

# The Responsibility to Rebuild, Transitional Justice, and Afghanistan: A Debacle as a Consequence of the Denial of Ownership

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## Abstract

After intervention and occupation lasting for two decades, the US and their allies left Afghanistan hastily and precipitately. Afghanistan is again ruled by the Taliban who do not seem to be able to provide minimum guarantees of stability and basic human rights protection. These events put into question pivotal international law concepts, such as the Responsibility to Protect or the requirement to provide for transitional justice, brought forward as a justification for intervention and occupation in the first place. This article aims to evidence that these concepts, independently from the terminology chosen, are expression of overarching aims of the State community. Interventions directed at these goals are associated with broader responsibilities both by the interveners as by the State community as a whole. In view of limited intervention and administration capacity, it is crucial to return ownership to the affected populations as soon as possible. Protracted intervention and foreign rule undermines self-determination and the capacity to find a self-reliant way to justice.

More attention has also to be devoted to the long-term effects of measures of intervention and the reciprocal interaction between rebuilding activities in the larger sense. It is submitted that attempts to re-engineer a societal fabric as a fighting tool in an ideological struggle creates enhanced responsibility as it undermines self-determination and ownership. A glaring example is the purposeful radicalization of students in Afghan refugee camps.

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## I. Introduction

1. In summer 2021, developments in Afghanistan precipitated. Unexpected by most, the US troop withdrawal agreed on 29 February in the context of the peace talks between the United States and the Taliban turned out to go hand in hand with the collapse of the Afghan government whose definite disbanding eventually even anticipated the airlifting of the last American soldier. In this sense, the US American defeat after two decades of presence on the Afghan soil (2001-2021) was even more abrupt and more crushing than the Soviet one, lasting one decade (1979-1989), whose troops left in a comparatively ordered manner, leaving behind a government under Mohammed Najibullah, considered as a puppet regime by its enemies, who managed to stay in power much longer than generally expected (1989-1992). The situation in the aftermath of the US withdrawal was chaotic in any sense, with a near-break down of the economy, the systematic persecution of former regime collaborators, widespread human rights abuses and a ruthless encroachment upon women's rights. As a consequence, the second nation building process, a "half-heartedly Western" one after the communist one of the Soviet era, ended in a shambles. In the meantime, Al-Qaida is trying to fight its way back to power while the ousting of exactly this group was the main reason for intervention by the US in 2001. The prospected by-product of the 2001 intervention, the improvement of the dismal human rights situation, has turned to be a complete failure.

2. From the viewpoint of political science it might be attractive to look for the reasons for two subsequent State-building processes to collapse and in this relation particular attention will probably have to be paid to international and regional geopolitics whereby Afghanistan can be seen as a contested territory in power struggles between international super-powers on the one hand and regional antagonists on the other.<sup>1</sup>

3. From a strictly legal, international law viewpoint, the latter State building failure by the US and its Western allies is probably of far greater interest as it unfolded in a setting that was legally pre-determined in a much clearer way. In this context, particular attention will have to be paid to concepts such as the Responsibility to Protect, one of its main elements, the Responsibility to Rebuild,<sup>2</sup> and the related, but only partly overlapping concept of Transitional

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1 In this, particular attention will have to be paid to the role of Pakistan, whose secret service ISI was surely a main player in this power game.

2 This is not the place to enter into the broad ongoing discussion about the legal nature of R2P. While for some authors R2P is an "accepted norm" (see Gareth Evans,

Justice. The developments in Afghanistan can be seen as a testing ground for the validity of these concepts, the relevance of their main elements and their usefulness in a prospective look at future State-building processes.

4. To this end, first of all, some conceptual clarifications as to the concepts of R2P, the Responsibility to Rebuild and Transitional Justice have to be undertaken. In the following, the present meaning and significance of these concepts will be examined with reference to the Afghanistan case. It will be shown that this intervention was not an outright and complete failure as it provided some stability, shelter and protection for a two-decades-period. Nonetheless, the Afghanistan case has revealed that the responsibility issue has to be addressed in a broader perspective. In view of a limited intervention capacity and unforeseeable consequences of military interventions—be they “massive” or of a “light footprint”—the concept of “ownership” has to be taken more seriously. It is assumed here that the recent developments in Afghanistan can be taken as a case study to test the present meaning of the Responsibility to Rebuild and explore its relationship and interactions with the concept of Transitional Justice.

## II. The Responsibility to Protect, the Responsibility to Rebuild and Transitional Justice—how they interact, how they intersect

### II.A. Rise and deep fall of R2P

5. The breathtaking success the concept of the Responsibility to Protect (R2P) had since its informal introduction in 2001<sup>3</sup> and its formal adoption

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The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All (2009), 11) others (see i.e. Carlo Focarelli, *The Responsibility to Protect in the Global System*, in: P. Hilpold, ed., *The Responsibility to Protect* (2014), 417-438) are more skeptical, contesting even the character of R2P as an “emerging norm” (ibid., 418). The conclusion of this discussion will largely depend on the—broader or narrower—understanding of what an international norm is. As it was stated, “nowhere in the literature [is the argument made] that R2P is *not* a norm”. See Melissa Laponte, *R2Ps Status as a Norm*, in: Alex J. Belamy & Tim Dunne (eds.), *The Oxford Handbook of the Responsibility to Protect* (2016), 133-150, at 135. As Laponte states, R2P now undeniably forms “part of the lexicon policy-makers, diplomats, practitioners and scholars utilize when debating appropriate and effective responses to mass atrocity cases.”

- 3 See the Report entitled “The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty” and published by the International Commission on Intervention and State Sovereignty on 1 December 2021, available at ([www.globalr2p.org/resources/the-responsibility-to-protect-report-of-the-international-commission-on-intervention-and-state-sovereignty-2001/](http://www.globalr2p.org/resources/the-responsibility-to-protect-report-of-the-international-commission-on-intervention-and-state-sovereignty-2001/)).

by the UN General Assembly in 2005<sup>4</sup> can be explained, at least to a considerable extent, by its formally simple nature, grounded on a very flexible structure capable of gathering, in a fascinating way, a broad consensus on pivotal values and goals in UN law, or, as far as this consensus has not yet taken definite shape, to strongly encourage the respective processes presently under way.<sup>5</sup> The appeal of this concept meant, however, that it also awakened desires to hijack it for purposes beyond its original goals or even contrary to them.<sup>6</sup> Furthermore, those same forces and elements that in the past had undermined the effectiveness and the acceptance of the concept of humanitarian intervention soon came to bear in a similar fashion as to R2P measures associated with the use of force. Already the suspicion about a spurious recourse to this justification for the use of force tainted its reputation. Military failures, insufficient or missing success of measures adopted, are events of even worse consequence for the legitimacy of an international law instrument such as R2P taken as a justification.<sup>7</sup> The allied intervention in Libya of 2011, justified by the Security Council (SC) implicitly with reference to R2P,<sup>8</sup> going eventually beyond its original scope and having devastating long-term consequences as to most goals it was intended to achieve,<sup>9</sup> brought the success story of R2P to a halt. The

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4 See UNGA Res. of 16 September 2005, 2005 World Summit Outcome, A/RES/60/1, available at: ([www.globalr2p.org/resources/2005-world-summit-outcome-a-60-1-1/](http://www.globalr2p.org/resources/2005-world-summit-outcome-a-60-1-1/)).

5 Since 2005, the UN endorsed this concept repeatedly with several UN GS becoming its wholehearted advocates. The number of publications as to this concept can hardly be overseen. See, for a brief survey on the occasion of the 15-year-birthday (referred to its first introduction by the ICISS commission in 2001), Ramesh Thakur, *The Responsibility to Protect* at 15, in: 92 *International Affairs* 2 (2016), 415-434.

6 See Mient Jan Faber, *R2P, Humanitarian Intervention and Independence: The Proof of the Pudding is in the Eating*, in: 1 *Amsterdam Law Forum* 2 (2009), 1-29.

