INTERNATIONAL LAW NEEDS DIALOGUE AND HARMONY WITH ISLAM AND THE SHARIA LAW SYSTEM
(extracts)

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Introduction

One essential part in the fostering of an atmosphere of understanding is a better and wider dissemination of the rules of international law among the Arab and Muslim civil servants and students. It is also necessary to enter into a deep dialogue with the experts of the Sharia law, in order to open up a dialogue and a conversation with the persons (the *ulama*) having the power to interpret the divine Sharia law. The interpreters of the Sharia law concepts hold the power to interpret the ancient dogmas of the Sharia law and to issue the *fatwas* that are followed by their believers.

In my opinion it is the mighty interpreters, the *ulama*, that is the most important "target group" for this kind of dialogue and conversation. It is of crucial importance – at this juncture in our history – to establish a platform from which we can "build bridges" to the interpreters of the Sharia law. This can only be done through the way of a respectful dialogue and upon the basis of *our* good knowledge in the field of the Sharia law, so that we respectfully and with dignity can talk to the persons who have the power to shape their countries' interpretations of the legal rules, also in the field of international law. In the light of this our institute in Amman – *The Middle East Institute of International law* – organised in December 2003 the seminar *"Islamic law and contemporary issues in International law: the Use of Force".* And in January 2004 I was invited to Kabul to deliver a *"Dialogue lecture"* before Afghan judges, civil servants and other experts that had gathered in Kabul to participate in the *Loya Jirga* (the Great Assembly) that adopted the new Afghan Constitution. Here below follows extracts from my lecture delivered in the tent where the *Loya Jirga* was held.

Dialogue and Harmony

Only through the way of 'Dialogue and Harmony' can the rules of international law survive the present hostile circumstances in the world, characterized by violence and terror. It is our duty – as international scholars – to contribute to the survival of the universal international law, that is to say rules that are hailed and respected by all nations of the world. The international law is called *ius gentium*, the law of the peoples, the law of the nations, that is to say all nations. Each sovereign nation has a role to play in the shaping and upholding of the rules of international law. This is not an exclusive matter for a few influential powers, but for the whole Society of Nations. It is not least an extremely important task for the Islamic state of Afghanistan to play an active role in this regard; to be active in the field of international law and to try to utilise the arguments of international law.

It is also the duty of Islamic countries to entertain a dialogue with Western scholars for the purpose of avoiding misinterpretations of ancient Shariah law concepts. Islam is a peaceful religion. Therefore it is important that Islamic law concepts are interpreted in a correct way, contributing to the maintenance of peace and stability in world politics. Incorrect or exaggerated interpretations of ancient Shariah law concepts will lead to higher tension in world politics and even to armed attacks against Islamic countries, as we have recently witnessed. For these reasons the mighty interpreters of the Shariah law concepts (the *ulama*) have an important role to play in the upholding of the safety of the Islamic countries. They have also an important role to play in the essential 'Dialogue' between Islam and Westerns

scholars. Without 'Dialogue' the risk of misapprehensions and misunderstanding is paramount. It must not happen that wars and armed attacks are initiated against Islamic countries because of misinterpretations and misunderstandings regarding the nature of the Islamic religion and the Islamic law system. If ancient Shariah law dogmas are misunderstood by the West as constituting a threat to "Western security" it is surely a grave matter that must be dealt with in a constructive way – in accordance with the "Way of Dialogue and Information".

The United Nations Era

The period of our times can be characterized as the *"United Nations Era"*, that is to say the World Order that came into existence after the Second World War and the adoption of the United Nations Charter in 1945. The leading principles of the U N Charter is, *firstly*, the prohibition of the use of force, except for the use of force in self-defence in accordance with article 51 of the Charter, *secondly*, the inviolability of the borders of the sovereign states, *thirdly*, the peaceful coexistence and friendly relations between nations and, *fourthly*, the collective responsibility of the U N Security Council to react against threats to international peace and security. It is the obligations of all states to uphold and defend these *basic principles* of international law. That goes with the signing of the Charter of United Nations. In accordance with the so called *Law of Treaties* a sovereign nation must honour its signature of an international treaty. Technically speaking there exist no escape from a state's international responsibility in accordance with the Law of Treaties.

