

GERMAN YEARBOOK
OF INTERNATIONAL
LAW

VOLUME 55 · 2012



DUNCKER & HUMBLOT · BERLIN

GERMAN YEARBOOK OF INTERNATIONAL LAW

Volume 55 · 2012

PEER REVIEW BOARD

- KAI AMBOS • University of Göttingen
RICHARD BARNES • University of Hull
EYAL BENVENISTI • Tel-Aviv University
LAURENCE BOISSON DE CHAZOURNES •
University of Geneva
ALAN BOYLE • University of Edinburgh
MARTEN BREUER • University of Konstanz
JUTTA BRUNNÉE • University of Toronto
CHRISTINE CHINKIN • London School of
Economics
CLAUS DIETER CLASSEN • University of
Greifswald
THOMAS COTTIER • University of Bern
JAMES CRAWFORD • University of Cambridge
ASTRID EPINEY • University of Fribourg
BARDO FASSBENDER • University of St. Gallen
DAVID FELDMAN • University of Cambridge
ANDREA GATTINI • University of Padua
DOUGLAS GUILFOYLE • University College
London
MATTHIAS HARTWIG • Max Planck Institute
for Comparative Public Law and
International Law Heidelberg
WOLFF HEINTSCHEL VON HEINEGG • European
University Viadrina Frankfurt (Oder)
ELLEN HEY • University of Rotterdam
CHRISTOPH HERRMANN • University of Passau
PETER HILPOLD • University of Innsbruck
STEPHAN HOBE • University of Cologne
RAINER HOFMANN • University of Frankfurt
UWE JENISCH • University of Kiel
BING BING JIA • Tsinghua University
STEFAN KADELBACH • University of Frankfurt
JÖRN AXEL KÄMMERER • Bucerius Law
School Hamburg
HELEN KELLER • University of Zurich
ECKART KLEIN • University of Potsdam
MARKUS KOTZUR • University of Hamburg
MARKUS KRAJEWSKI • University of
Erlangen-Nürnberg
CLAUS KRESS • University of Cologne
CHRISTINE LANGENFELD • University of
Göttingen
JANE MCADAM • University of New South
Wales
FRANZ MERLI • University of Graz
FRED L. MORRISON • University of Minnesota
MARTIN NETTESHEIM • University of Tübingen
GEORG NOLTE • Humboldt University Berlin
ANGELIKA NUSSBERGER • University of
Cologne
KARIN OELLERS-FRAHM • Max Planck
Institute for Comparative Public Law
and International Law Heidelberg
ROGER O'KEEFE • University of Cambridge
ALEXANDER ORAKHELASHVILI • University of
Birmingham
ANNE PETERS • University of Basel
ALEXANDER PROELSS • University of Trier
ANDREAS RAHMATIAN • University of
Glasgow
ROSEMARY RAYFUSE • University of New
South Wales
AUGUST REINISCH • University of Vienna
EIBE RIEDEL • University of Mannheim
MATTHIAS RUFFERT • University of Jena
CHRISTOPH SCHEWE • University of Latvia
STEFANIE SCHMAHL • University of Würzburg
KIRSTEN SCHMALENBACH • University of
Salzburg
ANDREW SERDY • University of Southampton
BRUNO SIMMA • University of Michigan
ACHILLES SKORDAS • University of Bristol
PETER-TOBIAS STOLL • University of
Göttingen
STEFAN TALMON • University of Bonn
CHRISTIAN TAMS • University of Glasgow
DANIEL THYM • University of Konstanz
CHRISTIAN TIETJE • University of Halle
STEPHEN TIERNEY • University of Edinburgh
CHRISTIAN TOMUSCHAT • Humboldt
University Berlin
ANTONIOS TZANAKOPOULOS • University
College London
ROBERT UERPMANN-WITZACK • University
of Regensburg
ERICH VRANES • University of Vienna
CHRISTIAN WALTER • University of Munich
THOMAS WEIGEND • University of Cologne
NORMAN WEISS • University of Potsdam
STEVEN WHEATLEY • Lancaster University
RÜDIGER WOLFRUM • Max Planck Institute
for Comparative Public Law and
International Law Heidelberg
ALEXANDRA XANTHAKI • Brunel University

GERMAN YEARBOOK
OF INTERNATIONAL LAW

JAHRBUCH FÜR INTERNATIONALES RECHT

Volume 55 · 2012



DUNCKER & HUMBLLOT / BERLIN

Founders:

RUDOLF LAUN / HERMANN VON MANGOLDT

Editors:

KERSTIN ODENDAHL / NELE MATZ-LÜCK

Honorary Editor:

JOST DELBRÜCK

Assistant Editors:

NICHOLAS ENGLISH / SYLVIA NWAMARAIHE

Editorial Assistants:

SINA HARTWIGSEN / BENJAMIN MAASS / NIKLAS SIEVERS

Layout and Production:

