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Editorial

Dear Readers,

with our new issue, the Goettingen Journal of International Law aims to contribute to current debates in international law.

A topic that promises to continue being highly debated is the interplay of International Humanitarian Law (IHL) and International Human Rights Law (IHRL). The latter is a set of rules stipulating fundamental rights every person has at all times and is established in international and regional treaties, customary rules as well as other so-called soft law instruments.[1] IHL on the other hand exclusively covers situations of armed conflict in order to mitigate the impact of war on the civilian population.[2] In contrast to some IHRL instruments and as stated in Article 5 of the Fourth Geneva Convention, IHL is non-derogatory, even if a person is suspected or active in hostile activities.[3] The relationship between the two areas of law becomes tense where human rights are successfully asserted in times of armed conflict, where IHL is initially

1 D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013) 1.

2 A. Quintin, *Permissions, Prohibitions and Prescriptions: The Nature of International Humanitarian Law* (2019) 11.

3 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Article 5.

applied. While some argue that solely IHL as *lex specialis* should apply,[4] others recommend the systemic integration of IHRL during armed conflict.[5]

With his article 'Reconciling the Irreconcilable? – The Extraterritorial Application of the ECHR and its Interaction With IHL', *Severin Meier* is adding to the discourse. After illustrating the origins of both bodies of law, the author will then scrutinize how the extraterritorial application of the European Convention on Human Rights (ECHR) as an IHRL instrument can be justified during armed conflict. The extent to which both instruments are applicable side by side is subsequently analyzed, considering the case law of the International Court of Justice (ICJ), before concluding how the interplay of the ECHR and IHL can be reconciled.

The ICJ is not only of relevance for assessing the relationship between IHL and IHRL, but has been consulted on a wide spectrum of issues concerning international law since its establishment seventy years ago. As the principle judicial organ of the United Nations,[6] the ICJ so far has dealt with 178 cases, compromising contentious cases and advisory opinions.[7]

Deepak Mawar examines the approach of the court's decision-making in his article 'The Perils of Judicial Restraint: How Judicial Activism Can Help Evolve the International Court of Justice'. The author firstly explains and analyses why the court in its judgments leans toward a strict application of the sources of international law listed in Article 38 (1) ICJ Statute. This exhaustive enumeration of sources aims at standardizing the norms applied by the court,[8] however, it is argued that a more active approach of reasoning can be desirable at times. For

4 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, para 25; M. Sassòli and L. M. Olson,'The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts', 90 *International Review of the Red Cross* (2008) 871,599, 613-616.

5 J. D´Aspremont & E. Tranchez, 'The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?', in: R. Kolb and G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (2013), 235-238.

6 *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993, Article 1.

7 Cf. https://www.icj-cij.org/en/cases (last visited 16 December 2019).

8 H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), 67.

this purpose, *Deepak Mawar* highlights, *inter alia*, the potential Article 38 (2) ICJ Statute carries to advance jurisprudence, the courts approach to political questions underlying the judicial dispute as well as the ICJ's view of lacuna in the law.

The Goettingen Journal of International Law furthermore is delighted to include in this issue *Valentin Schatz*' article titled 'Access to Fisheries in the United Kingdom's Territorial Sea after its Withdrawal from the European Union: A European and International Law Perspective' which has been pre-published in October 2019. Given the fact that a "Brexit" has become even more likely with the Tories winning the majority in the House of Parliament in the latest election,[9] thus reassuring the United Kingdom's undertaking to leave the European Union (EU), this article hits the pulse of time. One of the many serious impacts of a withdrawal from the EU is the inapplicability of the Common Fisheries policy which currently governs the access to territorial sea fisheries.[10] After illustrating the *status quo* this contribution looks at the eligible Conventions and Agreements regulating access to fisheries in absence of a new treaty.

Another concern of the international law community continues to be how private corporations can be held accountable for human rights violations. Human rights were composed and are understood as defensive rights of individuals against States.[11] However, as businesses continue to expand their reach across the globe and some of them having a higher annual revenue than some State's GDP,[12] the demand for legal instruments holding businesses accountable has increased. Furthermore, for some human rights violations no remedy could be claimed because they cannot be attributed to a particular State, creating a loophole.[13] As a result, the Zero Draft on a UN Treaty on Business and Human Rights was eagerly awaited.

9 2019 United Kingdom General Election held on 12 December 2019; results available under https://www.bbc.com/news/election/2019/results (last visited 16 December 2019).

10 EP and Council Regulation 1380/2013 of 11 December 2013, OJ L 354/22 [CFP Framework Regulation].

11 A. von Arnauld, *Völkerrecht*, 3rded. (2016), 274.

12 J. G. Ruggie, 'Business and Human Rights: The Evolving International Agenda', 101 *The American Journal of International Law* (2007) 4 ,819, 823.

13 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts With Commentaries, 2 *Yearbook of the International Law Commission* (2001) 2,47-48.

In 'Evaluating the Zero Draft on a UN Treaty on Business and Human Rights: What Does it Regulate and how Likely is its Adoption by States?' *Julia Bialek* first emphasizes the necessity for a binding instrument before she profoundly examines the Zero Draft and contrasts its content with existing soft-law instruments. The author concludes by giving a prognosis of the Zero Draft's impact.

This issue concludes with a Focus Section on Economic and Social Rights which came about after the conference "Unpacking Economic and Social Rights: International and Comparative Dimensions" organized by Professor Andreas L. Paulus and Sebastian Ehricht in cooperation with Professor Tomer Broude. The conference took place in Göttingen on 9 and 10 November 2018. The Goettingen Journal of International Law is proud to publish in this issue two articles of authors whose papers were presented and discussed at the conference.

In the article 'CSR and Social Rights: Juxtaposing Societal Constitutionalism and Rights-Based Approaches Imposing Human Rights Obligations on Corporations', *Ioannis Kampouraki* addresses the issue of human rights obligations by businesses. In contrast to *Julia Bialek*'s contribution, the author discusses the two underlying positions of either strengthening corporate liability or maintaining the non-binding legal instruments already in place. To do this, the author reveals the origins, understanding of rights and corporations of both approaches, before juxtaposing them. In addition, the author embeds the approaches into existing frameworks, such as the UN Draft Treaty on Business and Human Rights and various soft law regulations, before drawing conclusions about the human rights obligations by corporations.

The article 'Unpacking the Debate on Social Protection Floors' by *Viljam Engström* discusses the background, content and effectiveness of social protection floors as a social security system. Although no uniform understanding exists about the scope of social protection, a strong support for the development of social security in areas such as health care and social minimum has been apparent, resulting in the ILO Recommendation of Social Protection Floors.[14] The author examines in particular the social protection floors implemented by the International

[14] ILO, R202 – Social Protection Floors Recommendation' (2012).

Monetary Fund (IMF) and focuses on two key criticisms raised against the institution's policy-making in order to create space for a differentiated debate.

We hope that all these articles provide – in their diversity – a worthwhile read to our readership.

The Editors