Protego et obligo. Afghanistan and the paradox of sovereignty

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SPECIAL FORUM ISSUE: THE WORLD WE (INTERNATIONAL LAWYERS) ARE IN: LAW AND POLITICS ONE YEAR AFTER 9/11. [1] Governance in Afghanistan is a complex matter. Afghanistan today is not only the territory of Pashtuns, Tajiks, Northern Alliances, Taliban and Al Qaeda, all of whom are competing for power. Afghanistan is also a social field of other political actors like Germany, the UK, the US, the UN and of the "Six plus Two" group. Is it governance without government? **I.** [2] Focussing on governance in Afghanistan, we can first observe that *Niklas Luhmann* is right when he states that global governance is polycentric, heterarchical and networking, (1) a situation that *Hardt* and *Negri* describe as "Empire". (2) We basically find *six communicative circles* of "Empire" in Afghanistan: [3] *First - Operation Enduring Freedom*. Legitimised or not by Security Council Resolutions 1368 and 1373, legitimised or not by self- defence in the sense of Art. 51 UN-Charter, Australia, Great Britain, France, Canada and Germany are fighting under US-command against Al Qaeda and the Taliban. Yet Operation Enduring Freedom is not limited to Afghanistan and bears witness to the fact that segmental second differentiation of the political system into nation states is no longer predominant. The most challenging issue for contemporary international public law is to reformulate this diversification of political actors. [4] *Second – Six plus Two Group*: The Taliban became a military and political force in late 1994. At that time Afghanistan was governed by different "warlords" who were supported by different nation states. Obviously the situation could not be altered by finding a local solution. The "Six Plus Two" (3) group was established in 1997 under UN auspices, with the intention of promoting a peaceful settlement to the conflict. The group consists of the six neighbouring states of Afghanistan (Iran, Pakistan, Tajikistan, Uzbekistan, China and Turkmenistan) plus the USA and Russia. In July 1999 the group agreed on the Tashkent Declaration, a formal statement of its aims. The "Six plus Two" group was not really successful and the most important factor is probably that the member states fundamentally disagreed on the meaning of the Tashkent Declaration, when they agreed to the wording: "We confirm again our firm commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan." (4) Notwithstanding their disagreement, following the 11 September 2001 attacks, the members of the "Six plus Two" reaffirmed "their full support for the sovereignty, political independence and territorial integrity of Afghanistan". (5) [5] *Third - UNSMA*: The UN Special Mission to Afghanistan was established by the UN General Assembly in December 1993 to seek the views of a broad spectrum of Afghanistan's political leadership on how the UN could assist the country to bring about national reconstruction. It was specifically under the auspices of UNSMA that the "Six plus Two" group was established. The UN Secretary-General "froze" the mandate of UNSMA and of his Special Representative, *Lakhdar Brahimi*, in 1999 due to the group's lack of success. After the World Trade Center attacks the Secretary General emphasised in two identical letters dated 3 October 2001 and addressed to the President of the General Assembly and the President of the Security Council that the grave humanitarian and political situation affecting Afghanistan justified recalling *Lakhdar Brahimi*. Thus, he entrusted *Brahimi* with "overall authority for the humanitarian and political endeavours of the United Nations in Afghanistan" (6) and reappointed him as his Special Representative for Afghanistan. *Lakhdar Brahimi* has a mandate to "manage peacemaking activities involving the warring parties and others concerned, with a view to facilitating the establishment of a fully representative multi-ethnic and broad-based government." [6] *Fourth - Warlords of the Bonn Agreement and Interim Government*: Under the leadership of *Lakhdar Brahimi* and supported by the "Six plus Two" group, on 5 December 2001 Afghan warlords - without Taliban participation - signed the "agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions" commonly called the "Bonn Agreement". (7) As the result of the UN talks on Afghanistan the participants formed an Interim Administration under chairman *Hamid Karzai* (8) and agreed that this administration "shall be the repository of Afghan sovereignty". (9) Having reaffirmed "the independence, national sovereignty and territorial integrity of Afghanistan" (10) the parties pledged international assistance, in particular security assistance. [7] *Fifth - ISAF*: In resolution 1386, dated 20 December 2001, the Security Council followed up on this *security assistance* pledge and, acting under Chapter VII, authorised the member states participating in the International Security Assistance Force (ISAF) to "take all necessary measures to fulfil its mandate". As envisaged in Annex 1 to the Bonn Agreement, the Security Council established the ISAF to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations could operate in a secure environment. (11) However, in contradistinction to traditional peacekeeping missions, the operation was not placed under UN command. On the contrary, the Security Council only "calls upon the International Security Assistance Force to work in close consultation with the Afghan Interim Authority in the implementation of the Force's mandate, as well as with the Special Representative of the Secretary-General". (12) When the Security Council met it had before it a letter dated 19 December 2001 from the Permanent Representative of the United Kingdom to the President of the Council (document S/2001/1217), containing an annex addressed to the Secretary-General. Regarding the relationship between the ISAF and other forces operating in Afghanistan under Operation Enduring Freedom, the letter states that, "for reasons of effectiveness, the United States Central Command will have authority over the former so that activities between the two factions do not conflict with each other, and to ensure that there is

