwise devastating conflict situations, be they of an international or an internal nature.

A "salting of Carthage" would constitute a war crime today. But we should not err in the assumption that human nature has fundamentally changed since 146 BC. The treatment of the population of Carthage also shocked ancient historians. What has changed is the understanding of the long-term consequences of such acts[63] and the legal setting that should impede such acts to happen, for the benefit of all mankind. There can be no doubt that the establishment of a Responsibility to Rebuild opens up a new chapter in the civilizational process. The last years have given enormous insight into the opportunities this concept furnishes. The setbacks that have accompanied these developments – as to R2P in general and the Responsibility to Rebuild in particular – should not detract from the pursuit to further follow this path.

A Responsibility to Rebuild taken seriously will make sure that ploughs will no longer pass over the conquered sites to destroy them definitely but rather to make them flourish again thereby turning the beaten enemy into an ally for the further construction of the international peace order.

60 This is, though, surely a very important element of jus post bellum. See D. Tolbert/A. Solomon, United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies, in: Harvard Human Rights Journal 19 (1) (2006), pp. 29–62.

61 Without doubt, an uncompromising persecution of the most outrageous crimes committed during past conflicts (i. e. the crimes falling into the competence of the ICC) is of fundamental importance for overcoming the conflict itself. In this, criminal justice makes part of the attempts to preserve "memory" of past injustice with the aim to make sure that it does not happen again. Nonetheless, care must be taken not to exaggerate in cultivating "memory". In particular, it has to be avoided that past injustice perpetrated by former generations instils the desire for revenge in the present – against people that have nothing to do with these historical events if not for descent from the original culprits. Criminal justice should best be suited to avoid just this problem as it is by its very nature of a personal, subjective nature. On the importance to preserve "memory" and the concomitant dangers see E. Marko-Stöckl, My truth, Your truth – our truth? The Role of History Teaching and Truth Commissions for Reconciliation in the Former Yugoslavia, in: European Yearbook of Minority Issues Online 7 (1) (2010), pp. 327–352.

62 As to the need to further clarify this concept see also V. Epping, Ius post bellum – Völkerrechtliche Grauzone und Flickenteppich, in: A. Fischer-Lescano *et al.* (eds.), Festschrift Michael Bothe, Baden-Baden 2008, pp. 65–79.

63 As UN-Secretary General Ban Ki-Moon stated in 2009, "the surest predictor of genocide is past genocide". UNGA, Implementing the Responsibility to Protect, A/63/677, 12 January 2009, para. 48.