New Perspectives on the Divide Between National and International Law

Edited by
JANNE NIJMAN AND ANDRÉ NOLLKAEMPER

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Preface

This book is one of the results of the research program *Interactions between International and National Law*, funded by the Netherlands Organisation for Scientific Research under its 'Pioneer Programme' that was carried out between 2000 and 2007 at the Amsterdam Center for International Law, University of Amsterdam under the leadership of André Nollkaemper. A large part of the program was focused on developments in positive international law that reflect and cause the ever increasing and complex continuities and discontinuities between international law and domestic law. This resulted in several PhDs and academic publications by members of the research group (see <http://www.jur.uva.nl/aciluk/home.cfm>).

The research on interactions between international and domestic law as a matter of positive law was embedded in, and at the same time gave impetus to, theoretical reflections on these interactions. A series of seminars was organized to discuss the theoretical aspects of the interactions between international and domestic law. These seminars culminated in a larger conference in June 2004. Most of the chapters in the book are substantially developed versions of papers presented originally during these events. Not all participants in the seminars and conference could contribute to this book. However, their intellectual contribution is reflected in several of the chapters in this book. We thank in particular Armin von Bogdandy, Ellen Hey, David Kennedy, Benedict Kingsbury, Harold Hongju Koh, Martti Koskenniemi, and Susan Marks for their contributions.

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Janne Nijman and André Nollkaemper
January 2007

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Introduction

Janne Nijman and André Nollkaemper

1. Aim of the book

This book aims to contribute to our understanding of one of the most pressing issues of modern international law: the disconnection, or 'divide', between the international legal order, on the one hand, and the legal orders of over 190 sovereign states on the other. The book contains 12 chapters that offer alternative perspectives on the relationship between the international and the domestic domain. These chapters address questions such as whether the traditionally dominant perspective of the separation or divide between international and domestic law is still valid in view of developments as globalization, the emergence of common values, and the dispersion of authority over different public and private actors. If not, what perspective can replace it? Has the time come for a (re-)assertion of a monistic perspective, or is our understanding better served by a pluralistic perspective that recognizes the complexities and incompatibilities in legal reality?

The unique nature of this book lies in the fact that the majority of its contributions are of a reflective and theoretical nature. They distance themselves to some degree from positive international law. In the latter area, in recent decades we have seen a substantial number of studies into the relationship between positive international law and national law, for instance, in the fields of human rights law,[1] criminal law,[2] and environmental law.[3] We also have seen studies of how particular states or, on a comparative basis, groupings of states, have dealt with the question of the relationship between international law and domestic law.[4] The OUP online service *International Law in Domestic Courts*[5] further adds to

[1] C Heyns, F Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002).

[2] WN Ferdinandusse, *Direct Application of International Law in National Courts* (The Hague: TMC Asser Press, 2006).

[3] M Anderson and P Galizi (eds), *International Environmental Law in National Courts* (London: British Institute of International and Comparative Law, 2002).

[4] DB Hollis, MR Blakeslee, and LB Ederington (eds), *National Treaty Law and Practice: Dedicated to the Memory of Monroe Leigh* (Leiden: Nijhoff, 2005); FG Jacobs and S Roberts (eds), *The Effect of Treaties in Domestic Law* (United Kingdom Comparative Law Series, London: Sweet & Maxwell, 1986).

[5] International Law in Domestic Courts database, available at <http://ildc.oxfordlawreports.com/>.

our knowledge of how international and domestic law interact. However, the increasing empirical information on this interaction has not been matched by studies that help us understand at a more fundamental level the directions in which the relationships between domestic legal orders and the international legal order are evolving.

