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Marlene Straub

# Völker rechts ordnung

9 // 20  
Jahre  
später

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ON MATTERS CONSTITUTIONAL





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Marlene Straub (Hrsg.)

# Völkerrechtsordnung

9/11, 20 Jahre später:  
eine verfassungsrechtliche Spurensuche



## Vorwort

Der 11. September 2001 steht synonym für die Terroranschläge in den USA. Das Datum beschreibt ein Ereignis, beschränkt auf einen Tag, eine Uhrzeit, einen Ort. Tatsächlich markiert es aber einen Ausgangs- und Bezugspunkt für eine ganze Reihe von Ereignissen und Entwicklungen, die bis heute fortwirken und die vielfältige Spuren auf verschiedenen Ebenen hinterlassen haben: individuelle, gesellschaftliche, politische und rechtliche.

Zwei Jahrzehnte nach den Anschlägen schien es an der Zeit, auf die Suche zu gehen, welche Spuren es sind, die 9/11 und der *War on Terror* in den nationalen und internationalen Rechtsordnungen hinterlassen haben. Während wir das Projekt planten, überholten uns die Ereignisse und machten nur zu deutlich, wie die Geschehnisse von vor 20 Jahren die Gegenwart prägen und das Recht fordern: Der Abzug der internationalen Truppen aus Afghanistan im Sommer 2021 führte der Welt vor Augen, dass es moralisch und rechtlich ebensowenig schwierig ist, die militärische Präsenz in einem anderen Staat zu beenden wie sie zu begründen. So bildet *9/11 und die Völkerrechtsordnung* den Auftakt einer Reihe von insgesamt sieben Blog-Symposien, in dem internationale Expert\*innen der Frage nachgehen, wie sich das Völkerrecht in den vergangenen 20 Jahren gewandelt

hat. Neben den Autor\*innen, ohne die wir dieses Symposium nicht hätten realisieren können, gilt unser besonderer Dank Nora Markard und Dana Schmalz. Ihre Expertise und Ideen haben dem Symposium Kontur gegeben und uns bei der Suche nach den interessantesten und geeignetsten Autor\*innen zum Thema geholfen.

Die neun Beiträge des Symposiums bündeln wir in diesem Buch in dem die Ergebnisse zweier Projekte des Verfassungsblog zusammenlaufen. Mit Unterstützung der Bundeszentrale für politische Bildung konnten wir das Projekt *9/11, 20 Jahre später: eine verfassungsrechtliche Spurensuche* realisieren. Dass die Texte aus der Reihe der Blog-Symposien nun zu Büchern werden, ist eines der Ergebnisse aus unserem vom Bundesministerium für Bildung und Forschung geförderten Projekts *Offener Zugang zu Öffentlichem Recht*. Dabei kann und soll dieses Buch seinen digitalen Ursprung nicht verleugnen. Mit dem QR-Code auf der rechten Seite gelangen Sie direkt zum Blog-Symposium und über die QR-Codes, die den Beiträgen vorangestellt sind, zu den einzelnen Texten – eine Idee, die wir uns bei den Kolleg\*innen vom Theorieblog abgeschaut haben. Über diesen kleinen Umweg können Sie die Quellen auch in der Print-Version nachvollziehen, in der die ursprünglich verlinkten Textstellen in grau gehalten sind.

*Marlene Straub und Evin Dalkilic*







# Inhalt

<i>Obiora C. Okafor</i> The Afghanistan Saga did not Rupture the Orientation of International Law and Relations	11
<i>Jochen von Bernstorff</i> Afghanistan and Great Power Interventionism as Self-Defence	25
<i>Asad G. Kiyani</i> Deconstructing (Western) Exceptionalism for International Crimes	41
<i>Thilo Marauhn, Daniel Mengeler und Vera Strobel</i> Verletzung von Schutzpflichten durch die Bundesrepublik in Afghanistan?	55
<i>Norman Paech</i> Afghanistan - wer schützt das Völkerrecht?	73
<i>Frédéric Mégret</i> Intermediate Solidarities: The Case of the Afghan Interpreters	83
<i>Shaimaa Abdelkarim</i> Afghan Women and Resistance to the War on Terror	95
<i>Helmut Philipp Aust and Janne Nijman</i> Urban Legacies of 9/11: An International Law Perspective	107
<i>Corri Zoli</i> Exiting Afghanistan as Ushering in a New Era of Global Infrastructure and Supply Chain Wars	121



*Obiora C. Okafor*

**The Afghanistan Saga did not Rupture the Orientation  
of International Law and Relations**





Not all that long after the 9/11 attacks in the United States, I argued in two articles in the *Osgoode Hall Law Journal* ([here](#) and [here](#)) that the tragic events of that day, and the reactions of the US and its close allies, were not so significantly new in global (as opposed to national) history as to require or go on to inscribe marked changes in the character of the most fundamental norms and patterns of international law and relations. In the present blogpost, I argue that the intervening twenty years of US invasion and occupation of, nation-building in, and withdrawal from Afghanistan has provided strong justification for the analytical conclusions I reached in 2005.

More specifically, neither international law's broad attitudes toward the framings and dramas of world politics and events nor the general character of the behaviour of global power toward much weaker states and their peoples were ruptured to a significant extent within the context or because of the invasion, occupation, semi-occupation and recent withdrawal of US and allied forces from Afghanistan. Thus, while the withdrawal phase of allied involvement in Afghanistan has, quite deservedly, generated a lot of attention, controversy and tragedy, broadly speaking, it has not – so far – caused or signaled any significant rupture in the orientation of international law and relations toward weaker states and peoples. As the dust of that controversial set of events begins to settle, as the horizon becomes more

visible, continuity is much more evident to the trained eye than discontinuity. Thus, the Afghanistan saga is but an allegory of the broadly repeating historical character of international law and relations, albeit with certain attenuations and divergences in terms of the details.

### **A broad pattern of continuity**

This does not necessarily mean that there has been no change whatsoever in international law and relations in the context and because of the Afghanistan saga, however slight. What is meant, rather, is that the recent withdrawal events on which this blogpost is mostly focused, and the invasion and occupation that preceded it, have not (at least as yet) wrought any broad shifts that are of fundamental significance to the character of international law and relations. For sure, the withdrawal has meant that one established superpower (the US) has now offered appreciably more “space” for an emergent one (China) to exercise greater influence in Afghanistan. Yet, this broad shift in the distribution of global power (material, and to a lesser extent, ideational), with its possibly attendant creeping implications for international legal praxis, was already well underway, both in Asia (the region of which Afghanistan is an integral part) and right across the globe. For sure, it may have become somewhat more difficult



for the more established superpower of our time to “police” Afghanistan and the neighbourhood around it. Still, this reality has had no great bearing on the broad character of international law and relations.

International law’s norms and rules regarding when and by whom “sovereign” countries can be invaded; the legality or otherwise of occupying other countries; the responsibilities of occupying and semi-occupying powers; respect for the human rights of the locals; and refugeehood/asylum; basically remain intact post the Afghanistan invasion and withdrawal. The broad historical character of international relations in which much more powerful states have (within and outside the bounds of international law norms/rules) tended to take steps to augment, maintain and project their material and ideational power over much weaker states and peoples (including escaping responsibility for the most part for their breaches of their responsibilities to these), also remains as stable in the aftermath of the Afghanistan saga.

Without sufficient space to delve into all the relevant bodies of international law, the broad argument being made here is illustrated by the extent of relative continuity and stasis within two of the sub-bodies of international law and relations that frame, and connect intimately to, the withdrawal phase of the Afghanistan saga. These are: (a) the international law that governs or relates to the invasion of other countries; and (b) in-

ternational human rights law. Neither of these sub-bodies of international law was ruptured or altered in significant measure by either the full cycle of the Afghanistan saga or its recent withdrawal phase.

### **On the relative continuity of the international law on the invasion of foreign countries**

Regarding the impact that the withdrawal phase of the Afghanistan saga (or even of the full cycle of US and allied involvement) has had on the international law norms/rules governing the invasion of other states, the norms prohibiting such interventions, save either with UN Security Council authorization or in self-defence “if an armed attack occurs”, have not changed significantly since 9/11, and certainly not since the withdrawal from Afghanistan. They are also unlikely to change in any appreciable way. About five years after 9/11, in the heat of arguments by the US and certain other great powers that this body of norms ought to adapt to what was argued was our “new” circumstance, James Thuo Gathii undertook a painstaking analysis of the relevant state practice and normative attitudes to see if a new norm justifying unilateral invasions of other lands had emerged in international law. His findings were that the relevant norms had remained more or less stable, despite these claims and the US-led invasions of Afghanistan and Iraq. The arguments he made at the time

remain so strong, convincing and clear as to deserve extensive reproduction here. As he put it:

*“...under the doctrine of sources [of international law], state practice inconsistent with a norm of customary international law or persistent dissension from it, does not establish a new norm but is instead regarded a violation of the norm... a small number of states cannot within a limited time frame create a new rule without ‘a very widespread and representative participation’ in the practice...a small number of states cannot create a new rule of customary international law where there is practice which conflicts with the rule or where there are protests to the new rule. This is particularly so with respect to a rule relating to the prohibition of the use of force which is a ‘conspicuous example of a rule of international law having the character of jus cogens’ with respect to which practice inconsistent with it would be regarded as a violation of the norm rather than as establishing a new norm.”*

And although Gathii’s conclusions were based on pre-2005 data, there is nothing that has occurred in international legal practice since that time to even remotely suggest that a new customary international law norm that deviates from the UN Charter in authorizing Afghanistan-type forcible invasions and occupations of

other lands has emerged. The required widespread state practice simply does not exist. And it is also crystal clear that neither the text of the UN Charter nor its widely accepted interpretations have changed significantly since then (see arguments by Edward C. Luck and Oona A. Hathaway). It is also important to note that even if the US could have argued that its invasion of Afghanistan was lawful under international law as an act of self-defence, it would be on far shakier and much more untenable ground if it were to suggest that its subsequent occupation (*de jure* and *de facto*) was similarly justified. And although, for sure, the relevant international law norms have been violated from time to time, that does not in of itself inscribe or portend a rupture in the character and orientation of the law.

In the end, the key point, relevant to the withdrawal phase of the US' recent forcible encounter with Afghanistan, is this: Rather than the withdrawal being seen as signaling rupture, or some kind of aberration at the nexus of law, practice and morality, it should rather be seen as a belated act of compliance with a fundamental norm of international law, and indeed, as an act that was required of the US under that legal regime. At the very least, the withdrawal was required in order to abate and ameliorate what most other states and scholars see as its longstanding violation of the general prohibition under international law of the unilateral use of force against the territorial integrity and political independ-

ence of other states (see Muqarrab Akbar and Mahdi Zahraa). Thus, in a sense, the withdrawal aligned US behaviour in this context with the requirements of international law.

A related point is that, as disturbing as the televised scenes and spectacles of massive crowds attempting to flee the oppressions of Taliban rule were, they do not alter the basic content and orientation of international law and relations. They do not mean that unilateral foreign invasions and continued occupations of other states in order to prevent such scenes or right such wrongs are lawful or have somehow become more justified under international law. They do not also mean that most states would participate in, or sanction, such invasions. Such tragic scenes of human beings, who are just like us all, desperately attempting to flee to freedom or preserve their lives do not in and of themselves alter the constitutional norms of international law and relations which govern foreign invasions or continued occupations of other lands. Despite many identifiable breaches of its terms over history, and arguments by some in favour of both a right to pro-democratic invasions (see i.e., W. Michael Reisman, Robert Lancaster, and David Wippman) and the existence of a right to democracy in international law (see Thomas M. Franck), there is no general authority in international law for unilateral interventions (even if aided by allies) to invade or continue the occupation of other lands, in order

to preserve human rights or foster democracy. Clearly, there is an important difference between the vesting of human rights in the peoples of a particular country and the nature of the allowable means for foreign states to advance their protection or enforcement. This much is clear enough from the relevant legal provisions (Articles 1 and 2 of the *Charter of the United Nations*) and state practice (see Ann Orford). While the nature of the relevant norms/rules of international law and the allowed practices can, of course, change, there is not as yet convincing evidence of such discontinuity. These points have relevance and important implications for the ability or otherwise of the US and other countries to rescue from Taliban rule certain individuals still left behind in Afghanistan, who provided assistance to it whilst its forces and agents were in that country, as well as for the methods they are allowed to use to do so under international law.

### **On the relative stability of international human rights law post the Afghan saga**

Along these lines, the second sub-body of international law and relations that is focused on in this blogpost is international human rights law, and with a similar argument and conclusion. For, neither the withdrawal phase of the Afghanistan saga nor the full cycle of the US-led invasion has caused a significant rupture in the fabric

and orientation of international human rights law and relations.

There is no doubt whatsoever that throughout the full cycle of their invasion, occupation, semi-occupation of, and withdrawal from, Afghanistan, the US and its allies were under the obligation to respect the human rights of the people of that country (see Gilles Giacca and Ellen Nohle). In any case, having partly created the conditions that prevailed in Afghanistan immediately before, during and after the withdrawal, the US and its allies are, under international law, responsible for its negative human rights impacts on the Afghan people (see Rebecca Sanders). In each case, this means that the US was, until its final pullout from Afghanistan, also under an obligation not to take any steps or measures that would violate, or otherwise endanger, the human rights of Afghans.

One key issue that arises in this context is the nexus between the US' actions in withdrawing from Afghanistan and the human rights violations suffered or likely to be suffered by many Afghans (e.g. those who died in ISIS-K perpetrated bombings at the Kabul airport while awaiting evacuation; the greatly augmented women's rights violations that have since occurred; and the collapse of democracy in Afghanistan with its entailed human rights violations). Was it reasonably foreseeable that the US' actions either in invading, formally occupying (up to a point), and/or withdrawing from

Afghanistan would lead to any of these kinds of human rights violations in that country? The US government, not without plausible cause or reason could argue that some of these violations were not reasonably foreseeable and that it did take every possible step that it could to prevent such occurrences. Others (even within the US itself) might disagree, again not without good reason. Clearly, this discussion also has much relevance and important implications for the lives and rights of all Afghans, and especially certain individuals still in that country who might be targeted and victimized for assisting US forces and agents in that country (see David Zucchino and Najim Rahim).

In the end, it should be noted that there could be a clash here between the US' obligation under international law to withdraw from Afghanistan, following its invasion and occupation of that country and its obligation not to take any steps or measure that would endanger the human rights of the Afghan people. This clash could be resolved – at least in part – by the framing of the US' obligation to withdraw as an obligation to undertake their withdrawal in the way that least endangers the human rights of the Afghan people (i.e. very slowly over a much longer period). Given the socio-political (especially strategic and military) realities in Afghanistan, the problem with this kind of reframing, however, is that it might – in practice – require the US



not to withdraw from that country for many more decades to come.



