

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

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100 Years of Peace Through Law: Past and Future

Edited by

Andreas von Arnould, Nele Matz-Lück
and Kerstin Odendahl



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and Kerstin Odendahl (Eds.)

100 Years of Peace Through Law:
Past and Future

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In der Nachfolge von Jost Delbrück
herausgegeben von

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Walther-Schücking-Institut für Internationales Recht

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Foreword

The present book is the result of an international conference held in Kiel from 19 to 21 September 2014 in honour of the 100th anniversary of the Walther Schücking Institute for International Law (WSI) at Kiel University. The WSI is the oldest university institute for public international law in the world. It was established in 1913 by the Prussian Minister of Culture and took up work in 1914. Therefore, the year 1914 is regarded as its founding year. In 1995, the institute adopted the name of its former director and judge of the Permanent Court of International Justice, Walther Schücking, who, contrary to the vast majority of German public international lawyers of his time, felt duty-bound to create an order of peace and international understanding.

Today, focal areas of research of the WSI encompass practically all aspects of public international law. Besides a strong focus on questions of international peace and security, the work of the institute comprises several areas of public international law, such as human rights, international dispute settlement, international criminal law, environmental law, the law of the sea, the history and theory of international law, and cultural heritage law, as well as European Union law and comparative constitutional law. The broad range of activities at the institute includes the publication of the “German Yearbook of International Law” and the “Publications of the Walther Schücking Institute for International Law” series. Furthermore, the WSI is home to Germany’s oldest and biggest university library for international law, which became the first German library to attain the status of UN Depository Library bestowed upon it in 1948.

The topic of the international conference in honour of the 100th anniversary of the WSI was “100 Years of Peace Through Law: Past and Future”. The reason for choosing this subject was twofold: First, it picked up one of the main areas of work of Walther Schücking. Second, it referred to one of the key areas of present research and work of the institute as a whole. When we decided about the thematic focus in 2012, we did not expect it to be of such a topicality exactly at the moment the international conference took place. The events in Ukraine as well as in the Arab-Muslim world and in large parts of Africa do raise the question whether it is actually possible to maintain, establish and restore peace with the help of law. Are those who condemn the use of force, those who want to banish it from international relations, those who work for a world in which law prevails – and not power, aggression and violence – only dreamers? We discussed these and several other questions during three days.

The conference was composed of three parts. The opening part, under the title “100 Years of Public International Law” presented a historical perspective. The first speech, held by Prof. Dr. Dr. h.c. mult. em. *Knut Ipsen*, University of Bochum, one of the numerous distinguished alumni of the institute, dealt with “100 Years of Public International Law in Kiel: The History of the Walther Schücking Institute”. It was followed by a speech delivered by Prof. *James Crawford*, D.Phil., LL.D., S.C., F.B.A., then University of Cambridge, now Judge at the International Court of Justice, on “The Unfolding of Public International Law since 1914”. The two presentations analysed the entangled developments of both, public international law and an academic institution, between idealism and pragmatism, between disillusionment and high aspirations.

The second part of the conference took up the central topic of “Maintenance and Restoration of International Peace and Security”. Three speakers analysed the existing ways as well as available instruments to maintain and restore peace and security: Dr. *Gunter Pleuger*, former diplomat and then President of the European University Viadrina Frankfurt/Oder, presented the diplomatic means. Prof. *Francisco Orrego Vicuña*, Ph.D., Santiago de Chile, an experienced arbitrator and judge, dealt with arbitration and judicial settlement as legal means. Prof. Dr. *Théodore Christakis*, University of Grenoble and Director of the Centre d’Etudes sur la Sécurité Internationale et les Coopération Européennes, analysed the ways how international peace and security may be maintained and restored by means of (legitimate) force. These general surveys were supplemented by three case studies. Their aim was to show how in practice, depending on the circumstances, the different means (diplomatic and legal means as well as the use of force), are combined with each other. Dr. *Lucy Keller Läubli*, Swiss Federal Department of Justice and Police, who researched intensively on Cambodia, presented a case study on the peace process in this country. Prof. Dr. *Frank Hoffmeister*, European Commission, who worked on the European Commission’s Cyprus Desk as well as for the UN Special Advisor on Cyprus, dealt with the case of Cyprus. Prof. Dr. *Jean-Yves de Cara*, Paris Descartes University, former Executive Director of Paris-Sorbonne University Abu Dhabi and expert on the Maghreb region, exposed the difficulties in restoring peace in Libya.

