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Introduction

Bridges under Construction and Shifting Boundaries

Helmut Philipp Aust and Thomas Kleinlein

Foreign relations law is developing very dynamically and expanding its horizons while its relationship with public international law is notoriously complex. Like an interface, foreign relations law addresses multiple and diverse questions about how the 'domestic' relates to the 'international' sphere. This volume takes a fresh look at the 'bridges' and 'boundaries' between public international law and foreign relations law. It registers the manifold encounters between the two fields in a systematic and comparative manner and addresses pressing conceptual and practical questions. Its authors analyse both traditional and more recent functions, areas and contexts considered relevant for foreign relations law and the places where foreign relations law interacts with international law. In this introduction, we develop the questions that guide their analysis of the various encounters between public international law and foreign relations law (Section I), reflect on missed encounters between the two fields (Section II), introduce the core concepts and the approach of the book (Section III), and expose its overall structure as well as contents of individual chapters (Section IV).

I THE VARIOUS ENCOUNTERS BETWEEN PUBLIC INTERNATIONAL LAW AND FOREIGN RELATIONS LAW: GUIDING QUESTIONS

New encounters between foreign relations law and international law reflect a variety of interactions between the two fields. Essentially, the places of interaction are 'hybrid' in nature and defined by both international and domestic law.[1]

[1] For an account of hybrid international/national norms, see Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *ICLQ* 57 at 74–81.

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Foreign relations law not only 'bridges' international and domestic law or sets 'boundaries' to international law. Rather, in both capacities – as a 'bridge' and as a 'boundary' – foreign relations law is also responsive to developments in international and domestic law and, recently, subject to dynamic transformations. Due to these dynamics, the 'bridges' are constantly under (re-)construction and the boundaries keep shifting. Neither foreign relations law nor international law are fixed and stable notions.

The 'hybridity' of international and domestic law created by foreign relations law is ambivalent. If foreign relations law combines elements of both international and domestic law, this might strengthen as well as dilute the normativity of international law. On the other hand, similar concerns can be raised from the perspective of the integrity of constitutional law. Bridges significantly change landscapes, and boundaries can also considerably impact on the physical earth. In order to measure these landscapes and their transformations, the contributions to this volume address two questions: to what extent is the field of foreign relations law shaped by the normative expectations and structures of international law? Conversely, in how far is international law a product of the combined processes governed by foreign relations law and construed in the light of domestic law?

In public international law, the distinction between international and domestic law is certainly still firmly rooted in the law of treaties and the law of state responsibility. Article 27 of the Vienna Convention of the Law of Treaties (VCLT)[2] unequivocally stipulates that states cannot rely on their own domestic law in order to justify non-compliance with their obligations under international law. Yet, Article 46 VCLT is a slight opening in this regard by providing for the possibility of invalidity of an international agreement where there was a manifest violation of a provision of fundamental importance in a state party's internal law regarding the competence to conclude treaties. Article 3 of the International Law Commission's Articles on State Responsibility[3] makes a similar distinction between international and internal law, stating that the '[c]haracterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law'.

International law traditionally leaves it to states how to implement their international legal obligations and, in this regard, relies to a great extent on the

[2] Vienna Convention of the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.

[3] UNGA, 'Responsibility of States for internationally wrongful acts', UNGA Res. 56/83, UN Doc. A/RES/56/83, 12 December 2001.

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machinery of domestic law.[4] This leeway is one of the core sites for foreign relations law, to the extent that the rules in a given constitution can grant international law a certain domestic rank and effect.[5] However, international law increasingly harbours expectations about its domestic implementation. Such expectations can impact considerably on the organization of state power. An example is the customary law requirement to hold environmental impact assessments when industrial sites are likely to produce transboundary effects.[6] Even if this might seem to be just a further obligation under international law, compliance with the 'no harm principle' under international environmental law includes a procedural element.

International institutions in charge of compliance, mostly courts, pay increasing attention to domestic procedures. In the case law of the European Court of Human Rights, scholars have even traced a 'procedural turn'.[7] One aspect of this development is that the Court takes into account domestic procedures when pronouncing on the substantive merits. This means that the quality of domestic decision-making processes influences the intensity of the Court's substantive review. A number of UN bodies like the Human Rights Committee, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child promote implementation by domestic parliaments and parliamentary oversight as a complementary instrument for human rights realisation.[8]

[4] Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed. (Berlin: Duncker und Humblot, 1984), para. 848.

[5] Helmut Philipp Aust, 'The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective' in Jacco Bomhoff, David Dyzenhaus and Thomas Poole (eds.), *The Double-Facing Constitution* (Cambridge: Cambridge University Press, 2020), p. 345 at 350–1.

[6] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14 at 82–3.

