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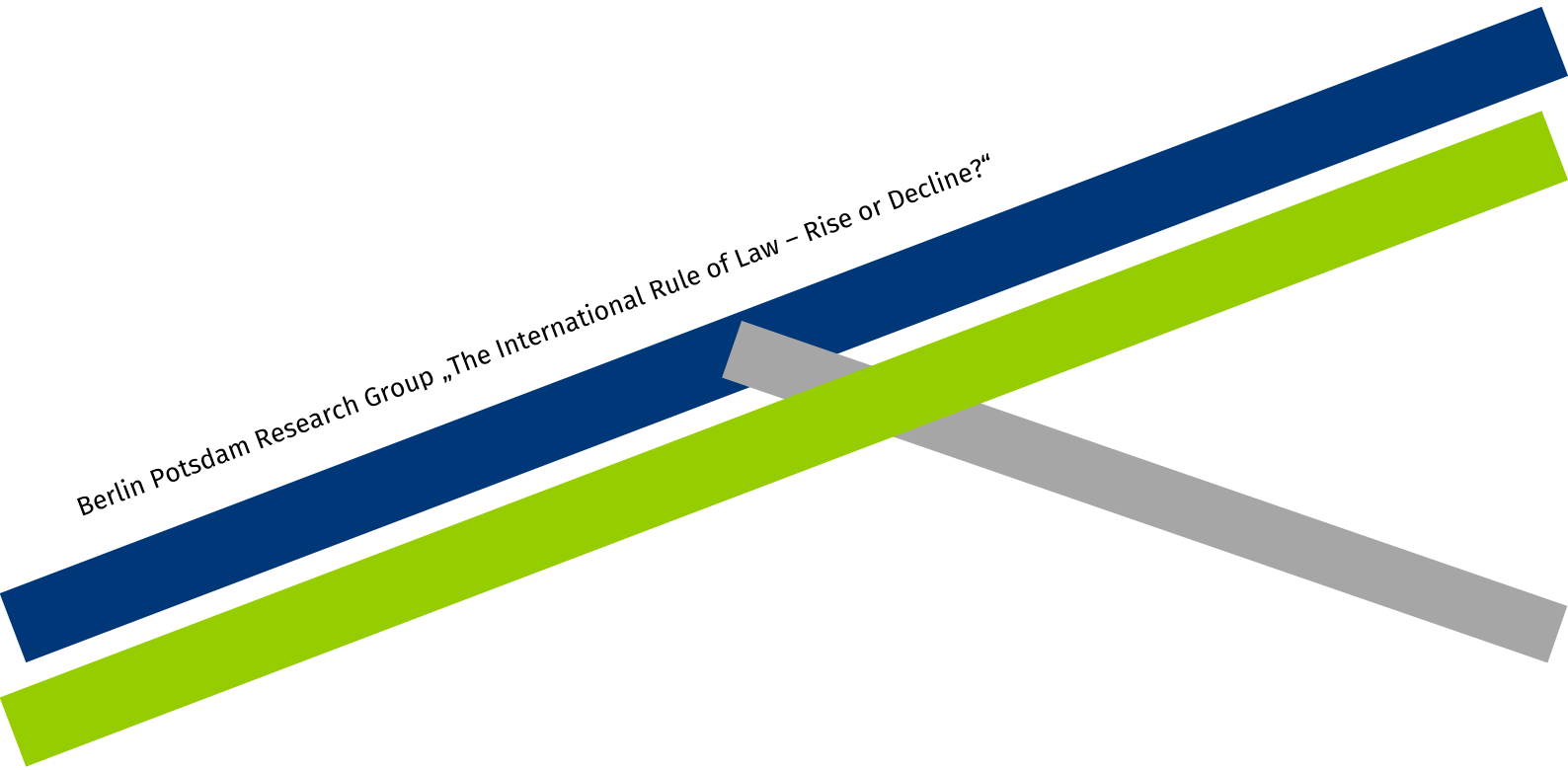

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Cooperation and Conflict: Diverging Trends in the Relationship Between International and Domestic Law

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This article will be published in Helmut Aust, Heike Krieger and Felix Lange (eds.), Research Handbook on International Law and Domestic Legal Systems (Edward Elgar, forthcoming).

Abstract:

This chapter of the emerging new Research Handbook on International Law and Domestic Legal Systems offers concluding observations on the centrality of different visions of the international for the relationship between domestic and international law. The contributions demonstrate that competing perceptions of the international as a space for co-operation and solidarity on the one hand and as an arena of conflict on the other are competing with each other. The editors point to key doctrinal responses to these opposite trends: accepting conflict, deference by international courts, the presumption of compatibility and the deepening of pluralist approaches.

Keywords: International law; domestic law; co-operation; conflict; opposing trends

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Contents:

1. Introduction

Is the relationship between international law and domestic legal orders just another doctrinal question or can this relationship serve as a prism through which broader trends in the international realm and their relation to the domestic can be assessed? The "Research Handbook on the Relationship between International Law and Domestic Legal Systems" sets out to demonstrate that the role of context[4] is essential for our understanding of ideas, techniques, and perspectives concerning the relationship between international and domestic law. Assuming that legal ordering and political ordering are mutually dependent we invited the authors of this Handbook to reflect on the impact that the transformation of the international order may exert on legal concepts. If current shifts entail a diffusion of power, agency, and political consciousness among a multitude of state and non-state actors[5] and a multiplication of diverging claims and interpretations[6], do diverging *Weltanschauungen* which govern different domestic systems and their legal ideas have repercussions for the design of the rules of the international legal system? Vice versa – do geopolitical and other shifts in the international order have an impact on domestic conceptions on how international law is integrated in national legal orders? Based on the contributions to the Research Handbook, we argue that different conceptions of the international by domestic actors impact the way in which the relationship between international law and national legal systems is constructed.