Although theoretical debates on the divide between international law and national law are about as old as the phenomenon of international law itself, [6] in recent years this debate seems to have evaporated. The debates peaked in the time of Anzilotti, Triepel, Scelle, and Kelsen. Still in 1899 Triepel had sighed: 'Die Frage nach dem Verhältnisse des Völkerrechts zum Landesrecht, die auf den folgenden Blätter erhörtert werden soll, gehört zu den stiefmutterlich behandelten kehren der Jurisprudenz'.[7] In the first part of the 20th century, several courses at the Hague Academy were devoted to the topic.[8] However, during the course of the 20th century the debate came to an end. Every textbook on international law still uses the concepts of monism and dualism to describe the main perspectives on the relationship between international and national law. However, most textbooks also take the position that these perspectives are of little use in making students understand practice. A common position is that practice is not in conformity with either monism or dualism, and that one should therefore turn to practice. Brownlie noted that an increasing number of jurists wish to escape from the dichotomy between monism and dualism, holding that the logical consequences of both theories conflict with the way in which international and national organs behave.[9] In that vein, other textbooks also take the position that the dogmatic dispute on issues of monism and dualism is now irrelevant, that international law has nothing to say on the matter except for the rule that a State cannot invoke national law to justify non-compliance with international law, and that otherwise one simply has to turn to national law.[10] On the whole, modern scholarship has become pragmatic, inductive, and largely anti-theoretical. It fits in the broader trend away from abstract theories in favour of technical and practical descriptions of how things work.[11] Perhaps the silence of modern scholarship is also inspired

[6] See, eg on the 17th century emergence of the sovereign State as 'a precondition to the dualism between the international and internal legal orders that became central to the modern law of nations', R Lesaffer, 'Peace treaties from Lodi to Westphalia' in R Lesaffer (ed), *Peace Treaties and International Law in European History* (Cambridge: CUP, 2004) 13–14.

[7] H Triepel, *Völkerrecht und Landesrecht* (Leipzig: CL Hirschfeld, 1899) 1.

[8] H Kelsen, 'Les Rapports de Système entre le Droit Interne et le Droit International Public' (1926) 14 Recueil des Cours de L'Académie de Droit International 227; H Triepel, 'Les Rapports entre le Droit Interne et le Droit International' (1923) 1 Recueil des Cours 77.

[9] I Brownlie, *Principles of Public International Law* (5th edn, Oxford: OUP, 1998) 33–34.

[10] P Malanzcuk (ed), *Akehurst's Modern Introduction to International Law* (7th rev edn, London: Routledge, 1997) 63–64.

[11] M Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (2nd edn, Cambridge: CUP, 2006) 3, 187–88.

by a fear of grand theories; by a post-modern scepticism of total theories that would unify our understanding of the grand issues of international law.[12]

The pragmatic approach has come at a cost. Whatever the pitfalls of the theoretical conceptions of monism and dualism, at least they provided observers with a perspective on how to understand the relationship between international and national law and, in their normative dimensions, with a view on the direction in which that relationship should evolve. The dominant pragmatic position is lacking in this respect. On this point at least, international legal scholarship has turned apologetic—there is no other perspective for understanding what is happening in practice other than what States do. Sir Percy Spender wrote that 'it is competent for a State party to any treaty or convention to pass a law binding on its own authorities to the effect that, notwithstanding anything in the treaty or convention, certain provisions thereof binding on that State shall not apply, or to legislate in terms clearly inconsistent with, and intended to override, the terms of an existing treaty'.[13] That certainly is a view that corresponds in large part to practice in most States, including the United States (with its later in time rule), the United Kingdom (with its ruling doctrine of parliamentary supremacy) and the Netherlands (with its limiting doctrine of direct effect). But is it necessarily the case that what States do—in this situation a persistent violation of the law—in itself generates a norm (or rather, a liberty) of public international law? Does the *fact* that states retain the competence under their national law to enact laws inconsistent with their international obligations mean that we have to accept an international legal liberty to do so?

By providing little guidance on our thinking regarding possible normative development, international legal scholarship also fails its primary task of educating new international lawyers. Responsible teaching of international law does not confine what we teach our students to a pragmatic approach that has nothing to say about the choices that students, once they become practitioners, can make and thereby help shape development.

