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# In the Absence of Human Rights

Whether R2P can protect Pakistani Refugees in Afghanistan

Candidate number: 8007

Submission deadline: 15<sup>th</sup> May 2023

Number of words: 19963



## **Acknowledgements**

I would like to express my deep gratitude to my fellow students: you made these two years special, and you know who you are. Moreover, I would like to thank my supervisor Prof. Dr. Cecilia Bailliet for her encouragement, advice, and support. A thank you as well to an individual at the NRC for participating in the interview, and to the Fritt Ord Foundation. Lastly, I would like to thank M.V. for being in my life, and my family for their continuous love and support.

## **Abstract**

This master's thesis explores whether R2P, the responsibility to protect, can protect Pakistani refugees in Afghanistan. A special emphasis is put on the colonial border between Pakistan and Afghanistan, the Durand Line, which is internationally recognized, but not by Afghanistan then or the Taliban now. The thesis' underlying theory by Boaventura de Sousa Santos makes use of a concept called "the abyss" to describe and to understand the Pakistanis' situation in the Afghan Gulistan Camp. Since the situation is characterized by the absence of human rights, I suggest R2P, an "emerging" or "contested" proto-legal, social, and moral norm as a framework to tackle the issue. Therefore, I utilize the "Framework of Analysis for Atrocity Crimes", provided by the UN Office on Genocide Prevention and the Responsibility to Protect. I demonstrate the existence of two "Risk Factors" from the Framework of Analysis in the geographical space between Afghanistan and Pakistan, namely "Existence of Non-international or International Armed Conflict" and "Humanitarian Crisis". The former is addressed by way of legal reasoning (international humanitarian law), the latter by way of interview (narrative approach).

In essence, the paper argues that it is possible to apply R2P to borderlands in inter-state dispute and armed conflict. However, R2P might not be the most suitable normative framework to protect the Pakistani refugees in Afghanistan directly.

**Key Words:** R2P, Durand Line, Human Rights, Prevention, UN Security Council, International Humanitarian Law, Humanitarian Action, Pakistan, Afghanistan, Refugees, Borderlands Studies

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## List of Acronyms and Abbreviations

DMZ	Demilitarized Zone
GCs	Geneva Conventions
IAC	International Armed Conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICISS	International Commission on Intervention and State Sovereignty
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IMCTC	Islamic Military Counter Terrorism Coalition
ISIL-K	Islamic State – Khorasan Province
NIAC	Non-international Armed Conflict
NRC	Norwegian Refugee Council
OIC	Organization for Islamic Cooperation
P-5	Permanent Five Members of the UN Security Council
R2P	Responsibility to Protect
RO(s)	Regional Organization(s)
SAARC	South Asian Association for Regional Cooperation
SCO	Shanghai Cooperation Organisation
TTP	Tehrik-i-Taliban Pakistan
UNAMA	United Nations Assistance Mission in Afghanistan
UNHCR	United Nations High Commissioner for Refugees
UN OCHA	United Nations Office for the Coordination of Humanitarian Affairs
UPR	Universal Periodic Review
UN SC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties
VCSSRT	Vienna Convention on Succession of States in Respect of Treaties

# 1 Introduction

“Our children don’t deserve this” - A tailor from North Waziristan<sup>1</sup>

In 2019, the Norwegian Refugee Council (NRC) published a briefing note on the dire circumstances for 72.000 Pakistani refugees, among them 20.000 children, stuck in Afghanistan.<sup>2</sup> The document describes how these Pakistani Pashto were displaced in 2014 after a Pakistani military operation, how they are not able to return, and how the majority of them are trapped in Gulistan Camp, Afghanistan, with no status, no social protection, little to no access to education and health facilities. At the time, they were “at risk of being forgotten.” Humanitarian organizations withdrew, donors stopped funding projects in the borderlands and in the camp, and UNHCR closed its office in Khost. Arguably, after the Taliban takeover in 2021, access for humanitarian organizations became increasingly difficult, and the situation in Afghanistan deteriorated drastically, increasing food insecurity and extreme poverty in the entire country. In addition, general security is not a given, and women are being pushed out of public life. Overall, Afghanistan’s human rights situation can only be described by the absence of human rights and the rule of law while the International Community is watching in an uncertain manner of how to deal with the Taliban as *de facto* leaders.

Now, in 2023, I take up the NRC’s briefing note and look at the risk of being forgotten of the displaced Pashto in Afghanistan. What happened to this sizeable group of displaced Pashto people? In section 2, I outline the origins of this displaced group and review literature on Pashto people as well as literature on the Durand Line. The Durand Line is the colonial border the refugees crossed; it is internationally recognized, but heavily contested between the neighbouring States of Afghanistan and Pakistan. The border is known to be a trouble spot since its creation. The theoretical framework used for understanding the Pashto refugees’ situation draws from Boaventura de Sousa Santos’ work on “the abyss”, a conceptualization of situations where humans are excluded so radically that their existence appears to be subhuman.

Identifying the borderlands of the Durand Line as one of the main sources of instability of the borderlands and the dire situation of the refugees, I suggest the Responsibility to Protect (R2P) as a framework to formulate a response to both the border dispute and the displacement of the Pakistanis in Afghanistan. The master’s thesis therefore seeks to answer the question of whether R2P can protect the Pakistani Refugees in Afghanistan. In section 3, I give an overview over R2P and a brief literature review on relevant issues.

In terms of method, I follow the “Framework of Analysis for Atrocity Crimes: A tool for prevention” provided by the Office of the UN Special Advisers on Genocide Prevention and the Responsibility to Protect. I analyse indicators of risk factor 1 “Situations of armed conflict or

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<sup>1</sup> Enayatullah Azad, ‘No Place to Call Home for Pakistani Refugees’, 15 October 2019, <https://www.nrc.no/news/2019/october/no-place-to-call-home-for-pakistani-refugees/>.

<sup>2</sup> ‘Left Behind: Waziristan Refugees in Afghanistan Risk Being Forgotten as Humanitarian Assistance Decreases.’, *BRIEFING NOTE NRC*, 15 October 2019, <https://www.nrc.no/resources/briefing-notes/left-behind-waziristan-refugees-in-afghanistan/>.

other forms of instability” of this framework, by classifying the situation in Pakistan under International Humanitarian Law (IHL) and by way of narrative analysis of an interview conducted with an NRC employee working on the ground in Afghanistan with the displaced Pashto people. In section 6, I outline the possibilities of R2P responses to this situation, focussing on preventive measures using less than force. Before concluding, I address R2P’s limits and the political reality in Section 7.

By asking whether R2P can protect the Pashto Refugees in the borderlands of the Durand Line, I intend to add to the academic discourse surrounding R2P: the relation of human rights (or their absence) and R2P; displacement and R2P, and interstate (border) dispute and R2P. Moreover, the research project looks at the meaning and content of R2P, especially prevention and measures lesser than force as part of the R2P framework/ norm. Moreover, the field of borderlands studies could benefit from this research: looking beyond “one State, one territory” but towards the shared space between two neighbouring countries and the consequences of the existence of that border.<sup>3</sup>

## 2 Context

### 2.1 The Pashto Refugees

This section seeks to outline who the people are that had to leave their homes in Pakistan in 2014 across the border, to Afghanistan. According to anthropologist Ahmed, the Pashto ([Pukhtun]) people on both sides of the border see themselves as one people, although they are organised tribally (there are “modern” Pashtun people as well, in the sense of urbanized).<sup>4</sup> Additionally, they still view the border as artificial and imposed.<sup>5</sup> Malik states that the Pashto people have been branded as “medieval tribes”, mostly by “neo-orientalist”<sup>6</sup> scholars, military planners and strategist from “across the Bosphorus”.<sup>7</sup> Malik polemises the West’s perception of Pashto people as them having become “the poster boys of whatever is wrong with Muslims

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<sup>3</sup> Borderlands studies as “the systematic study and exchange of ideas, information and analysis of international border, and the processes and communities engendered by such borders.” ‘About’, *Association for Borderlands Studies*, accessed 3 May 2023, <https://absborderlands.org/about-2/>.

<sup>4</sup> AMINEH AHMED, ‘UNDERSTANDING THE TALIBAN CASE THROUGH HISTORY AND THE CONTEXT OF PUKHTUNWALI’, *The Cambridge Journal of Anthropology* 22, no. 3 (2000): 87ff.

<sup>5</sup> AHMED, ‘UNDERSTANDING THE TALIBAN CASE THROUGH HISTORY AND THE CONTEXT OF PUKHTUNWALI’.

<sup>6</sup> “According to [Edward] Said, Orientalism is a ‘created body of theory and practice’ which constructs images of the Orient or the East directed toward those in the West. Representations of the East as exotic, feminine, weak and vulnerable reflect and define how the West views itself as rational, masculine and powerful. These essentializations permeate all categories of behavior - language, history, customs and religion - and create a severe dichotomy between two geographic entities.” Rachel Osborne, ‘Orientalism’, n.d., <https://academics.hamilton.edu/english/ggane/orientalism.html#:~:text=According%20to%20Said%2C%20Orientalism%20is,as%20rational%2C%20masculine%20and%20powerful>.

<sup>7</sup> Iftikhar Haider Malik, *Pashtun Identity and Geopolitics in Southwest Asia: Pakistan and Afghanistan since 9/11* (New York: Anthem Press, 2016), 1f.



everywhere”.<sup>8</sup> It is not in the interest of this thesis to reproduce an image of “revengeful”, anti-modern tribes. Pashtunwali ([Pukhtunwali]), at least in a traditional, non-urban form, is the code of conduct and/ or honour of the Pashto people.<sup>10</sup> Pashtunwali is organised along four core principles, honour, revenge, hospitality, and “to take refuge”( Ezat, Badal / Badla, Melmastia, and Nanawatee): these four principles govern a Pashtun’s life, tribal matters, and overall Pashto society and understanding.<sup>11</sup> Arguably, being of “the same people” facilitated arriving in Afghanistan for the Pashto refugees from Pakistan. However, as one of the Pashto refugees from Pakistan told UNHCR, they are aware of Afghanistan’s socioeconomic situation, and therefore they are grateful for the Afghans having helped them despite their own hardship.<sup>12</sup> The numbers of people having fled after the 2014 military operation “Zarb-e-Azb” are quite mixed: in 2014, UNHCR reported the displacement of more than 400,000,<sup>13</sup> the Pakistani Red Crescent spoke of “around 100,000 people in all”, although it is unclear if they took internally displaced persons into account as well,<sup>14</sup> and the NRC counted approximately 72,000 refugees from Waziristan in 2019.<sup>15</sup> In an interview conducted for this research project (Section 6.2), it became apparent that humanitarian actors were not sure either how many persons from Pakistan were still residing in Afghanistan, mostly in Gulan Camp: in the latest UN OCHA Assessment, 52 000 persons are being listed as refugees and asylum seekers in Afghanistan’s Khost and Paktika provinces.<sup>16</sup>

## 2.2 Literature on the Durand Line

To understand the Durand Line, a look at existing scholarship dealing with the border is crucial. In this section, I review literature on the history and problems, the legal aspects, and the current

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<sup>8</sup> Ibid., 2.

<sup>9</sup> Pashtunwali, moreover, requires the families of those killed to seek revenge. ZAHID HUSSAIN, ‘Pakistan’s Most Dangerous Place’, *The Wilson Quarterly* 36, no. 1 (2012): 19.

<sup>10</sup> AHMED, ‘UNDERSTANDING THE TALIBAN CASE THROUGH HISTORY AND THE CONTEXT OF PUKHTUNWALI’, 90f.

<sup>11</sup> Ibid., 90ff.

<sup>12</sup> Nayana Bose, ‘Displaced Pakistani Families Find Warm Welcome in Neighbouring Afghanistan’, 28 July 2014, <https://www.unhcr.org/news/makingdifference/2014/7/53d662fe6/displaced-pakistani-families-find-warm-welcome-neighbouring-afghanistan.html?query=North%20Waziristan>.

<sup>13</sup> Plus, the fact that there was displacement occurring before 2014, too. ‘Pakistani Offensive against Taliban Militants Uproots over 400,000 People – UN Agency’ *UN News* (Pakistan, 24 June 2014) <<https://news.un.org/en/story/2014/06/471522>> accessed 5 April 2023.

<sup>14</sup> ‘Pakistan: Red Crescent Doubles Assistance to the Displaced from North Waziristan’, 31 July 2014, <https://www.icrc.org/en/document/pakistan-red-crescent-doubles-assistance-displaced-north-waziristan>.

<sup>15</sup> ‘Left Behind: Waziristan Refugees in Afghanistan Risk Being Forgotten as Humanitarian Assistance Decreases.’

<sup>16</sup> ‘HUMANITARIAN NEEDS OVERVIEW AFGHANISTAN’ (UN OCHA, January 2023), 48.

dynamics of the Durand border. Here, the interdisciplinary field of borderlands studies provides expertise.<sup>17</sup>

The historian Omrani explains the history of and related problems to the Durand Line. He goes so far as stating that it is the “*one frontier dispute that trumps all [...] in terms of the world’s current security concerns.*”<sup>18</sup> At the time, in 2009, all problems both in Pakistan and Afghanistan and even beyond, were traced back by some to this specific region surrounding the Durand Line. The author outlines the huge historical developments leading to the Durand Lines creation in 1893. The line split tribal territories of the Pashtun people in half and is considered a classic example of artificially cutting a colonial border through a cultural region. Further, the border dispute caused Afghanistan to vote against Pakistan’s UN membership in 1948. According to Omrani, Pakistan let the Taliban stay in Waziristan and the Tribal Areas to create a “*talibanised*” buffer zone between the two countries and the US-led forces.<sup>19</sup> He argues, by doing so, Pakistan created a monster it cannot control. Militant groups have a strong influence in the area, by intimidating local population and attempting to eradicate any influence of the Pakistani government.

The question of possible independence and a Pashtun State arises. Were they ever a unified people? Omrani argues that the Durand Line itself is the problem as it is not policeable, and Pakistan was so far unable to bring the Tribal Areas under formal administrative control. His argument turns towards an important socio-economic point: lack of development and a deep mistrust against outside influence created a vicious cycle. For example, access to health care is very restricted, but when medical aid workers attempted to launch a vaccine campaign against polio, they were attacked and accused of plotting with the West to make the tribes infertile. In conclusion, a lot depends on this frontier and the States need to realize it, as well as “*various global powers with an interest in the stability and development of Afghanistan and Central Asia.*”<sup>20</sup> Omrani calls for immediate collaboration between the States, involvement of regional powers, and demilitarisation as well as investments on both sides of the border. Lastly, he questions the validity of the Westphalian system in this specific region by basing this final thought on the Islamic idea of statehood that governed the region up to the 19<sup>th</sup> century and did not guarantee any grounding for the concept of fixed borders.<sup>21</sup>

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<sup>17</sup> Regionally speaking, borderlands studies have contributed significantly to understanding dynamics in South Asia, just to name two recent articles: Debidatta Aurobinda Mahapatra, ‘From Alienation to Co-Existence and Beyond: Examining the Evolution of the Borderland in Kashmir’ (2018) 33 *Journal of Borderlands Studies* 141.; Dhananjay Tripathi and Sanjay Chaturvedi, ‘South Asia: Boundaries, Borders and Beyond’ (2020) 35 *Journal of Borderlands Studies* 173.

<sup>18</sup> Bijan Omrani, ‘THE DURAND LINE: HISTORY AND PROBLEMS OF THE AFGHAN-PAKISTAN BORDER’, *Asian Affairs* 40, no. 2 (July 2009): 177–95, doi:10.1080/03068370902871508.

<sup>19</sup> *Ibid.*, 189.

<sup>20</sup> *Ibid.*, 193.

<sup>21</sup> *Ibid.*

To Omrani, the legal aspects of the border do not seem to be entirely clear. However, he advances valuable arguments about the border cutting a “cultural region” in half and the long-term consequences of doing so. Fawad Poya, a legal scholar, discusses the border from a legal perspective.

Poya’s article deals with two legal aspects of the Durand line: first, whether the disagreement over the Durand Border between Afghanistan and Pakistan falls in a “dispute” situation and secondly, if so, how should the dispute be settled.<sup>22</sup> The author presents the agreement creating the Durand line and the arguments set forth by both sides. Afghanistan has started challenging the validity of the agreement ever since Pakistan became an independent State. The first legal argument questioning the validity concerns duress: based on Art. 51 and 52 of the Vienna Convention on the Law of Treaties (VCLT), some Afghan historians have claimed that the circumstances under which the Amir signed the Durand Agreement were not free from coercion. Others disagree, stating that the Amir endorsed and praised the agreement. Other claims relate to Art. 50 VCLT which provides that corruption of the State representative nullifies a treaty if the representative has been bribed into signing the treaty. The author dismisses this argument based on historical circumstances, as the subsidies the Amir received by British India were not considered bribery and therefore do not fall into the scope of Art.50 VCLT.

The second legal argument deals with the unilateral termination in 1949 of all agreements by Afghanistan, including the Durand Agreement, that had been in place with British India. However, boundary agreements cannot be terminated by invoking the ground of fundamentally changed circumstances as set out in Art. 62 VCLT (2).<sup>23</sup> The third argument put forward concerns Pakistan as a successor State of British India. Pakistan asserted being the successor state to British India in 1947 and claimed the Durand line is a valid international boundary. The Vienna Convention on Succession of States with Respect to Treaties (VCSSRT) is discussed as a ground for clarifying the status. Nonetheless, neither Afghanistan nor Pakistan are member-parties to the VCSSRT, and it is not considered customary international law. Lastly, the author discusses the argument of non-recognition of Pakistan as a State and as a prospect member of the United Nations in 1947. Afghanistan withdrew this objection of Pakistan after one month and established diplomatic relations with the neighbouring country. Therefore, this argument of questioning the validity of the Durand Line is invalid, too.

In conclusion, the author argues that the two countries do have a dispute, and they are obliged to settle the dispute peacefully. There is no obligation to reach a specific result, but they are obliged “*to take into account the peaceful settlement of disputes as per the UN Charter*”

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<sup>22</sup> Fawad Poya, ‘The Status of Durand Line under International Law: An International Law Approach to the Pakistan-Afghanistan Frontier Dispute’, *Journal of Borderlands Studies* 35, no. 2 (14 March 2020): 227–41, doi:10.1080/08865655.2019.1646147.

<sup>23</sup> A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary.

