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## Editorial

### Nein!; The EJIL App (again); In this Issue

I invited our Book Review Editor, Professor Isabel Feichtner, to write a Guest Editorial, which is published below. As the reader will immediately note it would have been foolish, given the circumstances addressed in the Editorial, to wait for the next issue of *EJIL* and so I proposed that it be posted immediately on EJIL: Talk! where it was widely read and justly applauded. Given its importance, going well beyond the so-called Greek Crisis, we republish it here as an official *EJIL* Editorial – which of course, as is the case with all Editorials in this Journal, represents the views of the author, not of *EJIL* as such.

It is our hope that this Editorial will stimulate a broader discussion on our role as international lawyers in today's world of politics. To this end, let me make an open call for contributions, to the Journal and to EJIL: Talk!, on the role of international law scholarship in making sense of questions of how the refugee crisis, austerity politics, megaregionals, security politics, and so on interrelate, and how we as international lawyers can usefully intervene.

JHHW

### Nein!

*Hold fast to dreams // For if dreams die // Life is a broken-winged bird // That cannot fly. //  
Hold fast to dreams // For when dreams go // Life is a barren field // Frozen with snow.*

With this poem by Langston Hughes I ended my graduation speech in high school. I remember it now as I ponder how to put into words my feelings and thoughts of the last weeks, which oscillate between hope, fear and despair, triggered by the events unfolding after the Greek delegation 'left the negotiating table' in Brussels on 27 June. When I graduated from high school more than 20 years ago I was quite hopeful (like generations before me) that knowledge combined with political activism could change the world for the better. Already then I was fearful of environmental disaster and military destruction, but periodical acts of teenage disobedience – plastering the school with antiwar poems to protest against the first Iraq war or blasting music over the courtyard while staging an impromptu play (I cannot remember against or for what exactly) – were not only fun but gave me and my friends a sense of agency: '*Viele kleine Leute an vielen kleinen Orten, ....*' / think global, act local.

In the meantime, the world has become no friendlier place (but who am I to state this, privileged as I am?). I may be wiser (although sometimes I doubt it), but I have also succumbed to a mixture of complacency or trust in professions and institutions,

resignation and perpetual lack of time. I trust that science and politics will do something to keep us safe and free, that one of the political parties will have a programme that is relatively compatible with my ideological leanings. I close my ears to the horror scenarios describing the consequences of climate change for I have stopped believing that we will achieve a reorganization of our economy and I am too much of a coward to confront the disasters that lie ahead. But apart from complacency and resignation, possibly the most significant change from my political teenage self is the perceived loss of time. Time spent with friends who also had nothing more important to do than to think up little projects – plays, posters, protests. I am lucky that my current employment does not meet the description of a bullshit job (recently formulated by David Graeber), but appears to leave me some freedom for thinking, educating, creating. Yet this has not helped me sustain the sense of agency I felt as a youth. I have become more knowledgeable and my critique better founded, but I no longer see how we (but who?) might halt ecological destruction or social destitution. And thus I am not even using the time and space offered by my job for any kind of mischief that would combine joy, resistance and engagement for change.

The last weeks have worked as a wakeup call for me, triggering a sense of urgency for action, some action, any action, even if it is only the writing of this Editorial (which prompts a multitude of voices in my head judging my musings to be ‘gratuitous’, ‘empirically unfounded’, ‘theoretically lacking complexity’ ...). So what was the trigger that suspended resignation and shattered complacency and trust (*‘Vertrauen’* – a word I have come to loathe in the past weeks for its abuse and misuse by crisis commentators)? It was, I suspect, a combination of a heightened perception of complicity in a number of outrageous injustices and the excitement of recognizing that agency may be regained. I may have long resigned myself to the fact that my privilege is the flip side of other people’s poverty, that through my daily consumption choices I am perpetuating structural injustices. Thus, you may call me a hypocrite – but whilst everyday complicity has become second nature it appears to me to be of a different quality if we (!) unflinchingly (i.e. without any visible/public reaction on my part) register the deaths of thousands of refugees at the borders of Europe; if we watch on as human misery in Greece increases, with my government actively contributing in my name as a German taxpayer.

As a sense of responsibility slowly pushed resignation aside the Greek announcement of a referendum came as a relief. For me (and I am not alone in this interpretation) the referendum was not merely a Greek affair. In my understanding it provided, first of all, an opportunity to express solidarity and resistance by supporting a No vote. Moreover, the referendum, by putting to a brief halt the crisis resolution machinery, promised a broader and more public debate, not only about the short- and medium-term remedies to the eurocrisis, but also the long-term reform of EU law and institutions and, ultimately, perhaps a re-humanizing of capitalism. While I had long lost interest in the rather stale academic debates about the need for, conditions and manifestations of a European public, during the days of the referendum I did indeed feel part of a transnational, trans-European public; part of a movement that voiced discontent about the austerity measures that have led to such utter deterioration of living conditions in Greece, but also disagreement with the general state of the world in which concerns of finance trump those of the real economy and where social justice and ecological health lie at the bottom of the hierarchy of political action.