*Jochen von Bernstorff*

**Afghanistan and Great Power Interventionism  
as Self-Defence**





**W**e are still in the process of assessing the outcomes of 20 years of Western military and humanitarian presence in Afghanistan, and of a heartless and chaotic withdrawal. While international lawyers have been discussing the human rights obligations in relation to those abandoned in great danger and consider the relationship with the new Taliban-led government, many political comments on the end of the military operations involve a substantial amount of Western soul-searching: are our values still attractive in other parts of the world? Are we perhaps too weak to export them successfully?

These current and somewhat self-centred debates may obscure not only that the post-9/11 war in Afghanistan so far has led to the death of at least 172.000 human beings, including 47.000 civilians, but also that it came with considerable collateral legal nihilism. For, with the US intervention in 2001 and the conceptual identification of “Islamist terrorism” as the absolute evil to be annihilated, central legal distinctions became blurred; such as the ones between unilateral military retaliation and self-defence, international criminal prosecution of terrorists and international armed conflict, fair trial and arbitrary executions by drone-strikes, as well as the distinction between imprisonment of convicted criminals and infinite detention in torture-camps (i.e. Guantanamo). In this short piece, I will only deal with one of these legal issues, namely the broader im-

plications of the 2001 US-led intervention in Afghanistan for the notion of self-defence.

My main argument is that the re-interpretation of Art. 51 UN Charter by the US in the context of the so-called “war on terror” was (and still is) an attempt to re-introduce new legal justifications for old forms of great power interventionism. The claimed early 20th century right of great powers to police and punish in one’s own semi-periphery in the form of unilateral self-help measures and retaliation had been outlawed in 1945. Various attempts to re-introduce this right under a new concept of self-defence had been thwarted by the UN and the ICJ throughout the 20th century. With 9/11 and Western reactions to the attacks, the outcome of the ongoing struggle to defend a restrictive understanding of the notion of self-defence in international law became uncertain.

### **I. A right to self-defence against Al-Qaeda?**

Politically, the 2001 US intervention in Afghanistan was justified as a punishment of both Al-Qaeda and the Taliban-led Afghan government for the mass murderous September 11 attacks on the Twin Towers and other targets in the US. Legally, however, the US referred to the right to self-defence under Art. 51 of the UN Charter, the only remaining justification for unilateral military operations under the Charter. While con-

demning the attacks, the UN Security Council had not been able to authorise military intervention in Afghanistan. The Council did not even qualify the attacks on the Twin Towers as a “breach” of the peace in the sense of Art. 39 UN Charter, but only as a “threat to peace”, and only referred to “self-defence” in a preambular paragraph of the resolution. International law debates since then have focused on when and how military operations against non-state actors (“terrorists”) on foreign soil could be justified under the right to self-defence. This focus on a new right of self-defence against non-state actors, created by George W. Bush’s declared post-2001 “war on terrorism” in Afghanistan and elsewhere, has arguably been misleading at best, and ideological “newspeak” at worst. Inevitably, unilateral military measures against *non-state* actors abroad without the consent of the respective states will always involve a violation of the territorial integrity of *state actors*. There simply is no such thing as an isolated right to self-defence against *non-state* actors.

Like many other Western interventions in the Middle East over the last 50 years, the war in Afghanistan was waged against a foreign state and even included fully-fledged external regime change. Fighting Al-Qaeda quickly became a side-show in Afghanistan. As I attempt to illustrate in this historical sketch, the US, by claiming a right to self-defence against non-state act-

ors, managed to reframe an outlawed imperial right to punish and police the periphery as a novel self-defence claim. The justifications advanced for the intervention have lured a whole generation of international lawyers into an at times highly apologetic debate about a new right of self-defence against non-state actors.<sup>1</sup> While previous attempts to re-conceptualise self-defence as a broader right of unilateral intervention had consistently been thwarted by the Third World and a broad coalition of smaller states in the UN, as well as by the ICJ, the re-branding of these efforts in counter-terrorism semantics after 2001 proved to be more resilient<sup>2</sup>. But let me start with the 19th century origins of great power interventionism in international law.

## II. A right to intervene in case of “chronic wrongdoing or impotence” abroad

Policing and punishing actors in one’s own semi-periphery had been part and parcel of European and US imperialism since the late 19th century. The US had already claimed this alleged right in the notorious 1904 Roosevelt Corollary for interventions in Latin America, which also provided the semantic toolbox for the three post-2001 US administrations in introducing the new notion of self-defence, including the “unwilling or unable” argument (I have attempted to depict these historical patterns elsewhere in more detail). The Corollary



claimed a right to intervene under the following circumstances:

*“Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power. [...]”*

In the same vein, Europe’s great powers during that era in a routine fashion intervened collectively or unilaterally in their zones of interest in Latin America, the Middle East and East Asia, often referring to prior foreign breaches of standards owed in their view to nationals and representatives from “civilized” states. Up until the Second World War, these great power interventions outside of the formalized colonial empires in case of alleged breaches of international law were justified as armed “reprisals”, “self-help” or “measures short of war”. Under this justification, great powers would *inter alia* intervene in reaction to non-payment of debts, expropriations, land reforms or in cases of perceived vital security risks, such as new governments threatening free access to the Panama/Suez Canal. Es-

tablishing puppet regimes and temporary occupation after these interventions was not uncommon. Upholding “civilized” standards of European international law was portrayed as the great power’s burden by Western jurists and as such considered a lawful instrument of foreign policy. Stylised humanitarian or moralized motivations for such interventions helped governments convince critical domestic publics and parliaments that these military missions were worth the effort. Another common feature of such forms of interventionism in the early 20th century was that the interests of foreign local populations played a marginal role in decisions on when and how to intervene and withdraw. Western interventions claimed to bring “civilization” or “humanity” to “uncivilized” foreign places. What’s not to like?

Geopolitical, economic or security prerogatives as well as promises made in election campaigns in Washington or European capitals prompted interventions and withdrawals, while the concrete and often disastrous short-, mid-, and long-term effects of these interventions on national and local communities could be ignored. For the interest of Western media and public opinion was bound to abate anyway after the withdrawal of one’s own troops.

### III. The US contribution to outlawing great power interventionism in 1945

A significant legal problem faced by the US administration after the September 11 attacks, as well as by previous US administrations, was that policing risks and punishing wrongdoings unilaterally in the periphery had been outlawed by the UN Charter. The UN Charter had deliberately closed legal loopholes for unilateral great power interventions by setting out a broad prohibition of the use of force in Art. 2 (4) and by restricting exceptions to collective action authorized by the Security Council and to a narrowly worded right to self-defence.

Ironically, it was the US delegation which at the San Francisco Conference in 1945 insisted that Art. 51 UN Charter should be constructed as restrictively as possible. Both France and the UK were concerned about losing their perceived right to unilateral military measures in cases where Council action would be blocked by a veto power. During the negotiations, France had proposed the insertion of a clause according to which, in case of inactivity of the Security Council and in face of a breach of peace, “*member states reserved themselves the right to act as they may consider necessary in the interest of peace, right and justice*”. The UK delegation supported this proposal in principle and proposed a slightly

amended version in informal bilateral consultations with the US, allowing for unilateral military measures “for the maintenance of right and justice” under Art. 51 UN Charter in case of a veto.

One of the chief negotiators of the US delegation, Harold Stassen, in commenting in a joint meeting of the two delegations on the British proposal, pointed out that “it had some of the defects of the proposed French amendment in that it opened very widely the field for the exercise of the right of self-defense” and that it could damage the entire organization. The British Foreign Secretary Anthony Eden according to the minutes

*“cited again the specific case of the position of Great Britain in the event of a Bulgarian attack upon Turkey, and the Soviet Union’s vetoing measures by the Security Council. Under such circumstances, he said he wanted Great Britain to be free to act and to take such measures as it might deem necessary for its self-defense in the Middle East.”*

The US made clear that it could not accept the British proposal. According to the minutes

*“Mr. Dulles said, that in his view, Mr. Eden wanted to go further in his proposal than the United States did and that if he understood correctly, Mr. Eden dis-*

*liked the United States proposal because of its limitations on the right of self-defense. Mr. Stassen (US) stated that with a proviso such as suggested by the British draft, the international organization would fail before it started; that the British amendment could not be written into the Charter without destroying the Organization in advance.”*

In these bilateral negotiations between the US and the UK, the joint proposal for what became Art. 51 UN Charter was developed, which in line with the US position restricted the right to self-defence to a lawful reaction against “armed attacks” only. A new and broad understanding of self-defence that could re-introduce the contentious “measures short of war” through the backdoor was emphatically ruled out. Harold Stassen and John Foster Dulles thus became the US-architects behind a strictly confined right to self-defence in the UN Charter. Great power usage of “measures short of war” or armed reprisals had increasingly been perceived as problematic, not only in the affected countries, but also in Western public opinion. It had been gradually banned by universal (Drago-Porter Convention (1907)) and regional treaty instruments. US delegations were well-aware of the fact that unilateral military enforcement of the so-called “minimum standard” or other alleged international legal rules in 1945 was no longer a legally justifiable option in the Americas. Inserting a

broad self-help clause under the concept of “self-defence” in the UN-Charter would have led to significant protests and criticism from smaller states not only from the region.

#### **IV. The Anglo-American revolts against the restrictive 1945 consensus**

That the world perceived great power interventionism in strategic zones of interest as outlawed by the UN Charter was proved during the Suez war in 1956, which after the unilateral Anglo-Franco intervention led to a global outcry rejecting the UK’s justification that it had to defend vital interests in the region. A public outcry forced the then British Prime Minister Anthony Eden to resign. After the Suez fiasco, two British international lawyers, Humphrey Waldock and D. W. Bowett, seconded by the US scholar Julius Stone, initiated the first Anglo-American post-war revolt against the perceived straight jacket imposed by Art. 2 (4) and Art. 51 UN Charter on great power interventionism. Soviet governmental elites followed suit, also claiming a right of the Soviet Union to intervene whenever socialist standards were endangered by “counter-revolutions” in the semi-periphery, which for the Kremlin included Afghanistan, prompting also the Soviet intervention in 1978.

It was the Third World and a broad coalition of small states, which during the cold war consistently defended

the restrictive consensus regarding unilateral violence in international relations reached in 1945. Hence, both the UN Friendly Relations Declaration (see Principle 1, e.g., renouncing forceful reprisals) and the UN Definition of Aggression (for aggressive acts by private actors and “indirect aggression”, see Article 3 (g)) confirmed the tight strictures or at least resisted to give in to the Anglo-American revolt. Nonetheless, during the 1980s and 90s, the US justified military retaliation measures on foreign soil without the consent of the respective governments as measures of self-defence, even though neither the scale- nor the time-requirement of an ongoing grave military attack set out in the narrow strictures of Art. 51 UN Charter (“if an armed attack occurs”) were met by these measures. Remarkably, the ICJ in the *Nicaragua* case confirmed the narrow strictures of Art. 51 and clarified that violence by non-state actors could only be attributed to a state if the latter had effective control over the respective forceful measures (paras. 115, 193 et seq., 228). And that unilateral military retaliation or punishment violated Art. 2 (4) UN Charter, and as such had nothing to do with self-defence, was stated by the ICJ as early as 1948 in the *Corfu Channel Case* (p. 35).

Nonetheless, the US government in 1993 characterized a missile raid on Baghdad punishing Iraq in response to an alleged assassination attempt on President Bush

(senior) as self-defence. This incidence prompted the then highly prominent US scholar Michael Reisman to assess the military measures as follows:

*„Despite the fact that the United States sought to characterize the Baghdad raid as an act of self-defence, the raid fits at least as comfortably, if not more so, under the classic rubric of reprisal.”*

But rather than stating their illegality under Art. 2 (4) UN Charter, Reisman apologetically identified a new trend under Art. 51 UN Charter, hereby aiming to facilitate a re-introduction of the old measures short of war as self-defence. When President Clinton ordered cruise missile strikes on a pharmaceutical company in Khartoum in 1998, in order to punish the Al-Qaeda-friendly Sudanese government for Al-Qaeda attacks on US Embassies in Africa, the notion of self-defence again was used to justify unilateral military retaliation measures.

In other words, the endless post-9/11 debates about whether or not Art. 51 UN Charter allows for measures of self-defence against terrorists obscured that the re-interpretation of Art. 51 UN Charter in this context was just another attempt to re-introduce legal justifications for outlawed forms of great power interventionism in the periphery, whenever vital interests of a great power were at stake. Accordingly, subsequent US interventions in the Middle East, including the 2018 missile strikes



punishing the Syrian government for chemical attacks in Douma, and the more recent US killing of the high-ranking Iranian general Soleimani in Iraq proved that the application of the new cored self-defence doctrine was by no means limited to threats created by non-state actors. Unfortunately, this claimed right to police and punish in the periphery on the basis of undisclosed intelligence information about potential threats as “self-defence” would bring back the old “measures short of war”, at a time when great powers like the Russian Federation and China have begun to assert regional prerogatives in a much more robust fashion. Without a concerted rejection of a right of unilateral military self-help, retaliation and punishment as “self-defence”, the 2001 US intervention in Afghanistan could eventually go down in history as the beginning of the end of the assertion of a broad UN-Charter based prohibition of the use of force.

John Foster Dulles and Harold Stassen would be turning in their graves.

## References

1 For an overview, see Max Planck Institute for Comparative Public Law and International Law, *Self-Defence against non-state Actors: Impulses from the Max Planck Dialogues on the Law of Peace and War*, MPIL Research Paper No. 2017-07; with a critical assessment of the debate, von Bernstorff, *Drone Strikes, Terrorism and the Zombie: On the Construction of an Administrative Law of Transnational Executions*, 5 *ESIL Reflections* (7), 2016; Corten, *The ‘Unwilling or*

Unable' Test: Has it Been, and Could it be, Accepted?, 29 *Leiden JIL* (3), 2016, pp. 777-799.

- 2 On the historical debates, Ruys, 'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice, CUP 2010, pp. 389 et seq.; cf. with a focus on the transformation of the proportionality requirement under Art. 51, Butha/Mignot-Mahdavi, *Dangerous Proportions: Means and Ends in Non-Finite War*, in: Bhuta/Hoffmann et al. (eds.), *The Struggle for Human Rights: Essays in honour of Philipp Alston*, OUP 2021, pp. 301-327.

*Asad G. Kiyani*

**Deconstructing (Western) Exceptionalism for  
International Crimes**





**H**ow is the war on terror to be understood in light of the final defeat of Western troops in Afghanistan, almost 20 years to the day since 9/11? One standard reading is that the lack of accountability for Western crimes reinforces the exceptional status that Western states hold in international law. Yet this *de facto* status is not fixed and cannot be passively enjoyed. It requires instead an active management of both domestic and international pressures for accountability that follow apparent violations of international law.