*instructions*.”<sup>24</sup> Poya ends with the remark that the two States should reach a second Durand Agreement which includes a prospective third party to settle future potential disputes.<sup>25</sup>

The authors Omrani and Ledwidge argue that the that “*the status of the Durand Line is very much open to question*.”<sup>26</sup> This master thesis does not intend to determine the legality of the border, it is of general interest to demonstrate the difficulty of and differing opinions on the issue. The authors’ arguments are appealing for two reasons: they identify military and political/diplomatic implications of the border in the light of the legality aspect. The military and security aspect entails a discussion of something like “a right to hot pursuit” envisioned by the creators of the Durand Line.<sup>27</sup> Generally, the British would allow the Amir of Afghanistan “*to chastise a tribe*” on their side of the border and vice versa, but this being the exclusive type of influence taken by the Amir on the British side (“*we should in a proper case have to allow the Amir to counter-raid, though on the understanding that he would not take permanent possession*.”).<sup>28</sup> The authors recognize however, that this type of border agreement does not uphold modern standards of a border. Secondly, the creators of the Durand Line did not seem to have the intention of a clear-cut border, given the nature of the tribes and the environment in which they were situated. Omrani and Ledwidge speak of an idea of shared sovereignty, as “*an area so unified in terrain, population and custom cannot bear inequalities in administration, but requires a common approach on both sides to solve the problems*.”<sup>29</sup> Full cross border cooperation is the only way forward, and the authors admit that there is a lot at stake for both sides. Nevertheless, overcoming these stakes is necessary to make the progress towards peace and development on both sides, in the entire region.

After having reviewed academic work on the border and its issues itself, it is important to speak about the dynamics in recent years, too. Oztig reviews Pakistan’s border policies and discusses the security dynamics along the Durand Line.<sup>30</sup> The author addresses methods of border securing, like building fences, so called “pushbacks”, and the aggressive option of a shoot-to-kill policy. She pursues the question of why Pakistan changed its prior, defensive border strategy to an offensive strategy against militants on its Afghanistan border. From 2001 after the US led invasion onwards until 2017, Pakistan’s border strategy was defensive. During these 16 years,

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<sup>24</sup> Poya, ‘The Status of Durand Line under International Law’, 238.

<sup>25</sup> Ibid.

<sup>26</sup> Bijan Omrani and Frank Ledwidge, ‘RETHINKING THE DURAND LINE: THE LEGALITY OF THE AF-GHAN-PAKISTANI FRONTIER’, *The RUSI Journal* 154, no. 5 (October 2009): 48–56, doi:10.1080/03071840903411988.

<sup>27</sup> Ibid.52ff

<sup>28</sup> Ibid.

<sup>29</sup> Ibid., 55.

<sup>30</sup> Lacin Idil Oztig, ‘Pakistan’s Border Policies and Security Dynamics along the Pakistan–Afghanistan Border’, *Journal of Borderlands Studies* 35, no. 2 (14 March 2020): 211–26, doi:10.1080/08865655.2018.1545598.

Afghan Taliban seemed to move relatively freely along the Durand border. Pakistani militants even welcomed the Afghan Taliban in Waziristan. Before turning to the shoot-to-kill policy, both governments agreed to cooperate in 2014 and in 2016, and a trench of 1,100 km in the Balochistan province was already being completed. Furthermore, the policy of dialogue between 2004 and 2014 was adopted to not alienate the local Pashtun population and drive them towards militant groups, especially the TTP. However, the terrorist attack on Jinnah International Airport in 2014 marked a turning point and the Pakistani government launched the military operation “Zarb-e-Azb” against TTP and other militant groups. From 2017 on, Pakistani border guards were authorized to shoot unauthorized border crossers on sight. The author views this as a continuation of the attempt to root out militant groups as well as an interrelation with the overall security concerns of the Pakistani State.

### 2.3 Theory: The Abyss

The theoretical, underlying values of this thesis draw from Boaventura de Sousa Santos’ thinking on a radical division between metropolitan social relations and colonial social relations. It can be applied to the described situation of the Pakistani refugees in Afghanistan, and overall, to Afghanistan itself. In this section, I define “the abyss” following de Sousa Santos’ work and explain how it relates to the Durand Line, and the people affected by it.

Conceptually, a line is being drawn, creating a space between “this side” of the line and “the other side of the line”.<sup>31</sup> Two realities are being constructed, and “*they become incommensurable*.”<sup>32</sup> The “other side of the line” maintains non-existent which is to be understood as radically excluded.<sup>33</sup> Two systems in Modern Western thinking uphold these lines: knowledge and law.<sup>34</sup> The knowledge aspect deals with the division of our thinking and epistemology, meaning that our Western understandings of science, philosophy and even theology take place on “this side” of the line, while other knowledges, like indigenous, peasant or plebeian knowledges are to be found on the other side of the line, as beliefs, opinions, or subjective and intuitive understandings.<sup>35</sup> The law aspect commences with the dichotomy that is inherent to law: to distinguish between illegal and legal before the law.<sup>36</sup> However, there are social spaces in which this dichotomy may not apply: de Sousa Santos calls this “*the territory of the lawless, the a-legal, the*

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<sup>31</sup> Boaventura Sousa de Santos, ‘Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges’, *Review (Fernand Braudel Center)* 30, no. 1 (2007): 45.

<sup>32</sup> Boaventura de Sousa Santos, ‘The Resilience of Abyssal Exclusions in Our Societies: Toward a Post-Abyssal Law’, *Tilburg Law Review* 22, no. 1–2 (5 October 2017): 251, doi:10.1163/22112596-02201011.

<sup>33</sup> Sousa de Santos, ‘Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges’.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, 49.

<sup>36</sup> *Ibid.*, 48ff.

*non-legal and even the legal or illegal according to non-officially recognized law.*"<sup>37</sup> The colonial era was the historical example of the territorial location and specific social territories were congruent: the "colonial zone" produced a specific social regime along physical (territorial) borders that would be unthinkable on "our" Western side of the line.<sup>38</sup> De Sousa Santos' theory has a focus on the abyssal line being non-territorial nowadays, meaning that we still divide the world in human and sub-human, and individuals of mainly three categories ("the terrorist", "the refugee", and "the undocumented migrant worker") carry the abyssal line of radical exclusion with them, even into "this side of the line".<sup>39</sup> A conceptual, abyssal line is for example the category of "unlawful enemy combatant", a term used to de-legitimize the applicability of certain provisions, like the safeguards for prisoner-of-war status found in the Third Geneva Convention, for enemy "fighters" being captured.<sup>40</sup> "Creating" a way of depriving an enemy of these safeguards makes him/ her significantly more vulnerable to inhumane treatment, rendering this individual sub-human.

"Our" Western side is built upon regulation and emancipation.<sup>41</sup> Exclusion may occur, however, it is not abyssal, and the excluded individuals or groups might be able to claim rights, as they are considered "fully human" (for example, through citizenship).<sup>42</sup> On the "other side of the line", individuals cannot realistically claim rights, as they are not necessarily considered "fully human".<sup>43</sup> The "other" side is built upon appropriation and violence, which means firstly incorporation, assimilation, and co-option, and secondly any expression of violence like prohibitions of native languages, racial discrimination, and of course physical violence.<sup>44</sup> De Sousa Santos dives into a multitude of implications of this invisible segregation, for example in Guantanamo, Iraq, Palestine, Darfur, in the new forms of slavery, in child labour, and in "*the savage zones of the mega cities*".<sup>45</sup> I intend to demonstrate how these theoretical dichotomies relate to the Pakistani refugees in Afghanistan and to the Durand Line.

### 2.3.1 Applying the Theory

I argue that the Durand Line and Afghanistan itself are a complete relapse into de Sousa Santos' description of the colonial era; with the difference that the ones reproducing the abyssal line, the Taliban, are not themselves the sole producers of the upholding of the abyssal lines surrounding the territory of Afghanistan, but they are the product of Western construction of

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<sup>37</sup> Ibid., 49f.

<sup>38</sup> Ibid., 45ff.

<sup>39</sup> Ibid., 58f.

<sup>40</sup> Ibid., 60.

<sup>41</sup> Ibid., 47.

<sup>42</sup> de Sousa Santos, 'The Resilience of Abyssal Exclusions in Our Societies', 251.

<sup>43</sup> Ibid., 250ff.

<sup>44</sup> Sousa de Santos, 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges', 53f.

<sup>45</sup> Ibid., 55ff.

abyssal lines, too. In the colonial era, the colonisers upheld the system of radical exclusion along the borders of a certain territory. In these current circumstances, the Taliban, former mujahideen propped up by the US against the Soviet invasion in Afghanistan in the 80s,<sup>46</sup> are upholding the radical exclusion that amounts to “abyssal circumstances” in the sense of de Sousa Santos’ theory. Additionally, the Pakistani Government, as a “third-party” in the relation between the Taliban and the Afghan people (and whoever is on Afghan soil), are maintaining the abyssal circumstances in its neighbouring country, by digging trenches and building fences.<sup>47</sup>

According to NRC, the refugees from Waziristan are stuck in a legal limbo.<sup>48</sup> They were never considered refugees by the Afghan Government after their displacement, nor by the incumbent Taliban government, therefore cannot claim refugee rights.<sup>49</sup> At the same time, they lack a *Tazkera*, the Afghan National Identity Document, and therefore do not enjoy the same rights as Afghans either.<sup>50</sup> At the time of their displacement, they carried their abyssal line of radical exclusion with them, as Pashto people from the Tribal Areas of Pakistan, not recognized by the Afghan Government. As of today, their exclusion manifests itself under the Taliban regime and at the Durand Line. The shoot-to-kill policy along the border makes unauthorised border crossings impossible,<sup>51</sup> additionally rumours of detention upon return impede realistic opportunities of return.<sup>52</sup> With reference to de Sousa Santos’ epistemological considerations, the Pashto people in general match the idea of people whose customs, laws, traditions, overall knowledges, do not fit with Western understanding of law, science, and theology: this is precisely expressed in the code of conduct, Pashtunwali.<sup>53</sup> A different, clear formulation on this is the remark that the Westphalian system of nation states might not be suitable for this geographic area in South Asia.<sup>54</sup> Such a statement reassures the perception of the territories along the Durand Line to be “of the lawless” or “the a-legal”, to rephrase it in de Sousa Santos’ words.

De Sousa Santos poses the question “*how to fight against the abyssal lines using conceptual and political instruments that don’t reproduce them?*”<sup>55</sup> Therefore, an attempt to apply R2P to protect the Pakistani refugees should also be viewed in the light of this statement. If R2P is

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<sup>46</sup> HUSSAIN, ‘Pakistan’s Most Dangerous Place’, 19.

<sup>47</sup> Abdul Basit, ‘Pakistan-Afghanistan Border Fence, a Step in the Right Direction’, *Al Jazeera Media Network*, 25 February 2021, sec. Opinion, <https://www.aljazeera.com/opinions/2021/2/25/the-pak-afghan-border-fence-is-a-step-in-the-right-direction>.

<sup>48</sup> ‘Left Behind: Waziristan Refugees in Afghanistan Risk Being Forgotten as Humanitarian Assistance Decreases.’

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Oztig, ‘Pakistan’s Border Policies and Security Dynamics along the Pakistan–Afghanistan Border’.

<sup>52</sup> Azad, ‘No Place to Call Home for Pakistani Refugees’.

<sup>53</sup> AHMED, ‘UNDERSTANDING THE TALIBAN CASE THROUGH HISTORY AND THE CONTEXT OF PUKHTUNWALI’.

<sup>54</sup> Omrani, ‘THE DURAND LINE’, 193.

<sup>55</sup> Sousa de Santos, ‘Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges’, 88f.

applicable, if it may live up to its standard of protecting civilians against the four atrocity crimes, does it simply reproduce a power structure in which Western power, or rather, Western abyssal thinking, creates radical exclusion at another, later point?

The next section gives an overview over R2P and a brief literature review. Afterwards, I address the question whether R2P can help the Pakistani Pashto refugees in Afghanistan. Therefore, I turn towards the hypothetical scenario of R2P in Afghanistan, since R2P relates mainly to single territories and the Pashto refugees are currently *in situ*.

## 2.4 Overview of R2P

In 2005, the international community adopted the World Summit Resolution unanimously,<sup>56</sup> which includes the main basis for R2Ps standing in international law and international relations. This was preceded by the failure of the international community in Rwanda and Kosovo in the 1990s and the dilemma between the conflicting principle of non-interference with State sovereignty<sup>57</sup> and the international community's responsibility to respond to widespread and severe human rights violations.<sup>58</sup> The International Commission on Intervention and State Sovereignty (ICISS) was then commissioned by the Canadian Government to produce a report on the question of the right to humanitarian intervention and "*when, if ever, it is appropriate for states to take coercive – and in particular military – action, against another state for the purpose of protecting people at risk in that other state.*"<sup>59</sup> The ICISS came up with a comprehensive document that envisioned multiple facets of a new concept, the "responsibility to protect". However, at the World Summit 2005, the international community rejected certain parts of the ICISS's concept, "reducing" its applicability it to the four atrocity crimes.<sup>60</sup> Spencer Zifcak calls the agreement on the concept and the principle a success nonetheless.<sup>61</sup>

In 2009, the Secretary General's report on "Implementing the responsibility to protect" sought to operationalize R2P.<sup>62</sup> A three-pillar strategy was presented:

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<sup>56</sup> '2005 World Summit Outcome' (New York: UN General Assembly, 24 October 2005), [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_60\\_1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf).

<sup>57</sup> UN Charter Art. 2(4)

<sup>58</sup> Malcolm D. Evans, ed., *International Law*, Fifth edition (Oxford, United Kingdom: Oxford University Press, 2018), 490.

<sup>59</sup> International Commission on Intervention and State Sovereignty et al., eds., *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) Foreword.

<sup>60</sup> Evans, *International Law*, 493.

<sup>61</sup> Evans, *International Law*.

<sup>62</sup> 'Implementing the Responsibility to Protect' (United Nations Secretary-General, 12 January 2009), <https://www.un.org/unispal/document/auto-insert-180580/>.



1. Pillar one -The protection responsibilities of the State
2. Pillar two - International assistance and capacity-building
3. Pillar three - Timely and decisive response

The first pillar puts the responsibility on each State to protect its populations from the four mass atrocity crimes: genocide, war crimes, crimes against humanity and ethnic cleansing. The second pillar entails that the wider international community has the responsibility to assist States in meeting those obligations. Pillars one and two are the key ingredients for prevention.<sup>63</sup> Pillar 3 is triggered if a state is manifestly failing to protect its population. It requires Member States to respond collectively in a timely and decisive manner, on case-by-case basis, utilizing any of the “tools available to the UN” from pacific measures under Chapter VI UN Charter to coercive responses under Chapter VII and to regional and subregional arrangements under Chapter VIII.<sup>64</sup> Measures under Chapter VII must be authorised by the UN Security Council (UN SC).<sup>65</sup> Henderson argues that R2P made actions permissible that would usually be prohibited under the principle of non-intervention; however, R2P does not compel states or the international community to take the opportunity to make use of “*a greater range of measures in response to, or anticipation of, the commission of atrocity crimes [...]*.”<sup>66</sup>

As R2P has been part of international relations and – at least in debates- international law since more than a decade now, what are the existing examples of application of R2P? R2P has been invoked in more than 80 UN SC, 50 Human Rights Council and 30 General Assembly Resolutions.<sup>67</sup> In practice, SC Resolutions 1970 and 1973 (both 2011) led to the first ever application of R2P under Chapter VII of the UN Charter,<sup>68</sup> therefore authorising members to use force “to protect civilians and civilian populated areas” and to establish and uphold a no-fly zone over the territory of Libya. Another, often overlooked first application of R2P without the use of force occurred after the outbreak of violence following the 2007 Kenyan elections.<sup>69</sup> Although the author Crossley argues that the mediation efforts and the heavy involvement of regional actors, in that case the African Union, would have happened without R2P as well, the narrative

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<sup>63</sup> Ibid., para. 11.

<sup>64</sup> ‘Implementing the Responsibility to Protect’.

<sup>65</sup> Ibid.

<sup>66</sup> Stacey Henderson, *Atrocity Crimes and International Law: Responsibility to Protect, Intercession, and Non-Forceful Responses*, 1st ed. (London: Routledge, 2022), 12, doi:10.4324/9781003220893.

<sup>67</sup> ‘UN General Assembly Resolutions Referencing R2P’, *Global Centre for the Responsibility to Protect*, 15 December 2022, <https://www.globalr2p.org/resources/un-general-assembly-resolutions-referencing-r2p-2/>.

<sup>68</sup> Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians, ‘Resolution 1973 (2011) / Adopted by the Security Council at Its 6498th Meeting, on 17 March 2011’ (New York: UN. Security Council (66th year : 2011), 17 March 2011).

<sup>69</sup> Noële Crossley, ‘A Model Case of R2P Prevention? Mediation in the Aftermath of Kenya’s 2007 Presidential Elections’, *Global Responsibility to Protect* 5, no. 2 (2013): 192–214, doi:10.1163/1875984X-00502004.

of the successful application of R2P was strong enough to make R2P “*seem less threatening and corrosive of state sovereignty*”.<sup>70</sup>

These two relatively successful examples – at least for the concept of R2P- do not hide the systemic flaws inherent to R2P. Firstly, as any action that requires approval by the SC, the application of coercive measures under Chapter VII has to be in, or at least not contrary to, the interest of the Permanent 5 (P-5).<sup>71</sup> Concerning the current situation, a stalemate between certain factions within the P-5 is also a looming possibility.<sup>72</sup> Secondly, the application of R2P so far has been quite selective. Bahrain, Gaza, even North Korea, and many more have been discussed by academics as potential but ignored R2P cases.<sup>73</sup> Thirdly, there is a potential that R2P may be misused: at the time, the US used R2P rhetoric partially to justify the intervention in Iraq in 2003 (from the ICISS report), as did Russia when intervening in South Ossetia in 2008.<sup>74</sup> Unfortunately, this list of issues is not exhaustive. On the other hand, concluding already that R2P generally should be considered a failure would be a premature judgement of a concept/framework.<sup>75</sup> As Bellamy states, R2P’s aim “*is to persuade States to live up to the responsibilities inherent in their sovereignty and to assist them in doing so.*”<sup>76</sup>

## 2.5 Literature on R2P

As R2P is the proposed framework for this master thesis, it deems necessary to review existing literature on R2P relevant to the research question. I approach R2P from three different angles: R2P’s status as a norm, R2P’s focus on atrocity crimes, and the relation between R2P and human rights.

### 2.5.1 R2P’s status as a norm

Labonte seeks to identify R2Ps’ status as a norm and further examines how new R2P is in international law.<sup>77</sup> The author finds that R2P is in fact, a norm.<sup>78</sup> The question shifts towards what kind of norm R2P is. It is not even clear whether R2P is a singular norm or a collection of norms. Others find it to be a political concept based on established legal principles. Regardless

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<sup>70</sup> Ibid., 212ff.