no interference to the successful completion of Operation Enduring Freedom." [8] *Sixth – SC-measures against terrorism*: On 28th September 2001, the Security Council, acting under Chapter VII, adopted resolution 1373 with wide-ranging measures to combat what it describes as "terrorist acts".. This resolution also affects Afghanistan. The Security Council decided, among other measures, that states are obligated to: • prevent, criminalize and suppress the financing of terrorist acts; • deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; • ensure that terrorist acts are established as serious criminal offences in domestic laws; • afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings. (13) To summarize: global governance activities in Afghanistan are - legal or illegal – diversified. They include UNSMA, Enduring Freedom, ISAF and United Nations Security Council decisions on fighting terrorism. All these measures affect Afghanistan's sovereignty. **II.** [9] The limitations placed upon Afghanistan by global governance give one pause. "Failed states" such as Afghanistan do not only give rise to dogmatical legal issues concerning sovereignty, but also manifest the paradox of sovereignty in a more fundamental sense. A politically disorganised segmentally second differentiated society with various political centres which may or may not be networking with each other, is a far cry from a *status civilis*. In this *Kantian status naturalis* different regimes implement their own laws: *ubi societas ibi ius*. (14) It is therefore irritating that the confirmation of the sovereignty of Afghanistan was so widespread. (15) [10] *Whose sovereignty? Which sovereign?* Observation of the political processes concerning Afghanistan seems to support the thesis that sovereignty is a construction of the political system itself which can be reformulated in juridical rationalities. Moreover, the "political system" does not mean the segmented political system of Afghanistan, but rather "global governance". Consequently, the Secretary-General, in a report on the situation in Afghanistan released on 6 December 2001, promoted the international community's objectives for Afghanistan: "The international community's renewed focus on Afghanistan after years of neglect, and the realization that a military campaign to root out terrorism from Afghanistan required a simultaneous political process leading to the formation of a legitimate Afghan government, offer renewed hope to the Afghan people." (16) [11] *Jacques Derrida* stated that the American Declaration of Independence contained a mystical moment because the same act that constituted the American Nation also legitimised *Jefferson's* Declaration of Independence. (17) One finds the same paradox when the warlords agreed to the *Loya Jirga* in the "Bonn Agreement". The *Loya Jirga* (pashtunic: big – "loya"; assembly – "jirga") is the traditional assembly of the Afghan tribes. The meeting was held with 1,500 participants beginning on 10th June 2002 and agreed on the composition of a transitory government that will govern Afghanistan until the middle of 2004. The element of force in implementing this process of decision-making is quite visible. One of the usual methods used to make invisible the mystical moment is that of "tradition". (18) But who legitimised the first *Loya Jirga* to agree on binding decisions in the name of the Afghan people? Not to go deeper into this issue: a special social climate is required if the process of making invisible the fundamental paradox is to be successful. Only if the necessary social climate exists, which generally accepts the decisions of the newly created processes, can a social system then start operating and begin to build one operation upon another. **III.** [12] Later these political and legal systems can change their programmes of invisibilisation. And in adopting a new constitution, Afghanistan copied a technique which western nation states had used successfully to make mystical moments invisible. *Niklas Luhmann* has explained on different occasions that a constitution - as a special form of structural coupling between the political and legal system - is an evolutionary achievement. It interrupts the fundamental circles of the political system and that system's paradox of limited sovereignty and the fundamental paradox of law, which consists in the fact that law defines law. (19) [13]But a structural coupling of law and politics not only exists on the level of the segmentally second differentiated nation states. Afghanistan is not an entity outside the global legal system. It is not only the global communication about the Afghan human rights problems and humanitarian issues which shows this. The Bonn Agreement and Security Council resolution 1386 also reaffirm on the one hand their "strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan" and, on the other hand, impose legal limits to this sovereignty. The Bonn Agreement thus describes the legal framework and judicial system of the new Afghanistan as, among other things, "the existing laws and regulations, to the extent that they are not inconsistent with this agreement or with international legal obligations to which Afghanistan is a party." [14]Yet the limits on sovereignty in world society go even further. The Security Council in resolution 1386 stresses, "that all Afghan forces must adhere strictly to their obligations under human rights law, including respect for the rights of women, and under international humanitarian law". (20) This is declaratory and describes the *status quo* of international public law that limits all sovereigns of the world. Consequently, international law becomes a functional equivalent to national constitutions, insofar as it restricts the sovereignty of the sovereigns. Operation Enduring Freedom, the Security Council, ISAF and UNSMA are bound in the same way by international law as is Afghanistan. *First Thesis: Sovereignty is the paradox of the global political system* [15] In rethinking sovereignty from a post-modern perspective one has to focus on the paradox of sovereignty and on the remarkable statements of *Georges Scelle, Gustav Radbruch, Hans Kelsen*, (21) all of whom stressed the ambiguities of a world of sovereigns, as exposed for example in the *Kantian* draft of a perpetual peace. (22) Under *Kant's* proposal sovereign Afghanistan would not be bound by international legal obligations and even *pacta sunt servanda* could not have a legal binding effect. *Kant* knew this, but failed to explain how it could be possible that free and sovereign nation states could enter into a situation dominated by legal procedures. *How is it possible, that on the one hand international public law is constituted by states and on the other hand states are constituted by international public law? Second Thesis: The paradox is made invisible by a "Global Constitution"* [16] If global law exists as a system

