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Non-State Actors as New Subjects of International Law

**International Law – From the
Traditional State Order Towards the Law
of the Global Community**

Proceedings of an International Symposium
of the Kiel Walther-Schücking-Institute of International Law
March 25 to 28, 1998

Edited by

Rainer Hofmann

Assistant Editor:

Nils Geissler



Duncker & Humblot · Berlin

**Non-State Actors as New Subjects
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**Veröffentlichungen des Walther-Schücking-Instituts
für Internationales Recht an der Universität Kiel**

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Foreword

Since the early 1990s, the biannual symposia of the Kiel Walther-Schücking-Institute for International Law have been devoted to the academic discussion of legal problems connected with and resulting from the on-going developments of international law and their repercussions on some of the traditional concepts of this branch of the law.

Thus, under the title *The Future of International Law Enforcement: New Scenarios – New Law*, the 1992 symposium dealt with the question whether and to what extent the increasing number of cases of humanitarian interventions by the international community upon prior authorization by the competent United Nations organs is compatible with the applicable rules of international law. It appeared that international law is increasingly characterized by legal norms having an *erga omnes*-effect and, thus, binding upon also those states that had not participated in the process of their creation. If, however, the violation of such norms with an *erga omnes*-effect indeed justifies the recourse to sanctions by the international community, the question arose as to which body was competent to authorize such sanctions.

Therefore, this issue, namely the *Allocation of International Law Enforcement Authority in the International System*, was chosen as the subject of the 1994 symposium. Its participants came to the conclusion that the pertinent changes in the field of international law enforcement resulted from fundamental modifications concerning the rules pertaining to the creation and application of international law.

Consequently, the 1996 symposium was concerned with *New Trends in International Law-Making: International 'Legislation' in the Public Interest*, in particular with the question as to whether the specific quality of *ius cogens* and *erga omnes*-norms could be explained by the “international public interest” which such norms reflect.

The discussions of the 1996 symposium revealed, *inter alia*, that – in particular with a view to the gradually changing role of the state as a consequence of the increasing process of *globalization* – there seems to be a growing tendency to involve non-state actors as participants in the international law-making process.

Therefore, this development and the consequences thereof were chosen, under the title *International Law – From the Traditional State Order Towards the Law of the Global Community: Non-State Actors as New Subjects of International Law*, to be the subject of the 1998 symposium. As such non-state actors were identified non- and para-governmental organizations, multinational enterprises, individuals and groups of individuals, in particular minorities.

This symposium, held at the Walther-Schücking-Institute of International Law at Kiel from 25–28 March 1998 brought together 26 leading international legal scholars from the United States and Europe. Based upon four thorough reports delivered by two American and two European scholars, namely professors *Ruth Wedgwood*, Yale Law School, *Thomas Franck*, New York University, *Daniel Thürer*, University of Zurich, and *Stephan Hobe*, University of Cologne, the participants had the opportunity to discuss in depth the thesis, formulated with slight modifications by all four rapporteurs, that due to the far-reaching consequences of the process of globalization, states are losing their previous position as the only – or at least the by far most – important actors of the international legal order. Moreover, it was held that the above-mentioned non-state actors, i.e non- and para-governmental organizations, multinational enterprises, individuals and groups of individuals, had assumed – to a varying degree, however – the status of (partial) subjects of international law.

These views constitute a fundamental challenge to some of the basic structures of traditional public international law. Therefore, it was not surprising that the ensuing discussions did not bring about full consensus. Nonetheless, it is important to stress that the participants shared the view that the on-going process of globalization already has resulted in an important change of the traditional international order: The hitherto unchallenged role of states as the dominant actors within the sphere of public international law is being modified or even decreasing due to the increasing role of non-state actors.

