Buchbesprechungen

***Beham, Markus P.*: State Interest and the Sources of International Law. Doctrine, Morality, and Non-Treaty Law.** New York: Routledge. 2018. ISBN 9781315098388 (eBook). ISBN 9781138298781 (Hardback). ISBN 9780367590796 (Paperback). 251 pp. £ 36.99 (eBook and Paperback), £ 120.- (Hardback).

The monograph under review is the result of a dissertation thesis written by *Markus P. Beham* at the Université Paris Ouest-Nanterre La Défense and the University of Vienna.

The author examines the "inherent connection between state interest" and the emergence or ascertainment of non-treaty law. That connection is examined in two "case studies", namely human rights and exceptions to the prohibition of the use of force for humanitarian reasons. Particularly in these fields, *Beham* argues, scholars push for normative change and, in constructing their arguments, invoke non-treaty sources as the positive foundation of their claims. According to *Beham*, this has led to a situation in which "a select number of academic legal elite […] has gradually created a body of law that runs parallel to, rather than intersecting with the realities of a state-centred international political system" (p. 15).

In explaining the need for the critical appraisal of such scholarship, as well as for developing his own project, *Beham* takes up a number of arguments often found in legal-positivist writing: the need for analytical clarity, meeting legitimate expectations of legal subjects, upholding the rule of law, or providing a realistic (or accurate) description of state behaviour (pp. 4-6). Moreover, *Beham* espouses the ideals of *Rechtsdogmatik,* a German-speaking legal tradition, with its focus on determining the "legal *status quo*", i.e. positive international law as it stands, through sound methodology (pp. 47-48).

In *Beham's* view, the behaviour of states is primarily, although not exclusively, guided by their own interests, which must have ramifications for the (theory of) sources of international law: "if customary international law is in any way dependent upon state practice and states act primarily according to their interests, then the result may well be that customary international law can only exist for norms that states require being followed" (pp. 25-26). In being guided by their own interests, states thus seek reciprocity or at least "an equilibrium of interests" (p. 29) when participating in the creation of customary international law. However, that comes to a head when moral concepts are concerned – such as human rights or humanitarian interven-

tions – that are not based on reciprocity or in which the motives of the relevant actors remain unclear.

In his second chapter on "Non-Treaty Sources", *Beham* considers the distinction between treaty and non-treaty law as one between consensual and non-consensual sources. The latter were not generated through the "formation of will at the international level", but rather "through social interaction or largely domestic processes" (p. 49). That approach allows *Beham* to limit his study to the non-treaty sources listed in Article 38(1) International Court of Justice (ICJ) Statute – namely customary international law and general principles of law – while not taking into account unilateral declarations as a distinct and (potentially) unwritten source of international law.

That being said, *Beham* retains a somewhat non-committal attitude by not explicitly ascribing to one particular view within sources theory, although he invokes *H. L. A. Hart* once, who notably considered "sources" as being determined by consensus of a given social group. The term "source" should be "understood here simply as any conceivable appearance of the law" (p. 51).

The study then turns to a comprehensive description of the relevance of state practice and *opinio juris* and various (purported) paradoxes concerning the formation of customary international law. In doing so, *Beham* also rejects the voluntarist assertion that custom constitutes a tacit agreement as a *contradictio in se* (pp. 88-89). While consent remains determinative, its role is limited: "States must accept and consent to the existence of customary international law as a concept, but not each and every rule thereof." (p. 89).

Beham then criticises the nonchalant approach of the ICJ towards ascertaining customary norms, which has also "facilitated scholarship turning a blind eye on authoritative proof of state practice and *opinio iuris*" (p. 99). He in particular points to self-defence against non-state actors as a widely accepted example of where the case law of the Court diverges from actual state practice on the matter (pp. 97-98). Scholars should rather engage in a "sound assessment" of customary international law taking account of both elements "on a sliding scale" (pp. 103-104).

With regard to general principles of law, *Beham* gives an account of the two orthodox views that these norms either were to derive from domestic legal systems or directly from natural law (pp. 109-111). He notes that "[i]t is really quite impossible to come up with a definitive assessment of general principles of law" (p. 112) and – although they have had a limited role concerning "the minimum standards of equity and procedure", "it is hard to

imagine how general principles could represent a dignified substitute as a basis of obligation for other substantive rules of international law" (p. 113).

The core of *Beham's* arguments is developed in the third chapter on "Morality and State Interest". He starts by reaffirming the "Separation Thesis" espoused by legal positivists, i.e. that morality and legality are conceptually distinct. Thus, moral norms (or "moral concepts") may only become legally binding, if "they have passed through either one of the processes of formation of international law" (p. 118).

Beham then turns to the notion of state interest, which "is undoubtedly an important factor in the decision-making of political stakeholders" (p. 121). In attempting to determine that notion, he highlights the distinction between the state (as an abstract entity), its organs (including its government), and its population. *Beham* argues that the interests of the state as such, as those of any actor, are dependent on its nature. The term "state interest" thus should refer to "a common set of factors that are important to the existence of the abstract entity of the state" (p. 124). These then should also be "determinative" in the process of law-creation in international law.

In his construction of the notion of "state interest", *Beham* primarily follows the position of Austrian international law scholar *Gerhard Hafner*. Thus, "the areas of state interest […] can be generalised as two principal considerations: first, national security, comprising the protection of statehood, territorial integrity, as well as sovereignty, and, second, a functioning economy. Recalling the definition of what constitutes a state, these "traditional" interests are inextricably linked to its 'survival'" (p. 125).