<sup>71</sup> Evans, *International Law*, 511.

<sup>72</sup> Both the dynamics between the “West” and Russia and the US and China are concerning in that sense.

<sup>73</sup> See: Aidan Hehir, Pinar Gözen Ercan and Serena Timmoneri, in: Sonja C. Grover, ed., *The Responsibility to Protect: Perspectives on the Concept’s Meaning, Proper Application and Value*, First published (London New York: Routledge, 2017).

<sup>74</sup> Peter Hilpold, ed., *Responsibility to Protect (R2P): A New Paradigm of International Law?* (Leiden ; Boston: Brill Nijhoff, 2015), 12.

<sup>75</sup> Evans, *International Law*, 509.

<sup>76</sup> Alex J. Bellamy, *The Responsibility to Protect: A Defense*, First edition (Oxford, United Kingdom ; New York, NY: Oxford University Press, 2015), 18.

<sup>77</sup> Melissa Labonte, *R2P’s Status as a Norm*, ed. Alex J. Bellamy and Tim Dunne, vol. 1 (Oxford University Press, 2016), doi:10.1093/oxfordhb/9780198753841.013.8.

<sup>78</sup> “Norms are shared understandings of standards of appropriate behaviour ” *ibid.*, 1:134.

of whether one calls R2P a “contested”, “emerging” or “fading” norm, norms and their constituent ideas are “*building blocks of international reality and practice*”.<sup>79</sup> Labonte argues that the “tipping” point in R2P’s lifecycle as a norm regarding the secondary responsibility of a State to engage other States which clearly fail their own primary responsibility has yet to come. R2P has neither cascaded fully nor was internalized, meaning that the norm is no longer to debate, and that State/ actor conduct is in line with the norm. Nonetheless, “R2P-speak” turns heads at UN headquarters, as Labonte puts it. R2P depends as well on the Permanent 5 (P5) in the SC, and R2P’s regulative effects depend on the political will to agree to use R2P. State actors apply R2P norms selectively and inconsistently which hinders the process of turning it into a truly constitutive and regulative norm. The author moves on to discuss the newness of R2P. It “*is not legally binding, [...] does not create unconditional or perfect duties*” and has had both rather successful and unsuccessful effects.<sup>80</sup> R2Ps’ secondary responsibilities, according to the author, are new. Sovereignty and non-interference have not been the main obstacles to come to another population’s support or aid, political will, on the other hand, is an intervening variable in that endeavour. Labonte summarizes that all States accept that they have a primary responsibility to protect while many states accept that they have a secondary responsibility to assist each other in upholding the primary responsibility. R2P is an option for policy makers, diplomats and scholars when discussing a response to mass atrocity cases. However, when States fail to assemble and gather political will, preventing mass atrocity crimes “*will remain an elusive goal*”.<sup>81</sup> Zifcak asserts that R2P is not embodied in any treaty and has not yet attained the status of customary international law.<sup>82</sup> Therefore, considering R2P as international law now is not correct, but there is a potential for legal recognition eventually.<sup>83</sup> This could be viewed as an expression of the perception of R2P as “emerging” or “contested” norm. Gholiagha contributes to this debate by attributing the ability of opening “discursive spaces” to R2P.<sup>84</sup> Gözen Ercan considers R2P as an international moral norm.<sup>85</sup>

Having established R2Ps status as a norm, although more a social, moral, discursive one, and proto-legal at best, the question of content of this norm should be discussed.

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid., 1:143.

<sup>81</sup> Ibid., 1:146.

<sup>82</sup> Evans, *International Law*, 511ff.

<sup>83</sup> Ibid., 515.

<sup>84</sup> Grover, *The Responsibility to Protect*, 89.

<sup>85</sup> Ibid., 101.

### 2.5.2 Reconsidering R2P's focus on atrocity crimes

The author Ainley argues that R2Ps focus on atrocity crimes should be reconsidered; after all, its drafters had a human rights lens in mind.<sup>86</sup> Ainley points out that R2P would benefit from the initial focus on the full field of human rights. She demonstrates how the ICISS initial report was narrowed down to the World Summit Outcome Document in 2005 and problematizes the atrocity lens in three ways: firstly, the atrocity focus ignores harm taking place within the laws of armed conflict. It “*fetishizes the distinction between war and war crimes*” and disregards the reality that war is inherently destructive, whether rules, such as IHL, are being followed or not.<sup>87</sup>

Secondly, R2P enables a simplistic view of good and bad, perpetrator and victim. This view is inaccurate and does not consider the circumstances in which atrocity crimes are committed, the agency of rights-bearing populations and the enablers of atrocity crimes, like arms traders and States supporting illegitimate regimes or non-state armed groups. Lastly, R2Ps focus on the context of conflict takes away attention from the non-conflict situations in which atrocities may occur, and the large-scale human suffering that is not caused directly by acts of atrocity but could be reduced or stopped through “*concerted political action*”, like the harms following slavery, famine, human, or arms trafficking.<sup>88</sup>

The author asks what it would entail to take R2P back to its intended initial state; the human rights protecting tool the ICISS had in mind. Ainley recognizes that an expansion of R2P's focus would not solve the issue of lacking political will regarding Pillar 3 obligations, but it should reduce the occurrence of atrocity crimes overall. Additionally, atrocity crimes do not occur without a warning; they build up over years or decades of human rights violations. Atrocity crimes should be less likely to happen as human rights protection overall is increased. Moreover, documenting serious harm and gathering evidence has its own value, even if it might not lead to an R2P Pillar 3 intervention. Incorporating R2P into “special procedures”, the Universal Periodic Review (UPR) or commissions of inquiry and fact-finding missions would have positive effects on R2P, as well as changing the R2P perception of “populations” as “victims” into “political agents”: R2P would empower, a different form of protection. Besides, a broader lens would simply include more people and more situations, and it might expose human rights issues within the States of the Global North, too. A human rights lens would allow a better prevention capability, as it would cover a wider range of issues, such as economic inequality and political representation. In addition, in case of a Pillar 3 type intervention with a human rights scope, the responsibility to rebuild could be taken more seriously after having intervened. Broadening the focus has downsides as well: if a narrow R2P has struggled, a broader focus will dilute the norm

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<sup>86</sup> Kirsten Ainley, ‘From Atrocity Crimes to Human Rights: Expanding the Focus of the Responsibility to Protect’, *Global Responsibility to Protect* 9, no. 3 (6 August 2017): 243–66, doi:10.1163/1875984X-00903003.

<sup>87</sup> *Ibid.*, 251.

<sup>88</sup> *Ibid.*, 253.

and leave it less powerful. According to the author, a stronger argument against a rights lens is that the rights lens itself does not do anything against “*the structures and institutions of international society that have failed to protect so many times since a responsibility to protect was acknowledged.*”<sup>89</sup>

Ultimately, she argues against abandoning R2P as a concept but for rejuvenating it through the initially intended human rights lens, protecting more people. However, States and International Organizations must take their Pillar 1 and 2 obligations more seriously.

### 2.5.3 The relation between R2P and human rights

Having argued for a human-rights lens, the author Karp distinguishes between prospective and retrospective responsibility and between a responsibility to prevent and to respond.<sup>90</sup> He identifies a responsibility to protect human rights, contrasts it with the “RtoP policy framework” and asks how these two relate.<sup>91</sup> A first answer is that they do not relate very much; RtoP is about humanitarian atrocity prevention and not about human rights set out in the ICCPR, for example. Karp problematizes that many RtoP advocates do mix RtoP and the advancement of human rights, and he indicates examples from the dimension of diplomacy, the theoretical dimension and the RtoP’s core documents. In diplomatic circles, RtoP is being understood as an initial thought experiment and the four atrocity crimes, as a particular sub-set of human rights issues, is the political leftover of a more general attempt to protect all human rights. A common description of RtoP being “deep and narrow” is not ethically or politically neutral because the reason why RtoP has not turned out to be a responsibility to protect human rights is political. In political philosophy, this diplomatic argument is reenforced and the concept of international responsibility to protect human rights should only apply to large-scale abuses, as a right to free speech for example falls within the sovereignty of a respective State. Lastly, the RtoP policy documents exclude stretching the RtoP concept to issues like HIV/Aids or climate change as it would undermine “*recognition or operational utility*”.<sup>92</sup> On these bases, the author argues that the State endorsement for the UN Guiding Principles on Business and Human Rights would not be viewed as consolidating rather than undermining. There are no explanations why other rights outside of the atrocity focus would necessarily be less protected.

Karp turns to the prospective and retrospective responsibility which provides for a different interpretation of RtoP overall:<sup>93</sup>

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<sup>89</sup> Ibid., 264.

<sup>90</sup> David Jason Karp, ‘The Responsibility to Protect Human Rights and the RtoP: Prospective and Retrospective Responsibility’, *Global Responsibility to Protect* 7, no. 2 (9 September 2015): 142–66, doi:10.1163/1875984X-00702004.

<sup>91</sup> Karp uses “RtoP” instead of “R2P”; it is interchangeable.

<sup>92</sup> Karp, ‘The Responsibility to Protect Human Rights and the RtoP’, 147.

<sup>93</sup> Table at *ibid.*, 152.

**Table 1: Prospective/Retrospective Responsibility and Prevention/Response:  
What counts as a failure?**

	Prospective Responsibility	Retrospective Responsibility
Prevention	<p>Responsibility for a person, object, outcome or event, irrespective of direct causal involvement (for example, because of one's role or because one had a duty of care).</p> <p>One has failed to fulfil one's responsibility if one fails to take appropriate preventive action, regardless of whether the outcome or event actually comes to pass.</p>	<p>The responsibility to take all reasonable steps to avoid future harm.</p> <p>One has failed to fulfil one's responsibility if harm occurs that can be traced back one's actions or inactions that failed to prevent it.</p>
Response	<p>Responsibility to take future action if a pre-specified set of circumstances arises.</p> <p>One has failed to fulfil one's responsibility if those pre-specified circumstances arise, and if one does not respond at all, if one does not respond appropriately, and/or if one is not in a position to respond.</p>	<p>Responsibility to act in a way that minimises harm or minimises a problem, once harm or a problem is imminent or underway.</p> <p>One has failed to fulfil one's responsibility if one's actions are harmful, or if one callously ignores a problem that one has the capacity to address.</p>

He outlines two future ways out of the unclarity surrounding RtoP. Either the human rights language in relation to RtoP should be entirely abandoned, and the focus should be separated more clearly from a responsibility to protect human rights. Otherwise, RtoP scholarship and practitioners intending to make use of RtoP could draw from the distinction between prospective and retrospective responsibility.

These articles on R2P/ RtoP showcase how some authors would like to expand the lens of the norm towards a human-rights based one, while others disagree and suggest that a more human-rights oriented R2P norm is fictitious and even politically biased. Karp's suggestion of a more distinct understanding of retrospective and prospective responsibility is useful and will be utilized in Sections 5 and 6 as it relates directly to the understanding of applicability in relation to time: prevention, as in, before, or reaction, ergo, during or after. The next section addresses the method of applying R2P to the borderlands of the Durand Line and to the displaced Pashto refugees in Gulistan Camp.

### 3 Method

This research project is designed as a critical and legal case study with additional qualitative data collection for a nuanced understanding of the principle of R2P in relation to a displaced population. Looking at each of the aspects of this approach, a case study examines a phenomenon or phenomena in context, and is, as Webley puts it, "*a real-world in-depth investigation of*

*a current complex phenomenon.*<sup>94</sup> A logical and consistent framework is the UN Office on Genocide Prevention and R2P's Framework for Analysis, which identifies 8 common and 6 specific risk factors that help identify a situation in which atrocity crimes are likely to occur.<sup>95</sup> Common Risk Factor 1 "*Situations of armed conflict* [...]" for example has 11 indicators; looking at indicator 1.1 "*International or non-international armed conflict*" requires a legal assessment of whether there is an international or non-international armed conflict or no conflict at all.<sup>96</sup> Therefore, one method is legal, and the reasoning of Section 5 on the classification of the situation follows general reasoning of international humanitarian law (IHL). Due to R2P's nature as a an "emerging" norm without being legally binding nor creating perfect duties,<sup>97</sup> the research is critical towards both the concept and the practical implications of the concept. R2P's status as a norm stems from both codified legal<sup>98</sup> and social<sup>99</sup> norms, therefore a case study which claims to include legal aspects of an only partially legal concept should be critical, too. This is reflected in Section 7 on limits, and I addressed weaknesses and shortcomings of R2P in the literature review.

News reports about the border issue and the refugees in Afghanistan give an overview over certain aspects of the situation. However, the additional qualitative data collection conducted in this research project add another methodological layer: semi-structured interviews with stakeholders from humanitarian, international organisations should help gain insights due to the outdatedness of the news reports. Having a perspective from staff on the ground is also more authentic. The interview method used here is the following: I contacted organizations who published on the topic in recent years and asked whether they were still working in the field, and if they were interested in participating in a semi-structured interview about their work in the borderlands of the Durand Line. They were sent the interview questions in advance and were given the option to answer the questions in written form, if more convenient.<sup>100</sup> The interview was conducted following a narrative approach, meaning that the interview should encourage the participant to share insights, "tell stories", about the phenomenon in question.<sup>101</sup> These

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<sup>94</sup> Lisa Webley, 'Stumbling Blocks in Empirical Legal Research: Case Study Research', *Law and Method*, 2016, 3, doi:10.5553/REM/000020.

<sup>95</sup> 'Framework of Analysis for Atrocity Crimes A Tool for Prevention' (United Nations Office on Genocide Prevention and the Responsibility to Protect, 2014).

<sup>96</sup> *Ibid.*, 10.

<sup>97</sup> Labonte, *R2P's Status as a Norm*, 1:143.

<sup>98</sup> For example, the prohibitions in the Geneva Conventions and the Rome Statute as well as the Genocide Convention. *ibid.*

<sup>99</sup> To be understood as values held by a group regarding the behaviour of its members. *ibid.*

<sup>100</sup> Cf. Appendix

<sup>101</sup> Chapters 14 and 20 Uwe Flick, *The SAGE Handbook of Qualitative Data Analysis* (1 Oliver's Yard, 55 City Road London EC1Y 1SP: SAGE Publications, Inc., 2014), doi:10.4135/9781446282243.

questions relate to indicator 1.3 of the Framework of Analysis, “*Humanitarian crisis or emergency [...]*.”<sup>102</sup>

Lastly, academic literature about application and implementation of R2P as well as resources by the Special Advisers of the Secretary-General on the Prevention of Genocide and on R2P may be utilised. By means of analogy, the documents mentioning the concept of R2P serve as point of reference under which circumstances R2P has been considered, applied, and implemented. Overall, the attempt is to follow the Framework for Analysis, which means to “*use the risk factors and indicators to guide the collection and assessment of information*.”<sup>103</sup> Then, after having assessed available information, determining the question of “*whether a particular State faces the kind of stress that could generate an environment conducive to atrocity crimes*”.<sup>104</sup> Not all risk factors have to be present at the same time to indicate that there is a risk of atrocity crimes occurring.<sup>105</sup> I focus on the indicators of armed conflict and humanitarian crisis, with occasional reference to other risk factors (for example, factor 3 “*Weakness of State structures*”). In the following section, I turn towards the scenario of R2P in Afghanistan, since the displaced are in Afghanistan.

#### 4 R2P in Afghanistan?

When asking the question whether R2P can protect the displaced Pakistanis, one must test whether a “classical” application of R2P onto one territory – the territory of Afghanistan - could be included in this context.<sup>106</sup> This kind of analysis has been done already, and the Global Centre for R2P lists Afghanistan’s population as a population at risk.<sup>107</sup> As the displaced Pashto currently reside in camps in Afghanistan, they also live at elevated risk. The female population is especially vulnerable, and according to the Special Rapporteur on the Situation of Human Rights in Afghanistan, the fundamental denial of women’s and girls’ human rights may amount to the crime of gender persecution, a crime against humanity.<sup>108</sup> Minorities, for example the Hazara, are being persecuted both by non-state armed groups like ISIL-K and the *de facto* authorities, the Taliban, themselves and the attacks against minorities seem to be of a widespread

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<sup>102</sup> ‘Framework of Analysis’, 10.

<sup>103</sup> *Ibid.*, 6.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> Classical *sensu stricto* that previous applications of R2P related to *one* territory and not to inter-state dispute/conflict: Libya, Kenya, or Côte d’Ivoire.

<sup>107</sup> ‘Afghanistan’, *Global Centre for the Responsibility to Protect*, 28 February 2023, <https://www.globalr2p.org/countries/afghanistan/>.

<sup>108</sup> Richard Bennett, ‘Situation of Human Rights in Afghanistan- Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan’, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General (Human Rights Council, 9 February 2023), 14.



and systemic nature, and “bear[...] the hallmarks of international crimes.”<sup>109</sup> Moreover, the International Criminal Court (ICC) opened investigations on international crimes committed since 2003.<sup>110</sup>

Afghanistan is therefore a prime example of an R2P case; the situation of women and girls, children generally, religious and ethnic minorities, the risk of war crimes, crimes against humanity like gender persecution, and even genocide occurring are alarming and should be sufficient to establish action by the International Community, as the Taliban are clearly not fulfilling their Pillar 1 obligations to protect the population within the Afghan territory from atrocity crimes. Multiple “Risk Factors” of the Framework for Analysis are immediately “fulfilled”.<sup>111</sup> Looking at Karp’s distinctions, Afghanistan falls within the reach of retrospective responsibility to protect (( 3) and 4), Section 2.4) : the retrospective responsibility to prevent has failed, since “one has failed to fulfil one’s responsibility if harm occurs that can be traced back [to] one’s actions or inactions that failed to prevent it.”<sup>112</sup> Evidently, the action that can be traced back in the more recent past is the troop withdrawal in 2021.<sup>113</sup> Therefore, the retrospective responsibility to respond demands a reaction to imminent harm, and “if one callously ignores a problem that one has the capacity to address”, States with the capacity in the international community will have failed their retrospective responsibility to respond, too. With Karp’s conception in mind, this aspect of retrospective R2P now applies.

Thus, the research question could be answered at this point with a clear “Yes, R2P measures should protect the displaced Pakistani Pashto people in Afghanistan. Moreover, R2P Pillar 2 or 3 measures should protect the Afghan population, especially women, girls, and minorities in Afghanistan.” This, however, is not a feasible option. I indicate two main reasons: political will and reality, for example the prioritisation of other issues (support for Ukraine or waging war against Ukraine), or the US-Taliban withdrawal agreement.

