Chapter 4 – Dynamics of Deference

In the previous chapter, we have seen how the application of different doctrines of deference changed. A general development is noticeable that courts treat executive decisions concerning foreign affairs less deferential. However, this development is not uniform within all three jurisdictions. The United States appears to be less strongly affected than Germany and South Africa. This chapter will try to explain these 'dynamics of deference'. It is submitted that all three jurisdictions are exposed to certain trends that intensified, especially after the Second World War, and pushed towards more judicial review. Yet, other factors have led to stronger or weaker receptiveness towards these trends or even created counter-trends. The interplay between these forces accounts for the dynamics of deference.[1] This chapter will examine the 'convergence' as well as the 'divergence' forces.

I. Convergence forces – a new calibration of executive and judicial power in foreign affairs

The trend toward more judicial review in foreign affairs can be primarily attributed to changes of the international (legal) system as well as general constitutional developments, which influence all three jurisdictions and (although this is beyond the ambit of this thesis) democratic states in general.[2] These changes undermine many assumptions on which the traditional position is based. It will be remembered that the traditional position entails three claims:

---

1 Using a similar approach for the Internationalization of Constitutional Law Chang Wen-Chen and Yeh Jiunn-Rong, 'Internationalization of Constitutional Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013) 1166.

2 Cf as well the impressive article by Peter J Spiro, 'Globalization and the (Foreign Affairs) Constitution' (2002) 63 Ohio State Law Journal 649; concerning constitutional law in general Mark Tushnet, 'Inevitable Globalization of Constitutional Law' (2009) 49 Virginia Journal of International Law 985; Daniele Amoroso, 'A fresh look at the issue of non-justiciability of defence and foreign affairs' (2010) 23 Leiden Journal of International Law 933, 935; Andrew Kent, 'Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs' (2015) 115 Columbia Law Review 1029, 1072; a similar approach (with

(1) foreign affairs are substantially different from domestic matters,
(2) the executive is best suited to deal with decisions in this area, and
(3) judicial control of executive action in foreign affairs should be minimal.

In Chapter 1, we examined how the three 'notions' of the traditional position developed together and strongly enforced each other. As we will see below, weakening the first two traits generally also weakens the notion of deference. I will argue that this development induced a new calibration of the respective role of the executive and the judiciary in foreign affairs. Although not leading to uniformity,[3] this process creates at least a convergence trend towards less deference. It goes without saying that it is impossible to provide a closed list of factors which effected the turn toward less deference. However, the cases analysed in Chapter 3 exemplify many of the forces that induced more judicial review. By taking these cases as a starting point and using an inductive approach, I will try to identify the main forces that challenged the traditional position as examined in Chapter 1.

1. Globalization

Globalization is the first significant factor undermining many assumptions on which the traditional position is based.[4] Its driving force is a global economic integration process whose effect transcends the economic realm and leads to a growing interconnectedness[5] and interdependence[6] of the political, social, cultural, and other systems throughout countries around

regards to the Commonwealth countries) is used by Campbell McLachlan, *Foreign relations law* (CUP 2016) 17.

3 Tushnet (n 2) 987.

4 On the effect of globalization on the 'foreign affairs constitution' Spiro (n 2); Wen-Chen and Jiunn-Rong (n 1) 1170 naming it as one of the driving forces of internationalization; on globalizations effects on legal systems Singh Auby, *Globalisation, Law and the State* (Hart Publishing 2017) 91 f; naming globalization as challenge to traditional foreign relations law Thomas Giegerich, 'Foreign Relations Law' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 8, cf as well Christian Calliess, *Staatsrecht III* (3rd edn, CH Beck 2020) 2 ff.

5 Anne Peters, 'The Globalization of State Constitutions' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (OUP 2007) 251, 252; Auby (n 4) 1.

6 Peters (n 5) 252.

the world.[7] While it is subject to continuous debate when exactly the process began,[8] it appears to be commonly accepted that globalization entered a new phase after the Second World War.[9] The growing interconnectedness and interdependence brought about by globalization challenge the underlying assumption of the traditional position introduced by Hobbes of a clear distinction between the state, which is establishing a community within its borders, and the 'wild' outer world. In the following, we will analyse three aspects of globalization of particular importance for this challenge: the 'deterritorialization' of the state, the 'changing structure of international law,' and a developing 'global judicial dialogue'.[10]

a) The 'deterritorialization' of the state and its economy

The Hobbesian idea of a 'closed' nation-state was based on the principle of territoriality,[11] which constituted and limited the state's area of influence. Laws, in general, were perceived as only effective inside a state's territory, and extraterritorial effects were limited.[12] In this picture, the economy focuses on internal exchanges as the constant war within the international

7 On globalization in general from a historical perspective Jürgen Osterhammel and Niels P Petersson, *Geschichte der Globalisierung: Dimensionen, Prozesse, Epochen* (5th edn, CH Beck 2012) 20 ff; from a sociological perspective Ulrich Beck, *What is Globalization* (Polity Press 2000).

8 This will necessarily be connected to the exact definition of globalization which is as well debated cf Osterhammel and Petersson (n 7) 15.

9 Osterhammel and Petersson (n 7) 26, 86 ff stressing that by no means Globalization only began with end of the Cold War but that the latter was even (partially) brought about by its effect; however some features of the Cold War period undermined globalizations basic claims Spiro (n 2) 659 fn 27.

10 Claire L'Heureux-Dubé, 'The importance of dialogue: Globalization and the international impact of the Rehnquist court' (2013) 34 Tusla Law Review 15.

11 Prisca Feihle, 'Territoriality' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (OUP 2015) mn 2; Gernot Biehler, *Auswärtige Gewalt: Auswirkungen auswärtiger Interessen im innerstaatlichen Recht* (Mohr Siebeck 2005) 21; Calliess (n 4) 3; on 'deterritorialization' as well Osterhammel and Petersson (n 7) 12 ff.

12 Feihle (n 11) mn 19; 'Verlust der territorialen Radizierung des Staates' Udo Di Fabio, *Das Recht offener Staaten: Grundlinien einer Staats- und Rechtstheorie* (Mohr Siebeck 1998) 97 ff.

system blocks all benefits of international trade.[13] The assumptions underlying such a closed conception of the state and its economy have long been called into question,[14] but they appear to have almost vanished after the Second World War. In the second half of the 20th century and early 21st century, transboundary economic transaction and foreign investment have increased dramatically.[15] Most national economies are now deeply integrated;[16] negative side effects could be painfully noticed during the recent Covid crisis and the Russian War in Ukraine.[17] National regulations do not only affect the domestic sphere, often having transnational consequences, and the growing orbit of cyberspace discards any idea of territoriality completely.[18] With economic integration, personal interaction[19] also increased, as indicated by the ever-thriving number of transnational marriages – and divorces.[20] In addition, the number of citizens working and living abroad enhances the number of foreign affairs cases concerning foreign official immunity or diplomatic protection. Whereas in former times, foreign affairs elements in front of courts were rare, judges can now hardly escape cases that have international or transnational implications.[21] They have become 'increasingly common'.[22] The sheer necessity to deal with foreign affairs circumstances has led to judicialization because courts, even when applying a strong deferential approach, at least have to engage with these cases and develop legal mechanisms to cope with them. Moreover, in some areas, the growing number of cases and changed structure of the international economy have shown strong deferential approaches to be dysfunctional.

13 Robert O Keohane, 'Hobbes's Dilemma and Institutional Change in World Politics' in Hans-Henrik Holm and Sorensen Georg (eds), *Who's World Order? Uneven Globalization and the End of the Cold War* (Westview Press 1995) 165, 169.

14 E.g. Locke's ideas of a international state of nature have already been proven inaccurate by his contemporaries McLachlan (n 2) 41.

15 Peters (n 5) 252.

16 Auby (n 4) 7.

17 On the effects especially of Russia's War in Ukraine cf below Chapter 5, II.

18 Feihle (n 11) mn 6.

19 Peters (n 5) 253.

20 Auby (n 4) 16.

21 Thomas M Franck, 'Courts and Foreign Policy' (1991) 83 Foreign Policy 66, 86; Daniele Amoroso, 'Judicial Abdication in Foreign Affairs and the Effectiveness of International Law' (2015) 14 Chinese Journal of International Law 99, 99; Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Vintage 2016) 4.