It is the aim of this book to increase our understanding and thus contribute to leading international law theory away from current pragmatism towards a new perspective which is grounded in practice yet reaches beyond mere pragmatism, recognizing the importance of more conceptual and normative perspectives on the evolution of the relationship between national and international law. Aiming for a contribution to international law theory, it will ultimately direct us beyond this particular phenomenon to confront the idea of a changing global society and the changing role of international law in that society.

[12] JE Nijman, *The concept of international legal personality. An inquiry into the history and theory of international law* (The Hague: TMC Asser Press, 2004) 397.

[13] Separate opinion to the judgment of the International Court of Justice in the *Guardianship of Infants Case (Netherlands v Sweden)* 1958 ICJ Rep, paras 125–26.

As a prelude to the chapters containing alternative perspectives on the relationship between international and national law, this introduction serves four purposes. First, we will clarify the 'theoretical' nature of the perspectives contained in the book (section 2). Second, we briefly review the classic positions of monism and dualism. Understanding the context of the emergence of monism in response to 19th century dualism will provide an essential yardstick for assessing modern perspectives on the divide between international and domestic law (section 3). Third, we will briefly review current legal developments, which challenge the discipline of international law to rethink these old theories (section 4). Finally, this introduction will provide a roadmap and indicate how these challenges are addressed by the various contributions to this book (section 5).

2. Legal doctrine, theory, and philosophy

Most of the contributions to this book abstract from questions of positive international law. Though most chapters do refer to developments in positive law, they aim to enhance, at a more general level, our insight and understanding of the relationship between international and domestic law. As a whole, the book represents a mix of legal doctrine, legal philosophy, and legal theory.

Legal doctrine is about rationalization and systematization for the short-term, to meet particular—more technical—legal problems. As noted by Cotterrell, 'Legal doctrine is to be organised, systematized and generalized just sufficiently to meet the needs of the moment. Concepts are used pragmatically and not necessarily with concern for broader consistency of meaning.'[14] Legal doctrine is relevant for inquiries into the relationship between international and domestic law. It can deal with such questions as the status and meaning of the principle of supremacy of international law or the principle that States cannot rely on domestic law to justify non-compliance with obligations under international law. Some of the contributions to this book are largely of a doctrinal nature.[15]

Legal philosophy encompasses philosophical speculation on matters of law or related to law.[16] Like legal doctrine, legal philosophy can encompass inquiries into the relationship between international and domestic law. It can address such questions as whether international law (in contrast to national law) is really law and whether a unity between international and domestic law properly reflects the unity of mankind. Some of the chapters of this book contain elements that can be properly characterized as legal philosophy.[17]

Legal theory is positioned between legal doctrine and legal philosophy. It is neither merely systematizing nor contemplating particular practices, nor does it solely

[14] R Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (Philadelphia: University of Pennsylvania Press, 1989) 6.
[15] eg, Anne Peters, ch 10.
[16] Cotterell (n 14 above) 2.
[17] eg, Phillip Allott, ch 3.

address conceptual and normative questions. It is rooted in actual practice which illustrates or evidences a particular phenomenon—yet when explaining this phenomenon, it includes external, conceptual, normative elements and ideas in order to analyse the phenomenon in a broader and more general context and to understand the more general and fundamental implications of the phenomenon for the system as a whole. Legal theory thus is ambivalent: it is both rooted in practice and speculative in nature. It captures in a way a dialectic movement between philosophical speculation about possible legal futures and current (legal) developments in practice.[18]

In this volume we are indeed seeking to postulate general legal theoretical findings on the relationship between international and national law that are open to sociological, that is, more empirical input, as well as inclusive of philosophical, that is, more speculative input. Most of the chapters in this book are stirred by, and often also explore, particular current legal developments. However, for the most part they do not confine themselves thereto, but seek to contribute to our understanding at a more general level. They vary in the emphasis put on either the empirical or the normative, speculative 'side' of the slope. Our aim is to present the contributions as an integrated whole, in the sense that each of the chapters forms a building block, with varying degrees of emphasis on doctrinal or philosophical aspects.