These modes of management are dynamic responses, resulting from interactions with a diverse range of domestic, international, and non-state actors. Understanding this complexity is a way of identifying where exceptionalism should be contested, as well as how less powerful states may adopt similar strategies for similar benefits. In what follows, I reflect on the techniques of accountability management relied upon by three Western states in response to allegations of international crimes, primarily in Afghanistan, and tentatively identify the implications of such practices.

These allies with similar domestic legal cultures – the United Kingdom, United States, and Canada – approached the question of avoidance of responsibility for crimes in Afghanistan in distinct but overlapping ways. Two of these states are obvious choices of study for their central role in the War(s) on Terror, and being directly implicated in huge numbers of alleged crimes. The

third, Canada, is relevant because of the comparatively blunt strategy it uses to attain the same ends. All three were integral to the establishment of the rules of the International Criminal Court (ICC), the institution that grew alongside the war on terror and which now poses the most serious (if not especially potent) threat to that exceptional status.

Examining how these states approach and develop their exceptional status with respect to allegations of international crimes shows that states pursue “exceptionalism” and its benefits through a variety of strategies. Given the relative standing and power of these states internationally, the risks posed by their tactics may disproportionately burden international institutions and norms rather than the states themselves. In the realm of international criminal law, the willingness of international institutions, such as the ICC, to tolerate or accept these approaches will strengthen criticisms that these actors have reconciled themselves to the existence of double-standards in international law, even when at the expense of protecting victims of crimes.

### **American avoidance**

American exceptionalism in regards to accountability for Afghanistan has taken three primary forms. One is outright denial of the commission of any crimes falling within the jurisdiction of the ICC. This denial has ex-

tended across US presidential administrations, including the Biden regime, which continues to insist on the total lack of ICC jurisdiction over US personnel. Even the recent admission that a US drone strike killed only civilians (among them up to 7 children), and no ISIS-K forces, has led to no legal response, just as the Obama-era admission of torture led to a suppressed investigation into the scale and severity of the abuses and no criminal prosecutions (in spite of a good deal of “trying”).

Yet as acknowledged by the Office of the Prosecutor (OTP) itself, US authorities have engaged in some investigations, taking some theoretical steps towards meeting complementarity requirements (even as experts disagree on whether this is satisfactory or not, and evidence suggests that key information was kept from Congress).

These gestures towards complementarity disrupt the paradigm of exceptionalism by suggesting some alignment between US practices and ICC rules, even if these investigations have not been presented to the OTP as such. More pointedly, they are evidence of a desire to engage in normative reconstruction of the ICC in a way that better fits US policy, alongside other stricter rejections of ICC jurisdiction.

The argument that complementarity has been satisfied is not one put forward by the state, but by other observers. Most interesting here is the suggestion from

the American Society of International Law's ICC Task Force that the United States engage in renegotiation of the terms of ICC engagement, in order to better fit US priorities. This includes modifying the complementarity standard in a way that better accords with US interests and practices. It also includes pushing the Court to move away from the "situation-as-a-whole" principle. In other words, to formally permit the OTP to only engage in limited investigations of some parties to a conflict. This would especially benefit the US because it is involved in more conflicts than any other state and risks being "enmeshed in an investigation based on the conduct of other parties". This assumes, of course, that US crimes are not as common or grave as those of other states or military actors, and comes close to suggesting that the more widespread a military's activities and crimes are, the less accountable it ought to be for its actions. Legally sanctioning partial investigations also clearly ignores the serious legitimacy deficit faced by the Court, all in the name of pandering to US exceptionalism.

The third and most notorious mode of accountability avoidance has been the leveraging of US legal power against the ICC. Threats of and actual sanctions against ICC officials and others who support the Court have been aimed at deterring investigations of US soldiers and commanders. While this Trump-era Executive Order sanctioning ICC officials was revoked by President



Biden in April 2021, it is a more refined use of power. Rather than just ignoring the Rome Statute and its provisions on complementarity, the US crafted laws intended to influence the discretionary decision-making of the OTP and other supporters of the Court. Ultimately, these approaches seem to have worked: the new Chief Prosecutor of the Court recently announced his office's intention to "deprioritise" investigations into the United States and its allies in the Afghani national forces.

### **British lawfare**

Where the US has simply avoided the question of complementary domestic prosecutions as part of a larger strategy of jurisdictional denial, the UK has gone a different route. One approach has been to modify international norms by legally insulating soldiers from domestic prosecution. Royal Assent was recently granted to a bill that places a five-year statute of limitations on prosecutions for international crimes, and legislates a "presumption against prosecution" of British soldiers engaged in overseas military activities. These shifts affect modern understandings of both the seriousness of international crimes, as well as the burden to be met by prosecutors.

The new law effectively precludes domestic prosecutions for British crimes in either Afghanistan or Iraq,

leaving the ICC as the only realistic site of accountability. While the OTP is not officially investigating British crimes in Afghanistan, it has not ruled out the possibility. The intermingled nature of military operations suggests such evidence may yet be uncovered (especially as evidence of a pattern of suspicious killings by the SAS has emerged).

This leads to the second avoidance approach: promoting complementarity efforts to show the ICC has no role to play. As a State Party to the ICC, the UK faces different pressure to comply with the Court's norms and rules than the US. Yet those norms privilege complementarity mechanisms that mirror the Court's own approach to specific cases, as well as those states with "significant resources" that use them for "framing and directing legal processes so as to prolong or otherwise frustrate the pursuit of accountability". In respect to allegations of crimes in Iraq, the UK clearly sought to avoid international responsibility by engaging in a complementarity process (see paras 117-120 [here](#)), albeit one that was directed at exoneration and stymying the OTP, rather than true accountability.

A similar complementarity process was developed to respond to allegations from Afghanistan. Operation Northmoor investigated 675 allegations from 159 complainants. Those investigations were formally concluded in June 2020, without any resulting prose-

cutions, even as evidence that information was withheld from the inquiry came to light.

Northmoor was arguably part of an ongoing strategy of avoidance reliant on institutional design, and it places the OTP in a difficult position. While the OTP has not ruled out investigating British crimes in Afghanistan, it is constrained by the findings of Operation Northmoor and its own prior determination on the inadmissibility of allegations of British crimes in Iraq. In that situation, the OTP found that while there was a “reasonable basis to believe” war crimes were committed, it could not say there was a lack of genuineness to domestic proceedings (and therefore that it could not investigate the allegations), notwithstanding that a decade-long domestic investigation produced no prosecutions. Given the facial comparability of the domestic “investigations”, there is reason to believe the OTP will find that the British strategy of delay, inadequate investigation, and non-prosecution again satisfies complementarity requirements.

### **Canadian obstinance**

In contrast to the approaches of its allies, Canada has adopted a hard line of denialism and suppression. While the US and UK have mixed gestures towards genuine investigations with other more stringent means of precluding accountability that are at least attentive to the

risk of ICC investigation and prosecution, Canada has simply filibustered when presented with allegations that its troops were complicit in crimes in Afghanistan.

These allegations rest primarily on the relationship between the Canadian Armed Forces (CAF) and the Afghan National Directorate of Security (NDS). Canadian diplomat Richard Colvin, who served in Afghanistan for 17 months, testified to a parliamentary committee in 2009 that “the likelihood is that all the Afghans we handed over [to the NDS] were tortured”; this included being “beaten, subjected to electric shocks, denied sleep, and raped or otherwise sexually abused.” Colvin had reported this information to superiors in May 2006, was warned off, and then threatened with legal action. A former Afghan interpreter for the CAF’s intelligence unit testified that the CAF “used the NDS as a subcontractor for abuse and torture”. In response to Colvin’s testimony, opposition parties called for the government to release all documents on detainee abuses. Parliament was instead prorogued for an election, and ultimately only 4,000 of the estimated 40,000 documents were released in heavily redacted form. One year later, the inquiry was simply closed.

Changes in government and additional allegations have not altered the pattern of denialism and non-investigation: there were “no concerns raised” about Canadian participation in missions with Australian special forces later accused of war crimes; Canadian troops re-

fused to cooperate with investigators in respect of abuse allegations; and, there is no need for an independent inquiry, according to the current Defence Minister (who himself served in the CAF's intelligence unit in Afghanistan).

### **Implications of exceptionalist practices**

This survey of practices in relation to the war on terror reveals that the relatively capacious label of exceptionalism captures a wide range of conduct, and that states often pursue exceptionalist protection on multiple tracks simultaneously. The first way in which this happens is through the obvious forms of denialism, threats and obstruction that all states are capable of engaging in.

At least two other relevant observations lie beyond this straightforward blunt-force approach. Importantly, exceptionalism is interactive, responsive to both international and domestic influences. Domestic pressure can emanate from civil society as well as within the government or military. This can prompt changes in domestic law in order to preclude findings of international law violations. It can also lead to not just contestation with non-state actors, but an alignment of interests. In the US, that alignment is aimed at a normative engagement with the ICC, toward the goal of concretizing the exceptional status of the US.

Relatedly, exceptionalism in the context of international crimes frequently relies on two sites of flexibility in the ICC admissibility regime. First, accountability avoidance can flow from complementarity obfuscation: the performance of genuine proceedings as demonstrated by the breadth of investigations that are also shallow by design. Second, Western states seek to exploit the gravity threshold by minimizing the seriousness of allegations. This is done either by modifying the *tu quoque* argument to point at the comparable gravity of acts of other parties to a conflict, or suppressing relevant information that would reveal the true scale and severity of Western acts. Both of these minimization tactics are available to (and have been practiced by) non-Western states and non-state parties to conflicts, but states with more robust legal systems may also start to scale up their complementarity efforts in pursuit of the volume-based, bureaucratic negation of international jurisdiction that the US and UK have modelled.

Ultimately, however, the success or propriety of these modes of avoidance is determined in part by the toleration and interpretation of domestic processes by international agents such as the OTP. Regardless of whether the ICC is as tolerant of non-Western states engaging in similar projects, it faces a serious legitimacy threat: either it will demonstrate its tacit acceptance of double-standards in international law, or it will be accused of failing to protect the victims of atrocities.

The powerful Western state that is exceptional in (or even exempted from parts of) international law is not a fixed category but an evolving one. This ongoing evolution means exceptionalism can be both pursued and challenged at multiple sites. This in turn suggests that while powerful states may disproportionately enjoy the benefits of exceptionalism, other states can apply some of the same tactics for similar benefits. With respect to the ICC, non-Western states have traditionally relied upon more direct forms of obstruction, including non-cooperation and threatening ICC officials. Witness interference also appears problematic. While charges of interference have only been laid in respect of two ICC cases, credible allegations of interference – which require some degree of coordination that could plausibly emanate from states or parties to conflicts – have been raised in many more.

Interestingly, some efforts at excepting non-Western states from the application of the Rome Statute have taken the form of collective efforts to rely on legal arguments. The repeated non-arrest of Omar al-Bashir by multiple States Parties was part of a larger debate about immunities, non-State Parties, and the powers of the Security Council (itself an incubator for “exceptional” states). As well, the attempts to have the investigation into Sudan deferred was the product of an African Union request to the Security Council to act under Article 16 of the Rome Statute. While these approaches

may lack some of the ulterior motives present in other strategies outlined above, it is telling that they rely on collective legal argumentation rather than the individualized approaches of the US, UK and Canada. This suggests a recognition on the part of some states that they do not have the requisite status or resources to act alone.

What this survey overall suggests is that Western exceptionalism might lie not in the fact of non-applicability of international law, but in the consistent enjoyment of non-applicability or reduced burdens. A hidden cost of the war on terror may therefore be that international norms and institutions that Western states otherwise promote are diminished through both the direct practices of those states as well as their legitimation and further dispersal of tactics of avoidance.



*Thilo Marauhn, Daniel Mengeler und Vera Strobel*

**Verletzung von Schutzpflichten durch die  
Bundesrepublik in Afghanistan?**

*Verfassungsrechtliche und völkerrechtliche Implikationen  
im Fall der Beendigung einer militärischen Intervention*





Der Abzug ausländischer Streitkräfte aus Afghanistan fast 20 Jahre nach der durch die Terroranschläge vom 11. September 2001 ausgelösten militärischen Intervention im Rahmen der sogenannten *Operation Enduring Freedom* löste dramatische Entwicklungen aus. Denn fast zeitgleich zur Ankündigung und Durchführung des Truppenabzugs nahmen die Taliban innerhalb kürzester Zeit große Teile Afghanistans ein und brachten das Staatsgebiet weitgehend ohne militärische Auseinandersetzung unter ihre Kontrolle. Zahlreiche Menschen, darunter Entwicklungshelfer\*innen, Ortskräfte, Lehrkräfte, Medienvertreter\*innen und viele andere, sahen und sehen sich durch die Herrschaft der Taliban Gefahren für Leib und Leben ausgesetzt. Sie fürchten um ihre freiheitliche Lebensweise. Mit Blick auf den Abzug von Angehörigen der Bundeswehr stellt sich die Frage, ob und in welchem Umfang die Bundesrepublik Deutschland verfassungs- und völkerrechtlichen Schutzpflichten zugunsten bestimmter gefährdeter Personen unterworfen war und ist – und zwar nicht nur im Hinblick auf eigene Staatsangehörige, sondern auch zugunsten weiterer Personen, auch über die eng umgrenzte Gruppe der sogenannten Ortskräfte hinaus. In Anbetracht der Gefahrensituation versuchte die Bundesregierung durch Notevakuierungsmissionen, Ortskräfte sowie – neben Staatsangehörigen aus Deutschland und weiteren Ländern des globalen Nordens – besonders gefährdete Personen über den Flugha-

fen Kabul außer Landes zu bringen. Den kurzfristigen Evakuierungen ging eine unzutreffende Lageeinschätzung der beteiligten Staaten voraus. Deshalb musste die Ausreise entgegen der ursprünglichen Planung statt über mehrere Monate hinweg innerhalb weniger Tage erfolgen. Viele Menschen konnten nicht mehr rechtzeitig ausreisen und sind nun möglicherweise Racheakten der Taliban, aber auch freiheitsverletzender Repression ausgeliefert.

Die Frage nach der Verantwortung für die entstandene Situation und für die Folgen des überstürzten und teilweise chaotischen Truppenabzugs wurde deshalb in den vergangenen Wochen intensiv aufgeworfen und kontrovers diskutiert. Neben der politischen stellt sich die Frage nach der rechtlichen Verantwortung der Bundesrepublik Deutschland. Ausgehend von der Grundrechtsbindung im Bereich der Außen- und Sicherheitspolitik analysieren wir die Anforderungen von grundrechtlichen Schutzpflichten und ihre Überformung durch das Völkerrecht im Fall der Beendigung einer militärischen Intervention. Dabei greifen wir auch die völkerrechtliche Schutzverantwortung und die humanitär-völkerrechtliche Pflicht zur Hilfeleistung auf. Wir kommen zu dem Zwischenergebnis, dass die Bundesrepublik Deutschland ihren grundrechtlichen Schutzpflichten – vor allem jener des Lebensschutzes gemäß Art. 2 Abs. 2 S. 1 GG – und völkerrechtlichen Verpflichtungen nicht in vollem Umfang nachgekom-

men ist. Es sind – so unsere vorläufige Analyse – verfassungs- und völkerrechtliche Pflichten verletzt worden.