7 The principle stated by Friedrich Schiller, "And with success comes pardon hand in hand" ("The Death of Wallenstein", Act 1 Scene 7), works also the other way round: concepts difficult or impossible to implement risk losing approval.

8 SC Res. 1973 of 17 March 2011. See Peter Hilpold, *Intervening in the Name of Humanity: R2P and the Power of Ideas*, in: 17 *Journal of Conflict and Security Law* (2012), 49-79.

9 See, critical in this sense, Charles Riziki Majinge, *The Use of Force in International Law and the UN Security Council Resolutions 1970 & 1973 on Libya*, in: *Hague Yearbook of International Law* (2012), 153-191; Enzo Cannizzaro, *Responsabilità di proteggere e intervento delle Nazioni Unite in Libia*, in: *XCIV Riv.Dir.Int.* 3 (2011), 821-824; Geir Ulfstein/Hege Christiansen, *The Legality of the NATO Bombing in Libya*, in: 62 *ICLQ* (2013), 159-171 and Stephan Hobe, *Die*

hesitancy to revive it in the—admittedly extremely complicated—Syrian conflict added to the doubts about the effective value of the concept of R2P.<sup>10</sup>

6. In this process, many important elements were overlooked. It was widely ignored that R2P is a three-pillar concept that reaches far beyond a mere tool of humanitarian intervention rebranded in a modern fashion as it would otherwise, sooner or later, re-embolden all the points of criticism that in the past delegitimized the concept of humanitarian intervention. To apply the R2P concept in all its dimensions is, of course, an extremely demanding endeavor, and the lack of means and will to fully comply with this challenge has led to half-hearted measures that, adopted in R2P clothes, ended up in tarnishing this very concept.

## II.B. The three pillars of R2P and the Responsibility to Rebuild

7. As is well-known, the R2P concept, as it is spelled out in the 2001 Report of the International Commission on Intervention and State Sovereignty (ICISS), can be distinguished in three sub-species of responsibility:

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internationale Schutzverantwortung (Responsibility to Protect) und die Maßnahmen des Sicherheitsrats gegenüber Libyen, in: Dirk Hanschel et al. (eds.), *Mensch und Recht*, Festschrift für Eibe Riedel, (Duncker & Humblot: Berlin 2013), 81-94. Prominent advocates of the R2P concept remained sanguine about this concept also in the immediate aftermath of the 2011 intervention, even though already seeing the threats on the horizon. See Thomas G. Weiss, *RtoP Alive and Well after Libya*, in: *Ethics & International Affairs* (2011), 1-6: “If the Libyan intervention goes well, it will put teeth in the fledgling RtoP doctrine. Yet, if it goes badly, critics will re-double their opposition, and the future decisions will be made more difficult—for one thing, because the decibel level of claims by contrarians about RtoP’s potential to backfire through ‘moral hazard’ will increase.” He continued with an optimistic outlook: “For the moment, however, the usual spoilers are on the defensive.” Soon after they were no longer. *Ibid.*, 1. In fact, the costs of non-intervention would also have been dramatic: “[. . .] it was perhaps the specter of another Rwanda, with Qaddafi invoking the same language of ‘cockroaches’ that was used by the perpetrators of the genocide against the Tutsis, and promising to ‘cleanse Libya house by house’ that swung the argument in the Obama White House in favor of intervention.” See Adrian Gallagher/Nicholas J. Wheeler, *Trust or Perish?: The Responsibility to Protect and Use of Force in a Changing World Order*, in: *35 Ethics & International Affairs* 2 (2021), 181-195. On the whole, the Libya intervention was a “damned if you do, damned if don’t” situation.

- 10 See Justin Morris, *Libya and Syria: R2P and the spectre of the swinging pendulum*, in *89 International Affairs* 5 (2013), 1265-1283; Jennifer M. Welsh, *The Responsibility to Protect after Libya & Syria*, in: *145 Daedalus* (2016), 75-87, and Bessma Momani and Tanzeel Hakak, *Syria*, in: Alex J. Bellamy & Tim Dunne (eds.), *The Oxford Handbook of The Responsibility to Protect* (OUP: Oxford 2016), 895-910: “[. . .] the crisis in Syria has proved to be one of the most daunting challenges in the history of R2P”. *Ibid.* at 908.

- the Responsibility to Prevent;
- the Responsibility to React and;
- the Responsibility to Rebuild.

8. This pillar concept conveys the idea of sequencing, and to a certain extent this idea is a very sensible one: Experience shows that international crises leading to grave human rights abuses follow a certain path. Reason and logic commands one to adapt to this process: Prevention would be the ideal measure but often the signals for an approaching crisis are difficult to identify and to assess appropriately. At a certain stage, prevention is no longer an option and reaction is needed that might also consist in forceful means. Afterwards, it might become necessary to rebuild the civil infrastructure where it has been destroyed. At the same time, governments have to be aware that all these pillars are interconnected and interrelated. Any neglect within one step bears the danger of bringing down the whole construct. Thus, for example, step 3 is strongly interrelated with step 1: to rebuild a society after a serious humanitarian crisis is the best preventive measure that could be imagined.

9. As has been mentioned, the R2P concept, developed in 2001 in a more or less private function by the ICISS, was afterwards, in 2005, adopted by the governments at the World Summit in a plenary way and under the auspices of the United Nations.

10. The concept of R2P was, as to its content, somewhat restricted and should explicitly apply, according to paras. 138 and 139 of the Outcome Document, to acts of genocide, war crimes, ethnic cleansing, and crimes against humanity (the so-called atrocity crimes).

11. Again, a “pillar perspective” was adopted to approach and explain this newly formulated R2P concept, even though the pillars were renamed and looked at from a new viewpoint<sup>11</sup>:

- Pillar one now emphasizes the primary and enduring responsibility of the State to protect its population from the crimes mentioned above. In this sense, the R2P concept reinforces State sovereignty, as long as this sovereignty is exercised in a responsible way.
- Pillar two calls for international assistance and capacity-building. It spells out a clear commitment to this end.

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11 See the Report by UN SG Ban-Ki Moon, Implementing the responsibility to protect, 12 January 2009, *A/63/677*.

- Pillar three refers to “timely and decisive response”. As Ban-Ki Moon emphasized in 2009, this response should not be understood in a narrow sense so as to be based only on military measures but should rather involve “any of the broad range of tools available to the United Nations”, including pacific measures under Chapter VI of the Charter, coercive measures under Chapter VII and/or collaboration with regional or subregional arrangements under Chapter VIII.<sup>12</sup>

12. The Secretary-General (SG) emphasizes that each of these pillars is of equal length and that “[a]ll three must be ready to be utilized at any point”.<sup>13</sup>

13. There can be no doubt that any of these pillars has some autonomy while there are also some reciprocal dependencies. In the following, particular attention will be dedicated to pillar two, “international assistance and capacity building”, or, according to the more concise terminology of the ICISS Report 2001, to the Responsibility to Rebuild. According to the terminology adopted in 2005, the Responsibility to Rebuild no longer appears as an autonomous pillar in the (newly conceived) R2P system. With some creative phantasy, the single bricks of pillar III of 2001 can be identified within this new structure, but at the same time, anyone not able to identify it any longer at first sight, might be forgiven. The fact that the R2P concept was universally approved and inserted in the Outcome Document was surely a remarkable achievement but also the result of difficult bargaining by which sovereignty-wary governments perceiving their countries as especially exposed to foreign intervention tried hard to erect the highest possible barriers to any form of unwanted interference. The result of this bargaining is a Responsibility to Rebuild that takes shape only in the eye of the beholder. All too easily and conveniently it can therefore be ignored.