with its centres in global remedies of national, international and supra-national political support and if global governance exists as an autopoietic system with national, international and supra-national legal frameworks, there must also exist an institution on the global level which performs as a structural coupling between the political and judicial systems: international public law. Parts of it (e.g. the rights protected by the *ius cogens* principle, Art. 38 ICJ Statute and the jurisdiction principles) are a functional equivalent of national constitutions. This explains why transnational constitutionalism is so attractive for legal scholars. (23) Indeed, *Neil Walker* has already observed what he terms a Constitutional Fetishism. (24) Such a "Global Constitution" in the sense of a structural coupling between global governance and global law does not necessarily mean a written document given in a constitutional moment. Various nations states do not have such a document. Such decorations only help to invisibilise the mystical moment of constitution making. [17] The Global Constitution prohibits the use of force and protects states' sovereignty and human rights. The exception, however, is also a part of the law. Self defence, Chapter VII, humanitarian interventions and restrictions of human rights caused by collisions of different human rights and values demonstrate that even revolutionary conceptions of global order do not offer a solution to the inherent contradiction of each social order. *Third Thesis: Autopoietic Law* [18] So, the question is not whether there exists binding law or not, but our question is the question of *Carl Schmitt: Who decides on the exception?* In the nation state we regularly find an independent, autopoietic legal system. Afghanistan is also going – following the Bonn Agreement – to install such a system: "The judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court of Afghanistan, and such other courts as may be established by the Interim Administration. The Interim Administration shall establish, with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions." [19] But – and this is the greatest challenge of a global constitutionalism – the jurisdiction as to measures of global governance is restricted and global governance practice is full of examples of a symbolic reference and instrumentalisation of international public law. If the US acted in self-defence, if the Taliban and Al-Qaeda fighters in Guantanamo are combatants or not, if the Security Council could adopt chapter VII competences, if humanitarian interventions are lawful - there are hardly international courts to decide on these issues of sovereignty. We still have to adopt the legal programmes of sovereignty and prohibition of the use of force, outlined by the ICJ in the Nicaragua Case in 1986. So the question is not whether sovereignty as a right or obligation exists or not, or whether we need new laws or if the old laws fit, but rather: By which procedures is the world society going to decide its conflicts arising from different norm-projections and collisions of the rights of the sovereigns? There are two options: The *Schmitt*ian decisionism of the politically sovereign nation state or the implementation of the rule of law. The implementation of the rule of law would mean that one has to strengthen *global remedies*, (25) because: "Where there is a right, there is a remedy". (26) *Fourth Thesis: Peripherisation of the centres* [20]„It is at the least worrying", states *Frederic Megret* in the EJIL, (27) „that some of the clearest recent intellectual precursors to the current efforts to wage a homefront ‘security war' were the Latin American juntas of the 1970s." His concerns seem to be justified. The legitimisation discourse of, for instance, the Argentine military regime to make more than 20,000 people "disappear" anticipates a global phenomenon, best understood by stressing that the "centres of the world's global villages" will make no effort to include the self-produced fields of exclusion, rejection and abjection. As stated by *Luhmann*: "The worst imaginable scenario might be that the society of the next century will have to accept the metacode of inclusion/exclusion. And this would mean that some human beings will be persons and others only individuals; that some are included into function systems for (successful or unsuccessful) careers and others are excluded from these systems, remaining bodies that try to survive the next day; that some are emancipated as persons and others are emancipated as bodies". (28) [21] So, world society seems to be affected by the same problems of separation of powers that we can observe in Latin American societies: Symbolic constitutionalism and exclusion of a large number of human beings. The *movemento dos sem terra*, the Brazilian movement of peoples without land, (29) thus becomes a global phenomenon and it is up to global law to emancipate itself from political pressure and to reflect that not servility to the "Empire" is needed but a new definition of distance from the political system. To emancipate individuals from being regarded as mere physical bodies to being respected as human persons the global legal system has not only to define the limits of politics but - and this is even more necessary - to create new legal procedures and enlarge the jurisdiction of existing ones. To end the legal oscillation between utopia and apology (30) a "rethinking of sovereignty" thus has to be a "rethinking of legal autonomy".