The discussion then turns to answering "the main question of this book", namely whether state interest also includes "moral considerations concerning the well-being of individuals" (p. 125). In that context, *Beham* notes the argument that the (purported) democratisation of domestic systems has led to a broadening of the notion of state interest. However, he considers this view to be unconvincing as, first, the interests of the "ruling classes" remain different from those of the population and, second, democratisation has never been truly universal. *Beham* also rejects the claim that other factors, such as the pressure on states (or governments) by Non-Governmental Organisations (NGOs) or broader interests of the international community, would be sufficient to classify these "moral considerations" as state interest. *Beham* concludes that while states might "observe altruistic inclinations", "these are the means, not the end in itself" (p. 132). Thus, they necessarily remain secondary *vis-á-vis* the interests related to the survival of states as "first-order reasons" (*Joseph Raz*). The Chapter concludes with the somewhat cryptic note that "[i]t is less obvious […] what the above findings im-

ply when moral concepts are sought in state practice and *opinio iuris* or by derivation from the domestic legal systems of states" (p. 133).

In the fourth chapter "Doctrine and Indeterminacy", *Beham* examines the approach taken towards human rights as non-treaty law within scholarship. As he observes, scholars often portray human rights to constitute customary international law or even *jus cogens*, without engaging in a proper analysis of state practice or *opinio juris*. *Beham's* critique particularly focuses on *Theodor Meron's* book *Human Rights and Humanitarian Norms as Customary International Law* (1991), which is taken as a prominent and often-praised example of a human rights scholar engaging with non-treaty law (pp. 140-148). In *Beham's* telling, *Meron* engages in doublespeak, by maintaining the relevance of the orthodox methodology on a general level but failing to actually employ it when making specific claims. Thus, *Meron* portrays a "flexible understanding of legal methodology in the formation of customary international law" (p. 145). In some instances, "the natural lawyer is fully revealed", as *Meron* bases claims as to the customary nature of certain norms solely on their content (p. 146). *Beham* also highlights the self-referential nature of human rights scholarship, in which claims partly become more and more grandiose with each subsequent iteration of a cascade of citations (pp. 149-150). In comparison, the subsequent treatment of the questions under general principles of law remains rather cursory. *Beham* addresses both the comparative law approach, noting that "constitutional protection [of human rights] does not necessarily correlate with compliance" (p. 158), as well as the natural law approach, which has had limited practical relevance. He concludes that human rights remain a "subsidiary interest" in relation to "core consideration[s] related to the survival of the state". Thus, "[w]hat the discourse needs, is an honest assessment of the legal *status quo*" (p. 161).

The discussion then turns to humanitarian exceptions to the prohibition of the use of force and the "indeterminacy" of state practice. *Beham* first gives an overview of the importance of Article 2(4) UN Charter, as well as the two generally accepted exceptions, i.e. self-defence and measures under the collective security system. He argues that, despite the supremacy clause of Article 103 UN Charter, non-treaty law could influence the content and operation of the prohibition. In the context of humanitarian interventions, *Beham* notes that of the many purported examples of state practice cited in literature, "none […] are fully devoid of ulterior motives" (p. 177). He finds that the "erratic" or "singular instances" of state practice are "underlined by a myriad of underlying interests with varying expressions of *opinio iuris*" (p. 181). In that context, solely relying on government statements to determine

the humanitarian motive (and thus the associated *opinio juris*) of an intervention would allow considering the German annexation of the "Sudetenland" and Soviet interventions in Hungary and Czechoslovakia as "humanitarian interventions" (p. 182). Due to the impossibility in determining the interests or motives involved, "it is not possible to determine their *opinio iuris* [of intervening states] for the purpose of establishing customary international law" (p. 191). *Beham* also briefly addresses the Responsibility to Protect, however considers its prime example in practice – Libya – as irrelevant, as the intervention was based on a Security Council resolution (pp. 183-189).

The fifth chapter, the Conclusion, briefly highlights the main conclusions of the monograph concerning human rights or humanitarian exceptions to the prohibition of the use of force under "non-treaty law". *Beham* argues that they are not "likely to be found in customary international law by a genuine analysis of state practice and *opinio iuris*", resulting from states not being "altruistically motivated" by nature of their purpose. Thus, even with regard to instances of state practice "it is not possible to discern any specific motivation from other underlying interests" (p. 192). In the context of general principles of law, *Beham* essentially reiterates the supplementary character of such norms: "the gravitational pull […] towards compliance is so low and the controversy as to their true nature still unresolved, making it hard to see in them a dignified substitute for the validity of human rights norms […] let alone as a basis for exceptions or obligations in connection with the regulation of the use of force" (p. 193).

Overall, *Markus Beham's* book provides a fascinating exploration of questions of sources theory, tying together a broad variety of scholarship from legal theory, international law and international relations, as well as empirical research and key instances of international legal practice.

The monograph also highlights problematic aspects of "human-rightism": one might well follow *Beham* in finding that scholars in the field of human rights (and humanitarian intervention) have adopted a particularly nonchalant approach to ascertaining the existence of norms of general international law, although that arguably has had rather limited spill-over effects into international jurisprudence (maybe except from the jurisprudence of the Inter-American Court of Human Rights under its president *Cançado Trindade* with regard to *jus cogens*). *Beham* is also certainly correct in his description that states typically act for what they perceive as their self-interest and that these interests are shaped by the particular nature of states. That being said, the particular approach adopted with regard to the notion of "state interest" subsequently appears to lead to the claim that the

emergence of such norms was conceptually *impossible*. In doing so, *Beham's* project turns from calling for "scholarly diligence" in the field of human rights[1] into espousing claims with much broader conceptual implications.

