Abhandlungen

Jurisdiction – Who Speaks International Law?

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Who speaks international law? Revolving around this question, the Working Group of Young Scholars in Public International Law (Arbeitskreis junger Völkerrechtswissenschaftler*innen, AjV) and the German Society of International Law (Deutsche Gesellschaft für Internationales Recht, DGIR) held a conference at the University of Bonn on 3 and 4 September 2021. Following conferences in Düsseldorf, Göttingen, Bochum, and Berlin, this was already the fifth conference of this format.

We would like to express our deepest gratitude to the German Society of International Law and especially its vice chairman Stephan Hobe for continuously supporting and encouraging this format. In equal high appreciation, we thank the University of Bonn, particularly the Institute for Public International Law and Stefan Talmon for agreeing to host the conference and for supporting it from the very first second. We are also indebted to the German Research Foundation (Deutsche Forschungsgemeinschaft, DFG) for recognising and contributing generously to the quality of our work. It is our privilege, too, to thank our sponsors Dombert Rechtsanwälte, Duncker & Humblot, Görg Wirtschafskanzlei, Luther Rechtsanwaltsgesellschaft, Universitätsgesellschaft Bonn (UGB), and, last but not least, our partner

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Völkerrechtsblog for hosting our symposium and for streaming both keynotes.[1]

Framed by two keynotes on the topics of racism, borders, and jurisdiction, and on the question of what it means to think *with* jurisdiction in international law, five panels examined various aspects of jurisdiction, including narrators and different narratives of jurisdiction, transnational aspects of jurisdiction, borders and jurisdictional boundaries, accountability, as well as the role of courts and how they navigate jurisdictional domains.

I. Past & Present: Introducing Jurisdiction

Thinking with jurisdiction means delving into the question of who the law endows with the authority to speak in its name – and about whom is (merely) spoken.[2] The legal concept of jurisdiction refers to an actor's competence to provide binding answers to legal questions. In the absence of 'absolute' and 'universal' truths that could 'resolve' contradictions, the question of whose answers ultimately prevail has become even more important.[3] An etymological approach shows that the question of who gets to produce these reliable answers to legal questions cannot be analysed without examining jurisdiction. After all, 'speaking law' – *juris dicere* – is directly related to the concept of jurisdiction.[4]

Beyond the origin of the word, however, jurisdiction in international law does not encompass the mere ability to administer justice. Instead, within the context of international law, the notion of jurisdiction is used to distinguish between international and domestic spheres of competence, especially by means of the territorial principle. Jurisdiction thus serves to determine what is 'inside'

1 Sué González Hauck and Julian A. Hettihewa, Who Speaks International Law?: Introducing the Symposium on the 2021 AjV-DGIR Conference, Völkerrechtsblog, 30 August 2021, doi: 10.17176/20210830-232608-0; Tendayi Achiume, Livestream: Race, Borders and Jurisdiction: Keynote by Prof. Dr. E. Tendayi Achiume (UCLA) on 3 September at 5 pm CEST, Völkerrechtsblog, 3 September 2021, <https://voelkerrechtsblog.org/race-borders-and-jurisdiction/> (last accessed 22 July 2022); Sundhya Pahuja and Shaun McVeigh, Livestream: Who Speaks International Law?: Keynote by Prof. Dr. Sundhya Pahuja and Prof. Dr. Shaun McVeigh (both University of Melbourne), Völkerrechtsblog, 4 September 2021, <https://voelkerrechtsblog.org/who-speaks-international-law-sundhya-pahuja-and-shaun-mcveigh-in-conversation/> (last accessed 22 July 2022).

2 Shaunnagh Dorsett and Shaun McVeigh, 'Questions of Jurisdiction' in: Shaun McVeigh (ed.), *Jurisprudence of Jurisdiction* (Abingdon: Routledge 2007), 3-18 (3).