[7] See, amongst others, Janneke Gerards and Eva Brems (eds.), *Procedural Review in European Fundamental Rights Cases* (Cambridge: Cambridge University Press, 2017); Thomas Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019) 68 *ICLQ* 91 (with further references); see also for a critical analysis of this development Başak Çalı and Kristina Hatas, 'History as an Afterthought: The (Re)Discovery of Article 18 in the Case Law of the European Court of Human Rights' in Helmut Philipp Aust and Esra Demir-Gürsel (eds.), *The European Court of Human Rights: Current Challenges in Historical Perspective* (Cheltenham: Edward Elgar Publishing, 2021), p. 158.

[8] On the role of parliaments in the protection and realisation of human rights, see Matthew Saul, 'How and When Can the International Human Rights Judiciary Promote the Human Rights Role of National Parliaments?' in Matthew Saul, Andreas Føllesdal and Geir Ulfstein (eds.), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond*, *Studies on Human Rights Conventions* (Cambridge: Cambridge University Press, 2017), with references.

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Beyond human rights law,[9] a 'proceduralisation' of the interface of international and domestic law can be discerned, particularly in WTO Dispute Settlement and, to a lesser extent, in international investment arbitration.[10] Arguably, this has broader implications for the interaction of foreign relations law and international law, at least in those areas of international law that are strongly 'judicialised'. Here, it is difficult to analyse the reach and authority of international law – and especially of provisions that are fairly open-ended – over domestic law independently of the authority of judicial institutions and their pronouncements.

Novel encounters like these suggest rethinking the relationship between international and domestic law and their 'site of encounter', foreign relations law. In fact, international law scholars have come to realize quite some time ago that the clear separation of international law and domestic law cannot explain phenomena of foreign administration as well as processes of integration and disintegration of states in the course of decolonization.[11] These inherently dynamic phenomena and processes presuppose the concurrent existence of international law and foreign relations law.

Public debates about the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA)[12] and the aborted project of a Transatlantic Trade and Investment Partnership (TTIP) are only two examples

[9] Irrespective of the procedural approach, see, for the notion that the ECtHR's *Hirst* case raises the general issue of the authority of international law over domestic state officials, Başak Çalı, *The Authority of International Law: Obedience, Respect, and Rebuttal* (Oxford: Oxford University Press, 2015), p. 1ff.

[10] For a procedural approach to necessity and proportionality stricto sensu, see Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy*, Cambridge Studies in International and Comparative Studies (Cambridge: Cambridge University Press, 2015), p. 149, at 149–50, 161–2; for a comparison of WTO law and international investment arbitration, see Lukasz Gruszczynski and Valentina Vadi, 'Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration: Converging Parallels?' in Lukasz Gruszczynski and Wouter Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford: Oxford University Press, 2014); for a synopsis of developments in international huma rights adjudication and WTO dispute settlement, see Thomas Kleinlein, 'The Procedural Approach in International Human Rights Law and Fundamental Values: Towards a Proceduralization of the Interface of International and Domestic Law?' (2017) 14 *ESIL Conference Paper Series*, pp. 1–22.

[11] Albert Bleckmann, *Das französische Kolonialreich und die Gründung neuer Staaten: Die Rechtsentwicklung in Syrien/Libanon, Indochina und Schwarzafrika, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Köln: Heymann, 1969), vol. 50; Albert Bleckmann, 'Fremdherrschaft und Dekolonisierung in rechtlicher Sicht' (1971) 4 *Verfassung und Recht in Übersee* 237.

[12] Comprehensive Economic and Trade Agreement between Canada and the EU (CETA), Brussels, 30 October 2016, not in force (parts are provisionally applied), (2017) OJ L11/23.

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for how deeply the 'international' is penetrating domestic legal orders. It is a truism that international law and international institutions have far-reaching implications for everybody's life. One of the prominent concerns raised by these 'mega-regionals' was about the regulatory autonomy remaining for democratic states to govern in the public interest.[13]

From the perspective of individuals, the consequences of some international legal instruments do not always differ categorically from the effects of domestic laws or executive measures, although the repercussions are usually weaker and less direct. Targeted sanctions imposed by the UN Security Council are only the most obvious example for this phenomenon.[14]

The impact of international law is not limited to the traditional sources of international treaties and customary international law (which provides for problems of democratic legitimacy of its own). It includes the secondary law produced by international organizations and many forms of what is often called 'soft law' but can also be described as informal processes of norm generation. Contrary to the actual impact of secondary law and informal instruments, which reinforces the need for democratic legitimacy, the role of domestic parliaments in their adoption and implementation is often neglected.[15]

Consequently, if ever, the claim that a clear distinction can be made between internal and external forms of state action is no longer easily tenable.[16] Rather, the strict distinction between international and internal law seems to be no more than a doctrinal remnant of the nineteenth century.

The approach of this book is to analyse not just these developments in detail, but to also take stock of the overarching narratives about foreign relations law and its relation to international law. Are there any overarching narratives which can be relied upon to look at these questions? If so, do they refer to individual jurisdictions or do they fit into more comprehensive trends?