However, *Beham* remains somewhat ambiguous on this. While the entire discussion appears to be primed towards the argument that the notion of "state interest" should delimit the areas in which states are able to express an *opinio juris*, he does not appear to ever explicitly make that claim. His statements rather oscillate between raising the question whether moral concepts "will likely manifest themselves" in general international law (p. 114), noting that scholars have "failed to reconcile customary international law and human rights" (p. 156), speaking of "the illusion of a non-treaty law of moral concepts" (p. 30), or finding that "[t]he element of state interest naturally stands in the way of concluding that" human rights constitute customary international law (p. 192). That being said, in absence of such a claim, *Beham's* construction of state interest might provide an explanatory frame for the scarcity of state practice and *opinio juris*, however, adds little else to his reasonable calls for a *Rechtsdogmatik*-inspired approach to human rights scholarship.

Beham also never makes a convincing argument for why his particular construction of the notion should have farther-reaching consequences. As already noted above, he himself acknowledges that state interests may not account for all acts attributed to the state: they are "undoubtedly *an* important factor in the decision-making of political stakeholders" (p. 121; emphasis added). Following *Beham*, law-appliers and scholars should apparently be constantly weary whether a *prima facie* expression of *opinio juris* by a state representative *actually* falls within an abstract definition of what purportedly lies in the self-interest of states. In that context, also the omission of binding unilateral declarations appears unfortunate: are states able to bind themselves to "moral concepts" through such declarations, which by their very nature necessarily lack any *do ut des* or an "equilibrium of interests"? If so, why should states not be able to consider themselves legally bound to similar norms on the basis of customary international law? One is left to wonder.

At any rate, it is unclear why the determination of "state interest" should not occur on the individual level of each state. If one were to adopt *Beham's* view, many acts of states remain inexplicable – or at least oddities. How

[1] A position which the present author is very prone to support, see *P. Janig*, Julian's Golden Cage: Julian Assange, the UN Working Group on Arbitrary Detention and the Quest for Scholarly Diligence, Austrian Review of International and European Law 18 (2013; published in 2016), 155 et seq.

might the aforementioned definition of state interest account for, e.g., The Gambia initiating proceedings against Myanmar, a country that is almost two continents apart, with regard to issues that neither touch upon its existence nor its economic wellbeing?[2] As *Beham* himself argues, "states will limit their activism with regard to *ius cogens* and *erga omnes* obligations to situations, in which their own interests are concerned" (p. 130). While that might be also the case for The Gambia, its interest in pursuing litigation for (alleged) violations of the Genocide Convention presumably follows from a certain kinship within the Muslim community and is thus simply different from *Beham's* concept.

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***Lahmann*, *Henning*: Unilateral Remedies to Cyber Operations.** Cambridge: Cambridge University Press. 2020. ISBN 978-1-108-47986-8 (Hardback). ISBN 978-1-108-80705-0 (eBook). xii, 334 pp. £ 85.-

With his doctoral dissertation, *Henning Lahmann* submits an intriguing work in the field of cyber operations under international law, for which the University of Potsdam awarded him the Wolf Rüdiger Bub Award.

The book's main thesis is that unilateral remedies to cyber operations will often remain unavailable to the attacked states, as the respective legal requirements can usually not be met due to the technology's inherent problems of a timely and reliable attribution. In the main part of the dissertation, the author presents the defence of necessity as a theoretical way out of this dilemma. Because the relevant academic literature has thus far not thoroughly addressed this topic, the author's focus on necessity is clearly a wise choice and is especially worth reading. *Lahmann* arrives at the conclusion that under customary international law, the defence of necessity is typically not available to states which have fallen victim to a malicious cyber operation. Hence the book ends with some guidelines for the development of a new primary rule of international law in a yet to be drafted "special emergency regime for cyberspace".

In his book, *Lahmann* focusses on unilateral remedies against cyber operations taken outside of armed conflict. This emphasis is justified because significant literature already exists on the *ius in bello* ramifications of cyber operations. More importantly, cyber operations so far play their most significant role outside of armed conflict. In this respect, the book considers

[2] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*) (Application and Request for Provisional Measures), ICJ (11.11.2019).

several case studies (pp. 5-14), including the alleged Russian interference in the United States (U.S.) presidential election in 2016.

Part I ("Cybersecurity Incidents and International Law", pp. 1-42) sets the stage for an understanding of the basic technicalities of cyber operations. It also functions as an introduction for readers who are new to the topic and provides a summary of the main legal discourse concerning cyber operations and their qualification under international law. The work categorises malicious cyber operations into three types: those of a mere access character (operations that enable other cyber activities by providing entry to an adversary computer system), those with disruptive effects (operations that interrupt the flow of information of the function of information systems without causing physical damage or injury), and finally attack operations (those that have effects in the real world beyond the cyber system itself). *Lahmann* concludes that there is a consensus that malicious cyber operations are capable of violating the prohibition of the use of force and the principle of non-intervention. However, disagreement would remain concerning the details of the relevant threshold. In his view, most malicious cyber operations so far do not qualify as a prohibited intervention, as they have not reached the prerequisite level of coercion.

