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Editorial

Dear readers,

We are proud to present our last issue of 2011. Looking back on a successful year, GoJIL can now – with a small delay – turn to its new exciting projects of 2012!

Moreover, we are honored to introduce to you a new member of our Advisory Board. Professor Dr. Dr. h.c. Angelika Nußberger M.A. is Judge at the European Court of Human Rights and Professor at the University of Cologne where she also heads the Institute of Eastern European Law. Her expertise in international law and her academic experience will provide substantive support for the GoJIL. Along with Thomas Buergenthal and Bruno Simma, Nußberger is now the third Judge from a renowned international court on the Journal's Advisory Board.

In Vol. 3 No. 3, *Cedric Ryngaert* examines "The Legal Status of the Holy See" in his article. Observing that the Holy See enjoys rights under international law that few, if any, non-State actors (excluding intergovernmental organizations) enjoy, like the participation in various intergovernmental organizations, in a substantial number of bilateral and multilateral treaties, the sending and receiving of diplomatic representatives, immunity from jurisdiction, and a permanent observer status at the United Nations, he further analyses the legal status and comes to the conclusion that although the Holy See is, unlike the Vatican City State, not to be characterized as a State, due to its global spiritual remit and the lacking territorial base, it is a *sui generis* non-State international legal person which borrows its personality from its 'spiritual sovereignty' as the centre of the Catholic Church.

As the events of the past year were by no means without impact for various fields of public international law, the section "Current

Developments" could be filled with an exuberant amount of short analyses. Nevertheless, one of the predominating and most passionately perceived topics was the Arab Spring. Therefore *Marie-José Domestici-Met* analyses the role of R2P during the Arab Spring in her article "Protecting in Libya on Behalf of the Internal Community … and in the Name of Humanity?" Her article is the third and last part in a series under the global title "Humanitarian Action – A Scope for the Responsibility to Protect?" which began in 2009. Although the future developments in the Arab world, especially in Syria are difficult to foresee, this article takes stock of some trends.

With the death of Osama bin Laden another question rising high again in public debate is the legality of targeted killings. Starting from the recent discussion about the regulation of combat drones in current conflicts *Sebastian Wuschka* claims in his article "The Use of Combat Drones in Current Conflicts – A Legal Issue or a Political Problem?" that, contrarily to misinterpretations in the media the legal framework regarding today's drone systems is settled. He first provides an assessment of unmanned combat drones as a new technology from the perspective of international humanitarian law to then proceed to the vital point of the legality of targeted killings with remotely operated drones. Further, he discusses the preconditions for applicability of humanitarian law and human rights law to such operations. In conclusion, the author holds the view that the legal evaluation of drone killings depends on the execution of each specific strike. He argues that assuming that targeted killings with drones will generally only be legal under the law of armed conflict, states might be further tempted to label their fights against terrorism as 'war'. *Wuschka* is the winner of our Student Essay Competition which takes place every spring/summer. We invite all interested students to have a look on our homepage www.gojil.eu for further information.

Despite the abundance of current issues, most of this issue is dedicated to an event in the future: In 2013, the International Criminal Tribunal for the Former Yugoslavia will finally close its doors. This raises questions about whether there is an ICTY legacy; if so what does it contain? That is the topic of our second GoJIL:Focus under the headline "The Legacy of the ICTY".

First, *Donald Riznik* analyses the way the Security Council and the ICTY have chosen to bring the Tribunal to an end by implementing the Completion Strategy in his article "Completing the ICTY Project Without Sacrificing its Main Goals. Security Council Resolution 1966 – A Good

Decision?". *Riznik*'s article contemplates issues the Security Council faced before adopting Resolution 1966, especially with regard to its main goal of ending impunity for serious breaches of international law, and to bring justice and peace to the people living on the territory of the former Yugoslavia. His article addresses pressing matters such as the implementation of the International Residual Mechanism for Criminal Tribunals (IRMCT), which was adopted while two remaining fugitives, Ratko Mladic and Goran Hadzic were still at large. Only a few months ago, the two were caught and transferred to the Tribunal. Riznik argues that not shutting the institutional doors entirely until all remaining fugitives have been arrested, was a complex situation in a legal and practical sense which was, at the time, best solved through Resolution 1966. He then proceeds to outline the practical impact of the IRMCT on the ICTY´s further work and the relation between these two organs during their coexistence.