The theoretical reflection on how national law relates to international law and vice versa will eventually confront us with questions which lie beyond the positive law level, such as the deformalization of international law, the nature of the international community, and the legitimacy of (international) law. With these questions our conception of international law also comes into play. Reflections developed on the basis of positive international law, judicial decisions, and legal developments thus will re-direct us to a meta-juridical level. We accept this as a task of our discipline. International law scholarship should not pursue a kind of rootless—groundless—approach which may be pragmatic but also disconnected from international law's fundamental purpose. International law scholarship—also when reflecting upon the relationship between national and international law—can not abstain from making its own particular contribution to a problem which has much more than a purely *legal* dimension.

The book does not aim to present one grand or 'total' theory on the relationship between national and international law. However, we can observe that in the theoretical reflections made by the authors, we do find returning elements which indicate more general developments in both legal practice and legal theory. Notably, these include the de-formalization of law, a focus on common fundamental values, a quest for new (sources of) authority, and the constitutionalization of an international community. We will return to these elements in the conclusion of the book.[19]

[18] See for a further typology of types of legal theory, Philip Allott, ch 3.
[19] Ch 12.

3. The origins of the debate on the divide between international and national law: the dualism-monism dichotomy

Any attempt to develop new theoretical perspectives on the relationship between international and national law somehow has to build on the legacy of what historically have been the two main theories on the matter: dualism and monism.

Dualism and monism confirm the dual image explained in the previous section, be it to a different degree at various moments in time. On the one hand, both theoretical models intend to describe the legal reality—ie the empirical, practically rooted side of the story—yet being theoretical models they intend to systematize, analyse, and explain legal practice and subsequently extrapolate future developments. The later aim includes a normative element, which brings us outside the positive law realm.

The chapters in this volume will pay ample attention to the question of the extent to which these theories are still useful for understanding present-day legal developments. However, one aspect of these theories that needs to be highlighted in this introduction is that both theoretical models were responses to somewhat time-bound and non-legal (essentially political) problems. The fact that international law scholarship has for a long time, and is arguably still today, engrossed in the monism-dualism dichotomy may well have prevented us from developing new perspectives on the divide between national and international law, and addressing the questions *currently* at stake. In order to accomplish our present intellectual task, we thus need to understand the intellectual task our discipline previously faced and which was at the origin of the early 20th century debate on monism and dualism.

The monism-dualism debate as it took place in the early decades of the 20th century should be understood as the legal manifestation of a broader (juridico-)political debate dominating intellectual, cultural, and political life at the time: the heated discussions on the ('old' concepts of) State and Sovereignty, and the position of the individual within the (organization of the) polity. During these critical decades in the history of Europe, for many the principal concern was the post World War I crisis of democracy and its dangers for individual freedom. The Interbellum crisis of international law should be understood as part of this more comprehensive European crisis. As in other disciplines, great minds took the lead in confronting the crisis and international law scholarship flourished as a consequence. The debate on monism and dualism, which was at a high point during the inter-war years, should be read in this context. That is to say, in general terms, monism may be understood as part of a rejection of old concepts and an attempt to reconstruct international law and theory in a new and modern way, with an eye for the position of the individual (freedom) in international law. This may be read as the discipline's response to the crisis of democracy.[20] The dualist model was also used by the discipline to reconstruct, however from a more restorative perspective: neither a new world order, nor a new international law was the objective. Rather, it focused on the restoration of the old classical tradition of voluntarism and the doctrine of sovereignty as its threshold. The early 20th century monist-dualist controversy was part of this broader scholarly debate which for a significant part, due to the political context, dealt with issues such as the identity of international law, its independent relevance next to morality and politics, State sovereignty, and the protection of the human individual. The monist and dualist models as we tend to use them today have their origins in this scholarly debate and context.