MIRIAM DÖRING / ANDREA NEISIUS

ADVISORY BOARD OF THE WALTHER SCHÜCKING INSTITUTE

CHRISTINE CHINKIN
London School of Economics

JAMES CRAWFORD
University of Cambridge

LORI F. DAMROSCH
Columbia University

VERA GOWLLAND-DEBAS
University of Geneva

RAINER HOFMANN
University of Frankfurt

FRED L. MORRISON
University of Minnesota

EIBE H. RIEDEL
University of Mannheim

ALLAN ROSAS
Court of Justice of the European Union, Luxembourg

BRUNO SIMMA
University of Michigan

DANIEL THÜRER
University of Zürich

CHRISTIAN TOMUSCHAT
Humboldt University Berlin

RÜDIGER WOLFRUM
Max Planck Institute for International and
Comparative 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 review board.

Walther Schücking Institute for International Law, University of Kiel
Westring 400, D-24098 Kiel, Germany
E-Mail: yearbook@internat-recht.uni-kiel.de · 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.

© 2013 Duncker & Humblot GmbH, Berlin
Printed by AZ Druck und Datentechnik, Berlin
Printed in Germany

ISSN 0344-3094
ISBN 978-3-428-14159-3 (Print)
ISBN 978-3-428-54159-1 (E-Book)
ISBN 978-3-428-84159-2 (Print & E-Book)

Printed on no aging resistant (non-acid) paper according to ISO 9706 ©
Internet: <http://www.duncker-humblot.de>

TABLE OF CONTENTS

FORUM

THE ARAB SPRING AND INTERNATIONAL LAW

JEAN-YVES DE CARA: The Arab Uprisings Under the Light of Intervention	11
JAVAID REHMAN AND ELENI POLYMEÑOPOULOU: Justice After Democracy in the Arab World: Islamic Law Perspectives on Accountability	53

FOCUS

DISASTER PREPAREDNESS AND RESPONSE

DAVID FISHER: The Future of International Disaster Response Law	87
WALTER KÄLIN: The Human Rights Dimension of Natural or Human-Made Disasters	119
SARA E. DAVIES: Natural Disasters and the Responsibility to Protect	149
REBECCA M. BRATSPIES: State Responsibility for Human-Induced Environmental Disasters	175
DIRK HANSCHER: Prevention, Preparedness and Assistance Concerning Nuclear Accidents – Effective International Legal Framework or Patchwork?	217
MARKUS KOTZUR: European Union Law on Disaster Preparedness and Response ...	253

GENERAL ARTICLES

ROSANNE VAN ALEBEEK: Jurisdictional Immunities of the State (Germany <i>v.</i> Italy): On Right Outcomes and Wrong Terms	281
--	-----

MARCO CALISTO: Jurisdictional Immunities of the State: Germany *v.* Italy before the ICJ from an Italian Perspective 319

ATHANASIOS YUPSANIS: The Meaning of ‘Culture’ in Article 15 (1)(a) of the ICESCR – Positive Aspects of CESCR’s General Comment No. 21 for the Safeguarding of Minority Cultures 345

MART SUSI: The Definition of a ‘Structural Problem’ in the Case-Law of the European Court of Human Rights Since 2010 385

MALGOSIA FITZMAURICE: Indigenous Whaling and Environmental Protection 419

PRABHAKAR SINGH: Mercantile Metaconstitutionalism: Interpretation of the WTO Treaty and the Developing Countries 465

NICHOLAS TSAGOURIAS: Scotland: Independence and Membership of the UN and the EU 509

GERMAN PRACTICE

CHRISTOPHE EICK: The UN Security Council and International Law in 2012 537

PETER WITTIG: Making UN Sanctions Work: Germany’s Chairmanship of the Al-Qaida/Taliban Sanctions Committee of the UN Security Council 561

ANTJE SIERING: Germany’s Contribution to the Protection of Biodiversity and Ecosystem Services by Hosting the IPBES Secretariat in the UN City of Bonn 573

NICHOLAS ENGLISH AND FELIX BIEKER: Upholding Data Protection Law Against Multinational Corporations: German Administrative Measures Relating to Facebook 587

CHRISTOPH SEIDLER: European Commission *v.* Germany: The Data Retention Directive – Legal or Political Issue? 601

PATRICK BRAASCH: Margin of Appreciation or a Victimless Crime? The European Court of Human Rights on Consensual Incest of Adult Siblings 613

JULIA GEBHARD AND JOHANNES FUCHS: Equal (Enough), at Last? Latest ECtHR Jurisprudence in *Abrens v. Germany* and *Kautzor v. Germany* on the Rights of Biological Fathers 625

RAINER GROTE: The ECHR's Rulings in *von Hannover v. Germany (No. 2)* and *Axel Springer AG v. Germany*: Rebalancing Freedom of the Press with the Respect for Privacy 639