2. Different Visions of the International

Juxtaposing the international and the domestic is part of the foundational structural binarities on which law is traditionally built. In the words of Andrew Hurrell, the dichotomy between the international and the domestic is 'one of the essential axes of legal and normative theorizing'.[7] Like the dichotomies of war and peace or public and private, it has been at the centre of international (legal) ordering since early modernity. Because of the traditional focus on the sovereign state in international law, it is inextricably linked with the dichotomy of the public and the private, fragile as these boundaries might be, as the contribution of Martin Clark to this Handbook reminds us.[8]

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[4] Philip Selznick, '"Law in Context" Revisited' (2003) 30 Journal of Law and Society 177: 'In law-and-society theory, the phrase 'law in context' points to the many ways legal norms and institutions are conditioned by culture and social organization. We see how legal rules and concepts... are animated and transformed by intellectual history; how much the authority and self-confidence of legal institutions depend on underlying realities of class and power; how legal rules fit into broader contexts of custom and morality. In short, we see law as in and of society, adapting to its contours, giving direction to change.'

[5] Andrew Hurrell, 'International Law within a Global International Society' in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline? – Foundational Challenges* (OUP 2019) 90, 99; cf. Amitav Acleinharya, 'After Liberal Hegemony: The Advent of a Multiplex World Order' (2017) 31 Ethics & International Affairs 271.

[6] Heike Krieger and Andrea Liese, 'Introduction' in Heike Krieger and Andrea Liese (eds), *Tracing Value Change in the International Legal Order* (OUP 2023) 15.

[7] Andrew Hurrell, 'Domestic politics and international relations', in Helmut Aust, Heike Krieger and Felix Lange (eds*), The Research Handbook on the Relationship between International Law and Domestic Legal Systems* (Edward Elgar Publishing, forthcoming), Ch. 2.

[8] Martin Clark, 'The 'domestic' and 'international': A brief conceptual history', in *Research Handbook* (n 7), Ch. 3.

Once states as sovereign political communities emerge, interact, and impact one another, the need for ordering their political and legal relations arises, as Andreas Paulus details in his chapter in this volume.[9] Creating legal relationships between the international and the domestic is an essential part of these order-building processes. They do not only require answering the questions of how the interaction between these political communities is organized and how their overlapping jurisdictions are dealt with. Rather, they also need to address whether these communities are only responsible for their internal affairs or whether they have a responsibility for conceptualizing and regulating concerns that transcend these communities and whether the regulation of these concerns in turn impacts their internal affairs. What answers communities will provide then depends on broader contextual perceptions, including the historical, cultural, and social context. As Russell Miller stressed in his contribution, the conceptualization of the relationship between the domestic and the international 'is contingent, convoluted, and contested.'[10]

One defining element for the conceptualization lies in the prevailing historical, cultural, or political perceptions of the international which exist on the domestic level. For the degree of openness of the domestic order towards international law, it marks a foundational difference in whether the international is seen as 'an arena of conflict while the national is the realm where societies can realize common goals' or whether states are seen as 'agents or interpreters of some notion of an international public good and some set of core norms against which state behavior should be judged and evaluated'.[11] The difference plays out concerning the effectiveness and legitimacy of international law. If one adopts the former view, one may tend to stress the intrusive nature of international law in the domestic realm. If one follows the latter, the emphasis may rather lie on the legitimate role of international law in shaping the domestic legal order.

Whether or not states are seen as agents of an international public good is reflected in the way national legal orders deal with the implementation of and compliance with international law. After all, international law's effectiveness depends on national law for its implementation in a vast realm of its regulatory efforts. Whether normatively or factually, the less states are willing to implement international law, the more it becomes a hollow reference frame unable to fulfill its purposes. The more states are willing to act for some imagined common good that transcends national political communities, the more international law will become a blueprint for social change that affects the internal self-perceptions of these communities. However, this raises in turn legitimacy concerns from the internal perspective. Tamar Hostovsky Brandes has argued in her contribution that national constitutions are often considered to express idealized conceptions of a state's self-identity. They define political communities and reflect shared political values. This identity may or may not be shielded

[9] Andreas Paulus, 'Past and future of sovereign statehood', in *Research Handbook* (n 7), Ch. 16; cf. Hedley Bull, The Anarchical Society: A Study of Order in World Politics (Red Globe Press London 1977) 9.

[10] Russell Miller, 'Analogizing the intersection of international law and domestic law: The European and American experience', in *Research Handbook* (n 7), Ch. 7.

[11] Hurrell, 'Domestic politics and international relations'(n 7).

through legal techniques against external influences that are considered to be illegitimate. The extent to which national constitutions allow outside actors to impact these national identities depends on a state's assessment of the legitimacy of international law. It is influenced by public discourses about the desirability of a normatively enhanced international order built on deeply entrenched forms of international cooperation and solidarity.[12] Opening up to international law represents an act of balancing a state's internal self-perceptions, identity markers, and ideologies as they are laid down in their constitutions with their interest in international engagement. Where this balance shifts globally, irrespective of whether we are looking at democracies or autocracies even, a new type of international law may be seen to emerge.

3. Two Diverging Trends

Throughout the contributions to the Research Handbook, the opposite visions of the international as a space for co-operation or an arena of conflict come to the fore in the analyzed ideas, techniques, and perspectives on the relationship between international law and national legal systems. They affect how legal actors think about this relationship.

a) The International as a Space for Co-operation and Solidarity

Some of the contributions highlight contexts in which the vision of the international as a space for co-operation and solidarity has contributed to procedural and substantive legal developments. They are related to a reading of the relationship between the international and the domestic as a response to a constant expansion of international law in light of increasing planetary challenges and persisting needs for connectivity.

aa) Proliferation of Parliamentary Participation

Since the 1980s, intensified international and transnational co-operation in economic, social, and cultural affairs and the diffusion of power and agency among state and non-state actors instigated a 'proliferation of constitutional references to international law'.[13] The rise of international organizations and multifaceted treaty practices led to an intensified impact of international law on the internal policies of states and pushed for – formal or informal – constitutional changes that broadened parliamentary participation in foreign affairs. In this regard, some of the examples provided by Thomas Kleinlein reflect to what extent national constitutions responded to the increasing impact of the international on the domestic. They range from Ecuador's constitutional requirement to seek

[12] Tamar Hostovsky Brandes, 'International human rights and constitutional protections – Towards a presumption of compatibility', in *Research Handbook* (n 7), Ch. 10.