Dualism was predominant in orthodox 19th century international law theory and often inspired by Hegelian Thought.[21] The State was then understood as a *real* metaphysical Being, mystifying the personality of the State and sanctifying its sovereignty. International law was conceived of merely as *external* law of the State.[22] Under this view, international law concerns the external life of the state but it is not above the State since it has its source *in* the State (will). Internal and external public law, international law and municipal law are completely separate orders. The State's sovereignty and power are not limited by international law, on the contrary international law is used as an instrument to exercise them. Rather than be protected against the State, in this view individual freedom can only be realized by self-sacrifice in service of the State, by the individual (will) being submerged into the State (will). The State is understood in mythical terms: 'the march of God in the world'.[23] Hegelian thought marked international law theory significantly because of its glorification of the State and its sovereignty. Hence, the separate, independent existence of international law as truly *law* was often denied, or its identity was defined as nothing more than each State's external law.[24] In Triepel's theory we see clearly how his conception of the State as a real personality leads him to accept dualism as the only possible perspective: 'two spheres that at best adjoin one another but never intersect'.[25]

[20] We can see this in the work of both the monist-*positivist* scholar Hans Kelsen and the monist-*natural law* scholar Hersch Lauterpacht. See Nijman (n 12 above) 85 et seq.

[21] Hegel: 'The state in and by itself is the ethical whole, the actualization of freedom; and it is an *absolute* end of reason that freedom should be actual.' TM Knox (ed), *Hegel's Philosophy of Right* (Oxford: OUP, 1967) 279.

[22] GWF Hegel, *Grundlinien der Philosophie des Rechts* ref § 259 and 330. Also, eg A Lasson, *System der Rechtsphilosophie* (Berlin und Leipzig: J Guttentag, 1882), on the '*Fehlender Rechtscharakter*' of international law, at 394–407.

[23] Knox (n 21 above) 279.

[24] Lasson (n 22 above) 389 and 394: 'Zwischen den Staaten als souveränen Wesen is zwar ein eigentlicher Rechtszustand nicht möglich'.

[25] Triepel, *Völkerrecht und Landesrecht* (n 7 above) 111: 'Völkerrecht und Landesrecht sind nicht nur verscheidene Rechtstheile, sonders auch verscheidene Rechtsordungen ... Sie sind zwei Kreise, die sich höchstens berühren, niemals schneiden'.

This origin could open the door to extremes. Viewed as rooted in a Hegelian-marked concept of State and (International) Law, dualism was soon conceived of as going hand in hand with 'the idolatry of the State' as well as favouring absolutist and authoritarian tendencies. Having these philosophical conceptual origins, (statist) dualism—confronted by renewing (often monist) scholars—was set (perceptually) in the corner of absolute sovereignty, nationalist fanaticism, state mysticism, and the sacrifice of the individual to the State.

However, not all scholars who favoured the dualist model worked from a Hegelian State perspective.[26] Those who had left the (orthodox) origins of dualism behind focused more on the confirmation of the legal nature of positive international law. A peaceful international community depends on basic rules of conduct agreed upon by sovereign States who keep away from each others internal affairs. As such, dualism operated as a model to uphold the 'positive law' identity of international law, to reconcile sovereignty and international law by the concept of self-obligation, and recognized the Family of Nations as an inter-State order (only).[27] Yet its presumption of the State as an actual pre- and meta-legal, social phenomenon, or person included a normative dimension of securing sovereign space and independent presence at the international stage. International law did not and should not govern national social relations. But dualism was also increasingly based on more inductive reasoning, as during the 20th century more and more States were recognized as independent members of the international community and the 'dualist' model dominated constitutional arrangements.

Still, it is fair to posit that the rise of monism within (international) legal scholarship was a response to these mainly 19th century theories of State and Law. Not merely in early 20th century German and Austrian scholarship but also in, eg French, British, and Dutch Scholarship we find monism as a feature of a forceful response to Hegelian driven theories of State, Sovereignty, and (International) Law.

Many Interbellum international law scholars responded with total rejection of dualism and adherence to the monist perspective to liberate the individual and its freedom.[28] Scholars such as Kelsen, Scelle, and Brierly aimed at strengthening the position of the individual, democracy, and subjecting power to the universal rule of law by arguing the existence of international law as a law limiting the state's actions. More than being a response to the technical legal argument of (statist)

[26] Not all 19th century orthodox theorists were influenced by German philosophy and jurisprudence, John Austin (1790–1859) is of course the other leading jurist behind the triumph of legal positivism in the later 19th century. He conceived of international law as 'no law proper', merely positive morality, and so, international law and domestic law were completely separate. J Austin, *The Province of Jurisprudence Determined* (1832) (Cambridge: CUP, 1995), Lecture V and Lecture VI.