The conference ended with a third part dedicated to the situation arising should the different means of maintaining and restoring peace fail. We looked at the existing rules and the challenges to international humanitarian law. Prof. Dr. *Marco Sassòli*, University of Geneva, who worked for the ICRC for several years, presented an expert’s *tour d’horizon* on the “Challenges to International Humanitarian Law”. This exposé was followed by two talks on specific and still unresolved challenges: Prof. Dr. *Andreas Paulus*, University of Göttingen and Justice of the Federal Constitutional Court of Germany, who formed part of the group of experts of the ICRC on occupation and other forms of administra-

tion of foreign territory, analysed whether the law of occupation may be applied to UN missions. Prof. *Math Noortmann* LL.M., M.Sc., Ph.D., then Oxford Brookes University, now Coventry University, an expert on non-state actors, presented the challenges posed to international humanitarian law by private military companies.

The conference was an inspiring success. The long and in-depth discussions which continued during breaks, receptions and dinners showed us that we still do not have the answers to all questions and problems challenging the maintenance and restoration of international peace and security today. However, we remain confident. In the Institute's future work we will carry on the legacy of Walther Schücking – an academic writer, a teacher of law, and a practitioner of international law, always devoted to lasting world peace and security. Many thanks to all speakers and their excellent contributions as well as to all participants and their valuable comments!

This book could never have been published without the support of an excellent team of three members of the WSI: *Jens Theilen* took over the immense task of proof-reading, assessing and commenting each single contribution. He was assisted by *Liv Christiansen* who helped him in verifying footnotes and other sources. *Samira Wagner* did a wonderful job by formatting the whole text and bringing it in due form. We are extremely grateful for their commitment and all the time they invested.

Kiel, October 2015

*Andreas von Arnould,
Nele Matz-Lück,
Kerstin Odendahl*

Table of Contents

Part I

100 Years of Public International Law

Knut Ipsen

100 Years of Public International Law in Kiel: The History of the Walther Schücking Institute	19
---	----

James Crawford

The Unfolding of Public International Law Since 1914: International Judgments and Domestic Courts with Special Reference to Germany	31
---	----

Part II

Maintenance and Restoration of International Peace and Security

Gunter Pleuger

Maintenance and Restoration of International Peace and Security by Diplomatic Means	45
---	----

Francisco Orrego Vicuña

Maintenance and Restoration of International Peace and Security Through Arbitration and Judicial Settlement	53
---	----

Théodore Christakis and Karine Bannelier

Maintenance and Restoration of International Peace and Security by Means of Force	67
---	----

Lucy Keller Läubli

Case Study on Cambodia	103
------------------------------	-----

Frank Hoffmeister

Case Study on Cyprus	113
----------------------------	-----

Jean-Yves de Cara

Case Study on Libya	133
---------------------------	-----

*Part III***International Humanitarian Law**

<i>Marco Sassòli and Yvette Issar</i>	
Challenges to International Humanitarian Law	181
<i>Andreas Paulus</i>	
UN Missions and the Law of Occupation	237
<i>Math Noortmann and Ioannis Chapsos</i>	
Private Military and Security Companies: A Transnational Legal Approach ...	257
List of Authors	277

List of Abbreviations

AFDI	Annuaire Français de Droit International
AJIL	American Journal of International Law
AP	Additional Protocol (to the Geneva Conventions)
API	Asia Pacific Issues
APLPJ	Asian-Pacific Law and Policy Journal
Art.	Article
Arts.	Articles
ASEAN	Association of Southeast Asian Nations
ASL	Air and Space Law
ASPJ	Air and Space Power Journal
AU	African Union
Bd.	<i>Band</i> (volume)
BRICS	Brazil, Russia, India, China, South Africa
Brook. JIL	Brooklyn Journal of International Law
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court of Germany)
BYIL	British Yearbook of International Law
CAR	Central African Republic
CC	Constitutional Commission (of Libya)
CCW	Convention on Certain Conventional Weapons
CDA	Constitution Drafting Assembly (of Libya)
<i>cf.</i>	<i>confer</i> (compare)
Chic. JIL	Chicago Journal of International Law
Chin. JIL	Chinese Journal of International Law
CIL	Customary international law
Conn. JIL	Connecticut Journal of International Law
CR	Cyprus Review
CTS	Consolidated Treaty Series
DIIS	Danish Institute for International Studies
DoD	Department of Defense
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Court of Cambodia
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EComHR	European Commission of Human Rights
ECR	European Court Reports

