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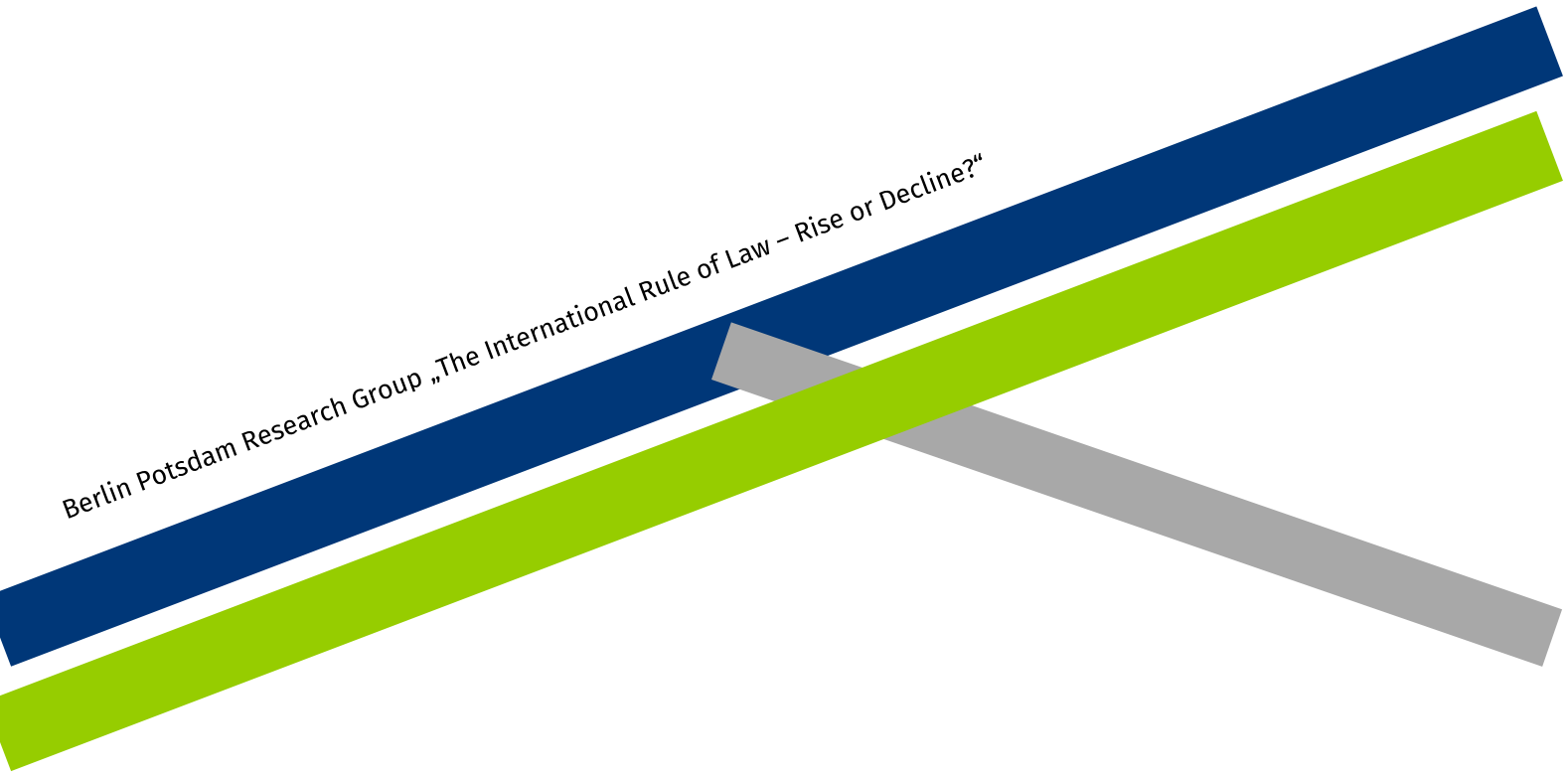

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The Functions of Law and Their Challenges: The Differentiated Functionality of International Law

Dana Burchardt[1]

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Abstract:

This paper illustrates the functional and conceptual variances of law in different contexts. Whereas legal actors on the international level might normatively aim for law to have a similar effect to that of domestic law, the way in which international and supranational law can fulfil these potential functions is different. Accordingly, this paper argues that an awareness with regard to the particularities and challenges that the potential functions of law encounter in the international and supranational context is needed. Moreover, it suggests an analytical lens to conceptually frame and locate current developments, offering a broader perspective on, or even an element of explication for, the apparent crisis that law is currently facing on the international and supranational scale. After describing the potential functions of law on an abstract scale and grouping them into analytical categories, the paper uses these categories as a lens in order to assess in which way international law can fulfil these potential functions, where priorities regarding certain functions might differ and where some aspects of these functions are challenged when law is made and applied in the international and supranational sphere.

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Contents:

1. Introduction

Understanding what the law is, requires an understanding of its functions.[2] The nature of law and its mode of operation can only be comprehended entirely if the functions that law can potentially, and does actually, fulfil are taken into account. At the same time, attributing functions to something, including to the law, endorses a standard by which the success or lack of success of something can be judged. A 'good' functionality of something, i.e. whether something fulfils its specific function in an optimal manner, reflects its quality.[3] In this regard, all functions, including the functions of law are evaluative.[4] Considering the functions of law thus means determining a yardstick for the effectiveness of legal norms and orders.

This approach is particularly relevant with regard to the assessment of international and supranational law. Some have claimed that the functions of law in the international community are the same as the functions of law in any human society; thus, international law should not be considered as something special.[5] This paper will show that this assessment is only partially true. Even if legal actors on the international level normatively aim for law to have the same effect as law has in a domestic context – an 'if' that is not always a given –, the way in which international law can fulfil these functions is different. Accordingly, this paper argues that an awareness of the particularities and challenges that the potential functions of law encounter in the international and supranational context is needed.

By way of highlighting these functional and conceptual variances of law in different contexts, the paper suggests an analytical lens to conceptually frame and locate current developments. In particular, it attempts to offer a broader perspective on, or even an element of explication for, the apparent crisis that law is currently facing on the international, supranational and transnational scale. Developments such as the stagnation of formal international lawmaking and its replacement by other mechanisms, the questioning of international courts and tribunals, the return of geopolitical power-relations combined with a disregard for existing rules, the circumvention of lawmaking and treaty-amending procedures by alternative means in order to respond to political, economic or other crises are only but some of the various phenomena currently posing a challenge to the once highly optimistic conception of international and supranational law.

This paper links the theoretical underpinning of law to these current challenges, offering a function-related viewpoint. With this objective in mind, it follows a two-step analysis. The first part of the paper sets out the standard. It describes the potential functions of law on an abstract scale, grouping them into analytical categories in order to structure the assessment. The second part of the paper applies these functional categories. It uses them as a lens in order to assess in which way international and supranational law can fulfil these potential functions, where priorities regarding certain functions might differ and where some aspects of these functions are challenged when law is made and applied in the international and supranational sphere.

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[2] John Finnis, *Natural Law and Natural Rights* (2nd edn, Clarendon 2011) 6-8.

[3] Aristotle, Nicomachean Ethics (Book I).

[4] Andrei Marmor and Alexander Sarch, 'The Nature of Law', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2015), available at https://plato.stanford.edu/archives/fall2015/entries/lawphil-nature/.

[5] Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 395.

2. The potential functions of law

The functions of law are manifold[6] – as much so as the approaches of lawyers in general and legal theorists in particular that exist on that issue.[7] What some consider to be a function of law, others might only conceive of as (undesired) effect of it. Although there might be many possible diverging definitions,[8] the term 'function' is conceived of in this paper as follows: The functions of law are defined by its effects combined with the intention of the relevant law-creating, law-applying and law-assessing actors that law ought to have these effects.[9] There is no automatic equivalence between effect and function, between is and ought. Thus, the question what functions law is to fulfil is a highly normative one. The answer to that question is influenced by a wide range of considerations including the political and cultural background of the observer. Nonetheless, regardless of the normative choice about what law should do within a specific context, there are certain *potential* functions of law that can be determined. These potential functions relate to the different effects that law can have: on the political powers and the actors exercising these powers; on the social reality of a group; and on the interrelations between individual legal norms. The fact that law is able to have these kinds of effects creates potential functions of law which can materialize into actual functions depending on the normative decision of the norm-creating entities and the social and political actors involved. In this regard, it is important to consider that although every area of law – be it domestic, European or international, criminal or private, constitutional or administrative – aims to fulfil very different *specific* functions, the range of their potential *abstract* functions related to their character as law is comparable.

Against this backdrop, this paper adopts a pluralist understanding of the functions of law.[10] It therefore includes all potential abstract functions, even if they are incompatible with each other,[11] or if they seem to be an expression of law's 'schizophrenic character'.[12] For analytical purposes, the paper will group the potential functions into three categories: the content-related functions, the system-related functions and the power-related functions. Albeit these categories are neither logically exclusive nor free of overlaps, they offer a structuring framework to guide the analysis.

a) Content-related functions

If an emphasis is put on the relationship between law and the social reality it operates in, the first and most inherent function of law comes to mind: law shapes social reality. In this respect, law is considered as a tool for shaping, framing and even constructing virtually all areas of human interrelations on the individual or institutional level. This shaping function is at the core of law

[6] However, scholarly discussion often seems to assume the existence of 'the function of law' as a singular, primary aim of legal norms.