3 Roberto Unger, *Knowledge and Politics* (New York: The Free Press 1976); Martti Koskenniemi, *From Apology to Utopia* (Cambridge: Cambridge University Press 2005), 590 et seq.

The battle with the novel coronavirus in particular has reignited public interest in epistemology. See, e. g., Guido Caniglia et al., 'COVID-19 Heralds a New Epistemology of Science for the Public Good', History and Philosophy of the Life Sciences 43 (2021), 58-63 (59).

4 Dorsett and McVeigh (n. 2), 3.

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and 'outside' of international law.[5] According to the received account of the meaning of jurisdiction in doctrinal international legal scholarship, 'jurisdiction' denotes an element of sovereignty in the form of 'the competence to control and alter the legal relations of those subject to that competence through the creation and application of legal norms'.[6] International legal scholars working within this doctrinal tradition generally distinguish three categories of jurisdiction, namely the power to prescribe rules (jurisdiction to prescribe / legislative jurisdiction), to decide on their concrete application in an individual case (jurisdiction to adjudicate/adjudicative jurisdiction), and, finally, the power to enforce the rules or the decision (jurisdiction to enforce/executive jurisdiction).[7] A discussion of jurisdiction raises fundamental questions of international law, even in seemingly technical doctrinal discussions involving the detailed rules within each of the aforementioned categories. Bruno Simma and Andreas Müller succinctly emphasise this fact:

'[T]he study of the rules assigning jurisdiction, limiting it and seeking to handle overlaps and tensions arising in this process of allocation is a fascinating lens through which to view the macro-structure of international law, since these very rules, in manifold ways, mirror the interplay, and conflict, of the governing principles of the international legal order.'[8]

The contributions to this special issue reflect both doctrinal aspects and more critical accounts of jurisdiction. The latter draw attention not only to the legal rules as such but to the social relations, particularly relations of exclusion and oppression, which the rules on jurisdiction produce. In her previous work, E. Tendayi Achiume has drawn attention to the racialised exclusion of Third World peoples by First World nation-states.[9] The connections between jurisdiction, territory, and racialised exclusion are not the only ways through which jurisdiction produces oppressive social relations. Building on Shaun McVeigh's work, Sundhya Pahuja has offered an innovative account of international law through the lens of jurisdiction,[10] using the

5 Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law', London Review of International Law 1 (2013), 63-98 (77).

6 Stephen Allen et al., 'Introduction: Defining State Jurisdiction and Jurisdiction in International Law' in: Stephen Allen et al. (eds) *The Oxford Handbook of Jurisdiction in International Law* (Oxford: Oxford University Press 2019), 3-22 (4).

7 Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford: Oxford University Press 2008), 299.

8 Bruno Simma and Andreas Th. Müller, 'Exercise and Limits of Jurisdiction' in: James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press 2012), 134-157 (134).

9 E. Tendayi Achiume, 'Migration as Decolonization', Stanford L. Rev. 71 (2019), 1509-1574 (1517).

10 Pahuja (n. 5), 63.

notion of rival jurisdictions as a frame to re-describe the relationship between international law and its 'others',[11] thus drawing attention to international law's 'worldmaking'[12] capacities.

II. Narrators & Narratives: Jurisdiction in Various Facets

The papers selected for this special issue provide an impetus for a more in-depth discussion of how jurisdiction reflects the current international order, while also continuing the successful tradition of AjV-DGIR conference publications.[13]

This special issue starts off with a dialogue between Shaun McVeigh and Sundhya Pahuja. The two scholars uncover the layers of what it means to think *with* jurisdiction as an international lawyer and encourage us to turn jurisdiction from an object of study into a part of thinking. This allows for the re-focussing of attention on how the authority of law is expressed, performed, and arranged as a juridical and administrative activity and how relations of law are understood.