If not qualifying as an intervention, cyber operations might at least violate state sovereignty. *Lahmann* regards the question whether state sovereignty is a primary rule of international law (as has been stipulated e.g. in the Tallinn Manual on the International Law Applicable to Cyber Warfare) as unsettled, while seeing good arguments in favour (p. 41). This aspect could have been elaborated on, especially because the author himself acknowledges that the other primary rules have thus far not been breached by cyber operations. Nevertheless, and in conclusion, *Lahmann* identifies a gap between the premise that international law does apply in cyberspace and his finding that most actual cyber operations have remained unaddressed by current international law.

Part II ("Unilateral Remedies to Cybersecurity Incidents") focusses on unilateral remedies to cyber operations available to states that have fallen victim to an operation that has violated a primary rule of international law. *Lahmann's* discussion in this part constitutes the main body, comprising around three quarters of the book (pp. 43-257). Three unilateral remedies are analysed in detail: self-defence, countermeasures, and necessity.

Concerning the right to self-defence under Art. 51 United Nations (UN) Charter, the author opines that mere access operations do not amount to the threshold of an armed attack needed for a State to invoke said right. However, the same is argued to not hold true for disruptive or attack operations.

As the literature is in relative agreement on this subject, the author is in line with the prevailing opinion.

A much more contested problem arises in connection with attribution, which is of special importance for cyber operations. It therefore comes as no surprise that *Lahmann* dedicates forty pages to this particular topic. Already in the introduction of the book the author recognises a development in recent years towards a faster and more high-profile attribution of cyber operations to perpetrators. Nevertheless, he makes clear that the attribution problem is and will remain prevalent for some time. This has to do with the underlying technicalities of cyber operations, which can be masked and routed through neutral, third party systems. Evidence thus plays a major role when attributing an operation to a state actor. In order to illuminate this issue, the book takes recourse to the various standards of proof under international law by examining case law of several international courts and tribunals. The analysis concludes that a state needs to put forward evidence that fulfils the "clear and convincing" standard in order to invoke its right of self-defence. Finding evidence in the realm of cyberspace is, however, not seen as straightforward but in need of considerable resources and time.

Lahmann goes on to discuss different doctrinal approaches concerning the attribution problem: the renowned International Criminal Tribunal for the former Yugoslavia's (ICTY) "overall control" test in the *Tadić* judgment, the International Court of Justice's (ICJ) "effective control" test in the *Nicaragua* judgment, and a novel "virtual control" test as proposed in literature. Other approaches are shown to focus on lowering the evidentiary standard necessary to establish authorship of an attack or utilising an indirect attribution by taking recourse to a state's duty to prevent malicious activity emanating from its territory. The latter approach is equivalent to the well-known "unwilling or unable" notion used in the "war on terrorism" after 9/11 in order to justify measures against non-state actors on foreign territory but not against the state itself. According to *Lahmann*, it is a minority position to claim that a State's omission to prevent an armed attack from being launched from its territory is tantamount to having committed it, making direct actions against said state possible. However, the latter more expansive approach is seen by the author as being the only reasonable legal construction for attribution due to the technologies' intrinsic character: as the author of a malicious cyber operation remains unknown due to evidentiary obstacles, the attacked state cannot direct its response against the author but only against the state from which the attack was launched. Nevertheless, such an approach is refuted by *Lahmann* in light of insufficient state practice to qualify as a rule of customary international law. He

furthermore fears the outcome of what states would have to do were they to be held accountable in this extensive manner: an exhaustive monitoring of their domestic networks would be needed giving rise to grave human and civil rights concerns.

After these more fundamental problems of attribution, the work analyses the consequences of error in factual assessment when deciding how and against whom a reaction should be directed. *Lahmann* strongly argues against the opinion put forward by the Tallinn Manual and the U.S. government, that the existence and authorship of an armed attack leading to the right of self-defence is to be based upon a reasonable determination made *ex ante* and not *ex post facto*. This position is even evaluated as indefensible (p. 109). State practice is argued to be inconclusive on the matter albeit the rationale of Art. 51 UN Charter as being a core part of the Charter's *ius contra bellum* paradigm, strongly implies the opposite. In *Lahmann's* view, mistakes concerning factual assessments lead to the responsibility of a state for the unlawful use of force. Moreover, as the International Law Commission's (ILC) Draft Articles on State Responsibility (ASR) would lead to the responsibility of the mistaken state, irrespective of any good faith of their agents already for mere non-forceful countermeasures, this should *a fortiori* hold true for forceful self-defence.

Subsequently, the work briefly examines the time factor that further complicates states' successful recourse to the right of self-defence. The author argues against the loosening of the temporal scope of the right of self-defence, which in connection with the "war on terrorism" is argued to already have set a negative precedent. As cyber operations have picked up speed in the last years, expanding the applicability of the right could lead to a considerable risk of escalation and a blurring of the lines between lawful and unlawful uses of force (p. 111). A sensible temporal nexus between armed attack and response should thus remain.

In conclusion, the author attests none of the approaches put forward so far to provide a coherent, comprehensive or persuasive solution as regards the right to self-defence, mainly due to the problem of a timely attribution (p. 112).