[13] Thomas Kleinlein, 'TTIP and the Challenges of Investor-State-Arbitration: An Exercise in Comparative Foreign Relations Law' in Anna-Bettina Kaiser, Niels Petersen and Johannes Saurer (eds.), *US Constitutional Law in the Obama Era: A Transatlantic Perspective* (London: Routledge, 2018); see also the contributions in Benedict Kingsbury et al. (eds.), *Megaregulation Contested – Global Economic Ordering After TPP* (Oxford: Oxford University Press, 2019).

[14] Anne Peters, 'Foreign Relations Law and Global Constitutionalism' (2017) 111 *AJIL Unbound* 331 at 331.

[15] For a critique, see Jan Klabbers, *The Concept of Treaty in International Law, Developments in International Law* (The Hague: Kluwer Law International, 1996), vol. 22.

[16] See already Louis Henkin, *Foreign Affairs and the US Constitution*, 2nd ed. (Oxford: Oxford University Press, 1996), p. 6.

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From a bird's eye view, the course of foreign relations law is rather obscured by seemingly opposite developments: In some jurisdictions, like the United States, an established foreign affairs 'exceptionalism' (with regard to justiciability or executive power) is subject to a process of 'normalisation'.[17] At least to some extent, this development is triggered by international trends (or a new perception of these trends). At the same time, and also as a consequence of international trends, other jurisdictions are just 'discovering' or developing foreign relations law as a distinct field. This raises the question whether this discovery will lead to new forms of foreign affairs exceptionalism.

II FOREIGN RELATIONS LAW AND INTERNATIONAL LAW: MISSED ENCOUNTERS?

While the encounters of foreign relations law and international law are manifold and a careful analysis serves a better understanding of both fields, scholars in the past have often focused on either foreign relations law or international law. Indeed, parts of the history of both fields can be summarised as a history of missed encounters. At times, academics from either discipline, international law and foreign relations law respectively, look at the other with a degree of scepticism. On the one hand, some international lawyers tend to view foreign relations law as a construct which primarily serves to dilute international law's normativity through domestic law categories.[18] The US pedigree of the field only further nurtures the impression of foreign relations law as a manifestation of 'American exceptionalism'. A more inward-looking approach to foreign relations law took hold in the US literature since the mid-1990s, often in the name of domestic democracy.[19] This move has been influential also outside the United States. Accordingly, on the other hand, some foreign relations law scholars, often hailing from the background of domestic constitutional law, harbour the opposite suspicion about the potentially damaging impact of international law's more lofty and looser categories which could work to the detriment of domestic constitutional principles like democracy, the rule of law and the protection of individual rights.[20]

[17] Ganesh Sitaraman and Ingrid Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 *Harvard Law Review* 1897.

[18] Cf. Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017), pp. 104–5.

[19] Curtis A. Bradley and Jack L. Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 *Harvard Law Review* 815.

[20] See, for instance, Frank Schorkopf, 'Von Bonn über Berlin nach Brüssel und Den Haag. Europa- und Völkerrechtswissenschaft in der Berliner Republik' in Thomas Duve and

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On the whole, the history of the field reveals that foreign relations law is not simply the domestic – and parochial – counter-perspective to public international law. Even in the United States, the history of the field has been shaped in the beginning by staunch internationalists: Quincy Wright and Louis Henkin.[21] At any rate, recent years have seen a growing amount of interaction between the two fields of expertise. International lawyers are increasingly interested in the domestic contexts of international law. This trend has nurtured the emergence of 'comparative international law' as a research project. This new field of study is interested in the domestic contexts of international law, that is, in the 'similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law'.[22] Foreign relations law scholars demonstrate increasing awareness of how foreign relations law shapes international law.[23] Despite these developments in both fields, a gap in the literature remains with respect to an exploration of how the two fields relate to each other, how categories, concepts and principles are informed by debates and developments in the respective other field and how differences persist.

Recent years have also witnessed a growing fascination of international lawyers with the role that domestic courts can play for a more effective implementation of international law,[24] hence to some extent returning to thoughts of a 'dédoublement fonctionnel' articulated by Georges Scelle in the interwar era.[25] In other words, international law needs bridges as well as boundaries towards foreign relations law in order to become and remain workable. Similar observations are true from the perspective of foreign relations law: if the autonomy of constitutional orders is to be protected – and their central values upheld – this field of the law cannot allow for a direct and unconditional reception of categories of international law into its own

Stefan Ruppert (eds.), *Rechtswissenschaft in der Berliner Republik* (Berlin: Suhrkamp, 2018), p. 327 at 347–8.

21 Quincy Wright, *The Control of American Foreign Relations* (New York: Macmillan, 1922); Louis Henkin, *Foreign Affairs and the Constitution* (Mineola, New York: The Foundation Press, 1972).

22 Anthea Roberts et al. (eds.), *Comparative International Law* (New York: Oxford University Press, 2018).

23 Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), parts II, IV and V.

24 For a recent casebook, see André Nollkaemper et al. (eds.), *International Law in Domestic Courts: A Casebook* (Oxford: Oxford University Press, 2018).

25 Georges Scelle, *Précis de droit des gens: Principes et systématique; Tome 1. Introduction: le milieu intersocial* (Paris: Sirey, 1932), p. 50; see also Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law' (1990) 1 *EJIL* 210.

