Editorial

'Especially problems of international law are still all too often discussed within national circles. The contributors and staff of journals come normally from more or less the same State. And yet, nothing is more necessary to form a legal opinion beyond national boundaries than an open discussion of contrary views as well as knowing and understanding diverging opinions.'[1] While it sounds like this could have been written today, and is in line with a contemporary comparative international law approach,[2] it actually dates from 1929. The words were written by Viktor Bruns, the first director of the Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht, the predecessor to today's Max Planck Institute for Comparative Public Law and International Law (MPIL). Bruns made this remark to explain why he launched a new journal, the Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV).

Why do I dwell on this? After all, the quoted editorial is 95 years old. Yet, this year marks the 100th anniversary of the MPIL, the institution behind the Journal. Anniversaries provide us with an occasion to take stock of what has been and to imagine what will be, so we as editors want to reflect on the Journal's past and future. This editorial serves both causes. Firstly, by picking up the Journal's history. Secondly, by introducing editorials as a new regular rubric in the Journal. The editorials shall introduce each new issue and provide a space for short reflections on current, or otherwise topical, issues.

The Journal, from the very beginning, was an intended part of the Institute. However, it took Viktor Bruns 5 years to publish the first volume. As my first 'new' editorial, I am afforded the opportunity to look back at the Journal's very first editorial. As the quote at the beginning shows, that editorial has still a lot to offer to the modern reader. We might be tempted to imagine the work at the Kaiser-Wilhelm-Institut in the 1920s as a paradise lost where no e-mails or smartphones might interrupt one's academic work. Yet in the editorial, Bruns excuses the delay in publishing the journal with his many other commitments, especially sitting on the bench of international

1 Viktor Bruns, 'Vorwort', ZaöRV 1 (1929), III-VIII, IV (translation by the author). In the original, the passage reads: 'Gerade die Völkerrechtsprobleme werden bisher noch viel zu sehr innerhalb der einzelnen nationalen Kreise erörtert. Der Mitarbeiterstab der Zeitschriften ist gewöhnlich ein mehr oder weniger national geschlossener. Und doch ist für die Bildung einer überstaatlichen Rechtsmeinung nichts notwendiger als eine offene Aussprache über die Gegensätzlichkeit der Auffassung, ein Kennen- und Verstehenlernen der verschieden gearteten Meinungen.'

2 See Anthea Roberts, *Is International Law International?* (Oxford University Press 2017), 21.

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tribunals.[3] Unwittingly, the quote offers the comforting knowledge that the academic's struggle to time for research, despite her or his various other obligations, is timeless.

Turning back to the initial quote, Bruns' lament is of course a creature of its time. It must be understood in the context of Germany's legal battle against the Treaty of Versailles.[4] Between the lines, one can read what Bruns actually wants to say: The Journal is meant to influence the debate on pertinent issues of international law stemming from the First World War by presenting a German view. Thus, launching the Journal stems from many German scholars' perception that views hailing from the victors of the First World War dominated these debates. While Bruns' plea for diversity was driven by this agenda, the quote nevertheless reminds us of one basic pitfall of international legal scholarship: epistemic nationalism.[5] At the same time, Bruns offers a cure by encouraging diversity in authorship, open discussion, and efforts to understand the other side. Freed from its underlying agenda against Versailles, Bruns provides us with a guiding idea for today's Journal: a diverse and inclusive authorship representing various views and outlooks. The MPIL's centenary provides an occasion to take stock whether the Institute and its Journal have lived up to this ideal. Interestingly, Bruns himself concedes the difficulties of realising this goal,[6] and it is fair to say that difficulties have persisted until today. Besides, conceptions of inclusiveness and diversity have drastically changed since 1929. Where Bruns had in mind authors from different (predominantly) western States, we would think of authors from the Global South, women, or marginalised groups. As even the most cursory look at past issues informs us, there is still room for improvement. Being a diamond open access journal,[7] we strive to be a forum for everyone engaging with topics of international, European, and comparative public law.[8] Bruns' words remind us of this aim despite his somewhat differing intentions.

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3 Bruns (n. 1), V.

4 This is implicit in the editorial where Bruns mentions some topics usually not discussed at international conferences, such as reparations, interpretation of peace treaties, and the issue of minorities, Bruns (n. 1), IV.