[7] Stressing the existence of many competing explanations of law and its functions and the problems following from that, see Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 396.

[8] See on the different concepts of 'function', Kenneth M Ehrenberg, *The Functions of Law* (OUP 2016) 20-30.

[9] On the link between effects and functions of law, see Stephen R Perry, 'Interpretation and Methodology in Legal Theory' in Andrei Marmor (ed), *Law and Interpretation* (OUP 1995) 97, 114. Stressing the intentional aspect, Kenneth M Ehrenberg, *The Functions of Law* (OUP 2016) 27.

[10] On the risk that an analysis of the functions of law is too closely tied to particular moral or political principles, see Joseph Raz, *Authority of Law* (OUP 1979) 167.

[11] On the incompatibility of the competing approaches to the functions of law, see Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 396.

[12] Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 1 Transnational Legal Theory 141, 154.

being a set of norms. All norms, be it legal, moral, religious or other norms, inherently contain a normative claim towards how reality should look like, a claim which can be translated into the shaping function of law. Put in temporal terms, law enables a society to shape its future.[13] From the perspective of social science, one could consider an explicit shaping function to be the main function of all norms: norms are created to solve a social problem.[14] For some, these social problems arise as a result of social change so that law ultimately should be seen as a response to social change.[15] But even without going that far, law has the potential to broadly influence the substance of social and political relations.

Legal norms have the effect to shape reality in all phases of their being. In the process of norm-creation, they force political actors to reach a compromise as to what the specific content of a norm should be. In this context, they function as a medium for communicating intentions.[16] When the existing norm is applied, it frames the behaviour of the addressees in a specific way. It singles out a certain possibility, one out of many possible ways of behaviour, factually making it harder to choose one of these other possibilities.[17] Thus, law can contribute to securing desirable behaviour and preventing undesirable behaviour.[18] It can, at the same time, contribute to settling disputes.[19] When an act of non-compliance is sanctioned, it creates a consequence of the behaviour violating the law, a consequence that would not have existed without the legal norm. In addition, non-compliance leads to an engagement with the norm and forces to position the addressee to either reach a goal through the norm or despite the norm.[20] The reality-shaping function of law can thus be seen as a hybrid of an 'indirect' and 'direct' function of law, with the former referring to the application of law and the latter to attitudes, modes of behaviours etc. which are not obedience to law or application of law.[21] The effect that law singles out specific possibilities and shapes reality in this way, can be observed both through direct and indirect implications of legal norms.

The second contend-related function is more normatively loaded. Although, strictly speaking, it could be included in the shaping function, it has an additional thrust. Law can also have the function of constructing and securing values. It can strengthen the respect given to certain moral values.[22] This goes beyond a narrow understanding of a value-related function of law which sees law only as implementing the community's values[23] or expressing them.[24] In the latter reading, law

[13] Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 399.

[14] For a critical discussion of this approach see Lina Eriksson, 'Rational Choice Explanations of Norms: What They Can and Cannot Tell Us' in Michael Baurmann et al (eds), *Norms and Values* (Nomos 2010) 179.

[15] Harry W Jones, 'The Creative Power and Function of Law in Historical Perspective' (1963) 17 Vanderbilt Law Review 135, 139.

[16] Kenneth M Ehrenberg, *The Functions of Law* (OUP 2016) 189.

[17] Christoph Möllers, *Die Möglichkeit der Normen* (Suhrkamp 2015) 425; Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 399.

[18] Joseph Raz, *Authority of Law* (OUP 1979) 169.

[19] Joseph Raz, *Authority of Law* (OUP 1979) 172. Stressing the foundations of this function in 'tribal law', Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 405.

[20] On the aspect of 'norm fidelity' (Normtreue), Christoph Möllers, *Die Möglichkeit der Normen* (Suhrkamp 2015) 422.

[21] Joseph Raz, *Authority of Law* (OUP 1979) 167-168.

[22] Joseph Raz, *Authority of Law* (OUP 1979) 176-177.

[23] On this understanding Kenneth M Ehrenberg, *The Functions of Law* (OUP 2016) 181.

[24] Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 University of Pennsylvania Law Review 2021.

has a mere executive function – it is seen as taking up pre-existing values and adding a layer of practicality to it. This narrow understanding, however, does not take into account that law can shape, influence and construct the content of values by putting them in a specific legal framework and thereby defining their features, setting limits to them, putting them into a broader context and in relationship to other values. By doing so, law has a normative effect, transcending execution. In addition, law also acts as a tool that stabilises and secures values. Accordingly, law does not limit itself to presupposing independently existing values. Rather, it guarantees the continuity and persistence of the values that are integrated in its legal framework.

For some, this potential value-related function of law translates on the specific social level into a 'moral aim of law'.[25] Like other sets of norms, law provides a standard against which human conduct is evaluated; it provides 'standards of criticism of such conduct'.[26] In doing so, law creates a yardstick comparable to strictly speaking moral principles, leading to a rapprochement of natural law approaches and positivism.[27] Some even go further and understand law as aiming not just at criticising but at correcting moral problems and moral defects of other forms of social ordering.[28] Such a correctional approach comes with the inherent normative claim that law always induces moral improvement or even that it always enacts the common interest of society as a whole.[29] However, a general orientation towards community interests in some legal orders should not be equated with the moral standard that all legal norms always serve a morally 'good' purpose.[30] Accordingly and in order to capture a broader variety of approaches, this paper uses the term of law *shaping* reality.

The potential values-related function of law is the most prominent expression of another, more general function of law, which relates to norms as stabilizer of expectations.[31] Norms can lay down expectations in the formal and binding form of law and thus establish a solid basis for expectations and their legitimacy. Human rights provisions are a telling example in this regard. They put expectations regarding political, social and other guaranties into the legal category of rights. More than just laying down existing expectations, norms can even create and develop new expectations. The normative approach to the value-related function of law can thus be very idealistic. However, this of course entails the risk of belying the expectations. Inversely, if law normatively aims at developing realistic expectations, not being too far removed from the existing social reality is a requirement. Also, the legal form makes it more visible when expectations are belied.[32] For law in general, this can be especially problematic with regard to expectations created by legal norms themselves: the specific (social) expectations on a certain subject matter are linked to a general expectation in law as a concept.

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[25] Kenneth M Ehrenberg, *The Functions of Law* (OUP 2016) 184; Scott J Shapiro, *Legality* (Harvard University Press 2011) 213-217.

[26] HLA Hart, *The Concept of Law* (OUP 1961) 249.

[27] Kenneth M Ehrenberg, *The Functions of Law* (OUP 2016) 184.

[28] Scott J Shapiro, *Legality* (Harvard University Press 2011) 213-214.

[29] Claiming the latter Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 399. See also Lon L Fuller, *The Morality of Law* (Yale University Press 1964). Stressing law as tool of cooperation in pursuit of the common good of a society, John Finnis, *Natural Law and Natural Rights* (2nd edn, Clarendon 2011) 276, 335.

[30] On the difference between a moral and a legal assessment of law, Joseph Raz, *Authority of Law* (OUP 1979) 158; see also Ronald Dworkin, 'The Elusive Morality of Law' (1965) 10 Villanova Law Review 631.

[31] Christoph Möllers, *Die Möglichkeit der Normen* (Suhrkamp 2015) 418.

[32] Christoph Möllers, *Die Möglichkeit der Normen* (Suhrkamp 2015) 419.

b) System-related functions

Whereas, at least in theory, every individual legal norm can fulfil the described content-related functions, this is not the case concerning the system-related functions of law. The latter are only the outcome of legal norms acting as a group. Although it is a normative question to what extent this is emphasized as a function, the effect of system creation is inherent to law. It is one of the main effects of the coexistence and interrelation of legal norms. Legal norms both create an order[33] and, different from some other sets of (non-legal) norms, also depend on order.[34] As a consequence, it is impossible to understand an individual legal norm without also understanding other legal norms at the same time.[35] This does not mean that *all* legal norms would relate to each other or that the formed order includes all existing norms. Rather, *groups* of norms create an order to the extent that they are interconnected. They do not necessarily relate in an ordered manner to other groups of norms; inconsistencies exists. However, law is indeed characterized by a multitude of interrelations between legal norms which cause the interacting legal norms to form a structured entity. In this case, individual legal norms transcend themselves, creating a structure that is more than its elements. At the same time, legal norms and the order that they form enable law to regulate itself: law specifies procedures for making changes to the law and it regulates bodies to apply the law.[36]

The effect of system-creation goes beyond the norms as analytical objects. Law can also be seen as a system of legal relations between legal subjects.[37] By being subjected to a set of norms, the addressees become interconnected as a normative collective: the group of addresses of legal norms. Consequently, law has an integrative effect. This can become a main function of legal norms, when law is understood as enabling certain actors to prove group loyalties and create group identities.[38] The integrative function is emphasized when law is explicitly used to harmonize legal standards applicable to (what becomes) a group of addressees. Legal harmonisation is both a tool to shape reality and a strong element of system-creation going beyond structures but orienting content.[39] Ultimately, norms and the unifying standards set by them can promote social integration.[40]

Yet creating a collective is not only an effect and a potential function of specific legal norms. Law as a concept also presupposes a collectivisation of the addressees with regard to the *trust* in this

[33] Understanding 'order' as one of the two elements implied by law: Edward Jenks, 'The Functions of Law in Society' (1923) 5 Journal of Comparative Legislation and International Law 169, 170.