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normative order. Some act of translation is needed, if only to assert the authority of domestic legal orders vis-à-vis 'the international'.[26] While this, from the perspective of international law, involves the establishment of boundaries, the sheer existence of foreign relations law also points to the fact that no state is an island and exists in isolation from the international community (of states) of which it forms part. If looked at from a sociological perspective focusing on the actors of the academic debate, it becomes also apparent that foreign relations law scholars need to simultaneously rely on both the bridges and the boundaries – otherwise their field of expertise would become meaningless, at least if it should not collapse into an exercise of resistance against 'foreign' elements entering the domestic legal order.

By focusing on the bridges and boundaries between the two fields, this volume also wishes to challenge too one-sided understandings of either field. It is precisely the by now established narrative of an '*Ersatz* international law'[27] that should be challenged critically. 'Comparative foreign relations law' does not have to become a counter-project to 'comparative international law' or even to public international law itself. For both fields, the treatment of bridges and boundaries raises distinct identity questions. International lawyers are notoriously sceptical of attributing too great a role to domestic law. International law scholarship might be characterised by a certain fear that its autonomy might be at risk if the role of domestic law is made too prominent.

Accordingly, this volume aims at making a conceptual as well as a practical contribution. Its conceptual contribution lies in the various attempts of the chapters in this book to sound out the complicated relationship between foreign relations law and public international law in a more context-sensitive and diverse manner than it has been undertaken so far. While this is a contribution to the world of ideas, its import is more than just theoretical. Whereas hard-nosed scholars of political science or adherents of a realist school of international relations might frown upon the relevance of public international law, various contributions to this volume – especially, but not limited to those in Part III of the volume on powers and processes – point to the pressing real world issues which are negotiated through the categories of foreign relations law and public international law. Depending on which frame is referenced, the one analytical category and legal field may weigh heavier than the other one. Yet, they always point to each other and need to be

[26] On processes of translation see Karen Knop, 'Here and There: International Law in Domestic Courts' (1999–2000) 32 *NYU Journal of International Law and Politics* 501.

[27] Originally, this phrase was coined by Dionisio Anzilotti, *Studi critici di Diritto internazionale privato* (Bologna: Cappelli, 1898), p. 104 to characterise private international law.

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seen in some form of stereovision so as to portray the whole picture. Perspectives from the 'Global South' or semi-peripheral states like Bosnia and Herzegovina included in our volume show that many of their constitutional systems are heavily shaped by international law. International law is considered not just as a tool to advance the foreign policy agenda of a given state, but as a factor to be reckoned with for basic questions of the organisation of the polity.

III CORE CONCEPTS AND THE APPROACH OF THE BOOK

The approach of this volume is pluralistic. It includes various jurisdictions, perspectives and positions. However, contributors have developed their chapters against the background of a set of core concepts and notions. The plurality of approaches entails that some authors may harbour different understandings of such concepts or may even reject them in the first place. We consider this an asset rather than a liability of this collection, as it helps to reveal the essentially contested nature of notions such as 'foreign relations law'.

A *Foreign Relations Law*

'Foreign relations law' is neither a legal term of art nor is it a category of the law with wide acceptance across national legal systems. The notion refers to the part of domestic law that is generally concerned with the relationship between the outside of a state and its interior[28] and focuses on the interaction between international and domestic norms. While a proper field of foreign relations law has not materialised in all legal systems, we presuppose that any given state will have some kind of foreign relations law, at least to the extent that its constitution or other relevant legal sources provide for guidance on these issues. Most jurisdictions share rules and related case law that fulfil comparable basic functions in governing the status of international law and foreign affairs powers. Therefore, it is plausible that foreign relations law has been discovered (although relatively recently) as a field of comparative research.[29]

[28] Campbell McLachlan, 'Five Conceptions of the Function of Foreign Relations Law' in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019).

[29] Curtis A. Bradley, 'Foreign Relations Law as a Field of Study' (2017) 111 *AJIL Unbound* 316; Curtis A. Bradley, 'What Is Foreign Relations Law?' in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019). For earlier comparative work in this area, see the references in Thomas Kleinlein, 'Book Review:

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The function of the respective body of law or cases is both to separate the internal from the external and to mediate the inward reception of international law into the domestic legal system. It is also concerned with separation of powers and the rule of law and with facilitating the external relations of the State. A further function of this body of law is to establish rules of jurisdiction and applicable law.[30] While relying on this analytical lens of 'foreign relations law', it is not our intention to contribute to a further global spread of yet another category of US law. Rather, this volume acknowledges the important tradition that foreign relations law has had in the United States and formulates invitations to rethink this category in different contexts.