JULIA MÜLLER: The Arrest of G8 Protestors: The Contested Legitimacy of Preventive Detention 649

STEPHANIE SCHLICKWEI: Preventive Detention Revisited Before the ECtHR: *O.H. v. Germany* 659

JULIA GLOCKE: German Measures Against Islamic Extremist Organisation Upheld in Strasbourg: *Hizb Ut-Tabrir and Others v. Germany* 671

TOBIAS THIENEL: The Appointment of Public Officials, Interim Measures and Article 6 of the ECHR..... 679

HANS MICHAEL HEINIG AND STEFAN KIRCHNER: Private Prayer in Public Schools: The Judgment of the German Federal Administrative Court of 30 November 2011 689

ANDREA MEYER: Handling of Somali Pirates from Capture until Transfer to Kenyan Authorities in Accordance with International Law? 699

BOOK REVIEWS

Louise Doswald-Beck: Human Rights in Times of Conflict and Terrorism (JOHANN) 713

Saelo Gumedze: The Peace and Security Council of the African Union – Its Relationship with the United Nations, the African Union and Sub-Regional Mechanisms (ZIMMERMANN) 715

Andrew Lang: World Trade Law after Neoliberalism – Re-imagining the Global Economic Order (MAGGIO) 716

Sir Hersch Lauterpacht: The Function of Law in the International Community (JIA) 718

Marko Milanovic: Extraterritorial Application of Human Rights Treaties (HOFMANN) 721

William Schabas: Unimaginable Atrocities – Justice, Politics, and Rights at the War Crimes Tribunals (FUCHS) 724

8 TABLE OF CONTENTS

Bert Swart/Alexander Zahar/Göran Sluiter (eds.): The Legacy of the International Criminal Tribunal for the Former Yugoslavia (WATERS) 727

Antonios Tzanakopoulos: Disobeying the Security Council (SKORDAS) 731

Helmut Volger/Norman Weiß (eds.): Die Vereinten Nationen vor globalen Herausforderungen – Referate der Potsdamer UNO-Konferenzen 2000–2008 (KOHOUTEK) 735

BOOKS RECEIVED 741

FORUM

THE ARAB SPRING AND INTERNATIONAL LAW

The Arab Uprisings Under the Light of Intervention

JEAN-YVES DE CARA*

ABSTRACT: Diverse uprisings took place in the Middle East and North Africa due to various political, tribal, sectarian, religious, social, and economic factors. In several cases they turned into civil wars. As a principle of international law, intervention is undoubtedly prohibited. A request from a government may justify intervention or even annul its very nature as interference. Humanitarian intervention or the new doctrine of responsibility to protect, have also been invoked in that context. Interventions in Bahrain, Libya and Syria are discussed here. However, there is no coherence duty in politics, and States may decide to intervene or not on variable legal basis.

KEYWORDS: Arab Uprising, Intervention, Civil War, Legal Basis, Intervention on Invitation, GCC, Responsibility to Protect, Humanitarian Intervention, Authorisation by Security Council, NATO, Assistance to Insurgents, Political Interests

I. Introduction

The Arab uprisings were received with bewilderment by the international society. Aware of the risk of destabilisation of the whole region, foreign States reacted through diplomatic channels,¹ however the preferment of peaceful settlement proves more difficult where disputes do not oppose two States but rather undefined groups, factions or parties within the same State. Advices have been given. Resignations and changes have been duly noted. The United Nations (UN) took a cautious approach. The UN Secretary General insisted “on respect for the rights of peaceful protest and assembly,” recalling that in responding the protesters “authorities have an obligation to respect human rights,” and urged all parties to exercise restraint and engage in

* Professor at the Faculty of Law, Paris Descartes, Sorbonne Paris Cité, previously the Executive Director of Paris Sorbonne University Abu Dhabi (2009–2012).

¹ *Louis Balmond* (under the direction of) *Chronique des faits internationaux, Revue Générale de Droit International Public* (RGDIP) 115 (2011), 551, 560–561.

dialogue and a process to respect and reflect the will of the people and their legitimate aspirations.²

Although there are common challenges in the region and major principles to uphold, each country is unique and all situations are different. Diverse factors – tribal, religious, demographic, sectarian, military, and geopolitical – may explain every national unrest and in most cases the issues raised are not yet resolved. There is no general explanation for the Arab uprising nor was there a common cause. In Bahrain, the Shi'a majority demanded more power with the alleged support of Iran, in Yemen tribal and political tensions prevailed. In Libya tribal rivalry and misuse of national wealth by a despotic leader infuriated the people. Nepotism and misappropriation destroyed the regime in Tunisia, just as in Egypt where the military played a key role. In some countries like Morocco, the traditional bond between the nation and the King, *Amir al-Mu Minin* (Commander of the Believers), helped the initiation of reforms.³

Inevitably, such an upheaval in the Arab world challenges security of international relations and raises international legal issues related to recognition, assistance to foreign governments, implementation of humanitarian law in civil war, or the role of international organisations.⁴ As the blast wave has not yet subsided,⁵ it seems difficult to appreciate, at this early stage, the invariable or the changing features of international law through these events. However, the theme of 'intervention' seemingly dominates: and every national crisis has affected, in its own way, the balance of powers in this region (the Middle East and North Africa), which is of crucial importance for the international society.