22 Derek Jinks and Neal K Katyal, 'Disregarding foreign relations law' (2007) 116 Yale Law Journal 1230, 1258.

The topic of foreign sovereign immunity analysed in Chapter 3[23] illuminates this point. By the end of the Second World War, US courts had established their conclusiveness approach granting the US State Department the possibility to intervene in virtually every case.[24] The system was always an imperfect blend of executive and judicial decisions but especially proved impractical with the growing number of states' commercial activities.[25] After the Second World War, they have increasingly acted not as arcane 'monarchs' or 'sovereigns' but simply as merchants.[26] This development, in turn, led to the gradual adoption of the restrictive immunity doctrine,[27] which posed a serious challenge to the US system.[28] The immunity determination now not only hinged on the relatively simple issue of whether or not the state was recognized but the nature of the activity in question (sovereign or commercial) and hence became much more complex.[29] In the face of the great number of cases[30] and possible political repercussions, if immunity was denied,[31] the State Department showed no real appetite to get involved. It often offered conflicting statements or gave no guidance at all to the courts.[32] The State Department itself finally asked for relief from this burden[33] and advised Congress to enact the Foreign Sovereign

23 Cf above, Chapter 3, I., 3.
24 Cf above, Chapter 3, I., 3., a).
25 Luke Ryan, 'The New Tate Letter: Foreign Official Immunity and the Case for a Statutory Fix' (2016) 84 Fordham Law Review 1773, 1790.
26 *Samantar v Yousuf* 560 US 305 (2010) (US Supreme Court) 323; 'Of the twenty-five richest people in the world, six are members of ruling families and may assert a claim of head-of-state immunity' Shobha V George, 'Head-of-State Immunity in the United States Courts: Still Confused After All These Years' (1995) 64 Fordham Law Review 1051, 1077; Lewis S Yelin, 'Head of State Immunity as Sole Executive Lawmaking' (2011) 44 Vanderbilt Journal of Transnational Law 911, 942; Curtis A Bradley, *International law in the U.S. legal system* (3rd edn, OUP 2021) 243; Ryan (n 25) 1789.
27 Cf already Eleanor W Allen, *The Position of Foreign States before National Courts – Chiefly in continental Europe* (Macmillan 1933) 82, 96; George (n 26) 1078.
28 Ryan (n 25) 1790.
29 Thomas M Franck, *Political questions, judicial answers: Does the rule of law apply to foreign affairs?* (Princeton University Press 1992) 103 ff; cf Ryan (n 25) 1790.
30 This development of course was already foreseeable during the 1940s G Edward White, 'The Transformation of the Constitutional Regime of Foreign Relations' (1999) 85 Virginia Law Review 141; Ryan (n 25) 1790.
31 Ryan (n 25) 1793.
32 Ingrid Wuerth, 'Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department' (2011) 51 Virginia Journal of International Law 1, 12 f.
33 Franck (n 29) 104.

Immunities Act to 'transfer the determination of sovereign immunity from the executive branch to the judicial branch'.[34] South Africa (and the United Kingdom), where the certification doctrine also had offered at least some executive influence, followed suit and enacted statutory law to regulate the issue.[35] In Germany, where the courts since the early 20th century have directly referred to international law, the necessary adoptions of the restrictive immunity doctrine have been left to the courts.

We may witness a similar development concerning cases of foreign official immunity in the US. With the Foreign Sovereign Immunities Act proven inapplicable in these cases, as we have examined in Chapter 3,[36] the situation now mirrors the problems of the old law of *state* immunity.[37] The (relatively) simple question of whether or not an individual is a government official is replaced by the much trickier question of whether they acted in an official or non-official (including commercial) capacity.[38] With more and more people working and living outside of their country of citizenship and the proliferation of possible beneficiaries of immunity,[39] the number and complexity of cases are likely to continue to rise.[40] The point is proven by *Chuidian v Philippine National Bank*,[41] analysed in Chapter 3,[42] which started the confusion concerning the applicability of the Foreign Sovereign Immunities Act to individuals. It was triggered by the suit of a Philippine citizen living in California against the Philippine National Bank conducting business in the United States and an individual member of a Philippine government commission instructing the bank to dishonour a letter of credit

34 Cf Ryan (n 25) fn 62.
35 Cf above, Chapter 3, I., 3., c).
36 Cf extensively above Chapter 3, I., 4., a), bb).
37 John B Bellinger, 'The Dog That Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities' (2011) 44 Vanderbilt Journal of Transnational Law 819, 827; Ryan (n 25) 1787 ff.
38 Ryan (n 25) 1783, 1796 f.
39 E.g., state-owned enterprises, to which the FSIA has been applied in *Chuidian v Philippine Nat'l Bank* [1990] 912 F2d 1095 (United States Court of Appeals for the 9th Circuit) but which add further complexity; other 'new' beneficiaries include public-private partnerships cf Heike Krieger, 'Between Evolution and Stagnation – Immunities in a Globalized World' (2014) 6 Goettingen Journal of International Law 177, 201 ff.
40 Also the incentive to sue the individual official may now be higher Wuerth (n 32) 33; Krieger (n 39) 199.
41 *Chuidian v Philippine Nat'l Bank* (n 39).
42 Cf above, Chapter 3, I., 4., a), bb).

issued to the plaintiff.[43] The court held the bank and the member of the government commission to be an 'agency or instrumentality' of the state in the sense of the Foreign Sovereign Immunities Act and immune from suit.[44] In *Samantar*,[45] the Supreme Court denied the applicability of the Foreign Sovereign Immunities Act to individuals like the government official in *Chuidian,* which led to the disarray in foreign official immunity analysed above.[46] Also, many of the cases against (former) foreign officials examined in Chapter 3, including *Samantar* itself, have come in front of the US courts, not at least because the alleged perpetrators found a new home in the United States.[47] With the growing number and complexity of cases, it is no wonder that calls for a statutory solution to put the matter in the courts' hands are growing.[48] South Africa and Germany have already diminished executive influence in the field.

Thus, the 'deterritorialization' of the state and its economy has severely undermined the traditional position. Foreign affairs cases are not exceptional but increasingly common. The executive may not necessarily be better suited to deal with these cases, but on the contrary, the judiciary may be more competent to solve many issues.

b) The changing structure of the international system and international law

The process of globalization has also changed the functioning of the international system.[49] As we have seen, the traditional position developed out of the idea that states face each other like gladiators in combat.[50] For the US context, Knowles described how the development of deference doctrines

43 *Chuidian v Philippine Nat'l Bank* (n 39) 1097 ff.
44 *Chuidian v Philippine Nat'l Bank* (n 39) 1099 ff.
45 *Samantar v Yousuf* 560 US 305 (2010) (US Supreme Court).
46 Cf above, Chapter 3, I., 4., a), bb).
47 E.g. the defendant in *Warfaa v Ali* [2016] 811 F 3d 653 (United States Court of Appeals for the 4th Circuit), discussed above cf Chapter 3, I., 4., a), cc).
48 Careful Bellinger (n 37) 835; Ryan (n 25) 1801 ff.
49 Acknowledging the connection of globalization and the changing structure of international law Christian Calliess, 'Auswärtige Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts, Band IV* (3rd edn, CF Müller 2006) 593; Auby (n 4) 172; also the changed structure of international law is here dealt with under the heading 'Globalization', both phenomena are mutually interdependent, and the changed structure of international law may further accelerate globalization processes.
50 Cf above, Chapter 1, I., 1.

is tied to such a 'realist' understanding of the international order, which requires the executive branch's 'ultimate flexibility and discretion'.[51] However, it is questionable if this picture still fully reflects the current state of the international system.[52] As Wolfgang Friedmann prominently described, international law developed significantly after the Second World War.[53] On a horizontal level, the decolonization movement led to the integration of now virtually every state into the international legal order as an equal member.[54] On a vertical level, more and more subject areas are now within the ambit of international law.[55] According to Friedmann, the international order thus changed from a 'law of coexistence' focused on demarcating the boundaries between sovereigns to a 'law of cooperation' facilitating their interaction.[56] Friedmann's work has often been criticized for over-emphasizing the new 'law of cooperation'.[57] However, there can be no doubt that the international legal system has changed dramatically since the Second World War. The proliferation of international organizations[58] and treaty bodies fosters the cooperative aspect of international law. The United Nations established the first real global organization,[59] including an integrated judicial body in the form of the International Court of Justice.[60] The World Bank, the International Monetary Fund, and the GATT structured international cooperation on the economic side. The European Court of Human Rights and other regional organizations started to protect human rights. After the Cold

51 Robert Knowles, 'American Hegemony and the Foreign Affairs Constitution' (2009) 41 Arizona State Law Journal 87, 116.

52 Knowles (n 51) 158, also I do not necessarily subscribe to Knowles broader claim concerning a new realism; Ewan Smith, 'Is Foreign Policy Special?' (2021) 41 Oxford Journal of Legal Studies 1040, 1063.