B *Public International Law*

Difficult as it is to define foreign relations law, it is even more problematic to capture the meaning of public international law in a nutshell. However, some features of modern international law are of particular importance for this book. Public international law is today obviously more than a set of rules that 'governs the relations between independent states', as the Permanent Court of International Justice famously held in its *Lotus* case.[31] The horizons of international law have greatly expanded and, while international law has become a 'comprehensive blueprint for social life',[32] this expansion affected the two most foundational organizing concepts of this body of law: sources and subjects.[33] New participants have entered the international arena and the list of the recognized subjects of international law now extends beyond states to international organizations and the individual. Many other candidates for legal personality are discussed, ranging from transnational corporations to subnational actors like entities of federal states and cities.[34] This expanding list of 'actors' in the international legal system also impacts on the

Oxford Handbook of Comparative Foreign Relations Law. Edited by Curtis A. Bradley' (2020) 114 *AJIL* 539 at 539, footnote 1.

30 McLachlan, 'Five Conceptions of the Function of Foreign Relations Law', p. 21.

31 *Case of the S.S. 'Lotus'*, Judgment, Series A No. 10, p. 18.

32 Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 *Recueil des Cours* 9 at 63–72.

33 On the importance of foundational doctrines for the operation of international law as a 'belief system', see Jean d'Aspremont, *International Law as a Belief System*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2018), chapters 3 and 4.

34 For an overview see Christian Walter, 'Subjects of International Law' in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012), p. 634; Jan Klabbers, *International Law*, 3rd ed. (Cambridge: Cambridge University Press, 2020), p. 74.

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forms of lawmaking. The newer and less established actors tend to engage in the production of normativity on the international level, yet they still find themselves – to varying degrees – excluded from the realm of formal international lawmaking in the fields of treaty and customary international law.[35]

Also states often do not opt for the conclusion of binding international agreements but see merit in more flexible instruments of a non-binding character. The old debates about 'soft law' do not fully capture this development as many important elements of contemporary international practice are situated in an ambiguous grey zone between bindingness and mere political commitment. This is the case, for instance, with respect to the Paris Agreement on Climate Change[36] and its rather novel way of setting forth obligations which leave it to the parties to define in a first step 'nationally determined contributions' (NDCs). The 'Joint Comprehensive Plan of Action' (JCPOA) between Iran and the six powers involved in its negotiation,[37] while not binding as such, was referred to in a Security Council Resolution.[38] Hence, the 'Iran deal' was made partly binding. A third example pertains to the 'Global Compact on Safe, Orderly and Regular Migration',[39] which explicitly states that it is a non-binding political framework that at the same time synthesizes many existing obligations in the fields of human rights and migration.[40]

Taken together, international law is in a process of deformalisation.[41] For foreign relations law, this has significant impacts as the key categories of the foreign relations law of most jurisdictions seem to be premised on certain

[35] This has generated interest in so-called 'informal international lawmaking', see the contributions in Joost Pauwelyn, Ramses A. Wessels and Jan Wouters (eds.), *Informal International Lawmaking* (Oxford: Oxford University Press, 2012).

[36] Paris Agreement on Climate Change, New York, 22 April 2016, in force 4 November 2016, not yet in UNTS.

[37] For the text of the JCPOA see UN Doc. S/RES/2231 (2015), Annex A.

[38] UNSC, 'Resolution on Iran Nuclear Issue', UNSC Res. 2231, UN Doc. S/RES/2231 (2015), 20 July 2015.

[39] UNGA, 'Global Compact for Safe, Orderly and Regular Migration', UNGA Res. 73/195, UN Doc. A/RES/73/195, 11 January 2019.

[40] On the relationship of the Compact with the existing legal framework see Jürgen Bast, 'Der Global Compact for Migration und das internationale Migrationsregime' (2019) *Zeitschrift für Ausländerrecht* 96; Daniel Thym, 'Viel Lärm um nichts? Das Potential des UN-Migrationsrechts zur dynamischen Fortentwicklung der Menschenrechte' (2019) *Zeitschrift für Ausländerrecht* 131.

[41] See already Jean d'Aspremont, 'The Politics of Deformalization in International Law' (2011) 3 *Goettingen Journal of International Law* 503; Alejandro Rodiles, *Coalitions of the Willing and International Law: The Interplay between Formality and Informality* (Cambridge: Cambridge University Press, 2018).

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more or less formal understandings of the established actors and forms of international cooperation and lawmaking.

C *Hybridity As an Effect of Foreign Relations Law*

As we have seen, the growing mutual enmeshment between international law and foreign relations law creates a hybrid zone where the two meet. This hybridity takes centre stage for this book on the various encounters between foreign relations law and international law. Yet, it is important to note that we do not argue that either international law or foreign relations law respectively are hybrid in nature. While, as explained above, the strict distinction between international and internal law is of limited explanatory power today, we see great merit in upholding the rather traditional view that international law is indeed international and that foreign relations law is part of a given domestic legal system.[42] Properly understood, 'hybridity' is not a characteristic but an effect of foreign relations law. As defined above, foreign relations law encapsulates the rules of domestic law about the reception of international law and about the participation of the state and its organs in the international sphere. Asserting a hybridity of foreign relations law might indeed create the risk of diluting the normativity of one of the two or even of both fields of law. International law operates on the assumption that it is distinct from domestic law. Understanding foreign relations law as a hybrid between the international and the domestic invites the construction of an '*Ersatz* international law' for domestic purposes; a tendency that is at times identified with respect to US approaches to foreign relations law.[43]

