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FOREIGN RELATIONS LAW

What legal principles govern the external exercise of the public power of states within common law legal systems? *Foreign Relations Law* tackles three fundamental issues: the distribution of the foreign relations power between the organs of government; the impact of the foreign relations power on individual rights; and the treatment of the foreign state within the municipal legal system. Focusing on the four Anglo-Commonwealth states (the United Kingdom, Australia, Canada and New Zealand), Campbell McLachlan examines the interaction between public international law and national law, and demonstrates that the prime function of foreign relations law is not to exclude foreign affairs from legal regulation, but to allocate jurisdiction and determine applicable law in cases involving the external exercise of the public power of states: between the organs of the state, among the national legal systems of different states, and between the national and the international legal systems.

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FOREIGN RELATIONS LAW

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PREFACE

> [E]very international dispute is of a political character, if by that is meant that it is of importance to the State in question. Thus viewed, the proposition that some legal questions are political is an understatement of what is believed to be the true position. The State is a political institution, and all questions which affect it as a whole, in particular in its relations with other States, are therefore political . . . [but] it is equally easy to show that all international disputes are, irrespective of their gravity, disputes of a legal character in the sense that, so long as the rule of law is recognised, they are capable of an answer by the application of legal rules.
>
> Hersch Lauterpacht, *The Function of Law in the International Community* (1933)

> I don't think intellectuals do very well talking about the need for the world to be democratic, or the need for human rights to be better respected worldwide. It's not that the statement falls short of the desirable, but it contributes very little to either achieving its goal or adding to the rigour of the conversation. I think the way to defend and advance large abstractions in the generations to come will be to defend and protect institutions and law and rules and practices that incarnate our best attempt at those large abstractions.
>
> Tony Judt, *Thinking the Twentieth Century* (2012)

Why, in the early twenty-first century, write a book about the principles of Anglo-Commonwealth law applicable to the foreign relations of the state? After all, the developments of the late twentieth century might seem, at first glance, to have increasingly marginalised the significance of the state in international affairs. In economic terms, the forces of globalisation have served to make national borders highly porous. The architecture of international economic law, in which the United Kingdom, Australia, Canada and New Zealand – the states whose legal systems are the object of the present study – are all committed participants, has developed to such an extent that it is now possible to assert that the real issues are not determined by the old tension between national sovereignty and international norms, but rather by the resolution of conflicting values and interests within the international legal system.[1] In this matrix, states jostle for position alongside multinational corporations as the holders of the levers of both economic power

[1] Howse 2010.

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and legal rights and duties. All four states are, in any event, now part of wider economic unions that place common objectives above national interest.

Moreover, in the broader landscape of public international law, arguably the most significant developments of the close of the twentieth century have all concerned not states but individuals. It is the human rights of individuals, as well as their criminal responsibilities, that have seen the most dramatic shift in the preoccupations of international law. A new breed of international courts and tribunals may preserve a formal priority for national adjudication (whether through the exhaustion of local remedies or complementarity), but in practice have shifted much attention to the remedies on the international plane that were not there before. It is these courts that have variously placed former heads of state in the dock, or vindicated the claims of citizens against their own states, whose decisions command attention – not merely that of international lawyers, but also increasingly that of national politicians and the public.

Is not, then, a renewed focus on the determination, particularly within municipal legal systems, of issues concerning relations between states more than a little anachronistic? The very notion of 'foreign relations' implicitly seems to treat everything outside the home state as somehow 'foreign' to domestic concerns. There is, to be sure, a strand in the contemporary debate about the relationship between international law and national legal systems that would seek to treat international law as 'foreign'. Certainly, much of the heat in this debate has been because it has exposed to view 'deep anxieties'[2] about the proper locus of control over law-making.

The instinctive reaction of the international lawyer is to dismiss such concerns as parochial. But for present purposes the more significant point is that the battle lines for the new debate about the place of international law within municipal legal systems have more often been drawn around the place of international human rights norms within domestic law. These issues serve to pit the individual against the state. The individual need not be a citizen. He or she may well be a foreign national, claiming either at the border as a refugee or would-be migrant, or within the territory. But such cases do not directly implead a foreign state and do not appear, at least at first sight, to provoke questions of foreign relations. The map of this terrain may be unfamiliar to Anglo-Commonwealth national judges, but such cases fall squarely within a traditional and accepted function of the judicial branch of government within Anglo-Commonwealth legal systems, namely the protection of the rights of the private individual against the state. It is only much more recently that they have been perceived as necessarily requiring re-examination of the traditional common law view of the exercise of the foreign relations power.

[2] Charlesworth, Chiam, Hovell & Williams 2003.