ECtHR	European Court of Human Rights
ed.	Editor/edition
eds.	Editors
e.g.	<i>exempli gratia</i> (for example)
EJIL	European Journal of International Law
EO	Executive Outcomes
<i>et al.</i>	<i>et alii/et aliae</i> (and others)
etc.	<i>et cetera</i>
<i>et seq.</i>	<i>et sequens/et sequentia</i> (and following)
EU	European Union
EUBAM	EU Border Assistance Mission
EWCA	Court of Appeal of England and Wales
EWHC	High Court of England and Wales
FARC	Revolutionary Armed Forces of Columbia
FILJ	Fordham International Law Journal
GA	General Assembly
GC	Geneva Convention/Grand Chamber (of the ECtHR)
GJICL	Georgia Journal of International and Comparative Law
GLJ	German Law Journal
GNC	General National Congress (of Libya)
GöJIL	Göttingen Journal of International Law
GYIL	German Yearbook of International Law
HNSLJ	Harvard National Security Law Journal
HoR	House of Representatives (of Libya)
HPCR	Humanitarian Policy and Conflict Research Program
HRC	United Nations Human Rights Council
HRILD	Human Rights and International Legal Discourse
HRLJ	Human Rights Law Journal
IAC	International armed conflict
<i>ibid.</i>	<i>ibidem</i> (at the same place)
ICC	International Criminal Court
ICD	Interim Constitutional Declaration (of Libya)
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICMP	International Commission on Missing Persons
ICRC	International Committee of the Red Cross
ICRtoP	International Coalition for the Responsibility to Protect
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
<i>id./ead.</i>	<i>idem/eadem</i> (the same)
IDF	Israeli Defense Forces
IDI	Institut de Droit International

IHFFC	International Humanitarian Fact-Finding Commission
IHL	International humanitarian law
IHRL	International human rights law
ILS	International Law Studies
IRRC	International Review of the Red Cross
Irv. LR	Irvine Law Review
ISAF	International Security Assistance Force
ISIL	Islamic State of Iraq and the Levant (also ISIS or <i>Daech</i>)
ISIS	Islamic State of Iraq and Syria (also ISIL or <i>Daech</i>)
IYHR	Israel Yearbook on Human Rights
JCSL	Journal of Conflict and Security Law
JICJ	Journal of International Criminal Justice
JILP	New York University Journal of International Law and Politics
JIR	Jahrbuch für Internationales Recht
JLE	Journal of Legal Education
JORF	Journal Officiel de la République Française
KFOR	Kosovo Force
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
LRTWC	Law Reports of Trials of War Criminals
Mich. JIL	Michigan Journal of International Law
MINUSCA	United Nations Multidimensional Integrated Stabilisation Mission in the Central African Republic
MINUSMA	United Nations Multidimensional Integrated Stabilisation Mission in Mali
MJIS	Millennium – Journal of International Studies
MLLWR	Military Law and Law of War Review
MN	Marginal number
MONUC	United Nations Mission in the Democratic Republic of Congo (later MONUSCO)
MONUSCO	United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo
MPEPIL	Max Planck Encyclopedia of Public International Law
MPRI	Military Professional Resources Incorporated
MPYUNL	Max Planck Yearbook of United Nations Law
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NIAC	Non-international armed conflict
NJB	Nederlands Juristen Blad
NLR	Nebraska Law Review
No.	Number
NQHR	Netherlands Quarterly on Human Rights
NTC	National Transitional Council of Libya