[13] Thomas Kleinlein, 'International law-making: Domestic channels to express consent to be bound', in *Research Handbook* (n 7), Ch. 8.

legislative approval for treaties impacting on national development issues to clauses in the constitutions of petroleum-exporting countries like Bahrain, Chad, and Kuwait about the special importance of the natural resources of these countries.[14]

In general, the proliferation of international law-related constitutional provisions was not seen to represent a kind of backlash policy, but rather a way to balance the relationship between international law and the domestic legal system in a more nuanced way given the increasing relevance of international law for addressing international as well as domestic public goods. Thus, parliamentary participation comes into play where treaties touch upon legislative competences or address more foundational issues of national importance. Concerns for the domestic separation of powers as well as domestic human rights required these more detailed and more sophisticated constitutional regulation. In his contribution, Kleinlein describes this development as a broader trajectory constantly curtailing the executive's prerogative in foreign affairs albeit pointing to an equally wide-spread use of executive agreements and agreements in simplified form as mechanisms to circumvent requirements of parliamentary participation. Importantly, this trajectory is not limited to democratic systems, but can also be found in autocratic states with China as an important yet sometimes inconsistent case in point.[15]

bb) Demands of the International on the Domestic

Next to these procedural consequences of a rise of international co-operation, there is a substantive side. In particular, in the realm of human rights, international law has exerted a significant substantive impact on the domestic to which national constitutions and national law have opened up in many states around the world. In his contribution, Jure Vidmar explains the extent to which the jurisprudence of regional human rights courts in Africa, Europe, and Latin America has developed standards that affect the institutional design and procedural organization of domestic state institutions and the political system, for example concerning the electoral process.[16] Based on case law from the ECtHR, the African Court on Human and Peoples' Rights and the IACtHR, Vidmar suggests:

> 'All three regional human rights courts have thus developed certain demands on the domestic institutional design of states party to the particular human rights treaty. Such demands do not impose one particular institutional model and leave some leeway to the domestic level. It is

[14] Ibid.

[15] Ibid., with a reference to Pierre Hugues Verdier and Mila Versteeg, 'Separation of Powers, Treaty Making, and Treaty Withdrawal: A Global Survey' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 135; Pierre Hugues Verdier and Mila Versteeg, 'International Law in National Legal Systems: An Empirical Investigation' (2015) 109 American Journal of International Law 514, 518; Pierre Hugues Verdier and Mila Versteeg, 'International Law in National Legal Systems: An Empirical Investigation' in Anthea Roberts et al (eds), *Comparative International Law* (OUP 2018) 214.

[16] Jure Vidmar, 'Demands of the international on the domestic', in *Research Handbook* (n 7), Ch. 5.

> understood, however, that the domestic institutional design needs to be compatible with tenets of democratic political order.'[17]

Praggya Surana draws our attention to how the demands of international law may empower marginalized groups, oppositional forces, and activists in national societies who advocate for 'a more progressive interpretation of rights'.[18] Against the background of the Indian experience, she highlights how courts were able to achieve a higher standard of minority protection based on the activism of these groups. She shows to what extent the Indian Supreme Court could rely on internationally binding and non-binding human rights principles for expanding the constitutional interpretation of human dignity. This allowed the court to develop a more complex reading of the intersectionality of discrimination to the benefit of women and LGBTQI+ rights.[19]

cc) Resistance and Pushback as Recalibration

Still, regional and domestic courts operate in a field of tension between promoting domestic democracy while often being exposed to criticism for exerting an illegitimate impact on national domestic democracy or human rights. The latter concern lies at the heart of the Kadi[20] and the Ferrini[21] sagas. It is disputed in the literature to what extent this development is part of recalibrating the balance between domestic and international law in view of the expansion of international law and the increasing impact of international tribunals or whether this is an early indication for more foundational shifts in the international order that highlight the conflictual nature of the international.

As the contribution by Apollin Koagne Zouapet shows, there is by now a well-entrenched repertoire of techniques of 'resistance and pushback', by which domestic courts stake out an independent ground vis-à-vis international law.[22] This repertoire finds support in a foundational criticism voiced against the impact of international tribunals on the domestic realm which is particularly widespread in the US. Hostovsky Brandes points us to this discourse that fears that 'subordinating the constitution to international law threatens to undermine the integrity of the social contract.' According to this perspective, taking into account international law in the US legal system would be ruled out almost *a priori* as doing so would risk undermining the fragile balance between majority rule and

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[17] Ibid. See also IACtHR, Yatama vs. Nicaragua (2005), Series C No 127.

[18] Praggya Surana, 'The expansion of constitutional protections through international law', in *Research Handbook* (n 7), Ch.12.

[19] See Vishaka and Ors v State of Rajasthan, AIR 1997 SC 3011 (Supreme Court of India); National Legal Services Authority v Union of India, AIR 2014 SC 1863 (Supreme Court of India); K.S. Puttaswamy (Privacy-9J.) v. Union of India (2017) 10 SCC 1 (Supreme Court of India); Navtej Singh Johar v Union of India, AIR 2018 SC 4321, (Supreme Court of India).

[20] Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

[21] Corte di Cassazione (Sezioni Unite), *Ferrini v Federal Republic of Germany*, Judgment n° 5044 of 6 November 2003, registered 11 March 2004.

