

## EDITORIAL

This second edition of Amsterdam Law Forum is a state-of-the-art of humanitarian intervention and independence. In this issue we are fortunate enough to publish the views of a range of acclaimed scholars, who have given us their thoughts on the central theme: ‘Kosovo, Georgia: Humanitarian Intervention and Independence’.

This issue deals with two areas on the edge of international legal discourse, the direction and borders of which are uncertain, but which are extremely topical, for obvious reasons. Humanitarian intervention and the use of force to prevent suffering, is an idea that has been a ‘hot topic’ for many years, but is one which clashes severely with the framework of international law. So too state independence, the divisiveness and political sensitivity of which is starkly revealed by both the Kosovo and Georgia cases. The link between humanitarian intervention and independence issues – clearly borne out by both of our case studies – explains the reasoning behind an issue dedicated to these twin themes, which have tested the international legal community, and which have given rise to new developments in legal discourse. One need only think of the novel ‘Responsibility to Protect’ initiative proposed in 2001 as a re-formulation of the humanitarian intervention debate to see both how controversial and how important these issues are.

The authors in this issue have reflected on these developments from different perspectives. Let us give a quick overview of what one can expect in this issue, starting with ‘humanitarian intervention’.

In the ‘opinion section’ one finds a personal, historical perspective on the situation in both Georgia as well as Kosovo written by Mient Jan Faber. Faber employs empirical evidence to contend that the ‘Responsibility to Protect’ (R2P) is yet another justification for military intervention. The article is an interesting read for its overview of the origin of the conflicts in Kosovo and Georgia, but also for its polemic with the protagonists of the R2P.

Outspoken advocates of the R2P doctrine are Gareth Evans and Thomas Weiss who both publish their opinions on the subject. Evans argues that the Russian claim that their intervention in Georgia was justified by the R2P principle is superficial. Per Evans, this principle does not provide a basis for the protection of citizens outside one’s borders. Even if this aspect were overlooked, then still the threat to the South Ossetian population was not of a nature and scale to render military force necessary. Thomas Weiss also takes the R2P as his starting point and gives the tragic case of Zimbabwe as example of a setting where exterior pressure is desperately needed to prevent atrocities. Weiss argues that the R2P is a “culmination of a long effort to inscribe the pledge of “never again” in law and practice”.

In the ‘scientific article section’ Ciarán Burke finds a whole other perspective to the humanitarian intervention debate. Instead of the R2P, which he labels ‘misconceived and its threshold criteria are faulty at best’,

Burke proposes an alternative which he dubs 'equitable humanitarian intervention'. Further thoughts are given by Anne-Sophie Massa and Fernando Tesón. They both take the NATO action in Kosovo in 1999 as a starting point. Massa argues that, despite the Kosovo 'precedent', no right of humanitarian intervention exists under international law. Such a right creates undesirable tension between the prohibition on the use of force and the protection of human rights. Massa bases her argument on a detailed textual analysis of the UN Charter combined with a review of state practice. Tesón however, fully opposes such a stance. He analyses the Kosovo action and opines that critics of the intervention fail to explain why the incident is discarded as state practice. Tesón goes on to state that NATO has a stronger claim to legitimacy in authorising humanitarian intervention (than the UN) 'because it comes closest to representing the liberal alliance, the community of nations committed to the values of human rights and democracy.'

In this interesting dialectic between these two authors we might see a re-affirmation of Martti Koskenniemi's perspective on patterns of justification in international law. Koskenniemi famously posits that there are two ways of arguing about order and obligation in international law. One argument traces them down to justice (Tesón: 'values of human rights and democracy'); the other bases its argument on State behaviour, will or interest (Massa).<sup>1</sup> Bearing this in mind might be helpful to understand why two eloquent, but radically opposing arguments are possible within one same context.

The 'independence' sub-theme is no less hotly debated. In the 'opinion section' Stephen Neff and Nicholas Tsagourias provide interesting appraisals of the cases of Kosovo and Georgia. Neff distinguishes two 'roads to the creation of a new state by way of secession': the 'high road' – which sees secession and independence as a positive right - and the 'low road' – which sees independence as a remedy for a delict committed by the 'mother state'. Along these lines, Neff discusses Kosovo, Abkhazia and South Ossetia. Tsagourias opines that Kosovan independence has been inevitable, since it is the end-product of the process of territorial administration. He argues that international society should accept Kosovo's independence, because it is the outcome of the process they themselves have set in motion.

In the 'scientific articles section' Aidan Hehir discusses the situation in Kosovo and Georgia from the perspective of the concept of 'self-determination'. He argues that Kosovo's declaration of independence does not constitute a precedent given the unique coincidence of factors which brought it about. While drawing the parallels with Georgia, Hehir stresses that Kosovo may well become an analogy used by the powerful to justify interventions against weaker opponents - thereby constituting a means of subjection.

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<sup>1</sup> M. Koskenniemi, *From Apology to Utopia*, Cambridge: Cambridge University Press 2005, pp. 58-70.

Finally, the literary section. Here one finds a broad variety of literary articles around the theme of this issue. Marco Eliëns, Jelle Jan van Baardewijk en Bas Schotel have written interesting reviews of contemporary books. Eliëns discusses Aidan Hehir's 'Humanitarian Intervention After Kosovo' arguing that Hehir has failed to answer the most important question: to intervene or not to intervene? Van Baardewijk reviews the landmark book of the Dutch philosopher Hans Achterhuis 'Met alle geweld' (By Force). He concludes that the book is a treasure of philosophical thoughts concerning violence. Schotel provides for an in-depth analysis of Giorgio Agamben's 'State of Exception'. In this critical review Schotel defends current legal culture and practice against Agamben's methods and substantive claims.

Wouter Werner 'rereads' Carl Schmitt's classic 'The Theory of the Partisan'. He argues that Schmitt's book can help to gain a better understanding of the structural changes that underlie issues of contemporary irregular warfare. Finally, Geoff Gordon provides for a refreshing perspective on the ICJ's landmark 'Case Concerning Oil Platforms'. Gordon explores the jurisdictional dispute among the judges to this case for their competing visions of the purpose and powers vested in the ICJ.

We are therefore proud to present you this varied issue, which we believe provides for interesting impetus to the debate of humanitarian intervention and independence.

Ciarán Burke and Martijn Stronks