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Nor has the contemporary debate about the relationship between international law and national law been confined to Anglo-Commonwealth countries. On the contrary, it has received renewed global scholarly attention. In this, the work of scholars reflects the greatly increased volume of national court decisions on matters of international law. But the preoccupations of national courts are not self-induced. The courts themselves mirror the extent of adoption of international treaties by national legislatures, reflecting the ever increasing range and depth of the concerns of public international law as a source of legal rights and duties that reach deep into what were once exclusively domestic domains, taking it far beyond its traditional role as a law of inter-state relations. Here, too, the tendency of the global debate (as often also the first reflex reaction of the courts) has been to sidestep, and thus not to address, the reserved domain of foreign relations issues, seen as 'political' and not legal.[3] All too often, when such concerns do surface, as arguments of state immunity, or lack of jurisdiction or non-justiciability, they are perceived as residual and somewhat anachronistic concerns that serve only to impede the full achievement of the dominion of the new positive mandate of international law.

Why, then, revisit the legal principles governing the foreign relations of the state as a specific concern of a set of municipal legal systems? To this question, I advance three answers: personal, doctrinal and historical.

I owe my own interest in the topic to my legal education and to my earliest professional experiences three decades ago, first at the Commonwealth Secretariat and then in legal practice. Law, as it was taught at Victoria when I studied there in the 1980s, was decidedly not seen in hermetically sealed compartments. On the contrary, public law and public international law, as taught by Quentin-Baxter and Keith, were seen as intimately related disciplines, even if only the first glimmerings of a renewed acceptance of this were discernible in the courts.[4] So, too, my first introduction to private international law, under Anthony Angelo, emphasised its comparative dimension[5] and the often contestable interface between private and public law claims.

My earliest forays into multilateralism were seen through the prism of the pursuit of a new role for the Commonwealth, as a modern post-imperial grouping of states, with a common legal inheritance. Following an earlier academic interest,[6] I spent 1985 working at the Legal Division of the Commonwealth Secretariat in London. At that stage, the role of municipal courts was very much on the agenda. Commonwealth states were attempting to find new cooperative ways to extend access to their courts for claims of a governmental character. New Zealand had signally failed to recover through the English courts

[3] Nollkaemper 2011.
[4] *Ashby v Minister of Immigration* [1981] 1 NZLR 222, (1981) 85 ILR 203.
[5] McLachlan 2008a. [6] McLachlan 1984.

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a Maori store-house panel put up for auction at Sotheby's in London.[7] Its failure led to an initiative for a Commonwealth scheme in 1985 – my first experience of a multilateral negotiation, with all its attendant perils. At about the same time the British Government brought suit in the Australian and New Zealand courts to seek to prevent publication of *Spycatcher*, the memoirs of a British spy,[8] decisions that led to much debate about the extent to which the other national courts could be used to prosecute claims of this kind.[9] A subsequent Commonwealth Human Rights Initiative, in the initial establishment of which I was closely involved, began by focusing on the role of national judges in the implementation of human rights standards.[10]

When I joined the London firm of Herbert Smith, my interest in the position of foreign states generally in municipal law took centre stage. Claims involving sovereign states formed an important element in the practice of the firm, in particular in the practice that I came to have working with Lawrence Collins (now Lord Collins of Mapesbury). But the topic of foreign relations was also a major topic of intellectual interest and discussion. The practice group had been headed by F. A. Mann, who continued to work in the firm as a consultant on a daily basis until his death in 2001. I had the pleasure (if that is the right expression, given the forthright manner in which he would dissect my clumsily expressed views) of many discussions with Dr Mann. I owe an immeasurable intellectual debt to Lawrence Collins and to Mann. Indeed, the first idea for this book, which was conceived in 2003 and has therefore been a decade in the making, was as a sort of sequel to Mann's ground-breaking *Foreign Affairs in English Courts*, published in 1986, which still stands as the first real attempt to conceptualise English law in this field.

Mann wrote in his preface to that work that it could not be treated as more than a 'sensible opening gambit', given that the law in the field 'displays much confusion of thought and lack of precision'. My hunch was that another attempt, in the light of several further years of case law, might be worthwhile. Mann had argued as long ago as 1943[11] that foreign affairs were as capable of regulation by national law and adjudication by national courts as other questions, and that 'national courts should as far as possible resist the tendency of replacing it by the idea of political expediency'.[12] I wished to examine the extent to which subsequent developments in case law and statute, then only beginning,[13] might bear

[7] *Attorney General of New Zealand v Ortiz* [1984] AC 1, (1982) 78 ILR 591 (CA).
[8] *Attorney General (UK) v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (CA); *Attorney General v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, affd (1988) 165 CLR 30.
[9] McLachlan 1990.
[10] Commonwealth 'The Bangalore Principles on the Domestic Application of International Human Rights Norms' (1988) 14 CLB 1196.
[11] Mann 1943b, repr. in Mann 1973, 391. [12] Ibid, 418.
[13] *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, (1999) 119 ILR 135 (HL); *Kuwait Airways Corp* v *Iraqi Airways Co (Nos 4 & 5)* [2002] UKHL 19, [2002] 2 AC 883, 125 ILR 602; *Thomas* v *Baptiste* [2000] 2 AC 1, (1999) 123 ILR 508 (PC).