[27] See, eg G Jellinek, *Allgemeine Staatslehre* (Berlin: J Springer, 1929) at 378–79, 387, and 393.

[28] See, eg Brierly's rejection of Hegel's influence on international law as 'devastating', JL Brierly, 'The Basis of Obligation in International Law' in Lauterpacht and Waldock (eds), *The Basis of Obligation in International Law and Other Papers by the late James Leslie Brierly* (Oxford: Clarendon Press, 1958) 29, 36. See for Kelsen's critique, H Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen: Mohr, 1920), 315–18.

dualism on the relationship between national and international law it responded rather to its moral and political implications. Monism was first and foremost an attempt to restrict power of the State and to empower the individual and protect human dignity.

For instance, Scelle, who saw a global society of humankind rather than of States—*la société humaine universelle*—thus conceived international law as normative federalism, monism without disguise.[29] With the French Third Republic going through a political crisis due to parliamentary absolutism, democracy was in jeopardy. In Scelle's perspective, international law defined and constrained domestic (legal and political) competences. He argued the hierarchical superiority of global solidarity and of the universal society and its law. Monism was in essence about the distribution of competences, about constraining (abuse of) power—*détournement de pouvoir*—by law. As such it was a fundamentally juridico-political—ie *Rechtsstaat* values-driven—perspective on international law inseparable from the issues at stake within the domestic political societies. The distribution of competences and its legitimization concerned a *constitutional* matter then as much as it does today. Similarly, Kelsen's monistic perspective was an integral part of a defence of democracy and the individual. He also welds the whole hierarchical universal legal order together with the notion of competence. Kelsen's rejection has been most rigorous, as he eliminated the concept of State sovereignty altogether and argued for the identification of State and legal order.[30]

The heritage of international law theories bequeathed to our disciple in the early 20th century, when confronted with a very different political context, may explain the (Interwar) heydays of international legal theory. The monist *v* dualist model reflected more general lines of opposition: State as Law *v* State as actual Being; Rule of Law *v* State as 'Absolute Power on Earth'; State Will as a purely legal phenomenon *v* State Will as a socio-political phenomenon; Law as distribution of Competence and as defining Power *v* Law as an instrument of Power; Sovereignty of Law *v* Sovereignty of State; the apology of international law *v* the apology of national law; World federalism *v* Nationalism (at a moderate as well as a more extreme rate); Progressive political powers *v* Conservative/political powers; empowerment of the individual *v* empowerment of the nation-State; Democracy *v* Authoritarianism; universal human society *v* society of nation-States and so on and so forth.

The monist and dualist models which emerged from this debate and continued to structure international law thinking, were thus primarily a response to political

[29] G Scelle, 'La Doctrine de Duguit et les Fondements du Droit des Gens' (1932) 1–2 Archives de Philosophie du Droit et de Sociologie Juridique (Sirey Paris) 108.

[30] H Kelsen, *Introduction to the Problems of Legal Theory* (transl of 1934 edition of *Reine Rechtslehre*, transl, B Litschewski Paulson and SL Paulson), (Oxford: Clarendon Press, 1992) 100, 116, 121–24. 'The theoretical dissolution of the dogma of sovereignty, the principal instrument of imperialistic ideology directed against international law, is one of the most substantial achievements of the Pure Theory of Law.'

problems rather than legal ones. They both took up their own conceptual life within international law arguments with fundamental consequences for our perception of the relationship between international and domestic law. Monism came to be understood as a relative denial of a fundamental divide between international and domestic law, connected with universal, cosmopolitan, or even utopian connotations. Dualism tends to be understood as an articulation and appreciation of a solid divide between international and domestic law, connected with a conceptual (apologetic) affirmation of state sovereignty and international law as inter-State law. In this way, the monism-dualism paradigm has come to structure international law scholarship.