53 Wolfgang Friedmann, *The changing structure of international law* (Stevens & Sons 1964); building on Friedmann's ideas Georges Abi-Saab, 'Whither the International Community?' (1998) 9 EJIL 248.

54 Friedmann (n 53) 64; Charles Leben, 'The Changing Structure of International Law revisited by way of introduction' (1997) 3 EJIL 399, 401.

55 Leben (n 54) 401.

56 Friedmann (n 53) 60 ff.

57 Leben (n 54) 402.

58 Spiro (n 2) 660 ff.

59 Whereas the UN virtually encompasses every state, its predecessor the League of Nations had a more limited membership and especially lacked support from the US, cf Christian Tams, 'League of Nations' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 9.

60 In contrast to the League of Nations, where the PCIJ was not an organ of the League, cf Tams (n 59) mn 10.

War ended, international integration developed further with organizations like the World Trade Organization or the International Criminal Court.[61] Recently it has been debated if newer developments of the international legal system may fall prey to a 'populist backlash'[62] or a general decline of the international rule of law.[63] In addition, the Russian War in Ukraine poses a serious challenge to the international system as developed after the end of the Second World War. The possible effects of these events on the dynamics of deference will be discussed below.[64] Here it suffices to state that even though some especially more recent 'layers'[65] of international law may change under pressure, it is rather unlikely that we will see a total remaking of the general structure of international law as developed after the Second World War.[66] The changed structure of international law certainly influenced domestic legal systems and especially their foreign relations law.[67]

The United Nations regime now outlaws the use of force as a form of solving international disputes.[68] This of course never meant that armed conflicts vanished but curbed the number and intensity of inter-state

61 Spiro (n 2) 659; Heike Krieger and Georg Nolte, 'The International Rule of Law—Rise or Decline?— Approaching Current Foundational Challenges' in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds), *The international rule of law: rise or decline?: Foundational challenges* (OUP 2019) 5; Frédéric Mégret, 'Globalization' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 22.

62 Eric A Posner, 'Liberal Internationalism and the Populist Backlash' (2017) University of Chicago Public Law & Legal Theory Paper Series No 606.

63 Krieger and Nolte (n 61).

64 Cf below this Chapter, II., 4. and Chapter 5, II.

65 The term is burrowed from Joseph HH Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 ZaöRV 547; Krieger and Nolte (n 61) 5.

66 For the challenge of populism Karen Alter, 'The future of international law' (2017) 101 iCourts Working Paper Series 4; for the Russian War in Ukraine Chapter 5, II.

67 Spiro (n 2) 722 f.

68 Ibid 660; Oliver Dörr, 'Prohibition of the Use of Force' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013); on the development cf Oona Hathaway and Scott Shapiro, *The Internationalists: How A Radical Plan to Outlaw War Remade The World* (Simon and Schuster 2017).

wars.[69] The Russian War in Ukraine has painfully proven (once more)[70] that inter-state wars remain possible.[71] However, as will also be examined in more detail below,[72] this does not change the fact that, in general, abstention from the use of force is now accepted throughout the international community.[73] Moreover, the 'balance of terror' has decreased the likelihood of direct confrontations between the nuclear powers.[74] The rise of democratic states additionally mitigates the risk of military conflicts as they are generally not inclined to wage war against each other.[75] These developments undermine the idea that court decisions in foreign affairs will entangle a state in serious international conflicts, which may even risk the state's existence.[76] Furthermore, as we have seen, not only 'the

69 For empirical data cf Our World in Data, 'Peaceful and hostile relationships between states' available at <https://ourworldindata.org/grapher/peaceful-and-hostile-relationships-between-states>; Our World in Data, 'Number of Wars' available at <https://ourworldindata.org/grapher/number-of-wars-project-mars>; Our World in Data, 'Number of Armed Conflicts' available at <https://ourworldindata.org/grapher/number-of-armed-conflicts?time=earliest..latest>.

70 Other examples include e.g. the Korean War, the Vietnam War, the Soviet-Afghan War, the Gulf War or the Invasion of Iraq.

71 On the many deaths of the prohibition of the use of force and the Russian War in Ukraine cf below Chapter 5, II.; on the remaining potential of armed conflict see Hathaway and Shapiro (n 68) 352 ff.

72 For the Russian War in Ukraine Chapter 5, II.

73 On the condemnation of the war and reaffirmation of Article 2 (4) cf UNGA, 'Aggression against Ukraine' A/RES/ES-11/1 from 2 March 2022 and below Chapter 5, II.; even Russia cynically clothes its War of Aggression in terms that justify the use of force, cf Ingrid Wuerth, 'International Law and the Russian Invasion of Ukraine' Lawfare from 25 February 2022 available at <https://www.lawfareblog.com/international-law-and-russian-invasion-ukraine>; on the development after the Second World War cf Gary Goertz, Paul F Diehl and Alexandru Balas, *The Puzzle of Peace: The Evolution of Peace in the International System* (OUP 2016).

74 Knowles (n 51) 140; the 'disciplining' function of nuclear arms can also be seen in the Russian War in Ukraine. The 'doomsday clock' has been set to 90 seconds to midnight, John Mecklin, 'It is still 90 seconds to midnight' Bulletin of the Atomic Scientists from 23 January 2024 available at <https://thebulletin.org/doomsday-clock/current-time/>; however, scientist assessing the probability of nuclear war still put the likelihood of nuclear war in the immediate future between 0,1 % and 2 % and most historians find the current situation less perilous than at the height of the Cold War, see Stuart Ford, 'The New Cold War with China and Russia: Same as the Old Cold War?' (2023) 55 Case Western Reserve Journal of International Law 423, 461 and authors cited in fn 214.

75 Spiro (n 2) 662; Anne Peters, 'Foreign Relations Law and Global Constitutionalism' (2017) 111 AJIL Unbound 331, 333 f.

76 Spiro (n 2) 674 ff.

state' but also non-state or sub-state entities like private individuals, NGOs, and single government agencies are increasingly engaged in transnational interactions.[77]

The famous dictum of Lord Atkin,[78] echoed by Justice Frankfurter,[79] that the 'state has to speak with one voice' may lose some of its relevance as, in fact, the state today frequently speaks with many voices.[80] There also appears to be a growing understanding (at least in democratic states) that the judiciary of (other) democratic states is working independently.[81] This understanding marks a clear contrast to the old conviction, famously harboured by Lord Eldon when establishing the certification doctrine, that the courts are close servants of the executive and any mention of an unrecognized state may amount to a derogation of duty.[82] This changed perception of judicial decisions may also be one of the reasons why the executive in the US and South Africa found it so easy to place the matter of state immunity in the courts' hands in the 1970s. Likewise, in recognition cases, judges have always struggled with the rigid assumption that their judicial cognizance of a non-recognized entity amounts to formal recognition.[83] In the light of the changing international environment, more freedom may be granted to the judiciary in this area,[84] as in Germany and South Africa. Such higher judicial independence appears to be particularly apt where cases only con-

77 Ibid 667; Wen-Chen and Jiunn-Rong (n 1) 1172; Auby (n 4) 7; Giegerich (n 4) mn 8; Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004) 131 ff; Anne-Marie Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' (2003) 24 Michigan Journal of International Law 1041, 1066 ff.

78 *Spain v Owners of the Arantzazu Mendi* [1939] AC 256 (House of Lords) 264.

79 *United States v Pink* 315 US 203 (1942) (US Supreme Court) 242.

80 For US cases confirming the monolithic view of the state cf Louis L Jaffe, *Judicial Aspects of Foreign Relations: In Particular of the Recognition of Foreign Powers* (Harvard University Press 1933) 131; in fact, at least in the US, the state always spoke with many voices Sarah H Cleveland, 'Crosby and the 'one voice' myth in U.S. foreign relations law' (2001) 46 Villanova Law Review 974; Knowles (n 51) 131, 151.

81 Spiro (n 2) 682.

82 Cf also the early critique by Jaffe (n 80) 127, 139; AJGM Sanders, 'The Courts and Recognition of Foreign States and Governments' (1975) 92 South African Law Journal 167, 169.

83 Jaffe (n 80) 129; critical concerning the US and UK practice already Ti-Chiang Chen, *The international law of recognition – With special reference to practice in Great Britain and the United States* (Frederick A Praeger 1951) 238 ff; Amoroso, 'Judicial Abdication' (n 21) 131.