14. The Afghanistan case is a good opportunity to evidence that the R2P concept has been implemented, so far, only in a tentative, reluctant way. It seems that many of its elements have gone out of sight or have been lost altogether. And in particular, the connections with and the dependencies from the other pillars have been mostly neglected. The Responsibility to Rebuild has been looked at in a static way that lost sight both of long-term consequences of the measures to be adopted as well as of their reciprocal dependencies. On the whole, R2P has either been totally disregarded or reprimanded for faults that were not its own but rather expression of an insufficient commitment to its basic prerequisites.

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12 Ibid., para.11.

13 Ibid., para.12.

### III. The Responsibility to Rebuild

#### III.A. History until the disintegration of Yugoslavia

15. Single traits of a Responsibility to Rebuild can be traced far back in history. While in some cases war-faring parties aimed at the total annihilation of their opponents,<sup>14</sup> in other cases the enemy of today became an ally soon after the war. In some cases already during the war or during peace negotiations, these future developments were anticipated and the vanquished opponent was treated rather gently.<sup>15</sup> Even in bilateral relations, too much harshness would not pay and caused only bitter resentment laying the seeds for further conflict. This was the lesson to be learnt by Germany after the Franco-Prussian war of 1870-1871 and by the victors of WWI against Germany.<sup>16</sup> After WWII a partly different strategy was pursued. While Germany was undoubtedly the culprit for the outbreak of WWII and had consequently to pay huge reparations, this did not take place in the form of a de-industrialization process as proposed during the war.<sup>17</sup> Quite to the contrary, the European Recovery Program (ERP), or Marshall Plan,<sup>18</sup> consisted in a US reconstruction plan from which Western Germany also took enormous profit and which laid the basis for a giant reconstruction and modernization of the country's industries. Similar processes took place in Japan, South Korea, and Vietnam in US-

14 One famous historic example regards the Third Punic War (149-146 BC) conducted by the Romans against Carthage. Historic sources reported that the Romans not only destroyed Carthage completely and sold the remaining population into slavery but they also wanted to make sure that Carthage would never be rebuilt by sowing salt over the earth thereby making the ground infertile forever. While later historians argued that this episode is not proven, history books are full of similar reports, some of which are proven in detail such as the policy of "burned earth" practiced by the German Wehrmacht in the Russian campaign started in 1941. See Peter Hilpold, *The Salting of Carthage and the Responsibility to Rebuild*, in: *3 Humanitäres Völkerrecht* (2020), 89-103.

15 This was the case, for example, subsequently to the Austrian-Prussian war of 1866, when Otto von Bismarck showed restraint in the peace negotiations with Austria, laying thereby the basis for transforming the previous enemy into a future ally.

16 See Emanuel Castellarin, *L'apport du traité de Versailles au droit international. Un regard retrospectif à l'occasion du centenaire: présentation générale*, Société française pour le droit international, *Le traité de Versailles. Regards Franco-Allemands en droit international à l'occasion du centenaire* (Paris: Pedone 2020), 7-31: "Un traité de paix à vocation punitive". *Ibid.*, 17.

17 See Henry Morgenthau, *Suggested Post-Surrender Program for Germany, 1944*, Office of the Historian (<https://history.state.gov/historicaldocuments/frus1944Quebec/d77>).

18 See Benn Steil, *The Marshall Plan: Dawn of the Cold War* (OUP: Oxford 2018).

sponsored nation-building processes.<sup>19</sup> These rebuilding processes may be primarily explained in Cold War logic and there can be no doubt that there was a bilateral perspective to them, in the sense that the United States mainly intended to prop up its allies in its visceral competition against the Communist bloc. Nonetheless, this campaign had also a Universalist note as it could be interpreted as an important milestone in the struggle for international democracy.<sup>20</sup> Only with the crumbling of the Soviet bloc in 1989<sup>21</sup> did what was before a policy of ideological antagonism now transform into a strategy of cosmopolitan reconstruction—at least for a certain period, until new forms of multi-polarity arose.<sup>22</sup>

16. In this new setting both military intervention and the rebuilding of destroyed State structure came to be seen in a new light: no longer as a tool to foster partisan interests but rather to be carried out in a genuine community interest. Towards the end of the 20<sup>th</sup> century, the manifold reciprocal dependencies became ever clearer.

17. A first showcase opened on the Yugoslav territory: At the beginning of the 1990s, the Yugoslav State-building process engineered by Tito revealed its profound defectiveness as soon as the paramount appeasing idea of socialism disappeared and deep-rooted ethnic conflict and national hatred re-

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- 19 See Francis Fukuyama, *Nation Building: Beyond Afghanistan and Iraq* (John Hopkins University Press: Baltimore 2006), 1-16.
- 20 See Benn Steil, *Dawn of the Cold War* (Simon & Schuster: New York 2019) and Alexander D. Weissman, *Pivotal Politics—The Marshall Plan: A Turning Point in Foreign Aid and the Struggle for Democracy*, in: 47 *The History Teacher* 1 (2013), 111-129.
- 21 By the way, in the discussion about the US-led nation-building process after 1945, it is often missed that the USSR conducted a parallel campaign sustaining a series of central planned economies and conducting proxy-wars through her ally Cuba (again a country highly subsidized by the USSR) by which communist regimes could thrive in a series of regions world-wide. In 1988, at Cuito Cuanavale in Angola, these nation-building processes met in an outright military conflict between West and East that ended more or less in a stalemate. Only the change of the overall geopolitical situation one year later drove this war of epical dimensions into oblivion.
- 22 It was exactly in these days that the fight for democracy could be portrayed as a struggle for universal goals while in the following years more and more doubts were voiced. See Thomas Franck, *The Emerging Right to Democratic Governance*, in: 86 *AJIL* (1992), 46ss. For a recent critical stance towards this discussion, see “Symposium on Thomas Franck, “Emerging Right to Democratic Governance” at 25, in: *AJIL Unbound* (2018), (<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/introduction-to-the-symposium-on-thomas-franck-emerging-right-to-democratic-governance-at-25/A7AD4E18CEDD8F1F28DB2D5568ECB8ED>.)

emerged.<sup>23</sup> At enormous humanitarian expense, the Yugoslav soil became the testing ground for a change of paradigm both in respect to military (humanitarian) intervention and in regard to State-building. The results are so far mixed, but the direction in which the developments in these fields are headed are nonetheless clearly discernable: the universalist dogma, as the leading idea that should govern intervention and rebuilding, in the sense that both intervention and reconstruction are of concern for the State community as a whole, is here to stay.

### III.B. Consequences resulting from the Yugoslav crisis

18. Both the approach towards intervention in the Afghanistan case and the modern notion of State-rebuilding are deeply imbued by the experiences made during the Yugoslav crisis. In view of previous genocidal acts in Bosnia<sup>24</sup> and sustained information about atrocities in the Serb controlled Province of Kosovo, NATO staged an armed intervention driving Serbian forces out of this Province.<sup>25</sup> However, this intervention had taken place “unilaterally”, i.e. without authorization by the UN Security Council, and was therefore illegal. The ensuing international dispute about the legality of measures of humanitarian intervention in the 21st century<sup>26</sup> led to the establishment of the International Commission on Intervention and State Sovereignty (ICISS), which eventually introduced the concept of the “Responsibility to Protect”. The Kosovo conflict was at the same time the testing ground for new forms of nation-building. With SC Res. 1244/1999 an institutional setting akin to a modern international protectorate was created that should form a prelude to “a comprehensive approach to the economic development and stabilization of the crisis region”. The mixed results of this endeavour should influence to a considerable degree later peace- and

23 Waldemar Hummer & Peter Hilpold, *Die Jugoslawien-Krise als ethnischer Konflikt* in: *Europa-Archiv* (1992), 87-96.

24 Later confirmed by the ICJ in 2017, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 140 (February 26, 2007), available at ([www.icj-cij.org/ijcwww/idocket/ibhy/ibhyjudgment/ibhy\\_ijudgment\\_20070226\\_frame.htm](http://www.icj-cij.org/ijcwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_20070226_frame.htm)).

