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Editorial

At the end of this decade the General Court of the European Union delivered its judgment Kadi II in which it applied the principles established by the European Court of Justice in its Kadi-judgment. The bottom line: the sanction system still lacks effective judicial protection, the improvements such as establishing a focal point or an ombudsman cannot be regarded providing sufficient legal protection. The General Court is therefore entitled as well as obliged to full judicial review "so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection"[1].

At the end of its judgment the General Court raised an important question: "It might even be asked whether – given that now nearly 10 years have passed since the applicant's funds were originally frozen – it is not now time to call into question the finding of this Court […] according to which the freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof."[2] Nearly 10 years have now passed since the funds of Mr Kadi and others were frozen – one could raise the question whether the Court's statement can be interpreted as a call for a return to normality, to a reassessment of the taken measures. At least, the sanctions as implemented in States have been subjected to judicial review and partly have been challenged successfully. Currently we are witnessing many legal proceedings focusing on legal questions about the terror-lists and its implementation: the Kadi-Litigation before the Courts of the European Union, the pending proceedings in Nada v Switzerland as well as Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada and A, K, M, Q & G v HM Treasury before the

1 *Yassin Abdullah Kadi v. European Commission*, Judgment of 30 September 2010, General Court, Case T‑85/09, para. 127.

2 *Id.*, para. 150.

United Kingdom Supreme Court, just to name a few. The latter one also discussed by Alexander Orakhelashvili in this issue. He analyzes in his article the UK state practice in interpretation of Security Council Resolutions of the last ten years and attempts to determine when and whether unilateral interpretation of Security Council Resolutions takes place. After an introduction on the interpretation of Security Council Resolutions, the author examines a broad range of cases, from the Iraq-intervention over the Presence in Iraq to the recent terror-list proceedings in the UK as well as Resolution 1244 in the Kosovo Advisory Proceedings.

Even 10 years after 9/11 the Law of Self-Defence and in particular its scope remains a disputed question. Taking a look at the definition of the crime of aggression in the Kampala resolution, States decided to define the crime of aggression as a so-called leadership-crime which has to be attributable to a State[3], non-State-actors are not capable of committing a crime of aggression *per definitionem*. Extending the scope of the definition to non-State-actors could have lead to far-reaching consequences for the interpretation of Article 51 of the Charter of the United Nations and for the international community. As Tom Ruys puts it in the most recent book dedicated to this topic "'Armed Attack' and Article 51 of the UN-Charter" "it is difficult to avoid the impression that both State practice and *opinio iuris* have undergone important shifts since 1986, and especially since 2001. At the same time, it appears premature to conclude that this shift in customary practice has crystallized in the unequivocal emergence of a new *ratione personae* threshold, replacing the traditional one. […] State practice since 2001 has been far from coherent."[4] One problem with customary international law is that a new practice is first a violation of the established norm until the practice is no longer be seen as a violation but as the expression of a new legal norm. This transition from illegality to legality is a grey area which stresses the importance of the second element, the *opinio iuris* and implicitly also the significance of the international lawyers interpreting the status of law. This is the starting point of Ulf Linderfalk. He invites us in his essay "The Post-9/11 Discourse Revisited – The Self-Image of the International Legal Scientific Discipline" to a critical examination of the role of the legal scientific discourse with regard to the law of self-defence after 9/11. According to the author the scholarly debate about the scope of Article 51 failed to live up to

[3] Cf. Article 8*bis* para. 1 of the Kampala-Declaration, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (last visited 29 December 2010).

[4] T. Ruys, *'Armed Attack' and Article 51 of the UN-Charter* (2010), 486.

the standards normally applied in serious legal analysis. Mr Linderfalk uses the debate to elaborate on and to deduce from it a description of the international legal scientist as archetype.

This issue covers furthermore a broad range of other topics.

The article of Markus Kaltenborn deals with the legal framework of the European Union's global development partnerships. It discusses legal problems arising in the context of the European Union's development policy and sheds light on its contribution to the international law of development.