² *Ban Ki-Moon*, Opening remarks to the press at stakeout, United Nations News Center, 17 February 2011, available at: http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statID=1075#.UOBCg2-NtEs (accessed on 30 December 2012).

³ *Charles Saint-Prot/Frédéric Rouvillois/Jean-Yves de Cara*, *Le Maroc en Marche: le développement politique, social et économique du Maroc* (2009); *Ahmed Bouachik/Michel Degoffe/Charles Saint-Prot*, *La Constitution marocaine de 2011* (2012).

⁴ See ICTY, Appeal Chamber, Case No. IT-94-1, *Duško Tadić*, Judgment of 2 October 1995, 96 *et seq.* These points have been extensively discussed by the Institut de Droit International (IDI), see *Dietrich Schindler*, *Le principe de non-intervention dans les guerres civiles*, Rapport provisoire, *Annuaire de l'Institut de droit international* (Annuaire IDI) 55 (1973), 416; IDI, *The Principle of Non-Intervention in Civil Wars*, Wiesbaden Resolution, 14 August 1975, available at: http://www.idi-iil.org/idiE/resolutionsE/1975_wies_03_en.pdf (accessed on 27 February 2013). See also *Guiseppe Sperduti*, *The Protection of Human Rights and the Principle of Non-intervention in the Domestic Concerns of States*, *Annuaire IDI* 63 (1989), 309.

⁵ At the time of writing.

For *Talleyrand*, “non-intervention is a term meaning almost the same thing as intervention.” The realistic aphorism of the famous diplomat summarises the punctilious questioning of lawyers who have consistently struggled to define the concept.⁶

Intervention is undoubtedly prohibited.⁷ That is the consequence of sovereignty, political independence, self determination and territorial integrity, particularly when it involves the use of armed force. That prohibition is embodied in many treaties,⁸ resolutions⁹ and rulings from the International Court of Justice (ICJ).¹⁰ For the United Nations General Assembly (GA), prohibition covers:

armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements [...] the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind [...] activities consisting in organizing, assisting, fomenting, financing, inciting or tolerating subversive, terrorist or armed activities aiming at the violent overthrow of the regime of another State, or interference in civil strife in another State.¹¹

Within such a comprehensive concept, many actions have been loosely defined as ‘intervention’ by governments from a mere statement or inclusion on the agenda of the UN, while an armed operation followed by occupation would not be described as such.¹² Classification depends largely on circumstances and political expediency:

⁶ *Jacques-Alain de Sédouy*, *Le Concert européen. Aux origines de l'Europe, 1814–1914* (2009); *Alan Vaughan Lowe*, *The Principle of Non-Intervention: Use of Force*, in: Alan Vaughan Lowe/Colin Warbrick (eds.), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst: Essays in Honour of Michael Akehurst* (1994), 66.

⁷ *Nguyen Quoc Dinh/Patrick Daillet/Mathias Forteau/Alain Pellet*, *Droit international public* (8th ed. 2009), 48; *Sir Robert Jennings/Sir Arthur Watts*, *Oppenheim's International Law*, vol. I (9th ed. 1996), 427; *James E. S. Fawcett*, *Intervention in International Law: A Study of Some Recent Cases*, *Recueil des Cours (RdC)* 63 (1961-II), 343, 347; *Lowe/Warbrick* (eds.) (note 6).

⁸ *Jennings/Watts* (note 7), 428, footnote 6; *Charter of the League of Arab States*, 22 March 1945, reprinted in: *International Human Rights Reports* 12 (2005), 893.

⁹ GA Res. 2131 (XX) of 3 December 1965; GA Res. 2625 (XXV) of 24 October 1970.

¹⁰ International Court of Justice (ICJ), *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14, 106–111.

¹¹ GA Res. 2131 (XX) and GA Res. 2625 (XV) (note 9).

¹² For the examples of the United States (US) opposing the inclusion of Puerto Rico on the GA agenda on the basis of Art. 27 of the UN Charter, the same about Korea in 1950, or France opposing Morocco in 1953 and Algeria in 1956 being on the agenda, see *Bruno Simma/Hermann Mosler/Albrecht Randzelhofer/et al.* (eds.), *The Charter of the United Nations: A Commentary* (2nd ed. 2002), 153.