[34] Christoph Möllers, *Die Möglichkeit der Normen* (Suhrkamp 2015) 179.

[35] Christoph Möllers, *Die Möglichkeit der Normen* (Suhrkamp 2015) 181.

[36] Joseph Raz calls these two aspects – regulating law creation and law application – the secondary functions of law: Joseph Raz, *Authority of Law* (OUP 1979) 175. According to this terminology, the secondary function of instituting law-applying bodies also serves for regulating and solving disputes.

[37] Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 400.

[38] Lina Eriksson calls this the 'signalling function' of norms, Lina Eriksson, 'Rational Choice Explanations of Norms: What They Can and Cannot Tell Us' in Michael Baurmann et al (eds), *Norms and Values* (Nomos 2010) 179, 185.

[39] Using the term 'unifying tie of law' ('einigendes Band des Rechts'), Manfred Zuleeg, 'Die Europäische Gemeinschaft als Rechtsgemeinschaft' [1994] NJW 545.

[40] Christoph Möllers, *Die Möglichkeit der Normen* (Suhrkamp 2015) 418.

very concept:[41] Law presupposes the trust or belief of every addressee that every other addressee trusts or beliefs in law. Law is a common idea which can only materialize if the idea is shared by everybody. On this basis, law functions as a conceptual unifier.

With law, as with any system, comes an additional social function. Many theorists are of the view that the function of law is to organize behaviour and provide guides to human conduct.[42] This enables society or group members to cooperate and solve coordination problems.[43] A key aspect of the system-related function of law is thus to create social order by providing a guiding structure for individual and collective actors.[44] This could also be referred to as coordinative function of law.[45] With the coordination of individual behaviour comes the structuring of society as a system. When law structures society as a system, it fulfils a function of system-creation on the social level. This complements the above-mentioned system-creation on the level of the legal norms.

Another aspect of the potential system-related functions of law links law back to the political. Highly normative, it is an aspect that is far from being inherent to every system of legal norms: law can have, and can be given, the effect of constitutionalisation, understood as a system-creation on the political level. Within the framework of the functions of law, the term constitutionalisation as it is used here describes the fact that a political entity is based on, and depends on, law. As a result, the entity is considered to be first and foremost a legal construction and only in the second place a political one. Whereas this is debatable for the political entity of a state, it can be witnessed, by way of example, in the form of the European Union. The EU is mainly perceived as a creation of law, with its legal nature dominating the political (and economic) aspect.[46] That law is capable of this far-reaching effect is due to the combination of the extensive power-related, content-related and system-related functions that law can have. They cause law to be 'the quintessential institution for creating other institutions'.[47] This mirrors the institutional nature of law.[48]

[41] On trust in international relations see, Jan Ruzicka and Vincent Charles Keating, 'Going global: Trust research and international relations' (2015) 5 Journal of Trust Research 8.

[42] HLA Hart, *The Concept of Law* (OUP 1961) 249; Edward Jenks, 'The Functions of Law in Society' (1923) 5 Journal of Comparative Legislation and International Law 169, 171; Hans Kelsen, *The Pure Theory of Law* (1967, translated from 2nd edition of Reine Rechtslehre, 1960) 31; Lon L Fuller, 'Human Interaction and the Law' (1969) 14 American Journal of Jurisprudence 1, 23; Anton-Hermann Chroust, 'The Managerial Function of Law' (1954) 34 Boston University Law Review 261, 261.

[43] John Finnis, *Natural Law and Natural Rights* (2nd edn, Clarendon 2011) 153, 245.

[44] Edward Jenks, 'The Functions of Law in Society' (1923) 5 Journal of Comparative Legislation and International Law 169, 173. See also Lon L Fuller, 'A reply to professors Cohen and Dworkin' (1965) 10 Villanova Law Review 655, 657 ('a system directing human conduct by rules'). These guiding structures can include e.g. legal facilities and frameworks for private arrangements between individuals, see Joseph Raz, *Authority of Law* (OUP 1979) 169-170.

[45] Kenneth M Ehrenberg, *The Functions of Law* (OUP 2016) 183. Some point out, however, that instead of solving problems, law can also maintain or even create them in the first place, see e.g. Gerald J Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 Journal of Legal Studies 165, 183.

[46] As an additional example. some see the transformation of the American colonies into a new kind of society at the end of the eighteenth century as an achievement of law, see Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 392.

[47] Kenneth M Ehrenberg, *The Functions of Law* (OUP 2016) 190.

[48] Joseph Raz, *Authority of Law* (OUP 1979) 103-121.

c) Power-related functions

The power-related functions look at the relationship between law and politics from two opposing sides, taking into account that law and politics can be 'either in agreement or in opposition'.[49] The first perspective in this regard concerns the restriction of power. The power-limiting function of law is one of its most normative functions. Law can set limits to actions of the state and of the individuals belonging to a society; it can set limits to the political.[50] In particular in its public dimension, it channels and organizes power.[51] In doing so, law restrains contingency and creates certainty. The exercise of powers becomes predictable in so far as actors have to abide by the limits set by law. These limits are of both a procedural and substantive nature for law gives a procedural framework to the way power is exercised and at the same time, it determines the result of this exercise in terms of content. The rule of law discussion both on the national and on the international level is closely related to this function,[52] as well as the idea of constitution and constitutionalism.[53] If the rule of law is understood in the sense of 'jurisdictio' (in opposition to law as 'gubernaculum'),[54] it requires that law should always be controlled by other law, that political power should always be bound by clear legal norms which are outside of the reach of the political.[55] In this regard, providing certainty and predictability of the exercise of political power and of its intrusion into the sphere of the individual are important elements of this power-limiting function of law.[56] Also, even if one does not agree that law should allow 'predicting official behaviour', the function of law can nonetheless be seen as providing 'a standard of criticism of behaviour, including the behaviour of officials'.[57]

This can be supplemented by a normative dimension that is related to the aspect of legitimisation. For some, the function of law is to justify the state's use or withholding of force.[58] This can even be stretched further by declaring this function to be law's defining feature: anything that does not perform this justificatory function cannot be counted as law.[59] This approach shifts the

[49] Miro Cerar, 'The Relationship Between Law and Politics' (2009) 15 Annual Survey of International & Comparative Law 19, 22.

[50] From the perspective of power, law is seen as an 'obstacle on the way toward the realisation of certain political goals', see Miro Cerar, 'The Relationship Between Law and Politics' (2009) 15 Annual Survey of International & Comparative Law 19, 37. See also on the power-limiting function, Frank Schorkopf, 'Gestaltung mit Recht - Prägekraft und Selbststand des Rechts in einer Rechtsgemeinschaft' [2011] Archiv des Öffentlichen Rechts 323.

[51] Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 EJIL 23, 32.

[52] For a general overview of the discussion on the international rule of law, see Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity' (2016) 65 International and Comparative Law Quarterly 277.

[53] On constitutionalism aiming for a 'legal control of politics', see Wouter Werner, 'The Never-ending Closure: Constitutionalism and International Law' in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2007) 329, 330.

[54] Gianluigi Palombella, 'The Rule of Law as an institutional ideal' in Leonardo Morlino and Gianluigi Palombella (eds), *Rule of Law and Democracy: Inquiries Into Internal and External Issues* (Brill 2010) 1.

[55] Dimitry Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' [2015] Yearbook of European Law 74, 75, 82; Gianluigi Palombella, 'The Rule of Law as an institutional ideal' in Leonardo Morlino and Gianluigi Palombella (eds), *Rule of Law and Democracy: Inquiries Into Internal and External Issues* (Brill 2010) 17, 24, 27-30.

[56] Stressing this aspect Richard S Kay, 'Judicial Policy-Making and the Peculiar Function of Law' (2007) 26 University of Queensland Law Journal 237, 251.

[57] Martti Koskenniemi, 'The Mystery of Legal Obligations' (2011) 3 International Theory 319.

[58] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 93; for a recent discussion of this approach see Kenneth M Ehrenberg, *The Functions of Law* (OUP 2016) 55-68.

[59] On this aspect see Kenneth M Ehrenberg, *The Functions of Law* (OUP 2016) 180.

understanding of law as a *tool* for restraining power to law being *source* of legitimacy for any exercise of power. This fundamentally effects the perception of the relationship between law and power insofar as both approaches differ with regard to the primary point of reference, law or power. However, the orientation of both approaches remains the same: being the source of legitimacy of the exercise of power represents the ultimate restriction of power.

In fact, it is not only the power of the state or of other institutional organisations which can be regulated and limited by law. A further dimension of limitation is situated on the individual level. Law has been described as 'attempt to prevent the individual encroaching on the interests of his fellows'.[60] Individuals and their freedom (e.g. their freedom of contract) are subjected to legal restrictions which are linked to the benefits coming with the provided legal framework.[61] This amounts to limiting the original powers within a society, before they have been institutionalized. Of course, this variation of the power-limiting function which concerns the individual is closely related to the institutionalisation of power in the form of a state. In this context, an important potential function of law is to make the use of force a monopoly of the community.[62] This highlights graphically how the relations within the triad individual-state-law can be perceived:[63] In order to limit the power relations between individuals, power is institutionalized in the form of the state and exercised by it through law.[64]

Contrary to an understanding that sees law primarily as limitation to power in its various forms, the reverse is possible as well. Law can also be conceived of as a tool to exercise power – and not to restrain it. This second perspective on the relationship between law and politics might actually be a historically older and more conventional function of law. Over time, it has found a broad variety of forms, including law being a means of economic exploitation and colonization[65] or an instrument of the state and of 'class struggle' in the perception of communist states.[66] The numerous examples further include the influence on lobbyists on legislative procedures or the contractual inequality in consumer/business contracts. What is more, law can also be used as a tool to mask the exercise of power. The reason for that is that the juridification of human interrelations comes with a claim of independence of the law, a (formal) decoupling from the political. Hence, law can be at the same time the means and the disguise of it.[67]

Although the potential function of exercising power seems diametrically opposed to the power-limiting function of law, both functions are actually able to coexist – each in a moderate form.