84 Amoroso, 'Fresh Look' (n 2) 947.

cern private disputes without a strong bearing on public policy.[85] In the same vein, arguments against an enforceable domestic right to diplomatic protection are weakened, even though not completely dispelled.[86] In the light of current international law, it seems unlikely that the assertion of diplomatic protection causes international frictions that threaten the state's existence or that the executive even would have to 'send gunboats'.[87]

To remain in the Hobbesian picture, the gladiators, after the end of the Second World War, often turned into merchants.[88] Even more, the single individuals and entities making up the 'Leviathan' do not always act as 'one immortal god' but correspond individually with their neighbours. In this new international reality, courts' involvement in foreign affairs poses much less risk of international frictions and, in some cases, may even be more convenient than executive interference.

c) The development of a global legal dialogue

A last and secondary factor brought about by globalization,[89] calling into question the assumptions of the traditional position, is the development of a global legal dialogue.[90] In the 1970s, Oscar Schachter coined the term of the 'invisible college of international lawyers' to refer to the community of international law scholars collaborating around the world.[91] International law was an obvious candidate for this development as all researchers work-

85 For a development of English common law in this direction cf McLachlan (n 2) 408.

86 Of course, the assertion protection claims for own nationals abroad can still lead to controversy, cf the ICJ cases in LaGrand and Avena, on both cases below this Chapter, I., 2., b).

87 Chapter 3, I., 5., b).

88 This is, of course, not to say, that the often-cited 'end of history' is near; coining the term Francis Fukuyama, 'The End of History?' (1989) 16 The National Interest 3; this is proven once more by the Russian War in Ukraine, cf below Chapter 5, II.; on the ongoing relevance of territoriality and conflict cf e.g. Miles Kahler and Barbara F Walter (eds), *Territoriality and Conflict in an Era of Globalization* (CUP 2006); Robert Patman (ed), *Globalization and Conflict* (Routledge 2006); Hathaway and Shapiro (n 68) 352 ff.

89 Slaughter, *New World Order* (n 77) 71; L'Heureux-Dubé (n 10) 16.

90 L'Heureux-Dubé (n 10) 21.

91 Oscar Schachter, 'Invisible College of International Lawyers' (1977–78) 72 North Western University Law Review 217; for a more recent view on the topic see Jean D'Aspremont, Tarcisio Gazzini, André Nollkaemper and Wouter Werner (eds), *International Law as a Profession* (CUP 2017).

ing in the field, although not necessarily agreeing, had a common object of study. The trend of international collaboration and exchange, fuelled by globalization and the internationalization of national legal orders, did not stop at the barriers of international law but migrated into more domestic areas. These areas include the recently revived field of (comparative) foreign relations law.[92] That is not to say that international exchange and comparative work did not exist prior to the Second World War, but the level of communication and exchange in joint research projects, conferences, blogs, databases,[93] and other personal meetings[94] certainly increased. Of course, not all scholars and professionals working in the field have a common normative aim,[95] nor does this inevitably mean that a kind of universal law will develop.[96] However, today almost every domestic legal development, especially in foreign relations law, is not only looked at from the inside but will also be discussed globally by scholars, judges, and other professionals in the field. The chance for cross-fertilization and converging approaches thus has strongly increased.[97]

The global judicial dialogue does not remain restricted to private individuals but can also occur between courts as institutional actors. This will usually happen in two ways:[98] In the form of a vertical interaction between domestic and international courts and as horizontal interaction

92 Cf new major publications in the field like Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019); David Dyzenhaus, Thomas Poole and Jacco Bomhoff (eds), *The double-facing constitution* (CUP 2019); Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021).

93 L'Heureux-Dubé (n 10) 25.

94 Concerning meetings of judges Slaughter, *New World Order* (n 77) 96; L'Heureux-Dubé (n 10) 26.

95 'The judges who are participating in these networks are motivated not out of respect for international law per se, or even out of any conscious desire to build a global system. They are instead driven by a host of more prosaic concerns, such as judicial politics, the demands of a heavy caseload, and the new impact of international rules on national litigants' Slaughter, *New World Order* (n 77) 67 f; Anne Peters, 'International Legal Scholarship Under Challenge' in Jean D'Aspremont, Tarcisio Gazzini, André Nollkaemper and Wouter Werner (eds), *International Law as a Profession* (CUP 2017) 117.

96 On the differences in international law discourse cf Anthea Roberts, *Is International Law International?* (OUP 2017) 209 ff.

97 Tushnet (n 2) 989.

98 Slaughter, *New World Order* (n 77) 66, 100; Auby (n 4) 149.

between different domestic courts.[99] The highest courts of contemporary Germany and South Africa have, since their establishment, taken part in this process.[100] As we will analyse below,[101] the issue is much more contested in the United States,[102] but the US Supreme Court, at least since the landmark case *Lawrence v Texas*,[103] where it cited the European Court of Human Rights, has also joined the global legal dialogue.[104] We have seen examples of interaction throughout the topics analysed in Chapter 3. For example, UK courts referred to the Supreme Court of the United States in their discussion concerning the restrictive immunity doctrine, and South African courts referred to precisely these cases in their turn to restrictive immunity.[105] Likewise, concerning diplomatic protection in the *Abbasi* case, the English Court of Appeals referred to the German *Hess* decision,[106] and the South African Constitutional Court in *Kaunda* referred to both the *Abbasi* and the *Hess* cases.[107] In cases involving diplomatic protection, all three jurisdictions arrived at a discretionary approach for the executive, albeit applying different legal constructions to achieve that result. Thus,

99 Breyer (n 21) 236 ff; on horizontal dialogue cf Sandra Fredman, *Comparative human rights law* (OUP 2018) 3 ff.

100 Andreas Voßkuhle, 'Rechtspluralismus als Herausforderung – Zur Bedeutung des Völkerrechts und der Rechtsvergleichung in der Rechtsprechung des Bundesverfassungsgerichts' (2019) 79 ZaöRV 481; Christa Rautenbach and Lourens du Plessis, 'In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges' (2013) 14 German Law Journal 1539.

101 Cf this Chapter, II., 3., b).

102 Cf especially the critical stance of late Justice Scalia, Norman Dorsen, 'The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 I CON 519; Peters, 'Globalization' (n 5) 303; Wen-Chen and Jiunn-Rong (n 1) 1178; Breyer (n 21) 236 ff.

103 *Lawrence v Texas* 539 US 558 (2003) (US Supreme Court) 573; cf as well the comparative approach applied by the majority in *Roper v Simmonds* 543 US 551 (2005) (US Supreme Court); for earlier examples of comparative approaches in the Supreme Court cf Breyer (n 21) 241.

104 Peters, 'Globalization' (n 5) 303; Breyer (n 21).

105 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (Transvaal Provincial Division) 121.

106 *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 (Court of Appeal) mn 102.

107 *Kaunda and Others v President of the RSA and Others* 2005 (4) SA 235 (CC) (Constitutional Court) 273, 285.

judicial cross-referencing does not lead to a simple 'legal transplant' but may contribute to converging approaches.[108]

Judicial dialogue becomes even more direct when courts deal not only with the same issue but even the same case. In the globalized world, cases often have a transnational component,[109] and thus more than one forum is open to litigants. This may increasingly lead to circumstances where a case is dealt with in more than one national jurisdiction and courts necessarily will have to cast a side-glance on how their counterparts dealt with the same issue.[110] A particular category of such cases involves potentially abusive exterritorial state action, especially related to the 'Global War on Terror'.[111] Falling in this group is the German Ramstein litigation,[112] covered in the introduction and Chapter 3,[113] concerning the usage of the Ramstein Air Base in Germany for US drone attacks. In determining whether the relatives of a Yemeni drone strike victim had a legal interest in having the case adjudicated in Germany[114] or if there were other more efficient options, the court explicitly mentioned that US courts had turned down the case applying the political question doctrine.[115] In the wake of this case, Peters mentioned laconically that a Higher Administrative Court in Germany would now serve as former President Trump's 'watchdog,'[116] which may entail at least a grain of truth. In such cases, courts may be inclined to widen the scope of their constitutional protection if other courts decline to hold their executive to account.[117] This reasoning also appears to underlie the South African case *National Commissioner of the South African Police*