These may be solipsistic impressions. There have been protests before and others will have experienced similar feelings already during the Genoa protests in 2001, the Arab spring, and the mass demonstrations in Spain in 2011. For me an earlier event that prompted some optimism was when Occupy took Zucotti park and similar camps appeared around the world, including one in front of the European Central Bank in Frankfurt. Yet whilst at that time I felt somewhat solitary in posting Occupy news from Frankfurt on my Facebook timeline, the extent of transnational politicization triggered by the Greek referendum appears unprecedented (at least in the Europe of my lifetime) – with public intellectuals weighing in en masse, economists taking public stances and writing open letters, with petitions multiplying, internet sites serving as platforms for trans-European networking, the organization of protests, collection and dissemination of political, economic and philosophical analysis.

Given the atmosphere of change, the feeling that we may have the chance to pry open a window of opportunity from our iron cage for a different, a social Europe, it was all the more disenchanting to observe how the referendum was treated by European institutions, political parties and mass media in Germany. The persistent reinterpretation by officials and politicians of the referendum question as a question about ‘Grexit’ was an attempt to foreclose any discussion about how a No vote should affect the crisis management within the eurozone. The depiction of the referendum as a nationalist affair pitted ‘the Greeks’ against ‘the Germans’ and completely ignored manifestations of solidarity across Europe. I have been tempted to take the partial and ignorant reporting by German media (which largely disregarded fundamentals of political economy by insisting on metaphors of doing your homework, keeping your household in order and not living beyond your means) as symptoms of the financially destitute state of German newspaper publishers and national public radio. Yet taken together with the statements of politicians and government officials, the ECB’s decision to freeze Emergency Liquidity Assistance afforded to Greek banks as well as post-referendum reactions it is difficult not to conclude that concerted actions were taken to weaken the push for change. European Council president Donald Tusk was very frank in an interview he gave the *Financial Times* after the referendum:

This new intellectual mood, my intuition is it’s risky for Europe. Especially this radical leftist illusion that you can build some alternative to this traditional European vision of the economy. I have no doubt frugality is an absolutely fundamental value and a reason why Europe is the most prosperous part of the world... My fear is this ideological contagion is more risky than this financial one.

A further particularly enraging attempt to discredit those who supported the referendum as an act of resistance and a request for reform from within the European institutions was to place them in the same camp as right-wing anti-European groupings.

Now that No has been turned into a Yes for further far-reaching austerity measures and that debt relief in the form of a haircut is being ruled out, in particular by Germany, as a violation of the no bail-out provision (Art. 125 TFEU) I refuse to feel irresponsible for having supported a No vote. Rather, I want to shout out loud in the direction of the German government and the European Council ‘*no me representan!*’. And my anger and disbelief increases this week as I listen over breakfast to the seemingly endless commentary on *Deutschlandfunk* – the German national public radio – that ‘the Greeks’ can

still not be trusted as they do not appear to take ‘ownership’ of the prior actions they needed to underwrite and implement before negotiations of a third ‘rescue package’ began. In 2010 and 2011 it was the unpredictability of nervous markets that served as an argument against too much democratic deliberation on how the eurocrisis should be handled. Today, as markets seem quite calm, it is EU member states’ governments, also known as ‘the creditors’, who instrumentalize Greece’s debt to make a farce of democracy.

So what now? For one hot week (not even a whole hot summer) I, and with me some others, felt a renewed sense of agency and glimpsed a chance of change. The semester has ended and I have some time to reflect on the past weeks and on my responsibility as a human being, German and European Union citizen and international lawyer. I might join others to refine the international law doctrine of odious debt, the argument that Art. 125 TFEU does not prohibit a debt restructuring, the case that the ECB acted illegally when freezing Emergency Liquidity Assistance and that the IMF departed from its own policies and practices by supporting the Greek memoranda of understanding. These might be suitable activities for short-term activist interventions in the crisis management. But what about after the semester break? When attention has diverted from Greece and we have each reverted to our own disaster specializations – climate change, migration, war, destruction of cultural property – our minds possibly more focused on career prospects than the fate of fellow human beings and future generations. What would it mean to assume responsibility? What can I do through my writing, teaching, activism to resist and if not to change the course of affairs at least (to use a formulation by Heinz-Dieter Kittsteiner) not to run from a history I cannot create.