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[60] Edward Jenks, 'The Functions of Law in Society' (1923) 5 Journal of Comparative Legislation and International Law 169, 171.

[61] Joseph Raz, *Authority of Law* (OUP 1979) 171.

[62] Hans Kelsen, *General Theory of Law and State* (translated by Anders Wedberg, Harvard University Press 1943) 21.

[63] Irrespective of the debated question whether law requires a coercive aspect to be called law: Whereas Kelsen considered this to be a requirement, HLA Hart denies this and understand the coercive aspect of law as marginal. See Hans Kelsen, *The Pure Theory of Law* (1967, translated from 2nd edition of Reine Rechtslehre, 1960) 33; HLA Hart, *The Concept of Law* (OUP 1961) 20-25.

[64] Accordingly, law has been described as 'a rule of conduct enforced by the State', see Edward Jenks, 'The Functions of Law in Society' (1923) 5 Journal of Comparative Legislation and International Law 169, 175.

[65] See Simon Chesterman, 'Asia's Ambivalence About International Law & Institutions: Past, Present, and Futures' (2016) 27 EJIL 945, 947-950.

[66] Hungdah Chiu, 'Communist China's Attitude Towards International Law' (1966) 60 AJIL 245, 246-249.

[67] On the critique of these influences on international law by classical Marxist approaches, see e.g. R A Mullerson, 'Sources of International Law: New Tendencies in Soviet Thinking' (1989) 83 AJIL 494.

However, this requires an equally 'moderate' understanding of the relationship between law and politics that does not see politics as internal to law in the sense of 'law is politics'.[68] If one takes a two-pronged approach, the relationship could be described as follows: it is immanent to law to be the means of politics in view of its creation and design;[69] yet at least conceptually, law is or ought to be independent from politics once the law has been created.[70] Put differently, law and politics are 'structurally coupled systems. Law is the product of political activity which has been fixed in order to organize (...) political action.'[71] In its moderate form, the relationship between law and politics is such that particular interests never fully determine the outcome of the lawmaking. Under this premise, a power-limiting and a power-exercising function of law can be combined.

3. The differentiated functionality of international law

The discussion of the potential functions of law has shown the possibilities for law to serve various purposes. To what extent the individual functions can be implemented depends, however, on the political and social context. In particular, it can be challenging for some of the potential functions when law is situated outside of the institutional and conceptual limits of the state. This section will show that the differentiated functionality of law can be better understood using the categories of the functions developed above.

a) Challenges to the content-related functions

For the international and supranational legal sphere, the content related functions of law have been most crucial. The idea of shaping reality through law is at the core of both supranational and – to a less explicit extent – international legal developments. The narrative of integration through law has been the essence of European integration for decades.[72] Supranationally, law has been given an integrative and shaping function that goes beyond the function of law in many domestic legal orders. The idea of integration through law is also at the origin of the powerful position of European courts.[73]

Whereas internationally this narrative has never been as explicit as for European law, there has nonetheless been a strong legalization of international relations especially since the early 1990s.[74] In analogy to the European terminology, one could speak about 'internationalisation through law' or even 'globalisation through law' to capture this development (a development that qualitatively and quantitatively goes further than the narrative of 'peace through law' that emerged more than a century ago). Law has been seen by many as 'the best way to make a better world'.[75] Although

[68] Mark Tushnet, 'Critical Legal Studies' (1991) 100 Yale Law Journal 1515, 1517.

[69] Describing law-making processes as a 'by-product of politics', Philip Allott, *The Health of Nations: Society and Law Beyond the State* (CUP 2002) 309.

[70] Miro Cerar, 'The Relationship Between Law and Politics' (2009) 15 Annual Survey of International & Comparative Law 19, 22-23.

[71] Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 Leiden Journal of International Law 579, 609.

[72] Mauro Cappelletti, Monica Seccombe and Joseph H H Weiler, *Integration Through Law* (de Gruyter 1986).

[73] For domestic courts, this is primarily based on the possibility of a preliminary ruling procedure.

[74] On the role of international court in this development, see Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014).

[75] Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 413.

international law differs from European law with regard to the level of integration, the prominent role of law is comparable. Comparable are also, as a consequence, the expectations in law of the relevant law-creating and law-applying actors and of the addressees. This is reflected as well in the equally prominent role of international courts, giving effect to these expectations.[76] Conceptually, certain readings of the development of international law, for instance the concept of global constitutionalism,[77] express particularly high expectations in the shaping function of international law. More generally, liberal internationalism as a basic approach has been described as reflecting an idealistic vision of what international law can achieve in terms of shaping reality.[78]

The shaping function of law is probably the most inherent function of 'norms' in general (not only of legal norm), although their shaping effect can differ. As a result of this inherent character, the different kinds of norms existing within the international legal space fulfil this function. This includes both 'hard' legal norms as well as norms belonging to the category of soft law which both have a prominent place in contemporary international law. In particular, norms can shape reality by singling out one possibility which makes realising other possibilities harder. To show this effect, norms do not need to be hard legal norms with binding obligations – the standards constructed by soft law are sufficient to factually shape the reality of possibilities.[79] In this regard, it can remain open whether soft law is qualified as legal norms formally understood; being a form of norms *tout court*, they are in any event able to fulfil the shaping function of norms. In addition, they can, when fleshing out existing hard law norms, perpetuate the shaping effect of these legal norms.

There are two particularities of the shaping function of international law. First, whereas international law can fulfil a shaping function and have a shaping effect during the process both of law-creation and law-application, this is the case to a lesser extent for the process of enforcement. The enforcement structure on the international level removes at least partially one of the three phases available to law for reality shaping. As international courts and tribunals as well as the UN Security Council (to a factually limited extent due to the frequent use of the veto) are the only active mechanisms of enforcement available, a significant proportion of the enforcement phase is taken over either by political means used by international actors or by non-international actors (e.g. domestic courts). Second, the social dimension of the shaping function both of hard and soft international norms which relates to guiding and structuring human behaviour is partially mediated. The underlying 'substructure of human behaviour' addressed by international law is often not directly the behaviour of human beings but the behaviour of governments acting on behalf of states.[80] This can be a factor that complicates the mode of action of reality shaping. What might complicate it even more is when mediated and immediate shaping effects coexist, when for instance state-related international law and transnational law aim at shaping similar areas of 'human behaviour'.

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[76] Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014).

[77] See e.g. Anne Peters, 'Global Constitutionalism', *The Encyclopedia of Political Thought* (2015) 1484; Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009); Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009).

[78] On the critique of this 'idealism', see Daniel Joyce, 'Liberal Internationalism' in Anne Orford and Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (OUP 2016) 471, 478.

[79] Christoph Möllers, *Die Möglichkeit der Normen* (Suhrkamp 2015), at 425.

[80] Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 404.

The potential function of constructing and securing values has also been important for the international legal sphere. Values, although always present in lawmaking, can be accentuated more or less strongly. It becomes an explicit normative function when norms are openly designed not as technical rules but as legal translation of certain fundamental values. In the previous decades, international law has arguably seen a shift from a system based on mostly state-oriented principles towards a more value-based order, emphasizing rights of individual persons.[81] Yet this development has come with a risk, especially when values are given a universal effect. It can affect a society negatively if moral norms and values are represented as universal and absolute; it undermines the differentiated nature of the society.[82] As a result, when the existing 'substantive value-diversity' is stressed by international actors, this does not only undermines the claim about the universality of substantive standards such as international human rights but also questions the function of constructing and securing values at the international scale altogether.[83] This tendency is reflected in the criticism against international law of promoting western values, human rights imperialism and general hegemonic tendencies by the western world.[84] It has also triggered alternative readings of the existing law as well as the creation of alternative sets of rules and regimes.[85]

More generally, it can become problematic when the shaping function of law is approached in an idealistic way. High expectations in the shaping capacity of law can turn out to be excessive. Wherever these expectations are not met, the trust in law as a concept is negatively affected. This concerns the law in its concrete form and serving a specific purpose, be it for example financial stability in European law or the use of force in international law. Moreover, it affects law in its entirety. If the trust in law being able to shape one particular field is compromised, the overall trust in law being able to shape other fields indirectly is too.

On the supranational level, the expectations in the shaping function of law have been extraordinarily high. The narrative of 'integration through law' has given jurists the prerogative of interpretation for the process of European integration. The manifold crises in the European legal space – financial crisis, migration crisis, crisis of domestic rule of law standards etc. – have made obvious, however, that law alone cannot always regulate effectively all areas of human behaviour. On several occasions, politics needed to find answers without being guided by law. In the recent

[81] See e.g. 2005 World Summit Outcome, UNGA Res 60/1 (2005) UN Doc A/RES/60/1; Theodor Meron, *The Humanization of International Law* (Brill 2006).

[82] Niklas Luhmann, 'Paradigm Lost: On the Ethical Reflection of Morality' (1991) 29 Thesis Eleven 82, 86.