### **Grundrechtsbindung in extraterritorialen Konstellationen und Bestehen einer Schutzpflicht**

Ausgangspunkt ist die aus Art. 1 Abs. 3 GG resultierende umfassende Grundrechtsbindung der durch das Grundgesetz konstituierten deutschen Hoheitsgewalt. Diese ist von den konkreten grundrechtlichen Anforderungen im Einzelfall zu unterscheiden. Die Grundrechtsbindung besteht unabhängig von einem territorialen Bezug zum Bundesgebiet oder der Ausübung spezifischer Hoheitsbefugnisse. In seinem BND-Urteil aus dem Jahr 2020 hat das BVerfG klargestellt, dass die Grundrechtsbindung auch bei extraterritorialen Sachverhalten keinen Relativierungen unterliegt. Das Gericht signalisiert, partiell bekräftigt durch den „Klima-Beschluss“, dass dies prinzipiell auch für die Schutzpflichtdimension der Grundrechte gilt, auch wenn hinsichtlich der konkreten grundrechtlichen Anforderungen graduell abgestuft werden müsse. Zwar muss prinzipiell ein Bezug zur deutschen Hoheitsgewalt bestehen, jedoch ist grundsätzlich weder für die Grundrechtsbindung noch für die Entstehung einer Schutzpflicht ein besonders qualifizierter Bezug zum deutschen Staat erforderlich. Dabei kommt es weder auf das Vorliegen einer deutschen Staatsangehörigkeit noch

auf die Personalhoheit der deutschen Staatsgewalt an, wie noch von älteren Schutzpflichtlehren teilweise gefordert. Die Grundrechte binden die deutschen Entscheidungsträger auch im Ausland gegenüber ausländischen Staatsangehörigen. Sie greifen auch zugunsten Betroffener in Afghanistan. Weitergehend wird teilweise, wie zuletzt durch das BVerwG in seinem Urteil zu US-Drohnenangriffen mittels der Ramstein Air Base, das einschränkende Kriterium einer politischen Entscheidungsverantwortung der deutschen Staatsgewalt als notwendige Voraussetzung für die Grundrechtsbindung gefordert. Dieses Kriterium ist unserer Auffassung nach dogmatisch unzutreffend, im vorliegenden Fall aber erfüllt – und zwar jedenfalls durch ein Mitverschulden der Gefahrenlage in Afghanistan im Rahmen der militärischen Intervention und ausschnittweisen effektiven Gebietsherrschaft durch die beteiligten NATO-Staaten.

Von der extraterritorialen Grundrechtsbindung zu trennen sind die tatbestandlichen Voraussetzungen für das Bestehen einer extraterritorialen Schutzpflicht. Auch wenn man den Truppenabzug nach einer Intervention durchaus als Eingriffskonstellation einordnen könnte, problematisieren wir in diesem Beitrag die Schutzpflichtkonstellation. Vorliegend sind unter anderem das Leben und die körperliche Unversehrtheit von Menschen betroffen. Es kommt daher eine Schutzpflicht aus Art. 2 Abs. 2 S. 1 GG in Betracht. Hierfür sind

weder ein hinreichend qualifizierter Bezug zum deutschen Staatsgebiet noch andere besondere Voraussetzungen zu fordern. Die Verantwortlichkeit richtet sich vielmehr nach den Gefährdungen der grundrechtlichen Schutzgüter, die sowohl auf deutschem Staatsgebiet, jedoch ebenso durch die Eröffnung faktischer Handlungsspielräume im Ausland entstehen können – auch gegenüber ausländischen Staatsangehörigen. Positive Handlungspflichten bestehen vorliegend bereits durch das mitwirkende militärische Gefährdungshandeln der Bundesrepublik Deutschland auf fremdem Staatsgebiet durch den Auslandseinsatz der Bundeswehr als solchen.

Bei bestehendem Schutzbedarf für das Leben und die körperliche Unversehrtheit lässt sich eine Schutzpflicht schon aus Art. 1 Abs. 1 GG und aus den objektiv-rechtlichen Grundrechtsgehalten des Art. 2 Abs. 2 S. 1 GG herleiten. Im konkreten Fall lässt sich ein solcher Schutzbedarf für die durch das gefährdende Vorverhalten an der militärischen Intervention beteiligten, in Mission für Deutschland aktiven sowie sich in Afghanistan aufhaltenden deutschen Staatsangehörigen ausmachen. Ähnliches gilt für von anderen intervenierenden Staaten angestellte oder sich anderweitig für die Ziele der Mission einsetzende Personen in Afghanistan. Trotz entgegengesetzter Ziele hat die militärische Intervention die Gefahr bewaffneter Auseinandersetzungen und terroristischer Angriffe durch die Taliban sowie Al-Qaida und später auch durch

den sogenannten Islamischen Staat nicht beseitigt, sondern verschärft. Mit dem Abzug der intervenierenden Streitkräfte tritt das mit der *de-facto*-Herrschaft der Taliban verbundene Gefährdungspotenzial für das Leben und die körperliche Unversehrtheit deutscher und anderer ausländischer Staatsangehöriger sowie sogenannter Ortskräfte und weiterer besonders vulnerabler oder durch die Taliban bedrohter Bevölkerungsgruppen hinzu. Diese Gefahr anerkennend wurden jedenfalls gegenüber afghanischen Ortskräften mündliche Zusagen für eine mögliche Ausreise nach Deutschland mittels besonderer Visaerteilungen getroffen. Hier sind möglicherweise arbeitsvertragliche Pflichten sowie nachvertragliche Fürsorgepflichten zu berücksichtigen, die nach cursorischer Einschätzung der bekannten Tatsachen nur unzureichend erfüllt wurden. Damit lässt sich insgesamt ein grundrechtsrelevanter Schutzbedarf konstatieren. Es ist deshalb vorliegend eine grundrechtliche Schutzpflicht für diese Personen und Gruppen entstanden.

### Erfüllung der grundrechtlichen Schutzpflicht

Nach der Rechtsprechung des BVerfG kommt der schutzverpflichteten Gewalt ein weiter Einschätzungs-, Wertungs- und Gestaltungsspielraum zu. Schutzmaßnahmen dürfen nicht vollständig unterlassen werden, gänzlich ungeeignet oder völlig unzulänglich sein. In



auswärtigen Angelegenheiten erfährt dieser Spielraum nach dem BVerfG eine zusätzliche Erweiterung. Die Anforderungen an die zur Erfüllung der Schutzpflicht ergriffenen Maßnahmen hängen dabei entscheidend vom konkreten Schutzbedürfnis der gefährdeten grundrechtlichen Güter ab. Insbesondere kommt es darauf an, inwiefern die betroffenen Personen sich selbst der Gefahrenlage entziehen können, inwieweit die Gefährdungen durch die grundrechtsverpflichtete Hoheitsgewalt hervorgerufen oder noch verstärkt wurden und wie groß das Ausmaß der Gefährdung für das konkret infrage stehende grundrechtlich geschützte Rechtsgut sind. Ausgangspunkt in Afghanistan ist die eingeräumte falsche Lageeinschätzung durch deutsche Behörden, verantwortet durch die Bundesregierung, in Zusammenarbeit mit ausländischen Geheimdiensten sowie örtlichen Expert\*innen in Bezug auf die Machtergreifung der Taliban. Diese Lageeinschätzung machte kurzfristige Evakuierungsflüge durch die Bundeswehr notwendig, um Menschen die Ausreise aus Afghanistan zu ermöglichen und drohende Lebensgefahren insbesondere von sogenannten Ortskräften abzuwenden.

Es konnten Schätzungen zufolge durch ausländische Rettungsflüge circa 150.000 Menschen aus Afghanistan geflogen werden. Durch die deutsche Bundeswehr wurden nach Angaben des Auswärtigen Amts lediglich circa 5.000 Menschen ausgeflogen. Es wurde vorgetragen, dass aufgrund faktisch begrenzter Möglichkeiten sowie

verschiedener Gefahrenquellen und wiederum Schutzpflichten für das Evakuierungspersonal nicht mehr Menschen gerettet werden konnten. Viele Afghan\*innen, die für deutsche Institutionen und Organisationen tätig waren und dadurch nach Medienberichten in ihrem Leben und ihrer körperlichen Unversehrtheit durch Racheakte von Mitgliedern der Taliban gefährdet sind, wurden wie ihre gleichfalls gefährdeten Familienangehörigen zurückgelassen. Diese müssen nun aller Voraussicht nach überwiegend in Afghanistan verbleiben – ebenso wie zahlreiche weitere besonders gefährdete und vulnerable Personen. All diese Menschen sind damit der Herrschaft der Taliban überwiegend schutzlos ausgeliefert und weitgehend ohne Möglichkeit einer Flucht vor drohenden Todesgefahren.

Die Schutzpflicht besteht unabhängig vom tatsächlichen verspäteten und chaotischen Verlauf der Evakuierungen. Ein geordnetes, rechtzeitig durchgeführtes Verfahren zum Schutz dieser Menschen wäre Indiz für eine hinreichende Erfüllung der grundrechtlichen Schutzpflicht gewesen. Ursprünglich war man von einem mehrmonatigen Zeitfenster für die Ausreise deutscher Staatsangehöriger und bestimmter afghanischer Staatsangehöriger nach dem Truppenabzug ausgegangen. Menschen in Afghanistan, die spezifische Anforderungen – etwa eine erhöhte Gefährdung durch die Taliban als sogenannte Ortskraft – erfüllen, sollten ein Verfahren für einen Aufenthaltstitel basierend auf einer

Aufnahmezusage im Ermessen des Bundesinnenministeriums nach § 22 S. 2 AufenthG durchlaufen. Darin sehen wir eine Anerkennung des Schutzbedarfs und des Bestehens einer Schutzpflicht. Die Bundesregierung und deutsche Behörden beharrten jedoch auf diesem restriktiv angewandten und langwierigen Verfahren sowie der überwiegend selbst zu finanzierenden Einreise nach Deutschland trotz zahlreicher Warnungen und Forderungen nach einem zeitnah umfassenden Handeln. So wurde insbesondere ein Antrag im Bundestag zur Aufnahme sogenannter Ortskräfte abgelehnt. Aufnahmeprogramme gemäß § 23 AufenthG sowie weitere Schutzmaßnahmen hätten schon frühzeitig für besonders vulnerable oder gefährdete Personen(gruppen) eingerichtet werden können.

Besonders muss darauf hingewiesen werden, dass bei sogenannten Ortskräften durch die Bundesregierung berechtigtes Vertrauen erweckt wurde, dass die Ausreise zeitnah vor dem Vormarsch der Taliban ermöglicht werde. Daher hatten sich viele Personen hierauf verlassen und keine Zuflucht in Nachbarländern gesucht. Aufgrund des tatsächlich sehr kurzen Zeitfensters für eine mögliche Ausreise wurde kurzfristig ein eher intransparentes Verfahren zur Überprüfung und Feststellung besonders gefährdeter Personen aufgelegt. Es wurden nur bestimmte Personen aus Afghanistan notevakuiert, statt umfassend, schnell und unbürokratisch humanitäre Hilfe zu leisten. Verfahren des Einreise- und Aufent-

haltsrechts wurden aus politischen Gründen trotz der akuten humanitären Notsituation zur Kontrolle und Steuerung von Fluchtbewegungen verwendet, ohne dem grundrechtlichen Schutzbedarf hinreichend etwa durch Ausnahmeregelungen nachzukommen. Aus flüchtlings- und migrationsrechtlicher Perspektive ist darüber hinaus zu beachten, dass die intervenierenden Staaten selbst – zumindest mittelbar – Ursachen gesetzt haben, die zur potenziellen politischen und religiösen Verfolgung durch die Taliban geführt, und somit die Gründe für eine angestrebte Flucht mit bewirkt haben. Denn gerade die Einbindung sogenannter Ortskräfte durch die intervenierenden Staaten ist heute ein wesentlicher Grund für die Verfolgung durch die Taliban und damit eine mittelbare Fluchtursache. Nachdem sich durch die *de facto* Machtübernahme der Taliban sowie das Verhalten der Nachbarländer eine Fluchtmöglichkeit allein auf den Flughafen Kabul beschränkt hatte, stellt sich die Nicht-Rettung aus Afghanistan wie eine Zurückweisung und damit wie ein schutzloses Zurücklassen angesichts von Lebensgefahren dar.

### Völkerrechtliche Überformung der Schutzpflicht

Zu den erfüllungsseitigen Anforderungen an die grundrechtliche Schutzpflicht gehören auch völkerrechtliche Aspekte, die den Spielraum der Exekutive lenken und bestimmen. Das für die Bundesrepublik geltende Völ-

kervertrags- und Völkergewohnheitsrecht legen der Bundesregierung verschiedene Pflichten auf, die insbesondere aufgrund des menschenrechtlichen Bezuges im Rahmen der Europäischen Menschenrechtskonvention (EMRK) bei der Auslegung der grundrechtlichen Schutzpflicht zu beachten sind. Menschenrechtliche Aspekte seien aufgrund der komplexen Fragestellungen hier nur am Rande erwähnt. Jedenfalls finden die EMRK sowie der Internationale Pakt über bürgerliche und politische Rechte (IPbpR) grundsätzlich auch in extraterritorialen Konstellationen Anwendung. Die grundrechtlichen Schutzpflichten sind im Lichte der Verpflichtungen aus der EMRK und dem IPbpR – soweit diese im konkreten Fall anwendbar sind – zu konturieren und zu erfüllen.

Neben der menschenrechtlichen Perspektive sind jedoch auch weitere völkerrechtliche Aspekte hinsichtlich der Schutzverpflichtungen der Bundesregierung zu beachten. Mit der Ausübung von Hoheitsgewalt – auch im Rahmen einer militärischen Intervention – sind völkerrechtliche Pflichten verbunden, die unbeschadet der umstrittenen Rechtsnatur des Konzepts der Schutzverantwortung, in diesem paradigmatisch zum Ausdruck kommen. Dieses Konzept formuliert die Verantwortung eines Hoheitsträgers für den Schutz der ihm unterworfenen Bevölkerung vor schwersten Menschenrechtsverletzungen. Als weitere Säule beinhaltet es inter-

nationale Unterstützung zur Verhinderung solcher Menschenrechtsverletzungen. Hier ist zu erinnern, dass die afghanische Regierung dem Einsatz der ausländischen Streitkräfte in Afghanistan zugestimmt und mit diesen Vereinbarungen zum Abzug getroffen hatte. Gegenüber der afghanischen Bevölkerung sind damit sowohl die afghanische Regierung als auch die durch ihren militärischen Einsatz Hoheitsgewalt ausübenden Staaten der völkerrechtlichen Schutzverantwortung unterworfen. Daraus resultiert im konkreten Fall die Pflicht, vorsorgliche Maßnahmen zum Schutz der Bevölkerung im Vorfeld des Truppenabzugs zu treffen. Deshalb waren die an den Auslandseinsätzen in Afghanistan beteiligten Staaten zur Organisation eines geordneten Abzugs verpflichtet, um zu verhindern, dass weite Teile der Bevölkerung schutzlos Lebensgefahren ausgesetzt werden. Es mussten zumindest hinreichende Schutzvorkehrungen getroffen werden. Die Bundesregierung hat diesen Verpflichtungen selbst bei der sich abzeichnenden schnellen Machtübernahme der Taliban nicht umfassend Rechnung getragen, weil sie nicht alle Möglichkeiten zur Rettung von Menschenleben ausgeschöpft und trotz der humanitären Notsituation an etablierten Verfahren zur Steuerung und Begrenzung von Fluchtmöglichkeiten festgehalten hat.

