

GERMAN YEARBOOK
OF INTERNATIONAL
LAW

VOLUME 58 · 2015



DUNCKER & HUMBLOT · BERLIN

GERMAN YEARBOOK OF INTERNATIONAL LAW

Volume 58 · 2015

LIST OF PEER REVIEWERS

YUTAKA ARAI • University of Kent

ALAN BOYLE • University of Edinburgh

THOMAS COTTIER • Bern University

MATTHEW CRAVEN • University of London

CHRISTOPHER HARDING • Aberystwyth
University

GEORG NOLTE • Humboldt University
Berlin

ASIF QURESHI • Korea University

AUGUST REINISCH • Vienna University

NICO SCHRIJVER • Leiden University

JAMES SHEPTYCKI • York University Toronto

CHRISTIAN TOMUSCHAT • Humboldt Uni-
versity Berlin

ANTONIOS TZANAKOPOULOS • Glasgow
University

EKATERINA YAHYAOUI • National University
of Ireland Galway

GERMAN YEARBOOK
OF INTERNATIONAL LAW

JAHRBUCH FÜR INTERNATIONALES RECHT

Volume 58 · 2015



DUNCKER & HUMBLLOT / BERLIN

Founders:

RUDOLF LAUN / HERMANN VON MANGOLDT

Editors:

ANDREAS VON ARNAULD / KERSTIN ODENDAHL

Honorary Editor:

JOST DELBRÜCK

Assistant Editors:

AVRIL RUSHE / WIEBKE STAFF

Editorial Assistants:

NINA BRANDT / CELIA RENZ / CATHARINA UEKERMANN

Layout and Production:

ANDREA NEISIUS / SYLVIA WEIDENHÖFER

ADVISORY BOARD OF THE WALTHER SCHÜCKING INSTITUTE

CHRISTINE CHINKIN

London School of Economics

JAMES CRAWFORD

International Court of Justice, The Hague

LORI F. DAMROSCH

Columbia University

VERA GOWLLAND-DEBBAS †

Graduate Institute of International Law, Geneva

RAINER HOFMANN

University of Frankfurt

FRED L. MORRISON

University of Minnesota

EIBE H. RIEDEL

Geneva Academy of International Humanitarian
Law and Human Rights

ALLAN ROSAS

Court of Justice of the European Union, Luxemburg

BRUNO SIMMA

Iran-United States Claims Tribunal, The Hague

DANIEL THÜRER

University of Zürich

CHRISTIAN TOMUSCHAT

Humboldt University of Berlin

RÜDIGER WOLFRUM

Max Planck Foundation for International Peace
and the Rule of Law, Heidelberg

The views presented in the German Yearbook of International Law are those of the contributors and do not reflect or represent the views of the Walther Schücking Institute or the editors, assistant editors, members of the advisory board, or the peer reviewers.

Walther Schücking Institute for International Law, University of Kiel

Westring 400, D-24098 Kiel, Germany

Internet: www.gyil.org

All rights reserved. No part of this book may be reproduced, translated, or utilised in any form or by any means, electronic or mechanical, without the expressed written consent of the publisher.

© 2016 Duncker & Humblot GmbH, Berlin

Printed by Druckteam, Berlin

Printed in Germany

ISSN 0344-3094

ISBN 978-3-428-15061-8 (Print)

ISBN 978-3-428-55061-6 (E-Book)

ISBN 978-3-428-85061-7 (Print & E-Book)

Printed on non-aging resistant (non-acid) paper according to ISO 9706 ☉

Internet: <http://www.duncker-humblot.de>

TABLE OF CONTENTS

FORUM

The Conflict in Ukraine and the ‘Weakness’ of International Law

CHRISTIAN MARXSEN: International Law in Crisis: Russia’s Struggle for Recognition	11
---	----

FOCUS

CYBER-SECURITY BEYOND THE MILITARY PERSPECTIVE

MARTIN NEY AND ANDREAS ZIMMERMANN: Cyber-Security Beyond the Military Perspective: International Law, ‘Cyberspace’, and the Concept of Due Diligence	51
CHRISTIAN WALTER: Obligations of States Before, During, and After a Cyber Security Incident	67
OLIVER DÖRR: Obligations of the State of Origin of a Cyber Security Incident	87
AUGUST REINISCH AND MARKUS BEHAM: Mitigating Risks: Inter-State Due Diligence Obligations in Case of Harmful Cyber Incidents and Malicious Cyber Activity – Obligations of the Transit State	101
ROBERT KOLB: Reflections on Due Diligence Duties and Cyberspace	113
JUTTA BRUNNÉE AND TAMAR MESHEL: Teaching an Old Law New Tricks: International Environmental Law Lessons for Cyberspace Governance	129
MATTHIAS HERDEGEN: Possible Legal Framework and Regulatory Models for Cyberspace: Due Diligence Obligations and Institutional Models for Enhanced Inter-State Cooperation	169

GENERAL ARTICLES

ECKART KLEIN AND DAVID KRETZMER: The UN Human Rights Committee: The General Comments – The Evolution of an Autonomous Monitoring Instrument 189