I do not have an answer. Having observed the skewed reporting, one way to take responsibility could be to get more involved in public discourse. Strangely enough, even though there was much talk of the fate of the European project – the European community of law – during the last weeks lawyers were conspicuously silent. It was mainly economists and some philosophers who (apart from politicians) took the stage. A few lawyers made the case that we should and could neatly separate questions of law and economics. I disagree. I am convinced that to take responsibility as lawyers we must attempt to understand the political economy of debt, money, finance, which are largely legal constructs and highly intertwined with government. If we then aim at reform of our capitalist economy (which we should) to ensure that it can provide prosperity and freedom, we must attempt to avoid two mistakes. First we should not disregard the limitations that the current political economy imposes on reform, not aim for the impossible; second we should not be satisfied with too little, not fall into the trap of what Roberto Unger calls rationalizing legal analysis, meaning that we need to go beyond proposals for law reform that neatly fit into the given legal material as we have rationally reconstructed it, that we should question and not take as a given the present distribution of the means of production, tax and transfer policies or separation of fiscal and monetary policy. There surely is no easy fix to overcome the crisis of democratic capitalism. There cannot exist a feasible ‘plan B’, we should not hope for a grand design for a ‘welfare world’. Successful reform will need to be incremental and, in my view, requires a combination of theory and practice, a coupling of programmatic thinking with democratic experimentation. A number of useful suggestions

have already been made for addressing structural deficiencies of the Economic and Monetary Union, among them those put forward by Yanis Varoufakis, Stuart Holland and James Galbraith in their 'modest proposal'. In order to develop further ideas we urgently need perspectives – historical perspectives on the political economy and legal construction of capitalist institutions in the last 500 years as well as perspectives opened up by contemporary social experiments such as, for example, the introduction of parallel currencies.

Finally, I believe that we need to make time. It may indeed be the most forceful act of resistance and a precondition for gaining agency to reclaim time – be it from bullshit jobs, the internet or consumption. Time to walk on the beach, sit in the park, make music, recite poetry, think slowly and dream of a revolution.

*Isabel Feichtner*

## The EJIL App (again)

I want to remind all our individual subscribers – for example all members of ESIL – of the possibility of installing the *EJIL* app and downloading *EJIL* to your tablet (both Apple and Android devices).

In a random survey we discovered that a large number of our subscribers, even those receiving the hard copy of *EJIL*, mostly access the Journal in its digital version online. The app offers two major advantages. The whole issue downloads to your tablet and you can then access it whether online or not. (Maybe I spend too many hours on airplanes and overrate this advantage.) The other advantage is that one clearly gets a much better sense of the issue as a whole, with the ability to browse through and skim even those articles you are not going to read in depth. An issue of *EJIL* is not a collection of articles simply waiting their time in the queue to get published. We curate each issue with care, like the construction of a satisfying meal with different courses. One also gets a better sense of our huge investment in the aesthetics and form of the Journal.

It is worth a try. Here, again, are the technical details:

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If you experience any problems do not hesitate to email our Managing Editor, Anny Bremner, at [ejil@eui.eu](mailto:ejil@eui.eu).

## In this Issue

This issue opens with a brace of articles on topics relating to the treatment of alternative dispute resolution in international institutional settings, albeit from quite different

perspectives. Jaime Tijmes introduces the possibility of using final offer arbitration to settle disputes in the World Trade Organization, and explores how it might best be introduced. In contrast, Lorna McGregor uses the jurisprudence of the European Court of Human Rights to consider the kinds of tests that supranational bodies should and do use to determine the compatibility of a particular dispute resolution process with the right of access to justice.

In *Roaming Charges*, we feature a photograph by Janet McKnight of Places of Impasse: Scars on Beirut Structures That Refuse to Fall. On this note, we encourage our readers to submit photographs for publication to [ejil@eui.eu](mailto:ejil@eui.eu).

The issue continues with two entries under our regular rubric, *EJIL: Debate!*. In the first, Catharine Titi argues that the European Union is in the process of introducing a new model of investment treaty that is ‘set to change the face of international investment law as we know it’, while in his Reply Martins Paparinskis introduces a note of caution regarding methodology, as well as a note of scepticism regarding Titi’s conclusions. The second *EJIL: Debate!* in this issue opens with an article by Devon Whittle, which applies Oren Gross’ ‘extra-legal measures model’ to conceptualize the UN Security Council’s Chapter VII powers as a form of emergency powers. In his Reply, Gross expands upon Whittle’s proposal to consider the application of the same model to another issue in international relations, namely unilateral humanitarian intervention. We invite comment on both debates on our blog, *EJIL: Talk!*

We close the articles section of this issue with two *Critical Reviews of International Jurisprudence*. Sookyoon Huh examines two judgments of the International Court of Justice from the perspective of the law of territory in a postcolonial context; her article is yet another output of the Junior Faculty Forum for International Law, having first been presented at the second Forum, held at the University of Nottingham in May 2013. Finally, Mikko Rajavuori uses the notion of ‘public shareholder’, as used by the European Court of Human Rights in *Heinisch v. Germany* (2011), to examine how states should govern the human rights performance of state-owned corporations.

*The Last Page* in this issue presents a poem by Laura Coyne entitled Her Whorl, which was written to celebrate the launch of The Women’s Worldwide Web.

JHHW