The book subsequently attends to countermeasures as a remedy against cyber operations as stipulated in Art. 22 ASR. The remedial aspect in this regard is seen in a protective conduct against a malicious behaviour, often labelled as "active cyber defence" or "hack-back". Here again, *Lahmann* focusses on the question of attribution of such an operation to a state. While direct attribution will often not be readily available due to the inherent technical difficulties of identification, indirect attribution becomes a more

viable option, as the requirement in this case is any wrongful non-performance of an international obligation by the adversary. Hence the author closely examines whether the notion of the duty to prevent malicious cyber operations emanating from a state's territory is in fact a primary obligation of states. The author concludes said duty to be considered established as a principle under international law. As the duty amounts to an obligation of conduct and not of result, the author analyses the interrelated standard of due diligence in the cybersecurity context which ultimately answers whether a state has fulfilled its obligation. Three prerequisites are identified in this regard: the obligation to enact laws that criminalise harmful cyber activity (p. 154), the requirement for states to prevent planned or actual harmful cyber operations – at least in those cases where the state is actually aware of them (pp. 156-158) – and the obligation to cooperate with the victim state in order to prevent further harm, to mitigate the consequences of an attack, or to help identify the perpetrators (p. 158). Using the more far-reaching precautionary principle established under environmental law, and purported by some voices in literature as a further element of due diligence in the cybersecurity context, is rebutted by the author as still being a merely political postulation (p. 162).

As the remedy of countermeasures ceases to be permitted as soon as the unlawful act has stopped, the time factor is again of crucial importance. Additionally, Art. 52 (2) ASR obliges the injured state to notify the state responsible of any decision to take countermeasures and offer to negotiate. Further, such countermeasures need to be proportionate. These preconditions lead *Lahmann* to the conclusion, that countermeasures too face numerous obstacles – as long as a state seeks to abide by the rules as identified by the ASR. Their practical relevance, at least in the form of hack-backs, is therefore seen as marginal (p. 178).

Countermeasures which are not taken as a remedy but as a means aimed at ensuring cessation and non-repetition of the unlawful act by the responsible state are shown to be exceptions to that conclusion. If the responsible state repeatedly fails to prevent a certain event from occurring, the obligation of cessation turns into an obligation to undertake certain measures to ensure that the unlawful event does not reoccur. However, as the author shows, "it would be disproportionate to claim more than the responsible state's fulfilment of its duty to carry out with due diligence measures to prevent a further repetition of harmful cybersecurity incidents" (p. 187). Nevertheless, he concludes that countermeasures usually only come into play in situations beyond the use of hack-backs, as in such situations the difficulty of a timely attribution is not pressing (p. 200).

Finally, the defence of necessity in emergency situations is analysed, as laid down in Art. 25 ASR. This can basically be seen as a fall-back scenario for those cases where the malicious cyber operation neither amounts to an armed attack inducing the right to self-defence, nor meets the preconditions for hack-backs as countermeasures. In necessity *Lahmann* finds a most intriguing feature: the lack of a need of attribution prior to its invocation. As preconditions in this respect, the work identifies a grave and imminent peril to an essential interest of the victim state. Once a reasonable assessment of the available evidence suggests the existence of a peril, a State's action to avert it must be the only means available. The latter condition is seen by *Lahmann* as the principal reason why necessity is rarely available. Especially in the cyber context, the decision-making moment is short and a state may not be able to exhaustively evaluate the available defensive means before resorting to hack-backs or other forms of active defence. As long as defensive measures are an option, they prevail in the "only means" test. In order to better be prepared for such situations, states should develop in advance response protocols to malicious cyber operations. These can offer the state several viable options. While *Lahmann* doesn't recognise the "only means" requirement to have become a customary duty for states, *de lege ferenda* he proposes states to be under a secondary due diligence obligation to establish such protocols. Consequently, only those states that have complied with this duty should be eligible to take recourse to the defence of necessity. A further complication is identified in the precondition of imminence. Once the threat has passed or actually materialised its imminence has disappeared as well. In contrast to self-defence or countermeasures, however, a state invoking necessity only needs to assess the available evidence with reasonable care.

Whether or not the use of force may be justified by the state of necessity is disputed. *Lahmann* analyses the different doctrinal approaches and relevant state practice in order to conclude that *de lege lata* the use of cyber defence operations may not transgress the use of force threshold by invoking necessity.

In conclusion, the work predicts that necessity may be more frequently invoked in the cyber context than was originally envisaged with respect to conventional threats. However, *Lahmann* strongly argues that it should not be a default instrument to react to cyber operations, but merely a last resort that may be applied in exceptional circumstances.

In the final Part III ("Outlines of an Emergency Regime for Cyberspace", pp. 261-284), *Lahmann* articulates his main thesis, that at least in practice current international law does not readily fit the novel environment

of cyberspace. As the problem of identification in the cyber context is identified as structural, so is the space for plausible deniability. In reference to *Jack Goldsmith* he especially sees the attribution problem as a "norm destroyer" undermining the function and the rule of law. This is because the attribution-based remedies are inherently limited in the cyber context. States are increasingly in a situation where they can evade the need to justify their conduct in cyberspace. While necessity may, at first glance, seem an appropriate remedy that does without a precise attribution, *Lahmann* fears that the overuse of such an exceptional rule will eventually lead to the suspension of the normal operation of law and ultimately to the erosion of the rule of law as such. Hence the necessity defence "is incapable of providing a stable legal basis for hack-back policies within an order that postulates the rule of law" (p. 266).

Consequently, *Lahmann* sees the need for a special emergency regime for cyberspace. For this purpose, the Convention Relating to Intervention on the High Seas in Case of Oil Pollution Casualties – though never invoked by any state – is taken as an example for an emergency framework. One of the most significant differences between this convention and the defence of necessity is shown to be the right of an affected state to intervene, providing for a much stronger authorisation than a mere justification or excuse under customary necessity.

Lahmann shows in part II, that it is very often impossible to timely ascertain attribution to a specific actor of a cyber incident in order to provide for a legally sound remedy. In part III he therefore proposes not to distinguish between unintended incidents and malicious behaviour as a precondition for protective conduct. Further, he argues that it ought to be mandatory to request assistance from the territorial state. Unilateral action should only be available if the said state is unable or unwilling to deal with the request.

