

PIONEERING MINDS IN INTERNATIONAL LAW

Today, it seems self-evident that the primary goal of diplomacy is to secure peace among nations. Whether this succeeds depends on two factors: the skills of the political negotiators and the expertise in the background. The Max Planck Institute for Comparative Public Law and International Law has provided such expertise now for 100 years, leaving its mark on contemporary history.

TEXT: SUSANNE KIEWITZ

52

Today's Max Planck Institute for Comparative Public Law and International Law owes its existence to a national state of emergency. After its defeat in World War I, Germany was isolated in foreign affairs. The Versailles peace treaty, as the basis for future cooperation, had been negotiated without the Germans. The young Weimar Republic needed international legal expertise to mitigate the harsh provisions set out in the treaty.

With its severe reparation obligations, the Treaty of Versailles promised an even bigger economic disaster, as Germany also had to cede its territories on the Saar, Rhein, and Ruhr, with their productive coal mines and heavy industry, to France for many years to come. The treaty also sparked domestic unrest, as con-

servatives and political extremists propagated the "disgrace of Versailles" as a failure of the young democracy, which was on shaky ground. From then on, the government's strategy was to revise the Treaty of Versailles within the framework of international law.

Establishing an independent research institute for international law was intended to support these efforts, as the Federal Foreign Office lacked the comprehensive overview of the legal systems of the foreign victorious powers that was essential for productive renegotiations. On 19 December 1924, the new institute was finally founded as an independent association, thus guaranteeing its political neutrality, in accordance with the statutes of the Kaiser Wilhelm Society for the Ad-

vancement of Science. "The idea goes back to Viktor Bruns, then Professor of Constitutional and International Law at the University of Berlin," says Philipp Glahé. The historian is researching the history of the Max Planck Institute for Comparative Public Law and International Law on the occasion of its 100th anniversary, working with previously unknown sources, some of which are still stored at the Institute. Together with international law scholar Alexandra Kemmerer, Head of the Institute's Berlin Office, he has launched a multi-perspective research project to mark the centenary. Scholars from various disciplines as well as past and present Institute employees are exploring the history of the Institute and documenting their research and recollections on a blog.



The Berlin Palace in the 1920s. After the end of the monarchy, the building housed various academic institutions, including the Kaiser Wilhelm Institute for Foreign and International Public Law.



The First World War dramatically highlighted just how interconnected the world was at the beginning of the 20th century. As a result, international agreements and structures to secure peace in the long term were of great importance; among them the League of Nations, founded in 1920. The Institute's founding Director, Viktor Bruns, also envisaged international law as an autonomous legal order that would form the basis for the coexistence of different states.

The heart of the Institute in the Berlin Palace of the now deposed royal house of Hohenzollern was its growing library, as the collection provided the basis for legal comparison, a method that Bruns introduced to his discipline as a pioneering approach. Comparing legal concepts, statutes, and the jurisprudence of various countries reveals common, general principles that can serve as the basis of agreements under international law, since they are compatible with the respective national law.

54

The new Institute soon provided the government with information that was important for diplomacy with former enemy states in the form of reports and expert opinions. The German strategy succeeded, at least in part, with Foreign Minister Gustav Stresemann achieving agreements with the Locarno Treaties that brought Germany back into the international community. One of Stresemann's greatest successes was Germany's admission to the League of Nations in 1926.

The Institute in the era of National Socialism

Hitler's accession to power in 1933 brought this peace process to an abrupt end. Just a few months later, Germany withdrew from the League of Nations and became a dictatorship, a dictatorship to which the Institute of

International Law remained fundamentally loyal. In his contribution to the anniversary blog, science historian Rüdiger Hachtmann attests to the clear "commitment to armament and imperial goals" of key players at the Institute during the Nazi era, also analyzing this dark chapter in the Institute's history. The Nazi state discarded the previously valid idea of international law as a peace-keeping legal order of equal states and replaced it with the dogma of German ethnic superiority in order to legitimize its imperialistic expansionist aims. The Institute – still a foreign policy advisor – "was now obliged, but not forced, to support this policy," Rüdiger Hachtmann says: in 1937, Director Bruns justified Germany's withdrawal from the League of Nations. And with Carl Schmitt, whom he appointed as an academic advisor in 1933, Bruns gave pro-Nazi international law a firm place at his Institute. Schmitt, the charismatic "crown jurist of the Third Reich", provided legal foundations for the racist, imperialist policies of the war-minded "Führer state." Bruns was himself a prominent National Socialist and anti-Semite.