Most humbly I appear here in Kabul to deliver this presentation of "the International law". Since I am a scholar I am interested in a 'Dialogue' and in a free and open discussion with Islamic scholars and experts. For this reason I am glad to have been invited to Kabul and to talk to the participants of this conference, which follows upon the adoption a few days ago ("14 Jaddi 1382") of the new Afghan Constitution by the *Loya Jirga* at this very place. Since there is a clear link between the rules of international law and the principles enshrined in the new Afghan Constitution, it is important to be present here in Kabul and underline the importance to transform the rules of international law into the legal domestic system of Afghanistan. It is extremely important to see to it that the rules of international law – including the Human Rights – are transformed into the real life of the Afghan people.

The new Afghan Constitution of 2004

In order to demonstrate the close link between the new constitution of Afghanistan and the rules of international law I quote here below some important passages of the newly adopted constitution:

In the name of God, the Merciful, the Compassionate

Preamble

We the people of Afghanistan:

1. With firm faith in God Almighty and relying on His lawful mercy, and Believing in the Sacred religion of Islam,

2. Realizing the injustice and shortcoming of the past, and the numerous troubles imposed on our country,

3. While acknowledging the sacrifices and the historic struggles, rightful Jihad and just resistance of all people of Afghanistan, and respecting the high position of the martyrs for the freedom of Afghanistan,

4. Understanding the fact that Afghanistan is a single and united country and belongs to all ethnicities residing in this country,

5. Observing the United Nations Charter and respecting the Universal Declaration of Human Rights,

6. For consolidating national unity, safeguarding independence, national sovereignty, and territorial integrity of the country,

7. For establishing a government based on people's will and democracy,

8. For creation of a civil society free of oppression, atrocity, discrimination, and violence and based on the rule of law, social justice, protection of human rights, and dignity, and ensuring the fundamental rights and freedoms of the people,

9. For strengthening of political, social, economic, and defensive institutions of the country,

10. For ensuring a prosperous life, and sound environment for all those residing in this land,

11. And finally for regaining Afghanistan’s deserving place in the international community,

Have adopted this constitution in compliance with historical, cultural, and social requirements of the era, through our elected representatives in the Loya Jirga dated 14 Jaddi 1382 in the city of Kabul.

Chapter One

The State

Article One
Afghanistan is an Islamic Republic, independent, unitary and indivisible state.

Article Two
The religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam. Followers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of law.

Article Three
In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.

Article Four
National sovereignty in Afghanistan belongs to the nation that exercises it directly or through its representatives.

The nation of Afghanistan consists of all individuals who are the citizen of Afghanistan.

The nation of Afghanistan is comprised of the following ethnic groups: Pashtun, Tajik, Hazara, Uzbak, Turkman, Baluch, Pashai, Nuristani, Aymaq, Arab, Qirghiz, Qizilbash, Gujur, Brahwui and others

The word Afghan applies to every citizen of Afghanistan. No member of the nation can be deprived of his citizenship of Afghanistan. Affairs related to the citizenship and asylum are regulated by law.

Article Five
Implementation of the provisions of this constitution and other laws, defending independence, national sovereignty, territorial integrity, and ensuring the security and defense capability of the country, are the basic duties of the state.

Article Six
The state is obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes and to provide for balanced development in all areas of the country.

Article Seven
The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.

The state prevents all types of terrorist activities, production and consumption of intoxicants (*muskirat*), production and smuggling of narcotics.

The link between the Afghan Constitution and the International law

The new Afghan Constitution is interesting because it explicitly spells out the obligation of the Islamic Republic of Afghanistan to abide by the United Nations charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.

Few constitutions in the world have this direct link between the constitutional rules and the rules of international law. By its wording the new constitution of Afghanistan orders the new administration of Afghanistan – including the courts – scrupulously to abide by the United Nations Charter and the rules of international law, including the rules of the Universal Declaration of Human Rights. An effective way to transform the rules of international law into the domestic legal system of a country is that the Constitution itself transforms the rules of international law to become rules of the domestic legal system. Another more complicated way to achieve this goal is for the Government and the Parliament to put into force the rules of each single treaty, agreement or convention by separate legislative acts.

In this respect the new Afghan Constitution is a modern product. Therefore the wisdom of the participants of the *Loya Jirga* that adopted the new constitution must be praised. It is now up to the new Afghan administration to let the rules of international law penetrate the domestic legal system as well as the courts' handling of individual cases – both in civilian and criminal cases. Here it is of relevance to point to the wording of article 3 of the Constitution saying the following: "In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam". At the same time as the courts of Afghanistan are obliged to abide the Sharia law they are also – by the Constitution itself – obliged to abide all rules of international law, including the rules of Human Rights.