Reliance on this distinction between public international law and foreign relations law might strike some readers as rather static in nature. Yet, upholding the traditional criteria – and, if you will, the boundaries between the two – does not preclude investigating the hybrid zone that is created by the encounters of public international law and foreign relations law. At times, the same legal question can be assessed from both perspectives. Whereas traditional dualists would defend the view that one can give starkly differing answers depending on the perspective from which the question is assessed, we argue that it is a function of both international law and foreign relations law to come

[42] Helmut Philipp Aust, 'Foreign Affairs' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford: Oxford University Press, 2017), para. 10.

[43] For a critical view in this regard see Campbell McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014), para. 1.30.

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to a solution that mediates between the two without undermining the specificities of each perspective.

This rather abstract consideration can be illustrated by reference to the ever-ongoing saga of the reach of state immunity in the Italian-German relationship. When the International Court of Justice decided in favour of Germany in the *Jurisdictional Immunities* case in 2012, it upheld a strict reading of the reach of state immunity and did not hint at the possibility of future legal developments which might accommodate the concerns of Italian courts that immunity might not be appropriate for German crimes committed in World War II.[44] While the case seemed to have been settled then, the Italian Constitutional Court struck back with its by now well-known *Sentenza 238/2014*. It found compliance with the ICJ judgment to stand in conflict with the supreme constitutional principles of the Italian constitutional order, namely the right of access to court and the right to a remedy.[45] The approach of the *Sentenza* was as categorical as the reasoning of the ICJ. The Italian Constitutional Court relied on a doctrine of 'counter-limits' (*controlimiti*) and limited its analysis to the level of Italian constitutional law, not without expressing its ambition to also influence the development of international law. One might say that this 'dialogue of courts' has created a hybrid zone where arguments from international law and foreign relations law intersect and clash with each other. While both positions seem to have opted for a 'closure' of their normative system,[46] a mutual openness for the position of the other perspective might have allowed for the construction of more bridges and the erection of fewer boundaries.

D *Dimensions of Encounters: Fields, Substance and Procedure*

Where and how do such encounters play out? For analytical purposes, we have identified three distinct yet interrelated dimensions of encounters along which the enquiry of this book is structured. This triad of fields, substance and procedure lends itself to structuring our collective endeavour in the following way.

[44] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99.

[45] Decision No. 238/2014 of 22 October 2014 (English version available at: www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf, last accessed 22 January 2021).

[46] Andrea Bianchi, 'Jurisdictional Immunities, Constitutional Values, and System Closures' in Curtis A. Bradley (ed.), *Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), p. 685.

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With respect to 'fields', this book develops a number of different perspectives on how the two fields of foreign relations and public international law interact. How do the two fields perceive each other? Is the emphasis more on bridges or on boundaries? Are arguments from one field relied upon to change the law in the other? Might foreign relations law questions even be used as bargaining tools in international negotiation processes? And how do dynamics in the development of the two fields develop, for instance with respect to the overarching narrative of a foreign affairs exceptionalism versus the alleged normalisation of this field?

'Substance' allows us to catch a glimpse on the outcome of the various encounters between public international law and foreign relations law. To what ends do states and other actors pursue international cooperation? Are they conditioned by their domestic constitutions also in substantive terms? Which limits do the national constitutional framework and foreign relations law impose on the organisation of international cooperation? Does foreign relations law undergo a development of 'normalisation', meaning that the conduct of foreign relations is increasingly subjected to the constitutional and other legal standards that apply to other governmental action? If this is the case, foreign relations law will decreasingly be regarded as 'exceptional' and 'normal' constitutional standards must apply.[47]

Finally, a shift of attention to institutions and procedures also in foreign relations law is not only justified by the 'proceduralisation' of the interface of international and domestic law outlined above. The focus on 'procedure' is also warranted as large parts of foreign relations law are precisely about procedure. We argue that significant changes in the relationship between public international law and foreign relations law will materialise with respect to procedures under foreign relations law. Foreign relations law regulates the division of competences between different state organs in the field of foreign affairs and how they interact. A typical focus of this debate is the necessary amount of parliamentary participation in foreign affairs. Yet, parliamentary participation does not mean the same in a presidential system like the one of the United States and a parliamentary system as in Germany. Rather, the balance of power in foreign affairs and domestic procedures are embedded in constitutional structures and domestic legal cultures, which need to be studied carefully.