The causes and circumstances including the authorship should only be addressed *ex post facto*, e.g. when it comes to a duty to compensate in case no malicious behaviour can be proven to have existed. In this respect, *Lahmann* references German civil law and its rules on defensive and offensive necessity. A rule should take into consideration "whether the assets damaged by the state conduct under distress – servers, cables etc – were the source of the malicious activity or rather simply intermediate tool" (p. 277). In both cases the victim state should be justified to take action, yet in the latter the state should be obliged to provide compensation.

In order to find evidence for the necessary attribution *ex post facto*, fact-finding mechanisms such as "attribution councils" should be considered as

well. Finally, *Lahmann* concedes that he does not want to oblige states to abstain from developing offensive cyber tools, which rely on software vulnerabilities that are not generally known. Yet he considers as necessary the development of some kind of vulnerabilities management system.

The book is remarkable in several aspects: firstly, it does give several new impulses to discussions surrounding cyber operations. This especially holds true for the analysis of customary necessity. Secondly, the author focusses on those areas that are in fact of practical relevance and not merely of an academic nature. Attribution is the essential part in this respect, as is the focus on unilateral remedies, especially those below the level of armed force. Thirdly, while the analogy of the high seas is somewhat old and often misguiding, the author does actually find some input from the law of the sea in the form of the Intervention Convention. It remains to be seen whether the proposition of a special emergency regime will actually bear fruit. *Lahmann's* demonstrated broad and well-founded knowledge, not only in the cyber context but in general international law as a whole, gives the author's arguments considerable weight.

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***Symmons, Clive Ralph*: Historic Waters and Historic Rights in the Law of the Sea. A Modern Reappraisal.** Publications on Ocean Development, Vol. 89. Leiden/Boston, USA: Brill/Nijhoff, 2nd ed. 2019. ISBN 978-9004377011/eISBN 978-90-04-37702-8. XVI, 455 pp. € 198,-

The doctrine of historic rights – and particularly historic waters – has traditionally been a subject of great importance in the international law of the sea. As explained in more detail below, a historic right is any right "recognized although it constitutes a derogation from the rules in force [and] would otherwise be in conflict with international law".[1] Historic waters are a form of historic rights that entail a claim to sovereignty in an area that would not belong to the coastal State in question under the normal rules. It is accepted that there are also categories of historic rights that fall short of sovereignty, such as fishing rights or rights of passage through another State's internal waters. The doctrine of historic rights played a key role in the early struggles between the freedom of the seas and the interests of coastal States, when the extent of the maritime zones of coastal States – and the rights that they enjoyed therein – were not clearly defined in any widely accepted multilateral treaties. This changed with the highly dynamic developments in the second half of the 20th century when i.a. the full exclusive

[1] *Fisheries Case* (*United Kingdom v. Norway*), Judgement, 18.3.1951, ICJ Rep (1951) 116, 130-131.

economic zone (EEZ) and archipelagic waters concepts were codified in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[2] The acceptance of these new or extended maritime zones and the clarification and codification of detailed legal rules for these areas rendered reliance on the doctrine of historic rights (including historic waters) increasingly superfluous. Most of these claims – with some notable exceptions such as historic bays – were now clearly identifiable as unlawful or lawful based on the new legal regime. Therefore, after the entry into force of UNCLOS in 1994, the topic of historic rights in the law of the sea did no longer receive much academic attention.

Against this background, *Clive R. Symmons'* treatise on historic waters in the law of the sea was first published in 2007 under the title "Historic Waters in the Law of the Sea: A Modern Re-Appraisal"[3] and has since served as the only contemporary monographic reference work on this topic. The greatest achievement of the book was perhaps that it clarified many of the doctrinal obscurities (such as the continued reliance on historic claims where such claims had been legalised under the new law of the sea) caused by the swift legal developments of the 20th century that had dramatically reduced the scope for claims to historic rights. *Symmons* showed that there was still a place for historic rights in the contemporary law of the sea, but that there was also much less room for an application of the concept than there was before. This was a commendable undertaking because to this day many academics and government officials fail to appreciate that many authorities on the doctrine of historic rights that might have been persuasive in the first (and even second) half of the 20th century must now be placed in the context of the legal developments that followed.

It is the second – substantially revised – edition of 2019 of *Symmons'* book that is the subject of this review. Perhaps its most important aspect is already evident from the change of the book's title to "Historic Waters *and Historic Rights* in the Law of the Sea: A Modern Re-Appraisal" (emphasis added). As noted by the author in the preface and acknowledgments (pp. IX-X), the book now covers in far greater detail the concept of claims to "historic rights" beyond claims to "historic waters" – a terminological and conceptual distinction clarified by the arbitral awards of 2015 and 2016 in the *South China Sea Arbitration* (*The Republic of Philippines v. The People's*

[2] United Nations Convention on the Law of the Sea, 10.12.1982, 1833 UNTS 3.
[3] *C. Symmons*, Historic Waters in the Law of the Sea: A Modern Re-Appraisal, 2007.