25 See the contributions in Peter Hilpold (ed.), *Kosovo and International Law* (Brill/Martinus Nijhoff: Leiden/Boston 2012).

26 See Peter Hilpold, *From Humanitarian Intervention to the Responsibility to Protect*, in: P. Hilpold (ed.), *The Responsibility to Protect* (Brill/Martinus Nijhoff: Leiden/Boston 2015), 1-37.

nation-building processes. By an enormously expensive international engagement represented, first of all, by the “United Nations Mission in Kosovo” (UNMIK) under the direction of a “Special Representative of the Secretary-General” (SRSG) and a security presence under the “Kosovo Force” (KFOR), the international community managed to re-establish security and economic stability in the region,<sup>27</sup> losing sight of the “final settlement” that should have brought the international presence to a close.<sup>28</sup> Over the years it became clear that the international community was overburdened by the task set by Res. 1244/1999. This was very clearly brought to the point by UN Special Envoy Martti Ahtisaari, who recommended in 2007, in substance, “the way out” as the only sensible step for the international community to take, paving thereby also the way for Kosovo’s declaration of independence, which was hard to reconcile with the wording and the spirit of Res. 1244/1999. As a result, it can even be deduced from Mr. Ahtisaari’s report that a prolonged international nation-building process without the achievement of a tangible “final settlement”, a continued “state of limbus”, can be detrimental to the interests of the communities involved.<sup>29</sup>

19. Partly similar experiences were made in Bosnia and Herzegovina, although the factual empirical situation diverged considerably: Based on the “General Framework Agreement for Peace in Bosnia and Herzegovina” (the so-called Dayton Agreement) of 1995, an international administration led by a high representative was introduced. His institutional capacities remained, however, rather weak in the face of a highly complex federal setting of the country with two main entities, the (Bosnian Serb) Republika Srpska,

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27 See the evaluation carried out by the Norwegian diplomat Kai Eide resulting in the report of 7 October 2005, S/2005/635.

28 See Peter Hilpold, *The ICJ’s Advisory Opinion on Kosovo: Perspectives of a delicate question*, in: 14 *Austrian Review of International and European Law* 2009 (2013), 259-310 (267ss.).

29 “Almost eight years have passed since the Security Council adopted resolution 1244 (1999) and Kosovo’s current state of limbus cannot continue. Uncertainty over its future status has become a major obstacle to Kosovo’s democratic development, accountability, economic recovery, and interethnic 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.” See UN Security Council, Letter date 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Addendum, Comprehensive Proposal for the Kosovo Status Settlement, UN Doc. S/2007/168/Add.1, para.4.

covering 49% of the territory and the (Bosniac-Croat) Federation of Bosnia and Herzegovina with 51% of the territory. These entities have become widely autonomous with a separate citizenship (alongside the national one), independent armies and “special parallel relationships with neighbouring states” (Croatia and Serbia):<sup>30</sup> in strict opposition to each other and in a permanent opportunistic relationship with the High Representative.<sup>31</sup> The tripartite presidency is able to create the appearance of stability, at the utmost. The looming danger of a secession of the Republika Srpska creates the threat of a renewed outbreak of violence.<sup>32</sup>

20. There can be no doubt that the Bosnian nation-building process has more or less stalled. The hopes of 1995 that the Dayton agreement could become the basis of a somewhat cohesive new Bosnian State has proved to be illusory, and the first conclusion could be that a failed international State-building process is a failure in its entirety, a mistake that should be reversed as soon as possible. A closer look at the Bosnian case reveals, however, a further trait of nation building endeavours that should warn against focusing too strongly on a successful completion of nation building processes: At the end, already the consolidation of the situation, the absence of open violence, can be seen as a success in comparison to the alternative.<sup>33</sup>

### III.C. The Responsibility to Rebuild as an evolutionary concept—from the ICISS Report 2001 to the Outcome Document 2005 and beyond

21. The first decade of the 21st century was characterized by a continuous evolution of the concept of the Responsibility to Rebuild, this process mirroring, in its vicissitudes, general political developments on the international scene.

22. The ICISS Report, strongly influenced by the Kosovo intervention and the ensuing problems as it was, approaches the issue of the Responsibility to Rebuild squarely from the intervention perspective and attributes in this context paramount responsibilities to the intervenor: Already before military

30 See Richard Caplan, *International Authority and State Building: The Case of Bosnia and Herzegovina*, in: 10 *Global Governance* (2004), 53-65 (55s.).

31 *Ibid.*, 59. Kaplan speaks in this context, with reference to Wolfgang Petritsch, of a “dependency syndrome”.

32 See “New Statesman”, 4 November 2021, ([www.newstatesman.com/world/europe/2021/11/in-bosnia-fears-of-state-collapse-and-the-return-of-violence](http://www.newstatesman.com/world/europe/2021/11/in-bosnia-fears-of-state-collapse-and-the-return-of-violence)), referring to a recent UN Report by Christian Schmitt, the High Representative for Bosnia and Herzegovina, of 22 October 2021.

33 See in this sense also R. Caplan, 60.

action is taken, the prospective intervenor has to anticipate the rebuilding responsibilities.<sup>34</sup>

23. Read with the benefit of hindsight 20 years after its adoption, the ICISS Report reveals surprising prescience in what would follow in Afghanistan as a consequence of the same year's intervention, in what measures should have been in the aftermath of the immediate intervention, and on what was decisive for the terminal disastrous withdrawal two decades later. This report might even offer a guide on how to assess post-withdrawal responsibilities of the intervenors.

24. The most important statement is probably to be found towards the end of the chapter on the Responsibility to Rebuild in the ICISS Report: "The long-term aim of international actors in a post-conflict situation is 'to do themselves out of a job'".<sup>35</sup>

25. To achieve this aim the interveners would have been required to take a series of measures spelled out in detail in the report that have not been set in Afghanistan, or not in the required measure.

26. By reading the relevant paragraphs of the ICISS Report in detail one might get the impression that this Commission was endowed with prophetic skills so as to predict what will go wrong in Afghanistan with the developments eventually leading up to catastrophe:

- "A poorly administered occupation which overtly treats the people, or causes them to believe they are being treated, as an 'enemy' will obviously be inimical to the success of any long-term rehabilitation efforts".<sup>36</sup>
- "One of the essential functions of an intervention force is to provide basic security and protection for all members of a population regardless of ethnic origin or relation to the previous source of power in the territory."<sup>37</sup>
- "Another element of the same problem is the rebuilding of new national armed forces and police, integrating as far as possible elements of the formerly competing armed factions or military forces."<sup>38</sup>
- "Although largely unavoidable, the sudden influx of large sums of foreign currencies that usually accompany an intervening military force (and subsequent police and administration personnel) can have highly distorting economic effects on often fragile economies, and create unrealistic

34 ICISS Report 2001, para.5.3.

35 ICISS Report 2001, para.5.31.

36 Ibid., para.5.27.

37 Ibid., para.5.8.

38 Ibid., para.5.10.

expectations in at least parts of the population. In some cases, local elites may seek to profit from this situation and set up corrupt networks and practices. They are then likely to oppose early withdrawal of the intervening authority, while at the same time undermining any hopes for a successful economic and political rehabilitation of the country.”<sup>39</sup>

27. The Report explicitly admonishes interveners to stay on in the country of intervention long enough to ensure sustainable reconstruction and rehabilitation<sup>40</sup> and to manage the exit appropriately.<sup>41</sup>

28. It might be interesting to note that the ICISS Report also refers to the aspect of “transitional justice”, albeit only succinctly and without giving much explanation on how it understood this goal and on how it was to be achieved. Nonetheless, notwithstanding this topic, in 2001, still being in a very rudimentary developmental stage, the two relevant paragraphs<sup>42</sup> already provided a glimpse on how “justice” would be significant for effective State rebuilding. As will be shown below, the subject of “transitional justice” is in the need of definition but already the ICISS evidences that even a very narrow delimitation of this concept, as it was adopted in this Report, must evidence that “justice” is a pivotal element of a sustainable rebuilding strategy.