Looking at the Global Centre for R2P’s call for “necessary action”, it becomes evident that existing ideas are strongly dependent on the Taliban as a complying actor:<sup>114</sup>

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<sup>109</sup> Ibid., para. 39.

<sup>110</sup> Ibid., para. 59.

<sup>111</sup> For example: 1. Situations of armed conflict [...]; 2. Record of serious violations of IHRL and IHL; 3. Weakness of State structures; 7. Enabling circumstances or preparatory action ‘Framework of Analysis’.

<sup>112</sup> Karp, ‘The Responsibility to Protect Human Rights and the RtoP’, 10.

<sup>113</sup> Julian Borger, ‘US Withdrawal Triggered Catastrophic Defeat of Afghan Forces, Damning Watchdog Report Finds’, *The Guardian*, 18 May 2022, <https://www.theguardian.com/world/2022/may/18/afghanistan-us-withdrawal-defeat-watchdog-report-sigar>.

<sup>114</sup> ‘Afghanistan’.

<b>Table 2: Necessary Action according to the Global Centre for R2P</b>	
a)	The Taliban must investigate patterns of human rights violations and take immediate steps to prevent future violations, including by holding perpetrators accountable.
b)	The Taliban should allow the international community to provide assistance in meeting these obligations.
c)	The international community should continue to pursue justice for war crimes committed in Afghanistan.
d)	The UNSC should ensure that UNAMA’s Human Rights Service is preserved in its mandate renewal in March 2023.

Overall, all these calls for necessary action are commendable and certainly would improve the situation. The question of *why* an R2P scenario in Afghanistan is extremely unlikely could be researched on its own. Bullet points c) and d) are “in the hands” of the International Community; the ICC agreed on starting an investigation in 2020,<sup>115</sup> and the UNAMA mandate has been renewed in in March 2023.<sup>116</sup> A) and b) however, depend fully on the Taliban’s recognition of their obligations: precisely the Taliban’s commitment to pushing women and girls out of public life demonstrates the opposite of what the Global Centre for R2P or Amnesty International<sup>117</sup> demand: to investigate patterns of violations of human rights and humanitarian law. The Taliban are the perpetrators, and for instances where they are not the perpetrators, they are unable or unwilling to respect, protect and fulfil their human rights and humanitarian law obligations towards the population.

Clearly, the time for prevention and early warning in Afghanistan is over, the time to (re-)act is practically present already. If the international community wanted to act in Afghanistan, it would have sufficient grounds to do so. However, in terms of early warning and prevention, there is space for action concerning the Durand Line, the dispute between Afghanistan and Pakistan, and there is room for preventing the commission of atrocity crimes on top of the already existing situation in Afghanistan.

<sup>115</sup> ‘Afghanistan Situation in the Islamic Republic of Afghanistan ICC-02/17’, *International Criminal Court*, n.d., <https://www.icc-cpi.int/afghanistan>.

<sup>116</sup> ‘Resolution 2678 (2023)’, Pub. L. No. S/RES/2678 (2023) (2023).

<sup>117</sup> For example: “The Taliban as the de facto authorities must condemn the incident (alleged rape by Taliban members) and immediately launch an independent, transparent and impartial investigation into the allegations.” ‘Afghanistan: Alleged Rape by Taliban Members Must Be Investigated and Prosecuted Immediately’, *Amnesty International*, 10 March 2023, <https://www.amnesty.org/en/latest/news/2023/03/afghanistan-alleged-rape-by-taliban-members-must-be-investigated-and-prosecuted-immediately/>.

I argue that stabilizing the borderlands of the Durand Line by R2P Pillar 2 or 3 measures could protect the refugees from Waziristan stuck in Afghanistan, mainly because the shoot-to-kill policy could be dropped, and their return (or resettlement) could be ensured by either the international community or a regional arrangement involving a third state and/ or regional organisation. Additionally, Pillar 2 or 3 measures in the borderlands should be able to ensure humanitarian access to Afghanistan, access which is crucial to the survival of Afghanistan's population. Further agreements, for example on securing trade between Afghanistan and Pakistan, could be tied to increasing human rights commitments. To establish whether R2P could be applicable to the borderlands of the Durand Line, one must demonstrate grounds for the possibility of atrocity crimes occurring. As Ban Ki Moon stated, "*the first thing we can do is to be more alert and pay attention to the warning signs. Atrocity crimes take place on a large scale, and are not spontaneous or isolated events; they are processes, with histories, precursors and triggering factors which, combined, enable their commission.*"<sup>118</sup>

Section 5 deals with identifying two credible grounds, or precursors, for establishing the applicability of R2P in the borderlands of the Durand line: the existence or risk of armed conflict, either international or non-international, by means of legal analysis and an existing humanitarian crisis, by means of qualitative interviews with humanitarian actors active in the region.

## **5 Applicability of R2P in the borderlands of the Durand Line**

### **5.1 Classification of the Situation**

The analysis of classification is not exhaustive and does not include all non-state armed groups active in the region; I focus on the three main actors: Pakistan, Afghanistan (Taliban), and the Tehrik-e-Taliban Pakistan (TTP). Other non-state armed groups like Al-Qaeda or ISIS-K are not going to be included in this analysis.<sup>119</sup> The three actors are currently the main actors concerning this issue.<sup>120</sup> While I rely on news reports, for example by Al Jazeera, there could be better material to consult, however, military intelligence is usually difficult to get and mostly classified. Moreover, this is a supportive argument of why a preventive use of R2P is justified in this situation.

The analysis therefore concerns the following dyads: The relationship between Pakistan and the TTP, the TTP and the Afghan Taliban, and lastly, Pakistan and Afghanistan.

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<sup>118</sup> 'Framework of Analysis', 3.

<sup>119</sup> 'Country Reports on Terrorism 2019: Pakistan' (Bureau of Counterterrorism, 2019), <https://www.state.gov/reports/country-reports-on-terrorism-2019/pakistan/>.

<sup>120</sup> Arsalal Bilal, 'Pakistan and the Afghan Taliban: Friends Becoming Foes', *The Diplomat*, 28 April 2023, <https://thediplomat.com/2023/04/pakistan-and-the-afghan-taliban-friends-becoming-foes/>.

### 5.1.1 Pakistan and the TTP

There are hostilities occurring on a regular basis between the Pakistani Armed Forces and the TTP,<sup>121</sup> mostly on Pakistani territory (in the Former Tribal Areas, now integrated into Khyber Pakhtunkhwa).<sup>122</sup> The hostilities occur in the territory of a High Contracting Party: Pakistan has ratified the four Geneva Conventions (GCs), but neither the first nor the second Additional Protocol to the GCs (API and APII).<sup>123</sup> Therefore, the following conditions of Common Article 3 to the GCs (ComArt.3 GCs) have to be fulfilled: “*In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties[HCP], each Party to the conflict...”*

The first question is whether the TTP can constitute “*a party to the conflict*”. If the armed group is sufficiently organised,<sup>124</sup> meaning possesses a hierarchy which enables it to sustain military operations and to implement the basic obligations of IHL,<sup>125</sup> the requirement will be satisfied. The International Committee for the Red Cross (ICRC) clarified as well that NIACs are protracted armed confrontations between governmental armed forces and the forces of one or more armed groups with a minimum of organisation.<sup>126</sup> The TTP seem to have a leader, or leadership,<sup>127</sup> and are on the US list of Foreign Terrorist Organizations (FTOs).<sup>128</sup> A counter-argument could be that authors like Siddiqi have called the TTP an “*umbrella organization*”, without “*central command*”,<sup>129</sup> which would be an organizational structure not sufficing. On the other hand, the Pakistani Government seems to see a sufficient amount of hierarchy and

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<sup>121</sup> In September 2022 for example, the TTP accused the Pakistani Government to have broken a prior cease fire agreement. ‘Pakistani Soldiers Killed in Gun Battle with Taliban’, *Al Jazeera Media Network*, 6 September 2022, <https://www.aljazeera.com/news/2022/9/6/five-pakistan-soldiers-killed-in-clash-with-taliban>.

<sup>122</sup> In February 2023, the Pakistani Armed Forces killed 12 individuals suspected of belonging to the TTP. Ayaz Gul, ‘Pakistan Kills 12 “Terrorists” Tied to Afghanistan-Based Group’, *VOA*, 8 February 2023, <https://www.voanews.com/a/pakistan-kills-12-terrorists-tied-to-afghanistan-based-group/6953284.html>.

<sup>123</sup> ‘Ratification of International Human Rights Treaties - Pakistan’, *University of Minnesota - Human Rights Library*, accessed 3 April 2023, <http://hrlibrary.umn.edu/research/ratification-pakistan.html>.

<sup>124</sup> *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, No. IT-04-84-T (ICTY 3 April 2008), para. 60

<sup>125</sup> ‘IHL Treaties - Geneva Convention (III) on Prisoners of War, 1949 - Commentary of 2020 Article | Article 3 - Conflicts Not of an International Character | Article 3’, para. 456ff, accessed 2 May 2023, [https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-3/commentary/2020#\\_Toc44265093](https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-3/commentary/2020#_Toc44265093).

<sup>126</sup> ‘Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949. Commentary of 2017 Article 3 - Conflicts Not of an International Character’, *ICRC Database, Treaties, States Parties and Commentaries*, 2017, para. 445ff, [https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-3/commentary/2017?activeTab=undefined#\\_Toc481072367](https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-3/commentary/2017?activeTab=undefined#_Toc481072367).

<sup>127</sup> Jibrán Ahmad, Saud Mehsud, and Saad Sayeed, ‘Pakistani Taliban Appoints New Chief after Previous Leader Killed in Drone Strike’, *Reuters*, 23 June 2018, <https://www.reuters.com/article/us-afghanistan-usa-militant/pakistani-taliban-appoints-new-chief-after-previous-leader-killed-in-drone-strike-idUSKBN1JJOQS>.

<sup>128</sup> ‘Foreign Terrorist Organizations’ (Bureau of Counterterrorism), accessed 3 April 2023, <https://www.state.gov/foreign-terrorist-organizations/>.

<sup>129</sup> Ayesha Siddiqi, ‘Pakistan’s Counterterrorism Strategy: Separating Friends from Enemies’, *The Washington Quarterly* 34, no. 1 (February 2011): 153, doi:10.1080/0163660X.2011.538362.

organisation to negotiate ceasefires with the fighters,<sup>130</sup> for example, the ceasefire that the members of TTP broke in November 2022.<sup>131</sup> State practice of Pakistan (negotiating with the group) as well as the US and the UK,<sup>132</sup> indicate that they can be considered reasonably organized, at least under respective terrorism legislation and in the endeavour to negotiate ceasefires. Concerning the scarce information on the TTP, these indicators are deemed sufficient to establish that the TTP is sufficiently organized,<sup>133</sup> can be considered a “military organization”, and therefore as a party to the conflict.<sup>134</sup>

Then, the question turns to the intensity of hostilities. The Pakistani Armed Forces as well as law enforcement and members of the TTP regularly target and attack each other. According to Al Jazeera, the TTP has been accused of at least 100 attacks since November 2022, mostly targeting law enforcement, ergo Pakistani State agents.<sup>135</sup> Additionally, the Pakistani Armed forces are on the ground in Waziristan.<sup>136</sup> Arguably, the intensity of hostilities between the “insurgents” and the Armed Forces exceeds the threshold of “internal disturbances”<sup>137</sup> as they are not riots nor isolated and sporadic acts of violence, but part of a pattern of increasing violence.<sup>138</sup> The quality of the hostilities is also “protracted”, as the TTP attempts to overthrow the Pakistani authorities in the region since its creation in 2007, with differing intensity.<sup>139</sup>

There is consequently a non-international armed conflict (NIAC) in the sense of ComArt. 3 GCs between the Pakistani forces and TTP.<sup>140</sup> The question of the applicability of APII can be abandoned: news reports of territorial control by TTP are not sufficient nor has Pakistan ratified APII. The same goes for the question of an internationalized non-international armed conflict.

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<sup>130</sup> ‘Pakistan Taliban Says Ceasefire with Gov’t in Islamabad Extended’, *Al Jazeera Media Network*, 3 June 2022, <https://www.aljazeera.com/news/2022/6/3/pakistan-taliban-says-ceasefire-with-govt-in-islamabad-extended>.

<sup>131</sup> Abid Hussain, ‘Pakistan Taliban Ends Ceasefire with Gov’t, Threatens New Attacks’, *Al Jazeera Media Network*, Pakistan Taliban ends ceasefire with gov’t, threatens new attacks, <https://www.aljazeera.com/news/2022/11/28/pakistan-taliban-ends-ceasefire-with-govt-threatens-new-attacks>.

<sup>132</sup> Listed as a proscribed terrorist group ‘Policy Paper Proscribed Terrorist Groups or Organisations’ (UK Home Office, 26 November 2021), <https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2/proscribed-terrorist-groups-or-organisations-accessible-version>.

<sup>133</sup> *ICTY Haradinaj et al.* paragraph 89.

<sup>134</sup> In the Hamdan-case, the US Supreme Court concluded that al-Qaeda did satisfy the requirement of military organization. *Salim Ahmed Hamdan v. Donald H. Rumsfeld et al.*, No. 548 U.S. 557 (2006) (United States Supreme Court 29 June 2006).

<sup>135</sup> Abid Hussain, ‘What Is behind the Rising Violent Attacks in Pakistan?’, *Al Jazeera Media Network*, 2 February 2023, <https://www.aljazeera.com/news/2023/2/2/what-is-behind-the-rising-attacks-in-pakistan>.

<sup>136</sup> ‘Pakistani Forces Kill Terrorist in North Waziristan Operation: ISPR’, *Daily Pakistan*, 28 January 2023, <https://en.dailypakistan.com.pk/28-Jan-2023/pakistani-forces-kill-terrorist-in-north-waziristan-operation-ispr>.

<sup>137</sup> Rome Statute, Art. 8(d)

<sup>138</sup> Abid Hussain, ‘What Is behind the Rising Violent Attacks in Pakistan?’

<sup>139</sup> Which does not mean that there is a NIAC since 2007. *Ibid.*

<sup>140</sup> To which IHL of NIACs applies.

There are records of TTP members re-grouping in Afghanistan; however, these are not sufficient to establish a clear case.

### 5.1.2 Afghanistan's relationship with the TTP

Secondly, the relationship between the TTP and Afghanistan is not entirely clear. On one hand, Afghanistan has pledged to not harbour anybody who intends to use Afghan territories against another State, especially with regards to their neighbouring States.<sup>141</sup> On the other hand, the Pakistani government accuses the Afghan Taliban regularly of sheltering TTP members.<sup>142</sup> According to Al Jazeera, the TTP are separate from the Afghan Taliban, but a close ally nonetheless.<sup>143</sup> At least, they do not seem to have a hostile relationship, and by demonstrating that there is already an ongoing NIAC as well as an IAC, it is not necessary for this thesis' argument to demonstrate that there could be another dyad of armed conflict. The same applies to testing "effective" or "overall control".

Generally, the existence of an NIAC, as has been shown, and the potential for an IAC, as the next section discusses, to erupt should be sufficient to establish that this indicator of the "Framework of Analysis" is largely fulfilled. Due to the existence of armed conflict, the likelihood for atrocity crimes to occur increases drastically. As the comment on this indicator puts it: "*Atrocity crimes usually take place against a background of either an international or non-international armed conflict.*"<sup>144</sup>

### 5.1.3 Pakistan and Afghanistan

Lastly, I analyse the dyad between Afghanistan (under the Taliban) and Pakistan. Recently, there have been border skirmishes between Afghan and Pakistani armed forces.<sup>145</sup> <sup>146</sup> ComArt. 2 of the GCs determines whether there is an international armed conflict (IAC) and reads as follows: "*the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*" As has been established before, Pakistan is an HCP.

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<sup>141</sup> 'Transcript of Taliban's First News Conference in Kabul', *Al Jazeera Media Network*, 17 August 2021, <https://www.aljazeera.com/news/2021/8/17/transcript-of-talibans-first-press-conference-in-kabul>.

<sup>142</sup> Abid Hussain, 'What Is behind the Rising Violent Attacks in Pakistan?'

<sup>143</sup> Ibid.

<sup>144</sup> 'Framework of Analysis', 10.

<sup>145</sup> Abid Hussain, 'Civilians Wounded as Fighting Erupts at Pakistan-Afghan Border', *Al Jazeera Media Network*, 15 December 2022, <https://www.aljazeera.com/news/2022/12/15/civilians-wounded-as-fighting-erupts-at-pakistan-afghan-border>.

<sup>146</sup> Abid Hussain, 'Pakistan-Afghanistan Border Crossing Reopens after Deadly Firing', *Al Jazeera Media Network*, 13 December 2022, <https://www.aljazeera.com/news/2022/12/13/pakistan-afghanistan-border-crossing-reopens-after-deadly-firing>.

On the opposing side, Afghanistan under the Taliban, has been considered the *de facto* authority under IHL before.<sup>147</sup> The threshold for IACs is very low; Pictet stated that

*“any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.”*<sup>148</sup>

As has been shown, there are hostilities between the members of the Pakistani forces, or at least the border guards, and Taliban individuals. ComArt. 2 refers to cases where one of the parties denies the existence of a state of war. According to Al Jazeera, the officials of both countries held talks concerning the re-opening of a border and resolved the issue.<sup>149</sup> Therefore, not one, but both Parties “deny” the state of war mentioned in ComArt. 2 GCs and managed to lay aside arms, at least for now. However, IHL applies vis-à-vis the facts.<sup>150</sup> Therefore, there was an IAC from the time of the first outbreak of hostilities until the two parties to the conflict resolved the issue. The risk of armed conflict between Afghani Taliban and Pakistani armed forces, however, is not resolved.

#### 5.1.4 R2P and Prevention

This brings the discussion back to prevention: Is R2P really designed in a way that makes it applicable “once it is too late”? Would that not destroy the purpose of the “protect” in R2P? After all, it is called a “responsibility to protect”, not a “responsibility to react”. The Secretary General stated in a report on children, youth and R2P that “*prevention is the most important part of the responsibility to protect populations from atrocity crimes*”<sup>151</sup> as well as the need for

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<sup>147</sup> See for example the Geneva Academy’s discussion on classification of Afghanistan’s situation: ‘REVISED CLASSIFICATION OF THE ARMED CONFLICTS IN AFGHANISTAN FOLLOWING US WITHDRAWAL AND TALIBAN’S OVERALL CONTROL OF THE COUNTRY’, *GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS*, 20 September 2021, <https://www.geneva-academy.ch/news/detail/467-revised-classification-of-the-armed-conflicts-in-afghanistan-following-us-withdrawal-and-taliban-s-overall-control-of-the-country>.