Republic of China) rendered by an arbitral tribunal constituted under Part XV and Annex VII of UNCLOS.[4]

The recent increase of interest in – a reliance on – the doctrine of historic rights both in State practice and academia certainly warranted a second edition of *Symmons'* treatise. Indeed, it seems that the ambiguities and legal certainty surrounding the doctrine of historic rights have attracted growing attention – not least by powerful States – as basis for exceptionalist legal claims, cherry-picking, and hybrid tactics, all of which threaten to undermine the integrity of the rules-based legal order for the oceans established by UNCLOS and other instruments. This review primarily focuses on the first chapters of the book which address the definitional and conceptual questions – and which were updated most substantially in the second edition.[5]

In the first chapter, *Symmons* clarifies the definitions of the terms "historic rights" and "historic waters" for the purposes of his study. His choice of definitions largely follows the views expressed in the arbitral awards in the *South China Sea Arbitration*. *Symmons* accepts that the term "historic rights", in its widest sense, is broader than the term "historic waters". Understood this way, the term "historic rights" includes "a State claiming to exercise certain jurisdictional rights at sea on the basis of long-standing historic maritime claim" (p. 2). This broad understanding of the term extends to both what *Symmons* calls historic rights in the "narrow sense" (i.e. historic rights short of sovereignty – so-called non-exclusive historic rights) and "historic waters" (i.e. historic rights based on a sovereignty claim to waters – i.e. internal waters or territorial sea). Due to their conceptual similarities, they have – in principle – the same requirements for proof, "particularly those of continuous and long usage with the acquiescence of relevant other States" (p. 5).

In the second chapter, *Symmons* explores in more detail the differences between historic rights (in the narrow sense) and historic waters. Most importantly, historic waters – unlike historic rights in the narrow sense, such as historic fishing rights – connote claims to sovereignty in a maritime area, and there is no place for hybrid concepts of "exclusive quasi-territorial rights" (pp. 14-16). Second, *Symmons* persuasively argues that – at least in

[4] *South China Sea Arbitration* (*Republic of the Philippines v. People's Republic of China*), Award on Jurisdiction and Admissibility, 29.10.2015, PCA Case No. 2013-19; *South China Sea Arbitration* (*Republic of the Philippines v. People's Republic of China*), Award, 12.7.2016, PCA Case No. 2013-19.

[5] For detailed reviews of the first edition including the parts of the book not reviewed here, see *D. Pharand*, Ocean Yearbook 23 (2009), 558 et seq., and *T. Scovazzi*, The International Journal of Marine and Coastal Law 25 (2010), 637 et seq.

practice – the legality of claims to historic waters is inextricably linked to their adjacency to the claimant's shore, whereas historic rights in the narrow sense may be acquired regardless of location (pp. 17-18).

The third chapter is devoted to additional definitional problems arising from the confusing and inconsistent use of terminology in the context of historic maritime claims. It first addresses the concept of "historic title" found in Articles 15 and 298(1)(a)(i) of UNCLOS. Here, *Symmons* agrees with the arbitral tribunal in the *South China Sea Arbitration* that "historic title" exclusively refers to claims to sovereignty such as claims to historic waters and excludes claims to historic rights short of sovereignty such as historic fishing rights (pp. 19-26). As a result, the scope of Article 298(1)(a)(i) of UNCLOS, which allows States Parties to UNCLOS to optionally exclude – by declaration – disputes "involving historic bays or titles" from the scope of compulsory dispute settlement under Section 2 of Part XV of UNCLOS (see Article 286), is effectively restricted to claims to historic waters. However, *Symmons* rightly cautions that the exception might be deprived of its object and purpose if UNCLOS tribunals subject claims to historic titles or bays to in-depth scrutiny in terms of *substantive legality* when assessing objections to jurisdiction pursuant to Article 298(1)(a)(i) of UNCLOS (pp. 24-25). It remains an open question how the right balance between the effectiveness of the exception and the integrity of the legal order established by UNCLOS might be struck with methodological consistency.

In Chapter 4, *Symmons* persuasively argues that the exercise of legal rights by a State, such as the freedom of fishing on the high seas, is generally not "exceptional" and does not give rise to acquiescence-based rights in the absence of protest by other States (pp. 40-41).

The fifth chapter of the book (and the last reviewed here) is entirely new and deals with "The Inter-relationship of the Doctrine of Historic Rights with the Regime of the LOSC; and the Impact of the LOSC on the Doctrine of Historic Rights in the Narrow Sense as Discussed in *Philippines v. China*". As the chapter's title suggests, it addresses a topic that was – and continues to be – controversially debated both in academic and governmental settings in the light of China's exceptionalist maritime claims in the South China Sea, which are often argued to constitute historic rights falling outside the scope of UNCLOS. *Symmons* presents the findings of the arbitral tribunal in the *South China Sea Arbitration* and explains their significance in the broader context of the dispute, including China's obscure and controversial claim based on the so-called nine-dash-line (pp. 45-46). Based on historical maps depicting a line of nine dashes enclosing most of the

South China Sea, the Chinese government claims the waters located within the line as Chinese waters, although the exact legal basis for this claim – which is widely considered to constitute a claim to historic rights – remains unclear. The arbitral tribunal rejected the Chinese historic rights claim – or what it considered to be China's historic rights claim in the light of China's non-participation in the proceedings –, holding that it was neither justified as a claim to historic waters nor as one to historic rights in the narrow sense.

After explaining that UNCLOS only contains "indirect (and circumlocutory)" references to historic or traditional fishing rights, most notably in Article 51(1) of UNCLOS, *Symmons* engages with the doctrinal question whether the legal framework established by UNCLOS is compatible with a continued existence of historic rights of non-coastal States in the maritime zones of coastal States or whether they have been extinguished (pp. 46-52). In doing so, *Symmons* mostly focuses on explaining the compatibility test applied by the arbitral tribunal in the *South China Sea Arbitration* in the context of (allegedly) pre-existing non-exclusive historic fishing rights (historic fishing rights of non-coastal States in the waters of coastal States, which may be exercised without displacing the coastal State's rights) and traditional fishing rights. This test requires a separate analysis of the compatibility of such rights with the fisheries regime of the various maritime areas of exclusive fisheries rights and jurisdiction codified in UNCLOS.