108 L'Heureux-Dubé (n 10) 23.
109 Slaughter, *New World Order* (n 77) 72.
110 Ibid 86 ff.
111 E.g. usage of secret prisons and drone strikes, Peters, 'Globalization' (n 5) 257.
112 *Judgment from 19 March 2019 (Ramstein Drone Case) 4 A 1361/15 (Higher Administrative Court Münster)* mn 27; Helmut Philipp Aust, 'US-Drohneneinsätze und die grundrechtliche Schutzpflicht für das Recht auf Leben: „German exceptionalism"?' (2020) 75 Juristen Zeitung 303; Diego Mauri, 'The political question doctrine vis-à-vis drones' 'outsized power': Antithetical approaches in recent case-law' (2020) 68 Questions of International Law 3, 13 ff.
113 Cf above, Introduction I. and Chapter 3, II., 2.
114 German: 'Rechtsschutzinteresse'.
115 *Judgment from 19 March 2019 (Ramstein Drone Case)* (n 112) mn 27.
116 Cf Peters cited in Aust (n 112) 310.
117 Peters, 'Globalization' (n 5) 257 f; concerning the trend towards constitutional protection for foreigners abroad cf Eyal Benvenisti and Mila Versteeg, 'The External Dimensions of Constitutions' (2018) University of Cambridge Faculty of Law Research Paper No 15, 11 ff.

v Southern African Human Rights Litigation Centre[118] also addressed in Chapter 3.[119] The Constitutional Court confirmed the judgments of lower courts to order South African police authorities to investigate alleged acts of torture committed by members of the governing Zimbabwean Zanu-PF party in Zimbabwe, which were unlikely to be investigated by Zimbabwean agencies and tried by Zimbabwean courts themselves.[120]

Finally, new constitutions no longer develop within the confines of national debate;[121] almost all contemporary constitutionalization processes now attract international attention. South Africa's constitutional development from the interim constitution of 1993 to the current constitution of 1996 happened under the scrutiny and advice of many foreign constitutional scholars.[122] This procedure fosters cross-fertilization, and many provisions of the South African Constitution, including foreign affairs provisions, are modelled after foreign, especially German, prototypes.[123] The first meeting of the newly elected judges of the South African Supreme Court even took place in Karlsruhe at the seat of the German Federal Constitutional Court.[124] Moreover, newer constitutions like the South African Constitution tend to accommodate the growing influence of international and foreign law.[125] Prominently Section 39 of the South African Constitution demands that the judges 'must consider international law' and 'may consider foreign law' in interpreting the Bill of Rights.

In general, the growing judicial dialogue, though not inevitably leading to convergence, has created at least 'nascent harmonization networks'[126] or

118 Cf above, Chapter 3, I., 4., c), bb), final decision on the matter in *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre* [2014] ZACC 30; 2015 (1) SA 315 (CC) (Constitutional Court).

119 Cf above, Chapter 3, I., 4., c), bb).

120 *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre* (n 118) mn 11.

121 Auby (n 4) 180, also admittedly the international environment has always played a role, but certainly not in the way of a broad scholarly discussion.

122 Peters, 'Globalization' (n 5) 296.

123 Rautenbach and du Plessis (n 100).

124 Antonio Cascais, 'The influence of the German constitution in Africa' DW from 23 May 2019 available at <https://www.dw.com/en/the-influence-of-the-german-constitution-in-africa/a-48852913>.

125 Lourens Du Plessis, 'International Law and the Evolution of (domestic) Human-Rights Law in Post-1994 South Africa' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (OUP 2007) 309; Wen-Chen and Jiunn-Rong (n 1) 1168.

126 Slaughter, *New World Order* (n 77) 69.

'clusters'.[127] Admittedly, 'harmonization' does not necessarily mean convergence towards more judicial interference. However, combined with the other factors described, it may act as a strong catalyst towards less deference.

2. Entanglement of international and domestic law

Another trend leading to weaker forms of deference is the ever-closer entanglement between international and domestic law. The Hobbesian picture saw sovereigns as constructing their legal systems as closed circles sealed off from foreign intrusion.[128] International law was supposed to regulate inter-state relations and exclusively addressed states. Today's relationship between the domestic and the international legal systems is much more complex. We will first analyse how the general blurring of the divide between domestic and international law undermines the assumptions of the traditional position before examining the entanglement of the systems in foreign relations law.

a) General blurring of the domestic and international law divide

Friedman described that more and more subject areas now fall within the ambit of international law. As Simma noted, this goes hand in hand with a change from bilateralism to community interest, that is, the recognition that issues like the international economy or the environment cannot be dealt with bilaterally but are genuinely global problems.[129] Thus, international law not only expanded its scope but also has taken over functions formerly exclusively related to the domestic sphere, like environmental issues, health, and the financial system.[130] The need to regulate these areas

127 Breyer (n 21) 245.

128 Calling it the 'monolithic' view Auby (n 4) 81.

129 Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Recueil de cours 217, 234.

130 Helmut Philipp Aust, 'Between Universal Aspiration and Local Application' in Helmut Philipp Aust and Georg Nolte (eds), *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (OUP 2016) 333, 334; Auby (n 4) 160; Helmut Philipp Aust, 'The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective' in David Dyzenhaus, Thomas Poole and Jacco Bomhoff (eds), *The double-facing constitution* (CUP 2019) 345, 350.

led to the proliferation of international organizations[131] which, to a growing extent, fulfil administrative functions and resemble national administrative bodies.[132] The clear demarcation of international law as dealing with purely inter-state relations thus becomes blurry. Likewise, international law expanded the scope of its addressees and now also aims to regulate the behaviour of non-state actors like multinational corporations and individuals.[133] Even norm creation can be less directly attributed to the state and is shifting to IOs or independent non-state actors.[134] The changes also affect the divide between public and private international law; e.g., classical conflict of law situations are now regulated on an international level by the Brussels Convention on Jurisdiction[135] and only applied by domestic courts.[136] Moreover, not only international law and the domestic legal order but also different national legal orders have become increasingly intertwined.[137]

The concept of a 'sealed off' or 'immune'[138] domestic legal system is thus replaced, at least in many democratic states, by the idea of permeable[139] legal systems that allow mutual interpenetration of norms not originating

131 Mégret (n 61) mn 21.

132 Especially as they become more and more elaborate and settle specific implementation issues Auby (n 4) 107; Sabino Cassese, 'Administrative Law without the state? The challenge of global regulation' (2005) 37 NYU Journal of International Law and Politics 663, 671.

133 Cf concerning the practice of the UN to target individuals Thomas J Biersteker, Sue E Eckert and Marcos Tourinho (eds), *Targeted sanctions: The impacts and effectiveness of United Nations action* (CUP 2016); on governing transnational corporations cf Human Rights Council, 'Resolution establishing the 'Working Group on the issue of human rights and transnational corporations and other business enterprises'' A/HRC/RES/17/4; Auby (n 4) 174; Mégret (n 61) 20.

134 Cassese (n 132) 677; Mégret (n 61) mn 33.

135 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (adopted 27 September 1968, entered into force 1 February 1973) 1262 UNTS 153.

136 Paul S Berman, 'From International Law to Law and Globalization' (2005) 43 Columbia Journal of Transnational Law 485, 518; Auby (n 4) 161; Mégret (n 61) 31; Of course, private international law was regulated on an international law level even before the Second World War, cf especially the work of the Hague Conference on Private International Law. However, also the Hague Conference only became institutionalized as an IO after the Second World War.

137 Auby (n 4) 81, 192.

138 Ibid 80.

139 David J Bederman, *Globalization and International Law* (Palgrave Macmillan 2008) 159; for EU law cf Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht: Verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich* (Mohr Siebeck 2011).

in their own domain.[140] Thus, the traditional Westphalian concept of sovereignty with the state as the sole authority internally[141] and only bound with its consent externally[142] is also called into question. It is unlikely that the idea of state sovereignty will be discarded, but it will likely have to be redefined[143] in the light of the various international and transnational norms now active in domestic legal systems[144] and the weakened role of state consent in the international legal system. In general, domestic and foreign affairs are no longer neatly distinguishable but flow into each other.[145] This development poses a serious challenge to the traditional position based on the clear distinction of both spheres. If the separation between domestic and foreign matters erodes, the courts lose indicators for when to defer to executive assessments,[146] and avoidance doctrines, in general, become less appropriate.[147]

b) Closer entanglement in foreign relations law

A closer entanglement of the international and domestic legal systems also affects foreign relations law. Traditionally the domestic legal system decided how to fulfil the expectations of international law in areas like diplomatic relations, treaty interpretation, or immunity. This independence was strengthened by the relative opaqueness of customary international law norms. Every domestic legal system could, on its own, formulate a

140 For the European Union Law cf as well Wendel (n 139); Auby (n 4) 80 ff; Malcolm N Shaw, *International law* (8th edn, CUP 2017) 96.