However, as the terms are used today, the models are disconnected from their contextual origins and the urgent problem of endangered European democracy with which they actually dealt. What was in origin an intensely political and moral debate became an issue approached rather pragmatically. From being a debate loaded with political and moral elements it became a more 'normal' doctrinal topic although always marked, consciously or subconsciously, by a conviction of either the moral supremacy of international law or the supremacy of the State will. Late 20th century textbooks at the same time increasingly expressed the relative importance of monism and dualism, as in practice both models rarely apply satisfactorily.[31] With the relatively minor importance of both perspectives and the more general withdrawal of philosophical elements, the monism-dualism debate dried up.

4. Reasons for revisiting the issue

The political and social context that inspired the original theories of dualism and monism is a very different one from that of today. The emergence of new non-legal developments, different from those that inspired traditional monism and dualism, call for alternative theoretical approaches that allow us to systematize, explain, and understand changes in the relationship between international and national law and, at the same time, to give direction to the future development of international and national law.

While protection of sovereignty, individual freedom, and rule of law remain relevant external factors, they are now part of more complex processes and interests. Above all, they have been redefined and submerged by the process of globalization. Increasing cross-border flow of services, goods and capital, mobility, and communication have undermined any stable notion of what is national and what is international.[32]

[31] Above, text to nn 9–10.

[32] See for references in this volume to developments that may prompt us to change our understanding of the relationship between international and domestic law: Peters, 252–54; Du Plessis, 310–11.

To be sure, these developments are not entirely new. Globalization is an old phenomenon and its current manifestations are certainly not something that is confined to the new millennium. We have long seen claims that the utility of dualism-monism will decline because of intensification of international relations, because of expansion *ratione personae*, *loci* and *materiea* of international law, because of growth of international institutions, because of the increasing opening of national constitutions to international law, etc.[33] Nonetheless, it is the premise underlying this book that the developments which we loosely cover by the label globalization, and which affect the relationship between the domestic and the international domain are sufficiently substantial to justify our exploration of new theories pertaining to the connection between the national and the international legal order.

In our conclusion to this book, we will highlight three developments. The first is the emergence of a set of international values that underlies policies of states, international organizations, and non-governmental organizations, and that straddles the boundaries of the national and the international domain. These values concern, in particular, the rule of law and human rights: values that are often treated as truly universal values that States should ensure, both in the international legal order and within domestic societies. The second development is the dispersion of sources of authority away from the State in both vertical (sharing of sovereign functions) and horizontal directions (involvement of private actors). The boundaries between international and national law become even less relevant when considering the more informal arrangements between private persons, corporations, etc. The third development, partly overlapping with the first two, is deformalization—a process in which the relative role of international law as a formal institution compared to other forms of normativity relevant to governance of international affairs seems to decline.

Neither dualism nor monism in their traditional form are able to capture the diversity of the processes of globalization. The reduction of the factual power of States to control the entry of international law in their domestic legal orders reduces the explanatory power of dualist theory. In an interdependent world, the boundaries of national legal systems are not watertight. Economic and political processes have led to ever stronger pressure on States to adapt domestic laws. Domestic law can no longer be treated in isolation from outside influences, legal or otherwise.[34]

Superficially, it might be thought that the process of globalization would lead to a piercing of the veil between the international and the domestic domain, and to a situation that one might characterize as monistic. Individuals are no longer invisible, shielded by the domestic legal order; the subject matter of national and international law look more and more alike and sources are less and less controlling of

[33] Arrangio-Ruiz, ch 1, 35.

[34] W Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000) 51.

any particular order. However, the reality is more complicated. We also face what can be called a 'new nationalism' that leads to fragmentation rather than a construction of a universal society.[35] Differences between States and regions are such that the explanatory power of monistic theories is very limited. In many States one may be hard-pressed to find evidence of an evaporation of the shield between the national and the international. Indeed, globalization may lead States and communities to protect their national values and identities against undefined and unwanted foreign influences and lead to a reassertion of sovereignty.