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(1) Niklas Luhmann, „Der Staat des politischen Systems", in: *Politik der Gesellschaft*, 189 et seq. (2000).

(2) Michael Hardt & Antonio Negri, *Empire* (2001).

(3) http://www.un.org/News/dh/latest/afghan/sixplus.htm.

(4) Declaration of Tashkent, 9 July 1999, http://www.uzland.uz/news/text040.htm.

(5) Declaration on the Situation in Afghanistan by the Foreign Ministers and other senior representatives of the "Six

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plus Two, 12 November 2001, http://www.un.org/News/dh/latest/afghan/sixplus.htm.

(6) A/56/432-S/2001/934.

(7) http://www.uno.de/frieden/afghanistan/talks/agreement.htm.

(8) Annex IV, Composition of the interim administration.

(9) Bonn Agreement, I.3.

(10) Bonn Agreement, preamble.

(11) S/RES 1386 (2001).

(12) SEC/RES 1386 (2001), cif. 4.

(13) SC/RES 1373 (2001).

(14) See the postmodern interpretation of this principle by Gunther Teubner, „Des Königs viele Leiber. Die Selbstdekonstruktion der Hierarchie des Rechts," in: H. Brunkhorst & M. Kettner (eds.), *Globalisierung und Demokratie: Wirtschaft, Recht, Medien*, 240 et seq., 264 (2000).

(15) In the Tashkent Declaration 1999 and the Security Council Resolutions 1376 (2001), 1267 (1999), 1214 (1998), 1193 (1998) and 1386 (2001), that all reaffirmed "the strong commitment to sovereignty of Afghanistan.

(16) A/56/681-S/2001/1157.

(17) Jacques Derrida, « Otobiographien. Die Lehre Nietzsches und die Politik des Eigennamens", in: Jacques Derrida & Friedrich Kittler, *Nietzsche - Politik des Eigennamens. Wie man abschafft, wovon man spricht*, 9 et seq. (2000).

(18) http://www.gazette.de/Archiv/Gazette-November2001/Jirga.html: According to the legends the first Loya Jirga came together 5,000 years before. It was seated at the river Oxus (Amu Darja).

(19) Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft*, 9 Rechtshistorisches Journal, 176 et seq. (1990); *idem*., Das Recht der Gesellschaft, 478 (1995).

(20) SEC/RES 1386 (2001), preamble.

(21) Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (2. Aufl., 1928); *idem*., *Souveränität*, in: K. Strupp (ed.), *Wörterbuch des Völkerrechts*, vol. 2, 554 et seq. (1925); Gustav Radbruch, *Rechtsphilosophie* (1932), R. Dreier (ed.), 185 (1999); Georges Scelle, *Précis de droit des gens*, vol. I, *Principes et systématique*, 13 et seq. (1932) writes: "Il est en effet impossible de concevoir dans une même société deux souverainetés coexistantes, sans quoi elles entreraient en conflit et chacune d'elles, pour rester souveraine, devrait posséder le pouvoir déterminateur de la compétence de l'autre. Mais il est également impossible de concevoir la souveraineté dans un milieu intersocial."