Germany's invasion of the Sudetenland in 1938 left no doubt that Hitler wanted to realize his imperialist fantasies of great power. The attack on Poland in September 1939 led to the break-up of the peaceful European order and to World War II. The Kaiser Wilhelm Institute for Comparative and International Public Law was now placed under the High Command of the Wehrmacht, as it was closely associated with the Foreign Office. As the war waged on, however, there emerged resistance within the system, which was organized around Claus Schenk Graf von Stauffenberg, starting in 1943. His brother Berthold had been a senior researcher at the Institute for Comparative and International Public Law since 1929 and was sentenced to death by the Nazi judiciary along with other members of the resistance after the failed attempt to assassinate Hitler on July 20, 1944.

By this time, the war had also reached the Institute with Allied air raids, and its rooms on the Berlin Palace went up in flames in the spring of 1945. However, as large parts of the precious library could be saved; there was a solid foundation for post-war reconstruction under Carl Bilfinger. Following the sudden death of Viktor Bruns, Bilfinger had already been coordinating the Institute from Heidelberg since 1944, where it was re-established in 1949 under the aegis of the newly founded Max Planck Society.

Peace in the Cold War – The Institute after 1949

In the newly established Federal Republic of Germany, research at the Institute also focused on practical, politically relevant issues. This was largely due to Hermann Mosler, who succeeded the Nazi-involved Bilfinger as director in 1954. Mosler had headed the Federal Foreign Office's legal department from 1951 to 1954. Through him, the Max Planck Institute for Comparative Public Law and International Law was closely connected to the Adenauer government for the next few years. Mosler also derived key research topics for the Institute from his work in ministerial bureaucracy. "The application-oriented international law research at the Max Planck Institute for Comparative Public Law and International Law also served to systematize international law as a legal framework for relations between states. The aim was to understand international law as a legal system – and accordingly, to approach it dogmatically," says legal historian Felix Lange, who has conducted extensive research into the history of the Institute and written a biography of Hermann Mosler, describing this specific, practice-oriented form of basic research into international law. As numerous graduates from the Institute went into the civil service, it also had an impact on legal practice and politics.



PHOTO: PICTURE ALLIANCE / SVEN SIMON

Willy Brandt kneeling at the monument commemorating the Warsaw Ghetto Uprising. Jochen Frowein of the Max Planck Institute for Comparative Public Law and International Law was among those accompanying the Federal Chancellor during this visit in 1970.

55

The first political goal of the Adenauer government – a few years after the end of the world war with more than 60 million dead – was to establish a stable and peaceful order. However, it was also necessary to regain trust that had been lost and to make the Federal Republic an equal partner among nations. As had been the case after the First World War, international law played a key role in this process. Hermann Mosler was convinced that cooperation with the Western powers based on international treaties would provide a safety mechanism preventing national or fascist unilateral action and thus avoid conflicts within

Europe. “International law also played an important role in consolidating the young Federal Republic’s foreign policy,” says Felix Lange. “Hermann Mosler supported Adenauer’s policy of integration into the West with his legal expertise because he shared his ideas on European politics.” This included a clear orientation towards the West instead of the search for a middle ground between the power blocs in East and West.

The new European treaties between Western states were of particular interest for the Institute’s research work. In 1950, French Foreign Minister

Robert Schuman proposed the founding of the European Coal and Steel Community (ECSC). Hermann Mosler participated in the negotiations on the structure of this alliance as one of the legal experts in the German delegation. The founding of the ECSC in 1951 created the first European economic alliance and was also the prelude to the history of the European Union.

European integration created so many new tasks for international law that soon European law emerged as a new area of legal expertise. The supranational associations of European states



were new legal entities intertwined with both national constitutional law and international law. Hermann Mosler also played an active role in the development of the international legal order by becoming the first German judge at the International Court of Justice in The Hague in 1976. He would not be the only one of the Institute's directors to go on to serve as an international judge.

In 1969, the social-liberal coalition took over from Adenauer's conservative Christian government after it had been in power for 20 years. A new era

for German foreign policy began under Federal Chancellor Willy Brandt. "Change through rapprochement" was Brandt's motto as he sought a co-operative relationship between the Federal Republic and the countries in the Eastern bloc and promoted a peaceful Europe in the midst of the Cold War. Already in the summer of 1970, the Treaty of Moscow was signed with the Soviet Union, followed by further treaties with Poland and finally the GDR. The partners undertook to resolve conflicts without violence and declared the existing borders inviolable. This pragmat-

cally compensated for the lack of a formal peace treaty between Germany and its former wartime adversaries with the innovative power of international law. In the Basic Treaty with the GDR, both countries agreed to set up permanent representations as a basis for the establishment of diplomatic relations.