A more activist approach by some domestic courts in their control of both the executive and the legislative in foreign affairs leads to more demanding procedures. For example, the Higher Administrative Court of North Rhine-Westphalia, in March 2019, ordered the Federal Republic of Germany to take

47 Aust, 'Foreign Affairs', para. 1.

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appropriate measures to ascertain whether the use by the United States of America of the Ramstein Air Base for the deployment of armed drones in Yemen takes place in accordance with international law. This decision was set aside on appeal in November 2020. While the Federal Administrative Court stressed the margin of assessment and action of the Federal Government ('*Einschätzungs-, Wertungs- und Gestaltungsbereich*') and decided in its favour, it did not deny that the state's duty to protect includes a procedural component which relates to ensuring conformity with international law. More generally, it certainly remains the case that for both courts the question of whether international law permits armed drone missions in Yemen was not a political question, but rather a legal question, to be assessed by the judiciary.[48]

IV THE STRUCTURE OF THE BOOK

The volume is structured into three main parts that analyse the three dimensions of encounters between foreign relations law and international law developed in the previous section. A first part ('Identities and Interactions') looks at varieties and variations of the field of foreign relations law and how it relates to public international law. A second part ('Sovereignty and Cooperation') analyses substantive limits to international cooperation which often stem from domestic constitutional principles. A final main part ('Powers and Processes') turns to the processing of international law obligations through domestic categories like separation of powers. These categories fulfil an important heuristic function for the structuring of our volume. They are each characterised by built-in tensions – between the identity of the respective field and its interactions with its respective 'others', between absolute sovereignty and forms of international cooperation that lead to substantial commitments and between unchecked powers and their taming in processes. The book will be concluded by some cross-cutting observations on the bridges and boundaries between public international law and foreign relations law.

A *Identities and Interaction*

The first Part, on identities and interaction, studies diverging conceptualisations of the field of foreign relations law and looks at places where one would

[48] For the decision of the OVG Münster see *Bin Ali Jaber* v. *Germany*, Judgment, 19 March 2019, 4 A 1361/15; the decision of the Federal Administrative Court is *Bin Ali Jaber v. Germany*, Judgment, 25 November 2020, 6 C 7.19; see further on the decision by the OVG Münster Helmut Philipp Aust, 'US-Drohneneinsätze und die grundrechtliche Schutzpflicht für das Recht auf Leben: "German exceptionalism"?' (2020) 75 *JuristenZeitung* 303.

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not, from a traditional perspective, expect any foreign relations law. It develops a contextual account of how the various identities of the field have been shaped in encounters with different legal traditions and theoretical concerns. Furthermore, this part studies several linkages between and mutual effects of foreign relations law and international law. It analyses how foreign relations law affects the making of international law and how, vice versa, international law influences domestic rules on treaty making powers.

Felix Lange analyses the more informal and contextual influence of foreign relations law on the making of international law and, in particular, its use as a bargaining tool in treaty negotiations. With reference to the US position on the Paris Agreement on Climate Change, the chapter argues that domestic foreign relations law at times shapes the negotiation process by limiting possible outcomes. The example demonstrates potential effects of domestic constitutional design for the international legal structure.

Edward Swaine discusses how international law has homogenised foreign relations law relating to the creation and elimination of international treaty obligations – encouraging even those states that possess other constitutional agents to regard executive power as sufficient. This tendency has been fully expressed in the international law regarding ratification and is increasingly apparent in emerging practices of treaty withdrawal.

While these two contributions analyse modes of interaction between foreign relations law and international law and how this affects their respective identities, *Michael Riegner* poses the identity question on a different level. He contrasts two different perspectives on foreign relations law, one that developed in liberal democracies at the centre of geopolitical gravity and one shaped by the postcolonial contexts and historical experiences of countries at the periphery of the global political economy. The peripheral perspective is not exclusive to an essentialised 'South' but has increasing resonance and heuristic value in the 'North', highlighting contemporary transformations in liberal-democratic foreign relations law.

This insight is further corroborated by *Prabhakar Singh*'s chapter, which offers a critique of the notion of foreign relations law, formulated from an Indian perspective. The chapter traces the development of the case law of Indian courts on the resonance of international law in the domestic legal system and concludes with reflections on whether it is desirable to frame these cases as manifestations of 'foreign relations law' or whether this conceptual transplant would ignore the special situation of India as a postcolonial country. The chapter points to the difficulties in determining whether a given legal system has a field of foreign relations law and what the implications of such a finding are.

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This question is also reflected on in the contribution by *Frédéric Mégret*, who asks whether there is a French variant of foreign relations law. By revisiting the idiosyncratic work of the French international law scholar and practitioner Guy de la Charrière, *Mégret* brings to the fore a starkly contrasting understanding of foreign relations law which both takes international law seriously and connects it with wider geopolitical power games. Uncovering such early and non-Anglophone voices in the effort to formulate the conceptual framework of foreign relations law can help further problematise the very notion.

The first part of the volume concludes with the contribution by *Angelo Jr. Golia*, who suggests to understand foreign relations law as a form of global administrative law. Already the categorisation as administrative law is subversive as it plays with the traditional assumption that much of foreign relations law is about high politics. Using the theoretical approach of 'Global Administrative Law' (GAL), *Golia* makes a contribution which can be understood as a particular facet of the normalisation of foreign relations law through administrative law.