[22] Apollin Koagne Zouapet, 'Undermining, resisting or developing international law? Domestic deviations from international law', in *Research Handbook* (n 7), Ch. 11.

anti-majoritarian constraints.[23] Also Natalia Torres Zuñiga points to processes of resistance and pushback. She points out that the 'Peruvian experience shows that constitutionalization as an ongoing process of progress and unifying values is rather an illusion.'[24] In line with this type of argument, both Koagne Zouapet and Paolo Palchetti identify a recent trend in theory and practice according to which domestic courts (should) rely on value-oriented claims based on the national constitution to resist the implementation of international law at the domestic level with detrimental effects for international law's universality. The pertinent arguments rely on both organizational as well as substantive constitutional provisions. Given the perception that national courts act as 'agents of the international rule of law, impartially enforcing international law without regard for national interests', this development may be seen as particularly detrimental to any vision of the international as a space for co-operation.[25]

However, Koagne Zouapet relativizes this assessment himself. Whereas he identifies how courts across a wide range of different systems rely on constitutional values, constitutional identity, or the concept of sovereignty to shield the domestic legal order against international values, he makes two important caveats: First, resistance towards international law is the exception rather than the rule. What is required is to more clearly distinguish between cases in which national courts interact with their international counterparts to further develop the interpretation of the pertinent obligations via claims and counter-claims and those instances where national courts aim at challenging or even destabilizing the international rule of law. And second, his analysis shows that it might make sense to gauge the quality of this resistance on factors such as the independence of the judiciary in a given state. Accordingly, the democratic nature of a political system can also have an impact on the consequences that such forms of resistance then play for the international level[26], at least for those who continue to ascribe to democracy a central place among the values of the international legal system, something which can no longer be taken for granted. What is more, not all resistance to international courts is principled: As Torres Zuñiga demonstrates for the reception of the doctrine of conventionality control in the Peruvian context, it is at times less recourse to domestic constitutional values but rather political instability and an undermining of the rule of law which limits the impact of international law.[27]

[23] Hostovsky Brandes (n 12) with reference to Michael Wells, 'International Norms in Constitutional Law' (2004) 32 Georgia Journal of International & Comparative Law 429, 431.

[24] Natalia Torres Zuñiga, 'Conventionality control in the Inter-American system of human rights and its reception in the Peruvian legal order', in *Research Handbook* (n 7), Ch. 13.

[25] Koagne Zouapet (n 22) with reference to Paolo Palchetti, 'From domestic law to international law: the acceptance of domestic legal rules between deference and autonomy', in *Research Handbook* (n 7), Ch. 6.

[26] However, this observation might need further qualification. As Koagne Zouapet and Congyan Cai argue with reference to Thomas Franck – sociologically speaking – national judges are often entrenched in their national background preferring national interests over international obligations; Congyan Cai, 'International law in domestic legal systems and the future of universality', in *Research Handbook* (n 7), Ch. 19.

[27] Torres Zuñiga (n 24).

b) The International as an Arena of Conflict

Many of the current developments in legal ideas, techniques, and perspectives of the relationship between international law and national legal systems reflect a vision of the international as an arena of conflict that may contribute to an unravelling of the international (legal) order. The contributions to the Research Handbook point to populism and geopolitical shifts as drivers in this process that may eventually result in increasing interpretative dissonance in international law.

aa) Resistance as an Indication for Shifts

For example, the discourse around the resistance of national courts to decisions of international tribunals may also be seen as an indication for the (re-)emergence of a conflictual vision of the international. In view of both the normative principle of sovereign equality and the empirics of geopolitical shifts, Koagne Zouapet is probably right in arguing that it will be difficult to contain arguments on national values as a valid reason for resistance to international law to democratic states. The stakes of this approach for the international order are particularly high: 'Insisting on one's own particular standards when dealing with the global sphere ignores the need to accommodate diversity when cooperating with countries with quite different sets of values.'[28]

Such a 'legal navel-gazing'[29] may further trends that some observers consider indicating a process of unravelling of the international legal order. They fear that arising interpretative dissonances and visions of the international as an arena of conflict reveals fundamental discord about both the very functions and purposes of international law as well as 'the very structure of political order necessary to sustain the integrity of international law'.[30]

bb) Populism as a Driver for Shifts?

Many voices see populism as one driver of these developments.[31] There is an extensive discourse in the literature on how populist governments have altered constitutional provisions to curtail human rights for certain minority groups and to change organizational rules to remain in power.[32] Pertinent examples include states, such as Hungary, Israel, and Poland before the 2023 elections. Because of the entrenchment of national constitutions with international law and international adjudication, these efforts also impact the relationship between the domestic and the international. A pertinent

[28] Koagne Zouapet (n 22).

[29] Ibid.

[30] Malcolm Joergensen, 'The German National Security Strategy and International Legal Order's Contested Political Framing' (EJIL Talk!, 5 July 2023), available at https://www.ejiltalk.org/international-legal-orders-contested-political-framing/.

[31] With diverging perspectives on the phenomenon, e.g. Janne Nijman and Wouter Werner (eds), *Populism and International Law, 49 Netherlands Yearbook of International Law* (2018); Gerald Neumann (ed), *Human Rights in a Time of Populism* (CUP 2020); Lucas Lixinski and Fabio Morosini, 'Editorial: Populism and International Law. Global South Perspective', (2020) 17 Brazilian Journal of International Law 54-60.

[32] Mark Tushnet and Bojan Bugarič (eds), *Power to the People – Constitutionalism in the Age of Populism* (OUP 2022).

example concerns the interpretative constitutional concept of a presumption of compatibility of domestic and international law when international legal obligations are put under an explicit national interest reservation.[33] In her contribution, Hostovsky Brandes identifies a trend that opposes the idea of the international formulating demands for domestic constitutionalism, in particular in the field of human rights.[34] Based on their anti-elitist stance, populist governments juxtapose 'the people' with 'the global technocratic elite' in order to undermine prevalent interpretations of international law that emerged in the last three decades. This opposition is realized through eroding international legal obligations, rhetorically attacking international institutions, and refocusing international discourses on sovereignty. Because of their holistic identity policies, populist governments foster those legal rules that defend state sovereignty and shield the *domaine réservé* against international demands.[35] The extent to which this approach reflects an understanding of the international as an arena of conflict is exemplified in a statement made by two former members of the Trump administration according to which: '[T]he world is not a "global community" but an arena where nations, nongovernmental actors and businesses engage and compete for advantage.'[36]

However, not all authors of the Research Handbook share this view. To the contrary, Congyan Cai argues that populism has not exerted lasting impacts on the fabrics of international law, not least because within democracies the populist impact may only be temporary.[37] The elections in the US in 2020 and in Poland in 2023 may prove his point. Moreover, as Paul Blokker notes, some authors see populism as an instrument that may instigate reformative efforts in international law because it magnifies normative or institutional shortcomings in the international legal order. As Blokker demonstrates, populist governments not just thrash international law, but they also use international law instruments against what they perceive as a form of neoliberal-cosmopolitan hegemony. Thus, he suggests to acknowledge the 'mobilizing force of the current wave of populism and – rather than re-proposing an unlikely return to the *status quo ex ante* [...] to think in more fruitful and innovative ways about international regimes and global constitutionalism.'[38]

Such a more optimistic perspective partly depends on the underlying conceptions of populism. In any case, the concern remains that a globalization critique based on anti-pluralism, a distorted form

[33] Freedom Party of Austria, Party Programme, 'Accepting and fulfilling international obligations may not be to the detriment of the Austrian population, 18 June 2011, available at www.fpoe.at/themen/parteiprogramm/parteiprogramm-englisch/.