29. On the whole, if we apply these criteria to Afghanistan, it seems that in this case none of them has been respected, at least not in a somewhat sufficient manner.

30. Some reasons for this to happen have also been anticipated by the ICISS Report when this document warned, at least implicitly, that a prolonged stay in the context of extensive rebuilding endeavours may cause a drain on resources in the intervening States that the respective constituencies over time may not be willing to support.<sup>43</sup>

31. But there were further elements that made the warnings by the ICISS in the Afghanistan case come true: In the norm-engineering process after 2001 the trajectory of the R2P had to be re-dimensioned as far as it challenged

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39 *Ibid.*, para.5.28. On the devastating effects of American money-inflow in Afghanistan and of the ensuing corruption see Sarah Chayes, *Afghanistan’s Corruption Was Made in America*, in: *Foreign Affairs*, 3 September 2021, ([www.foreignaffairs.com/articles/united-states/2021-09-03/afghanistans-corruption-was-made-in-america](http://www.foreignaffairs.com/articles/united-states/2021-09-03/afghanistans-corruption-was-made-in-america)).

40 ICISS Report 2001, para.5.25.

41 *Ibid.*, para.5.2.

42 Paras.5.13 and 5.14.

43 Paras.5.24 and 5.29.

too openly traditional sovereignty concepts.<sup>44</sup> In this, the “Responsibility to Rebuild” was one of the first pillars to be put into question.

32. This happened, as anticipated above, already in the Outcome Document of 2005, where the “Responsibility to Rebuild” lost its character as an explicit pillar of R2P only to become integrated in this concept in a highly complex way. The newly instituted “Peacebuilding Commission”<sup>45</sup> was detached from R2P and widely emasculated.

33. It was surely an enormous success that the concept of R2P had become part of the Outcome Document but with a Responsibility to Rebuild no longer in the forefront, this whole concept risked becoming a limping one, hardly able to withstand the challenges of conflicts in practice.

34. As set out above, “R2P-lite”, as it was called,<sup>46</sup> not only limited the material purview of R2P to the so-called “atrocities crimes” but it refocused attention towards the responsibilities of the States. The international community had primarily to assist States in this task. In the run-up to the World Conference 2005, sovereignty-wary States had the greatest problems both with the preventative limb of R2P and with the rebuilding mission. They were not deleted in the “R2P-lite” concept of the Outcome Document, but looked at primarily from the prism of State sovereignty, whereby the international community, through the United Nations, should “encourage and help States to exercise” their responsibility to protect and help States “build capacity”. It was said that by the Outcome Document, following pressure from a series of States, emphasis had shifted to prevention.<sup>47</sup> This form of prevention was, however, a different one than that ideated by the ICISS as it should operate through the States. The same should apply to “capacity building,” as this also should happen through the States and not directly by the international community. What might have been seen in the past, and in particular in the ICISS document, as the primary threat to State sovereignty, namely military intervention by the international community, was rendered more palatable to

44 Coralie Pison Hindawi, *Decolonizing the Responsibility to Protect: On pervasive Eurocentrism, Southern agency and struggles over universals*, in: *Security Dialogue* (2021), 1-19.

45 Established by two concurrent resolutions of the Security Council (Res. 1645, 20 December 2005) and the General Assembly (Resolution 60/180, 30 December 2005).

46 See Thomas G. Weiss, *Humanitarian Intervention* (Polity: Cambridge 2007), 117.

47 See Outi Keranen, *What Happened to the Responsibility to Rebuild?*, in: *22 Global Governance* (2016), 331-348 (337).

States both by emphasizing its subsidiary role and by attributing the respective competence exclusively to the Security Council.

35. Starting with the year 2009, a series of reports by the UN Secretary-General was issued which engendered an evolutionary interpretative process.<sup>48</sup> This process carved out a R2P concept that should become more effective by dissipating fears of excessive intrusion in State competences being based on the new pillar model as described above.

36. As to the “Peace-Building Commission” (PBC) conceived by the ICISS Report to form an integral part of the R2P edifice, a series of developing countries had the upper-hand in their attempt to separate this institution from R2P, so that this institution, financed by the international community, should again operate through the States and assist national rebuilding policies after traditional conflicts.<sup>49</sup> Instituted in 2005,<sup>50</sup> this Commission fell short of most expectations: It was not created as an independent international organization but as an intergovernmental organ with merely advisory, consultative functions.<sup>51</sup>

37. Divorced from R2P, the Peacebuilding mission was to widely neglect the specific realities created by atrocity crimes so that a true “peacebuilding gap” materialized.<sup>52</sup> By turning a blind eye towards destruction provoked by atrocity crimes, the UN peacebuilding activity came to fail on an essential field and became widely unable to exercise one of the pivotal functions for which it had originally been conceived by the ICISS: conflict prevention. While political power relations might have suggested such a move, the

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48 Anthea Roberts and Sandesh Sivakumaran, *The Theory and Reality of the Sources of International Law*, in: M.D. Evans (ed.), *International Law*, OUP, 5<sup>th</sup> ed. (2018), 89-118 (102ss.).

49 See Outi Keranen above n.47, 339.

50 UNSC, Resolution 1645 (2005), S/RES/2645 (2005), 20 December 2005; UNGA, Resolution 60/180, *The Peacebuilding Commission*, A/RES/60/180, 30 December 2005.

51 See Alex J. Bellamy, *The Institutionalisation of Peacebuilding: What Role for the UN Peacebuilding Commission*, in: O.P. Richmond (ed.), *Palgrave Advances in Peacebuilding* (Palgrave Macmillan 2010), 193-212: “[...] the PBC has a narrow advisory role and lacks the authority or capacity to coordinate UN agencies, conduct planning, or develop consolidated strategies”. *Ibid.*, 209s.

52 See Alex J. Bellamy, *The United Nations and the Responsibility to Rebuild*, in: Oliver P. Richmond/Gezim Visoka (eds.), *The Oxford Handbook of Peacebuilding, and Peace Formation* (OUP: Oxford 2021), 7 (referring also to Alex J. Bellamy/Edward C. Luck, *The Responsibility to Protect: From Promise to Practice* (Cambridge: CUP 2018), 93-94).

consequence was that thereby also an important empirical insight was lost: Atrocity crimes occur where they have previously occurred.<sup>53</sup>

38. In the following, the UN Security Council had little to say with regard to the most ferocious atrocity situations like those in Sri Lanka in 2009, in Libya subsequent to the intervention of 2011, in Syria, for example during the siege of Aleppo in 2016 and in Myanmar starting with the year 2017.<sup>54</sup> In particular, its peacebuilding resources could not be employed in these areas with a preventative intent.<sup>55</sup>

39. These gaps, omissions and inactivities created an atmosphere of alienation and contributed further to undermining confidence in international institutions, foremost the United Nations.

40. Not least, this whole failure came to be perceived as a problem of justice and in this context these factual situations met with a trend designed to offer a remedy for this new kind of challenge. It came to bear the name of “transitional justice”.

#### IV. The concept of transitional justice

41. The concept of “transitional justice” is of relatively recent origin and there is still no consensus about its definition, with larger and narrower approaches in reciprocal competition. While some concepts concentrate on judicial measures (again in a larger or a narrower meaning), others refer to “justice” in a broader sense and are therefore far more encompassing.<sup>56</sup>

42. The origin of the concept of “transitional justice” is unclear, with several authors claiming original authorship.<sup>57</sup> What seems to be more or less uncontested is the fact that this concept appeared first at the beginning of the 1990s while the underlying idea can be traced back at least to the war criminal

53 See *ibid.*, 7.

54 See, however, a series of resolutions by the Human Rights Council ([www.globalr2p.org/resources/un-human-rights-council-resolutions-referencing-r2p/](http://www.globalr2p.org/resources/un-human-rights-council-resolutions-referencing-r2p/)) and the UN GA ([www.globalr2p.org/resources/un-general-assembly-resolutions-referencing-r2p-2/](http://www.globalr2p.org/resources/un-general-assembly-resolutions-referencing-r2p-2/)). On the unsatisfactory role played by the Security Council in the last six years in the prevention of atrocity crimes and humanitarian catastrophes, see Jennifer M. Welsh, *The Security Council’s Role in Fulfilling the Responsibility to Protect*, in: 35 *Ethics & International Affairs* 2 (2021), 227-243.