B *Sovereignty and Cooperation*

Part II of the volume deals with issues of sovereignty and cooperation, two notions which are at the heart of international law and find themselves in constant tension. Sovereignty often also serves as a placeholder for constitutional values, in particular domestic democratic self-determination. Foreign relations law can mediate between these concerns and the values of international cooperation, but it can also exacerbate conflict. The theoretical debates of the beginning of the twentieth century on the tension between sovereignty and the binding force of international treaties and between monism and dualism nowadays reappear in the concepts of foreign relations law and respective case law of domestic courts. Recent years have also demonstrated that foreign relations law itself is a politically contested field, and it is exactly this field where the right balance between these conflicting values is to be struck in a dynamically developing globalised world.

Niki Aloupi sheds light on concrete examples of how this tension and the mutual imbrications can be mediated. She analyses the case law of the French Conseil Constitutionnel on 'Limitations of Sovereignty'. Since this doctrine has not the least allowed the Conseil itself to take an active role in the field of foreign relations law, *Aloupi's* contribution also demonstrates how 'substance' and 'procedure' interact.

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Anna Petrig's contribution turns to another factor complicating the relationship between sovereignty and cooperation: the growing deformalisation and privatisation in international law and the impact that these developments have on the framework of democratic participation in Swiss Foreign Relations law. The chapter submits that the 'democratic participation framework' of Swiss foreign relations law is predicated on a very traditional understanding of sources and actors of international law. The chapter warns against a hollowing out of these traditional mechanisms of generating democratic legitimacy.

C *Powers and Processes*

The third and final main Part of the volume turns to powers and processes in the proverbial field where foreign relations law and international law meet. The transformations of procedures in foreign affairs and their reverberations for international law are specific examples of the interaction between foreign relations law and international law. In some legal orders, a trend towards earlier information of parliaments about imminent foreign policy decisions can be pursued. Moreover, the role of courts in foreign relations law is subject to change. In some jurisdictions, there is at least an emerging trend towards a greater role of courts in controlling the executive in foreign affairs. However, these trends do not seem to be robust but rather depend on individual subject matters and jurisdictions. While domestic procedures are themselves subject to transformation, they also impact on or transform the substance of international law foreign relations and drive innovations and change.

Dire Tladi revisits the normalisation story through the perspective of South African constitutional law. In particular, he traces how successively the role of executive discretion in this field has been diminished through case law of the courts. *Tladi* argues that the post-Apartheid constitution was a constitution made for Mandela – while subsequent case law was born out of the frustrating experience of the Zuma years. His chapter offers hence a particular perspective on the adaptability of foreign relations law to changing political circumstances – which is an important and at times overlooked factor for the implementation of international law.

The chapter by *Jean Galbraith* follows with observations on a turn from scope to process as limits to executive power in US foreign relations law. In particular, she traces how the Presidential power has undergone changes – substantive checks on the foreign affairs power were removed

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but at the same time substituted by procedural checks and limits. The chapter argues that international law has played a key role in this development.

In his contribution, *Stanisław Biernat* looks at the division of competences in Polish foreign relations law. He analyses how different parts of the executive – the Council of Ministers and the President – can clash with respect to their foreign affairs power and how this clash has been addressed in Polish constitutional practice.

Ajla Škrbić, in turn, focuses on the role of parliaments in creating and enforcing Foreign Relations Law from the perspective of Bosnia and Herzegovina (BiH). BiH is a unique case for the foundation of its constitutional framework in an international treaty, the Dayton Peace Agreement. Consequently, its foreign relations law, nascent as it is, is inextricably tied up in the various connections between international law and foreign relations law from the outset. In this sense, the contribution connects back to insights from the first part of the volume which highlighted the dependency of foreign relations law on international law for some states, in particular in the 'Global South'.

The contribution by *Veronika Fikfak* details how concepts of international law become appropriated in parliamentary discourses. Her case study focuses on UK parliamentary practice with respect to the use of force. She shows how the role of parliament has increased in decisions about the use of force in the UK context. At the same time, the role of international law has become ambiguous. Her chapter unearths the development that domestic approval for the use of force might be seen as a substitute for legitimation under international law. The chapter hence points to potentially troubled appropriations of international law categories in domestic contexts with uneasy repercussions for international law.

The third part of the volume is concluded by a contribution by *Ji Hua*, who looks at environmental governance and the role it plays in Chinese foreign relations law. In particular, this chapter takes the field of environmental governance as a case study to probe whether a field of foreign relations law exists in China or whether questions usually associated with foreign relations law in Western jurisdictions are processed through different categories. The chapter can hence also be read as a variation of *Prabhakar Singh*'s explorations on the existence (or not) of an Indian foreign relations law in Part I of the volume. At the same time, it tackles these questions from a more practical level with a view to the division of competences in the Chinese legal order.

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D *Final Reflections*

Part IV of the volume offers two sets of final reflections from *Curtis* A. *Bradley* and *Campbell McLachlan*. Both contributions reflect on the overarching questions of the volume presented in this introduction through a reading of and reaction to the individual chapters.

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