[34] Hostovsky Brandes (n 12); see also Paul Blokker, 'International law and populist critique', in *Research Handbook* (n 7), Ch. 17.

[35] Heike Krieger, 'Populist Governments and International Law', (2019) 30 EJIL 971, 976-7, 984; Hostovsky Brandes (n 12).

[36] H.R. McMaster and Gary Cohn, 'America First Doesn't Mean America Alone', Wall Street Journal (Europe edition) (1 June 2017) A11.

[37] Cai (n 26).

[38] Blokker (n 34) with reference to Anam Alterio, 'Reactive vs structural approach: A public law response to populism' (2019) 8 Global Constitutionalism 270 and Cédric Maxime Koch, 'Varieties of populism and the challenges to Global Constitutionalism: Dangers, promises and implications' (2021) 10 Global Constitutionalism 400.

of anti-elitism, and exclusionary identity politics can hardly offer alternative readings of international law that help to address planetary challenges.[39] Rather, it pushes towards a vision of the international as an arena of conflict.

cc) Interpretative Dissonance as a Consequence of Shifts?

The move towards a conflictual vision of the international may entail far-reaching consequences for the type of international law, we see currently emerging. Through a geopolitical lens, China's efforts to offer alternative conceptions of international law feed into the fear that – in a multipolar world with diverging spheres of influence – hegemonic powers will dominate the understandings of international law with far-reaching interpretative dissonances that may foundationally affect the functions and purposes of international law. In his chapter, Cai shows that we may see vigorous challenges to established conceptions of universality arising from Chinese law-making efforts.

Increasing its impact on law-making processes has turned into a primary Chinese foreign policy goal which shall be attained through legislative activities concerning extraterritorial issues, through furthering Chinese international legal scholarship as well as through a more proactive role of courts. Cai and Ryan Mitchell refer us, for example, to China's expansion of extraterritorial legislation, the so-called 'long-arm jurisdiction' or 'foreign-related rule of law' which can be seen as a reaction to the comparable long-standing practice of the US in the field of economic or counter-terrorist sanctions.[40] Other authors point to the Chinese government's expectation on scholarship to develop 'indigenised' conceptions of law.[41] Cai cites the Deputy President of China's Supreme People's Court, Judge He Rong, who advocates for a more proactive role of judges in international economic rule-making in the framework of the Belt and Road Initiative.[42]

From a substantive perspective, both Cai and Mitchell highlight China's attempts to establish a counter-narrative to liberal human rights conceptions in UN human rights fora. In this respect, Mitchell usefully illustrates how China is not just projecting power politics, but rather embraces informal and non-binding instruments like the Sustainable Development Goals ('SDGs') and turns them into something which he calls 'SDG authoritarianism'. In deviation from prevalent UN (or Western) interpretations, China aims to dissolve the entanglement between sustainable development and the UN's human rights framework by promoting a hierarchical conception of human rights according to which peace and development form the foundational values that take priority over economic, social, and

[39] Krieger, 'Populist Governments and International Law' (n 35).

[40] Ryan Martínez Mitchell, 'Domestic governance as critique of international law: Beijing's "SDG authoritarianism" and the contested future of human rights', in *Research Handbook* (n 7), Ch. 18.

[41] Samuli Seppänen, 'Anti-formalism and the Preordained Birth of Chinese Jurisprudence', (2018) Vol. 4 China Perspectives 31, 31-32.

[42] Cai (n 26) quoting He Rong, 'On Chinese Judiciary Participation in the Formation of International Economic Rules' 2016 (1) International Law Studies 3, 9.

cultural rights which are in turn prioritized over civil and political rights.[43] These efforts run, in particular, against the 1993 Vienna Declaration and Programme of Action. The emphasis on peace and development as foundational values for human rights shifts the focus from the individual to the state as the guardian of these values and offers a further legitimization of state sovereignty against international monitoring via human rights bodies.[44] To this end, the Chinese government has issued several pertinent white papers since the last decade – as Cai demonstrates. The 2019 paper on 'Seeking Happiness for People: 70 Years of Progress on Human Rights in China' formulates a preference for a right to development, while the 2021 paper on 'Whole-Process People's Democracy' contests conceptions of representative democracy in favor of 'whole-process participation of people'. The non-ratification of the International Covenant on Civil and Political Rights completes the picture.[45] These efforts culminate in the 2023 'Global Security, Global Development, and Global Civilization Initiatives', which are seen to be directed against the SDG's multi-stakeholder processes.[46] While universality remains a key analytical category against which also Chinese approaches to international law define themselves, the efforts of the Chinese government reflect an understanding of the international as an arena of conflict. In the words of Mitchell: 'Beijing's messaging on SDG-based governance carries clear implications for the juxtaposition of a "Chinese approach" or "Chinese solution" (Zhongguo fang'an) for developing states, as contrasted with Western liberal democracy.'[47]

4. Doctrinal Responses to Diverging Trends

It seems to be emblematic of the 'complex, hybrid and contested character of international society' that two diverging trends based on two different visions of the international – as a space for cooperation and an arena of conflict – exist simultaneously at present. It reflects Hurrell's observation that the international society

> 'faces a range of classical Westphalian challenges (especially to do with the threat of major power war and power transition) … in a context marked by strong post-Westphalian characteristics (in terms of the material conditions of globalization, the changed character of legitimacy, and the changed balance between the international and the domestic, even in large, introspective societies.'[48]

[43] On Chinese understandings of the SDGs see also Helmut Aust and Alejandro Rodiles, 'Cities and Local Governments: International Development from Below?' in Ruth Buchanan et al (eds), *The Oxford Handbook of International Law and Development* (OUP 2023) 207, 221-24.