Sharia law and the rules of International law

From this constellation of applicable laws it follows that the sharia law must be interpreted in a way that is compatible with the rules contained in the corpus of

international law. This points to the fact that the new Afghan administration – including the courts and the interpreters of the Sharia law – must have a good knowledge of international law and its structure. Every single Afghan judge must have a thorough knowledge of international law in order to be able to pass judgements in accordance with the provisions of the new Afghan Constitution. As much as the judge abides the Sharia law, he is obliged to abide the rules of the international law.

At this point it must, however, be pointed out that the corpus of international law is not a static phenomenon. It moves alongside the political development in the world. Present day rules of international law are not the same as those existing during the 17th century, when the famous Dutchman Hugo Grotius founded what the Europeans call "the modern international law". The so called "*modern international law*" developed, however, in a pure European surrounding.

The construction of international law

If we shall be able to maintain a generally applicable international law – i. e. the rules of law guiding the behaviour of all sovereign states – and thereby also the daily lives of all human beings – it must be clarified in what manner international law is being created, in what manner it functions and in what manner it comes under a process of changes. Which factors are influencing changes or variations in the corpus of international law? Are we today in the midst of the waves causing such changes in the rules of international law? [2]

The sources of present day international law are traditionally classified into some few categories:

1) Treaties, Agreements and Conventions (*Treaty Law*),

2) Customs or General practice among states accepted as law (*Customary law*),

3) General principles of law recognised by civilized nations,

4) Judicial decisions of International Tribunals, foremost the *International Court of Justice* at the Hague and the preceding *Permanent Court of International Justice*,

5) The doctrine of international law or the teachings of the most highly qualified publicists of the various nations.

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2 The Statute of the International Court of Justice, Art 38.1: The Court, whose function is to decide in accordance with International law such disputes as are submitted to it, shall apply
(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.
2: This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The contents of agreements and treaties (*Treaty law*) have legal force by the very signature of the parties. One of the fundamental Treaties of today is the Charter of the United Nations. The Charter has legal force by the will and the signatures of almost all existing sovereign nations. The Charter does not stand above the nations but bind the nations in a certain pattern of rights and obligations.

The *customary law* is equivalent to a *de facto state practice* and the conviction of the acting state that it is acting as it does because it regards its action as being in conformity with the rules of international law (*the notion of opinio juris*). This is an extremely important source of international law, not least in these days when the rules of international law change and develop at fast speed. For instance, the right of self defence in accordance with article 51 of the United Nations Charter has, in my opinion, been quickly redefined in connection with the armed actions against Afghanistan, this owing to the joint position taken by almost all nations and the Security Council in its 15-0 resolutions, in accordance with Chapter VII of the Charter (the Enforcement Chapter).

Customary law plays an important role in the creation of international law

As is clear from this classification of the sources of international law, it is the *customary law* – i. e. the *de facto acts by states* – that plays an important role in the creation and changes of the rules of international law. If several states take a certain view on a certain interpretation this provides the basis for the creation of a new rule, or a new interpretation, in a short time. Thus the states – by their day to day behaviour – give quick input into the corpus of international law. But when such a quick change materializes in the corpus of international law, does this correspond to the wishes and needs of all those sovereign states that are members of the present day Society of States?

At the bottom line stands the basic question – is the present day international law accepted and recognised by all the sovereign nations of the world? Do all the sovereign nations feel that they have participated in the creation of the rules of international law? Do all nations feel that the different rules of international law protect their particular interests? Do all sovereign nations feel that they are equal in the decision making when it comes to the implementation of the rules of international law? Or is there still a feeling of inequality among nations – in many senses: politically, economically, socially and culturally. If there exist such tensions in the corpus of international law, this means that the society of nations has an international law system that is not working – a law system that is even breaking down! The rules of international law are not any longer the steering factor of world politics. States start to act on their own!

