



ASSER PRESS

Netherlands Yearbook of International Law 2013

Crisis and International Law:
Decoy or Catalyst?

Contents

Part I Crisis and International Law: Decoy or Catalyst?

1 Crises: Concern and Fuel for International Law and International Lawyers	3
Willem van Genugten and Mielle Bulterman	
1.1 Introduction	4
1.2 Overview of the Chapters	5
1.3 Highlighting Issues of General Concern and Interest.	10
1.3.1 The Role of Crises in Developing International Law	10
1.3.2 Do We Do the Things Right or Do We Do the Right Things?	13
1.3.3 Reconsidering and Sharpening Compliance	14
1.3.4 The Role of International Lawyers	17
References	18
2 The Crisis and the Quotidian in International Human Rights Law	19
Benjamin Authers and Hilary Charlesworth	
2.1 Introduction	20
2.2 What is a Crisis?	21
2.3 The Crises of International Human Rights Law	24
2.3.1 Crisis as Catalyst	25
2.3.2 Crisis as Distraction	28
2.4 A Crisis-Driven Distinction Between Rights	30
2.5 Conclusion.	37
References	38
3 The Crisis of International Human Rights Law in the Global Market Economy	41
Daniel Augenstein	
3.1 Human Rights and Business.	42
3.2 The International Legal Order of States and the Challenge of Corporate Power.	44

3.3	Bhopal	48
3.4	The ‘Escape’ into Tort	51
3.5	The Turn to Governance	55
3.6	International Human Rights Law at the Crossroads.	59
	References	63
4	International Refugees and Irregular Migrants: Caught in the Mundane Shadow of Crisis	65
	Juan M. Amaya-Castro	
4.1	Introduction: The Crisis-Mundane Distinction	66
4.2	The Refugee Crisis: The Legal Limbo of the Refugee and the Normalization of the Camp	69
4.2.1	Refugee Law: A Discipline of Crisis, a Discipline in Crisis	69
4.2.2	The Temporary Nature of the Refugee	71
4.3	Irregular Migration: Cracking the Black Box of Sovereignty	77
4.4	Beyond the Crisis/Mundane Distinction?	84
	References	86
5	Saving Humanity from Hell: International Criminal Law and Permanent Crisis	89
	Edwin Bikundo	
5.1	Between Utopia and Dystopia	90
5.2	International Criminal Law: A Discipline of and for Crisis	92
5.3	Getting to and from ‘twas never thus’ to ‘twas ever thus’	97
5.4	UNSC as a Force Arresting Catastrophe	101
5.5	Conclusion: Real Versus Official Crises	107
	References	108
6	Warming to Crisis: The Climate Change Law of Unintended Opportunity	111
	Tomer Broude	
6.1	Introduction	112
6.2	Crisis? What Crisis?	113
6.2.1	Reflecting on Crisis and its Models	113
6.2.2	Climate Change: A Different Kind of Crisis?	115
6.2.3	Crisis, Failure and the Birth of the New	117
6.3	The Construction of Climate Crisis Framing and its Rhetoric	118
6.3.1	The Roots of Climate Crisis Framing	118
6.3.2	Climate Crisis Framing in Negotiations	119
6.3.3	Climate Crisis Framing in Academia and Civil Society	121
6.3.4	Climate Crisis Framing and Lawyers	122

6.4	The ‘Technical Limitations’ of Climate Crisis Framing	123
6.4.1	International Lawyers and the Scientific Debate	123
6.4.2	Analytic Progress Despite Crisis Framing: The Micro and Macro	125
6.4.3	Thickness, Depth and the Overreach of Crisis Framing	126
6.5	The ‘Ethical Limitations’ of Climate Crisis Framing	128
6.5.1	An Increasingly Broad, Not Narrow, Climate Agenda for International Law	128
6.5.2	Which ‘Heroic Mission’? What Silences?	131
6.5.3	The Unrestricted Substance of International Climate Change Law: From Multilateralism to Multilevel Engagement	132
6.6	Conclusion: Crisis and the Opportunities of International Law	134
	References	136
7	Between Crisis and Complacency: Seeking Commitment in International Environmental Law	139
	Karin Mickelson	
7.1	Introduction	140
7.2	Crisis in International Environmental Law and Policy	141
7.2.1	The Use (and Abuse) of Crisis in Environmentalism	141
7.2.2	Differing Perspectives on Environmental Crisis	143
7.2.3	From Crisis to Sustainability	146
7.3	Crisis and Specific International Environmental Regimes	148
7.3.1	The Case of Ozone	148
7.3.2	The Contrast with Climate Change and Other Environmental Problems	149
7.3.3	Accounting for the Difference: Downs and the Issue Attention Cycle	153
7.4	Crisis and Commitment	155
	References	158
8	The WTO and the Doha Negotiation in Crisis?	161
	Alexia Herwig	
8.1	Introduction	162
8.2	The Notion of Crisis	163
8.3	The WTO in Crisis?	165
8.3.1	Development of the Doha Negotiations	165
8.3.2	The WTO in a Legitimacy Crisis?	167
8.3.3	The DDA Negotiations as the Locus of a Legitimacy Crisis?	170

8.4	Consequences of a Perceived Legitimacy Crisis for the Development of Multilateral Trade Liberalisation Law	178
8.5	Conclusion: How to Avert a Crisis?	182
	References	184
9	The EU in Crisis: Crisis Discourse as a Technique of Government	187
	Jessica C. Lawrence	
9.1	Introduction	188
9.2	Crisis as a Technique of Government	190
9.3	The Unexceptional Crisis.	193
9.4	Crisis and the Production of Truth	195
9.5	The Uncertain Effects of Crisis	197
9.6	Conclusion: Crisis Discourse as a Technique of EU Government	201
	References	201
Part II Dutch Practice in International Law		
10	The Thin Line Between Deference and Indifference: The Supreme Court of The Netherlands and the Iranian Sanctions Case	205
	Marjolein Busstra	
10.1	Introduction	206
10.2	The European Debate: <i>Kadi Versus Nada</i>	207
10.2.1	The <i>Kadi</i> -Approach of the ECJ: Moderated Dualism.	207
10.2.2	The <i>Nada</i> -Approach of the ECtHR: Moderated Monism.	210
10.3	<i>Kadi</i> and <i>Nada</i> Merged: Position of the Supreme Court of The Netherlands	212
10.4	The Supreme Court of The Netherlands as Subsidiary of the European Courts?	216
	References	219
	Table of Cases	221
	Index	225