The Walther-Schücking-Institute is greatly indebted to the Volkswagen-Stiftung which by a generous grant made the 1998 Kiel International Law Symposium possible. It also wishes to express its gratitude to the Deutsche Forschungsgemeinschaft for its considerable financial support. Moreover, it is pleased to recognize the great hospitality extended to the participants of the symposium by the Government of Schleswig-Holstein, namely to State Prime Minister *Heide Simonis*, and to State Secretary Dr. *Ralf Stegner* who hosted a dinner reception for the participants. Many thanks are also due to the Christian-Albrechts-University which provided for a very convenient conference room and bus transportation, and to the local Süverkrüp Mercedes-Benz-Company and Schmidt & Hoffmann Volkswagen-Company for their provision of excellent means of transportation.

My personal thanks are extended to the entire staff of the Walther-Schücking-Institute whose efforts have, as always, made this symposium possible. I am especially grateful to Dr. *Nils Geissler* and Mrs. *Carmen Thies* for their effective management of the symposium and its follow-up.

Kiel, December 1998

Rainer Hofmann

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Abbreviations

AJIL	American Journal of International Law
Am.U.L.Rev.	American University Law Review
BDGVR	Beiträge der Deutschen Gesellschaft für Völkerrecht
BGBI.	Bundesgesetzblatt
BVerfGE	Bundesverfassungsgerichtsentscheidung
CCPR	Covenant on Civil and Political Rights
Corr.	Corrigendum
EA	Europa Archiv
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
EJIL	European Journal of International Law
EPIL	Encyclopedia of Public International Law
EuGRZ	Europäische Grundrechte-Zeitschrift
Europ. T.S.	European Treaty Series
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
FYROM	Former Yugoslavian Republic of Macedonia
GA Res.	United Nations General Assembly Resolution
GAOR Supp.	General Assembly Official Records Supplement
GYIL	German Yearbook of International Law
Harv.L.Rev.	Harvard Law Review
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICS Rep.	International Commission of Jurists
ICSID	International Centre for Settlement of Investment Disputes
IGO	Intergovernmental Organization

IJGLS	Indiana Journal of Global Legal Studies
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
IRRC	International Review of the Red Cross
JRMP	Jugoslovenska Revija za Medunarodno Pravo
JZ	Juristen Zeitung
LNTS	League of Nations Treaty Series
MNC	Multinational Corporation
MNE	Multinational Enterprise
NGO	Non-governmental organization
NILR	Netherlands International Law Review
NJW	Neue Juristische Wochenschrift
N.Y.U.L.Rev.	New York University Law Review (NYU L Rev.)
OAS	Organization of American States
OAU	Organization of African Unity
P.C.I.J.	Permanent Court of International Justice
PDK	Party of Democratic Kampuchea (Khmer Rouge)
RdC	Recueil de Court
RSDIE	Revue Suisse de Droit International et de Droit Européen
SZIER	Schweizerische Zeitschrift für internationales und europäisches Recht
TNC	Transnational Corporation
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
Yale L.J.	Yale Law Journal
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZRP	Zeitschrift für Rechtspolitik

Opening Address

Jost Delbrück*

Excellencies, dear colleagues, ladies and gentlemen, welcome to the 1998 symposium “International Law – From the Traditional Interstate Order Towards the Law of the Global Community: Non-State Actors as New Subjects of International Law”! This is the last of our traditional biennial symposia in this century. I hope you are aware of this “historical” dimension of our meeting. But rest assured, it will not be the last symposium altogether. We shall certainly continue the tradition of these conferences, but the next one will not be until the next century. We are very glad to have you, and we are pleased that most of our invitations have been followed. We are grateful for this positive response to our invitation, and we feel encouraged to continue with the format of our symposia which are literally roundtable talks providing for two papers presented in the morning and then a long discussion period in the afternoon. This has been proven a very fruitful procedure in the past. Many participants have been here several times. All those who join us for the first time are especially welcomed. We sadly miss, of course, one particular participant of recent years, *Richard Lillich*, who died shortly after our last symposium – a very sad loss for all of us.