The Basic Treaty was a turning point for the Federal Republic's intra-German policy, as it rendered the Hallstein doctrine obsolete. With this doctrine, the Federal Republic had not only rejected the GDR's claim to state sover-

56

PHOTO: MPI FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW



The library at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg also features collections from the Institute's early years and provides insights into the history and development of international law (here shown before it was rebuilt).

eighty, but also boycotted its recognition by non-communist countries. Willy Brandt therefore had to ensure that the Basic Treaty with the GDR was properly negotiated – not least in order to secure approval from the opposition in the Bundestag. Although many at the Institute were critical of the new social-liberal path, the Federal Chancellor also received strong support from Heidelberg: Jochen Frowein, who had worked on his habilitation (an extended postdoctoral qualification period which is required for a full university professorship) in comparative law in the mid-1960s, identified a constellation in the legal practice of the Commonwealth that could be applied comparatively to the relationship between the FRG and the GDR. This opened up new scope for legal arrangements. Frowein later concluded that a state could “establish and develop a variety of legal relationships with non-recognized states even below the threshold of full recognition.”

In 1967, Frowein became a member of a small working group of the German Council on Foreign Relations which dealt with the political and legal problems arising from a recognition of the GDR. In 1968, the group presented a report that significantly influenced the actions of the Brandt government. On behalf of the Federal Chancellery, Frowein drafted a legal opinion on possible relations with the GDR and traveled with Willy Brandt’s delegation to Moscow and Warsaw for the 1970 negotiations. Brandt’s empathetic and respectful demeanor, which found its iconic image in his kneeling at the memorial to the victims of the Warsaw Ghetto Uprising, ushered in a political thaw for several years, which in the long term paved the way for the opening of the Iron Curtain. In 1981, Jochen Frowein became a Director at the Institute, which in the meantime had transitioned to management by a board of directors. The opening to the East also affected the work of the Institute, which intensified its academic exchanges with Eastern Europe. The topics discussed in the Institute’s colloquia document increasing global in-

terconnectedness, which raised practical questions in constitutional law. These included, for example, the domestic legal status of non-Germans, whose share of the total German population was growing. The Institute drafted an expert opinion on this matter for the Federal Ministry of the Interior. European policy issues, such as the organizational structures of the European Communities, also remained in focus.

The Institute in times of transition

The trend towards globalization since the 1980s is also reflected by the fact that Rüdiger Wolfrum, who became Director at the Institute in 1993, addressed issues in international law regarding state-free spaces. The deep sea, the Arctic, and even outer space harbor mineral and biological resources, the use of which is fraught with conflict if there are no underlying agreements in international law. Wolfrum paved the way for global environmental international law which, in light of climate change, is now one of the Institute’s most progressive fields of work with high political relevance for the global community.

From 1996 to 2017, Rüdiger Wolfrum applied the international legal expertise gained from his research as a judge at the International Tribunal for the Law of the Sea. He was also president of the court from 2005 to 2008. While president, he followed the example set by his predecessors in high judicial offices: Helmut Steinberger had served as judge at the Federal Constitutional Court and the Court of Arbitration of the OSCE, and Rudolf Bernhardt served as judge at the European Court of Human Rights. With its academic contribution to the development of law, the Institute has also frequently supported global peace efforts. The break-up of the Soviet Union after the end of the Cold War and the war in Yugoslavia raised numerous questions for international research at the Max Planck Institute for Comparative Public Law and In-

ternational Law, which also fed into its legal consulting. In 1995, Director Helmut Steinberger participated in the Dayton peace talks as an advisor to the Bosnian delegation on constitutional and international legal matters.

One hundred years after its founding, the Institute is making practical use of its research on democracy and the rule of law in dialogue with practitioners and academics from many parts of the world. Director Anne Peters was a member of the Venice Commission of the Council of Europe, which provides advice on constitutional law to states on their path to democratic structures. Director Armin von Bogdandy is researching and advising on the current restoration of the rule of law in Poland. The idea of international law as the legal order of a peaceful world community, which also understands itself as a community of values united by its recognition of a common international legal order, remains fundamental.

←

57

FURTHER READING

MPIL100. The MPIL’s blog is celebrating its 100th anniversary. Edited by Armin von Bogdandy, Philipp Glahé, Alexandra Kemmerer, and Anne Peters.

<https://mpil100.de/>

Rechtswissenschaft in der Max-Planck-Gesellschaft 1948–2002. Edited by Thomas Duve, Jasper Kunstreich, Stefan Vogenauer. V & R 2023. (open access, in German)