[83] Matej Avbelj, 'Transnational Law between Modernity and Post-modernity' (2016) 7 Transnational Legal Theory 406, 425.

[84] On this challenge for Human Rights, see e.g. Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (CUP 2016) 27. On hegemonic tendencies in international criminal law, see e.g. M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 Virginia Journal of International Law 81, 55. For a historical account see Martti Koskenniemi, *The Gentle Civilizer of Nations* (CUP 2001); Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP 2005).

[85] See, e.g. on the challenge of 'western' human rights by 'Asian values', Li-ann Thio, 'Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before I Sleep' (1999) 2 Yale Human Rights & Development Law Journal 1. On a concept of 'Eastphalia' in contrast to 'Westphalia' reflecting Asian power structures and principles, David P Fidler, 'Eastphalia Emerging? Asia, International Law, and Global Governance' (2010) 17 Indiana Journal of Global Legal Studies 1, 3. On the creation of the Asian Infrastructure Investment Bank as alternative regime to the Bretton Woods institutions, see Simon Chesterman, 'Asia's Ambivalence About International Law & Institutions: Past, Present, and Futures' (2016) 27 EJIL 945, 972.

past, this often happened on an ad hoc basis and outside of the supranational legal structures.[86] European law – and to some extent law in general – is perceived to have disappointed in the time of crisis with regard to the effectiveness of its shaping function. Consequently, one can arguably witness a loss of trust.[87] This loss of trust in law and its shaping function has a severe impact, due to the fact that legal integration is the basis of the entire political construction.[88] The narrative of the EU as 'community of law'[89] is fundamentally challenged.

On the international level, high expectations in the shaping function of law have been present, although probably not to the same extent as supranationally. In the international sphere, the predominance of the political is much too incorporated in the idea of international relations to have given law the same creative leeway and guiding role as it has happened in the context of European integration. Nonetheless, the perception that international law can successfully shape the major aspects of international and transnational relations has become predominant for a certain period of time, at least from a western perspective on international law. The legalization and considerable multiplication of international treaties in the post-cold-war period bear witness to that. These high expectations have been challenged by recent developments. Conceptual and factual shifts can be seen both as cause and as symptom of expectations that are perceived to either being disappointed or overplayed. The various examples include the unilateral use of force in the context of Ukraine or Syria, certain international courts being increasingly criticised by member states and even faced with withdrawals, the rise of populist politics critical towards international law, or the inability to regulate the global financial system. This has arguably led not only to stagnation in international lawmaking[90] but maybe even to a crisis of international law in general.[91]

However, this analysis of how high expectations in the potential shaping function of international law first developed and have later been challenged, does not reflect a comprehensive global view on the issue. From the perspective of many Asian states, the expectations of what law und especially international law can do and how it can shape reality have been significantly lower.[92] This is reflected in an under-participation and under-representation of many Asian states in international law regimes: 'colonialism, the unequal treaties, and the post-war experience encouraged the perception that international law is of questionable legitimacy, can be used for

[86] On the impact of the so-called interngouvernemental methode replacing suprantional regulation, see in general Christopher Schoenfleisch, *Integration durch Koordinierung* (Mohr Siebeck 2018).

[87] Discussing a crises of trust, Armin von Bogdandy, 'Jenseits der Rechtsgemeinschaft – Begriffsarbeit in der europäischen Sinn- und Rechtsstaatlichkeitskrise' (2017) 52 Europarecht 487-511.

[88] On the need to emancipate European unity from integration, see Armin von Bogdandy, 'European Law Beyond "Ever Closer Union" Repositioning the Concept, its Thrust and the EJC's Comparative Methodology' (2016) 22 European Law Journal 519, 527-528.

[89] This goes back to Walter Hallstein, 'Die EWG – Eine Rechtsgemeinschaft' in Thomas Oppermann (ed), *Europäische Reden* (Deutsche Verlags-Anstalt 1979) 341-348; the CJEU first referred to the concept of 'community based on the rule of law' in Case 294/83, *Les Verts v Parliament* [1986] (ECLI:EU:C:1986:166), para 23.

[90] Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Law Making' (2014) 25 EJIL 733.

[91] Heike Krieger and Georg Nolte, 'The International Rule of Law – Rise or Decline? – Points of Departure' (2016) KFG Working Paper Series, No. 1, Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?', available at http://www.kfg-intlaw.de/PDF-ftp-Ordner/KFG%20Working%20Paper%20No.%201.pdf.

[92] See e.g. on India's disillusionment with the capacity of law to change the international economic order, B S Chimni, 'International Law Scholarship in Post-colonial India: Coping with Dualism' (2010) 23 Leiden Journal of International Law 42-45.

instrumental purposes, and is necessarily selective in its application'.[93] Thus, the expectations of non-western states are often not only lower but different. There are, for instance, different views on which particular power relations and which actors' positions should be reflected by international law.[94] Moreover, whereas states with strong and independent courts might have high expectations in law and see law, once the lawmaking procedure is completed, as self-standing with regard to the political sphere, other states traditionally might conceive of law as more densely intertwined with the political and as its instrument.[95] Such internal approaches to law are likely to be translated to the international level, although this does not always have to be the case. On the global scale, such diverging expectations of the various international actors about what law can and should achieve can be problematic in itself. This is exemplified, amongst others, by the disagreement about whether and to what extent international law should be value-based.

For international law, another aspect, more inherent to the nature of international law itself, can influence how far-reaching the shaping effect of international law can be. The international legal order is characterized by a strong interlinkage between the law-creating, law-applying and law-enforcing actors. Despite the multiplication of actors and especially of non-state actors, international law is still to a considerable extent horizontal law wherever there is identity of the makers and the subjects of the law – as well as of those who have the supreme authority of interpreting the law.[96] This leads to a predominance of unanimous lawmaking procedures which in contrast to majoritarian systems, often might only allow for less ambitious regulations. Fulfilling a shaping function thus becomes difficult for law when the interests of the actors are more divergent and when certain actors are in a stronger position to assert their interest. For instance, the emergence of 'new powers' such as India, China or Brazil creates new divisions and makes consent-finding more difficult.[97] Tendencies towards a regionalisation of international law can be understood as a one of the fall back options for international actors in order to shift the shaping function to a different level.[98] In this context, territorial limitation appears to be the trade-off for upholding a broader shaping function by international law.

The second result of the strong interlinkage between the law-creating, law-applying and law-enforcing actors is that many (hard) international legal norms are – once they are created – fairly

[93] Simon Chesterman, 'Asia's Ambivalence About International Law & Institutions: Past, Present, and Future' (2016) 27 EJIL 945, 964. On 'unequal treaties' see Dong Wang, *China's Unequal Treaties: Narrating National History* (Rowman and Littlefield 2005).

[94] On the hope of better reflecting a strong position of third world states, see Upendra Baxi, 'What May the "Third World" Expect from International Law?' (2006) 27 Third World Quarterly 713.

[95] On international law being traditionally conceived by China as instrument of the state and not as an element of control thereof, Hungdah Chiu, 'Communist China's Attitude Towards International Law' (1966) 60 AJIL 245, 246-249.

[96] Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 404. From the perspective of international relations, this is described as 'anarchy', see Jan Ruzicka and Vincent Charles Keating, 'Going global: Trust research and international relations' (2015) 5 Journal of Trust Research 8, 10.

[97] Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Law Making' (2014) 25 EJIL 733, 742.

[98] On the regionalisation of international criminal law, see e.g. William Burke-White, 'Regionalization of International Criminal Law Enforcement: A Preliminary Exploration' (2003) 38 Texas International Law Journal 729.

inflexible.[99] Despite the possibility of further developing existing provisions through their interpretation and thereby taking subsequent practise into account, a modification or development of the existing international law is often difficult, compared to the legislative flexibility of other legal orders.[100] Classical international law has always been relatively static.[101] Consequently, it can become a challenge for (hard) international law to fulfil a shaping function, given that adapting the law to changing circumstances and ultimately to a changing reality is limited by various procedural and political factors. In order to create a higher alterability of international law,[102] the international sphere has developed alternative mechanisms such as an informalisation of international regulation. Both states and other international actors use informal instruments to achieve flexibility, potentially combining an informality of the output and of the actors. Although this comes for instance for soft law with a trade-off relating to the binding effect of the norms, it strengthens the shaping function of international law broadly understood.[103]

Thirdly, in the international sphere, it can be more difficult for the involved actors to agree on certain guiding principles for the shaping function of law. For instance, considerations of common good often serve as a guiding principle in domestic legal orders. The concept of common interests is however less present on the international level.[104] Although there have been developments towards integrating collective interests into international law,[105] individual state interests still seem to be a major factor and currently even seem to gain traction. This influences the shaping function of international law. Consent-based lawmaking becomes more difficult when there is – despite the rhetoric – no meaningful agreement that lawmaking should generally be guided by considerations of common good, trumping particular interests. Along these lines, some hold the opinion that international law cannot fulfil its 'true' functions until there is 'an international social system capable of processing conflicting interests and conflicting ideas'.[106] Some even go a step further by understanding the orientation towards the common good not only as one aspect of the potential shaping function of law but as essential requirement of the rule of law.[107] Even without going that far, at the very least, guiding principles strengthen the shaping function of law. If these

[99] On the inflexibility of formal international lawmaking see also Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Law Making' (2014) 25 EJIL 733, 743.

[100] Stressing how existing conventions in one area of law make the conclusion of new treaties difficult: Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Law Making' (2014) 25 EJIL 733, 739.