The subject of this symposium is one that I like to call a prelude to the next conference of the German Society of International Law which will have the impact of globalization on the structure of public international law and international conflict of laws as its subject. We are convinced that international law is in a period of a very radical transformation. Witness to this is the rather antagonistic debate over whether international law still is an interstate legal order or is transforming to something else. Those who are convinced protagonists of sovereignty almost tautologically argue that, since international law is an interstate legal order, nobody else can have standing in this legal order, which certainly is, at a closer look, not in conformity with international realities, nor is it very convincing logically. We thought, as we have done in the previous three symposia since 1992,

* Prof. Dr. *Jost Delbrück*, Director of the Institute of International Law at the University of Kiel; Visiting Professor at the Indiana University School of Law, Bloomington.

that we use the opportunity of this rather small but elite round to discuss the processes of transformation that are going on. Social science has given attention to the new actors in the international system for quite some time. However, the international legal science, particularly but not exclusively in Germany, has until recently tended to pay random or no attention to these new developments. Of course, the individual has attracted some attention as a potential or actual subject of international law – human rights protection has led to that development – , international organizations have by now a well established standing in international law.

Now is non-governmental organizations (NGOs) and some other powerful players in the international system which need to be looked at from also an international legal point of view. The recent literature has produced a wealth of material and empirical data about the role of NGOs. There is hardly any piece of legislation, recommendation, or whatever done in the United Nations, especially in the Economic and Social Council, where NGOs have not had a heavy hand in influencing or even drafting some of these documents. We will hear more about this at this symposium. So I think it is very adequate that we are giving our attention to these new phenomena, and to the fact that international law is transforming into something like the legal order of international civil society. I think this is a challenging topic, and I hope that this elite group will have pleasure in addressing these things from a doctrinal and also from a practical point of view, since in the case of NGOs, particularly, we have a coincidence of practical relevance and doctrinal challenge. So I wish us all a fruitful meeting.

My second task this morning is this: The 1998 symposium is mainly organized by *Rainer Hofmann*. It is a kind of business card that he is now handing out every one of you as the new co-director of this Institute. Thus, it is with pleasure that we can officially welcome you in our midst and also thank you very much for doing the hard work of organizing our meeting together with Institute's staff. *Rainer Hofmann* has joined us as of 1st April last year, but the process of becoming a part of this northern most German institution working on international law is not the easiest task for someone who has grown up in the south. But others before you coming from the south have taken roots up here and so will you. As the saying goes among Kiel University professors: they shed tears only twice – the first time when they come, the second time when they have to leave! Herr *Hofmann*, please, take over the chair for this morning's session.

Opening Address

Rainer Hofmann*

Excellencies, ladies and gentlemen, first of all, I should like to welcome all of you in Kiel. And, dear Professor *Delbrück*, thank you very much for this kind introduction. I am trying my best in achieving a good survival training in Kiel and you will be able to judge after this symposium, as a first part of that survival training, whether it is going to be a success or not.

The topic of our symposium is, as you know, a twofold one, globalization and non-state actors as new subjects of public international law. Looking at the participants, we must admit that we have not quite succeeded in a globalization of participants due to some reasons I do not want to mention right here. But at least we have a North-Atlantic meeting here, it is Europe and North-America. As regards new actors, I think we have succeeded quite well, and that is so not only because of the fact that you, Professor *Delbrück*, referred to, namely the new co-director as a new actor in Kiel, but also in particular because of the very large number of persons who participate for the first time in this symposium. Obviously, I cannot mention all of you, but I should like to make one exception, and that is Judge *Vereshchetin*: not so much because you are a judge at the International Court of Justice, but because of the fact that you are known for your capacity in new thinking – I am referring, of course, to your famous article in the 1988 edition of the *Gosudarstvo i Pravo*, which, under the title *New Thinking and International Law*, sort of introduced new thinking to the then Soviet school of public international law. I am sure that this capacity in new thinking will assist us very much in our discussions. Thank you very much for having accepted our invitation! This is also an opportunity to express our gratitude to those who have made it possible that we are here. I am particularly glad that Dr. *Schmidt* representing the Volkswagen-Stiftung is among us. Something which is often forgotten among academics is the fact that without the financial basis supported by institutions like the one you represent all our intellectual thinking would be rather futile. Thanks very much to

*Professor Dr. Dr. *Rainer Hofmann*, Director of the Walther-Schücking-Institute of International Law at the University of Kiel.