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FORUM

THE CONFLICT IN UKRAINE AND THE ‘WEAKNESS’ OF INTERNATIONAL LAW
International Law in Crisis: Russia’s Struggle for Recognition

CHRISTIAN MARXSEN

ABSTRACT: This article discusses the impact of the conflict between Ukraine and Russia on the international legal system, particularly in regard to the prohibition of the use of force. As an initial approach, the paper reflects on the concrete effects of the crisis on the substance of the provisions of the *jus contra bellum*. Identifying the distinct legal claims put forward by Russia it is argued that the crisis has left the substance of the law untouched.

The crucial dimension of the crisis, which is the main claim of the paper, does not lie on the level of substantive legal provisions, but rather concerns the recognition that States express towards each other in international law – a recognition that is, at the same time, required to uphold the normative power of international law. Taking a series of prior violations of international law by Western States into account, the paper argues that we have to interpret the current crisis as a *struggle for recognition* in which Russia aims to oppose Western instrumental use of international law and to regain its lost political strength. The paper then discusses Russia’s strategies in this struggle for recognition, through which Russia challenges Western reaction patterns and aims to dominate the rules of the conflict. Ultimately, the paper argues that the crisis exemplifies both – the robustness of international law’s substantive provisions and the fragility of international law *vis-à-vis* short-term incentives driven by political power.

KEYWORDS: Russia, Western States, Crimea, Crisis of International Law, Self-Determination, Hybrid Warfare, Illegality, Struggle for Recognition

I. Introduction

The conflict between Ukraine and Russia has long evolved into a polarising international affair. The stakes are high. Russia has engaged in a form of conflict that was considered *passé* in Europe, namely the use of force aimed at the acquisition of terri-
tory. The conflict has created a new dimension of confrontation between East and West that has led some to the assumption of an emerging “new cold war” era.¹

International legal scholarship has so far concentrated on the legal assessment of the events that have occurred in Crimea and Eastern Ukraine since early 2014. Russian actions have overwhelmingly been assessed as illegal; very few scholars have made a case for legality. But what effects does the crisis have on international law? Has the crisis exposed a general weakness of international law or have international norms proven to be insufficient to keep up with the factual developments of international relations?

This paper aims to reflect on the state of international law in view of the crisis between Russia, on the one hand, and Ukraine and a wide assortment of States on the other. The first step will be a reflection on the concrete effects of the crisis on the substance of the provisions of the _jus contra bellum_ (II.). Identifying the distinct legal claims put forward by Russia, I will argue that the crisis has left the substance of the law untouched.

The crucial dimension of the crisis does not lie on the level of substantive legal provisions, but rather concerns the recognition that States express towards each other in international law and that is, at the same time, required to uphold the normative power of international law. Taking a series of prior violations of international law by Western States into account, I argue that we have to interpret the current crisis as a struggle for recognition in which Russia aims to oppose Western instrumental use of international law and to regain its lost political strength (III.).² In this struggle for recognition Russia employs a certain set of strategies, challenging Western reaction patterns and aiming to dominate the rules of the conflict (IV.). Ultimately, I argue that the crisis exemplifies both the robustness of international law’s substantive provisions as well as the fragility of international law _vis-á-vis_ short-term incentives driven by political power.


² Using the notion of ‘Western States’ I am aware that there are frictions and dividing lines between the politics of these States. We could witness this, for example, in view of the 2003 Iraq war. However, I assume that the commonalities of approaches to international law and politics are still strong enough to allow for the use of this term.
II. Effects on the Jus Contra Bellum

So far, international legal scholarship has focused on providing a legal assessment of the events that took place in Crimea. This assessment has largely focused on the application of established doctrines of the jus contra bellum to the facts at hand, or at least to the facts that the outside observer could establish, with some uncertainties remaining. The papers and symposiums published have exhausted the material and overwhelmingly agree that Russia’s actions have to be considered violations of international law, with only a few voices raising opposite opinions. The situation in Eastern Ukraine, by contrast, remains underexplored. With Russia denying any involvement in the conflict and without proper factual exploration, also the legal analysis lags behind.

But what has the crisis so far done to the jus contra bellum? Is it possible to anticipate that the crisis is about to trigger changes in the prohibition of the use of force, i.e. of Article 2 (4) Charter of the United Nations (UN Charter)? Doctrinally speaking, such changes to the substance of Charter provisions can either be understood to be the result of a reinterpretation of the UN Charter or they can be understood to be the result of the emergence of new customary law, providing for new rules side-lining established Charter provisions. In either case, both constellations require that a new

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5 Charter of the United Nations, 26 June 1945, UNCIO 15, 335 (UN Charter).

6 Whether the latter is possible depends, however, on an interpretation of Art. 103 UN Charter. Does Art. 103 Un Charter only require the prevalence of Charter provisions over treaty law or does it have to be interpreted as also providing for the prevalence over customary law? See generally Andreas Paulus/Johann Leiß, Article 103, in: Bruno Simma et al. (eds.), The Charter of the United Nations: A Commentary (3rd ed. 2012), 2110, paras. 66–69.