<sup>148</sup> ‘Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016 Article 2 - Application of the Convention’, *ICRC Database, Treaties, States Parties and Commentaries*, 2016, para. 236, [https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016?activeTab=undefined#76\\_B](https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016?activeTab=undefined#76_B).

<sup>149</sup> ‘Trade Resumes as Pakistan, Afghanistan Reopen Torkham Crossing’, *Al Jazeera Media Network*, 25 February 2023, <https://www.aljazeera.com/news/2023/2/25/pakistan-afghanistan-reopen-torkham-border-trade-resumes>.

<sup>150</sup> ‘Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016 Article 2 - Application of the Convention’, para. 243.

<sup>151</sup> ‘Responsibility to Protect: Prioritizing Children and Young People Report of the Secretary-General’ (UN General Assembly, 26 May 2022), [https://r2pasiapacific.org/files/8995/SGReportChildrenandYoungPeople\\_2022.pdf](https://r2pasiapacific.org/files/8995/SGReportChildrenandYoungPeople_2022.pdf).

the prioritization of early action.<sup>152</sup> A similar consequence and recommendation is brought up by the Secretary General in relation to R2P, prevention and women: “*Strengthen gender-based atrocity prevention*”.<sup>153</sup> Bearing in mind these three references to R2P, prevention, children and women, I re-emphasize the fact that the case of Afghanistan is past prevention. The borderlands however are not yet as tumultuous and still bear the possibility of “preventing” the commission of atrocity crimes. The risk demonstrated should be understood as a risk of a *back-and-forth spill over effect*: Pakistan struggles with the TTP, the consequences of a devastating flood in 2022,<sup>154</sup> and other internal<sup>155</sup> and external<sup>156</sup> political issues while Afghanistan’s population suffers from and deals with the outlined issues: the Taliban as *de facto* leaders, non-state armed groups like ISIL-K, general poverty and food insecurity.<sup>157</sup> By getting a hold of the dynamics along the border, certain measures framed as R2P measures could have the potential to prevent said atrocity crimes in the region along the border, improve humanitarian access to Afghanistan and prevent *back and forth* spill over of the demonstrated issues in the region.

On a side note: The strong focus on prevention in recent years has caused a shift that contradicts both Karp and his perception of R2P and human rights as two entirely different domains,<sup>158</sup> and Ainley who called for renewal of R2P by adoption of the originally proposed human rights lens.<sup>159</sup> The Framework of Analysis has some indicators that are clearly about human rights, and by putting the emphasis on early warning, the UN has brought human rights into R2P without affecting the narrow scope on atrocity crimes. Excellent examples of that are Factors 8.10 “*Discovery of natural resources or launching of exploitation projects that have a serious impact on the livelihoods and sustainability of groups or civilian populations*”, 8.6 “*Religious events or real or perceived acts of religious intolerance or disrespect [...]*” and Enabling Circumstance 7.7 “*Expulsion or refusal to allow the presence of NGOs, international organizations,*

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<sup>152</sup> ‘Responsibility to Protect: Lessons Learned for Prevention Report of the Secretary-General’ (UN General Assembly, 10 June 2019), [https://r2pasiapacific.org/files/4085/SGReportLessonsLearnedPrevention\\_2019.pdf](https://r2pasiapacific.org/files/4085/SGReportLessonsLearnedPrevention_2019.pdf).

<sup>153</sup> ‘Prioritizing Prevention and Strengthening Response: Women and the Responsibility to Protect Report of the Secretary-General’ (UN General Assembly, 23 July 2020), para. 34a, <https://www.globalr2p.org/resources/prioritizing-prevention-and-strengthening-response-women-and-the-responsibility-to-protect-2020/>.

<sup>154</sup> ‘Devastating Floods in Pakistan’, *UNICEF*, 2022, <https://www.unicef.org/emergencies/devastating-floods-pakistan-2022>.

<sup>155</sup> For example, an ongoing economic crisis Abid Hussain, ‘IMF to Crisis-Hit Pakistan: Tax the Rich, Protect the Poor’, *Al Jazeera Media Network*, 20 February 2023, <https://www.aljazeera.com/news/2023/2/20/imf-to-crisis-hit-pakistan-tax-the-rich-protect-the-poor>.

<sup>156</sup> ‘Why India’s Revival of Civil Militias in Kashmir Is Raising Fears’, *Al Jazeera Media Network*, 13 March 2023, <https://www.aljazeera.com/news/2023/3/13/why-indias-revival-of-civil-militias-in-kashmir-is-raising-fears>.

<sup>157</sup> ‘WFP Afghanistan Country Brief’ (World Food Programme, February 2023), [https://docs.wfp.org/api/documents/WFP-0000147899/download/?\\_ga=2.86336600.1782114389.1680685958-1424529850.1678803671](https://docs.wfp.org/api/documents/WFP-0000147899/download/?_ga=2.86336600.1782114389.1680685958-1424529850.1678803671).

<sup>158</sup> Karp, ‘The Responsibility to Protect Human Rights and the RtoP’, 159ff.

<sup>159</sup> Ainley, ‘From Atrocity Crimes to Human Rights’, 256ff.



*media or other relevant actors, or imposition of severe restrictions on their services and movements.*”<sup>160</sup> These exemplary indicators relate to Arts. 27 (The Rights of Minorities), 18 (Freedom of Religion or Belief), and 19 (Freedom of Expression) ICCPR.

In the following, I discuss the results of interviews conducted with humanitarian actors who have worked in the region. This relates to indicator 1.3, “*Humanitarian crisis or emergency* [...]”<sup>161</sup>

## **5.2 The Humanitarian Situation**

To assess the humanitarian situation of the North Waziristan refugees, I intended to conduct interviews with active humanitarian actors in the borderlands and ideally in contact with the displaced. I reached out to 10-15 organisations, humanitarian actors, and UN entities, and for differing reasons, only the NRC could provide me with the information sought after in the interview guide (cf. appendix). The ICRC, for example, declined the request for the interview arguing that there are other actors in Afghanistan that are in a better position to provide information on these questions. Other actors, like the Norwegian Church Aid or RäddBarna (Swedish Save the Children), answered that despite being active in Afghanistan, they were not exactly active along the border and did not have contact with the displaced persons in question.

The interview conducted can be viewed as a direct follow-up to the “*Left Behind* [...]” brief by the NRC.<sup>162</sup> Reconstructing the narrative, the interview was conducted through Zoom, and audio-only. Facial or other reactions could therefore not be noted.

The participant, a directing employee at the NRC, gave insights of the NRC’s general work in Afghanistan: for example, so called ICLA (Information, Counselling and Legal Assistance) is conducted at border checkpoints between Afghanistan and Pakistan, namely at Torkham and Spin Buldak; LID (Legal Identity Documentation); ELP (Employment law and procedures) in limited capacities; WASH (Water, Sanitation and Hygiene) and Shelter; some support on HLP (House, Land, and Property Rights), and education, especially CBE (Community-based education), as well as general protection programming. Moreover, the interviewee shared that emergency responses, for example due to earthquakes in the region, were not possible because of HSS (Health, Safety, and Security) constraints before the Taliban takeover in August 2021. The participant’s narrative revolved around a field visit to Gulan Camp around 6 months ago. The NRC is still working with the displaced Pashto Pakistanis in Afghanistan, and the “*case*

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<sup>160</sup> ‘Framework of Analysis’, 16ff.

<sup>161</sup> Ibid., 10.

<sup>162</sup> ‘Left Behind: Waziristan Refugees in Afghanistan Risk Being Forgotten as Humanitarian Assistance Decreases.’

*load*” is mainly located in Gulan Camp. Apparently, the NRC is the only organisation in steady contact with this group of displaced people, besides a French NGO called ACTED that apparently expressed interest in working in the camp, too.

The interviewee emphasized that the settlement in Gulan Camp near Khost should be understood as “*a town*”, as the displaced Pashto people are “*a sizeable [...] community, probably one of the largest ones in Afghanistan.*” In terms of numbers, the participant shared that they were encountering the same problem: with how many people are we dealing here? There is no clarity, and there will be an MSNA (Multisector Needs Assessment) later this year. It was delayed because of the female workers ban in NGOs and the following suspensions of work in the area. The participant indicated that the NRC was providing basic primary education to 6 000 up to 8 000 children in the past 12 months. Again, this should not be understood as reliable data. Between 2014 and 2018, the numbers were around 80 000 to a 100 000, but there has been further movement since then. Describing the humanitarian situation in this settlement, the population is still very much “*aid dependent*”, there “*is no adequate standard of living*”, no “*minimum access to food and water*”, “*no meaningful [...] access to employment or livelihoods*” and “*no adequate health care facilities.*” Additionally, having no legal status whatsoever renders the population without any social protection or entitlements in Afghanistan. The participant’s team on the ground in the camp did not see any prospect for the legal status to change in relation to the Taliban takeover: “*they [the staff in the field] were under the impression that this community would be forgotten by all parties irrespective of who’s in control or in decision making.*”

The participant explained the movement as a consequence of aid and assistance having “*dried up*”: after UNHCR closed their office in Khost in 2018 due to a funding crisis, less donors were aware or willing to fund anything along the border. Gulan Camp was removed from the OCHA HRP (Humanitarian Response Plan),<sup>163</sup> and therefore donors are not funding any needs of the North Waziristan refugees. Among the many contacted organisations, UNHCR, UNICEF, UNAMA, and other UN actors like the IOM in Afghanistan, did not respond to any kind of request.

Furthermore, the settlement is completely segregated, “*living in parallels*”, from the host country’s population, and there are only rare points of connection through occasional day labour. There are no tensions between the Pashto people from this side and from the other side of the border; the fact that the affected displaced and the host society are Pashto did not seem to influence the dynamic: apparently, “*being Pashto and speaking Pashtun is not enough.*” The

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<sup>163</sup> After fact-checking this information, OCHA is apparently aware of the Gulan Camp, mentioned it in the 2022 HRP once (‘HUMANITARIAN RESPONSE PLAN AFGHANISTAN’ (UN OCHA 2022).), but not at all in the most recent 2023 HRP. According to the 2023 HRP, “*there are approximately 52,000 refugees living in Afghanistan, the vast majority of whom were displaced from Pakistan to Afghanistan in 2014 and who reside in Khost and Paktika provinces in the South-eastern Region.*” ‘HUMANITARIAN NEEDS OVERVIEW AFGHANISTAN’ (UN OCHA 2023). p. 47

only tensions the interviewee mentioned might have been during the timespan when the Gulan camp received material, humanitarian aid, and the host population did not (between 2014 and 2018). In comparison to other displaced groups from Pakistan, the North Waziristan people do not even have old passports, while another sizeable, displaced Baloch community has at least expired Pakistani ID.

The main insights from the interview are the precarious humanitarian situation, no water nor food, no access to health care, limited education possibilities, and the unique issue of no legal status and no documents to obtain any legal status in the future. Additionally, resettlement in the area of origin, the former F.A.T.A. areas in Pakistan, is not a viable option. Hence, resettlement in a third place seemed to be “*the most realistic option*”, although it is speculative whether this option can be called viable or not. In the context of this thesis, it is not possible to determine where this third area of resettlement would be. The records from the interview match the many indicators included in the Framework for Analysis, for example 1.3 “*Humanitarian crisis or emergency [...]*”, 1.7-1.9 “*Economic instabilities [...]*”, and 3.1-3.10 relating to weak State structures.<sup>164</sup>

As “*obiter dicta*”, the participant clarified that the North Waziristan refugees are not unique in the sense that there are other displaced communities from Pakistan, for example the Baloch community, on the other side of the Iranian-Pakistani border near Zabol in the Sistan and Baluchestan Province (Iran), “*who are essentially living off Iranian remittances*”. Additionally, the NRC experiences significantly more interference by Taliban members along the Iranian Afghan border. The Durand line is difficult, but not as challenging as the Iran-Afghanistan border which used to be a complete no-go area for humanitarian actors. The NRC, so the interviewee, “*has a more limited operational footprint along the Pakistan Afghanistan border.*”

In conclusion, the Waziristan refugees in Gulan Camp in Afghanistan were at risk of being forgotten in 2019, and in 2023, they have largely been forgotten, except for the NRC after 2020. Status and prospects do not seem to be influenced by the Government in charge, and ultimately, “*there is nothing to return to and there is nothing to stay for*” for the North Waziristan refugees.

## **6 Measures of R2P in this situation**

In this section, I discuss measures under an R2P framework suitable for this kind of situation: a volatile, militarised, and disputed border which does not permit movement for displaced persons but allows for a non-state armed group to re-group when necessary. The measures I discuss fall both in Pillar 2 and 3 responses: preventive diplomacy can be viewed as a Pillar 2 or 3 measure, as the International Community either seeks to assist a State, or in the present case, two States, to assist in meeting their Pillar 1 obligations, or “interferes” diplomatically in the

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<sup>164</sup> ‘Framework of Analysis’.

State's affairs, which would make it a Pillar 3 measure.<sup>165</sup> Measures under Chapter VII are clearly Pillar 3 measures, while the measures under Chapter VIII can be both 2 and 3 as well.<sup>166</sup>

The emphasis here is on the fact that any measure should affect both countries in a way that has an influence on the humanitarian situation and the situation of armed conflict, mainly allowing for movement of displaced persons and for fleeing Afghans in accordance with the latest UN-HCR Guidance Note on the International Protection Needs of People Fleeing Afghanistan.<sup>167</sup>

Some initial remarks before presenting relevant measures: this section does not address sanctions, especially economic sanctions, as well as the disruption of diplomatic relations or the provision of assistance to opposition groups. Henderson discusses many of these measures as measures less than force,<sup>168</sup> but they are not included for the following reasons:

Imposing (additional) sanctions on both countries is not suitable as an R2P measure as it would not change the risk of commission of atrocity crimes.<sup>169</sup> It would exacerbate an already difficult situation, and another sanctions regime would likely hit the civilian population harder than any of the belligerents. Additionally, the insight of this thesis is surely not that Pakistan is not fulfilling its Pillar 1 obligations entirely, but partially with regards to the displacement along the Durand Line and the Pashto people in the former F.A.T.A areas.

Disrupting diplomatic relations is not an appropriate measure, as the dispute between Afghanistan/ the Taliban and Pakistan stems exactly from the inability to negotiate a solution. Moreover, the Taliban Government has not received formal recognition<sup>170</sup> as incumbent government. Cutting diplomatic ties that hardly exist would barely impact the Taliban Government. It could even have detrimental effects to cut diplomatic ties with Pakistan, the same applies to the growing diplomatic efforts with the Taliban. Recently, Special Representatives from various Western countries on Afghanistan “*emphasized the need for continued engagement with neighbouring countries and other countries of the region to further deepen coordination on a joint*

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<sup>165</sup> ‘Secretary-General’, *UN Office on Genocide Prevention and the Responsibility to Protect*, accessed 3 May 2023, <https://www.un.org/en/genocideprevention/secretary-general.shtml>.

<sup>166</sup> Ibid.

<sup>167</sup> ‘GUIDANCE NOTE ON THE INTERNATIONAL PROTECTION NEEDS OF PEOPLE FLEEING AFGHANISTAN – UPDATE I’.

<sup>168</sup> Henderson, *Atrocity Crimes and International Law*.

<sup>169</sup> For example, the EU sanctions map shows the sanctions regime imposed on Afghanistan, or more specifically, the Taliban in the fields of arms export, asset freeze and prohibition to make funds available, as well as travel restrictions for individuals on the list. ‘EU Sanctions Map’, *European Commission*, 24 April 2023, <https://www.sanctionsmap.eu/#/main?checked=1&search=%7B%22value%22:%22Afghanistan%22,%22searchType%22:%7B%22id%22:1,%22title%22:%22regimes,%20persons,%20entities%22%7D%7D>.

<sup>170</sup> Some States entertain diplomatic relations with the Taliban. As Ben Saul puts it: “[E]ven in the absence of recognition, the entity will still be the legal government.” Ben Saul, “‘Recognition’ and the Taliban’s International Legal Status”, *International Centre for Counter-Terrorism*, 15 December 2021, <https://icct.nl/publication/recognition-talibans-international-legal-status/>.

response to the developing situation in Afghanistan.”<sup>171</sup> The US, the UK, Germany, and the EU overall recognize the importance of Afghanistan’s neighbouring States, like Pakistan.

It is self-explanatory why provision of assistance to opposing groups is not a proper measure: the TTP are the opposing group, and there is no benefit in arming and supporting the non-state armed group conducting terrorist acts on Pakistani soil. The measures I address in this section relate to the use of diplomatic measures to prevent atrocity crimes, the role of regional arrangements in implementing R2P (Chapter VIII UN Charter) as well as some thoughts on the use of force under Chapter VII UN Charter. Furthermore, I intend to highlight each measure’s adaptability to the theoretical concepts of de Sousa Santos.

### **6.1 The use of diplomatic measures to prevent atrocity crimes**

According to Oellers-Frahm, “*the most important aspect of R2P [...] remains the issue of intervention, while prevention*” does “*not play a significant role.*”<sup>172</sup> As this section highlights the use of diplomatic measures for the prevention of atrocity crimes in the borderlands between Afghanistan and Pakistan, some opposing arguments can be utilized to showcase why prevention is indeed the pivotal point of R2P:

Firstly, State practice, especially in the region and neighbouring regions discussed in this thesis, demonstrates that States value non-interference and prefer diplomatic measures over forceful measures, even if a State like China is capable of proposing them in the UN SC and conducting forceful military operations.<sup>173</sup> Examples of States and intergovernmental organisations preferring diplomatic means over forceful ones are the BRICS<sup>174</sup> States and the ASEAN organisation.<sup>175</sup>

Secondly, R2P’s preventive function re-affirms the measures set out in Art. 2(3) UN Charter and under Chapter VI UN Charter, stating that States “*shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*” As has been demonstrated, there is a dispute between the two countries concerning the Durand Line,<sup>176</sup> which could evolve into an IAC. The dispute endangers the already unstable situation in the region, and the involved States should find a peaceful settlement. Dispute settlement between States would

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<sup>171</sup> ‘Joint Statement on Afghanistan’, *OFFICE OF THE SPOKESPERSON*, 7 March 2023, para. 9, <https://www.state.gov/joint-statement-on-afghanistan-2/>.

<sup>172</sup> Peter Hilpold, ed., ‘Responsibility to Protect: Any New Obligations for the Security Council and Its Members?’, in *The Responsibility to Protect (R2P)* (Brill | Nijhoff, 2015), 185, doi:10.1163/9789004230002\_008.

<sup>173</sup> Henderson, *Atrocity Crimes and International Law*, 39.

<sup>174</sup> Brazil, Russia (Henderson states as well that this should be viewed differently with concern to the Russian aggression against Ukraine since February 2022), India, China, and South Africa.