Shiri Krebs' paper approaches the questions of who is given the power to speak in international humanitarian law and who is not, to whom international humanitarian law is speaking, and how data practices shape the jurisdiction of international humanitarian law by taking a closer look at representations of data practices in international humanitarian law in popular culture, particularly the 2015 British thriller 'Eye in the Sky'.

Max Noll takes a closer look at the decades-long scholarly dispute of whether the customary international law on the jurisdiction of States applies to private law. In his article 'Limits to the Jurisdiction of States in Private Law Matters under International Law', he argues that it does, analysing the content of the customary law on jurisdiction of States in different fields of private law with an emphasis on tort law.

In her paper on post-ceasefire Nagorno-Karabakh, Júlia Miklasová analyses the limits to the European Court of Human Rights' (ECtHR) approach

11 See also Anne Orford (ed.), *International Law and Its Others* (Cambridge: Cambridge University Press 2006).

12 See Nelson Goodman, *Ways of Worldmaking* (Indianapolis: Hackett 1978).

13 2012 in Düsseldorf: Helmut Philipp Aust et al. (eds), 'Demokratie, Wandel, kollektive Sicherheit – Das Völkerrecht und der Umbruch in der arabischen Welt', HJIL 72 (2012), 443-445; 2014 in Göttingen: Björnstjern Baade et al. (eds), *Verhältnismäßigkeit im Völkerrecht* (Tübingen: Mohr Siebeck 2016); 2017 in Bochum: Sebastian Wuschka et al. (eds), *Zeit und Internationales Recht: Fortschritt – Wandel – Kontinuität* (Tübingen: Mohr Siebeck 2019); 2019 in Bonn: Björnstjern Baade et al. (eds), *Cynical International Law?: Abuse and Circumvention in Public International and European Law* (Berlin: Springer 2020).

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to jurisdiction over secessionist entities under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In light of the complicated factual setup in Nagorno-Karabakh, Miklasová proposes to dispense with the 'boots on the ground' requirement of effective control, as States can yield significant power vis-à-vis a secessionist entity through a variety of channels.

Philipp Eschenhagen analyses Germany's exercise of universal criminal jurisdiction (UCJ) regarding the growing Syrian diaspora and their influence on UCJ proceedings. In his paper 'When Perpetrators and Victims Meet Again', he finds that Frederic Mégret's hospitality conception evolved towards a powerful theoretical framework to understand the agency of victims in UCJ proceedings in Germany. Notwithstanding, Germany's exercise of UCJ cannot yet be considered an expression of state practice or *opinio juris* that could inform a customary duty of hospitality towards victim diasporas.

Can international arbitrators strike a balance between the limitations of consent to jurisdiction and the need to respond to the challenges of a complex international legal system in executing their law-making function? Nicola Strain poses this question in her paper titled 'Invoking Systemic Ideals or Systemic Rules? Jurisdiction in WTO and Investor-State Decisions'. She focuses on systemic integration and its relationship to jurisdictional limits of international tribunals. Analysing systemic integration in the reasoning of World Trade Organization (WTO) and Investor-State Dispute Settlement (ISDS) tribunals, Strain calls for more clarity and contributes to a more methodologically refined conceptualisation of the principle.

In his contribution 'Constitutions Challenging the International Court of Justice's Jurisdiction to Adjudicate Territorial Disputes in Latin America', Walter Arévalo-Ramírez presents domestic constitutions as a source of jurisdictional challenges to international law. Looking at delimitation disputes concerning Nicaragua, Honduras, El Salvador, Colombia, and Venezuela, Arévalo-Ramírez zooms in on how Latin American states have used territory clauses in their constitutions to pick and choose which (parts of) judgements they adhere to, thus challenging the International Court of Justice's jurisdiction.

Another approach to delimitation and borders is present in Greta Reeh's contribution. She devotes her piece 'Rejection at the Frontier' to the principle of non-refoulement. After contrasting the principle's design under the Geneva Convention on the Status of Refugees and International Human Rights Law, Reeh advocates for stronger and more stringent protection of migrants from rejections at the border in accordance with the presented United Nations (UN) Treaty Bodies' approach and in line with a general trend of the proceduralisation of human rights in the UN Treaty Body system.