55 See Bellamy, above n.52, 7ss.

56 See G. Werle & M. Vormbaum, *Transitional Justice* (Springer: Heidelberg 2018), 27.

57 *Ibid.*, 3.

tribunals of Nuremberg and Tokyo. The enormous success that this concept experienced can be seen as evidence for a need to address this issue specifically and autonomously. Now more or less three decades old, this concept reflects a long and tortuous discussion about the relationship between peace and justice with a consensus appearing on the horizon according to which both goals have to be achieved in parallel and both being of equal value.

43. At its origin, judicial and non-judicial processes aiming at achieving the right to truth, delivering reparations, and realizing judicial reform stood at the forefront. Over time, additional aims were integrated as the perception grew that justice is a multifaceted issue inter-related with practically all pivotal UN goals, and at its core with peace.

44. According to a 2010 United Nations definition, “transitional justice is the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. Transitional justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law.”<sup>58</sup>

45. In the meantime, within the transitional justice epistemic community there are strands which reach out to aspects of development, social injustice, patterns of inequality, humanitarian aid, refoulement, disarmament, demobilisation, and re-integration.<sup>59</sup> Thereby, the fields of transitional justice and peace-building, while not fully merging, show a considerable amount of overlap and become mutually reinforcing.

46. These developments evidence, on the other hand, a further fact hinted at above: peacebuilding, in the UN practice, is conceived too narrowly, giving it a static, isolated fashion while in practice it can unfold its effects only interactively in a synergetic approach with other initiatives. Even if it had to be detached from R2P at least nominally, seen from its tasks, functions, and tools it remains intimately related to this concept if it is intended to work properly. Transitional justice could remediate as to these deficits as it enjoys broad support also in the developing world. Nonetheless, from the perspective of conceptual clarity a more balanced approach, whereby peacebuilding could comprise a broader range of measures, would surely be desirable.

58 See Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice (2010), 2.

59 Joanna R. Quinn, The development of transitional justice, in: Cheryl Lawther and Luke Moffett (eds.), *Research Handbook on Transitional Justice* (Edward Elgar: Cheltenham 2019), 11-33 (31s.).

47. That said, it becomes, however, also clear that the core challenge in this field is of a substantive and not merely of a conceptual nature. The Responsibility to Rebuild, irrespective of the fact whether we want to address it by its original name or if we want to integrate it into a peacebuilding program (again either in an autonomous fashion or as part of a broader concept of transnational justice), has to be taken more seriously if broader goals of the UN Charter shall be achieved. This can be exemplified in an impressive way by the Afghanistan case, in particular on the basis of developments in the second half of the year 2021.

## V. Peace-building and transnational justice neglected

### V.A. Afghanistan as a showcase for the need of effective rebuilding measures

48. On the basis of the theoretical framework developed above we can now approach the Afghanistan question. As it seems, the developments in this country in the two decades between 2001 and 2021 will enter into history as an outstanding example of how peacebuilding initiatives—however formally qualified—should not take place.

49. As exposed above, the relevant paragraphs of the ICISS Report as well as concomitant and subsequent discussions on the meaning and the requisites of transitional justice have revealed some essential elements for a rebuilding initiative to have the potential for success:

- they must be based on a clear strategy considering also the long-term effects of the measures taken and their reciprocal interaction;
- they must be endowed with sufficient means and be carried out with the necessary resolve;
- they must be based on local ownership.

50. In Afghanistan, the strategy on what the US troops and their NATO and non-NATO allies were supposed to achieve was unclear from the very beginning.<sup>60</sup>

51. SC Resolution 1368 and 1373 of 12 September and 28 September 2001 had authorized US-led military intervention in Afghanistan as an act of self-defence according to Article 51 of the UN Charter, while Resolution

60 See, for example, Gilles Dorronsoro, *Le gouvernement transnational de l'Afghanistan – Une si prévisible défaite* (Karthala: Paris 2021), 207ss. and Rory Stewart, *Foreign Affairs: The Last Days of Intervention*, in: 100 *Foreign Affairs* 6 (2021), 60-73.

1378 affirms that the United Nations should play a central role in supporting the efforts of the Afghan people to urgently establish a new and transitional administration that should i.a. be broad-based, multi-ethnic, and fully representative of all the Afghan people.

52. This formula was understood as expressing a mandate for creating a Western-style democracy compatible with Islamic values and traditions in Afghanistan.<sup>61</sup> Whether this intent was realistic in view of a society with entrenched tribal structures, the specific cultural and religious values practiced in this country and, above all, subject to a radicalizing indoctrination sponsored also by the West,<sup>62</sup> was unclear from the very beginning.<sup>63</sup> Such a sudden change of strategy would have required an enormous extension of means, of investment in hard and soft power. In fact, it meant that a heavy-handed act of self-defence ended up in a “light footprint” territorial administration.<sup>64</sup> In other words: Means that were easily sufficient to chase away a terrorist group and to bring about a regime change in a poor third-world country revealed to be too meagre to reconstruct a country that presented challenges of an extraordinary nature. Costs exploded with the duration of the occupation: In fact, as exposed above, no real exit strategy was developed with the interveners mired more and more in a reality whose complexity was not the least anticipated.<sup>65</sup>

53. The necessity of a clear strategy is closely connected with the need to show resolve during the intervention, to deploy the necessary forces, and to invest the required means. As it is generally held, in all these elements the record of the interveners remained unsatisfactory, both on the military level by

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61 See Amin Saikal, *The UN and Afghanistan: Contentions in Democratization and Statebuilding*, in: *19 International Peacekeeping* (2012), 217-234 (219s.).

62 See i.a. Craig Davis, “A” Is for Allah, “J” Is for Jihad, in: *19 World Policy Journal* 1 (2002), 90-94, who refers to the fact that in the late 1980s the US provided grants for textbooks for Afghan pupils promoting violence against Russians (*ibid.*, 92s.). According to this author, these books had remained in use long after the Russians had left Afghanistan (93).

63 See Amin Saikal, above n.61, 220.

64 With regard to the “light footprint” approach see i.a. Fernando M. Luján, *Light Footprints: The Future of American Military Intervention*, Center for a New American Security (2013), ([www.jstor.com/stable/resrep06176](http://www.jstor.com/stable/resrep06176)).

65 At the end, the total costs of US American intervention was estimated at 14 trillion USD. See Brown University, Watson Institute, *Costs of War* (<https://watson.brown.edu/costsofwar/>).

their concentration on Kabul and larger cities, and on the field of broader societal rebuilding activities.<sup>66</sup>

54. As to the rebuilding activities, a crucial element to make them succeed was identified by the UN GS in 2014<sup>67</sup> in “national (or local) ownership”. To a certain extent, initiatives in this direction were undertaken with the delegation of power to a local government under Hamid Karzai (Afghan President from 2004—2014) and with the attempt to integrate former warlords in the government in order to stabilize the system. The resulting government proved, however, to be inept, corrupt,<sup>68</sup> and prone to further human rights violations.<sup>69</sup> In this context, one essential condition was ignored: National strategies must be reflective of society as a whole; they have to be the product of inclusive processes that engage national and local authorities.<sup>70</sup> Eventually, national and local ownership must also be based on some essential elements of rule of law considerations.

55. National ownership extends also to the military level: The Afghan forces, while bearing the brunt of the fighting, over the whole two decade period of foreign occupation never managed to become an independent, self-reliant national actor able to provide control and security independently from assistance by the interveners. This also explains the rapid dissolving of the Afghan forces once the US capped the lifeline of air support in summer 2021.<sup>71</sup> As to transitional justice, this goal was missed both in its narrower and in its broader sense.