<sup>175</sup> Henderson, *Atrocity Crimes and International Law*, 39.

<sup>176</sup> Poya, ‘The Status of Durand Line under International Law’.

usually take place in fora or bodies like the International Court of Justice (ICJ), but it is difficult to assess within this research project whether the Taliban and the Pakistani Government would consent to involving the ICJ in their border dispute. Zyberi explores R2P through an ICJ lens and finds that the ICJ is able to provide “*legal guidance and oversight in the process of the institutionalisation and implementation of RtoP*” and that some ICJ cases facilitated understanding international legal obligations arising under R2P.<sup>177</sup>

Thirdly, prevention is a main concern for the UN as the reports by the Secretary General show. “*Prevention is indeed the key to guaranteeing the safety of children and young people from atrocity crimes,*” for example.<sup>178</sup> Academics working on R2P, such as Alex Bellamy, have called prevention “the essence” of R2P, as well as its cornerstone.<sup>179</sup> Therefore, when speaking about R2P, it is not recommendable to speak only about intervention and omit the importance of prevention. In relation to the post-election violence in Kenya, Ban Ki-moon precisely stated that “*if the international community acts early enough, the choice need not be a stark one between doing nothing or using force.*”<sup>180</sup>

Henderson names diplomatic criticism, naming and shaming, dialogue, and mediation, as well as fact finding missions.<sup>181</sup> *In casu*, diplomatic criticism could be made use of as a soft measure, calling upon the authorities of both countries to settle the dispute and let refugees return in safety. Mediation through a third party could be thought of as well.<sup>182</sup> The difficulty would be to find a suitable State or organization to involve as mediating third party. The Organisation for Islamic Cooperation (OIC) has addressed “*all Afghan parties*” before,<sup>183</sup> and its potential role will be addressed in the next section. Otherwise, the Taliban *de facto* authorities and the Pakistani Government could meet under the auspices of Qatar, which the acting Taliban Minister of Foreign Affairs, Amir Khan Muttaqi, has visited most frequently after 2021.<sup>184</sup> Muttaqi has been to Pakistan, too, but according to Reuters, the border dispute was not directly addressed, rather issues relating to the border such as “*facilitation of transit trade, cross-border movement*

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<sup>177</sup> Gentian Zyberi, ‘The Responsibility to Protect Through the International Court of Justice’, in *Responsibility to Protect*, ed. André Nollkaemper and Julia Hoffmann, 1st ed. (Amsterdam University Press, 2011), 305–18, doi:10.1017/9789048515042.022.

<sup>178</sup> ‘Responsibility to Protect: Prioritizing Children and Young People Report of the Secretary-General’, para. 50.

<sup>179</sup> Bellamy, *The Responsibility to Protect*, 201.

<sup>180</sup> Henderson, *Atrocity Crimes and International Law*, 44.

<sup>181</sup> *Ibid.*, 38.

<sup>182</sup> Poya does not suggest a State or another entity but endorses the idea of a Second Durand Agreement including a third party. Poya, ‘The Status of Durand Line under International Law’.

<sup>183</sup> ‘OIC Urges All Afghan Parties to Effect A Lasting Ceasefire and Contribute to Fighting Coronavirus’, *Organisation of Islamic Cooperation*, 30 March 2020, [https://www.oic-oci.org/topic/?t\\_id=23302&t\\_ref=13970&lan=en](https://www.oic-oci.org/topic/?t_id=23302&t_ref=13970&lan=en).

<sup>184</sup> ‘List of International Trips Made by Amir Khan Muttaqi as Acting Foreign Minister of Afghanistan’ (Wikipedia, 6 January 2023), [https://en.wikipedia.org/wiki/List\\_of\\_international\\_trips\\_made\\_by\\_Amir\\_Khan\\_Muttaqi\\_as\\_Acting\\_Foreign\\_Minister\\_of\\_Afghanistan](https://en.wikipedia.org/wiki/List_of_international_trips_made_by_Amir_Khan_Muttaqi_as_Acting_Foreign_Minister_of_Afghanistan).

[...] *and regional connectivity.*”<sup>185</sup> A fact-finding mission could be useful to establish a common ground concerning the factual situation, especially when both sides accuse each other of a certain conduct. A more bottom-up approach could be to engage religious leaders to make use of their influence in order to facilitate community-based dialogue.<sup>186</sup> Generally, such measures foster trust and cooperation. It is questionable though whether the religious leaders’ influence is large enough to stabilize an international border and decrease tensions to such an extent.

### 6.1.1 Theory I

This community-oriented approach fits particularly well with de Sousa Santos’ ideas of abyssal lines and abyssal resilience: people, especially in the Global South, regularly become the object of European human rights discourse, but not participating agents of said human rights discourse.<sup>187</sup> Therefore, engaging the communities themselves has the potential of empowering the radically excluded. According to de Sousa Santos, “the other side” of the abyssal line is innovative and resilient; by Western standards, they simply do not fit into Western conceptions of economy, politics, science, and social order.<sup>188</sup> Again, this relates to the social code Pash-tunwali: communities approaching each other with the same or at least a similar system of values, beliefs and convictions is more sustainable and closer to the affected people’s living reality than a UN SC resolution drafted in New York. On the other hand, diplomatic criticism creates more attention on the international level and in the international relations of the States involved. However, this would be speaking *about* the people affected, not with them. A combination of the community-oriented approach and the diplomatic high-level approach would be beneficial: a dispute settlement negotiation under the auspices of a neutral third State that includes Pashto people struggling with the Durand Line in their daily lives, participating in negotiations on a Second Durand Line Agreement. In these negotiations, special attention should be paid to IDPs and the displaced Pashto population from Pakistan in Afghanistan. A major downside is the amount of recognition and validity the Taliban Government would gain from participating in these kinds of talks; on the other hand, it is questionable how long recognition of the Taliban as a government can be avoided or postponed.

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<sup>185</sup> ‘Afghanistan’s Taliban-Appointed Foreign Minister Visits Pakistan’, *Reuters*, 10 November 2021, <https://www.reuters.com/world/asia-pacific/afghanistans-taliban-appointed-foreign-minister-visits-pakistan-2021-11-10/>.

<sup>186</sup> ‘Responsibility to Protect: Lessons Learned for Prevention Report of the Secretary-General’, para. 25b.

<sup>187</sup> de Sousa Santos, ‘The Resilience of Abyssal Exclusions in Our Societies’, 253ff.

<sup>188</sup> *Ibid.*, 254.

## 6.2 The role of regional arrangements in implementing the responsibility to protect

In 2011, the Secretary General addressed the role of regional arrangements in implementing R2P.<sup>189</sup> The report states that “*threats to populations frequently result in large flows of refugees and internally displaced persons,*”<sup>190</sup>, therefore matching this thesis’ context. Carment et al. argue that NGOs and local actors are currently filling a “responsibility gap” regional organizations (ROs) have allowed to emerge, in terms of fully embracing R2P.<sup>191</sup> The promise of R2P in connection with ROs can “*only be realized if greater emphasis is placed on working to prevent the outbreak of large-scale violence and atrocities as opposed to trying to manage and contain them.*”<sup>192</sup> As argued before, there is room for prevention through an RO, and ideally, both Pakistan and Afghanistan are members of an RO tasked with atrocity prevention in the borderlands of the Durand Line. In this section, I address the prospects of four such ROs resorting to R2P measures, especially mediating, between the two countries.

**Table 3: Organizations and Pakistan’s and Afghanistan’s Membership Status**

South Asian Association for Regional Cooperation (SAARC)	Both States are Members
Organisation for Islamic Cooperation (OIC)	Both States are Members
Islamic Military Counter Terrorism Coalition (IMCTC)	Both States are Members
Shanghai Cooperation Organisation (SCO)	Pakistan is a Member State, Afghanistan has Observer Status

To “commission” the international community or more specific, an RO, a SC Resolution with reference to Chapter VIII (or VII, see next section) would be necessary. The UN SC has been made aware of the border and the implications for the region by the Secretary General, confirming multiple clashes between the Taliban and the Pakistani armed forces.<sup>193</sup> Therefore, it could refer implementation of measures to one or more of the four ROs (Art. 52(3) UN Charter) discussed in this thesis. One important premise is the fact that this larger “Asian” region, the

<sup>189</sup> ‘The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect Report of the Secretary-General’ (UN General Assembly, 28 June 2011).

<sup>190</sup> Ibid., para. 12.

<sup>191</sup> David Carment, Sean Winchester, and Joe Landry, *The Role of Regional Organizations*, ed. Alex J. Bellamy and Tim Dunne, vol. 1 (Oxford University Press, 2016), doi:10.1093/oxfordhb/9780198753841.013.18.

<sup>192</sup> Ibid., 1:346f.

<sup>193</sup> ‘The Situation in Afghanistan and Its Implications for International Peace and Security Report of the Secretary-General’ (UN General Assembly, 7 December 2022), para. 22.



ROs, and the States in it do not favour interventionism and Pakistan as well as India “revolted” against R2P in 2007-8 before changing their perspective in 2009.<sup>194</sup>

### SAARC

Citing Carment et al., “no serious scholar entertained the possibility that SAARC had an important role to play in managing the conflict in Sri Lanka.”<sup>195</sup> There are no reasons indicating change in SAARC’s capabilities and willingness to prevent atrocities under R2P between Pakistan and Afghanistan, when the organisation was not interested in a simmering conflict 15 years ago. SAARC has an arbitration council, SARCO:<sup>196</sup> according to the agreement establishing the arbitration council, SARCO should provide fair, inexpensive, and expeditious arbitration in the region.<sup>197</sup> Art. 3(a) refers to “commercial, investment and such other disputes as may be referred to the Council by agreement”, it is, however, not clear whether that could include border disputes or not.

### OIC

The OIC has been mentioned before in addressing disputes and conflicts between its members. Al-Ahsani analyses two successful cases (Bangladesh-Pakistan Conflict and PLO -Jordan Conflict) and one failed example (Iran-Iraq Conflict) of conflict resolution, and finds that the two successful examples had to do with the OIC leading figures at the time.<sup>198</sup> In 2021, the OIC had committed itself to set up a humanitarian fund through its members to prevent Afghanistan from collapsing economically; according to Al Jazeera, Afghan Foreign Minister Muttaqui was excluded from the official photograph taken during an extraordinary session of the OIC.<sup>199</sup> However, both Afghanistan and Pakistan are member States and the religious aspect of difficulties in encountering the Taliban could be overcome by an Islamic organisation (in comparison to the suggestion of foreign mediating organizations or entities, like the EU). The Charter of the OIC provides a peaceful settlement mechanism by means of consultation with the Executive

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<sup>194</sup> Sarah Teitt, *Asia Pacific and South Asia*, ed. Alex J. Bellamy and Tim Dunne, vol. 1 (Oxford University Press, 2016), 379ff, doi:10.1093/oxfordhb/9780198753841.013.20.

<sup>195</sup> Carment, Winchester, and Landry, *The Role of Regional Organizations*, 1:341.

<sup>196</sup> <https://sarco-sec.org/>, this website was not accessible although it is supposedly the official one.

<sup>197</sup> South Asian Association for Regional Cooperation (SAARC), Agreement for establishment of SAARC Arbitration Council, 2009, available at: <https://www.refworld.org/docid/4ed8d51c2.html> [accessed 28 March 2023] Art.3(c)

<sup>198</sup> Abdullah al-Ahsan, ‘Conflict Resolution in Muslim Societies: Role of the OIC’, in *Qur’anic Guidance for Good Governance*, ed. Abdullah al-Ahsan and Stephen B. Young (Cham: Springer International Publishing, 2017), 193–214, doi:10.1007/978-3-319-57873-6\_9.

<sup>199</sup> ‘OIC Nations Pledge Fund to Prevent Afghanistan Economic Collapse’, *Al Jazeera Media Network*, 19 December 2021, <https://www.aljazeera.com/news/2021/12/19/oic-nations-pledge-fund-to-prevent-afghanistan-economic-collapse>.

Committee and the OIC's Secretary-General.<sup>200</sup> Supposedly, the Charter creates an Islamic Court as well;<sup>201</sup> as of now, the Court has not been set up.

Recently, the OIC Secretary-General to Afghanistan has visited Afghanistan as well to discuss legislation on girls' and women's rights with the *de facto* authorities:<sup>202</sup> this kind of existing contact could be utilized for the benefit of resolving the Durand Line issue and bringing up the needs of the North Waziristan refugees. Overall, it seems to be that the OIC does not isolate the Taliban, looking at diplomatic interaction in recent weeks and months.<sup>203</sup> Moreover, the OIC operationalised its conflict resolution mechanism, emphasizing that "*preventive diplomacy is the center point of the OIC peace architecture.*"<sup>204</sup>

### IMCTC

The IMCTC was established by the Kingdom of Saudi Arabia in December 2015, "*in order to consolidate Muslim countries' efforts in countering terrorism.*"<sup>205</sup> Its objectives and strategic vision ("*To be a leader at the international level in counterterrorism and a prime partner in international efforts for preserving international peace and security.*") imply that the IMCTC could be particularly suited in tackling the Durand Line issue.<sup>206</sup>

According to the IMCTC's website, assisting in the coordination of resourcing and planning of member countries' military counterterrorism operations, facilitating sharing of military information and encouraging military counterterrorism capacity is one of the four core domains of the coalition, the other three domains being "ideology", "communications" and "counter terrorist financing".<sup>207</sup> Mainly, the IMCTC is a network of military intelligence sharing between the 42 member States.<sup>208</sup> It does not seem to be capable of settling disputes between members; it

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<sup>200</sup> Arts. 27 and 28 OIC, 'Charter of the Organisation of Islamic Cooperation (OIC)' (2008), [https://www.oic-oci.org/upload/documents/charter/en/oic\\_charter\\_2018\\_en.pdf](https://www.oic-oci.org/upload/documents/charter/en/oic_charter_2018_en.pdf).

<sup>201</sup> Art. 14 *ibid.*

<sup>202</sup> 'The Envoy of the Secretary-General for Afghanistan Arrives in Kandahar and Meets with the Minister of Foreign Affairs of the Afghan de Facto Authority', 8 March 2023, [https://www.oic-oci.org/topic/?t\\_id=38622&ref=26292&lan=en](https://www.oic-oci.org/topic/?t_id=38622&ref=26292&lan=en).

<sup>203</sup> 'Press Releases', *Organisation of Islamic Cooperation*, accessed 3 May 2023, <https://www.oic-oci.org/news/?lan=en>.

<sup>204</sup> 'OIC Operationalizes Its Conflicts Resolution Mechanism', *Organisation of Islamic Cooperation*, 18 May 2016, [https://www.oic-oci.org/topic/?t\\_id=11205&t\\_ref=4407&lan=en](https://www.oic-oci.org/topic/?t_id=11205&t_ref=4407&lan=en).

<sup>205</sup> 'Brief History', *Islamic Military Counter Terrorism Coalition*, 3 January 2023, <https://imctc.org/en/AboutUs/History/Pages/default.aspx>.

<sup>206</sup> See for example „Strategic objectives“: 3. Take effective measures that strengthen prevention, detection and curbing of terrorism financing. 4. Coordinate military and relief support to member countries to enable them to defeat armed terrorist groups and alleviate the suffering of local communities. 'Strategic Objectives', *Islamic Military Counter Terrorism Coalition*, 3 March 2021, <https://imctc.org/en/AboutUs/goals/Pages/default.aspx>.

<sup>207</sup> 'FAQ', *Islamic Military Counter Terrorism Coalition*, 27 January 2021, <https://imctc.org/en/Help/FAQ/Pages/default.aspx03.05.2023>.

<sup>208</sup> 'Member Countries', *Islamic Military Counter Terrorism Coalition*, 27 January 2021, <https://imctc.org/en/AboutUs/MemberCountries/Pages/default.aspx>.

could, however, facilitate counter terrorist operations against the TTP on Pakistani soil: it is questionable whether Pakistan would be willing to share military intelligence with the Taliban.

### SCO

Lastly, the SCO has been addressed as “*an ideal forum for the settlement of the Afghanistan issue in theory.*”<sup>209</sup> Although Afghanistan only has observer status, all other neighbouring countries of Afghanistan and all major regional powers are member States of the SCO, for example India, China, and Russia.<sup>210</sup> According to Seiwert, there should not be too much expectation from the SCO concerning the Taliban.<sup>211</sup> The author MacHaffie finds that the SCO indeed has the quality of turning rivalries, especially in terms of border issues, into cooperation, for example through joint military operations.<sup>212</sup> However, the analysis did not include Pakistan as a “new member”, and did not address Afghanistan as an observer either.<sup>213</sup> Therefore, it is speculative to assume any capabilities of the SCO in mediating between Pakistan as a member State and Afghanistan as an observer; the same applies to Pakistan and India as two members with an active dispute concerning Kashmir. This issue has been called an intractable challenge the SCO cannot overcome.<sup>214</sup>

In summary, the OIC seems to be the most suitable arena for mediating as a third party, having successfully mediated between member States and even non-member factions (PLO). The IMCTC and the SCO do not provide for settlement mechanisms; Pakistan could request assistance from the IMCTC when operationalising counter terrorist efforts against the TTP. SAARC’s settlement mechanism is rather unclear. With regards to atrocity prevention, the IMCTC could be useful as a network for military intelligence sharing as well.

### 6.2.1 Theory II

De Sousa Santos discusses ROs mostly as part of “regional trading blocs” or in relation to regional human rights regimes, where he notes the absence of a human rights regime comparable to the European, the Inter-American and the African system.<sup>215</sup> Additionally, he discusses

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<sup>209</sup> Eva Seiwert, ‘The Shanghai Cooperation Organization Will Not Fill Any Vacuum in Afghanistan’, Foreign Policy Research Institute, *Central Asian Papers*, (30 September 2021), <https://www.fpri.org/article/2021/09/the-shanghai-cooperation-organization-will-not-fill-any-vacuum-in-afghanistan/>.

<sup>210</sup> ‘Member States of the Shanghai Cooperation Organisation’, *Shanghai Cooperation Organization Secretariat*, 05 2022, [http://eng.sectsc.org/for\\_media/20221005/915167.html](http://eng.sectsc.org/for_media/20221005/915167.html).

<sup>211</sup> Seiwert, ‘The Shanghai Cooperation Organization Will Not Fill Any Vacuum in Afghanistan’.

<sup>212</sup> James MacHaffie, *The Shanghai Cooperation Organization and Conflict De-Escalation: Trust Building and Interstate Rivalries*, 1st ed. (London: Routledge, 2023), 135, doi:10.4324/9781003353119.

<sup>213</sup> MacHaffie, *The Shanghai Cooperation Organization and Conflict De-Escalation*.

