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International Law of Cooperation and State Sovereignty

Proceedings of an International Symposium
of the Kiel Walther-Schücking-Institute of International Law
May 23 – 26, 2001

Edited by

Jost Delbrück

Assistant Editor:

Ursula E. Heinz



Duncker & Humblot · Berlin

**International Law of Cooperation
and State Sovereignty**

**Veröffentlichungen des Walther-Schücking-Instituts
für Internationales Recht an der Universität Kiel**

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Foreword

It was in the early 1990s, more precisely in 1991 shortly after the end of the Cold War, that the Walther-Schücking-Institute at Kiel University – within the framework of its biennial international conferences – started a series of international symposia which, in retrospect, can be subsumed under the overall heading of “international law at the frontiers.” The aim of these thematically closely related symposia, bringing together eminent international legal scholars, was to explore the structural changes that the international system and its legal order were undergoing due to the forces of globalization and the political upheavals following the end of the ideological division of the world. The series opened with a symposium on “New Scenarios – New Law” in 1992 that was devoted to the question what role international law in general and the United Nations in particular could play in the unfolding of a then envisaged New World order. Following that, the 1994 symposium focussed on the “Allocation of International Law Enforcement Authority” that paid special attention to the question of who is entitled to enforce fundamental or constitutional principles of international law imbued with *erga omnes* effect and serving the maintenance of international peace and security as well as the enforcement of internationally protected human rights. In this symposium the debate centered around the thorny problem of whether the United Nations, namely the Security Council, was vested with a law enforcement monopoly or whether other actors (regional organizations and states) had law enforcement authority and if yes to what extent and under what conditions. The 1996 symposium on “New Trends in International Lawmaking” carried this debate further ahead by analyzing the changing modes of international lawmaking either by comprehensive lawmaking treaties (*traités lois*) or by an accelerated creation of customary norms of international law whereby both, the treaties and the new customary law, are expressing norms in the international or global public interest and are therefore meant to have *erga omnes* effect, that is that they are meant to create obligations of states without or even against their will.¹ In 1998, the fourth symposium took up the increasing role of non-state actors in the inter-

¹ See *Christian Tomuschat, Obligations Arising for States without or against Their Will, Recueil de Cour*, vol. 241 (1993 IV), 195 *et seq.*

national system and discussed the question whether this increased role of, for example, non-governmental organizations or multinational enterprises was or should be reflected in international law, i.e. whether these non-state entities possessed or should possess at least a limited, functional international legal personality. The present papers and proceedings of the fifth conference of the series of symposia with this special focus on “international law at the frontiers” exploring the meaning of the concept of the international law of cooperation and its relationship with the concept of sovereignty brings this project to an end. This certainly does not mean that the tradition of the biennial international law conferences of the Walther-Schücking-Institute will not be continued. On the contrary, as the directorship of the Institute now passes over into younger hands, these conferences will be forcefully carried on, but naturally, the emphasis on certain subject matters will be shifting. With the present publication of the 2001 symposium on “The International Law of Cooperation and State Sovereignty” the Institute is hoping that – like in the past – the international legal community will find incentives for further research on a subject matter, i.e. the international law of cooperation and the concept of international legal obligations to cooperate, that is crucial for the development of an International Civil Society under the rule of law.

Kiel, January 2002

Jost Delbrück

Contents

Opening Addresses by	
<i>Rainer Hofmann</i>	11
<i>Jost Delbrück</i>	12
Obligations of Cooperation in the International Protection of Human Rights	
<i>Lori Fisler Damrosch</i>	15
The Duty to Cooperate in International Economic Law and Related Areas	
<i>Christian Tietje</i>	45
Discussion	66
Cooperation in International Dispute Settlement	
<i>Anne Peters</i>	107
State Sovereignty and the Duty of States to Cooperate – Two Incompatible Notions? (Summary and Comments)	
<i>Christoph Schreuer</i>	163
Discussion	181
List of Participants	218