NWCR	Naval War College Review
NYULR	New York University Law Review
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OHCHR	United Nations Office of the High Commissioner for Human Rights
OJ	Official Journal of the European Union
P5	Permanent members of the Security Council
para.	Paragraph
paras.	Paragraphs
PCA	Permanent Court of Arbitration
PKK	Kurdistan Workers' Party
PMC	Private military company
PMSC	Private military and security company
PNG	Papua New Guinea
POW	Prisoner of war
PSC	Private security company/Peace and Security Council (of the African Union)
PSPICoC	International Code of Conduct for Private Security Providers
R2P	Responsibility to Protect
rapp.	Rapporteur
RBDI	Revue Belge de Droit International
RdC	Recueil des Cours
RGDIP	Revue Générale de Droit International Public
RoE	Rules of engagement
RPS	Research in Political Sociology
RQDI	Revue Québécoise de Droit International
RWP	Responsibility While Protecting
SC	Security Council
S.Ct.	Supreme Court (of the United States)
SI	Sandline International
SJIL	Stanford Journal of International Law
SLPR	Stanford Law and Policy Review
SNC	Supreme National Council (of Cambodia)
TFEU	Treaty on the Functioning of the European Union
TFSC	Turkish Federated State of Cyprus
TLP	Transnational Legal Process
TRNC	Turkish Republic of Northern Cyprus
UAE	United Arab Emirates
UAV	unmanned aerial vehicle
UCR	United Cyprus Republic
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations
UN Doc.	United Nations document symbol

UNAMIC	United Nations Advance Mission in Cambodia
UNAMSIL	United Nations Mission in Sierra Leone
UN-Ch	Charter of the United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNITA	National Union for the Total Independence of Angola
UNMIK	United Nations Mission in Kosovo
UNOCI	United Nations Operation in Côte d'Ivoire
UNPROFOR	United Nations Protection Force
UNSMIL	United Nations Support Mission in Libya
UNTAC	United Nations Transitional Authority in Cambodia
UNTS	United Nations Treaty Series
US	United States of America
USSR	Union of Soviet Socialist Republics
VJIL	Virginia Journal of International Law
Vol.	Volume
WFP	World Food Programme
WHO	World Health Organisation
WLR	Weekly Law Reports
YJIL	Yale Journal of International Law

Part I

100 Years of Public International Law

100 Years of Public International Law in Kiel: The History of the Walther Schücking Institute

By *Knut Ipsen*

100 years of an academic institution devoted to international law: such a history comprises a hardly imaginable diversity of acting persons, of ideas, of activities, of success and sometimes of aberration and of failure. My contribution to this anniversary does not, of course, permit a comprehensive appreciation of the merits of all generations that have contributed to the reputation of this Institute. A detailed history is to be found in the “Festschrift” which will be presented at this Conference. The author of that historical survey is Dr. *Ursula Heinz*¹ and I very warmly recommend reading it, which I had the pleasure of doing in advance.

I will confine my brief contribution to finding the common denominator of that diversity just mentioned. Finding this common denominator requires looking for the traces of the spirit that has animated the acting persons and guided their activities. I would like, therefore, to invite this distinguished audience to participate in a search covering three phases partially similar to three epochs of our national history.² This approach will consequently reflect the positions of scholars of this Institute in comparison with the mainstream of German international legal scholarship in their time.

¹ *Ursula E. Heinz*, 100 Jahre Walther-Schücking-Institut für Internationales Recht, in: Jost Delbrück et al. (eds.), *Aus Kiel in die Welt: Kiel's Contribution to International Law, Festschrift zum 100-jährigen Bestehen des Walther-Schücking-Instituts für Internationales Recht*, 2014, 13 *et seq.* This is a general reference for everybody who seeks for more detailed information than it has been possible to provide during the 30 minutes presentation of this paper.

² The first phase covers the time of the Republic of Weimar, but begins already with the disastrous year 1914. The second phase, the adaption of the national-socialist ideology by many German scholars of international law, came to an end with regard to the Institute already in 1944 with the directorship of Hermann von Mangoldt. It was von Mangoldt whose careful leadership prepared the beginning of the third phase of the Institute as a research entity in a democratic State.

A. Realism and Idealism – the Basic Approaches to International Law of Two Eminent Scholars

The first phase to be considered covers the time from 1914 to 1933. The initiator and first Director of this Institute, *Theodor Niemeyer*, and his successor, *Walther Schücking*, whose personality and work are rightfully honoured by the name of the Institute since 1995, cannot be regarded as typical German international lawyers of their time. Precisely because of this fact, both deserve our special attention.