[101] The problem of change in the international sphere has already been addressed e.g. by Hersch Lauterpacht, *The Function of law in the International Community* (Clarendon Press 1933) 248-250.

[102] On alterability being a main characteristic of law, see Niklas Luhmann, *The Differentiation of Society* (Columbia University Press 1982) 94.

[103] On the discussion about 'binding or less binding' legal norms, see e.g. Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 Nordic Journal of International Law 167, 181.

[104] Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 404.

[105] Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1995) 250 Collected Courses of the Hague Academy of International Law 217; Benedict Kingsbury and Megan Donaldson, 'From Bilateralism to Publicness in International Law' in Ulrich Fastenrath et al (eds), *From Bilateralism to Community Interest – Essays in Honour of Judge Bruno Simma* (OUP 2011) 81.

[106] Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 409.

[107] Mortimer Sellers, 'What Is the Rule of Law and Why Is It So Important?' in Flora Goudappel and Ernst Hirsch Ballin (eds), *Democracy and Rule of Law in the European Union* (Springer 2016) 3, 6.

guiding principles are less prominent, the potential shaping function can develop only with some difficulty.

Although collective interests as guiding principle might be less pronounced in the context of lawmaking, it seems to play a bigger role when international law is applied. To an extent, international courts and tribunals have attempted to emphasise collective interests as guiding principle. As actors that are neutral vis-à-vis the process of formal law-creation, they are in principle well situated to shape the law from a more holistic point of view, not being confined as much by the particular interests of states or other actors. This might be one of the reasons for the strong role of some courts in the international sphere, such as for instance the Inter-American Court of Human Rights or the European Court of Human Rights. As opposed to that, other courts are facing more criticism with regard to a (perceived) particular interests driven approach. Guiding principles as element of the shaping function of law thus might have a considerable impact on the long-term effectiveness of international adjudication.

b) Challenges to the system-related functions

The idea of international law fulfilling a system-related function seems to be conceptually much more challenged than the content-related functions. Looking at international law through the lens of the legal order has been criticised by some for being too formalistic or positivistic.[108] If one takes this approach, the extent to which international law has system-related effects or functions does not matter; the focus is instead on actors, on power structures etc. However, for those who consider the (additional) lens of the legal order to be analytically and normatively useful, the question arises to what extent international law has an ordering effect or function.[109]

The conventional perception is that international law as a whole has a weak character of order. Traditionally, the character of international law as an order was particularly put forward when it came to delimiting international law towards external legal bodies, especially towards domestic law which has been considered to be a mere fact, without normative importance from the perspective of international law.[110] The emphasis has been put on the external dimension of the order, not so much on the *internal* structure. International law is less seen as an internally structured entity which is formed by the interrelations of its individual norms, but as a set of individual provisions which do not necessary communicate and depend on each other. From this perspective, it is understood as an 'unsystematic plurality of systems or regimes'[111]. A conceptual unity of international law is regarded as mere chimera.[112] Accordingly, international law as a whole is perceived to have a less pronounced effect of system creation.

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[108] Labelling the lens of the legal order as a German academic approach that emphasises consistency more than other legal orders, Martti Koskenniemi, 'Between Coordination and Constitution: International Law as a German Discipline' (2011) 15 Redescriptions 45, 63.

[109] On 'legal order' as a 'main stream' idea, see Andrea Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking* (OUP 2016) 38-39.

[110] *Certains intérêts allemands en Haute-Silésie polonaise* PCIJ Rep Series A No 6, 19.

[111] Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law' (2012) 22 Duke Journal of Comparative and International Law 349, 375.

[112] Andreas Fischer-Lescano and Gunther Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of International Law' (2004) 25 Michigan Journal of International Law 999, 1017. Critical on the narrative discourse of unity, Mario Prost, *The Concept of Unity in Public International Law* (Hart Publishing 2012).

This has various consequences which relate to the interrelations between international legal norms.[113] One of them concerns the potential existence of structural principals within international law. If one normatively considers international law to have an overarching function of system creation, structural principles would be one of the instruments to foster such a systematizing effect. On the basis of the interconnectedness of norms within a group of norms, it is conceptually possible to derive distinct legal principles from an overview of this group of norms. In this way, a 'new' principle emanates from the existing legal norms, structuring their interrelations. However, for international law, such a process would have to overcome a potentially restrictive understanding of the numerus clausus of sources of law.[114] Tying back every norm to one of the sources listed in article 38 of the ICJ statute makes it more difficult to argue for overarching structural principles. This is exemplified by the critical reception that approaches encounter which try to create integrative structures of order by developing principles of international administrative law, applicable to all international administrative regimes.[115]

As a result and combined with the increasing fragmentation of international law,[116] the ordering function of international law has received a regime-specific orientation. The function of system creation relates not that much to international law as a whole but to sub-sets of legal norms. Within individual international law regimes such as international criminal law, human rights law or international trade law, the ordering effect can be strong. Hence, the differentiation of the various international law regimes, sometimes fostered by specific regime-related courts or tribunals, actually strengthens the effect of system-creation on a different scale. Contrary to a conventional reading, the fragmentation of international law can in this regard be conceived of as an indicator for the normative ordering function being reinforced.

Inversely, opportunities might arise from the fact that the function of legal system creation for international law as a 'universal whole' is less pronounced. If the inner structures of an order are less strong, the order might be more apt to open up towards other groups of legal norms. The external permeability of the order can potentially be greater if the internal structures of interdependence between norms are less tight.[117] As a consequence, there are, for example, some regimes of international law interacting more closely with domestic law than others, be it international organisations law,[118] human rights law,[119] international investment law, national

[113] Critically on perceiving international law as a system, Martti Koskenniemi, 'Between Coordination and Constitution: International Law as a German Discipline' (2011) 15 Redescriptions 45, 63.

[114] For a general discussion of the formalist understanding of the sources of international law, see Jean D'Aspermont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules* (OUP 2011).

[115] See e.g. regarding common procedural principles Benedict Kingsbury and Lorenzo Casini, 'Global Administrative Law: Dimensions of International Organizations Law' (2009) 6 International Organizations Law Review 319, 333. International administrative tribunals have started to refer e.g. to general principles of international civil service law, see *Judgment No. 2991* (Administrative Tribunal of the International Labour Organization, 2 February 2011), para 13; see also *De Merode et al v The World Bank* (World Bank Administrative Tribunal), decision No. 1 of June 5 1981, para 28.

[116] Eyal Benvenisti, 'The Conception of International Law as a Legal System' (2007) 50 German Yearbook of International Law 393, 402. On fragmentation in general see e.g. Margaret A Young, *Regime Interaction in International Law – Facing Fragmentation* (CUP 2012); Anne Peters, 'Fragmentation and Constitutionalization' in Anne Orford and Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (OUP 2016) 1011.

[117] On the concept of permeability of legal orders, see Mattias Wendel, *Permeabilität im Europäischen Verfassungsrecht* (Mohr Siebeck 2011).

[118] See e.g. Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 EJIL 190, who ties back global administrative law standards to domestic law principles.

security law or – with regard to the need of many of its norms for domestic implementation – international environmental law.

An aspect of the potential system-related function of law that is challenged on the international level is the self-regulation of law. Law is considered to regulate itself based on rules for norm creation and norm application. Internationally, the self-regulating effect of law faces restrains. International norms about norm creation and norm application do of course exist: many treaties have provisions on amending procedures by the parties to the treaty; there is the Vienna Convention on the Law of Treaties regulating formation and application of treaty law; and even customary international law is confined by rules on norm creation. Yet these 'formal' means of self-regulation of international law have proven to be less efficient than they are for instance in many domestic legal orders and also in the supranational context. The relatively strict formal rules on law creation that prevail are considered to be not flexible enough to meet the needs of international actors.[120] Consequently, international law-making has developed to reach beyond its own self-regulatory attempts, increasingly using informal processes.[121] The application of international law also seems to be less guided by law itself. Given that hard international law, especially treaty law, tends to be created once at a specific point in time without being formally modified afterwards much or at all,[122] the 'guidelines' for the norm application are limited. Unlike for instance in a domestic context where the legislator can provide a basis for interpretation with every modification made to a statute (and potentially even give motivations), such legal tools are not often available on the international level. As a result, norm-interpreting actors have more leeway. In some treaty frameworks, expert bodies suggest interpretations of legal obligations that amount to establishing new norms.[123] In others, international courts and tribunals become creative in the further development of 'old' rules and their adaption to changing factual circumstances.[124] This is particularly so for treaties with an intended long-lasting lifespan such as human rights treaties which are even less likely to be subjected to amendments than for instance environmental and trade related conventions. Although such tendencies by international courts and other actors are increasingly criticised,[125] they are in a sense inbuilt into the structure of international law that

[119] See e.g. the 'European consensus' standard in the jurisprudence of the European Court of Human Rights, e.g. *Evans v the United Kingdom* App no. 6339/05 (ECtHR, 10 April 2007), paras 79, 90.

[120] Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Law Making' (2014) 25 EJIL 733, 743. However, other political motivations might have contributed to this development such as e.g. third world approaches which aspired to changing international law making processes. On this aspiration Andrea Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking* (OUP 2016) 214.

[121] Laurence R Helfer, 'Nonconsensual International Lawmaking' (2008) 71 University of Illinois Law Review 71, 79-90; Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Law Making' (2014) 25 EJIL 733, 743.

[122] Here again, interpretation provides of course a (limited) mechanism for development.