Abbreviations

ABIEG	Amtsblatt der Europäischen Gemeinschaften
ACC	Administrative Committee on Coordination
AJIL	American Journal of International Law
ASIL	American Society of International Law
AVR	Archiv des Völkerrechts
BDGVR	Berichte der Deutschen Gesellschaft für Völkerrecht
BGBI.	Bundesgesetzblatt
BT Drs.	Drucksache des Deutschen Bundestages
CSCE	Conference on Security and Cooperation in Europe
CTE	Committee on Trade and Environment
EA	Europa-Archiv
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council of the United Nations
ECRI	European Commission against Racism and Intolerance
EEZ	Exclusive Economic Zone
EJIL	European Journal of International Law
EPIL	Encyclopedia of Public International Law
ETS	European Treaty Series
EuGRZ	Europäische Grundrechte – Zeitschrift
FAO	Food and Agriculture Organization of the United Nations
GATS	General Agreement on Trade in Services
GYIL	German Yearbook of International Law
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICJ	International Court of Justice

ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICSID	International Centre for the Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
ILF	International Law Forum du droit international
ILM	International Legal Materials
ILO	International Labour Organisation
IMF	International Monetary Fund
Ind. J. Global Legal Stud.	Indiana Journal of Global Legal Studies
ITC	International Trade Centre
ITLOS	International Tribunal on the Law of the Sea
ITO	International Trade Organization
ITU	International Telecommunication Union
IYIA	Indian Yearbook of International Affairs
J. Int'l Econ. L.	Journal of International Economic Law
JWT	Journal of World Trade
LLDC	Least Developed Countries
LOS	Law of the Sea
NAM	Non-Aligned Movement
NGO	Non-Governmental Organization
NILR	Netherlands International Law Review
NVwZ	Neue Zeitschrift für Verwaltungsrecht
ODIL	Ocean Development & International Law
ÖZöRuV	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht
PCIJ	Permanent Court of International Justice
PIN	Public Interest Norm
RdC	Recueil des Cours de l'Académie de Droit International
RIAA	Reports of International Arbitral Awards
SC	Security Council

TRIPS	Trade-Related Aspects on Intellectual Property Rights
UNCLOS	United Nations Conference/Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITA	União Nacional para a Independência Total de Angola
UNPROFOR	United Nations Protection Force in (former) Yugoslavia
UNTAC	United Nations Transitional Authority in Cambodia
UNTS	United Nations Treaty Series
UPU	Universal Postal Union
Va. J. Int'l L.	Virginia Journal of International Law
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
VN	Vereinte Nationen – Zeitschrift
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZRP	Zeitschrift für Rechtspolitik

Opening Address

Rainer Hofmann

Ladies and Gentlemen, dear friends, first of all I should like to welcome all of you to this year's Kiel Symposium. A special welcome goes to our four speakers: Professor Lori Fisler Damrosch of Columbia University; Dr. Christian Tietje, Walther-Schücking-Institute of International Law, Kiel University; Dr. Anne Peters, Walther-Schücking-Institute of International Law, Kiel University; and Professor Dr. Christoph Schreuer, Institute of International Law and International Relations, University of Vienna.

I should also like to tell you that you are assisting a very special event. Obviously, all Kiel symposia are special events both *ratione personae* – and that is because of you as reknown experts of international law – and *ratione materiae* – and that is because of the subject matters with which they deal this year: the International Law of Cooperation and State Sovereignty. A further reason why this is a special event has to do with the year in which the symposium takes place. It is, as you know, the first year of a new millennium, and since we wanted to show that we wish to continue contributing to the development of international law also in this new millennium, we have moved the date of this symposium from the year 2000 to the year 2001. But there is another, even more important reason for organizing a Kiel symposium, for the first time, in a year with an uneven number: It is not only for paying tribute to the beginning of a new millennium, but much more so for honoring Jost Delbrück who has retired as a Professor at Kiel University at the end of last winter term. So we wanted to take advantage of this fact as an opportunity to contribute to the development of international law. Usually, in such a situation, a symposium or colloquium is organized by a faculty or an institute in order to honor the person who has retired as a Professor. This, however, is not the case today and tomorrow: This symposium is Jost Delbrück's present to the community of international lawyers and I should simply like to thank you very much for this present. Let me add, however, that we hope – and trust – that this is not the last present which you will give and that you will continue to be a very important contributor to the development of international law.