In Afghanistan bestand darüber hinaus die letzten beiden Jahrzehnte ein nicht-internationaler bewaffneter Konflikt, für den die Verpflichtungen des humanitä-

ren Völkerrechts zu beachten waren. Auch wenn die afghanischen Streitkräfte den Kämpfern der Taliban weitgehend kampflos das Feld überlassen haben und die ausländischen Truppen abgezogen sind, bleibt für eine (umstrittene) Übergangszeit humanitäres Völkerrecht weiter anwendbar. Dieser Aspekt wird unter dem Begriff des *ius post bellum* thematisiert. Erst wenn von einer dauerhaften und nachhaltigen Beendigung des nicht-internationalen bewaffneten Konflikts im Rahmen der faktischen Machtübernahme der Taliban gesprochen werden kann, erlöschen humanitär-völkerrechtliche Pflichten in Bezug auf das ehemalige Konfliktgeschehen und damit auch Regelungen zur humanitären Hilfeleistung im Zusammenhang mit der Vorbereitung des Truppenabzugs und hierdurch ausgelöster humanitärer Hilfsbedarfe. Soweit die Bundeswehr auf Seiten der afghanischen Regierung zumindest mittelbar als Konfliktpartei einzuordnen war, bildet dies einen Anhaltspunkt für eine solche Pflicht zur humanitären Hilfeleistung in dieser Funktion. Auch wenn für Nicht-Konfliktparteien keine Pflicht zur Hilfeleistung besteht, gibt es doch gute Argumente für ein Recht zur Hilfeleistung jenseits der zumindest mittelbaren Beteiligung an einem nicht-internationalen bewaffneten Konflikt. Es ist denkbar, dass ein solches Recht im konkreten Fall durch die Beteiligung Deutschlands an der Intervention sowie am Aufbau ziviler Strukturen in Afghanistan zur Pflicht geworden ist.

## Fazit

Im Ergebnis bestehen aufgrund unserer vorläufigen Analyse in Bezug auf die Beendigung einer militärischen Intervention wie jener in Afghanistan Schutzpflichten der deutschen Staatsgewalt nach dem Grundgesetz, bei deren Erfüllung auch völkerrechtliche Verpflichtungen zu beachten sind. Diesen Schutzpflichten ist die Bundesrepublik nur unzureichend nachgekommen, so dass die Pflicht zum Schutz des Lebens und der körperlichen Unversehrtheit in verschiedenen Stadien der Beendigung gegenüber zahlreichen Grundrechtsträger\*innen verletzt wurde. Unabhängig von der Frage, ob Gerichte diese Argumente ihrer Entscheidung zugrunde legen würden, ist eine verfassungspolitische Verantwortung der Bundesregierung für eine angemessene Konfliktfolgenbewältigung gegeben. Wünschenswert ist, dass die Bundesregierung die Grundrechte als Handlungsanleitung und Orientierungshilfe ihrer Politik zugrunde legt. Schutzpflichten bestehen auch nach dem vollständigen Truppenabzug weiterhin und verlangen Maßnahmen zum Schutz gefährdeter Afghan\*innen.

Durch die Geschehnisse zeigen sich einmal mehr die mannigfaltigen Herausforderungen, die sich bei Auslandseinsätzen stellen. Die Anforderungen der Grundrechtsbindung und Schutzverpflichtung enden nicht mit der Beendigung eines Auslandseinsatzes. Sie inten-



sivieren sich vielmehr, wenn hierdurch das konkrete Gefährdungspotential steigt und Schutzbedarf ausgelöst wird, wenn berechtigtes Vertrauen erzeugt wird, dass diesem Rechnung getragen werde. Eine hinreichende Schutzpflichtenerfüllung erfordert eine sorgfältige Prüfung, vorsorgliches und frühzeitiges Handeln und eine Berücksichtigung früher Warnungen sowie Schutzkonzepte und organisiertes, kurzfristiges Vorgehen, um humanitäre Notlagen und Lebensgefahren zu vermeiden und sie nicht selbst durch eigenes Verhalten hervorzurufen oder gar zu intensivieren.



*Norman Paech*

## Afghanistan - wer schützt das Völkerrecht?





**I**n einem sind sich politische Parteien, Medien und Öffentlichkeit einig: ob man den Rückzug der Bundeswehr aus Afghanistan nun Desaster, Debakel oder Niederlage nennt, er soll gründlich analysiert werden, und mit ihm der gesamte Einsatz seit 2001. Bei aller Skepsis, ob das bei der ständig betonten weltweiten Verantwortung der Bundesrepublik wirklich tiefgreifend geschieht, ist ein Defizit schon heute offensichtlich. Die völkerrechtliche Legitimation des Kriegseinsatzes steht nicht zur Debatte. Doch muss eine unvoreingenommene Analyse zu dem Ergebnis kommen: der Krieg begann mit einem Verstoß gegen das Völkerrecht, produzierte in seinen 20 Jahren zahlreiche Kriegsverbrechen und endete nun mit einem letzten Bruch des Völkerrechts.

### Verteidigung oder Aggression?

Gehen wir an den Anfang. Schon einen Tag nach dem historischen Anschlag auf das World Trade Center wusste die US-Regierung, wer ihn zu verantworten hatte und wo der Verantwortliche sich aufhielt. Sie beantragte am 12. September 2001 bei dem UN-Sicherheitsrat ein Mandat für einen Angriff auf Afghanistan, wo sich Bin Laden versteckt hielt. Doch der Sicherheitsrat verweigerte eine derartiges Mandat. In seiner Resolution 1368 vom gleichen Tag sah er in dem Anschlag zwar eine „Bedrohung des Weltfriedens und

der internationalen Sicherheit“, die gemäß Art. 39 und 42 UNO-Charta Voraussetzung für eine militärische Antwort ist. Er stufte die Angriffe jedoch als „terroristische Handlungen“ ein, auf die nicht wie auf Kriegsakte mit militärischen Mittel der UNO-Charta reagiert werden kann. Terrorakte sind Gewalt von nichtstaatlichen Akteuren gegen Zivilisten oder zivile Objekte und werden nach den zahlreichen Anti-Terrorkonventionen bekämpft. So etwa nach den Regeln der „Montreal-Konvention von 1971 zur Bekämpfung widerrechtlicher Handlungen gegen die Sicherheit der Zivilluftfahrt“, der „Konvention gegen Geiselnahme“ von 1979 oder dem „Übereinkommen gegen Geiselnahme“ von 1999. Da alle 19 Piloten bei den Angriffen ums Leben gekommen waren, hätten die USA auf der Basis der „Montreal-Konvention“ Verhandlungen eröffnen sollen, nach Bin Laden fahnden lassen und seine Auslieferung verlangen können. Diese war übrigens von den Taliban verschiedentlich angeboten worden. Am 28. September versuchte Bush noch einmal, die Zustimmung für militärische Gewalt zu bekommen, er sprach nun von „Akten des Krieges“. Er scheiterte aber wiederum, der Sicherheitsrat bezeichnete die Angriffe in seiner Resolution 1373 erneut als „terroristische Akte“.

Am 7. Oktober teilte Botschafter Negroponte dem Sicherheitsrat mit, dass die USA nunmehr ihr Recht auf Selbstverteidigung gemäß Art. 51 UNO-Charta in Anspruch nehmen wollten. Die „Operation Enduring Free-

dom“ (OEF) dauerte bis zum 31. Dezember 2014. Doch auch diese Rechtsgrundlage trifft nicht zu, da terroristische Handlungen kein Recht auf Selbstverteidigung mit militärischen Mitteln auslösen. Es gab damals keine Beweise, dass die Taliban als afghanische Regierung hinter den Anschlägen standen. Wie Verteidigungsminister Powell in einem Interview mit der „New York Times“ sagte, gab es nicht einmal Indizien gegen Bin Laden. Eine Anklage hätte nicht einmal vor einem normalen Strafgericht standgehalten. Es gab schlicht keine völkerrechtliche Grundlage für den Angriff auf Afghanistan.

Damit fehlte auch dem Beschluss der NATO am 12. Oktober, mit dem sie den Bündnisfall nach Art. 5 NATO-Vertrag ausrief, die rechtliche Grundlage. Die USA waren nicht militärisch angegriffen worden, die NATO konnte sich nicht auf die Legitimation „kollektiver Selbstverteidigung“ nach Art. 51 UNO-Charta berufen. Gegen Terrorakte wie im Fall Lockerbie oder der Anschläge auf die Botschaften der USA in Afrika hatte es ebenfalls keinen Bündnisfall gegeben.

Selbst wenn man der US-amerikanischen Argumentation folgt, lässt sich eine solche Verteidigungslegitimation nicht über Jahre hin begründen. Art. 51 UNO-Charta lässt Maßnahmen der individuellen und kollektiven Selbstverteidigung nur so lange zu, „bis der Sicherheitsrat die zur Wahrung des Weltfriedens und der internationalen Sicherheit erforderlichen Maßnahmen

getroffen hat“. Dies war aber schon im Dezember 2001 mit der Einrichtung der International Security Assistance Force (ISAF) der Fall. Selbstverteidigung setzt die Gefahr eines unmittelbaren Angriffs auf das eigene Territorium oder das eines Bündnispartners voraus. Mit der Beseitigung der Talibanherrschaft im Herbst 2001 und der Vertreibung Osama Bin Ladens und der Al Qaida aus den Grenzgebirgen Afghanistans war der *Verteidigungsauftrag* der Militärintervention OEF erfüllt. Es drohte keine unmittelbare und gegenwärtige Gefahr mehr für das Territorium der USA, geschweige denn für Deutschland.

Eine Legitimation lässt sich auch nicht aus Resolution 1386 (2001) herleiten, mit der der Sicherheitsrat am 20. Dezember 2001 ein zunächst auf sechs Monate begrenztes Mandat zur Aufstellung einer internationalen Sicherheitsunterstützungstruppe in Afghanistan beschloss. Obwohl es auf Kapitel VII der UNO-Charta basierend die Anwendung von Waffengewalt legitimierte, war es nur ein Mandat zur Friedenssicherung, zunächst in Kabul. Es wurde später mit der UN-Resolution 1510 vom 13. Oktober 2003 auf andere Landesteile ausgeweitet. Es war kein Mandat zur Terrorbekämpfung und wurde lange Zeit strikt vom OEF-Einsatz getrennt.



## Nur Kriegsverbrechen der Taliban?

Die zahllosen Toten und Verletzten unter der Zivilbevölkerung, die immer wiederkehrenden Berichte über Folter, Flucht und Vertreibung, die „Irrtümer“ beim Einsatz von Kampfdrohnen dokumentieren massive Verletzungen des humanitären Völkerrechts während der 20 Jahre Krieg. Die ehemalige Chefanklägerin des Internationalen Strafgerichtshofes, Fatou Bensouda, hatte bereits Untersuchungen wegen Kriegsverbrechen in die Wege geleitet. Ihr Nachfolger Karim Khan hat sie jedoch, wahrscheinlich auf Druck der USA, wieder eingestellt, aber Untersuchungen wegen Kriegsverbrechen der Taliban angekündigt. Selbst ein Kriegsverbrechen wie die Bombardierung eines Tanklastzuges am Kundusfluss im September 2009, bei dem über 100 Zivilisten umgekommen sind, blieb ohne strafgerichtliche Klärung<sup>1</sup> und angemessene Entschädigung der Opfer. Nichts spricht dafür, dass die Aufarbeitung des Kriegsgeschehens nicht ebenso scheitert wie nach dem Überfall auf Ex-Jugoslawien 1999 (vgl. Carla Del Ponte, *Ich bin keine Heldin*, 2021, S. 65 ff).

## Ein letztes Mandat?

Schließlich das Ende dieses unrühmlichen Kriegszuges, der ein weitgehend zerstörtes Land und eine entwurzelte Gesellschaft hinterlässt. Während die Regierung mit

einem großen Zapfenstreich und Lobgesängen auf die Bundeswehr versucht, die Öffentlichkeit und sich selbst über das komplette Scheitern der Mission hinwegzutäuschen, wird vollkommen übersehen, dass auch dieses Ende mit einem Bruch des Völkerrechts besiegelt wird. Denn die Bundesregierung beantragte am 6. Oktober im Bundestag ein Mandat für die Bundeswehr, die Evakuierung ihrer Ortskräfte im Lande bis Ende September fortführen zu können. Für dieses Mandat benötigte sie aber ein Mandat des UNO-Sicherheitsrats oder die Zustimmung der neuen Machthaber im Land, da das alte Mandat mit der Flucht des Präsidenten Ashraf Ghani und dem Zusammenbruch seiner Regierung keine Gültigkeit für den geplanten Zeitraum mehr hatte. Es erweiterte zudem den Einsatzbereich der Bundeswehr auf ganz Afghanistan und setzte dem Kontingent „im Notfall“ keine zahlenmäßigen Grenzen. Das bedeutete einen schweren Eingriff in die Souveränität Afghanistans, und die große Mehrheit des Bundestags stimmte zu – ein klarer Verstoß gegen das Völkerrecht.

Die Regierung hatte ebenso wie die USA noch im August in Doha über eine Verlängerung des Mandats mit den Taliban verhandelt. Diese hatten abgelehnt, und die USA haben sich dem gefügt. Am Vorabend der Abstimmung im Bundestag hatte US-Präsident Biden den Rückzug der US-Truppen für den 31. August angekündigt. Alle Abgeordneten im Bundestag wussten also, dass ihr Mandat, über das sie abzustimmen hatten, ins Leere

ging, da bekannt war, dass die Bundeswehr ohne die Unterstützung der USA ihre Evakuierungsflüge über den verlassenen Flughafen nicht mehr fortsetzen konnte. Was veranlasste die Mehrheit der Abgeordneten, einem völkerrechtswidrigen und obendrein sinnlosen, da undurchführbaren Mandat zuzustimmen oder sich der Stimme zu enthalten? Der Regierung ging es offensichtlich darum, ihr Versäumnis einer frühzeitigen Evakuierung noch in letzter Minute in ein Zeichen moralischer Verantwortung zu verwandeln. Und der Bundestag stimmte zu, da auch ihn der Vorwurf der Untertassung traf – keine Sternstunde des Parlaments.