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out Mann's argument and enable the construction of the resulting set of principles into a coherent whole.

Not only did this seem to be a much needed exercise in itself, in view of the relative absence of other doctrinal work in the field.[14] It was also prompted by my desire to see whether a distinctively Anglo-Commonwealth approach to foreign relations law could be articulated, which might provide an alternative within the common law family to the highly developed body of US foreign relations law. The latter had been shaped by a set of deliberately different decisions taken by the framers of the United States Constitution. Increasingly, in the latter half of the twentieth century, both case law and academic writing bore the imprint of the United States' own imperial position. Whatever else might be said about that (and of course much has and should be said about it), it serves to reduce the potential relevance of US foreign relations law as a model to guide the development of principle in other countries. So a distinctively Anglo-Commonwealth foreign relations law might provide an alternative account.

But what I could not have fully foreseen when I first conceived this project was the extent to which a welter of new problems presented to the courts in the last decade would serve to return foreign relations issues to centre stage in Anglo-Commonwealth countries. In this sense, the project has taken on a highly contemporary salience and urgency. It has been argued with some cogency by Kent Roach that a substantial amount of this new litigation amounts to 'substitute justice' provided by Anglo-Commonwealth courts at the behest of plaintiffs who have been unable to obtain relief against the United States in its own courts for claims of human rights abuses in the so-called 'war on terror' post the 9/11 terrorist attacks on the United States in 2001.[15]

Whatever the proximate cause, one of the effects of this new-style foreign relations litigation has been to collapse the separation between the two strands of reception of international law within the domestic legal system. Indeed, such litigation has often served to expose apparently profound conflict between what might be called statist concerns – jurisdiction, immunity, the prerogative of the Crown in foreign affairs – and the new agenda of human rights protection. Both sides of these arguments have sought support from principles of public international law. The effect has been to drive competing international law principles (such as jurisdiction and human rights obligations) into apparent conflict. The courts have had to look afresh at some too easy assumptions about the principles of law governing foreign relations that they previously took for granted. In

[14] 'Foreign Relations Law' in *Halsbury's Laws of England* (4th edn, C Parry & J G Collier (eds), Butterworths, London, 1977) vol 18 (now revised as 'International Relations Law' in Halsbury 2010) was an important exception, but focused mainly on the substantive rules of public international law. The nature of *Halsbury* does not, in any event, provide a framework for the re-evaluation of traditional doctrine.

[15] Roach 2013.

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undertaking these tasks, the judiciary has faced a set of problems that had been largely unanticipated, and therefore under-theorised. Anglo-Commonwealth courts have not always reached uniform conclusions in their resolution of these issues. Nevertheless, the decisions of the last decade show a remarkable persistence of the common law both as a prime source of underlying principle and as a legal community for the sharing of ideas. So, if this work is found to be at all useful, it may be judged on the extent to which it begins to supply a principled and coherent framework for the many issues that the courts have, of necessity, had to work out ad hoc as claims have been presented to them.

I am conscious of the fact that individual human rights claims involving foreign relations issues, however important they now are as a subject of foreign relations law, have a tendency to pit the individual against the state and in the process to vilify the state. Such litigation often casts the state, whether home or foreign, as the perpetrator of abuses. Pleas based on foreign relations interests can, in this context, appear as attempts to avoid substantive engagement and redress. From the opposite perspective of the foreign ministry legal adviser, opening a second domestic front for the adjudication of international law issues can be a substantial and unwelcome distraction from the implementation of foreign policy. The international affairs of states are, to be sure, shaped by public international law, but this operates on the international plane, and directly between states. What good reasons of principle justify the elaboration of a further sphere of foreign relations law within the municipal polity?

Looked at as a matter of the history of ideas, it may be said that the foundations of the modern liberal constitutional state, at least in England, were laid on the notion of a strict separation between the domestic and the foreign affairs of the state. Only the former could legitimately be the subject of municipal legal regulation. John Locke was explicit about this. He considered that 'the *Laws* that concern *Subjects* one amongst another, being to direct their actions, may well enough *precede* them. But what is to be done in reference to *Foreigners*, depend[s] much upon their actions, and the variation of designs and interests'.[16] The conclusion that he drew from this is that the conduct of foreign affairs, which he termed the exercise of the federative power, 'must necessarily be left to the *Prudence* and *Wisdom* of those whose hands it is in, to be managed for the publick good'. The early work of the common law jurists served only to emphasise this exclusion of foreign affairs from the new constitutional polity at home. Blackstone, giving full vent to his royalist tendencies, wrote in 1783: 'In the king, therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendour, and power, that make him feared and respected by foreign potentates'.[17] Dicey, writing in the newer language of constitutional government a century later, nevertheless continued to assert that

[16] Locke 1690, II, [147]. [17] Blackstone 1783, Bk I, 252.