Based on this test, *Symmons* agrees with the arbitral tribunal that pre-existing historic or traditional fishing rights are incompatible with the EEZ fisheries regime in Part V of UNCLOS and, therefore, have been extinguished (pp. 52-57). He is somewhat more critical with respect to the arbitral tribunal's decision to treat allegedly pre-existing "traditional fishing rights" in the territorial sea differently from those in the EEZ in that the arbitral tribunal considered that the former could be acquired even in high seas areas and that they were compatible with the fisheries regime of the territorial sea (pp. 57-59). In his view, the outcome of the arbitral tribunal's approach is "anomalous" because it preserves rights of non-coastal States "in the *more sovereign area* of seas of another State" (pp. 57). In a next step, the author proposes the doctrine of *voisinage* between immediately adjacent coastal States, which usually refers to the granting of reciprocal access to coastal fisheries among neighbouring States, as an alternative explanation for the continued recognition of reciprocal fisheries access to the territorial sea (p. 59). Overall, *Symmons* concludes that the award in the *South China Sea Arbitration* provided a number of important clarifications regarding the validity of historic rights in the narrow sense, which raised the threshold for the recognition of such rights significantly (pp. 59-61).

Symmons' treatment of the question of non-exclusive historic fishing rights and traditional fishing rights, which is unquestionably the most convincing this reviewer has come across, nonetheless reveals a weakness of the book. This weakness is that – despite its detailed and precise analysis of the arbitral awards in the *South China Sea Arbitration* – the book does not always offer sufficient critical reflection of – or open disagreement with – that jurisprudence. However, one might have expected such critical reflection in the light of the contentious nature of various findings in the awards. For example, *Symmons* accepts, without further inquiry, the questionable distinction made by the arbitral tribunal between the doctrine of traditional fishing rights in the EEZ (prescriptive historic rights *sensu stricto*) and traditional fishing rights in the territorial sea (non-prescriptive "vested rights" of individuals rather than States). Where did this peculiar doctrine come from and does it have a doctrinal place in the law of the sea as reflected in UNCLOS and relevant State practice including fisheries access agreements? And while the author criticises the arbitral tribunal's view that traditional fishing rights continue to exist in the territorial sea to some extent, that part of the award raises more fundamental questions. Why should it have been possible to acquire "traditional fishing rights" in high seas areas within the 3-12 nm belt? Why did the arbitral tribunal quote a section from the International Court of Justice's (ICJ) judgments in *Fisheries Jurisdiction* in support of its view,[6] although another section of those judgments (concerning the 12 nm exclusive fisheries zone[7]) explicitly contradicted its view? *Symmons*, despite his detailed and insightful analysis of the award's findings, also does not attempt an independent survey of State practice concerning historic fishing rights to (in-)validate the findings of the arbitral tribunal in the light of the lack of reference to such State practice in the award. Arguably, such a more critical examination of the awards would have yielded additional valuable insights, particularly regarding the dubious concept of "traditional fishing rights" presented by the arbitral tribunal.[8]

A further (albeit less important) point of criticism relates to the form. The book contains an unusually large amount of typographical errors and misspellings (e.g., of names of cited authors) that may be found mostly – but not exclusively – in the footnotes.

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[6] *South China Sea Arbitration* (Award) (note 4), para. 802.

[7] *Fisheries Jurisdiction* (*Federal Republic of Germany v. Iceland*), ICJ Reports 1974, 175, para. 59; *Fisheries Jurisdiction* (*United Kingdom of Great Britain and Northern Ireland v. Iceland*), ICJ Reports 1974, 3, para. 67.

[8] See, e.g., *D. P. O'Connell*, The International Law of the Sea (Vol. 1), 1982, 536 et seq.

Overall, *Symmons'* revised "Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal" is a well-written, logically structured and timely contribution to the contemporary understanding of the doctrine of historic rights in the law of the sea. The topic addressed by the book has – perhaps surprisingly – become a particularly dynamic one in recent times. Indeed, important contributions to the doctrine of historic waters – and particularly historic bays – may be expected from the UNCLOS Annex VII arbitral tribunal's award on the merits in the currently pending *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (*Ukraine v. the Russian Federation*).[9] Similarly, in the currently pending case *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v. Colombia*), Colombia has effectively asked the International Court of Justice to disagree with the arbitral tribunal in the *South China Sea Arbitration* and to hold that traditional fishing rights of non-coastal States have not been extinguished in the EEZ under customary international law.[10] While this review did offer some criticism regarding the depth of *Symmons'* critical doctrinal and empirical inquiry into some of the more criticisable contributions of the award in the *South China Sea Arbitration*, there is no doubt that *Symmons'* book is the most authoritative and persuasive monograph on the subject of historic rights in the law of the sea. As such, it will be of helpful guidance to those involved in current and future cases before domestic or international courts and tribunals that touch upon historical claims in the maritime domain.

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[9] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (*Ukraine v. the Russian Federation*), Award concerning the Preliminary Objections of the Russian Federation, 21.2.2020, PCA Case No. 2017-06.

[10] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v. Colombia*), ICJ Reports 2016, 3; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v. Colombia*), ICJ Reports 2017, 289.