Finally, E. Tendayi Achiume reflects on racist border enforcement more broadly. She connects the event of the Black teenager named Eugene Williams who, in 1919, drowned after a White beachgoer threw rocks at him for swimming into the 'Whites only' part of Lake Michigan and the tens of thousands Black Africans and other refugees, including the Nigerian girls named Marian Shaka and Osato Osaro, who have met their death in the Mediterranean Sea as a result of European border enforcement. Achiume elaborates on how jurisdiction functions as a *conjuring technology* – a mystical device that transforms otherwise unthinkable things into things that are seen as irrefutable truths. This conjuring technology works together with the racial technology of borders and forms the core of the international legal rules that serve as a permissive doctrinal backdrop to many national legal schemes of racialised exclusion of non-nationals. By looking at race, borders, and jurisdiction in this way, it becomes apparent that the death of Marian Shaka, Osato Osaro, and of so many others is not something that happens outside of the international legal system but as an intended outcome of international legal rules.

III. Critique & Doctrine: Who Speaks and Who Listens?

As the previous section illustrates, the participants of the conference engaged with the indeterminate concept of jurisdiction using different methods and approaches. Although the conception of the conference was informed by the work of Critical Legal Studies (CLS), we attempted to reflect the methodological diversity of actors participating in the jurisdictional discourse in international law. All too often, those who wholeheartedly align themselves with one school of thought engage in battles against those who pledge allegiance to another. The conference, in contrast, wanted to offer a forum where different approaches can meet, enabling different intellectual affiliations to speak and listen.

While it is true that a conference on jurisdiction is only comprehensive if it also discusses the role of states, such an event does not have to take states as its starting point, but it does have to focus on them as pivotal actors. However, we have done more than that: State-centric adjudication was – unsurprisingly – not only marginally discussed at the conference. Presentations on cognitive biases of judges, consent as a basic prerequisite of judicial power, citation discourses of international human rights courts, effects of adjudicative practice on refugees, torturers, and inhabitants of secessionist entities, and state responses to judicial decisions occupied major parts of the conference. However, the conference was not intended to focus solely on this

multifaceted yet classic dimension of jurisdiction. Using a wide array of methodologies and approaches, the conference looked beyond traditional technological, medial, terrestrial, and public spheres to consider the jurisdictional power of civic tribunals, blockchain, movies, outer space, and the private sphere.

Jurisdiction as a term certainly does not run the risk of limiting the debate. Thus, while we are proud of the diversity of topics, methods, and approaches, we look forward even more eagerly to what is still to come.

IV. Emerging & Established: Challenging Hierarchies in Legal Scholarship

The presentations, of course, were embedded in a certain context being a conference designed by us as the organising team. We seized the occasion to think not only about aspects of jurisdiction but also to critically (self-)reflect issues of knowledge production and legal education. In other words, we understood the conference as an effort in a broader project to challenge hierarchies in academia. The work of critical legal scholars dating back to the 1970s provides the theoretical grounding,[14] particularly Duncan Kennedy's famous critique of *legal education as training for hierarchy*.[15] In a chapter published in 1982, Kennedy describes the power structures in law schools, separating teachers and students. These power structures are established and enforced by 'frightening instruments of judgment, including not only the grading system but also the more subtle systems of teacher approval in class, reputation among fellow students,

14 See for a contextualisation of Critical Legal Studies: Mark Tushnet, 'Critical Legal Studies: A Political History', Yale L. J. 100 (1991), 1515-1544; Andrea Bianchi, *International Law Theories. An Inquiry Into Different Ways of Thinking* (Oxford: Oxford University Press 2016), 135-142.