Then, *Gabrielle McIntyre* examines the International Residual Mechanism for Criminal Tribunals as the legal successor of the ICTY and the ICTR in her article "The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the former Yugoslavia and Rwanda". She argues that in the creation of the Residual Mechanism, the Security Council appears to have intended to ensure the continuation of the work of the Tribunals and thereby safeguard their legacies. Accordingly, the Statute of the Residual Mechanism continues the jurisdiction of the Tribunals, mirrors in many respects the structures of the Tribunals, and ensures that the Residual Mechanism's Rules of Procedure and Evidence are based on those of the Tribunals. However, the Statute of the Residual Mechanism is silent with regard to the significance the Judges of the Residual Mechanism must accord to ICTY and ICTR judicial decisions. She analyses that while there is no doctrine of precedent in international law or hierarchy between international courts, this omission by the Security Council does have the potential to negatively impact the legacies of the Tribunal by allowing for departures by the Residual Mechanism from the jurisprudence of the Tribunals, which lead to similarly situated persons being dissimilarly treated. She underlines that even if the Residual Mechanism does adopt the jurisprudence of the Tribunals as its own, as a separate legal body it will nevertheless still have to answer constitutional questions regarding the legitimacy of its establishment by the Security Council. McIntyre assumes that it can be anticipated that the Residual Mechanism will find itself validly constituted. The wisdom of the Security Council's decision to artificially end the work of the Tribunals by the establishment of the Residual Mechanisms will, however, ultimately turn upon the question of whether any inherent unfairness could be occasioned to

persons whose proceedings are before the Residual Mechanism. She suggests that the Security Council has provided the Residual Mechanism with sufficient tools to ensure that its proceedings are conducted in *para* passu with those of the Tribunals and that the responsibility of ensuring the highest standards of international due process and fairness falls to the Judges of the Residual Mechanism.

Not focusing on the legitimacy of the Residual Mechanism but on that of the ICTY, *Mia Swart* argues in her article "Tadic Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY" that the reasoning of the Tadic Appeals Chamber when deciding that the establishment was legitimate was not sufficiently strong or persuasive but has nevertheless been replicated or repeated in the trials of Saddam Hussein and Charles Taylor. She points out that the legitimacy question is crucial since it affects the very foundations of the ICTY. Therefore, the substantive and procedural achievements of the ICTY are dependent on the legitimacy of the ICTY. Her article considers the difference between the ICTY's self perception as well as the way the work of the Tribunal over the last sixteen years has been perceived from the outside. Moreover she focuses on the question whether legitimacy can also be acquired after the initial establishment and considers whether the ICTY's initial defect in legitimacy could subsequently be remedied by the fairness of the proceedings and the moral power of the ICTY.

Frédéric Mégret explores the legacy of the ICTY through the experience of some of its actors and observers in his article "The Legacy of the ICTY as Seen Through Some of its Actors and Observers". It is based on material provided by a dozen interviews and written in the spirit of understanding the tribunal's "legacy" as a collection of complex individual narratives of what the tribunal stands for, what it did well, and what it might have done better. His collection considers the ICTY's legacy both as an international tribunal and as a device for transnational justice. He argues that although a tension is found to exist between a more "forensic" and a more "transitional" view of its role which is particularly manifest in determining the tribunal's constituencies and policies, the two are also linked. He underlines the broad consensus about the tribunal's importance, but on the eve of its closing, also a sense of the limits of what international criminal justice can aspire to.

Focusing on the defence counsel's point of view, *Michael G. Karnavas* examines the legacy of the ICTY in his article "The ICTY

Legacy: a Defence Counsel's Perspective". He argues that the achievements of the ICTY are as impressive as they are irrefutable. He complains about the uneven quality of procedural and substantive justice that the Tribunal has rendered. Karnavas highlights several shortcomings at the Tribunal, including the appointment of unqualified judges, excessive judicial activism, its disparate application of law, procedure, and prosecutorial resources to different ethnic groups, and its tinkering with the rules of procedure to promote efficiency but which erode the fundamental rights of the Accused. Drawing on specific examples, from the approach adopted to the admissibility of testimonial evidence to specific areas of substantive law where judicial activism has been pronounced - the development of joint criminal enterprise and the requirements for provisional release at a late stage of the proceedings - this article is one defence counsel's perspective of some of the most unfortunate shortcomings of the ICTY, which regrettably form part and parcel of the Tribunal's legacy.

In her article "The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims", *Giovanna Maria Frisso* examines the effects of the completion strategy of the ICTY on the victims of the crimes under its jurisdiction. Initially, she considers the impact of the completion strategy on the victims who participated- as witnesses- in the proceedings before the ICTY. She argues that the pressure to comply with the time frame established by the Security Council has resulted in the reduction of the victims to their forensic usefulness. The victims were considered primarily in light of their instrumental relevance to the proceedings. She then suggests, through the analysis of the measures related to the transferal of cases to the national courts and the archives of the ICTY, that the completion strategy may have a positive effect on the implementation of the rights of the victims who have not had direct contact with the ICTY. In this context, this article argues that the termination of the ICTY does not necessarily mean that the struggle for the implementation of the rights of the victims has finished.

We hope that all these articles in this issue provide a worthwhile read to our readership.

The Editors