So bleibt nur die Hoffnung, dass dem notorischen Bekenntnis zum Völkerrecht und einer „regelbasierten Ordnung“ bei der nächsten Versuchung, mit der Bundeswehr Ordnung zu stiften, der gebotene Vorrang vor der Entscheidung eingeräumt wird.

## Hinweise

1 Nachdem die Generalbundesanwaltschaft 2010 ihre Ermittlungen nach einem Monat gem. § 170 II StPO eingestellt hatte, wie die große Kammer des Europäischen Gerichtshof für Menschenrechte mit 14 zu 3 Stimmen am 16. Februar 2021 die Beschwerde gegen die Einstellung zurück. Die deutsche Justiz habe zwar Fehler begangen, aber insgesamt ausreichend Ermittlungen angestellt und nicht gegen Art. 2 Europäische Menschenrechtskonvention verstoßen, Beschwerde 4871/16.



*Frédéric Mégret*

**Intermediate Solidarities: The Case of the Afghan  
Interpreters**





The Western imaginary of solidarity to distant others has long dominated discussions of Afghanistan: it was, for example, supposedly to save Afghan women that the invasion and occupation of the country was sometimes justified. This sort of solidarity, genuine or not, is in a largely cosmopolitan vein. At the same time, the fate of troop members and veterans has long evidenced much more national and communitarian types of solidarity: toward service members who have made sacrifices in the pursuit of the US's defence, for example, or at least foreign policy.

This commentary looks, instead, at what might be described as intermediary solidarities: neither national nor cosmopolitan but occupying a place in between that borrows characteristics of both. The 20 years following 9/11 have drawn on a wide range of local suppletives who have put themselves in harm's way to aid foreign interventions. The commentary takes as its case study the now emblematic case of Afghan interpreters formerly employed by Western armies (most notably the US, the UK and Canada). Specifically, it seeks to interrogate how one might frame duties owed to these individuals from a legal and rights perspective. It contrasts a transnational solidarity to former allies with a more critical international evaluation of the status of interpreters.

## The poverty of transnational imaginings of solidarity

The demand made on behalf of US Afghan personnel, to be clear, is often not only for an objective treatment: it is also for all intents and purposes for a *preferential* treatment in that among the tens of thousands (if not more) who would like to flee Afghanistan, it foregrounds the fate of a minority. This may be required from a humanitarian perspective because of the immediate threats that exist against them, although such threats exist against many individuals. Nonetheless, discourse on the basis of obligations to exfiltrate Afghan interpreters struggles to articulate exactly what the basis for their favoured treatment might be. It has a tendency to fall between the cracks created by competing paradigms, straddling the domestic and international as well as the private and public divides.

International law does not furnish categories of privileged personnel for the purposes of post-war relocation. One can see how one might want to concoct such a regime from the *jus post bellum*. From a broad Just War theory perspective, it might be contended that, having failed to implement one's war goals, one should at least not leave persons who directly assisted in the pursuit of those goals in a worse position than they were at the outset. Michael Walzer and others have specifically hinted at this.



Be that as it may as an ethical duty, the reality is that international humanitarian law for example is focused on duties towards former enemies (to liberate prisoners of war for example), not former allies. From the perspective of international human rights law, foreign troops hardly have “jurisdiction” over their former employees that would inform direct obligations towards them. Their fate *a priori* falls to be regulated by the default regime of refugee law. Under that reading, Afghan interpreters are certainly at risk of persecution and as such may be eligible for asylum. Unlike some of the rationales for relocation explored below in relation to the US, this has the advantage of being a claim that is exercisable, very theoretically, in any country. But this broad international framing has two drawbacks. First, it renders them vulnerable to all the complications associated with seeking refugee status including the inherent challenge of even being able to claim it. Second, it normalizes their fate, merely putting them in line with a host of persons from which one may think they ought to differ in some respects.

Instead, the obligation to Afghan interpreters, such as it is, may need to be framed on a transnational basis between the Afghan interpreters themselves and the US. This is irrespective of the fact that US veterans may feel and act as if they have their own personal duties to their former aides, or the possibility that at some point in the future the Afghan government would conclude

some kind of agreement with the US to facilitate the departure of Afghans (this is highly unlikely but something along those lines was once negotiated with the Vietnamese government by the OHCH in the form of the “orderly departure program”).

Rather than look at the broad framework of international law, the decisive site may be domestic law and policies, specifically immigration. It remains of course possible for states as a matter of their own immigration law to foreground the claims of particular, somehow meritorious individuals. In effect, this is what the US, Canada and the UK have done through special visa programs, cumbersome and not up to the task as they have proved in the circumstances. Such regimes do fast track applicants although they are also promoted on a merely humanitarian and *ex gratia* basis. They therefore do not provide a particularly strong basis for a notion of an obligation towards one’s former aides.

It may be useful here to think instead in terms of private law, at least by very rough analogy given the complexity of jurisdictional issues and the unlikelihood of conventional adjudication. To the best of this author’s knowledge, no contract recruiting local staff in Afghanistan included an actual promise of exfiltration and resettlement into the country of employment if things turned sour. It does not seem that such a promise could be implied without more as a matter of ordin-

ary contractual interpretation, since it is hardly an ordinary feature of employment contracts.

One track might be to think of the relation between interpreters and the US as a form of quasi-contract, preventing a party from unfairly benefiting from a situation at the other's expense. Yet this is an awkward construction given the existence of actual contracts. A somewhat similar lead would be to consider that a kind of promissory estoppel is involved, perhaps on the margins of actual contracts, in that specific representations were made by the US executive and military to Afghan employees that they would be taken care of. Those concerned might thus assert that they reasonably relied on such a promise (working with the US) and stand to suffer (death) if that promise is broken.

Alternatively, the situation has occasionally been said to give rise to a fiduciary obligation on Western states to act in the best interest of Afghan interpreters. Fiduciary obligations involve a duty of loyalty and care by agents with the ability to exercise discretion or power unilaterally in ways that can affect a beneficiary's interest. They arise when a person places trust in another to act in their best interest, which arguably Afghan employees have in relation to their US employer. A breach of fiduciary duty would arise as a result of the US having failed to act responsibly towards Afghans, for example by anticipating the risks to them and failing to adequately speed up the processing of their applications

or by displaying carelessness in protecting the confidentiality of employment records. The call, in short, is to think creatively about how particular duties of solidarity to former allies might be deployed transnationally.

### **“Traduttore, Traditore”?**

Imagining the duty as one owed by the state that employed them to former employees, however, provides only a partial picture based on a vision of US national interest and duties. A famous Italian aphorism has it that “to translate is to betray”. This is of course concerned with a rather inoffensive form of linguistic betrayal. The question bears asking, however, how one should conceptualize the role of Iraqi or Afghan “interpreters” in the broader scheme of things and whether their translating, regardless of its linguistic fidelity, constituted a political betrayal of a deeper kind. I use “interpreters” here in the strict sense but also in the broader sense of some persons acting as go-betweens and facilitators for US occupation in Afghanistan and Iraq.

Because their fate is currently so precarious, problematizing their position may appear to be unhelpful and ungenerous. And because the Taliban have themselves been in cahoots with various foreign secret services and transnational terrorist networks, for example, they seem to be in no position to blame anyone for their lack

of fidelity to Afghanistan. Certainly, many who have worked for US forces have done so for no other reason than because they needed to make a living. Whatever their status, moreover, nothing justifies that they be treated unlawfully and in violation of their rights.

But a certain patriotic US discourse of solidarity with individuals who risked their lives based on sentimental stories of camaraderie between soldiers and their helpers can blind us to the reality that *prima facie* working for occupying troops, has long been seen as problematic, and not just by the Taliban. This is especially so when an occupation results from an illegal invasion or overstays its welcome or is problematic from a humanitarian point of view. One may come to be seen nationally, in ways that are at least *prima facie* plausible, as a traitor. The fact that one did so for lack of other professional opportunities or as a result of difficult circumstances or in an apolitical way has evidently not been a defence in other contexts. During the Second World War French *collaborateurs*, Jewish *Kappos*, and various *quislings* have gone down as being on the wrong side of history, and in some cases far worse. Closer to us, the fate of the Algerian *harki* has opened up a gaping wound in France-Algerian relations.

The emphasis on “interpreters” in public discourse masks the extent to which some who worked with and for the US had less neutral civilian roles and in their military capacity also occasionally exhibited harshness

and excess, with protection from occupying forces. In fact, behind the image of the meek interpreter lies a more complex reality where some interpreters were not only fully embedded in problematic US commandos (for example in assisting interrogations) but engaged in their own criminal initiatives. The occupation also thrived on indecent amounts of war profiteering and in other circumstances a change of regime might be an opportunity to prosecute some of it.

The argument that working for the Americans is not treachery can be made, but it is thus necessarily complex. The Americans, after a time, evidently gave way to an Afghan government that allowed their presence with the blessing of the Security Council. Working for foreign powers was thus fully validated, from a security or legal point of view, by the Afghan state at the time. Moreover, an argument might be made that whatever the errors of American presence in Afghanistan, the occupation served the broad purpose of rebuilding the country. That it did so whilst at least partly usurping Afghan sovereignty does not mean that, in working for the Americans, Afghan staff were not in a deeper way working for their own country. Such an argument may not be readily available in Iraq where the US presence was the result of an illegal invasion.

At any rate, this requires taking the US and international narrative about the invasion of Afghanistan at face value and not critiquing it too readily. It remains

that the Afghan government was largely propped up by the international presence. It served ambiguous ends. It was deeply corrupt. The Taliban may be a wretched, tyrannical and fanatic group but at least they cannot be accused of being a foreign invader. Their “victory” in reclaiming Afghanistan is less a validation of their military might or even political legitimacy than it is a complete disavowal of the Afghan regime that simply melted away in a matter of weeks once it was clear it would no longer have foreign backing.

### **Conclusion: the problem with intermediary solidarities**

One of the regrettable ironies of privileging the fate of Afghan supplicants may be that it is those who in some cases have most deeply been compromised in US imperial ventures who are singled out for evacuation. Although as it turns out, lack of strategic foresight, poor intelligence and administrative incompetence have made *even* the evacuation of close US allies difficult, this should not blind us to the fact that, amidst the colossal failure of 20 years of occupation of Afghanistan, it is the local relays of that occupation who are given a sort of normative pride of place.

This is even more problematic in Iraq, notwithstanding the sort of private transnational debt of gratitude that US personnel may have incurred towards individuals who served them dutifully. Of course, the agency of

those who worked is complex and deserves to be treated as such. It includes persons who had little choice; who made the best of a bad situation; and who may have thought that in less than ideal circumstances, assisting a foreign but modernizing international presence was a good bet on the long term for their country.

The failure to challenge the narrative of helping local aides, nonetheless, is one more failed opportunity to problematize the US invasion and occupation of Afghanistan, its broader connection to the “war on terror”, and responsibilities therein. The narrative of solidarity with Afghan allies should be tempered by an attention to how it can perversely make less visible no less meritorious aspirations to flee by persons who are vulnerable because of who they are rather than the political choices they made.

*Note from the editor: The author has adjusted the text for publication in this volume.*



*Shaimaa Abdelkarim*

## Afghan Women and Resistance to the War on Terror





*I usually start my writing on resistance with a note on listening. My note somehow acts as a warning against the powers of salient international legal narratives that govern our agencies and as an assurance that there is a way out of those salient frameworks by simply listening. Fred Moten's work furthered my understanding of listening to the act of "figuring it out". Listening becomes a form of responsivity and not a reactionary practice.*

My responsivity to the persisting war on terror and the rise of Taliban emanates from the urgency to "figure out" an anti-colonial consciousness and to actualize the conditions of postcoloniality. The short answer to my responsivity is that the Taliban does not fulfil such urgency. In this short reflection, I treat the rise of the Taliban in its imperialist context and choose to work through Afghan women's mobilisations that have taught me how to attend to persisting colonial relations in the conception of agency in human rights. I am also alerted of the politics of survival that govern those mobilisations beyond the liberationist narrative that has been utilized during the US-led invasion of Afghanistan and through the current return of the Taliban to power.

In the blog post, I start by briefly examining the link between the war on terror and the function of human rights practices in shaping gender struggles. Then, I analyse the conditions of action that Afghan women navigate in their resistance. I suggest that Afghan women's experiences are integral to taking seriously the

rise of consciousness and subject formation in a non-liberal domain. Their experiences are also important to challenge the function of human rights in reproducing gender norms. I treat the non-liberal domain as a counter-narrative to the conceptualisation of agency in liberal human rights practices. This counter-narrative questions the divide between the liberal and Islamic realm that has been determinantal to the operations of human rights in linking gender struggles to the war on terror.

### **Gender, human rights and the war on terror**

Feminist international legal scholarship has been attentive to the gendered framing of the “war on terror”, specifically, in relation to proliferating practices of democratisation in third world societies. Practices of democratisation affirm a “moral culture” to the international community that aims to eliminate suffering, while justifying humanitarian intervention as instrumental, necessary, momentary and exceptional. Such practices center the role of the Security Council in sustaining peace after the Cold War period under Articles 24 and 39, Chapters VI, and VII of the UN Charter. Article 39 gives the Security Council the jurisdiction to use of force in the case of a “threat to peace”, which has been interpreted broadly in Security Council resolutions to include breaches in human rights and demo-

cratic rule<sup>1</sup>. A liberal attitude to the use of force has led to an increase in the legitimisation of the Security Council's role and other regional organizations like NATO to assert their presence within "failed" states.

The war on terror was never an exception. Postcolonial voices – like Paul Gilroy and Gayatri Spivak – have argued that the war on terror is an extension of colonial relations that are masqueraded with a salvationist rhetoric. This rhetoric creates a dehumanised radical subject (an "Other") that becomes the object of fear and a gendered subject (i.e. Muslim women) that lacks agency and is in need of protection. The relationship between colonialism and human rights has been marked by a continuous production of lacking (gendered and racialised) subjects and a distinction between regressive and progressive societies. Gender becomes a way of reproducing those stratifications in human rights practices. Moreover, the UN adoption of resolution 1325 in 2000 on women, peace, and security has been integral for aligning women empowerment with calls for humanitarian intervention. The resolution assumes that the inclusion of women in humanitarian missions offers a gender narrative to security. However, as Ratna Kapur argues, resolution 1325 does not offer a counter-narrative to security. The resolution co-opts gender struggles to the "forceful rhetoric of protectionism and 'Othering'", while women are inconceivable in their actions.