[44] Martínez Mitchell (n 40).

[45] Cai (n 26).

[46] Martínez Mitchell (n 40); on the role of China as a rising hegemon in a changing world order; see also Moritz Rudolf, 'Xi Jinpings Rechtsstaatskonzept und das Ziel der Neudefinition internationaler Regeln', Democratic Futures Policy Papers, available at https://www.democraticfutures.de/policy-paper-moritz-rudolf; see also Heike Krieger, 'Von den völkerrechtlichen Fesseln befreit?', (2023) 62 Der Staat 579, 583-585.

[47] Martínez Mitchell (n 40).

[48] Hurrell, 'Domestic politics and international relations' (n 7).

These simultaneities point to the fact that the interdependence that post-Cold War globalization has brought about may have changed its face, but it has (not yet?) gone away.

The authors of the Research Handbook are aware of the complex challenges current approaches to legal ordering are facing. The questionable explanatory value of the 'old' theories of monism and dualism is shared widely among the authors of the Handbook. As the contribution by Geir Ulfstein makes abundantly clear, the theories are not helpful in establishing who has the 'last word' in situations in which international law and domestic law clash.[49] Instead, our authors offer a full panoply of doctrinal responses to better understand and adapt the legal techniques for dealing with the relationship between international law and domestic legal systems to a complex context in flux. These responses range from path-dependent efforts of reconstruction over reform approaches to more far-reaching conceptualizations. They include embracing the necessary conflicts between the international and the domestic, a call for a more conscious use of deference by international tribunals, a plea for the presumption of compatibility, and a deepening of pluralist perspectives.

Among the contributions to the Research Handbook, the prevailing view is that some level of conflict between international law and domestic law will be inevitable. While recognizing that such conflicts can have harmful systemic consequences, Palchetti argues to embrace the inevitability of this state of play. This would be, in his view, better than to think of built-in carve-outs in international law which would mitigate the danger of conflicts arising in the first place. Rather, conflict should be taken for what it is.[50] Again, it is notable that to Palchetti, this does not mean embracing a *traditional* dualist perspective, even though it can be remarked that the inevitability of conflict is a well-established trait of dualist approaches going back as far as the works of Heinrich Triepel.[51]

Palchetti engages, in particular, with the suggestion that adherence to national fundamental principles could justify violations of international law, akin to being a circumstance precluding wrongfulness.[52] He stresses that such a proposal would eventually prove to be too broad since it opens space to unilateral definitions of what is justified under international law. The same applies to suggestions that a conflict between international legal obligations and a domestic constitutional provision could be understood as a conflict between two international legal obligations, if the latter is also protected under international law. This leads to the consequence that it is up to the national court to decide the conflict. Given that in such cases the substantive outcome will likely differ from state to state it would foster unilateral interpretations and add to international law's ambiguities.[53] This suggestion may indeed come at the cost that current geopolitical shifts result in far-spreading interpretative

[49] Geir Ulfstein, 'International and national law: who has the last word?', in *Research Handbook* (n 7), Ch. 9; see also Study Group on Principles on the Engagement of Domestic Courts with International Law (International Law Association, 7 May 2011 – 12 November 2016).

[50] Palchetti (n 25).

[51] Heinrich Triepel, *Völkerrecht und Landesrecht* (Hirschfeld 1899).

[52] Palchetti (n 25).

[53] Ibid.

dissonances which put an international consensus as to what international legal obligations mean in danger.

a) Deference by International Courts

The contribution by Ulfstein shifts the responsibility for minimizing potential norm conflicts to the international level. He argues in favor of a more conscious use of deference by international tribunals – what he calls 'a new form of argumentative sovereignty.'[54] In this respect, the ECtHR's concept of the margin of appreciation could be a guiding principle for other international tribunals as well. According to Ulfstein, such a kind of deference means that 'the international court will not determine the correct interpretation or implementation of the international obligation but leave some discretion to the domestic level.'[55] For him, such an approach could nudge domestic actors to better explain their policies with a view to the applicable international law for gaining a greater regulatory leeway vis-à-vis international judicial control. National discretion may vary depending on which branch of public authority has taken the decision under review. For this argument, he relies on the idea of a dialogue between courts which has long been discussed in pertinent academic discourses in Germany.[56] An open question in this regard is to what extent such an approach might also risk diluting the normativity of international law. When international courts and tribunals, and especially those in the field of human rights protection, adjust their case law too willingly to the expectations of states, they may jeopardize their original mandate to protect the most marginalized and vulnerable individuals – a development we may already be seeing in the case-law of the ECtHR on the human rights protection of migrants and refugees, where the Strasbourg case law took a sharp turn from being a strong force for the protection of individual rights to accommodating the interests and demands of state parties to grant them more leeway in how they deal with questions of migration.[57]

While Palchetti's criticism of unilateralism and normative ambiguity looms in the background the still overall positive experiences with the dialogues between national courts and the ECtHR argue in favor of this approach. Yet, it begs the question of to what extent such an approach only works in the context of an overall international law-friendly environment on the domestic level because it is still closely tied to a perception of the international as a space for co-operation and solidarity. Recent years have increasingly seen national courts develop various strategies of resistance against the Strasbourg Court, to the degree that academic commentators have begun to talk of 'principled

[54] Ulfstein (n 49).

[55] Ibid.

[56] See, for instance, Mattias Wendel, 'Richterliche Rechtsvergleichung als Dialogform: Die Integrationsrechtsprechung nationaler Verfassungsgerichte in gemeineuropäischer Perspektive' (2013) 52 Der Staat 339-70.