141 Samantha Besson, 'Sovereignty' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 1 ff.

142 Ibid mn 31.

143 Keohane (n 13) 174 ff; Di Fabio (n 12) 122 ff; Biehler (n 11) 5; Berman (n 136) 523 ff; for the 'untamed' side of sovereignty Bardo Fassbender, 'Sovereignty and Constitutionalism in International Law' in Neil Walker (ed), *Sovereignty in transition* (Hart 2006) 115 ff; Martin Nettesheim, 'Art. 59' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 19; Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 EJIL 513; Auby (n 4) 103 ff.

144 Berman (n 136) 527.

145 Peters, 'Globalization' (n 5) 274; Mégret (n 61) mn 39; Helmut Philipp Aust and Thomas Kleinlein, 'Introduction: Bridges under Construction and Shifting Boundaries' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 5.

146 Cf as well Aust, 'Democratic Challenge' (n 130) 361.

147 Peters, 'Globalization' (n 5) 274.

position towards customary international law and, through its behaviour, even influence the latter's development. The exact content of the law was open to debate.

With the changing structure of international law, the room for domestic variety may not have been completely abolished but it is now at least more narrowly confined, as '[i]nternational law increasingly harbours expectations about its domestic implementation'.[148] Especially through the work of the International Law Commission[149] during the second half of the 20th century, many subject areas that beforehand were core areas of (domestic) foreign relations law became codified in international treaties. Examples include the Vienna Convention on Diplomatic Relations (1961),[150] the Vienna Convention on Consular Relations (1963),[151] and the Vienna Convention on the Law of Treaties (1969),[152] which we saw the courts refer to throughout the groups of cases in Chapter 3.[153] Even if some states, like the United States and South Africa, have not signed or ratified treaties like the Convention on the Law of Treaties, they often consider them as reflecting customary international law.[154] Due to this codification process, as a kind of 'substitute legislation' within the international system,[155] domestic legal systems now have a clear common point of reference, increasing the need for justification in cases of deviation.[156]

148 Aust and Kleinlein (n 145) 3 [my adjustment].

149 Arthur Watts, 'Codification and Progressive Development of International Law' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 10 ff.

150 Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.

151 Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.

152 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

153 Cf above, Chapter 3., I., 1. and 4.

154 For the US Bradley, *International Law* (n 26) 33 f; for South Africa Dire Tladi, 'Interpretation of Treaties in an International Law-Friendly Framework: The Case of South Africa' in Helmut Philipp Aust and Georg Nolte (eds), *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (OUP 2016) 134, 139; for reliance on the VCLT in general compare the contributions in Helmut Philipp Aust and Georg Nolte (eds), *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (OUP 2016).

155 Shaw (n 140) 70.

156 Cf in general William Twining and David Miers, *How to Do Things with Rules* (5th edn, CUP 2010) 146.

In legislating or applying foreign relations law, lawmakers and courts must consider the demands of these international law instruments.[157] Germany's Statute Concerning the Organization of the Courts may serve as an example. As we have seen during our examination of the German approach concerning foreign official immunity,[158] it explicitly refers to the Vienna Conventions on Diplomatic and Consular Relations[159] to synchronize domestic and international law. In the same vein, South Africa's Diplomatic Privileges and Immunities Act,[160] also analysed in Chapter 3,[161] in several provisions explicitly refers to the conventions.[162] In the United States, the trend is exemplified by the changes within the influential Restatements on Foreign Relations Law,[163] which provide a summary of the case law in the area. The first provisions of the Fourth Restatement concerning the interpretation of treaties are now almost an exact copy of Articles 31 and 32 VCLT.[164] In contrast, the Third Restatement had only referred to some of the VCLT's rules on interpretation.[165]

Of course, codified international law can still spark disputes, but the consequences of neglecting (especially written) international standards can give rise to the mentioned global legal dialogue[166] and exert pressure toward compliance. Even a global superpower like the United States witnessed this in two prominent cases relating to Article 36 of the Vienna Convention on Consular Relations, mentioned above when analysing treaty interpretation in the United States.[167] Article 36 of the Convention demands that detainees be informed of their right to consular protection. The non-compliance of the US concerning this standard led to the ICJ's judgments in *LaGrand*[168]

157 In general cf Tushnet (n 2) 993.
158 Cf above, Chapter 3, I., 4., b), bb), (1).
159 Courts Constitution Act § 18 and § 19.
160 Diplomatic Immunities and Privileges Act 37 of 2001.
161 Cf above, Chapter 3, I., 4., c), bb).
162 Ibid Sections 3 and 12.
163 Cf already above, Chapter 3, I., 1., a), bb), (3), (d).
164 American Law Institute, *Restatement of the Law Fourth – The Foreign Relations Law of the United States – Selected Topics in Treaties, Jurisdiction and Sovereign Immunity* (American Law Institute Pub 2018) § 306.
165 American Law Institute, *Restatement of the law, third: The foreign relations law of the United States, §§ 1 – 488* (American Law Institute Pub 1987) § 325.
166 Cf above, this Chapter, I., 1., c).
167 Cf above, Chapter 3, I., 1., a), bb), (3), (c).
168 *LaGrand (Germany v United States of America) Judgment* ICJ Rep 2001, 466 (ICJ) 497.

and *Avena*[169] and triggered major foreign relations law disputes in the United States with corresponding Supreme Court cases.[170] Although the international demands were not met in both cases, there can be no doubt about the international pressure. The *Avena* case even induced the US president to issue an unconstitutional memorandum to enforce the ICJ's decision domestically.[171] In the wake of the *Avena* and corresponding domestic *Medellin* case, two US states stopped executions that would have violated the ICJ's judgment and even Texas, which refused to comply in the original case, promised to respect the judgment in future cases.[172] As a result of the *Avena* litigation, the US terminated the optional protocol allowing states to challenge VCCR violations before the ICJ.[173] Nevertheless, the information about the right to consular protection in the US is now part of state and local police training, and some US states have even amended their legislation[174] and now require detainees be informed of their right to consular protection together with the obligatory Miranda warnings.[175] Moreover, federal legislation was introduced to facilitate US compliance with the VCCR's demands,[176] even though Congress has not signed it into law.[177] Despite the resistance, the VCCR has thus shaped US foreign relations law.

In general, the increasingly codified international law in classical foreign relations law areas creates a convergence impulse through its demand for

169 *Avena and Other Mexican Nationals (Mexico v United States of America) Judgment* ICJ Rep 2004, 12 (ICJ) 57.

170 *Federal Republic of Germany et al v United States et al* 526 US 111 (1999) (US Supreme Court); *Medellín v Texas* 552 US 491 (2008) (US Supreme Court).

171 *Medellín v Texas* (n 170).

172 Peter J Spiro, 'Sovereigntism's Twilight' (2013) 29 Berkeley Journal of International Law 307, 316.

173 John B Bellinger, 'The Trump Administration's Approach to International Law and Courts: Are We Seeing a Turn for the Worse?' (2019) 51 Case Western Reserve Journal of International Law 7, 19.

174 'In accordance with federal law and the provisions of this section, every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country […]' California Penal Code § 834 c (a) (1).

175 Spiro, 'Sovereigntism's Twilight' (n 172) 316.

176 Curtis A Bradley, 'The Dynamic and Sometimes Uneasy Relationship Between Foreign Relations Law and International Law' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 343, 348 fn 19.

177 Ibid 348, Consular Notification Compliance Act of 2011.

specific standards and procedures and by providing a common point of reference.[178] Although the time of large ILC codifications appears to be over,[179] still in the 2000s, the ILC concluded major projects in classical foreign relations law areas like the Convention on Jurisdictional Immunities of States and Their Property[180] and the ILC Draft Articles on Diplomatic Protection.[181] The latter even includes an Article on 'recommended practice'[182] in which the official commentary positively refers to the *Hess*, *Abbasi*, and *Kaunda* cases analysed in Chapter 3.[183] In line with the approach developed in these cases, the Draft Articles advise states to at least give 'due consideration to the possibility of exercising diplomatic protection,' especially in cases of significant injury.[184] Thus, they will likely contribute to more convergence in states' domestic approaches towards diplomatic protection. This is also true for other, more recent projects like the 'Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction,'[185] which will presumably continue to have a convergence effect in classical areas of foreign relations law.

178 Speaking of a 'homogenizing' effect Edward Swaine, 'International Foreign Relations Law – Executive Authority in Entering and Exiting Treaties' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 46, 47.

179 Pemmaraju Sreenivasa Rao, 'International Law Commission ILC' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 40; assessing the role of the ILC and its challenges cf also Georg Nolte, 'The International Law Commission Facing the Second Decade of the Twenty-first Century' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest – Essays in Honour of Bruno Simma* (OUP 2011) 781.

