GoJIL | Goettingen Journal of International Law

Vol. 1, No. 3 (2009)

Editorial

It is already December and the year of 2009 is almost over. With the publication of its third and closing issue for Volume I the GoJIL is completed. With this final issue of the year, the Editorial Board looks back on a very inspiring and successful albeit busy year of publishing.

In February 2009, the first issue of the GoJIL was released. Prior to that, it took more than a year to prepare for the release of the first issue. In planning for the first year, the Editorial Board set high goals; three issues were to be published in 2009, including one special issue on a specific subject. The stakes were high, but with the appreciation and support, not only at its place of birth, the Georg-August-University Göttingen, but also in the international legal community, and the strong commitment of the team, the GoJIL managed to publish the targeted three issues in its Volume I. In addition, the team also organized a workshop on "Strategies for Solving Global Crises – The Financial Crisis and Beyond" in fall 2009.

It could be said that the GoJIL might have entered – after a relatively short period of time – into a stage of day-to-day-business with its third issue this year. But in editing, there is no such "business as usual". And it is pretty much the same in international law. It develops constantly and challenges scholars to grow continuously with these very changes. The best example underlining this hypothesis is the legal history of the former Federal Republic of Yugoslavia. With the break-up of the former republic, the necessary application of international law in the situation resulted inevitably in the same being challenged. The International Court of Justice was required to decide in several cases on the facts and also on the application of international law. Now, it is the International Court of Justice again, that is asked to examine the application of international law in its Advisory Opinion on the legality of the Unilateral Declaration of Independence with regard to Kosovo. New methods of solving the situation have been attempted: United Nations Special Envoy Martti Ahtisaari, after many others, was finally put in charge to initiate round tables discussions with the parties. These attempts

proved to be futile. Today, the International Court of Justice, an established mechanism, is required to deal with the new conditions. In the Kosovo situation, one can see that the principles invoked and those that may have been violated, have been in existence for centuries: the principle of sovereignty and territorial integrity, and the principles of self-determination and of human rights. Additionally, the authority of the Security Council of the United Nations and of the United Nations itself is challenged. It goes without saying, to answer the question posed by the General Assembly will not be easy. International law as it stands has to adapt to the current situation. Of course, the international community will be looking to The Hague and the opinion that will be written by the 15 judges. Additionally, law journals attempt to make a contribution to solve the situation, in hope that the judges will rely, at least in part, on the published works of scholars.

Revisiting the example of Kosovo, it demonstrates that the will of people has become increasingly important in our times. It's all about people! This mantra of recruitment offices determines in various ways today's discussions in international law. This year, a deficit of democratic representation of the German people led the *Bundesverfassungsgericht* (Constitutional Court of the Federal Republic of Germany), in its controversial Lisbon judgment, to demand modifications of Germany's process of treaty ratification of the Treaty of Lisbon. The people's right to self-determination also plays a role in Spain with regard to the people in Catalonia. As we have learnt from news reports just a few days ago, the people in parts of Catalonia voted yet again in a non-binding referendum for the independence of Catalonia. In a Swiss referendum, the people have voted in favor of a ban of the erection of minarets which will now be incorporated into the Swiss constitution. This bears the questions what can happen in a case of conflict between democratic participation and international human rights obligations. It will be interesting to see if the European Court of Human Rights in Strasbourg will be asked to decide and what position it will take regarding the referendum and the freedom of religion.

The people demanding "*Wir sind das Volk*" (We are the People) led to the end of the socialistic German Democratic Republic 20 years ago. Although the people seem to play an important role in international law, the definition of "people" is still unclear. This lies at the heart of many disputes today. Do Kosovars constitute a people? Even the Kosovars themselves avoid this question and rather base their arguments on resolution 1244 of the United Nations' Security Council. The Serbs as opponents in the case at hand stress a breach of resolution 1244 rather than focusing on the right to self-determination. It was in fact the other states submitting their statements

to the Court which relied on this principle. The neighboring state of Albania, for example, submitted partly on the right to self-determination. It will be interesting to see which line of reasoning the Court will take when answering the General Assembly's question. One may consider Kosovo's membership in international organizations, indicating a normative force of the factual (*normative Kraft des Faktischen*) to quote Jellinek. His doctrine of the three elements, although not directly relied upon by the main participants Serbia and Kosovo, could see a revival due to the questions being raised not only with regard to Kosovo, but also with regard to South Ossetia, Tibet etc.