(22) Immanuel Kant, *Schrift zum ewigen Frieden*, in: *Werkausgabe*, W. Weischedel (ed.), vol. 11, (8th ed. 1991).

(23) Philip Allott, *The Emerging Universal Legal System*, 3 International Law Forum (2001), 12 et seq., 16; Jochen A. Frowein, *Konstitutionalisierung des Völkerrechts*, in: Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System, 39 Berichte der Deutschen Gesellschaft des Völkerrechts GVR (2000) 427 et seq.; cf. also Christian Walter, *Die EMRK als Konstitutionalisierungsprozeß*, ZaöRV/Heidelberg Journal of International Law (1999), 961 et seq.; Robert Uerpmann, *Internationales Verfassungsrecht*, 56 Juristen Zeitung (2001), 565 et seq.; Bardo Faßbender, *The United Nations Charter as Constitution of the International Community*, 36 Columbia Journal of Transnational Law (1998), 529 et seq.; idem., *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998); Gaetano Arangio-Ruiz, *The "Federal Analogy" and the UN Charter Interpretation: A Crucial Issue*, 8 EJIL (1997), 1 et seq; Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 Max Planck Yearbook of United Nations Law (1997), 1 et seq; Ernst-Ulrich Petersmann, *How to Reform the UN System? Constitutionalism, International Law, and International Organizations*, 10 Leiden Journal of International Law (1997), 421 et seq.; Erik Suy, "The Constitutional Character of Constituent Treaties of International Organizations and the Hierarchy of Norms," in: U. Beyerlin, et al. (eds.), *Recht zwischen Umbruch und Bewahrung. Völkerrecht - Europarecht - Staatsrecht, Festschrift für Rudolf Bernhardt*, 267 et seq.

(1995); Georg Nolte, *Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten*, 59 ZaöRV/Heidelberg Journal of International Law (1999), 941, 957 et seq.; see also Rudolf Geiger, Kaleidoscope. The *German border guard cases* and international human rights, 9 EJIL (1998), 540 et seq.; Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EJIL (2000), 3 et seq.; Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 Michigan Journal of International Law (1998), 1005 et seq.; Christian Tomuschat, "International Law as the Constitution of Mankind," in: UN (ed.), *International Law on the Eve of the Twenty-first Century*, 47 (1997); *idem*., Die Internationale Gemeinschaft, 33 Archiv des Völkerrechts (1995), 1 et seq., 17; *idem*., *Obligations arising for States without or against their Will*, Recueil des Cours (1993) IV, 195 et seq., 216; Otto Kimminich, *Einführung in das Völkerrecht*, 94 et seq.; Konrad Ginther, „Die Verfassung der Völkerrechtsgemeinschaft im Lichte der Entscheidung des Internationalen Gerichtshofes im sogenannten Südwestafrika-Streit", in R. Marcic et al. (eds.), *Internationale Festschrift für Alfred Verdroß*, 91 et seq., (1971); Hauke Brunkhorst, *Solidarität, Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft*, (2002); Hardt & Negri, *Empire* (footnote 2, above).

(24) Neil Walker, *The idea of constitutional pluralism*, EUI Working Paper, LAW No. 2002/1, 8.

(25) On the terminology of a "global remedies rule" see: Andreas Fischer-Lescano, *Globalverfassung: Verfassung der Weltgesellschaft*, 88 Archiv für Rechts- und Sozialphilosophie (2002), 349 et seq.

(26) Ashby vs. White (1703, quot.: Constantine vs. Imperial Hotels (1944), 1 KB 693, 705); see also David Walker, *The Law of Civil Remedies in Scotland*, 12 (1974).

(27) Frederic Megret, 'War'? Legal Semantics and the Move to Violence, http://www.ejil.org/forum_WTC.

(28) Niklas Luhmann, *Globalization or world society: How to conceive of modern society?*, International Review of Sociology 7 (1997), 67.

(29) Marcelo Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne* (1992).

(30) Martii Koskenniemi, *From Apology to Utopia. The Structure of International Argument*, Helsinki (1989).

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