15 Of course, Kennedy was not the only one critiquing hierarchies in law schools, see, for instance: Mark G. Kelman, 'Trashing', Stanford L. Rev. 36 (1984), 293-348 (321-326); Angela Harris and Donna Maeda, 'Power and Resistance in Contemporary Legal Education' in: Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy. A Polemic Against the System. A Critical Edition* (New York: New York University Press 2004) 168-184. Sadly, recent events have shown that an academic engagement with hierarchy in legal academia does not always equip academics with the ability to act in a way that challenges rather than upholds said hierarchies. Duncan Kennedy was one of the few professors who did not retract their signature from a letter defending John Comaroff amidst sexual assault allegations. For more information, see Michael Levenson and Anemona Hartocollis, Colleagues Who Backed Harvard Professor Retract Support Amid Harassment Claims, New York Times (9 February 2022), <https://www.nytimes.com/2022/02/09/us/harvard-sexual-harassment-letter.html> (last accessed 22 July 2022).

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and out-of-class faculty contact and respect'.[16] This is continuously impacting and challenging students:

'Liberal students sometimes begin law school with an apparently unshakable confidence in their own competence and with a related confidence in their own left analysis. But even these apparently self-assured students quickly find that adverse judgments – even judgments that are only imagined or projected of to others – count and hurt. They have to decide whether this responsiveness in themselves is something to accept, whether the judgments in question have validity and refer to things they care about, or whether they should reject them. They have to wonder whether they have embarked on a subtle course of accommodating themselves intellectually in order to be in the ball park where people win and lose teacher and peer approval. And they have, in most or at least many cases, to deal with actual failure to live up to their highest hopes of accomplishment within the conventional system of rewards.'[17]

The critique of CLS based in the context of United States (US) law schools in the last century is (still) relevant in the academic environment in Germany today. Here, further lines of demarcation and division are established through the *Habilitation*. For instance, only scholars who have completed their *Habilitation* are allowed to become members of the relevant learned societies, the German Society of International Law (DGIR) for both public and private international law or the Staatsrechtslehrertagung for public law more broadly. The joint conferences of the AjV *and* the DGIR – which have become a fixture in the academic calendar – challenge this status quo. Since its inception, the conference format is deliberately designed to accommodate conversations across academic ranks. PhD students and early-career researchers give presentations, on which more established academics comment. This is done to not only offer valuable feedback but also to enable synergies. Both presenter and commentator, positioned in different academic contexts, have the opportunity to learn from one another.

This design, of course, has its shortcomings as well and cannot fully live up to the critique of CLS. As the conference format differentiates between speakers and commentators, it offers a meeting point but not a means to overcome academic ranks. While the design achieves to contain 'frightening instruments of judgment',[18] it leaves the contentious and constructed notions

16 Duncan Kennedy, 'Legal Education as Training for Hierarchy' in: David Kairys (ed.) *The Politics of Law. A Progressive Critique* (New York: Pantheon Books 1982), 54-75 (66). Parts of the text were later reproduced in Kennedy's famous polemic, see: Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy. A Polemic Against the System* (Cambridge: Afar 1983).

17 Kennedy, 'Legal Education' (n. 16), 66-67.

18 Kennedy, 'Legal Education' (n. 16), 66.

of emerging and established scholar in place. It could thereby face the charge that it is contributing (although implicitly and unintentionally) to the 'mystification' of legal knowledge.[19] However, where scholars meet, hierarchies are already waiting for them. This has nothing to do with determinism or fatalism, but rather with (current) limits to organising conferences aspiring to the aims presented here.

V. Equality & Empowerment: Invisible Women in International Law

Hierarchies are, of course, not only a matter of academic ranks. Sexism, racism, and other systems of oppression can lead to barriers piling up in front of young legal scholars. During the process of organising the conference, we reflected particularly on the underrepresentation of women in international law and on how we could contribute to remedying this.