I. International Law as an Undeniable Reality and an Element of Civilisation

Theodor Niemeyer,³ though holding a chair of Roman and civil law at the law faculty of Kiel University since 1893, concentrated his main interests more and more on international law. Thus he wrote, already at the very beginning of the 20th century: “The unfolding of national energies directed at worldwide interaction demands of jurisprudence, too, a cosmopolitan extension ... The internationalisation of law corresponds to the generally accepted interests of all progressive States”.⁴ This was perhaps still the private international lawyer and the Roman lawyer (with regard to the antique *ius gentium*) speaking. His basic position, however, was laid down in 1910, when he published, under the title “On the nature of international law”, a revised version of his inaugural speech as the Rector of the *Christian-Albrechts-Universität*.⁵ He qualified the view of the majority of his contemporary German colleagues that States are bound to international law only by their will and only as long as the law was in accordance with their will as a “misguided doctrinalism” and an incorrect “aprioristic” (*eine falsche Aprioristik*).⁶ To explain this verdict he argued that it was not conceivable to seek the nature of all law *a priori* in the heterogeneous regulations of law on the national and international level. When doing so, the result would be an *abstractum* not compatible with reality. He was convinced that nobody could deny the reality of an international legal organisation, if one was prepared to consider the reality of international relations instead of “looking up

³ See for details *Alexander Bader*, *Leben und Werk des Geheimen Justizrates Prof. Dr. Dr. h.c. Theodor Niemeyer*, 2001.

⁴ *Theodor Niemeyer*, *Zeitschrift für Internationales Privat- und Strafrecht* 11 (1902), 2 (introduction of Niemeyer as the editor); this and all following quotations of German texts in an English version are translations of the author of this paper.

⁵ *Theodor Niemeyer*, *Vom Wesen des internationalen Rechts*, *Zeitschrift für Internationales Recht* 20 (1910), 1 and note * on that page.

⁶ *Niemeyer* (note 5), see this and the following quotations 8 *et seq.*

to the clouds and waiting whether from there, international legal revelations and angels of peace would be inclined to come down to earth”.

The unions organised on the basis of multilateral treaties during the second half of the 19th century had created in his view an undeniable new quality of international law.⁷ So this organisation of peaceful and permanent international cooperation had transformed international law into a positive and important component of the entire social order of international life. Thus, international law was, in the modern age, a real element of international culture. Its source was the consensus of States and it was this consensus which must be taken as a reflection of the real interests of States. This sociological approach, as *Niemeyer* qualified his concept, was, as he himself expressly stated, far removed from the traditional approach of his contemporary German colleagues, who inquired whether or how far international law was compatible with the sovereignty of States. According to *Niemeyer's* opinion the nation which would succeed in combining national interests with the development of international law in the most clear-sighted manner would, in the future, be at the pinnacle of civilisation.⁸

At this point I cannot resist the temptation to consider whether our American colleagues *Goldsmith* and *Posner* would perhaps have hesitated to qualify international law as a kind of a mere epiphenomenological “drop off” of State interests, if they had studied *Niemeyer's* 100 years old treatise on the nature of international law before elaborating on the limits of international law.⁹

After all, this was the fundamental position of *Theodor Niemeyer* when he succeeded in obtaining, on 5 February 1914, the Ministerial Approval to the Statute of the “Royal Seminar of International Law at the University of Kiel”.

II. International Law as the Basis of a Peaceful World Order

Walther Schücking,¹⁰ who was appointed as the successor of *Niemeyer* in 1926, had always frankly confessed his political orientation as a convinced liberal and a declared pacifist – in times of a wide-spread conservatism in German law faculties and, moreover, in German public life a position outside the

⁷ *Niemeyer* (note 5), 12 *et seq.*

⁸ *Niemeyer* (note 5), 15.

⁹ *Jack L. Goldsmith/Eric A. Posner*, *The Limits of International Law*, 2005, especially Part 2 (Treaties), 81 *et seq.*

¹⁰ For details as to his work and life see *Frank Bodendiek*, *Walther Schückings Konzeption der internationalen Ordnung – Dogmatische Strukturen und ideengeschichtliche Bedeutung*, 2001.