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the transfer of real power from the monarch to the Cabinet: 'leaves in the hands of the Premier and his colleagues, large powers which can be exercised and constantly are exercised free from Parliamentary control. This is especially the case in all foreign affairs.'[18] The judges, especially those who, like Lord Eldon LC, also served in the Cabinet, enthusiastically pursued the consequences of this separation for the scope of judicial power. 'What right have I, as the King's Judge', asked Lord Eldon rhetorically in a decision still cited as a foundational authority on the municipal effect of the non-recognition of a foreign state, 'to interfere upon the subject of a contract with a country which he does not recognise?'[19]

But the world of the early twenty-first century is not that of the early nineteenth century. Rules and practices created as servants of the exigencies of Britain's expanding empire need to be re-evaluated in order to see whether the principles that underlie those rules remain relevant today. In any event, as will be seen, the law reports provide ample empirical evidence for the proposition that issues of foreign relations cannot be excluded from domestic concern. The contracting scope of state immunity and the growing cross-border commercial and regulatory agendas of states have brought the foreign state into national courts to an unprecedented extent. The actions of the home state abroad have been subjected to review as never before as a result of the new range of remedies afforded to individuals under human rights legislation. Meanwhile the growing impact of law made in multilateral fora on the domestic statute book has led all the Anglo-Commonwealth states to review the role of Parliament in foreign affairs, particularly as regards the treaty-making process.

The purpose of this book, then, is to put this separation of the foreign and the domestic legal spheres to the test and to argue that the exercise of the external public power of the state is properly subject to legal regulation and cannot be cast beyond the pale in a nebulous zone of executive discretion and non-law. It is necessary to emphasise immediately, since this proposition forms the basis for much of the analysis that is to follow, that this is not to say that all issues of foreign relations should therefore be treated as properly the subject of litigation before the municipal courts of the forum. On the contrary, my argument is that the main function of foreign relations law, properly conceived, is allocative. That is to say, it serves to determine which court, national or international, domestic or foreign, has jurisdiction over a legal claim; which law applies to that claim; and which of the three branches of constitutional government is empowered to determine a foreign relations question. Whether this structure for analysing the many different problems of foreign relations law is found convincing and useful, the reader will have to decide on consideration of the whole work. The important point to stress at this stage is the fundamental point that foreign relations is properly

[18] Dicey 1886, 393. [19] *Jones v Garcia del Rio* (1823) T & R 297, 299, 37 ER 1113.

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the subject of principled legal analysis. It does not sit in some extra-legal no-man's-land.

This means, too, that foreign relations law sits in a positive account of the enduring purpose of the modern constitutional state. Tony Judt concludes his magisterial history of Europe since 1945 not (as might have been expected) with the view that the emergence of the European Union had led to the withering away of the nation state, but rather with the opposite opinion, that '[d]istinctive nations and states had not vanished.'[20] Judt contends that this is all the more remarkable given the extent to which the state had been discredited earlier in the twentieth century and the subsequent assault on the primacy of the state as a result of globalisation. He points out:

> The illusion that we live in a post-national or post-state world comes from paying altogether all too much attention to 'globalized' economic processes . . . and assuming that similarly transnational developments must be at work in every other sphere of human life.[21]

Judt contends that the nation state retains today as much as it ever did the two prime functions of the early modern state, namely its right to wage war externally and its right to maintain order internally. The question in each case for the modern constitutional state is the extent to which and the manner in which each of these powers is to be contained by the rule of law. Anglo-Commonwealth countries remain committed in a deep sense to the idea of a liberal constitutional state operating within the rule of law both within their respective national legal systems and as participants in the international legal system. The present work exposes to view some of the cases that have put that commitment to the test. No doubt in some instances, the system, as any human system, may be found wanting. If this work has a larger positive significance, it will be because the solutions found in the Anglo-Commonwealth states may serve as useful guidance more generally by demonstrating that the state strengthens rather than weakens its essential functions in the field of foreign relations by subjecting them to law.

Campbell McLachlan
Wellington, New Zealand
1 January 2014

[20] Judt 2005, 798. [21] Ibid.

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All responsibility for the views expressed (and for any errors) is mine alone.

The law is stated as at 1 November 2013.

[1] Thwaites 2014a.

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