[57] On the precarious construction of legal arguments in this context see Prisca Feihle, 'Asylum and immigration under the European Convention on Human Rights – an exclusive universality?' in Helmut Aust and Esra Demir-Gürsel (eds), *The European Court of Human Rights – Current Challenges in Historical Perspective* (Edward Elgar Publishing 2021) 133, 150-55; Jürgen Bast et al, *Human Rights Challenges to European Migration Policy* (Nomos 2022) 251-253.

resistance', when these national courts do not merely disregard the Strasbourg case law but frame it in terms of their adherence to fundamental values deriving from domestic constitutional law.[58]

b) Presumption of Compatibility

Hostovsky Brandes offers another approach that ultimately relies on an international law-friendly environment in democratic states under the rule of law, but unlike Ulfstein shifts the burden back to domestic courts. She considers it as important to normatively bind domestic courts via a rebuttable presumption of compatibility of constitutional law with international law.[59] Her concerns are, in particular, directed against the criticism of the 'undemocratic nature' of international law. She models her proposal on the example of the South African constitution which includes in Article 39 (1) (b) a reference to international law according to which 'when interpreting the Bill of Rights, a court, tribunal or forum must consider international law'. In the jurisprudence of the South African Constitutional Court, this has led to a refined balancing process between the domestic and the international.[60] Hostovsky Brandes justifies the rebuttable nature of the presumption by pointing to the democratic deficits of international law, which in her view justify that political communities 'uphold their internal' sovereignty.[61]

The technique which is also known in German constitutional practices[62] might indeed offer a useful tool for resolving pertinent norm conflicts. However, to what extent it may be helpful in an environment that is hostile towards international law as is the case in some states with populist governments remains questionable. The example of the party program of the Freedom Party of Austria comes to mind. Where 'accepting and fulfilling international obligations may not be to the detriment of the … population'[63] the refutable nature of the presumption combined with the unprecise nature of what 'detriment' means may contribute to constantly outweighing international law concerns. At the same time, the presumption of compatibility may only offer an appropriate instrument for constitutional interpretation as long as domestic actors can reasonably entertain a vision of the international as a space for co-operation and solidarity. The extent to which legal techniques of regulating

[58] See further Marten Breuer, 'Principled resistance to the European Court of Human Rights and its case law: a comparative assessment' in *The European Court of Human Rights* (n 57) 43.

[59] Hostovsky Brandes (n 12).

[60] See specifically on the South-African context Dire Tladi, 'Interpretation of Treaties in an International Law-Friendly Framework: The Case of South Africa' in Helmut Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts – Uniformity, Diversity, Convergence* (OUP 2016) 135; it can be noted that the international law-friendly environment has also increasingly come under pressure in the South-African context, see Dire Tladi, 'A Constitution Made for Mandela, a Constitutional Jurisprudence Developed for Zuma: The Erosion of Discretion of the Executive in Foreign Relations' in Helmut Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law – Bridges and Boundaries* (CUP 2021) 215.

[61] Hostovsky Brandes (n 12).

[62] Helmut Aust, 'The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective' in Jacco Bomhoff et al (eds), *The Double-Facing Constitution* (CUP 2020) 345, 365-71.

[63] Freedom Party of Austria, Party Programme, 18 June 2011, available at www.fpoe.at/themen/parteiprogramm/parteiprogramm-englisch/.

the relationship between the international and the domestic depend on preconceptions of the international is revealed in the justification of the German Federal Constitutional Court for applying the presumption of compatibility: 'The Basic Law wants a far-reaching friendliness towards international law, cross-border co-operation, and political integration into a gradually developing international community of democratic constitutional states.'[64] The quote highlights that the idea of open statehood entrenched in the German Constitution is eventually conditioned on Eurocentric perceptions of international law, i.e. on the assumption that international law essentially reflects and reenforces values akin to domestic ones.[65]

c) Deepening Pluralist Approaches and the 'Conflict of Laws'-Approach

One conceivable escape route from inevitable and irresolvable conflict might lie in a turn to pluralist approaches. In her contribution, Dana Burchardt pleads to embrace what she calls 'the pluralism of pluralism'.[66] Her analysis of pluralism shows that pluralist approaches aim to give up the early modernist trajectory of grounding legal order building on binary categories and strict dichotomies: 'Reconceptualizing the notion of law is one of the key pluralist endeavours', she notes. Pluralism dissolves the strict differentiation between state law and non-state law, for example the public and the private, in fields as diverse as religious law and indigenous law as well as between the international and the domestic with its focus on what is perceived as transnational law. It conceives of 'hybrid regulatory regimes' rejecting the traditional strictly formalist understanding of law as well as the dichotomy of binding vs non-binding. Burchardt claims that thereby pluralist accounts are more apt to understand phenomena, such as the turn to informality in international law. She also argues that a pluralist approach would be more appropriate to integrate non-Western conceptions of law and conflicts of law and points us by way of example to Chinese practices which favor a 'discourse-based approach to conflict resolution'.[67]

Indeed, at first sight, such an approach seems to correspond more convincingly to the 'complex governance structures that have developed beyond the state' and reach far beyond inter-state relations to intricate informal network structures woven around sub-state and private market actors as well as civil society activists.[68] If states indeed lose their predominant position in the international a pluralist conception appears to be an appropriate answer. Likewise, any attempt to continue to see the international as a space for co-operation will require conceiving of more inclusive and less Eurocentric conceptions of legal structures.

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[64] BVerfGE 111, 307 (319).

[65] Krieger, 'Von den völkerrechtlichen Fesseln befreit?' (n 46) 594.

[66] Dana Burchardt, 'Looking behind the façade of monism, dualism and pluralism', in *Research Handbook* (n 7), Ch. 14.

[67] Burchardt (n 66).

[68] Hurrell, 'Domestic politics and international relations' (n 7).