56. With regard to the narrower notion, already in 2002 Hamid Karzai presented the principle “peace before justice” that should become decisive over

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66 For a good overview on the reasons for the collapse of the Allied-backed Afghan regime see Chas Danner, *Why Afghanistan’s Security Forces Suddenly Collapsed*, *Intelligencer*, 17 August 2021 (<https://nymag.com/intelligencer/2021/08/why-afghanistans-security-forces-suddenly-collapsed.html>), as well as Anthony H. Cordesman, *The Reasons for the Collapse of Afghan Forces*, CSIS—Center for Strategic & International Studies, 17 August 2021. See also Craig Whitlock, *Summary of the Afghanistan Papers: A Secret History of the War* (2021).

67 See “Fulfilling our collective responsibility: international assistance and the responsibility to protect”, *A/68/947 – S/2014/449*, 11 July 2014, 5.

68 See above n.61, 224.

69 Ahmad Nader Nadery, Editorial Note: In the Aftermath of International Intervention: A New Era for Transitional Justice?, in: 5 *The International Journal of Transitional Justice* (2011), 171-176 (173).

70 See UN GS “Fulfilling our collective responsibility” (2014), 5.

71 See above n.66, 16.

the whole period of foreign occupation.<sup>72</sup> As it was rightly said, thereby a false dichotomy was created that was misleading and deceptive, as justice, both retributive and restorative, is a vital component of any lasting peace and durable reconstruction.<sup>73</sup>

57. The re-integration of former warlords into the government system, starting in December 2001, might have been seen as a move to stabilize the country and to achieve peace. As this move implied, however, also the tolerance of repression, human rights violations and impunity, it was eventually counterproductive exactly in this regard: it drove large parts of the repressed population into the arms of the insurgents.<sup>74</sup>

58. Attempts to implement some elements of transitional justice were not totally absent: For example, an “Afghanistan Independent Human Rights Commission (AIHRC)”, introduced pursuant the Bonn Agreement of 5 December 2001, was intended to bring together main stakeholders in a national reconciliation attempt. Within this institution, a series of committed experts tried to go to great lengths to make the best out of the situation. In view of the fact, however, that the protection of human rights had no solid foundation in the material national constitution and in view also of the precarious security situation, this was an uphill battle with limited results.<sup>75</sup> The word was of a “near-absence of justice in Afghanistan”.<sup>76</sup>

59. But also if interpreted in a broader sense, transitional justice was broadly missing in Afghanistan. As set out, this broader concept aims at realizing “justice” as a material value in societies in transition. In this context, not only do a functioning economy and security-apparatus (both widely absent in Afghanistan) have to be rebuilt, but it is essential to re-constitute the very

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72 In a BBC interview Hamid Karzai stated the following:

“If we can have justice while we are seeking peace, we will go for that too. So [. . .] justice becomes a luxury for now. We must not lose peace for that”. Cited according to Tazreena Sajjad, *These Space in Between: The Afghanistan Independent Human Rights Commission and its Role in Transitional Justice*, in: 3 *The International Journal of Transitional Justice* (2009), 424-444 (438).

73 *Ibid.*, with reference to Kai Ambos, Judith Large, & Mariëka Wierda (eds.), *Building a Future on Peace and Justice: The Nuremberg Declaration on Peace and Justice* (Springer: Berlin 2009).

74 See Nadery, above n.69 (2011), 174.

75 See Sajjad, above n.72, 443 and ICG Asia Report N. 64, *Peacebuilding in Afghanistan*, 29 September 2003.

76 See Djeyhoun Ostowar, *The Near-Absence of Justice in Afghanistan* (Taylor & Francis: London 2020).

fabric of the society built on the rule of law, on mutual trust, and on the prospect of a peaceful future. None of these elements could be guaranteed in the aftermath of the US-led intervention.<sup>77</sup>

## V.B. Towards a broader notion of transitional justice

60. Read this way, the events in Afghanistan could lead to devastating conclusions: The intervention of 2001 by the US, NATO, and non-NATO troops ended up in a territorial administration unable to fulfil most of the criteria specified that same year by the ICISS. As has been shown, in several ways an insufficient understanding of “ownership” and its consequences may have been crucial to the ultimate failure of this intervention. The intervention created expectations the interveners were not able to fulfil. Hopes had come up that proved to be illusionary; plans and life designs were made that were abruptly destroyed, causing extreme hardship and pain. The Taliban rulers don’t seem to be able to rule a country in a way that can give prospects of a decent life to a population that has doubled since 2001 to nearly 40 million. Claims might come up to hold the interveners liable for failing to live up to their responsibilities, for creating hopes while letting down the whole

77 There is ample material giving proof of this assessment. See only the “Afghanistan Papers”, above n.66. An intervention designed to bring peace to a territory requires also a thorough analysis of the causes that provoked the crisis beforehand as well as an evaluation of the consequences of the acts the interveners are intended to set. In particular, the strong support the Taliban had obtained by the Pakistani Secret Service Inter-Services Intelligence (ISI) throughout their history is well known and was never effectively counteracted. See Rolf Tophoven, *Unheilige Allianz – Pakistans Geheimdienst (ISI) und die islamistischen Extremisten*, in: *5 Jahrbuch Terrorismus (2011/2012)*, 187-204. Already during the fight against Soviet invasion in 1979 the US made dramatic mistakes as to the long-term effects of some of their measures, in particular in the field of education. In this fight, the US as well as the Pakistani government attributed a decisive role to the ISI. US and Saudi aid financed the creation of religious *madrassah* schools (theological schools) indoctrinating students in Afghan refugee camps along the Afghan borders to become jihadist warriors. See Roozbeh Shirazi, *Islamic Education in Afghanistan: Revisiting the United States’ Role*, in: *8 The New Centennial Review (2008)*, 211-233 (221), citing A. Coulson, *Education and Indoctrination in the Muslim World: Is There a Problem? What Can We Do About it?* Policy Analysis 511. The Cato Institute, ([www.cato.org/pubs/pas/pa511.pdf](http://www.cato.org/pubs/pas/pa511.pdf)). On Pakistan’s role in the Afghanistan conflict see also Dorronso, above n.60, 197ss. In retrospect, the article by Craig Davis of 2002 (note 62) seems to be prescient in an almost frightening way when he wrote the following: “Recent estimates suggest that between 10 and 15 percent of Pakistan’s 45,000 madrassas promote violence; if true, the next generation of graduates will likely be a political force to be reckoned with”, 94.

population of a country as soon as the long-term costs of territorial administration appeared to have been miscalculated.<sup>78</sup>

61. Nonetheless, it is also possible to adopt a more positive and conciliatory perspective. What has been said above about the situation in Bosnia, where much disappointment and criticism was voiced as to the international administration of this country, applies, with the necessary adaptations, also to Afghanistan: Some security, some stability, some semblance of justice are always better than none of them in a situation of an Hobbesian all-out civil war. As mentioned, the Afghan population has doubled; prospects for a brighter future were there and have most probably not yet disappeared. It had been possible to provide for some education to the female population, and information about women protesting against the new Taliban repression<sup>79</sup> evidences that there are Afghans who want to keep and to defend these achievements. The new rulers are under strict international supervision. They are in need of international cooperation, and a series of nations has already made clear that human rights conditionality will apply.<sup>80</sup>

62. If we come to the repercussions of the events in Afghanistan on concepts and theory, a nuanced discussion has to be conducted. As shown, there is now considerable authority for the proposition that intervention is conducive to an additional responsibility to rebuild, and these rebuilding activities have to guarantee transitional justice as explained above. This responsibility should, however, not only be attributed to the interveners according to the “belligerent-rebuild-thesis”, but is rather a responsibility of the international

78 This appears to be even more the case as the US and its allies can hardly justify their sudden retreat by a “*ultra posse nemo tenetur*” argument. As recent studies have evidenced, “[...] the cost of remaining beyond 2021 would have been minimal. The United States could have supported 2,500 soldiers in Afghanistan almost indefinitely—and with little risk.” See Rory Stewart, *Foreign Affairs: The Last Days of Intervention*, in: 100 *Foreign Affairs* 6 (2021), 60-73 (72).