Modern developments thus do not point in one direction and are indeed contradictory. It is for that reason that the present volume presents an array of partly overlapping, partly supplementary, but also partly contradictory theoretical propositions and perspectives. It is the aim of this book to take stock and explore alternative approaches that may provide such perspectives for a modern age.

5. Overview of the contributions

In order to address the challenges sketched above, we have selected a number of contributions that provide a broad range of perspectives on the evolving relationship between the international and domestic legal orders.

Since, as indicated above, the development of new perspectives on the relationship between international law and national law has to deal with the legacy of dualism and monism, the book starts with two contributions that reassess the present-day value of dualistic and monistic thought on the relationship between international and national law. **Gaetano Arangio-Ruiz** argues, in **Chapter 1**, that the dualist theory indeed has continued validity. The chapter seeks to correct some misperceptions of dualist theory and adjusts it to modern developments and also contains a powerful rebuttal against some of the claims made in later chapters to the effect that 'modern' development such as the rise of international organizations and the changing position of the individual would have undermined the fundamental validity of dualism. In **Chapter 2, Giorgio Gaja** presents a more cautious approach on the present-day relevance of dualism and underlines the shortcomings of the theory in regard to modern international law.

In **Chapter 3, Philip Allott** presents a perspective that is closer to legal philosophy than legal doctrine. It recognizes that in most States, as a matter of positive law, there is no unity and that international law is not supreme—a position with which a dualist author would not disagree. However, Allott argues that the trends of the internationalizing of the national, the nationalizing of the international, and the universalizing of value underlie the emergence of a universal legal system. His theory of the universal legal system postulates a legal system with international law at the apex, which would embrace the laws of all subordinate societies that

[35] This point is made in this volume by Paulus, 248–50, and Du Plessis, 311.

would exist by virtue of and in accordance with international law. This theory thus has decidedly monistic aspects.

The other seven chapters are, in certain respects, less all-encompassing than the ambitions of dualism and monist theory and deal with various aspects of the complex landscape. Rather than seeking grand alternatives to dualism and monism, they disaggregate these grand questions and identify more specific developments in the international legal order and ask us the question how these developments inform our understanding of the relevance or irrelevance of the national law-international law divide.

Chapter 4 by **Catherine Brölmann** examines how the process of deterritorialization of international law, in which territoriality increasingly gives way to functionality as a dominant organizing principle, affects the relationship between international law and national law.

Anne-Marie Slaughter and **Bill Burke-White** argue in **Chapter 5** that the future of international law is predominantly a political one, located at the domestic level. They view international law as an important force to influence domestic politics in addressing global issues, guiding the legislature. In a sense, this approach is one of empowering governments and legislatures through international law.

In **Chapter 6, Christine Chinkin** examines the emergence of private authority and what the role of private authority in law-making and law enforcement means for our traditional understanding of self-contained and comprehensive national and international legal orders.

Mayo Moran discusses in **Chapter 7** the emergence and consequences of the notion of the influential authority of international law. She argues that much of our thinking on the relationship between international and domestic legal orders is erroneously based on the bindingness of international law. Whereas that standard account may leave little room for breaking out of an essentially dualistic paradigm, she argues that a more substance-based conception of international law allows for a richer account of the relevance of international norms in domestic settings and indeed makes formal separations between legal orders largely irrelevant.

In **Chapter 8, Christian Walter** explores the utility of the concept of constitutionalism as a perspective to study and understand the changing nature of the relationship between international and national law. His main argument is that we have witnessed a shift from actor-centrism to subject matter-orientation in the general structure of international law, with direct consequences for the relationship between international and national law. In the new, subject matter oriented perspective, the boundary between international and national law is much less controlling.

In **Chapter 9, Andreas Paulus** explores the extent to which modern recognition of an 'international community' influences the relationship between international and national law. The traditional picture is based on an opposition between the State and the international community one the one hand, and State and individual, on the other. If one accepts the notion of an international community