180 United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force).

181 Draft Articles on Diplomatic Protection with Commentaries (2006).

182 Article 19 of the Draft Articles on Diplomatic Protection with Commentaries (2006).

183 Commentary 3 to Article 19 of the Draft Articles on Diplomatic Protection with Commentaries (2006); cf above, Chapter 3, I., 5., b) and c).

184 Article 19 (a) of the Draft Articles on Diplomatic Protection with Commentaries (2006).

185 Available at <https://legal.un.org/ilc/summaries/4_2.shtml>.

3. Changing role of parliaments in foreign affairs

Another trend challenging the traditional position is the growing role of parliaments in foreign affairs. As the traditional position's second proposition entails, foreign affairs were historically treated as an executive domain. Likewise, the idea of separation of powers limiting the executive's competences in favour of parliament was only applied to the domestic realm.[186] The outer sphere was left to the executive's will, a position which now appears to be changing. With the gained competences of parliament, by proxy, the judiciary has also became more involved in foreign affairs. In power struggles between the two branches, the call for a neutral umpire in the form of the judiciary often included the latter in competence disputes and normalized its involvement in foreign affairs cases.

This part will first take up the development described in Chapter 1 and lay down how far parliaments were excluded from foreign affairs in all three jurisdictions. It will then examine how the legislative branch gained influence, especially after the Second World War. The starting point will be the involvement of parliaments in treaty-making, touched upon in Chapter 3. As this development, at least in some of our reference jurisdictions,[187] is connected to parliaments' involvement in the deployment of military forces, this area will also be included in the analysis. Finally, we will examine how the stronger involvement of parliament has strengthened the judiciary's position vis-à-vis the executive branch.

a) Traditional exclusion of the legislative branch from foreign affairs

As examined in Chapter 1, the conduct of foreign affairs in common law remained part of the monarch's (and later the executive branch's) prerogative,[188] and the very idea of the prerogative was (and still is) that it can be exercised without parliamentary approval.[189] Consequently, treaty-making

186 For Germany, Franz-Christoph Zeitler, *Verfassungsgericht und völkerrechtlicher Vertrag* (Duncker & Humblot 1974) 122.
187 Especially Germany, cf below this Chapter, I., 3., b), aa).
188 McLachlan (n 2) 36; Swaine (n 178) 48.
189 McLachlan (n 2) 15.

in English[190] and South African law[191] was a task of the executive and parliament's role was confined to enacting legislation for implementation. Hence, parliamentary implementation of treaties was not driven by the idea of sharing foreign affairs powers but merely by the need to safeguard parliament's (internal) competences from executive intrusion.[192] Likewise, the power to deploy military forces abroad was exclusively vested in the executive.[193]

Germany, as we have seen,[194] also followed the monarchical idea.[195] As in the United Kingdom, following the constitutionalization processes of the 19th century,[196] parliament was only called upon to enact treaties into domestic law.[197] The Bismarck Constitution reflected this trend.[198] Treaties that did not call for domestic implementation were free of legislative influence.[199] The Weimar Constitution only slightly expanded the legislative's involvement by demanding legislative involvement in concluding 'alliance' treaties.[200] A similar picture is provided by declarations of war that were still in the monarchical prerogative under the Bismarck Constitution.[201] Here, the legislative branch in Germany gained more influence in the

190 Ibid 152, for the parliamentary exclusion under the common law.

191 Joanna Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making' (2006) 55 ICLQ 121, 142.

192 McLachlan (n 2) 36.

193 For South African Law cf Henry J May, *The South African Constitution* (3rd edn, Juta 1955) 205; in detail on the development of the English law Rosara Joseph, *The war prerogative: History, reform, and constitutional design* (OUP 2013); Katja Ziegler, 'The Use of Military Force by the United Kingdom: The Evolution of Accountability' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 771.

194 Cf above, Chapter 1, II., 3.

195 Luzius Wildenhammer, *Treaty Making Power and Constitution – An international and Comparative Study* (Helbing & Lichtenhahn 1971) 9.

196 Werner Heun, 'Art. 59' in Horst Dreier and Hartmut Bauer (eds), *Grundgesetz: Kommentar* (3rd edn, Mohr Siebeck 2015) mn 4.

197 Zeitler (n 186) 122 f.

198 Cf above, Chapter 1, II., 3., b) Article 11 Bismarck Constitution.

199 Ernst R Huber, *Deutsche Verfassungsgeschichte seit 1789 – Bismarck und das Reich* (Kohlhammer 1963) 941.

200 Cf above, Chapter 1, II., 3., c), Article 45 Weimar Constitution, cf as well Ernst R Huber, *Deutsche Verfassungsgeschichte seit 1789 – Die Weimarer Reichsverfassung* (Kohlhammer 1981) 465.

201 Cf above, Chapter 1, II., 3., b), Article 11 Bismarck Constitution, controlled only by the former independent states assembled in the Federal Council, Huber (n 199) 942.

aftermath of the First World War. As examined above,[202] declarations of war needed the consent of the *Reichstag*. However, the 'master of business'[203] was still the executive branch.[204] Moreover, the Emergency Power of Article 48 of the Weimar Constitution allowed the conferral of powers to the President of the Reich and manifestly undermined parliamentary safeguards.[205]

The United States deviated from that account, as at least the framers appeared to break with the monarchical principle and awarded classical foreign affairs powers to Congress.[206] Most prominently, treaties could (and can) only be entered into with the advice and consent of two-thirds of the Senate. Likewise, declarations of war are in the power of Congress.[207] However, as depicted in Chapter 1, soon after the constitution's inception, politicians,[208] scholars, and courts started to limit legislative (and judicial) involvement in foreign affairs.[209] The legislative involvement in treaty formation was soon circumvented with the use of 'sole executive agreements,' that is, international agreements without the legislature's involvement, a method that reached its height in the 1930s and 1940s.[210] Likewise, in the early years of the US Constitution, military forces were deployed without congressional involvement.[211] Though to varying degrees, in all three jurisdictions, parliamentary influence in foreign affairs was thus relatively weak by the end of the Second World War.

202 Cf above, Chapter 1, II., 3., c).
203 'Herr des Geschäfts' – cf Huber (n 200) 464.
204 Huber (n 200) 464.
205 Katja Ziegler, 'Executive Powers in Foreign Policy: The decision to Dispatch the Military' in Katja Ziegler, Denis Baranga and Anthony W Bradley (eds), *Constitutionalism and the Role of Parliaments* (Hart 2007) 141, 150.
206 Bradley, *International Law* (n 26) 34.
207 Article 1 § 8 (11) US Constitution.
208 Concerning the role of the Washington administration cf Curtis Bradley and Martin Flaherty, 'Executive Power Essentialism and Foreign Affairs' (2004) 102 Michigan Law Review 545, 631 ff.
209 Cf above, Chapter 1, II., 2., b) and c).
210 Harrington (n 191) 141; Bradley, *International Law* (n 26) 80 f.
211 Bradley, *International Law* (n 26) 299.

b) Gradual expansion of legislative influence

This relatively limited influence of parliaments in foreign affairs compared to the executive appears to be changing.[212] The development is, in part, influenced by domestic particularities[213] but also by the changing structure of international law.[214] As described, international regulation is growing significantly. Quantitatively, international law regulates more and more subject areas, and qualitatively the influence of international law on the domestic sphere becomes stronger.[215] This trend, especially (but not only)[216] in countries without a directly elected executive, has led several commentators to identify a growing 'democratic deficit'[217] and often to correspondingly demand extended parliamentary participation in treaty-making.[218] Likewise,

212 Cf the impressive large N study by Pierre-Hugues Verdier and Mila Versteeg, 'Separation of Powers, Treaty-Making, and Treaty Withdrawal: A Global Survey' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 135; cf for the UK as well Ziegler (n 193); for the UK as well Veronika Fikfak, 'War, International Law and the Rise of Parliament' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 229; for Bosnia and Heregovina cf Ajla Skrbic, 'The Role of Parliaments in Creating and Enforcing Foreign Relations Law – A Case Study of Bosnia and Herzegovina' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021).

213 E.g., Germany's membership in the EU, cf below this Chapter, I., 3., b), aa).

214 McLachlan (n 2) 156 f.

215 Harrington (n 191) 122; Peters, 'Globalization' (n 5) 283.

216 Cf Quote from *Zivotofsky* below, this Chapter, I., 3., c), cc).

217 Describing the trend Harrington (n 191) 122; describing the trend McLachlan (n 2) 156; referring to the so-called 'mega-regional' trade agreements Aust, 'Democratic Challenge' (n 130) 352; referring to the German discussion Stefan Kadelbach, 'International Treaties and the German Constitution' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 178; on the German discussion as well Christian Calliess, '§ 72 – Auswärtige Gewalt' in Hanno Kube and others (eds), *Leitgedanken des Rechts* (CF Müller 2013) 776 ff; acknowledging the discussion around the democratic deficit Felix Lange, *Treaties in Parliaments and Courts: The Two Other Voices* (Edward Elgar 2024) 302.