79 In view of the massive violation of women rights, calls for “gendering R2P” gain even more weight. See on this issue Cristina G. Stefan, *Opportunity for Gendering the Responsibility to Protect Agenda at the United Nations*, in: 1 *Global Studies Quarterly* (2021), 1-13.

80 See, for example, Council of the EU, *Afghanistan: Declaration by the High Representative on behalf of the European Union*, Press release of 17 August 2021: “[...] cooperation with any future Afghan government will be conditioned on a peaceful and inclusive settlement and respect for the fundamental rights of all Afghans, including women, youth and persons belonging to minorities, as well as respect for Afghanistan’s international obligations, commitment to the fight against corruption and preventing the use of Afghanistan’s territory by terrorist organisations.”

community as whole,<sup>81</sup> which, by the way, has also approved the intervention and the subsequent creation of an international administration.

63. As to the issue of transitional justice, the Afghanistan case might have revealed further insights with regard to the direction in which this highly dynamic and promising discipline could head. This discipline is blossoming, and it could become tempting to tell the story of Afghanistan during the past two-decade backwards through the lenses of this discipline. Such an approach can explain everything and nothing. The outcomes rather depend on how the lenses are set. By taking recourse to the narrower concept of transnational justice, important dysfunctions of Afghanistan's material constitution can be explained. An inefficient and corrupt justice system that did not work properly or did not work at all contributed massively in alienating larger parts of the population from the new regime. The same holds true as to the impossibility to come to terms with past criminal acts committed in part by rulers returned to power after the 2001 regime change. It appears however daring to try to explain the demise of the Afghanistan democratization experiment exclusively or even mainly by these failures in the judicial sector. For this, too little is known about the reciprocal relationship between the stability of the broader constitutional order and the proper functioning of a judicial system. And even if such data existed, the question whether they can be generalized would arise.

64. The broader (and more recent) notion of transnational justice seems to be better equipped to study more complex nation-building processes like the one in Afghanistan, their prospects and failures. In this case, however, due to the still unclear borders of this newer, broader and extremely dynamic notion, further challenges arise. It might be the case that by the introduction of this concept only the same ideas are conveyed, though now in new clothes, untainted by the failures of past experiments that required in their aftermaths a change of terminology. In the end, the guiding forces for these developments are the deeply rooted humanitarian values that undergird UN law as a whole, like the quest for peace and for the realization of basic human rights, which appear to provide the momentum with terminology constituting only formal templates. Perhaps the concept of transitional justice, interpreted and used in a broader fashion, could re-ignite the forces that at the beginning of the 21<sup>st</sup> century managed to open such promising prospects under the

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81 See in this sense also James Pattison, *Jus Post Bellum and the Responsibility to Rebuild*, in: 45 B.J. Pol.S. (2013), 635-661.

terminology of R2P. In this sense, terminology also gains substantial content.<sup>82</sup> Unvarnished words, whatever their original meaning, can become vehicles of ideas and aspirations that are only awaiting to be baptized by new names.

## VI. Conclusion

65. A new experimental field has opened to examine the seriousness by which the international community accepted the R2P in 2005: In view of the fact that the survival of a 40 million-person population is at stake the time has come to become serious about this responsibility, and to close the gaps in this concept of exactly the same age as the Western Afghanistan intervention.

66. From a more dogmatic point, the present escalation of the Afghan crisis is also a testing ground for the actual meaning of attractive modern concepts such as R2P and transitional justice designed to steer the development of international law in order to implement peace and basic human rights. Even if we change terminology, for the foreseeable future it remains essential to realize these aims in a way that should be compatible, as far as possible, with State sovereignty, and provide at the same time international guidance and supervision,<sup>83</sup> in particular when atrocity crimes loom. In the past four decades, the Afghan soil has been the theatre of a series of interventions that allegedly or effectively, partly or mainly, have been directed exactly at these aims. The situation, as it presents itself at the turn of the years 2021/2022, reveals that these concepts, if not deeply flawed, need a thorough revisiting<sup>84</sup> as to their content and meaning. In particular what has to be newly assessed, also in the light of the experience made in Afghanistan, are the long-term effects of intervention, the question how to reconstruct a war-torn society, the specific responsibilities in this context, not only

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82 Here, the remark by Martti Koskenniemi, “when vocabularies change, things that previously could not be said, are now spoken by everyone [...]”, comes to mind. See Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law* (2009), 15 *Eur J Intl Relations* 395-422, 395.

83 See Carlo Focarelli, *The Responsibility to Protect in the Global System*, in: P. Hilpold (ed.), *The Responsibility to Protect (R2P)* (Brill/Martinus Nijhoff: Leiden/Boston 2015), 417-438.

84 It is argued that for the time being also R2P carries a “positive political and normative value” notwithstanding all the shortcomings in its implementation. As it was said, R2P “has an important discursive function and considerable potential to influence and guide international decision-making processes.” See Christof Royer, *Framing and reframing R2P: a responsibility to protect humanity from evil*, in: *Critical Review of International Social and Political Philosophy* (2018), 1-24.

of the interveners but of the State community as a whole, and the concept of “ownership”. The lessons learnt in Bosnia and in Kosovo, as portrayed above, should be reckoned with. In view of a limited intervention capacity, erratic support for intervention by the State community, and the need to protect the sovereignty and the right to self-determination of the communities involved, ownership could become the crucial element to bring both sustainable rebuilding activities and effective transitional justice to bear, or at least to aim at a “realistic utopia”<sup>85</sup> in this sense. To strive for these goals might appear utopian if we contend ourselves only with full achievement of our aims. Partial achievements with a positive outlook for more may be a realistic “second-best”-solution worth fighting for. And then there are objectives that should be non-negotiable: “Ownership” taken seriously not only requires to take every effort that the affected communities become self-governing as soon as possible, but it prohibits also any attempt to transform a whole society through educational measures, as has been the case in Afghanistan where religious radicalization was also implanted from outside. Returning ownership to the Afghan people would have required providing for the minimum of security and stability allowing this people to find their own way back to peace and stability. Now the Afghan people are waiting for the State community, and in particular Western countries, to accept their responsibilities enshrined in concepts such as R2P and transitional justice properly understood!<sup>86</sup>

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85 As is well known, John Rawls propounded the idea of a “realistic utopia” in order to achieve a “reasonably just society of people”. See Chris Brown, *The Construction of a ‘Realistic Utopia’: John Rawls and International Political Theory*, in: 28 *Review of International Studies* 1 (2002), 5-21. This utopia shall be understood as an ultimate aim that can never be definitely achieved, which needs continuous re-adaption and re-orientation but which provides nonetheless guidance in the quest to serve humanity. See as to these considerations Antonio Cassese, *Five Masters of International Law* (Hart: Oxford et al. 2011), referring to René-Jean Dupuy at 267 and to Adolph Abramovich Joffe at 272.

86 As has been shown in literature, “[e]xpecting revolutionary change in the behavior of states [...] while advocating the maintenance of the systemic status quo” is “pejoratively utopian” as it creates hopes that will never be fulfilled, leaving the underlying problems unchanged. See Aidan Hehir, “Utopian in the Right Sense”: The Responsibility to Protect and the Logical Necessity of Reform, in: 31 *Ethics & International Affairs* 3 (2017), 335-355. A better understanding of the effects of intervention measures and of their interaction could help to avoid catastrophic developments like that in Afghanistan, which is also the consequence of a wrongly-engineered State-building process and has most probably been brought about with the best of intentions.