Ralf Michaels argues to bring a 'conflict of laws'-mindset to the relationship between international law and domestic law. He claims that because of its rich experience with organizing the plurality of legal orders, international private law has legal techniques at its disposal which provide insightful guidance for how to conceive the relation. Michaels suggests that existing doctrines of international law can be redescribed as a choice of law-rules in the 'conflict of law'-sense. By discussing the outfall of the *Kadi* saga, he shows that this might be the best approach to explain how the different players involved staked out their respective territories of legal thought. This call is particularly useful as it reminds us that just as a strict division between international law and domestic law might not be opportune in all cases. The distinction between public and private international law can be just as artificial.[69]

Still, it is another question whether such boundaries can and should be brought down in all cases. After all, private international law is in many cases domestic law. Tearing down the walls between public and private international law might therefore also work to the benefit of particularly powerful states whose respective system of private international law is likely to have an outsize influence on international debates. Furthermore, the private law of these states can also be particularly exposed to regulatory capture by powerful actors from the business, finance and tech sectors.[70] Pluralist approaches do not only analyse and address, but also contribute to and foster the trend to break up categories, formal thinking, and conceptions of universalism thus pushing for an enduring transformation from international law to a kind of transnational postmodern law. As an unintended consequence the pluralist dissolution of form and categorization may pave the way for hegemonic powers in a multipolar world order to operationalize their competing visions of international law for resisting any claim to consensual universalist perceptions. This is why we argue for a combination of a pluralist mindset with more traditional dualist categories – a pluralistically-informed dualism. This approach acknowledges that there is no way back to the world of Heinrich Triepel and that this is so for good reasons. One need only read his 1899 book on *Völkerrecht und Landesrecht* attentively to see how his dualist theory was steeped in the racism and civilizational language of his time.[71] This history of domination can be traced back even further. As Clark has shown the construction of the binaries of domestic law and international law was used to justify British imperial claims from the 17th century onwards.[72] The contribution by Imogen Saunders and Ntina Tzouvala to the Research Handbook reminds us that international law needs to open up towards the legal concepts, ideas, and practices of non-state actors of non-Western descent, most importantly indigenous peoples whose law should find adequate recognition when, for instance, determining general principles of law under

[69] Ralf Michaels, 'International law and domestic law – A conflict of laws?', in *Research Handbook* (n 7), Ch. 15.

[70] Katharina Pistor, *The Code of Capital – How the Law Creates Wealth and Inequality* (Princeton University Press 2020).

[71] See, for instance, Triepel (n 51) 20-21.

[72] Clark (n 8).

Article 38 (c) of the ICJ Statute.[73] In more and more contexts, it is also formally binding international as well as domestic law itself, which mandates transcending of classical barriers; for instance by requiring the taking into consideration of indigenous law in the context of the USMCA Agreement between the US, Mexico, and Canada or in the form of a mainstreaming of indigenous knowledge in the context of the new BBNJ Agreement. At the same time, at least for democracies, these processes need to be embedded in democratic processes to gain the necessary legitimacy in contemporary societies. Hence, we would argue that pluralism in and of itself cannot be the sole answer – it needs to be anchored in domestic political processes that are connected to the various channels through which states express their consent to become bound by international law.[74]

5. What's next? Potential Future Avenues of Research

The contributions of the authors thus clearly demonstrate that developments relevant to the relationship between the domestic and international legal order pull into different directions. This leaves us with a paradox. How is it possible that our authors detect signs of a deepening cooperative vision of international law as well as a more conflict-oriented version at the same time? Are we in a period of transition, a *Zwischenzeit,* where we move from one dominating vision to another? Or will we have to accept that different actors lobby for competing visions so that this leaves us in a somewhat open state of play?

We cannot provide answers to this question since the situation is unstable. While the geopolitical situation is changing, it is not easy to tell where it will end up. In any case, the Research Handbook demonstrates that the different conceptions have strong effects on the relationship between the domestic and international. It seems to be safe to say that if a more conflict-laden conception of international law takes the upper hand, it will also permanently change the landscape of the debate between international law and domestic law. Future scholarship should keep sight of the implications of divergent conceptions of the relationship and continue to ponder which legal doctrines can respond best to the lingering challenges.

Moreover, we want to highlight two other issues which merit further scholarly attention. First, as we can see across many different legal systems, their constitutional set-ups are not well-equipped to ensure democratic legitimacy and participation when it comes to informal instruments. Rather, the constitutional rules deal with formally binding international law, mostly treaty law, and the role that parliaments play in this regard. To the extent that the turn to informality becomes more and more entrenched, this will raise crucial questions for domestic legal systems to respond to this development. As the chapters to the Research Handbook also demonstrate, it will not be in the interest of all states to develop robust and meaningful forms of parliamentary participation and oversight. But

[73] Imogen Saunders and Ntina Tzouvala, 'Domestic law and "civilized states": the general principles of law revisited', in *Research Handbook* (n 7), Ch. 4.

[74] Kleinlein (n 13).

liberal-minded states should try to provide for such mechanisms as long as they are still in a position to also influence the normative processes on the international level. Such an exercise might also invite to integrate into the research field of the Handbook work which looks more specifically towards the inside of the state: There is a growing awareness of the role that cities and other subnational actors can play in making, interpreting, and implementing international law. Their growing role is partly owed to the informalization of international law, a process that has opened up possibilities for new actors to enter into the game. While this is a burgeoning research field in and of itself[75], it still stands in relative isolation from the debates on the relationship between international law and domestic legal orders.

Second, future academic debates should also pay closer attention to the role that indigenous peoples and their legal systems can play in this regard, especially if calls for a turn to legal pluralism are to be taken seriously. Indigenous legal orders have a long history of negotiating their relationship with outside legal orders. Increasingly, states also set forth rules on how to accommodate a triad between international, domestic and indigenous law. The late Karen Knop has in one of her last works suggested that a fruitful approach for developing this relationship might lie in a combination between a 'conflict of laws'-approach and a critical foreign relations law[76], a sensitivity to which several of the chapters in our Handbook speak as well.[77]

This sensitivity may also allow for better integrating the planetary boundaries that we are facing into the research field of international law and its relationship to domestic legal orders. As already mentioned, the recently adopted BBNJ treaty calls for a mainstreaming of indigenous and traditional knowledge in order to achieve the objectives of this ambitious new multilateral agreement. In a related manner, domestic legal systems might enquire – where applicable – how such a mainstreaming of indigenous legal concepts might contribute to enriching not just the field of global environmental law, but more generally the interaction between different legal orders.

[75] See the contributions in Helmut Aust and Janne Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar Publishing 2021).

[76] Karen Knop, 'Foreign Relations Law: Comparison as Invention' in Curtis Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 45, 61.

[77] See Burchardt (n 66) and Michaels, (n 69).

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

The Research Group brings together international lawyers and political scientists from three institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Humboldt-Universität zu Berlin and Universität Potsdam. An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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