5 See for international law Anne Peters, 'Die Zukunft der Völkerrechtswissenschaft: Wider den epistemischen Nationalismus' ZaöRV 67 (2007), 721-776, especially 768 et seq.; see for EU law Armin von Bogdandy, 'Comparative Public Law for European Society', ZaöRV 83 (2023), 209-256 (230).

6 Bruns (n. 1), IV.

7 See on our commitment to Open Access Armin von Bogdandy and Anne Peters, 'Editorial', ZaöRV 81 (2021), 1-6.

8 See also von Bogdandy and Peters (n. 7), 6.

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Anniversaries prompt us to engage with our past. Although there has been significant work on the institution's history,[9] this research has been intensified, especially in a blog curated by Philipp Glahé and Alexandra Kemmerer reflecting on the MPIL's history.[10] This issue will introduce some of their efforts and is complemented by Sabino Cassese's reflections on the MPIL's role within the broader development of the field. Over the course of this and the next year, we will publish more contributions engaging with the Institute's past. Needless to say, some of the darker hours of Germany's past (1933-1945) are also part of the Institute's past, and the Journal's history. It is a past we are committed to scrutinising closely to understand the Institute's role during this period.[11]

Many things have changed since 1929, but the generalist approach – to cover current and topical issues of international law with a commitment to problem-oriented foundational research – has remained the same both for the Institute and its Journal.[12] And this issue reflects this broad approach, covering a wide field of topics, ranging from a plea for a feminist foreign relations law, criminalising crimes against the environment, putting the Iranian Revolutionary Guards Corps (IRGC) on the European Union (EU) terror list, and the provisional application of treaties. Despite widely diverging topics, focuses, and approaches, all of these texts respond to acutely felt issues of international law, offering their assessment of the situation and, at times, options for the way forward.

In the comment section edited by Carolyn Moser, Anne Peters pleads for a feminist foreign relations law mapping fields where German foreign policy could and should include feminist perspectives.[13] Covering different fields of foreign relations law, she reflects on the possible impact of a genuine turn to

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9 See Felix Lange, 'Zwischen völkerrechtlicher Systembildung und Begleitung der deutschen Außenpolitik – Das Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht (1945-2002)', in: Thomas Duve, Jasper Kunstreich and Stefan Vogenauer (eds), *Rechtswissenschaft in der Max-Planck-Gesellschaft, 1948-2002* (Vandenhoeck & Ruprecht 2023), 49-90; see also Rudolf Bernhardt and Karin Oellers-Frahm, *Das Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht – Geschichte und Entwicklung von 1949 bis 2013* (Springer 2018).

10 See <https://mpil100.de> last access 31 January 2024.

11 See for existing treatises on the Institute's history in the Nazi period: Ingo Hueck, 'Die deutsche Völkerrechtswissenschaft im Nationalsozialismus. Das Berliner Kaiser-Wilhelm-Institut für Auswärtige Politik und das Kieler Institut für Internationales Recht' in: Doris Kaufmann (ed.), *Geschichte der Kaiser-Wilhelm-Gesellschaft im Nationalsozialismus. Bestandsaufnahmen und Perspektiven der Forschung*, Vol. 2 (Wallstein 2000), 490-527.

12 See for our Aims & Scope statement here: <https://www.nomos.de/en/journals/zaoerv/> last access 31 January 2024.

13 Anne Peters, '"Füg' dich, meine Schöne": Plädoyer für ein feministisches *Foreign Relations Law*', ZaöRV 84 (2024), 7-22.

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a feminist foreign relations law. While she remains cautious as to whether such a turn, if followed by many states, could help contain a war like the Russian aggression against Ukraine, her thoughts might provide some inspiration for new strategies to promote peace and cooperation.

With the start of the Institute's anniversary year, this issue begins the journal's engagement with the past. Alexandra Kemmerer and Philipp Glahé introduce their blog project on the history of the Institute and a contribution by Sabino Cassese in which Cassese situates the Institute's intellectual journey within the broader developments of the field.[14]

The article section is characterised by a common concern for the pressing issues of our day, be that the environment, the functioning of the international legal order against the rise of authoritarian States, and State terrorism. Muyiwa Adigun advances the cause of the distinct crime of ecocide. He espouses a historic perspective and argues that such a crime has much older historical roots than is commonly thought, in order to disperse concerns against such a crime.[15] While concern for the environment links Adigun's text with the contribution by Onur Seddig, Laura Tribess, and Silja Vöneky, they address an environmental law issue of a different nature.[16] They spotlight the Liability Annex to the Antarctic Treaty,[17] which still has not entered into force. By explaining why its entry into force is so important to closing an accountability gap, they argue in favour of its provisional application.