<sup>214</sup> *Ibid.*, 139.

<sup>215</sup> Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 3rd ed. (Cambridge University Press, 2020), 310ff, doi:10.1017/9781316662427.

regional integration through the EU, which is not comparable to any of the presented ROs. What can be said about the OIC has a potential mediating entity is that it has a clear advantage in terms of religious proximity to the parties to the conflict; as the main organization of Islamic States and States with Muslim population, the mode of negotiating, in line with Islamic principles, and the reflection of (more or less) common religious values,<sup>216</sup> could help a negotiating process. However, de Sousa Santos also recognizes the difficulties of aligning a certain type of interpretation of Islam with international human rights law: for absolutists, like the Taliban, “*there are irreconcilable inconsistencies between the Shari’a and the international human rights, but the Shari’a must prevail.*”<sup>217</sup> As with any absolutist position on any issue, this is difficult to circumvent.

In the last sub-section, I discuss potential R2P Pillar 3 measures under Chapter VII of the UN Charter along the Durand Line, authorizing the use of force.

### 6.3 Use of Force under Chapter VII

Certainly, “*military intervention [...] is the most controversial element of the responsibility to protect (R2P).*”<sup>218</sup> Nonetheless, it should not be entirely overlooked. An essential starting point for discussing measures under Chapter VII is that Pakistan is a nuclear power.<sup>219</sup> Therefore, measures “overruling” Pakistan’s sovereignty are not worth considering. If either the International Community, a regional organisation or a State was to enforce a measure including the use of force, it had to be with – at least- Pakistan’s consent for said measure, letting foreign military access the border from the Pakistani side. Consent usually is a pre-condition for UN peacekeeping missions as well.<sup>220</sup> Ideally, the Taliban would consent to having foreign or UN military personnel operating along the border, too. Theoretically, consent is not necessary for R2P Pillar 3 responses: Resolution 1973 and “all necessary measures” allowed the International Community to conduct military action in and against a sovereign State, namely Libya.<sup>221</sup> In this section, I look at “de-militarised zones” (DMZs) and the relation of R2P and peacekeeping/-building/ and -enforcing.

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<sup>216</sup> It is not in my intention to paint with a broad brush: of course, there are important differences between Muslims all over the world and the Taliban as fundamentalist, jihadist, and oppressive governing group.

<sup>217</sup> de Sousa Santos, *Toward a New Legal Common Sense*, 327ff.

<sup>218</sup> Taylor Seybolt, *The Use of Force*, ed. Alex J. Bellamy and Tim Dunne, vol. 1 (Oxford University Press, 2016), 561, doi:10.1093/oxfordhb/9780198753841.013.30.

<sup>219</sup> Hans M. Kristensen and Matt Korda, ‘10. World Nuclear Forces’, in *SIPRI Yearbook 2022: Armaments, Disarmament and International Security* (Stockholm: SIPRI, 2022).

<sup>220</sup> UN Secretary General, ‘An Agenda for Peace : Preventive Diplomacy, Peacemaking and Peace-Keeping : Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992.’ (New York: UN, 17 June 1992), para. 20, <https://digitallibrary.un.org/record/144858?ln=en>.

<sup>221</sup> Simon Adams, *Libya*, ed. Alex J. Bellamy and Tim Dunne, vol. 1 (Oxford University Press, 2016), doi:10.1093/oxfordhb/9780198753841.013.41.

Boutros Boutros-Ghali, UN Secretary General at the time, stated that “*consideration should now be given to the usefulness of such zones as a form of preventive deployment, on both sides of the border, with the agreement of the two parties, as a means of separating potential belligerents.*”<sup>222</sup> The establishment of a demilitarised zone signals the involvement of the international community, and the intention of preventing armed conflict as an international concern.<sup>223</sup> The humanitarian access to Afghanistan and Gulistan Camp could be guaranteed in a better way. The main difficulty here is the scale of the border: securing 2 600 km of borderlands is easier said than done. A defensive strategy, establishing a humanitarian corridor or a large, protected area, must be credible in terms of deterrence: if a (foreign) military unit was to establish a humanitarian corridor to or from Gulistan Camp, the deterrence must be credible for armed groups in the area.<sup>224</sup> Technically, there are two broad categories of “demilitarised zones”: one under *jus ad bellum*, the other one under *jus in bello* (which contains multiple sub-categories).

For a DMZ under *jus in bello*, a classification of Afghanistan would be necessary, to map out the dyads between the different actors and whether they can constitute parties under IHL as well as to clarify what kind of zone would make sense. IHL knows DMZs or neutralized zones that are far from the frontline, in the middle of the combat zone, etc.<sup>225</sup> According to the ICRC, “a “*demilitarized zone*” is an area, agreed upon between the parties to an armed conflict, which cannot be occupied or used for military purposes by any party to the conflict” and “can be established by a verbal or written agreement in times of peace or during an armed conflict.”<sup>226</sup> The difficulty here is obvious: getting the agreement of the Taliban, and potentially of other groups like the TTP and ISIL-K, is not particularly realistic. Demilitarized zones “*are pointless against an enemy determined to violate IHL.*”<sup>227</sup> The willingness of these actors to respect such a zone would need to be ensured.

More importantly, a DMZ under *jus ad bellum* is the type of zone Boutros Boutros-Ghali addressed: there is not yet an IAC between Afghanistan and Pakistan, thus a DMZ under Chapter VII could be authorized to maintain the absence of conflict. Pre-dating R2P language, the UN

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<sup>222</sup> UN Secretary General, ‘An Agenda for Peace : Preventive Diplomacy, Peacemaking and Peace-Keeping : Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992.’, para. 30.

<sup>223</sup> Ibid., para. 30ff.

<sup>224</sup> Seybolt, *The Use of Force*, 1:xxxx.

<sup>225</sup> ‘Protected Zones According to International Humanitarian Law’ (International Committee of the Red Cross), accessed 5 April 2023, [https://casebook.icrc.org/sites/default/files/u71/protected\\_zones\\_table.jpg](https://casebook.icrc.org/sites/default/files/u71/protected_zones_table.jpg).

<sup>226</sup> M. Sassòli, A. Bouvier, A. Quintin, J. Grignon, ‘Demilitarized Zones’, in *How Does Law Protect in War? A to Z* (Geneva: International Committee of the Red Cross, 2014), [https://casebook.icrc.org/a\\_to\\_z/glossary/demilitarized-zones#:~:text=A%20%E2%80%9Cdemilitarized%20zone%E2%80%9D%20is%20an,or%20during%20an%20armed%20conflict](https://casebook.icrc.org/a_to_z/glossary/demilitarized-zones#:~:text=A%20%E2%80%9Cdemilitarized%20zone%E2%80%9D%20is%20an,or%20during%20an%20armed%20conflict).

<sup>227</sup> 13. Zones created to protect war victims against the effects of hostilities M. Sassòli, A. Bouvier, A. Quintin, J. Grignon, ‘Conduct of Hostilities’, in *How Does Law Protect in War? The Law* (Geneva: International Committee of the Red Cross, 2014), [https://casebook.icrc.org/law/conduct-hostilities#ii\\_13](https://casebook.icrc.org/law/conduct-hostilities#ii_13).

SC established such a DMZ before under Chapter VII along the border between Iraq and Kuwait.<sup>228</sup> In the aftermath of the Iraqi invasion of Kuwait, it was a “United Nations observer unit” to monitor the DMZ.<sup>229</sup> As a potential measure for the Durand Line, UN personnel could enforce such a DMZ. Thus, one must address the relation between R2P and peacekeeping/ -building, or as Roland Paris calls it, “*the blurry boundaries between Peacebuilding and R2P.*”<sup>230</sup>

In 2019, the Secretary General suggested multiple preventive measures, among them providing protection to civilians through deployment of UN peacekeeping operations.<sup>231</sup> Firstly, “Peace Keeping” means a variety of activities: usually, they are multidimensional operations with more than one activity, for example to restore the rule of law, monitor a ceasefire, etc.<sup>232</sup> According to UN Peacekeeping, “*the boundaries between conflict prevention, peacemaking, peacekeeping, peacebuilding and peace enforcement have become increasingly blurred.*”<sup>233</sup> Paris argues that peacebuilding seems to be an integral part of R2P.<sup>234</sup> Therefore, a peacekeeping mission could be imagined securing the situation along the border, and even more specific, targeting the needs of the Afghans close to the border and the inhabitants of Gulan Camp. This would lead away from R2P to peacebuilding language, from atrocity prevention to activities such as basic safety and security, the provision of basic services, restoring core government functions, and economic revitalization.<sup>235</sup> The endeavour of analysing in detail all different kinds of peacekeeping, -enforcement, or -building responses would go beyond the scope of this master’s thesis.

### 6.3.1 Theory III

With the goal of developing a “post-abysal law”, de Sousa Santos commented on both the right to non-intervention as well as “global” law relating to “*political mobilization of international human rights or of international conventions on humanitarian intervention in situations of extreme, life-threatening forms of social exclusion.*”<sup>236</sup> Within the context of de Sousa Santos’ theory, the use of force by foreign military is therefore a two-edged sword: while recognizing

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<sup>228</sup> ‘Resolution 687 (1991) / Adopted by the Security Council at Its 2981st Meeting, on 3 April 1991.’, Pub. L. No. S/RES/687(1991) (1991).

<sup>229</sup> Ibid., para. 5.

<sup>230</sup> Roland Paris, *The Blurry Boundary between Peacebuilding and R2P*, ed. Alex J. Bellamy and Tim Dunne, vol. 1 (Oxford University Press, 2016), doi:10.1093/oxfordhb/9780198753841.013.27.

<sup>231</sup> ‘Responsibility to Protect: Lessons Learned for Prevention Report of the Secretary-General’, para. 23b.

<sup>232</sup> ‘Peacekeeping Is One among a Range of Activities Undertaken by the United Nations to Maintain International Peace and Security throughout the World.’, in *TERMINOLOGY* (UN Peacekeeping), accessed 1 May 2023, <https://peacekeeping.un.org/en/terminology>.

<sup>233</sup> Ibid.

<sup>234</sup> Paris, *The Blurry Boundary between Peacebuilding and R2P*, 1:519ff.

<sup>235</sup> Ibid., 1:513f.

<sup>236</sup> de Sousa Santos, *Toward a New Legal Common Sense*, 577ff.

the potential of mobilising human rights or humanitarian intervention for situations of extreme and life threatening forms of social exclusion as part of a future cosmopolitan law, the pitfalls like imperialist military interventions as part of an agenda to “recolonize difference” are too obvious to ignore.<sup>237</sup>

De Sousa Santos calls for an epistemological intervention (Section 2.3): in line with the aforementioned, I argue that the use of force under R2P Pillar 3 partially fits into the theoretical framework of de Sousa Santos. Imagining a UN SC Resolution that, in analogy to the Libya precedent, allows “all necessary measures”, aiming at establishing and patrolling a DMZ along the Durand line with the intention of organizing resettlement for the refugees in Gulan Camp and to establish humanitarian access, it depends on how well the process a) is executed and b) who intervenes. This highly hypothetical scenario would not fit particularly well with the idea of an emancipatory “global law” if the UN SC agreed upon such a resolution, NATO member States take out most of the TTP members and by virtue of their presence patrolling the established DMZ, appear to be a foreign, occupying force. To determine whether R2P measures could be the tool to connect the International Community’s shared responsibility for both domestic and international issues with “post-abysal law”, a different, rather theoretical research approach would be necessary. I address additional issues, like the role of the UN SC in voting on resolutions like the Libya Resolution 1973, in the next section on R2P’s limits.

## 7 R2P’s limits

Before concluding on whether R2P can protect the Pakistani refugees in Afghanistan, I deem it necessary to point out two inherent limits of R2P plus a limiting factor relating to the political reality.

Firstly, the ongoing paralysis of the UN SC is likely to impede any kind of consensus on anything, especially on geopolitically sensitive issues. The UN Prevention and Protection Architecture, including R2P, relies on “*the ability of the Security Council to cooperate on the world’s most significant humanitarian crises.*”<sup>238</sup> Bellamy outlines some special responsibilities of the SC in relation to R2P and argues that the inconsistency of the SC with regards to R2P should not overshadow the SC’s transformation and increasing willingness to utilize R2P under the goal of human protection.<sup>239</sup> R2P might be politically too charged to be functional now, as any measure that depends on the P-5’s unanimous vote.

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<sup>237</sup> de Sousa Santos, ‘The Resilience of Abyssal Exclusions in Our Societies’, 246.

<sup>238</sup> Cecilia Jacob, ‘The Status of Human Protection in International Law and Institutions: The United Nations Prevention and Protection Architecture’, *The Australian Year Book of International Law Online* 38, no. 1 (12 December 2020): 131, doi:10.1163/26660229\_03801006.

<sup>239</sup> Alex J. Bellamy, *UN Security Council*, ed. Alex J. Bellamy and Tim Dunne, vol. 1 (Oxford University Press, 2016), doi:10.1093/oxfordhb/9780198753841.013.14.

Secondly, R2P applies to territories/ jurisdictions (“within their responsibility”), and in this thesis’ rather progressive application of R2P to the “shared” geographical space, the borderlands, between two countries. Consequently, an R2P measure adopted in the UN SC would address the authorities, in the present case the *de facto* authorities of Afghanistan and the Pakistani Government, to protect the populations present in the borderlands.<sup>240</sup> The displaced Pashto refugees would fall within the ambit of “the populations”; as grave as their situation might be, their situation alone might not be sufficient to trigger an R2P response. This thesis has pointed out additional cumulative factors increasing the risk of atrocity crimes to be committed in the future, in relation to the borderlands and the refugees, for example the inter-state dispute, the existence of a NIAC, and the humanitarian crisis. It cannot be argued, however, that R2P can protect the Pakistani refugees **directly**. The narrow scope of R2P (addressed in Sections 2.5.2 and 2.5.3) does not allow for an R2P application to protect “only” ~50.000 refugees stripped of all rights, means, and agency. This is a rather cynical realization; R2P’s purpose, especially the more recent focus on prevention, has not only a narrow scope, but also a drastically large requirement of affected people to fulfil its purpose in the UN system.

Lastly, Afghanistan still is a politically difficult topic; the International Community does not yet know how to deal with the Taliban properly. The ongoing ban of women from education and from work in NGOs led the UN in Afghanistan to unequivocally condemn the decision by the Taliban *de facto* authorities, and to not comply with the exclusion of women.<sup>241</sup> As pointed out in Section 4, R2P could protect the Pakistani refugees directly in a scenario of R2P measures in Afghanistan.

## 8 Conclusion

Step by step, I summarize the main findings of this thesis and answer the main research question of whether R2P can protect the Pakistani refugees in Afghanistan.

Firstly, I outlined the issue at hand. The Pakistani refugees that were displaced after 2014 were at risk of being forgotten by 2019 due to the closure of the UNHCR office in Khost, a general funding crisis and an increase in instability. By now (2023), the displaced have largely been forgotten. Merely the NRC has contact with and provides humanitarian aid to the Pakistanis in the Afghan Gulan Camp. Their situation has deteriorated, there are no health services, limited access to water, food and means of income. Additionally, aid has dried up. The refugees have no actual reason to stay, but on the other hand, have no real prospects of going somewhere else

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<sup>240</sup> cf. ‘Reiterating the responsibility of the Libyan authorities to protect the Libyan population’ ‘Resolution 1973 (2011) / Adopted by the Security Council at Its 6498th Meeting, on 17 March 2011’.

<sup>241</sup> ‘UN PROTESTS ORDER FROM TALIBAN DE FACTO AUTHORITIES PROHIBITING AFGHAN WOMEN FROM WORKING WITH THE UNITED NATIONS IN AFGHANISTAN’, *UN in Afghanistan*, 5 April 2023, <https://unama.unmissions.org/un-protests-order-taliban-de-facto-authorities-prohibiting-afghan-women-working-united-nations>.



either. Their hardship fits into de Sousa Santos' concept of the abyss, where humans are rendered subhuman. As de Sousa Santos puts it:

*“[T]he few rights they [refugees] are entitled to are grossly violated with almost total impunity. Such rights have evolved both from international human rights law and international humanitarian law, and include the obligation of the states through which refugees and displaced people transit or seek asylum or durable settlement in, to uphold their rights to life, to personal property, to shelter, to food, to basic health care, [...] and so on. In reality, however, such rights are rarely respected. [...] [R]efugees are often confined to camps and detention centers where, aside from the lack of freedom of movement and access to the outside world, refugees are subjected to the most degrading human conditions.”<sup>242</sup>*

In the following, I suggested R2P as a normative framework to protect the Pakistani refugees. R2P is a “contested” or “emerging” norm in the international sphere that does not create perfect duties and obligations and does not have legally binding character. R2P as a tool for atrocity prevention is not fully fledged out and proto-legal at best. However, the concept was agreed upon by the International Community in 2005 by adopting the 2005 World Summit Outcome.<sup>243</sup> In these characteristics, there is a certain flexibility and R2P still “turns heads at the UN”. The “Framework of Analysis” provided a suitable frame to analyse the issue of whether R2P can protect the Pakistani refugees in Afghanistan. As the Pakistani refugees are on Afghan soil, I looked at the option of applying R2P in Afghanistan first.

Afghanistan currently constitutes a prime R2P example but is nonetheless out of range. I have demonstrated that the time for prevention in Afghanistan is over, and atrocity crimes, for example the crime against humanity of gender persecution, are being committed right now. If the International Community wanted to act on Afghanistan, the time is now. At this point, the first answer to the research question is that R2P should be able to protect the Pakistani refugees in Afghanistan, but for multiple reasons, for example the US-Afghan withdrawal agreement, this is not a feasible option.

Consequently, I argued for a progressive application of R2P to the borderlands between Afghanistan and Pakistan. By means of legal analysis, I proved the existence of a NIAC in the bordering region as well as a period of IAC and the persistent risk of a new IAC between the *de facto* Afghan authorities and the Pakistani Armed Forces due to a border dispute. In addition, the interview conducted with an NRC official in contact with the displaced persons clarified the circumstances amounting to a humanitarian crisis or emergency. Two indicators of the risk factor 1 “*Situations of armed conflict [...]*” of the “Framework of Analysis” have been proven fulfilled, and therefore, an R2P measure under Pillars 2 and 3 involving the International

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<sup>242</sup> de Sousa Santos, *Toward a New Legal Common Sense*, 271.

<sup>243</sup> ‘2005 World Summit Outcome’.

Community in tackling the issues of an inter-state dispute, the risk of an IAC, an NIAC in Pakistan with potential spill over effect to Afghanistan, and displacement of an unclear number around 50 000 persons in Gulan Camp resulting in a dire humanitarian situation for the individuals and families affected.