## **Afghan women and the basis of action in a non-liberal domain**

I utilise the tactical cunningness of Afghan women to re-collect their consciousness from the liberal domain that perceives them as incomplete subjects. By tactical cunningness, I am referring to actions that sustain the capacity to resist, when such resistance is conceived as impossible in the humanist and gendered framework. This framework portrays Afghan women as victims in their social relations. Elaheh Rostami-Povey's work exhibits how Afghan women have been challenging gender relations internally and globally. Rostami-Povey contextualises gender struggles in Afghanistan within the material conditions that have shaped the political and social realm during the Taliban rule, the civil war period, and the US-led invasion. Different phases have influenced the tactics that women use to maintain their collective spaces. For example, during the civil war period, survival was the main aim. Afghan women resorted to creating networks (like the Women's Association of Afghanistan) with other women from their neighbourhoods and across different classes to build social ties, while others migrated and formed those communities in diaspora. Women employed these networks to build economic opportunities, navigate ethnic conflict and create a safe space for each other. Their

networks were integral for teaching each other skills to generate incomes (i.e. carpet weaving workshops, language and computer classes), creating necessities and markets among women (i.e. exchanging clothes they make for other products), and shielding each other from forms of violence that they faced during the war. Afghan women understood the restrictions on their mobility internally and in diaspora, and organized accordingly. As Rostami-Povey outlines, one way their secret networks have thrived internally were through participating in UN-backed food aid distribution, which the Taliban approved of (and were usually led by pro-Taliban women), in order to circulate knowledge and create secret schools for children.

In documenting women's resistance, Rostami-Povey work makes space for the tension between pro- and anti-Taliban women. Yet, the two positions (with or against the Taliban) come from a power structure in which the Taliban are a product of imperialist modes of governance. That is to say, the choice is not between a "regressive" or "progressive" stance. The two political positions are communicative of different stages of women's struggles and gender relations that surpass this divide. A way of understanding the move beyond the liberal/Islamic divide is through Saba Mahmoud's work<sup>2</sup>.

Saba Mahmoud documents the authority of Egyptian women who work in mosques, a male-dominated

sphere. While it is arguable that the work of Egyptian women in mosques disrupts the authority of a male Islamic jurist, this argument reduces their actions to align them with a pre-supposed liberated identity in the divide between liberal-secular societies and Islamic-regressive societies. Mahmoud delves into power structures that are dismissed in creating the liberal/Islamic divide. She signposts that Egyptian women have validated their work in mosques through the same source of authority that has deemed their presence illegitimate. For that, Mahmoud questions the utility of the liberal notion of autonomy for grasping the basis of action of Egyptian women. The work of consciousness in the liberal domain is typically linked to the desire for autonomy. Mahmoud's premise invites us to work through power structures that limit and, at the same time, shape the agencies of women. Her work affirms that our agencies do not precede power relations. Rather, we are informed by those relations in our actions and how we come to relate to our agencies.

### **Contesting the politics of liberation**

Analyzing the various positionalities of women in Afghanistan while moving beyond the liberal/Islamic divide requires not falling for the "rhetoric of salvation". With the fall of the Taliban in 2001, the US-led invasion (and the "reconstruction phase") has left Afghanistan



without the rudimentary social, economic and political infrastructure. Women's mobilisations continued against patriarchal structures while attending to the western gaze that has labelled them as essentially agentless Muslim women. In "Do Muslim Women Really Need Saving", Lila Abu Lughood disassembles the justification of the war on Afghanistan in Laura Bush's 2001 notorious speech. Bush associated the war on terrorism with "a fight for the rights and dignity of women" and the liberation of Afghan women from the Taliban. Through this salvationist narrative, liberal human rights practices played an essential role in the justification of the invasion and the sustenance of the war on terror.

Afghan women have challenged the liberationist narrative even in their work with international NGOs, which for some was a safe space to work as Rostami-Povey pinpoints. During the invasion, Abu Lughood notes that the struggles of Afghan women were reduced to that of a burqa. In Laura Bush's speech's narrative, the burqa (and any form of veiling) is taken to signify oppression. With the current return of the Taliban to power, women have also been central to sustain their power structure. Speeches of Taliban officials on their support of women's rights ironically reflect the same narrative in Laura Bush's speech; they are freeing women from the shackles of oppression.

Against the salvationist narrative, Abu Lughood draws on a space in which diverse practices in which Muslim women choose to wear or not to wear any form of veiling surpasses the objectification of Muslim women in liberal feminism. In Rostami-Povey's documentation of Afghan women's testimonies, wearing a burqa was one of the ways that made mobility for women possible during the invasion because they would not feel safe otherwise.

So, what is the function of human rights discourse in all this? Practices of various international NGOs and UN organizations during the US-led invasion of Afghanistan have been marked with the salvationist rhetoric. One argument against this rhetoric would move us to the malleability of human rights, as a political instrument, in which the problem is framed around how to salvage human rights from its failures to lessen suffering and recognise the humanity and agencies of the "Other"<sup>3</sup>. But if we are to take seriously the role of human rights practices in the sustenance of the war on terror and the reproduction of "Othering", then perhaps we ought to initiate from what is being communicated to us from the various experiences of Afghan women, who have been bending gender relations constantly. One way of listening would be to contextualise their basis of action in the consciousness that drives their experiences. Such work requires a lot of "figuring out" the layers of repressions that mobilise Afghan women

against gender norms that identify them (and others who do not conform to the image of a liberal agent) as inconceivable in their resistance. Possibly, through the experiences of Afghan women, we ought to think of the function of human rights discourse as one that enforces a guardianship over progressive ideals rather than one that nurtures postcolonial futures.

## References

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- 2 Mahmoud, *Politics of Piety: The Islamic Revival and the Feminist Subject*, Princeton University Press 2005; Ziba Mir-Hosseini also offers a historical mapping of gender relations in Iran beyond the liberal/Islamic divide that is helpful in contextualizing the mobilization of women's rights by Muslim women. See Mir-Hosseini, *Religious Modernists and the "Women Question": Challenges and Complicities*, in: Hooglund (ed.), *Twenty years of Islamic Revolution: Political and Social Transition in Iran since 1979*, Syracuse University Press 20002, pp. 74-95.
- 3 On the malleability of human rights in critical scholarship: See, Grear, "Framing the project" of international human rights law: reflections of the dysfunctional "family" of the Universal Declaration, in: Gearty/Douzinas (eds.), *The Cambridge Companion of Human Rights Law*, CUP 2012, pp. 17-35; Douzinas, *The Paradoxes of Human Rights*, 20 *Constellations* (1), 2013, pp. 52-55; Baxi, *Reinventing human rights in an ear of hyper-globalisation: a few wayside remarks*, in: Gearty/Douzinas (eds.), *The Cambridge Companion to Human Rights*, CUP 2012, pp. 150-170.



*Helmut Philipp Aust and Janne Nijman*

**Urban Legacies of 9/11: An International Law  
Perspective**





When reflecting upon the legacy of the attacks of 9/11 from the perspective of an international lawyer, there are obvious topics which spring to mind: the right to self-defence against non-state actors, the legacy of the CIA extraordinary renditions programme, the widespread practices of mass surveillance which the Snowden revelations brought to the fore and so on and so forth. Important as all these questions are, we would like to use this post to reflect on a different legacy of the attacks of 9/11. This legacy takes its cue from the place where the two most severe attacks struck: New York City and its World Trade Center. Much of the shock created by the attacks derives from the fact that they targeted the heart of the American territory and its primary city; a city which to many has been for quite some time also something akin to the capital of the world. This urban dimension of the attacks of 9/11 is conspicuously absent from most of the debates in international law. Yet, this brief essay argues, there is a hidden story underneath the bigger geopolitical picture and its international legal implications that most of the contributions to this symposium discuss. The 9/11 attacks went for urban symbols that were at the same time global symbols; in the wave of terrorism that followed cities both in the Global North and Global South were the target – physically, politically and culturally. Security is increasingly understood as an urban issue.

## **The absence of cities from traditional international law discourses**

Let us first discuss the obvious – the absence of cities as actors and sites from traditional international law. It is this absence which explains why the starting point of this blog post may be counterintuitive to many lawyers. In public international law, for a long time, scholars did not give a lot of attention to sub-national actors. And if they did, it was only indirectly. There were some debates about the treaty-making powers of the units of federal states. And, of course, cities and local governments can violate international law in their capacity as state organs. According to the customary international law rule reflected in Article 4 of the 2001 *Articles on State Responsibility*, their conduct is attributed to the state. The consequences of such violations can be cases before the European Court of Human Rights or arbitral tribunals in the field of international investment law. In addition to these legal and technical questions, there is another reason why we do not immediately think about cities and the urban when we reflect on the legacies of 9/11. Interstate warfare overshadowed any criminal justice response. The terrorist attacks of 9/11 and their consequences are as “high politics” as it can get, steeped in ideology. Al-Qaeda attacked the world’s most powerful nation at the time, hit its most important city



and triggered a military response which has shaped the twenty years afterwards. If ever there was an example of a situation of high politics, here you have it. Is it not entirely inappropriate to reflect on the legacy of these events through the prism of sub-national actors?

### **The urban turn in global governance**

Unsurprisingly, we would say that it is not. Over the last two decades, and hence coinciding with the period under analysis in this symposium, cities have asserted themselves as internationally relevant actors in manifold ways, also challenging the divide between high and low politics which previously relegated international efforts like twinning to a sphere that international lawyers felt comfortable enough to ignore. The rise of cities towards being important international actors has much to do with, on the one hand, a certain geopolitical constellation and, on the other hand, developments in the field of climate change governance, which has led to spill-over effects into other fields, such as security. Let us first turn to the geopolitical constellation: with the end of the Cold War, the West was celebrating the so-called “end of history”. It seemed to be all but inevitable that capitalism and liberal democracy had won the fight of the Cold War. The prevailing ideology of the day was one which put an emphasis on the retreat of the state

which, if not superfluous, at least had to be cut back to size.

This process and dynamic opened up possibilities for other actors, mostly from the private realm, as well as for unbundling the state into different agencies, as it was described by Anne-Marie Slaughter in her book “A New World Order” with its focus on the “disaggregated state”. With respect to cities, it was Saskia Sassen who captured the atmosphere of the time with “The Global City”, her seminal book detailing how certain metropolises functioned as command and control centres of the global economy and produced a highly mobile class of employees, especially in the finance sector, whose lives became increasingly detached from the previously unquestioned bonds of national citizenship. It is also this group of people who found themselves targeted in the attacks of 9/11, with the World Trade Centre hosting the offices of important companies of the financial sector. Sassen’s book and later works in the field detailed a “loss of control” of the nation-state. In a paradoxical way, the attacks of 9/11 represent different strands of this narrative – both the fixation on a lean state and the emphasis on corporate power, exported to all corners of the globe, as well as the increasingly fragile conditions of modern statehood, exposed to “new wars” which could not be won on a classical battlefield (if ever there was such a thing).

The crucial move towards a more active role in global governance – and also international law? – was, however, initiated in the climate change context. This is not the place to go into the details of this development, but suffice it to note that the common disenchantment with the global climate change regime around the United Nations Framework Convention opened up a policy space in which cities and their transnational networks increasingly claimed a role to play. Pointing to the alleged deficits of inter-state cooperation, cities claimed that they would be more agile and willing to cooperate. This rhetorical move has been replicated also in other policy fields, including security, where a panoply of transnational networks exist among cities today as well and where such networks also partner with international organizations in various ways. As the political scientist Kristin Ljungkvist has shown in “The Global City 2.0”, these developments in the fields of climate change governance and security are closely interwoven – and nowhere in a more evident way than in New York City, which she has used as a case study for her important book, explaining how the city administration of Mayor Bloomberg set upon itself the task of making New York a leader in both urban sustainability and security; a mission which was continued under Mayor de Blasio, as recently detailed by New York City’s international commissioner, Penny Abeywardena at a high-

level panel of the American Society of International Law.

### **And international law? Urban features of global security law**

A broader societal legacy of 9/11 is the securitization of our lives, a legacy which looks unlikely to be undone at any point in the near future. Many activities ranging from shopping to commuting to work to other forms of travel bear a security imprint today, which would have been unimaginable twenty years ago. These imprints seem reasonably justified for many of us today and are made ever more forceful due to technological developments, with the spectre of automatic decision-making processes driven by artificial intelligence and self-learning machines only being the most recent scare (to which we will also grow accustomed in due course). Smart cities come with serious concerns for permanent surveillance and the Covid-19 pandemic only exacerbates the development of urban surveillance systems. All of this pertains to real world events, or at least to our perception of these events. But is it also legally significant? And how does this translate to the world of international law?

The legal significance is easy to affirm from a perspective of fundamental and human rights protection, the yardsticks for the legality of security measures. As

we know, some of these protections have proven to be bulwarks against securitization tendencies, whereas the overall trend seems to be unstoppable. This legal significance is not yet specifically related to the urban sphere, however. As Alejandro Rodiles has remarked in his contribution to our recently published *Research Handbook on International Law and Cities*, in this connection “the city appears merely as an object, a referential space of international law, not as a subject”.

The relationship between this securitization trend and the urban becomes more palpable, also from a legal sense, if we turn our attention to the growing world of informal security cooperation which is orchestrated by and around international organization, with the UN Security Council and its sanctions committees being only the most obvious emanation, as Rodiles details in his article. A number of networks and initiatives have sprung up which are active in the field of urban security and whose work feeds back into international policy debates on how to achieve urban security. Sub-committees of the Counter Terrorism Committee of the Security Council partner with the Strong Cities Network, with a view to developing best practices how to fight terrorism and “preventing violent extremism”, the newest emanation of global security politics. Being the targets of global terrorism, cities have claimed a role in counter-terrorism. Hence, in this policy field, international and regional organizations are turning to cities

as partners, for example in the prevention of terrorism, radicalization, and violent extremism. The UN, EU or Global Counter Terrorism Forum (GCTF) are well aware that the so-called “life-cycle of radicalization” frequently finds fertile grounds in cities with marginalized groups and individuals; research points to a relationship between marginalization, social exclusion, and serious mental health issues of terrorist suspects living in Dutch cities. Therefore, these international organizations seek connections with the local level and recognize the relevance of the condition of the social tissue in cities. Dialoguing and collaborating with urban practitioners potentially provides input for the development of good practices and guidelines for preventing and countering terrorism and violent extremism. The UN also encourages dialogue among cities, and on September 24 2021, SCN chaired the first session of the GCTF’s 14th Coordination Committee Meeting in New York, on the margins of the 73rd Session of the UN General Assembly, on *GCTF and Local Impact – the Role of Cities and Communities*.