Ernst-Ulrich Petersmann's article transcends concern for the environment and explains various governance failures, including but not limited to climate change, with a lack of constitutional restraints in the United Nations (UN) and the World Trade Organization (WTO) system.[18] Building on constitutionalist scholarship in international (economic) law, which he has very much shaped, Petersmann argues in favour of multilevel constitutionalism on the global level. He argues that the European Union features as a role model which has effectively prevented many governance failures seen elsewhere by disciplining the nation State. While he does not see any chance for introducing such models on the universal level, he espouses plurilateral arrangements as the second best options for developing multilevel constitutionalism be-

14 Sabino Cassese, 'Being a Trespasser', ZaöRV 84 (2024), 27-38.

15 Muyiwa Adigun, 'Ecocide: The "Forgotten" Legacy of Nuremberg', ZaöRV 84 (2024), 39-72.

16 Stefan Onur Seddig, Laura Tribess and Silja Vöneky, 'Umweltnotfälle in der Antarktis – Notwendigkeit und Umsetzungsmöglichkeiten einer vorläufigen Anwendung des Haftungsannexes zum Antarktisvertrag', ZaöRV 84 (2024), 73-101.

17 Annex VI to the Protocol on Environmental Protection in the Antarctic Treaty on Liability arising from Environmental Emergencies, signed 14 June 2005, BGBl. II 2017, 722.

18 Ernst-Ulrich Petersmann, 'Regulatory Competition without Effective UN and WTO Legal Restraints', ZaöRV 84 (2024), 103-139.

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yond Europe. Some assumptions underlying this strand of scholarship have come under critique. Paolo Mazzotti, in his comment on Petersmann's piece, questions whether the European experience can be described as a form of multilevel constitutionalism, or rather as pluralist.[19] With his critique, he adds a layer of nuance to Petersmann's grand narrative of constitutionalism as a cure to the problems of the international legal order. Yet, it does not detract from Petersmann's analysis of the many crisis we see in today's world for which he offers a remedy.

Last but not least, Lukas Märtin questions EU politicians' argument that it was legally impossible to include the IRGC on the EU Terror List.[20] Based on the European Court of Justice's (ECJ's) case-law and national decisions on the IRGC, Märtin argues for their inclusion on the Terror List. Beyond the specific issue, he identifies a broader trend in the ECJ's judicial practice to take into account the changed geopolitical situation and situate the issue in this new landscape.

The focus on the EU continues in the book review section edited by Richard Dören. Lisa-Marie Lührs reviews Frank Schorkopf's monograph on the constitutional history of the European Union ('Die unentschiedene Macht. Verfassungsgeschichte der Europäischen Union, 1948-2007'), which he sees as characterised by the (undecided) question of power. By situating and questioning Schorkopf's approach to calling his history a constitutional history, Lührs' review echoes the debate between Petersmann and Mazzotti, as to the most convincing way of conceptualising the reality of the European Union and its Member States.

While the first review is thus connected with Petersmann's article and Mazzotti's comment, the second review discusses a pertinent issue of the *ius contra bellum*: anticipatory consent to military interventions. Hannah Kiel's review of Svenja Raube's monograph on this very topic ('Die antizipierte Einladung zur militärischen Gewaltanwendung im Völkerrecht') highlights the practical relevance of this work in light of Economic Community of West African States' (ECOWAS') threats to intervene in Niger following a *coup d'état* in 2023.

The third review covers an issue more closely related to the environmental concerns tackled by the first two articles. With his review of Felix Beck's monograph 'Self-Spreading Biotechnology and International Law. Prevention, Responsibility, and Liability in a Transboundary Context', Tade Mat-

19 Paolo Mazzotti, '(European) Multilevel Constitutionalism to Govern Transnational Public Goods? A Reply to Petersmann', ZaöRV 84 (2024), 141-156.

20 Lukas Märtin, 'The EU Terror List and the Islamic Revolutionary Guard Corps About the Law as an Alleged Obstacle to Political Action', ZaöRV 84 (2024), 157-185.

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thias Spranger brings the intersection of genetic engineering and international law to our attention.

The beginning of the Institute's centenary left its mark on this issue. Otherwise, the issue remains faithful to the Journal's approach dating back to the very first volume: tackling the most important and pressing issues of current international law.[21]

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21 See Bruns (n. 1), IV.

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