In the final issue of this year, scholars use the opportunity provided by GoJIL as a platform to examine and discuss the application of international law to current situations and challenges faced.

We compliment Marco Benatar, the winner of the second GoJIL Student Essay Competition on "Justifying the Use of Force", for his remarkable approach. He strikes new paths in taking a look at the "wired" world and considers "Cyber Force" as a means of force in his article "The Use of Cyber Force: Need for Legal Justification". Further, we take this winning paper as well as the contributions of all participants as a testament for the high academic standard and the courageous approach of young academics. This prompts us to continue to hold Student Essay Competitions. The topic of the following competition in 2010 will be "The Rise of Self-Determination".

On the subject of changes and challenges, the French concept of "*droit à l'ingérence*", also known as humanitarian assistance, was developed to counter violations of human rights. Marie-José Domestici-Met, the first French scholar publishing in the GoJIL, presents, and elaborates on, this concept in the first part of a tripartite series "Humanitarian Action – A Scope for the Responsibility to Protect?" She describes the evolution of this concept, applying a geopolitical approach, in this first introductory part. The author refers to several international and internal conflicts faced by the international community during the past decades and relates them to the emergence of the concept. She further illustrates how the international community copes with old and new situations.

Not only does international law change due to current developments, circumstances may also arise where domestic law has to adapt to conform to international law. For instance, in 2006, China acceded the World Trade Organization. Since the accession had a special outcome on China's banking sector, Jiaxiang Hu examines the consequences in "Market Access or Market Restrictions – Analysis on the Regulations of PRC on Administration of Foreign-funded Banks".

International law finds itself somehow in a paradox situation: its proliferation as proof of its success goes hand in hand with difficulties. States or parties develop alternative treaty based mechanisms. The problems international law faces differ from field to field. In the distinct branches, several approaches have been developed to solve the problems. In International Environmental Law, for instance, framework conventions are used. Nele Matz-Lück in the fourth article of this issue elaborates on this matter in "Framework Conventions as a Regulatory Tool" and demonstrates the advantages of their usage in all fields of international law.

Nevertheless, one may question whether international law as a system runs the risk of collapsing on account of its plurality. Fortunately, states enter into treaties and accept various legal obligations. On the reverse side, states become subjects of various legal norms and hence may come into conflict with rules of general international law or contradicting treaty obligations. This issue dedicates its section "Current Developments" to the highly fascinating clashes of norms that are challenging the application of human rights.

61 years after the Universal Declaration of Human Rights, the claim of universal validity of human rights continues to be confronted with new practical difficulties, which arise from extraterritorial acts of states or the challenges through acts of the United Nations Security Council, and the normative problems with the simultaneous application of different legal regimes.

In 2009, we are not only celebrating the 20 years anniversary of the Fall of the Berlin Wall, it has also been 20 years since the European Court of Human Rights' decision in the *Soering case*. In "When Soering Went to Iraq…: Problems of Jurisdiction, Extraterritorial Effect and Norm Conflicts in Light of the *Al-Saadoon Case*", the authors Cornelia Janik and Thomas Kleinlein examine how the European Court Human Right and the British Courts coped with international law norms that potentially compete with the Convention.

The conflict between Art. 103 United Nations Charter and Human Rights is a relevant part of the contribution by Marko Milanović dealing with the *Sayadi v. Belgium* case before the Human Rights Committee.

Is the principle of state sovereignty challenged not only by a single people, but also by international organizations? Kenneth Anderson in a book review examines Paul Kennedy's "The Parliament of Man: The Past, Present, and Future of the United Nations". The author refutes Paul Kennedy's thesis about slow global governance take-over by international institutions in place of sovereign states.

The following contributions shed some light on the subjects raised. And as these subjects show: there is no business as usual, neither in international law nor in international law discourse.

The Editors