[123] See e.g. general comment No. 15 of the UN Committee on Economic, Social and Cultural Rights (concerning the right to water).

[124] See already Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933) 254-257.

[125] On the latest critique of the jurisprudence of ECHR by member states, see the Draft Copenhagen Declaration of 5 February 2018 under the Danish Chairmanship of the Committee of Ministers of the Council of Europe. On the critique of expert bodies engaging in 'aggressive interpretations', see e.g. Monica Hakimi, 'Secondary Human Rights Law' (2009) 34 Yale Journal of International Law 596-604, 599.

offers fewer possibilities for the law to regulate its own application. A lack of self-regulation by law expands the range of actors exercising a norm-*creating* function through interpretation.[126]

Further, legal system creation as a potential function of international law is challenged with regard to the integrative effect that law can have on its addressees. It is increasingly unclear for international law who is actually addressed and bound by it. Despite decades of discussion about it, many questions have remained without answer: to what extent, if at all, can individuals be considered as subjects of international law; are international organizations bound by human rights standards; are corporations bound by international criminal law; or are non-state actors bound by humanitarian law. The appearance of new actors in the international sphere has not only broadened the spectrum of potential addressees but also of uncertainties. Non-governmental organisations, private armed groups, quasi-executive agencies installed by international organisations are examples questioning to what extent the defining boundaries of the group of contemporary international law addressees have become permeable, broadened or – more sceptically put – indeterminable.[127]

It is not only the potential legal system creation that is challenged in the international context. Social system creation can be complex as well. This relates to the coordinative function of law, with law coordinating how to solve problems. For international law (narrowly understood), this presents a challenge. A considerable amount of the existing problems of international nature are partly or entirely regulated by domestic or transnational law. There are 'vast areas of extra-national, non-statist human activity, in particular, vast quantities of economic transactions conducted by individual, commercial, and financial corporations' which are not coordinated on the international level; instead, they are subjected to the 'conflicting, overlapping and uncoordinated' domestic legal systems[128] and transnational regimes. Thus, the space for law to fulfil a problem-solving function in these contexts is, so to say, highly competitive. From the perspective of international law, this space is – at least partially – already taken. What is more, the problem solving takes place in different legal orders, including to some extent the international one, but without (or with little) structured coordination between them.[129] This effect is multiplied by the fragmentation of international law itself and the little developed coordination between the different regimes. Accordingly, the transnational and multi-level legal structures challenge the coordinative aspect of the system-related function of law. As a reaction, courts have aimed to provide a coordinative effect through the mechanism of judicial dialogue. However, coordination might be too much a task for courts alone. As actors which are restricted both by their position as 'organ' of one legal order and the limitations of the case-based judicial law-making, they cannot achieve a comprehensive and balanced coordination of the interplay between different legal spaces. If their coordination is not balanced, there is a risk that other international actors turn to unilateral considerations because they are dissatisfied with unbalanced coordination.

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[126] On the norm-creating function of expert bodies, Eckart Klein, 'Impact of Treaty Bodies on the International Legal Order' in Rüdiger Wolfrum and Volker Röben (eds), *Developments of International Law in Treaty Making* (Springer 2005) 571, 575.

[127] See e.g Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Bloomsbury Publishing 2016).

[128] Philip Allott, 'The True Functions of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 404.

[129] Whereas the coordination of private law has been attempted by organisations such as the Hague Conference on Private International Law, UNCITRAL and UNIDROIT, the outcome is still a long way from a harmonized global private law.

Finally, international and supranational law can have a major effect in terms of political system creation. Whereas states are characterized by pre-existing political structures, this is much less the case internationally. Of course, power relations between states exist independently of legal regulation, but they are less institutionalized. Law can potentially provide this institutionalisation. Accordingly, political system creation is a possible purpose that is of special relevance for law on the international level. However, as the example of the European Union shows, a strong emphasis on such a function comes with a risk. If the legal dimension remains the predominant one, institutionalisation can lack a political counterweight. The created institution might get into disequilibrium. For the EU, the narrative of a 'Union based on law' has been increasingly questioned.[130] This shows that the institutionalizing role of international and supranational law does not have an infinite reach and that the effectiveness of law in this regard can face challenges as well.

c) Challenges to the power-related functions

The power-related functions of international law have been at the focus especially of the discussion about international law and its history. As has been highlighted by various approaches in international law scholarship, the potential function of law to serve as a tool for the exercise of power is extensively visible on the international plane.[131] International law leaves ample space for power-relations to determine both the content of legal norms and their application. Many scholars have stressed the political character of international law, conceiving international law as a political project.[132] As has been argued, the autonomy of international law from politics and power structures is less pronounced than this is the case for domestic law.[133]

For international law, this function presents a challenge in itself. Power-relations being reflected in and strengthened by international law are considered to challenge the legitimacy of international law. Current developments such as states criticizing, and withdrawing from, international organisations and courts is but one prominent symptom of that discussion. However, the assessment of how international law can serve as a tool for exercising power shall not be repeated here. This paper focusses not so much on how the potential functions themselves can present a challenge for international law. Rather, it aims at discussing how the potential functions *are challenged*. Accordingly, this section will concentrate on the potential power-limiting function of international law which raises the question to what extent it can materialize.

Despite its traditionally horizontal, non-hierarchical character, international law can pursue a power-limiting function. A certain power-limiting effect of international law exists that relates to both the power exercised by international actors in the international sphere and that exercised by

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[130] See e.g. Armin von Bogdandy, 'European Law Beyond "Ever Closer Union" Repositioning the Concept, its Thrust and the EJC's Comparative Methodology' (2016) 22 European Law Journal 519, 527-528; Christian Joerges, 'Recht und Politik in der Krise Europas' (2012) 66 Merkur 1013.

[131] To mention but a few of the various critical legal scholars, TWAIL scholars or Marxist scholars: David W Kennedy, 'A new Stream of International Legal Scholarship' (1988*)* 7 Wisconsin International Law Journal 1; Martii Koskenniemi, 'The Politics of International Law' (1999) 1 EJIL 4; B S Chimni, 'An Outline of A Marxist Course on Public International Law' (2004) 17 Leiden Journal of International Law 1; Antony Anghie, *Imperialism, Sovereignity and the Making of International Law* (CUP 2005).

[132] See e.g. David W Kennedy, 'A new Stream of International Legal Scholarship' (1988) 7 Wisconsin International Law Journal 1, 7.

[133] Miro Cerar, 'The Relationship Between Law and Politics' (2009) 15 Annual Survey of International & Comparative Law 19, 36.

domestic actors in the domestic sphere.[134] The most obvious element limiting the *international* exercise of power resides in the international norms guiding and confining political power. Every legal norm obliging an addressee to act in a specific way, or to abstain from a certain action, can be understood as a potential limit to individual power. These norms aim at preventing actors to act exclusively in their respective interest. If one follows this premise, all the international legal provisions creating obligations for states and international organisations can have in principle a power-limiting effect. To what extent this potential effect materializes in practice is a different question.[135] Beside this general aspect, some international legal norms contain more explicit restrictions of power, such as the norms on the use of force and the acquisition of territory. Under international law, the use of force as one of the elements of power is considered a monopoly of the community. Guaranteeing peace and stability are part of the key objectives of a number of international law regimes. Furthermore, international law does not only aim at limiting the individual power of certain international actors but also their collective power. An example for that are the ius cogens norms, preventing international actors even in the case of group consensus to act in a way that would violate the respective ius cogens norm (unless, of course, the consenting group is composed by the international community of states as a whole). What is more, the international exercise of power can be limited by elements of separation of power. One of these elements is the creation of international courts and tribunals.[136] They serve as a framework for the application of international law and can contribute to providing certainty and predictability of the exercise of political power.

International law can also restrain the *domestic* exercise of power by states. International human rights law is the most prominent field of international law which has a power-limiting function. The various human rights instruments and, where it exists, the related international judicial control aim at confining the exercise of power by states with regard to individuals. In particular, they aim at offering an international layer of confinement in cases in which the power-limiting effect of domestic law might be considered insufficient. Here, the interconnection between legal orders and the respective functions of law becomes apparent: International law can fulfil a power-limiting function that shows its effect not only on the international but also on the domestic level.

From a normative perspective, international law can have broad or narrow power-limiting functions. A broad function does however encounter challenges. In general, an *immediate* limit to the exercise of power is created by 'jurisdictio', i.e. legal norms controlling other law and binding political power.[137] What exists internationally in this respect is relatively sparse: it would include ius cogens norms, certain norms contained in the UN Charter norms Security Council resolutions, and arguably some aspects of human rights law. A fully-fledged hierarchy within the international legal norms does not exist;[138] the effect of norms formally equipped with primacy over other

[134] Critical about 'conceiving of international law as the self-limiting of equal sovereigns', Philip Allott, *Eunomia: New Order for a New World* (OUP 2001) 304.

[135] Sceptical of whether international law can in fact restrain the interest based relations between states, Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005). For a critique of this approach, see Jens D Ohlin, *The Assault on International Law* (OUP 2015).

[136] Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP 2013) 189.

[137] On the term 'jurisdictio', see above.