ALEX G. OUDE ELFERINK: International Law and Negotiated and Adjudicated Maritime Boundaries: A Complex Relationship 231

HARALD KLEINSCHMIDT: Decolonisation, State Succession, and a Formal Problem of International Public Law 265

MARCO LONGOBARDO: The Palestinian Right to Exploit the Dead Sea Coastline for Tourism 317

FENGHUA LI: Safeguarding State Sovereignty: The Relevance of Post-Award Remedies in ICSID and Non-ICSID Arbitration 353

LAURA SALVADEGO: Witness Protection and Inter-State Cooperation: Current and Emerging Challenges in the Fight Against Transnational Organised Crime 379

GERMAN PRACTICE

ELISA OEZBEK: Strengthening the Human Rights Council: The 2015 Presidency of German Ambassador *Joachim Rücker* 413

HENDRIK SELLE: Confronting the Destruction of Cultural Heritage Used as a Tactic of War: A German-Iraqi Initiative in the UN General Assembly 431

STEPHANIE SCHLICKWEI: The Deployment of the German Armed Forces to the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) 443

HENNING BÜTTNER AND MARVIN SCHWOPE: The Aftermath of Prism: The International Legal Framework for Surveillance and the Radius of Operation for German Intelligence Agencies from a Human Rights Perspective 465

SARAH BOTHE AND CHARLOTTE GASCHKE: Germany’s Proposal of a “*Grexit auf Zeit*” 481

JENS T. THEILEN: Towards Acceptance of Religious Pluralism: The Federal Constitutional Court's Second Judgment on Muslim Teachers Wearing Headscarves	503
---	-----

BOOK REVIEWS

<i>Amal Alamuddin/Nidal Nabil Jurdi/David Tolbert</i> (eds.): The Special Tribunal for Lebanon: Law and Practice (SCHABAS)	523
<i>Aharon Barak</i> : Human Dignity: The Constitutional Value and the Constitutional Right (ROEDER)	526
<i>Majorie Cohn</i> (ed.): Drones and Targeted Killing: Legal, Moral, and Geopolitical Issues (NELSON)	528
<i>Richard K. Gardiner</i> : Treaty Interpretation (DÖRR)	531
<i>Lauri Mälksoo</i> : Russian Approaches to International Law (MORRIS)	533
<i>Marko Milanovic/Michael Wood</i> (eds.): The Law and Politics of the Kosovo Advisory Opinion (HILPOLD)	537
<i>Jens David Ohlen/Kevin Govern/Claire Finkelstein</i> (eds.): Cyberwar: Law and Ethics for Virtual Conflicts (STADLMEIER)	542
<i>Donald R. Rothwell/Alex G. Oude Elferink/Karen N. Scott/Tim Stephens</i> (eds.): The Oxford Handbook of the Law of the Sea (HAAKE)	545
<i>Carsten Stahn</i> (ed.): The Law and Practice of the International Criminal Court (KRZAN)	548
<i>Neil Walker</i> : Intimations of Global Law (WACKERNAGEL)	550
<i>Gerhard Werle/Lovell Fernandez/Moritz Vormbaum</i> (eds.): Africa and the International Criminal Court (KRZAN)	554
BOOKS RECEIVED	557

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-

* Dr. iur., LL.M. (NYU), Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

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-à-vis* short-term incentives driven by political power.

¹ See *Simon Tisdall*, *The New Cold War: Are We Going Back to the Bad Old Days?*, 19 November 2014, available at: <http://www.theguardian.com/world/2014/nov/19/new-cold-war-back-to-bad-old-days-russia-west-putin-ukraine> (accessed on 2 November 2015); *Dmitri Trenin*, *Welcome to Cold War II*, 4 March 2014, available at: <http://foreignpolicy.com/2014/03/04/welcome-to-cold-war-ii/> (accessed on 2 November 2015).

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,³ with only a few voices raising opposite opinions.⁴ 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)?⁵ 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.⁶ In either case, both constellations require that a new

³ See for example Christian Marxsen/Anne Peters/Matthias Hartwig (eds.), Symposium: "The Incorporation of Crimea by the Russian Federation in the Light of International Law", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)/Heidelberg Journal of International Law (HJIL)* 75 (1) (2015), 1; Zoran Oklopčić (ed.), *The Crisis in Ukraine*, *German Law Journal Special Issue* 16 (3) (2015), 350; *Thomas D. Grant*, Annexation of Crimea, *American Journal of International Law* 109 (2015), 68; *Peter Hilpold*, Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History, *Chinese Journal of International Law* 14 (2015), 237; *Christian Marxsen*, The Crimea Crisis: An International Law Perspective, *ZaöRV/HJIL* 74 (2) (2014), 367.

⁴ See for example the contributions of Russian authors in: Marxsen/Peters/Hartwig (note 3); see also: Russian Association of International Law, Circular Letter to the Executive Council of the International Law Association, 6 June 2014, available at: <http://www.mgimo.ru/study/faculty/mp/kmp/news/n252984.phtml> (accessed on 2 November 2015).

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.