On a normative level, the focus on cities has found a crystallization point in the UN Sustainable Development Goals (SDGs), which were adopted by the UN General Assembly in 2015. SDG 11 is the only actor-specific goal among the SDGs and is concerned with making cities and local communities “inclusive, safe, resilient and sustainable”. The accompanying target 11.2 speaks

about the more mundane aspects of urban safety, notably with respect to road safety and public transport (but also including the special attention required “to the needs of those in vulnerable situations”). But this is not where international policy documents stop when it comes to urban safety. The *New Urban Agenda* (NUA), adopted as the outcome of the Habitat III conference in Quito 2016, makes a more explicit link between urban safety and more robust security discourses. In the “*Quito Implementation Plan*”, it is envisaged that “[w]e will integrate inclusive measures for urban safety and the prevention of crime and violence, including terrorism and violent extremism conducive to terrorism” (para. 103).

To the traditionally-minded international lawyer this will all sound rather vague. Where are the sources of international law as detailed in Article 38 of the Charter of the International Court of Justice? How can cities and their local governments be part of this international law game when they are not even subjects of international law in a traditional sense? These questions, we would submit, are beside the point, however, though even formalist international lawyers will have to acknowledge that the boundary between binding international law and the SDGs, as well as the NUA, can be eventually quite thin. Global governance has moved on far beyond the traditional categories of public international law. As Jan Klabbers has argued in his contri-

bution to the Research Handbook on International Law and Cities, the old categories no longer work. They are not fit to capture the many ways in which authority is today exercised. Accordingly, international law needs an update, desperately, to get a sense of how international cooperation is unfolding today.

The changes of global security cooperation which have taken place since 9/11 are one potent example to underline the need for such an update. In this development, cities and their transnational networks have had a role to play – arguably not among the forefront and not in a way which would displace the centrality of states for both security governance and international law. But increasingly, a vocabulary of international law which does not allow to take into account what sub-national actors are doing, is incomplete and risks overlooking important developments in various policy fields.

### **Concluding observations**

Accordingly, the urban legacies of 9/11 invite us to consider such an update in a most fruitful way. Issues of national security are often issues of urban security, and countering terrorism cannot be done without practitioners active in the urban space and their involvement in the development of effective, rule of law and human rights compliant practices, policies and norms.



The urban legacies also make clear what is at stake. If international lawyers decide to rest in the comfortable armchair position of the established sources and subject doctrines which we teach our students, we will miss out on important real-world developments which are driven by technocrats, analyzed by political scientists and fought by social movements. It is all too easy to close our eyes to these developments. The new worlds of international law and global governance are messy – but we should embrace them as international lawyers.

It is another question how the urban legacies of 9/11 will overlap with new developments and layers of history. Since early 2020, the world is living through the Covid-19 pandemic. The ensuing lockdowns and the images of empty cities they have produced have led many to question whether the so-called “urban age” is already over and a new era of suburban living and “urban flight” is dawning. Yet, we are not convinced that this pandemic will reverse long-term trends of urbanization. Cities have lived through and mastered many plagues. They have not undone the fascination that cities apparently meet with. But each previous pandemic has changed the streetscape of cities and their infrastructures. So will Covid-19. Its turn to smart governance, including the increasing use of tracing apps look all but likely to reinforce tendencies that were originally triggered by 9/11. The securitization of urban living is here to stay.



*Corri Zoli*

**Exiting Afghanistan as Ushering in a New Era of Global  
Infrastructure and Supply Chain Wars**





**T**wenty years after the Al-Qaeda terrorist attacks against US civilian and government infrastructure, what have we learned? Did two decades of countermeasures against this new internationalized form of terrorism make us more informed, prepared, policy-savvy, wise? Has the recent US exit and restoration of the Taliban, despite their UN-designated status as a terrorist organization since 1999, given pause to scholars and human rights defenders about the effectiveness of the global counterterrorism regime, now firmly entrenched in the UN system? For today's undergraduate students – many not yet born on 9/11 – what durable security policies are to be gleaned from an event that we insist we must “never forget”, even as eerily-familiar hospitable conditions for terrorism return to Afghanistan?

Some argue that the humbling exit of the United States and NATO coalition partners from Afghanistan marks a fitting end to the post-9/11 wars and its conceits – small footprint forces, nation-building under fire, winning hearts and minds by counterinsurgency strategy. My sense is that this exit marks a more important beginning: our unwitting entry into a new era of competitive warfare – with Afghanistan representing the opening salvo of a new era of global infrastructure and supply chain wars. A window into this process is already open if one tracks the restored Taliban government's diplomatic recognition, or Chinese-built belt

and road networks, including deep-water ports in South and Central Asia, with plans to cut across Afghanistan, or even recent EU strategic engagement plans in the Indo-Pacific.

With shifts in warfare, then, the question is whether the current fate of Afghanistan signals the exhaustion of once-heady projects; not only building stable and secure post-conflict government institutions, but the prospect of the international community working together in ways framed by the rules-based liberal international order. Either way, international terrorist organizations have proved they can be utilized as fully-integrated proxy actors. Going forward, human rights-compliant counterterrorism measures will face headwinds, as realignments among competitors favour governments seeking new economic alliances (and revamped supply chains), rather than shared norms and values.

Can international law and human rights norms keep up or make the jump to this new, supply chains-based theatre?

### **The role of international law in combating terrorism**

The devastating attacks of 9/11 shocked the conscience of the world. Almost immediately, UN Security Council resolutions 1368 and 1373, adopted unanimously on 12 and 28 September 2001, condemned the attacks as a threat to international peace and security, reaffirmed

the inherent right of individual and collective self-defence, and mandated binding measures under Chapter VII of the Charter to criminalize support for terrorism and coordinate actions to prevent future attacks.

Henceforth, the bureaucratic counterterrorism apparatus grew exponentially. As part of resolution 1373, the UN Security Council established the first dedicated Counter-Terrorism Committee (CTC) and Executive Directorate (CTED), to strengthen both national and multi-lateral counterterrorism efforts. Under the UN umbrella, since 1963, stakeholders – states and organizations – had already developed 19 counter-terrorism instruments covering civil aviation hijacking to assassinations and dirty bombs. This, despite a lack of consensus on a universal legal definition of terrorism.

Since 9/11, dozens of terrorism-related UN General Assembly and Security Council resolutions were issued and adopted, if not always implemented by individual states (as is their prerogative). A coherent official Global Counter-Terrorism Strategy was devised around four pillars: conducive conditions, preventive measures, state capacity, and rule of law and human rights compliant antiterrorist approaches. In 2017, yet another terrorism agency was formed, the UN Office of Counter-Terrorism (UNOCT), with five subsidiary units and 43 Counter-Terrorism Implementation Task Force entities. Unlike the Security Council's CTC, focused on assessing member states' needs for technical assistance, the UN-

OCT's work convenes expert meetings, regional conferences, and develops guidance documents, such as the 2018 *Reference Guide for Developing National and Regional Preventing Violent Extremism (PVE) Action Plans*. Still other offices, like the UN Human Rights Office of the High Commissioner, take on some obligations outlined in the four strategic pillars to report on the human rights impact of UN policies aimed at preventing and countering violent extremism.

These efforts are net gains in the global security law and policy space – even if they tend toward the bureaucratic and aspirational. (Such critiques of the UN system are the subject of repeated reform efforts, including by current UN Secretary-General Guterres).

Despite the limitations inherent in global governance, the net result of these UN-led efforts is greater multi-lateral communication and uniformity in approach: in identifying acts of terrorism, setting standards for criminalizing those acts in domestic law, tracking networked groups and mobilized foreign fighters, and enabling cross-border counter-financing, interdiction, and counter-trafficking efforts. As outlined in the 2015 Doha Declaration at the 13th UN Congress on Crime Prevention and Criminal Justice in Qatar, crime prevention, rule of law, and counter-extremism are “mutually reinforcing” aims, integrated into the wider UN agenda. In this way, the UN's role in counterterrorism is here to stay.



## Back to the future? Afghanistan as exemplar of exhaustion

Yet from a regional vantage point, taking into account the recent events in Afghanistan, that sense of progress is fleeting. Taliban-controlled Afghanistan is only the most recent, dramatic example (think ISIS, Syria, Iraq, Yemen, Mali, Niger, Somalia, etc.) of troubling global terrorism trendlines, with implications for human rights, regional stability, and still-opaque geopolitical interests on the horizon, and of the UN-led apparatus missing its mark.

Looking back in time, Afghanistan was many things: a safe haven for Al-Qaeda and company by the 1990s, a protracted space for civil war and post-conflict pathologies after the Soviet invasion and exit in 1989, a laboratory for low-information nation-building and counterinsurgency strategies, a site for cynical proxy wars by unsteady neighbours, and, primarily, an independent Central Asian country with a variegated warrior culture and habit for burying empires that dared enter its dispersed communities or daunting geography. In the international community's early optimism of the Bonn Agreements of 2001, Afghanistan was also intended to be an international exemplar, reflecting, as US defence policy scholars noted as late as 2011, "the best of US and United Nations statesmanship" and "the effective application of military and diplomatic power". This, even though Afghanistan's stakeholders wished to

“recreate” a state that never did quite exist in that centralized, federally-governed, rule of law way of which designers dreamed. That precipitous fall, with predictable and rising human rights abuses, raises the question as to whether the myriad international law instruments completely overlooked the conditions in the country, as did the stakeholders devising them.

The international community’s emotional and material investment in Afghanistan as a “success-story” was evident in the near constant follow-on “International Conference[s] on Afghanistan” in Berlin, London, Geneva, Paris, Moscow, The Hague, Rome – the list goes on until 2020. The investment was extraordinary: the US alone spent over \$3 trillion plus, not to mention the human costs of war, with Special Inspector General (SIGAR) findings vast public monies lost to graft, fraud, and corruption, as US defence officials chronically misled publics. And, yet, the current fate of Afghanistan signals even larger costs: the declining political will and capability for building stable societies, as per the UN Charter, but also the reduced prospect of the international community working successfully in the service of the rules-based international order.

### **Everyone knew**

This existential angst arises in part from the bureaucraticUN system, as mentioned, in which various parts

cannot reach or communicate with the other, particularly during crises, in ways that prompt a credibility and accountability deficit. If defence contractors and officials on the ground in Afghanistan knew the score, so did UN oversight teams.

In June 2021, just months before the August 31st withdrawal of US troops – with feigned assurances of order and Taliban partnership – the UN Monitoring Team reported Al-Qaeda’s presence in “at least 15 Afghan provinces”, noting Al-Qaeda’s strategic “effort to ‘lay low’ and not jeopardize the Taliban’s diplomatic position”. The report documents Taliban “relationships with Al-Qaida, ISIL-K, Jamaat Ansarullah, Jama’at al-Tawhid Wa’al-Jihad, among other known jihadist groups”, and the Taliban’s use of a “long-standing practice of denying the presence of foreign terrorist fighters in Afghanistan”.

Likewise, Afghan civil society, nurtured over the last two decades by international stakeholders and donors, were aware of the impending disaster of US/NATO withdrawal plans and appealed to UN mechanisms accordingly – Shaharзад Akbar, the chair of Afghanistan’s Independent Human Rights Commission, asked the Commission to use its role “to prevent catastrophe”, noting the “storm of atrocities”. Deborah Lyons, the special representative of the Secretary-General and head of the UN Assistance Mission in Afghanistan, urged the Security Council to take “swift action”, as Afgh-

anistan was at a dangerous turning point to prevent a crisis. Scholars and advocates, including the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Fionnuala Ní Aoláin, saw the international community's efforts, including the August 6 Security Council emergency meeting, as delayed hand-wringing, rather than decisive action.

Not only did the UN system appear unwilling or unable to respond, the sheer quantity of counterterrorism instruments, offices, and tools – least of all the UN Security Council sanctions regime, which had, after all, designated the Taliban a terrorist organization on multiple occasions – appeared strangely inert. This, in combination with national states' waning emotional investment in Afghanistan, using a model of government imposed from the outside, undercut commitment to the mission as a whole, particularly once the US stepped out.

If the early optimistic Bonn 2001 Afghanistan Agreements acknowledged “the right of the people of Afghanistan to freely determine their own political future in accordance with the principles of Islam, democracy, pluralism and social justice”, what becomes of the Afghan people now? Will Afghans, many socialized over two decades to UN values and promises, take kindly to international acceptance of a long-designated terrorist organization as the governing authority? Is such a fate

reconcilable with UN counterterrorism strategic pillars, notably human rights compliance?

### **The coming infrastructure and supply chain wars**

Rather than reckoning with the responsibilities under international law when retreating from a war, Afghanistan appears to have reverted to the status of a strategic prize – clearly for the Taliban, but also for Pakistan’s strategic interests, including its intelligence service’s long-documented involvement. Foremost, Afghanistan is emerging as rich in mineral wealth and central to China’s Belt and Road infrastructure development. With this come wholly new types of state interests and alliances, associated with China, Russia, Iran, Pakistan, and others – most notably, the China-Pakistan Economic Corridors initiative and China’s attempt to rebuild the road over the Wakhjir Pass (the 46-mile shared border). Certainly, many of the new power players are not amenable to the cardinal human rights ideal that governments should be responsive and accountable to their own citizens.

Apart from these new strategic alliances, Afghanistan has revealed multiplying realignments external to it, with new commercial corridors and strategic collaborations on the horizon – whether the renewed Quad (US, India, Japan, and Australia), the US-UK-Australian nuclear-powered submarine deal, which exiled the oldest of

allies, India-Iran partnerships to access Central Asia, or Italy and Turkey's Europe-to-Africa commercial corridor. In parallel, savvy strategic scholars are beginning to see the expanded use of Pakistan's regional deployment of proxy jihadist actors, as a cheap form of "grand strategy", to effect high-value national interests at low-cost disbursements. Certainly, tacit support for terrorist organizations is cheaper than standing up a national security force or nation-building. Especially so, as tectonic plates of power and strategic commercial interests are shifting.

Ending what many have termed the post-9/11 "forever wars" or "the global war on terror" – ending any war – is invariably a good thing. But in this case, the nature of the ending and exit of US and coalition forces in Afghanistan, and its simultaneous deprioritized status by the international community, have left observers with lingering doubts: about the promise of UN-based counterterrorism goals and about the nature of US and UN-based support and competence for stability, security, governance and rule of law efforts, all with impacts for international human rights law.

Others fear the end, the twilight, of a larger set of admittedly idealistic goals promoted by the international community for Afghanistan. There is no doubt a palpable fatigue in the failure to move the needle of governance in Afghanistan past where we started – even if the Taliban must be distinguished from the nation itself

and its heterogeneous population. Now, the big unknown are the strategic interests which replace the international community – or the West’s – idealistic goals for Afghanistan of 20 years and beyond. A window into this future of global infrastructure and supply chain wars is already open.







Der 11. September 2001 war Ausgangspunkt eines internationalen „Kriegs gegen den Terrorismus“, der grundlegende Fragen für die Normenordnung des Völkerrechts aufwarf. Fast genau 20 Jahre später endet die militärische Präsenz in Afghanistan auf denkbar desillusionierende Weise. Doch unterliegt ein Staat komplementär zu den rechtlichen Voraussetzungen für den Beginn einer Intervention auch Pflichten, wenn er eine Intervention abbricht oder beendet?