The law of order among sovereign nations can never be static

However from the historical point of view the international law – the Law of order among sovereign nations – can never be static. Since world politics move on, political conditions change. Powers come and go. New powers are created, others disappear, e.g. the empire of the Soviet Union. This could be seen as being of the same magnitude as the fall of the Roman Empire during the 5th century. Rome was steering

the world, Rome was the centre of the world. Rome owned the world! After the fall of Rome history changed – as did the Roman law – as did the rules guiding inter-state relations. Here is no need to describe the history of the development of the "national sovereign state", but the concept of "nation" and the concept of "sovereignty" has for long been the lode star guiding the sphere of inter-state relations. Since the world came to consist of sovereign and independent nations it became necessary to develop some kind of mechanism for inter-state cooperation. This was necessary for peace and stability among the sovereign nations.

After the 1st World War the *League of Nations* was created by the *Versailles Peace Treaty* of 1919. The sovereign states "gave away" some parts of their sovereignty to the new organ for inter-state cooperation. This construction could not, however, face the threats preceding the outbreak of the 2nd World war in 1938. It could not stop the hostilities. At the end of the 2nd World War the *United Nations* was created 1945 by the victorious powers. Because of political reasons the U N Security Council came to harbour five permanent members, namely the victorious powers of the 2nd World War. This was the political balance that was necessary to give birth to the new organ for inter-state cooperation, the organ that still is supposed to guide and control our present society of states.

But after the fall of the Soviet Empire – and all subsequent dramatic changes in world politics – experiences from history would tell us that again the rules for inter-state relations and behaviour are under the process of changes. Here reference could be made to what was said earlier about the force of *customary law* as one of the strong decisive factors behind changes in the corpus of international law. If there today – as during the time of the Roman Empire – exists only one superpower, with all possibilities to steer the world militarily, economically, politically and culturally, what remains of the traditional international law? What remains of the United Nations and the Charter of the United Nations? Is the present World organisation, as its predecessor the League of Nations, about to become obsolete? Is the Charter of the United Nations becoming obsolete? Is international law, in its traditional sense, becoming obsolete? Has the new unilateralism of the world come to substitute the "old UN system" with its own interpretation of the rules of international law – and of the U N Charter?

A Post United Nations era? A new kind of World Order?

Are the still ongoing military actions in Iraq – unilaterally initiated by the only remaining superpower – a signal of a "*Post United Nations era"*? We are here touching upon absolutely fundamental question for the very existence and the future of international law. Is the world, as during the days of *Pax Romana*, being subordinated to a *Pax Americana?* Who could oppose, or dare to oppose, the interpretation of the rules of international law by the only remaining world power, with all its might and power?

But in the long run also a super power is in need of a well functioning system of rules for inter-state relations. International law does not only deal with questions of the magnitude of war and peace, but with a variety of matters. International law is the vehicle for smooth inter-state relations in general. Would the superpower put this at stake by leaning towards a pronounced unilateralism? International law is after all a

"give and take" in inter-state relations. For this reason it is important that the 'Dialogue' is going on and that the discussion is continuing about the nature of international law; as well as about the future of the United Nations and its Charter, the treaty that legally binds all its signatories.

The importance of Dialogue between the interpreters of the Sharia law and Western scholars in International law

A scholar must know about factors that may change the corpus of international law. International law is a "volatile phenomenon" that easily can be changed through the development of a new state practice, a new behaviour of states – as we are witnessing nowadays. As said above it is important to discuss these issues in relation to international peace and security. If legal experts can meet – like here in Kabul - and discuss sensitive but interesting topics of law, the area of confrontation will diminish. We will be able to understand each other in a better way. To open up the avenue of "Dialogue" between Islam and the Western world in the legal field!

It is of great importance for the future of Islamic countries to take an active part in analysis and discussions related to these vital matters. It is in the interest of Islamic countries to embark on an "active path" in this regard. It is for them to create and preserve a predominant position in the field of international law.

The Middle East Institute of International law in Amman, Jordan

In order to enhance the 'Dialogue' between Islam and the Western world in the legal field, as well as for the purpose of fostering a better system of education in international law in all Islamic countries a new institute of international has been created in Amman, Jordan, namely *The Middle East Institute of International law*. This institute will be affiliated to the *Max Planck Institute for Comparative Public and International law in Heidelberg*. The institute in Amman will offer advanced courses in international law as well as higher academic degrees and certificates to student from all Islamic countries. Since I have the honour to represent *The Middle East Institute of International law* at this very important conference on *Islamic and Constitutional law* I will close my intervention by expressing my sincere thanks to the organisers and to the country of Afghanistan for having invited me to come to Kabul and deliver this lecture on international and constitutional law.


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