Introduction

Bridges under Construction and Shifting Boundaries

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

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

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

¹ For an account of hybrid international/national norms, see Anthea Roberts, ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’ (2011) 60 ICLQ 57 at 74–81.
Foreign relations law not only ‘bridges’ international and domestic law or sets ‘boundaries’ to international law. Rather, in both capacities – as a ‘bridge’ and as a ‘boundary’ – foreign relations law is also responsive to developments in international and domestic law and, recently, subject to dynamic transformations. Due to these dynamics, the ‘bridges’ are constantly under (re-)construction and the boundaries keep shifting. Neither foreign relations law nor international law are fixed and stable notions.

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

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

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


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

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

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

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

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

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


12 Comprehensive Economic and Trade Agreement between Canada and the EU (CETA), Brussels, 30 October 2016, not in force (parts are provisionally applied), (2017) OJ L11/23.
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for how deeply the ‘international’ is penetrating domestic legal orders. It is a truism that international law and international institutions have far-reaching implications for everybody’s life. One of the prominent concerns raised by these ‘mega-regionals’ was about the regulatory autonomy remaining for democratic states to govern in the public interest.¹³

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

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

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

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


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

II FOREIGN RELATIONS LAW AND INTERNATIONAL LAW: MISSED ENCOUNTERS?

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


\(^{20}\) See, for instance, Frank Schorkopf, ‘Von Bonn über Berlin nach Brüssel und Den Haag. Europa- und Völkerrechtswissenschaft in der Berliner Republik’ in Thomas Duve and...
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On the whole, the history of the field reveals that foreign relations law is not simply the domestic – and parochial – counter-perspective to public international law. Even in the United States, the history of the field has been shaped in the beginning by staunch internationalists: Quincy Wright and Louis Henkin. At any rate, recent years have seen a growing amount of interaction between the two fields of expertise. International lawyers are increasingly interested in the domestic contexts of international law. This trend has nurtured the emergence of ‘comparative international law’ as a research project. This new field of study is interested in the domestic contexts of international law, that is, in the ‘similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law’. Foreign relations law scholars demonstrate increasing awareness of how foreign relations law shapes international law. Despite these developments in both fields, a gap in the literature remains with respect to an exploration of how the two fields relate to each other, how categories, concepts and principles are informed by debates and developments in the respective other field and how differences persist.

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

24 For a recent casebook, see André Nollkaemper et al. (eds.), International Law in Domestic Courts: A Casebook (Oxford: Oxford University Press, 2018).
normative order. Some act of translation is needed, if only to assert the authority of domestic legal orders vis-à-vis ‘the international’. While this, from the perspective of international law, involves the establishment of boundaries, the sheer existence of foreign relations law also points to the fact that no state is an island and exists in isolation from the international community (of states) of which it forms part. If looked at from a sociological perspective focusing on the actors of the academic debate, it becomes also apparent that foreign relations law scholars need to simultaneously rely on both the bridges and the boundaries – otherwise their field of expertise would become meaningless, at least if it should not collapse into an exercise of resistance against ‘foreign’ elements entering the domestic legal order.

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

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

27 Originally, this phrase was coined by Dionisio Anzilotti, Studi critici di Diritto internazionale privato (Bologna: Cappelli, 1898), p. 104 to characterise private international law.
seen in some form of stereovision so as to portray the whole picture. Perspectives from the ‘Global South’ or semi-peripheral states like Bosnia and Herzegovina included in our volume show that many of their constitutional systems are heavily shaped by international law. International law is considered not just as a tool to advance the foreign policy agenda of a given state, but as a factor to be reckoned with for basic questions of the organisation of the polity.

III CORE CONCEPTS AND THE APPROACH OF THE BOOK

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

A Foreign Relations Law

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


The function of the respective body of law or cases is both to separate the internal from the external and to mediate the inward reception of international law into the domestic legal system. It is also concerned with separation of powers and the rule of law and with facilitating the external relations of the State. A further function of this body of law is to establish rules of jurisdiction and applicable law.\footnote{McLachlan, ‘Five Conceptions of the Function of Foreign Relations Law’, p. 21.} While relying on this analytical lens of ‘foreign relations law’, it is not our intention to contribute to a further global spread of yet another category of US law. Rather, this volume acknowledges the important tradition that foreign relations law has had in the United States and formulates invitations to rethink this category in different contexts.

B Public International Law

Difficult as it is to define foreign relations law, it is even more problematic to capture the meaning of public international law in a nutshell. However, some features of modern international law are of particular importance for this book. Public international law is today obviously more than a set of rules that ‘governs the relations between independent states’, as the Permanent Court of International Justice famously held in its \textit{Lotus} case.\footnote{\textit{Case of the S.S. ‘Lotus’}, Judgment, Series A No. 10, p. 18.} The horizons of international law have greatly expanded and, while international law has become a ‘comprehensive blueprint for social life’, this expansion affected the two most foundational organizing concepts of this body of law: sources and subjects.\footnote{Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ (1999) 28\textit{Recueil des Cours} 9 at 61–72.} New participants have entered the international arena and the list of the recognized subjects of international law now extends beyond states to international organizations and the individual. Many other candidates for legal personality are discussed, ranging from transnational corporations to subnational actors like entities of federal states and cities.\footnote{On the importance of foundational doctrines for the operation of international law as a ‘belief system’, see Jean d’Aspremont, \textit{International Law as a Belief System}, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2018), chapters 3 and 4.} This expanding list of ‘actors’ in the international legal system also impacts on the...