Accepting the facts that a) the borderlands are disputed and there is an inter-state dispute, b) the situation is volatile and militarized and c) the dispute creates an instability beyond Pakistan's and Afghanistan's borders enabling an environment conducive to atrocity crimes, putting regional security at risk, I suggested various measures possible under the R2P norm.

Divided in three overarching themes, I suggested the use of diplomatic measures to prevent atrocity crimes in the borderlands, regional arrangements in implementing R2P measures, especially under the OIC, and lastly, the prospects of using force in the borderlands by establishing a demilitarized zone to create a humanitarian corridor. Throughout the section on Measures of R2P in this situation (6), it becomes fairly evident that R2P measures could, as of now, not directly protect the Pakistani refugees. Especially the section on the use of force shows that R2P does not have a clear-cut delimitation towards other UN concepts of protection and prevention, for example peace making/ -enforcing, or -building. The 2019 "Responsibility to protect: lessons learned for prevention" report by the Secretary General proves that explicitly.<sup>244</sup> A more direct protection could be provided by a stronger, "more robust" mandate of UNAMA that includes the Pashto refugees in Gulan Camp. This, however, is not necessarily part of an R2P measure and therefore not entirely within this thesis' scope. The second answer to this thesis' research question is therefore that R2P could protect the Pakistani refugees in Afghanistan *indirectly* if R2P was applied to the borderlands, either by means of preventive diplomacy, by R2P measures through a regional organisation, or by establishment of a DMZ.

The unfortunate insight is as well that the sole existence in "abyssal" circumstances for such a town-like refugee settlement does not trigger R2P nor any other protection mechanism immediately. Other corroborating circumstances, like the existence of the NIAC, previous IAC, and the border dispute, are necessary for a situation to "become" an R2P case. The Pashto refugees have been forgotten, and apparently their situation is not impacted by leadership in Kabul either. Therefore, a conceptual insight concerning R2P is that the absence of human rights might constitute environments conducive to atrocity crimes, which, as I have pointed out in Section 5.1.4, may make part of the emphasis on prevention in recent years.

That does not entail automatically that other systemic human rights violations, even on a large scale, enable R2P measures. That means environments with large scale human rights violation that do not equal or amount to one of the four atrocity crimes, ethnic cleansing, genocide, war crimes, and crimes against humanity, are as of now not part of any R2P agenda but subject to

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<sup>244</sup> 'Responsibility to Protect: Lessons Learned for Prevention Report of the Secretary-General', para. 25.

other discourses. On one hand, harsh oppression of freedom of expression is listed as an indicator. Violations of socio-economic rights or more recent formulations on human rights, such as the right to a healthy environment, are not part of the prevention and response cycle.

After all, Pillar 1 is the “*primary responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement*”,<sup>245</sup> not the responsibility to protect populations from starvation, homelessness, or the consequences of climate change.<sup>246</sup> To live up to its goal of at least preventing atrocity crimes, R2P should not be abandoned, but reformed. The same applies to the UN Security Council that is essentially blocked and unable to fulfil its responsibilities.

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<sup>245</sup> ‘Secretary-General’.

<sup>246</sup> The upcoming ICJ Advisory Opinion on Climate Change could clarify the obligations of States with respect to climate change.

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## **10 Appendices**

### **10.1 Interview Questions**

1. How is your organisation currently active in the borderlands between Afghanistan and Pakistan? How does your organisation perceive the borderlands between Afghanistan and Pakistan?
2. What challenges does your organisation experience in relation to the border?
3. Is your organisation in contact with displaced persons from North Waziristan, Pakistan in Afghanistan?
4. If so, how many would you estimate? (The numbers of individuals, families, etc. diverge quite strongly, regarding both the date (2014 – until now) as well as according to which organisation) Of the total amount, how many children?
5. Does the group of displaced persons experience additional challenges to the already generally challenging situation in Afghanistan?
6. What are their specific needs?
7. Is there contact between the local population and the refugees in the camps? If so, of what nature is this contact (e.g., has it developed, etc)
8. How was the closure of the UN office in Khost justified at the time? How does UNHCR try to respond to the situation in the borderlands now? (To UNHCR)

## 10.2 Interview Transcript

*Transcript of the Interview with DM, NRC (2pm, 23.03.23)*

**AUTHOR (A):** [Introduced the research project, background to the research project]

**A:** *How is your organisation currently active in the borderlands between Afghanistan and Pakistan? How does your organisation perceive the borderlands between Afghanistan and Pakistan?* **Q1**

**DM:** We work along all points of entry in Afghanistan. NRC has a more limited operational footprint along the Pakistan Afghanistan border. In comparison to the Iran points of entry. For example, we do ICLA (Information, Counselling and Legal Assistance) at Torkham and Spind Boldak, quite niche and specific. Core competencies, key sectors, Camp Management, Education, Livelihood, WASH and Shelter, Education is active as well as protection programming. LID= Legal identity documentation, birth certificates, Tazkera, marriage certificates. Support on HLP= Housing Land and Property Rights; Employment law and procedures (ELP) in limited capacities. With Pakistan predominantly the LID work. The Waziristan case load especially. In the last year, more emergency response: in Khost and Paktika, after a series of flooding events and earthquake in Khost and Paktika. That's interesting because pre-Taliban takeover that kind of response would not have been feasible because of access constraints. First time we can launch emergency response. Programming in the last few years because of the security and HSS situation pretty poor and limited, but now some opportunity.

**A:** *If I understand correctly... the Iran border has certain aspects as well. But concerning the Pakistan border... if you get resources, for example, how do you transport them to Afghanistan? Mainly through the Iran border or through the Pakistani border too?*

**DM:** We don't really have any ... we don't work in that way. That is more UN strategy ... a lot of NRCs programming is Cash based intervention, we don't have a lot of material assistance which might require import or export, because its predominantly cash based, so that is not a concern for us. But if you get to speak to them, ask UNHCR.

**A:** *Okay, very good. So, you don't perceive any specific challenges in relation to the Pakistani border?* **Q2**

**DM:** Vis-à-vis the Iran border, it is more challenging. There is certainly ... I mean ... a year ago, we were speaking about access constraints, the fact that actually it was a no-go area for humanitarian actors, including the NRC... by comparison to many of our peer organisation have always had more access of areas of opposition and contested areas... what I would say is a little bit different to the Iran side... there is definitely more Taliban interference which I think is a very interesting dynamic on that border crossing .. and border points, it's quite specific interesting interference, in terms of beneficiary selection, so they want to exert pressure on us in terms of the criteria we apply to selecting beneficiaries. A lot of these no-go areas were of course by nature, Taliban strongholds, and they now, as you might expect, would like to see our programming pivot into those areas of response.

That is a unique challenge that we don't experience in other parts of the country.

**A:** *Okay. That is very interesting. So, I can tell you maybe: I contacted a lot of organisations, and the NRC, or you, as head of Afghanistan programme, were the only ones able to tell me about the Waziristan refugees in Afghanistan. The other organizations were either unable or unwilling, so you are my main point of reference in that sense... is the NRC still in contact with the displaced North Waziristan people from Pakistan in Afghanistan?* **Q3**

**DM:** We are. Its more limited today than it would have been in 2014, I guess when they were first displaced, or when the refugee case load came first to light. I am not surprised that no one else is responding to you because frankly speaking no one else is working there. Though it might be ... I am not certain about this, but it might be worth contacting ACTED, the French NGO. They were certainly making noises 6 months ago of working in Gulan Camp in Khost. It might be worth sending them an e-mail, if you are not already in contact with them.

**A:** *I am in contact with many organisations, but not with this particular one ... most organisations told me they are active in other regions of Afghanistan.*

**DM:** Yeah. That is because it's the hard miles, it's quite a difficult place to work in. That's one of the reasons, why, strategically, we are trying to stay there. It's also a funding issue. It's difficult to get donors to fund that border. They are much more interested in funding much easier places to work. It is not necessarily humanitarian needs over focussed funding, over, you know, looking at severity of needs. It's much more about access and where they think they can have unrestricted or unhindered operations. But no, we have been there since 2014, I've only been in the Afghanistan programme for a year, so I don't have a lot of details on this. We did respond, I understand, to that kind of initially displaced caseload. Not just in Khost and Gulan Camp, also in Paktika as well I think the numbers were around 80.000-100.00. But there is still some uncertainty to what the numbers are today but certainly our programming did become kind of channelled and focused in Gulan Camp, were we continued these ICLA and very limited camp management services. Today, its predominantly education. We still have a decent education portfolio there.

**A:** *So, the numbers from 2014, 80.-100.00 ... the last, somewhat accurate number I have is 67 000 ... I think it's also from the NRCs website ... would you say that is somewhat accurate?*

**Q4.1**

**DM:** I would say, it is certainly less than that now, I say that I did a field mission to Khost and Gulan Camp about 6 months ago and I asked that very same question ; what we are actually planning to do in August, and it got somewhat delayed because of all the recent events and suspensions that we've had to impose in response to the female ban on NGO workers is, we are going to be conducting an MSNA (Multisector needs assessment). We are actually going to go into the camp in order to do that so that will give us a better understanding of the headcount, as it were. My team who had counted (?) have been saying probably around 40.000. I would not quote that, there is no hard fact data collection backing that. There is certainly the feeling that in the last 6 to 12 months, there has been further movement.

**A:** *That is very interesting to know. I found various sources, for example the Red Cross was active on the Pakistani side of the border, and they were counting differently because they tackled more the IDP question in Pakistan so therefore it's kind of difficult to have accurate data. So, from what I understood, you do a lot of education there. Would you have a guess, roughly, how many children, either in percentage or an absolute count, are in the camp and in that area?*

**Q4.2**

**DM:** I wouldn't be able to guess that, but I might be able to ask our education team. I know that we are currently supporting around 8.000 children in the last 12 months. We are actually having a bit of a funding issue to continue those classes, so we have these what we call CBE Community based Education classes. It's very basic primary education that kind of runs in parallel to the government led schools. But it was between 6-8.000.

**A:** *okay, that is also very interesting. That relates more back to the fact that I started this research with the intent of utilizing a children's rights perspective which as I told you is not entirely applicable although if one speaks about R2P there is a huge chapter on children in this field of research and measures. Maybe for context: I am not planning on proposing a military intervention on the border, that is something not feasible and actually helpful so R2P measures can be measures using less than force as well, diplomatic, humanitarian, etc other actors on regional settlement mechanisms with influence on the parties to the dispute that concerns this displaced population as well. That's kind of where I am coming from. So, do you think that additional to the challenges this population experiences, how do they relate to the ...do they have contact with the already present, Afghani population in any way?* **Q7**

**DM:** (pausing) it's not a hard ... its quite fluid... by the fact that they ... it's so well established now, and the size of it ... it's a town. Even now, even if we want to put an arbitrary number of 40 – 50.000 people on it. It's a sizeable, displaced community, probably one of the largest in Afghanistan. We always come at it and look at it from the angle of durable solutions. When you think of in terms of settlement options, one of them being, local integration, I would say that is certainly not a viable option for this case load. There is certainly a disconnect between the case load and the host community, just the geography of it, entirely segregated, not living amongst the host community, which is throws up an interesting dynamic, there is no example from my field missions 6 months ago of any resettlement out of the camp into the local community which you might also have anticipated. I think the only point of interaction is very limited employment opportunities, day labour, so I would say no, at the same time, because it's so well established, I wouldn't say that there is any particular issue around social cohesion or tensions between the two communities either, you know. They're kind of living in parallels if that makes sense.

**A:** *Yes, I completely can see that. I think that gives a valuable insight into the dynamic as well. So, if you say that they live in a parallel, so they rely mainly on humanitarian aid, education, maybe even food and water...*

**DM:** I think that was the case between 2014 and 2018. I would say, because NRC is the primary actor and we are doing quite a limited response there now, aid has dried up, to a large extent.



There is no food or material assistance happening in this camp or for this case load specifically, as far as I am aware. But something which the team gave me as a strong message, that these people are still aid dependent, there is a strong aid dependency angle to this, certainly around that time period between 2014 and 2018, and that actually is a point of tension with the local host community, because they haven't received any humanitarian or development assistance, to my knowledge. So, I certainly wouldn't want you to think that this is an informal camplike settlement that is receiving regular humanitarian assistance or aid. And as a consequence, the challenges and needs for this community are quite severe. I mean, when you go into this camp, there is no adequate standard of living, they don't have a minimum access to food, water or housing, there is no adequate health care facilities, the basic education that we provide through those community-based classes is not enough for that community, it's really just scratching the surface. There is no meaningful or reliable access to employment or livelihoods and then obviously this entire angle that has been our focus around accessing legal justice and remedies, especially related to legal status and identity documentation specifically, is also a non-starter, in terms of what that community needs, is some form of I guess we would call it asylum, basically they don't have any legal status. And if you don't have any legal status in Afghanistan, you don't have any social protection, be what they may, entitlements.

**A:** *Okay, so from this NRC brief "Risk of being forgotten" that I read when starting this research, it can be said that they have, in fact, been forgotten...*

**DM:** Yes, I think they are a forgotten community. One of the reasons, when I went to Gulan camp, one of the questions with one of the people from the team there, is: has post-August 2021, the Taliban takeover, has that changed the likelihood of the community receiving some form of legal identity or legal status? Because there was clearly some kind of dynamic going on with the former government, they didn't want to adopt or implement any form of asylum, and leave them in this legal limbo, as we call it. But has the dynamic now changed with the Taliban in control? They were not sure: they were under the impression that this community would be forgotten by all parties, irrespective of who's in control or in decision making, but I still think that there is some pressure point that we could push them on a little bit. To test them.

**A:** *That is very interesting. So, you mentioned as well that local integration is not a viable option. What are exactly the viable options besides having increased funding to increase the standard of living of these people in this camp?*

**DM:** Big question. I think you know resettlement, you move to a third area, or the area of origin, which we know is not an option for this caseload, or if you can't locally integrate, you resettle in a third location, which is probably the most realistic option, whether it's a viable one, I don't know. But what is clear is, because of the aid and the assistance that has dried up, there is nothing to stay for. They are in a real predicament, there is nothing to return to and there is nothing to stay for. I don't know what that means in terms of alternatives, we really can only speculate. Okay, so maybe, this legal dimension is unique to this case load and community, but being an undocumented population in Afghanistan, there is several, take a look at the Baloch

community in Nimrus [Afghanistan], they are not unique in that sense. But the legal dimension [of the North Waziristan people] is quite interesting.

**A:** *Alright, I can see that. The Baloch would also be related to the border ...*

**DM:** I would definitely dive a little bit into that, there is a sizeable Baloch community in Kandahar. And then the one in Nimrus who are essentially living off remittances from Iran in Sistan and Balochistan province. The side of the border, there is also Zabol, not the Afghan but Iranian Zabol. That would be fascinating to take a look at I think.

**A:** *Thank you, that is good advice... I had another question ... the Baloch people from Balochistan, they might be either linguistically or ethnically distinct from the people across the border on the Afghan parts, I am not entirely sure, I researched mostly Pakistan and Afghanistan in relation to the Gulan Camp. They are technically from the same people, Pashto, but that did not facilitate the fact that these people were fleeing and were seeking some kind of help.*

**DM:** No, it did, I think that's why its so interesting ... I am not sure, but being Pashto and speaking Pashtun is not enough. You know, this ethnic group, you might know better than me, this very ... complex tribal dynamics, even being from this next village can mean nothing ... so what's the relation between these various Baloch undocumented populations and communities, I don't know. Frankly speaking, but I think, the challenges, the problems, the needs, are largely the same. What they did have though, the Baloch community I met with in Nimrus, on the Iran border, they had expired Pakistani IDS, and that is not the case for the North Waziristan case load, who to a large extent have nothing. Expired or not.

**A:** *Ah okay, that is a huge difference indeed.*

**DM:** I mean an expired Pakistani ID is also not particularly helpful, but at least it's something.

**A:** *Yeah, I mean when I looked at the option of resettlement in the place of origin, it became apparent that most of the children never had a Pakistani passport in the first place, so it would be difficult either way if they would return. Some years ago, I am not entirely sure whether that is still in place, where Pakistan had adopted a shoot to kill policy at the border, ... and the TTP they seem to regroup quite effectively between the two countries and I think they've gained a lot of traction in the past months, Pakistan has many issues and so does Afghanistan. I think you mainly answered my questions, if there's anything you want to ask or to add ...*

**DM:** no, but maybe there were some questions I couldn't do justice? If there are any reflections or you want to speak to any of the specialists concerned, I am happy to connect you. I would definitely speak to UNHCR, if there is anybody there who ... I mean ideally someone who was around until 2019... until they left the camp... and Acted, are an interesting NGO, especially if they have considered entering Khost and Gulan Camp ... they work with REACH ... REACH are an assessment body ... they might have data for you...

**A:** *very good advice... I had one specific question prepared for UNHCR; they are not very responsive ...*

**DM:** yeah, they are not to me either ...

**A:** *oh interesting, I hope they will respond to you at some point...*

**DM:** out of interest, what was your question for UNHCR?

**A:** *So, I wanted to ask them more or less for a more specific justification for closing the office at Khost at the time ... and if the consequences of that ... I think they are somewhat active, and it must have cost them a lot in terms of organisation and to re-enter ... go back in again after closing...*

**DM:** Well, I would say two things: UNHCR they had a funding crisis in 2018-19 in Afghanistan. They had to make hard operational decisions... one thing which is interesting for them, UNHCR, and indeed most of the UN Agencies, UNICEF, etc are the same: they don't do direct implementation, they work through national or local NGOs and civil society organisations... and that was quite difficult to do in Khost and Paktika, they were under an enormous amount of pressure, I mean I opened up by saying we have Taliban interference at the moment. That was definitely a deciding factor for them as well, although they might not accept that or admit that to you ... the other thing that is interesting ... this specific caseload was removed from the HRP, a kind of annual OCHA needs and response exercise , ... and I can tell you, if you are not in the HRP, donors will not fund you. Or a specific population. That is certainly something to take a look at or ask them about...

**A:** *I think I've seen the last HRP map ... not a lot of organizations active in ...*

**DM:** Paktia and Paktika... predominantly displaced in Khost... many went to Paktika, might be worth looking at which organizations respond to the earthquake in June last year... because maybe for the UNHCR managed to restart some operations ...

**A:** *Actually, I think there was an earthquake last night ... don't know how big it was ... it hit the bordering region as well*

**DM:** strong one, but not too damaging... since the June earthquake, constant quakes, ...

**A:** *Yes, it seems to be a difficult region for many aspects ... Thank you very much for your time*

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[Personal conversation]