Opening Address

Jost Delbrück

Thank you! It's one of those rare occasions when you don't know that you made a gift to others, as Herr Hofmann indicated that I did. I only hope that at the end of this event you will agree with him that you received something of substance. And that is an open question given the complexity of the topic that we chose for this conference. We will be dealing with the international law of cooperation and the duty to cooperate. These are wonderful words and everybody would probably agree that we should have an international law of cooperation and we should have obligations to cooperate. But on the other hand, it would be silly if you could say: Oh, we all commit ourselves to cooperate unless we decide otherwise, meaning that these terms "international law of cooperation" and "duty to cooperate" may just be empty shells or wonder shells – I think you recall those wonderful things we had as kids, shells that you put in a glass of water and they unfold into beautiful flowers. So, maybe, we can open these shells and find out if they are empty shells or whether they hide something of substance.

In a sense, it is part of my own *vita* that we have the symposium at this point, because it is definitely the fifth and the last in a series of symposia where we have tried to be a little bit at the frontiers of international law. In 1992, the first of this series was on *New Scenarios – New Law – i.e.* on the post-Cold War era that we tried to probe into and find out whether the international legal system and international community had really the opportunity to change for the better. Then we followed up with the symposium on the Allocation of International Law Enforcement Authority in 1994, and then we took up the question of New Trends in International Lawmaking in 1996. After that Rainer Hofmann introduced himself as the then new co-director of the Institute with the symposium on the Legal Status and Role of Non-State Actors. This symposium on the International Law of Cooperation and State Sovereignty somehow rounds up this series of subjects.

The stark fact is that we are facing major challenges in the international system with regard to its steering capacities, the modes of implementing international law, and at the same time we are taking into account global demands on the law that

should provide for common goods that we have come to realize more clearly in the last ten or 15 years after the Cold War ended. The traditional paradigm of law enforcement, its *ultima ratio*, is repressive implementation, is enforcement in the true sense of the word. I think in starting from the notions thrown out by Wolfgang Friedman when he talked about the changing structures of international law, you come to realize that international law enforcement probably more than domestic law depends on strategies that are not repressive, that are not confrontational, but rather provide for incentives for States to cooperate. And that, of course, can only work if we have a better vision of what is meant by cooperation. Is it sitting at a table, looking friendly, and afterwards go home with nothing really achieved, or is there a duty to cooperate in a sense that something substantial comes out of it? Art. 33 of the UN Charta says that States are obliged to peacefully settle their disputes. Well, what does that really mean? The need to cooperate in this effort, of course, but we also know that sometimes people do sit at the table, smile, and then go home and nothing has happened, and then the question arises: Have they violated Art. 33? Taking stock of what we can find in terms of elucidation of the meaning of the concepts “international law of cooperation” and “duty to cooperate,” I think, one must admit that there is a lot of rhetoric in the literature and in political utterances about cooperation without seriously probing into what this obligation is about in practice, what is the substance of what the States are supposed to do.

In this sense, we want to achieve a clearer vision of what international law can tell us about the duty to cooperate. And I hope that, at the end of the conference, we will also know some more at least of how to manage – I use that terrible word – the international system, or better, how to enable an international civil society to live under the rule of law – a rule of law which is abided by not necessarily under the threat of or use of force but rather by cooperative incentives for States to abide by the law. I would like to remind you of Abram and Antonia Handler Chayes’ book with the title “The New Sovereignty” which very much influenced me in choosing the title “International Law of Cooperation and State Sovereignty” for our conference. Their new understanding of sovereignty is crucial with regard to international cooperation and the functioning of an international governance under law, *i.e.* that States understand their sovereignty as being in good standing with the international community, playing a model role as law-abiding States.

I think that, in view of the really disquieting failure of the one leading world power at this moment, it is timely to foster the idea of abiding by the law and *thereby* exercise leadership for the world community. And it is timely that we as