[138] On the merely limited trumping impact of jus cogens norms on other international law norms see Jure Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in Erica DeWet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 13.

international law norms is limited.[139] Instead, the international legal system relies mostly on the *indirect* power-limiting effect of the institutional structures established by international legal instruments. In this framework, legal relations and power relations are situated on the same level which, in case of conflict, can cause the latter to superimpose the former. The institutional structures established by law aim at counterbalancing such results and at constituting a functional equivalent to an immediate power restriction. Their practical impact is however more contingent than an immediate power-limiting effect would be. This can be for instance problematic when the international exercise of power intrudes directly into the sphere of the individual. If there are no adequate institutional guaranties, acts of states and international institutions can lack accountability and the exercise of authority remains unchecked.[140] In such cases, the power-limiting effect of international law is narrow. From the perspective of other legal orders, a weak power-limiting effect of international law can then be perceived as a shortcoming. It is in these circumstances that other legal orders try to compensate for such a shortcoming, be it the European legal order[141] or the domestic legal orders.[142] In this regard, one legal order can serve as 'jurisdictio' for another order. The 'Solange' approach of European and domestic courts are an explicit expression of circumstances when a power-limiting function is exercised by an 'external' legal order.

A second challenge for a broader power-limiting function of international law consists in the fact that other than in domestic or even in European law, there is no consensus as to what the object for such a limitation of power could or should be. As is demonstrated by the various attempts in international law scholarship to conceptualize what the exercise of power in the international sphere actually means and what forms it can take,[143] 'power' or 'authority' on the international level is even less a monolithic force than it would be domestically. Rather, it is complex, multi-layered and diverse, emanating from states individually or in groups, through international organisations or their agents, in legal or non-legal form, affecting individuals directly or indirectly etc. Given that this plurality of ways to exercise power is not structured, the objects of potential limitation are so intangible that law necessarily has to encounter difficulties in setting limits to all these forms of power.

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[139] On the mitigated precedence of the UN Charter over conflicting obligations of the member states, see e.g. Rain Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 ICLQ 583.

[140] As one example of the broad accountability discussion, see e.g. Benedict Kingsbury, 'The Administrative Law Frontier in Global Governance' (2005) 99 Proceedings of the Annual Meeting (American Society of International Law) 143. On the discussion about 'international public authority', see Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory on International Adjudication* (OUP 2014) 111 et seq.

[141] See e.g. CJEU, Joined Cases C-402/ 05 P and C-415/05 P, *Kadi and Al Barakaat* [2008] (ECLI:EU:C:2008:461) as well as CJEU, Joint Cases C-584/10 P, C-593/10 P and C-595/10 P, '*Kadi II*' [2013] (ECLI:EU:C:2013:518).

[142] A prominent example in this regard are domestic courts diminishing the broad immunity of international organizations. See e.g. *Siedler (S.M.) v Union de l'Europe occidentale*, (17 Septembre 2003), Cour d'Appel de Bruxelles (4ème Ch.), Journal des Tribunaux [2004] 617 ; *unesco v Boulois*, 20 October 1997, Tribunal de grande instance de Paris (ord. Réf.), (1997) Rev Arb 575; Cour d'Appel Paris (14e Ch. A), 19 June 1998, (1999) xxiv Yearbook Commercial Arbitration 294. See also August Reinisch, 'To What Extent Can and Should National Courts "Fill the Accountability Gap"?' (2013) 10 International Organizations Law Review 572.

[143] Possible perspectives on this question include 'international public authority' and 'global administrative law', see e.g. Armin von Bogdandy et al (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010); Benedict Kingsbury and Richard B Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations' in Katerina Papanikolaou (ed), *International Administrative Tribunals in a Changing World* (Esperia Publications 2008) 193.

An additional element of the potential power-limiting function is certainty and predictability provided by law. With regard to international law, this potential function can face challenges as well. This is first of all due to the two aforementioned aspects: without a sufficient element of control over a determinable set of actors, law cannot provide certainty and predictability to its full effect. Moreover characteristics such as the voluntarism predominant in the international sphere prevent a general and automatic jurisdiction of international courts and tribunals. Thus there is no certain judicial control over political power and no certain application of law. This can contribute to creating actual or perceived extra-judicial spaces. Such extra-judicial spaces undermine a potential power-limiting function of law. The non-existence of a system of guaranteed jurisdiction and the – at least perceived – extra-judicial spaces for certain actions and actors might contribute to other actors questioning existing courts and eluding their jurisdiction. The examples of states rejecting decisions of international courts, tribunals or arbitral bodies[144] or withdrawing from their jurisdiction altogether have become numerous.[145] International organisations as well can be placed – or place themselves – in extra-judicial spaces. This is for instance the case regarding the question of their liability relating to private law claims advanced by third parties, such as in tort.[146] In general, with the multiplication of new actors in the international arena, predictability as to whether the exercise of power by these actors can be legally challenged decreases.

For European Union law, the power-limiting function is emphasized more strongly (at least in the context of supranational law). This is due, first of all, to the existing hierarchy between primary and secondary law. European primary law provides for legal norms which are outside of the reach of the political actors within the institutionalized structures of the Union. When Parliament, Commission and Counsel exercise their political power through lawmaking, this power is confined by the standards set by the treaties; the respect of these standards is controlled by the Court of Justice of the European Union who has automatic jurisdiction in this regard. Thus, the institutionalized political power within the EU is bound by 'jurisdictio' in the form of European primary law. In addition, the dense intertwinement of Union law and domestic law adds another layer to that.[147] European and domestic law *together* exercise a power-limiting function. The domestic constitutional law standards are used as an element of power-limitation based on domestic law.[148] This however bears risks as well. The power-limiting function of domestic law can

[144] See e.g. China's rejection of the decision in the South China Sea Arbitration, PCA Case No. 2013-19 *Philippines v China*, Award of 12 July 2016; the decision by the Russian Constitutional Court of 19 April 2016 rejecting a full-fledged execution of the judgment of the European Court of Human Rights in the case App nos 11157/04 and 15162/05 *Anchugov and Gladkov v Russia* (4 July 2013); the decision by the Danish Supreme Court of 6 December 2016, Case no. 15/2014, setting aside the CJEU judgement, Case C-441/14 *Dansk Industri (*19 April 2016).

[145] This includes the withdrawal of Burundi and the Philippines as well as the attempted withdrawals of South Africa and Gambia from the International Criminal Court.

[146] See e.g. the recent litigation against the UN brought on behalf of the cholera victims in Haiti (where a United States federal appeals panel upheld the immunity of the UN in a decision of 18 August 2016).

[147] On this intertwinement and its conceptualisation, see Dana Burchardt, *Die Rangfrage im Europäischen Normenverbund* (Mohr Siebeck 2015).

[148] See e.g. for the jurisprudence on constitutional identity as one element of domestic constitutional law used to limit power: See e.g. German Constitutional Court, order of 15 December 2015, 2 BvR 2735/14; French Conseil Constitutionnel, decision of 27 July 2006, n. 2006-540 DC; Polish Constitutional Court, decision of 24 November 2010, K 32/09; Czech Constitutional Court, decision of 26 November 2008, Pl. US. 19/08; Italian Constitutional Court, order of 23 November 2016, n. 24/2017; Hungarian Constitutional Court, decision of 30 November 2016, 22/2016. (XII. 5.) AB.

be used as a pretext for achieving political aims.[149] In such a case, the power-limiting effect would in fact have a power-exercising function. This shows how closely power-limiting and power-exercising functions can be interrelated and how the latter might challenge the former.

4. Conclusion

The close scrutiny of the effects and potential functions of law has illustrated three key aspects. First, as mentioned at the outset of this paper, the functions of law offer a yardstick for the effectiveness of legal norms and orders. In this regard, the above analysis has at its very basis highlighted that it is important to consider that functions as an analytical yardstick are neither objective nor carved in stone. Being aware of the normative basis of functions as yardstick enables to contextualize how international actors, including scholars, assess international law developments, allowing for a more fruitful dialogue on that matter.

Second, the paper has demonstrated that the functions of law are not a uniform or unitary but differentiated standard; they thus require a differentiated assessment of the effectiveness of law in different settings. The analysis has shown the details of the functional and conceptual variances of law in different contexts. Linking this back to the current developments in international and supranational law offers an analytical lens to conceptually frame and locate these developments. In this regard, this conclusion advocates for a renewed awareness of the challenges that the potential functions of law encounter in the international and supranational context. This includes an increased sensitization both on the academic and on the practical level: Understanding the differentiated functionality of law allows both for a more adequate analysis of legal phenomena and for a more adequate use of legal mechanisms by lawmakers and those who apply the law. What is more, analytically taking into account a differentiated functionality of law can contribute to understanding how the functions of various sets of norms be it norms labelled as domestic, supranational, international or transnational law interrelate and how they might react to each other's particularities.

Lastly, the function-related analytical lens contributes to providing a broader picture both for an assessment and a critique of current developments. Instead of examining individual phenomena separately and drawing general conclusions from each of them for international law, the function-related lens of this paper has aimed at painting a more encompassing and at the same time more nuanced picture. Linking back current developments to a fundamental theoretical category such as the functions of law enables conclusions about what these developments might mean for the concept of law in general and for law in specific contexts. Moreover, it allows to assess how various developments and phenomena might influence and – what is important – compensate each other. While some phenomena might challenge certain potential functions of law, others might strengthen them. This broader perspective can contribute to offering a more balanced assessment of current legal developments and help to better situating symptoms of an apparent crisis.

[149] See e.g. the developments discussed by Kriszta Kovács, 'The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts' (2017) 18 German Law Journal 1703; Gábor Halmai, 'National(ist) constitutional identity? Hungary's road to abuse constitutional pluralism' EUI Working Paper LAW 2017/08.

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

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

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