Jessica Liang examines the defence of superior orders as one of the most controversial defences to be pleaded under international criminal law and points out how in recent years the resort to superior orders has re-emerged as a complete defence. Criticizing the motives of this development the author claims the manifest illegality doctrine as a "middle-way" to be most workable.

Marie-José Domestici-Met delivers in her second part a description of the origins of the Responsibility to Protect and discusses whether the World Summit Outcome 2005 provides a legal tool to protect a state's population from violations of humanitarian law. She concludes that although the R2P might not have a striking impact on an ongoing conflict it might help to establish a new principle leading to national and international measures before and after a crisis.

With her contribution "The Rise of Self-Determination Versus the Rise of Democracy" Cécile Vandewoude won the annual Student Essay Competition. Ms Vandewoude examines the gap between the idea that the right of self-determination should be lead to the establishment of democratic governments and the state practice. She argues that the right of self-determination should not only be limited by the principle of territorial integrity and by human rights but also by the goal of democratic governance.

It is great to see that the winning contributions of our student essay competitions have been cited so far[5] which encourages us to continue the concept of hosting an annual competition and of accompanying students on the path of

[5] Cf. M. Roscini, 'World Wide Warfare- Jus ad bellum and the Use of Cyber Force', 14 *Max Planck United Nations Yearbook of International Law* (2010), 106; Law Council of Australia, 'A Charter: Protectiong the rights of all Australians- Law Council of Australia's Submission to the National Consultation on Human Rights', available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_ uuid=8A2A9585-1E4F-17FA-D2E6-585D7F729F44&siteName=lca (last visited 22 December 2010).

a (first) scientific publication. More information on the 2011 essay competition will be available at our website www.gojil.eu soon.

This issue's Current Developments in International Law section contains three contributions related to the situation in Kosovo and two more dealing with recent developments in the areas of legal assistance and the United Nation's Millenium Development Goals.

Christopher Borgen evaluates the implications of Kosovo's declaration of independence on the European Union. In "From Kosovo to Catalunya: Separatism and Integration in Europe" Mr Borgen compares the separatism in Kosovo to similar situations in regions of the EU and the increasing role of regions in the EU in general.

Michael Riegner argues that independence and constitution-making under external influence in Kosovo represent two faces of the same internationalized constituent power aspiring for self-determination. According to the author, the International Court of Justice recognized the constitutional law concept of *pouvoir constituant* and discusses its role as well as normative standards applying to it.

Volker Röben critically evaluates the underlying Lotus-recourse of the International Court of Justice: according to the author the rule-centred approach to international law is not without alternatives. More coherence of the law, more predictive power and ultimately greater legal certainty can be expected from a principle-based approach on which he further elaborates.

In "The Millennium Development Goals and Human Rights at 2010 – An Account of the Millennium Summit Outcome" Marie von Engelhardt focuses on the outcome of the United Nations' Millennium Summit of September 2010. She analyses the previous progress made towards the Millennium Development Goals with regard to human rights.

In view of recent events involving Julian Assange the interest in the system of legal assistance in criminal matters increased noticeably. What are the legal bases for legal assistance among European States and between them and third countries? Bilateral agreements between European States, between European States and third countries, between third countries and the European Union as well as obligations deriving from the European Treaties and corresponding secondary acts lead to a complex legal situation. In addition, definitions of crimes differ from country to country.

Peter Rackow and Cornelius Birr illuminate the fundamental principles of legal assistance and underline the importance and problems of the principle of mutual recognition in criminal matters paying also attention to the European Union's role as an entity to commit its individual members to the fulfillment of obligations towards other non-Member States.

We are delighted to present herewith this issue of the GoJIL to our cherished readership and are hoping that it will be a worthwhile read.
Since the release of the last issue in August the Editorial Board expanded its field of activity by organizing and hosting the GoJIL's first international conference on "Resources of Conflicts – Conflicts over Resources" from October 7-9 in Göttingen. It was a remarkable event which was attended by international lawyers from all over the world. It is a pleasure to rebuke to the publication of the papers presented during this distinguished event in the next issue of the GoJIL.

The Editors