Attention – first and foremost by women – has been drawn on feminist approaches to international law as well as women in international law. Hilary Charlesworth, one of the pioneers of feminist approaches to international law,[20] was elected as Judge to the International Court of Justice in November 2021. This event well deserved the celebratory remarks it engendered[21] and it demonstrates that the status quo is not immune to change. However, the data (still) shows the astounding gender inequality that has been preserved over years. Hilary Charlesworth is only the fifth woman in the 75-year history of the court.[22] The fact that women are still underrepresented can be observed not only at the ICJ but in most international (legal) institutions.[23] For example, only four out of 76 people who have held the Presidency of the

19 Cf. Kelman (n. 15), 325-326; Kennedy, 'Legal Education' (n. 16), 59, 64-65.

20 See Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law', AJIL 85 (1991), 613-645. This ground-breaking article formed later part of the book: Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law. A Feminist Analysis* (Manchester: Manchester University Press 2000).

21 The Hague Academy of International Law, 5 November 2021, <https://twitter.com/hagueacademy/status/1456668988503691268?s=21> (last accessed 22 July 2022); Philipp Sands, 5 November 2021, <https://twitter.com/philippesands/status/1456654092965711880?s=21> (last accessed 22 July 2022); Nilufer Oral, Australian judge Hilary Charlesworth elected to the International Court of Justice, 5 November 2021, <https://news.un.org/en/story/2021/11/1105002> (last accessed 22 July 2022).

22 See for an overview of all members of the court: International Court of Justice, All members, <https://www.icj-cij.org/en/all-members> (last accessed 22 July 2022).

23 For a general overview on women in the system of the United Nations, see: Charlesworth, Chinkin and Wright (n. 20), 174-187.

United Nations General Assembly were women.[24] Seven out of 229 members of the International Law Commission – that is 3,1 % – are women.[25] As J. Jarpa Dawuni puts it emphatically:

'Achieving equitable gender representation in international law bodies cannot wait. Women have held half of the sky for too long, it is time for them to be at the international seats where decisions are made about what lies below and beyond those skies.'[26]

Having this inventory in mind, and openly expressing our displeasure about the lack of female representation, our aim was to reach both gender balance and a variety of different legal backgrounds among commentators, keynote speakers, and panellists.

Here is what we achieved: Our commentators consisted of eight female and five male speakers; the Keynotes were delivered by two women and one man. After a blind peer-review process, we selected seven female and six male speakers. The welcoming speeches were delivered by three men and one woman, the final remarks came from a man. Obviously, equality in a greater context is not achieved through these kinds of practices, yet we tried to contribute a small part. To draw on Charlesworth again, we only touched upon an 'obvious sign of power differentials between women and men'.[27]

Focusing on representation of women, we have missed other aspects of a diverse conference. To name only one example, many of the speakers and commentators are either European or have an academic background from Western countries. Still, engaging in the already existing struggle, we hope to have contributed despite our shortcomings and despite the structural difficulties to a more inclusive academic world in international law.

Rather than offering a fixed standpoint from which we can assess structural barriers, hierarchies, and how these interact with academic methodologies and approaches, this special issue seeks to emphasise that it is valuable to raise one question over and over again: Who speaks international law?

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24 United Nations, Gender Equality and the UN General Assembly: Facts and History, <https://www.un.org/en/delegate/gender-equality-and-un-general-assembly-facts-and-history> (last accessed 22 July 2022).

25 From 1947-2021, see: J. Jarpa Dawuni, 'Why the International Law Commission Must Address Its Gender and Geography Diversity Problem', OpinioJuris (1 November 2021), <https://opiniojuris.org/2021/11/01/why-the-international-law-commission-must-address-its-gender-and-geography-diversity-problem/> (last accessed 22 July 2022); also, pointing towards geographical inequalities: no African woman has been elected to the International Law Commission.

26 Dawuni (n. 25).

27 Hilary Charlesworth, 'Feminist Methods in International Law', AJIL 93 (1999), 379-394 (381).