218 Foreseeing this trend already Eberhard Menzel, 'Die auswärtige Gewalt der Bundesrepublik' (1954) 12 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 179, 183; calling for more parliamentary involvement Harrington (n 191) 159; calling for more legislative involvement as well Peters, 'Globalization' (n 5) 283; describing the trend of more legislative involvement Hannah Woolaver, 'State engagements with treaties – interactions between international and domestic law' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 433, 435; describing the trend of more legislative involvement

at least in some countries, there appears to be a growing influence of parliaments concerning the deployment of military forces.[219] This also appears to reflect a growing demand for democratic legitimacy and accountability.[220]

aa) Germany

In Germany, parliament's role in foreign affairs was strengthened with the Weimar Constitution[221] but considerably reinforced with the inception of the Basic Law.[222] Like under older German constitutions, today parliament's approval is necessary for treaties that require domestic implementation.[223] Moreover, as we saw in Chapters 2 and 3,[224] pursuant to Article 59 (2) of the Basic Law, parliament must also consent to treaties that 'regulate political relations of the Federation'.[225] This provision opens an additional category of treaties to legislative influence. In the mentioned judgment concerning a German-French-Trade-Agreement decided in the early years of the new constitution,[226] the Constitutional Court established a rather narrow interpretation of the provision and only applied it to treaties relating to the 'existence of the state, its territorial integrity, its independence,

Campbell McLachlan, 'Five conceptions of the function of foreign relations law' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 32; speculating about democratic deficits as reason for the trend Verdier and Versteeg (n 212) 135.

219 Tom Ginsburg, 'Chaining the Dog of War: Comparative Data' (2014) 15 Chicago Journal of International Law 138; Ziegler, 'Use of Military Force' (n 193) 784; acknowledging this trend Campbell McLachlan, 'The Present Salience of Foreign Relations Law' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 355, 367; for the UK Fikfak (n 212).

220 Ziegler, 'Use of Military Force' (n 193) 771.

221 Menzel (n 218) 186.

222 Cf above, Chapter 1, II., 3., e); on the process as well Calliess, *Staatsrecht III* (n 4) 83 ff.

223 For mere 'administrative agreements', no parliamentary approval is required, but the constitutional provisions for the federal administration apply (and may call for the involvement of the *Länder*), the exact scope of the involvement of the *Länder* in this area is contested Nettesheim (n 143) mn 188 ff.

224 Cf Chapter 2, I., 2. and Chapter 3, I., 1., b), bb), (1).

225 Article 59 (2) of the Basic Law; for an overview of treaty making in Germany cf Kadelbach (n 217).

226 Cf above, Chapter 3, I., 1., b), bb), (1).

its position or relative weight within the international community'.[227] In the wake of the discussion surrounding the 'democratic deficit,' academics challenged this narrow interpretation,[228] but until today the Constitutional Court has not overruled its previous decision. However, although the narrow interpretation of Article 59 (2) of the Basic Law remained, the Constitutional Court found other ways to strengthen parliament's influence in foreign affairs.

One of these areas is European Union law. The European integration process was initially effected using the provisions for 'ordinary' international law provided in the Basic Law.[229] With unprecedented level of integration, the German constitution has been amended to allow the large-scale transfer of sovereign powers to the EU.[230] The level of integration multiplies the problems surrounding democratic accountability.[231] The new constitutional provision now calls for the involvement of the legislative branch,[232] and the Constitutional Court has been eager to strengthen the role of the Bundestag within the European integration process. It coined the expres-

227 *Judgment from 29 July 1952 (Deutsch-Französisches Wirtschaftsabkommen)* BVerfGE 1, 372 (German Federal Constitutional Court); the tendency to interpret Article 59 of the Basic Law narrowly already showed in the *Judgment from 29 July 1952 (Petersberger Abkommen)* BVerfGE 1, 351 (German Federal Constitutional Court); cf on the topic Nettesheim (n 143) mn 99.

228 Stefan Kadelbach and Ute Guntermann, 'Vertragsgewalt und Parlamentsvorbehalt' (2001) 126 AöR 563; stressing the role of parliament Kay Hailbronner, 'Kontrolle der Auswärtigen Gewalt' (1997) 56 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 8, 11; comprehensively Pernice, 'Art. 59' in Horst Dreier (ed), *Grundgesetz Kommentar* (2nd edn, Mohr Siebeck 2006) mn 37 ff; in this direction Nettesheim (n 143) mn 32; acknowledging this trend as well Juliane Kokott, 'Kontrolle der Auswärtigen Gewalt' (1996) 111 DVBl 937, 938; Kadelbach, 'International Treaties' (n 217) 177; for a moderate extension Frank Schorkopf, *Staatsrecht der internationalen Beziehungen* (CH Beck 2017) 137; advocating more legislative influence in cases of treaty withdrawal Felix Lange, 'Art. 59 Abs. 2 S. 1 GG im Lichte von Brexit und IStGH-Austritt' (2017) 142 AöR 442, 462 ff.

229 Especially Article 24 of the Basic Law.

230 Rupert Scholz, 'Art. 23' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 1.

231 Claus D Classen, 'Art. 23' in Peter M Huber and Andreas Voßkuhle (eds), *Mangoldt/Klein/Starck: Kommentar* (7th edn, CH Beck 2018) mn 15; law-making through the EU has often been criticized as dominated by the executive cf Heiko Sauer, *Staatsrecht III* (6th edn, CH Beck 2020) 57.

232 Article 23 (2) of the Basic Law.

sion of the 'responsibility for integration'[233] (*Integrationsverantwortung*)[234] of the Bundestag and even quashed national legislation which insufficiently reflected this parliamentary duty.[235] The narrow interpretation of Article 59 (2) of the Basic Law thus does not affect the stronger parliamentary involvement in the important field of European Union law.[236]

Likewise, concerning the use of military force, the legislative's influence in Germany has been strengthened. We saw in Chapter 3 how the Constitutional Court developed its 'integration framework' doctrine, especially to allow the executive to subsequently develop the North Atlantic Treaty.[237] This could have meant a strong position for the executive to decide on the deployment of military forces, especially because the Basic Law includes no explicit provisions concerning the responsibility for troop deployments, and the area was widely perceived to be an executive domain.[238] However, the Constitutional Court, in the previously mentioned[239] controversial[240] *Out-Of-Area* case,[241] decided that the Basic Law calls for a 'parliamentary army' (*Parlamentsarmee*) and that in general, armed military deployments

233 Also this terminology has been used before in relation to Article 24 it gained importance when it was applied to Article 23 *Judgment from 30 June 2009* (*Lissabon)* BVerfGE 123, 267 (German Federal Constitutional Court) 351.

234 For a recent monograph on the topic Michael Tischendorf, *Theorie und Wirklichkeit der Integrationsverantwortung deutscher Verfassungsorgane: Vom Scheitern eines verfassungsgerichtlichen Konzepts und seiner Überwindung* (Mohr Siebeck 2017); Calliess, *Staatsrecht III* (n 4) 261 ff.

235 *Judgment from 30 June 2009* (*Lissabon)* (n 233) 432 ff.

236 According to the dominant academic position, Article 23 (1) of the Basic Law leaves no room for the application of Article 59 (2) of the Basic Law, cf Sauer (n 231) 57 with further references; the involvement of the Bundestag is at least strong in de jure terms, de facto it is often complained that it does not live up to its 'Integrationsverantwortung'; on the role of parliament in European integration cf as well Christian Calliess and Timm Beichelt, *Die Europäisierung des Parlaments* (Verlag Bertelsmann Stiftung 2015).

237 Cf above, Chapter 3, I., 1., b), bb), (4).

238 Sauer (n 231) 79 f.

239 Cf above, Chapter 3, I., 1., b), bb), (4).

240 Georg Nolte, 'Bundeswehreinsätze in kollektiven Sicherheitssystemen, Zum Urteil des Bundesverfassungsgerichts vom 12. Juli 1994' (1994) 54 ZaöRV 652, 674; with further references Otto Depenheuer, 'Art. 87a' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 143.

241 *Judgment from 12 July 1994 (Out-of-Area-Einsätze)* BVerfGE 90, 286 (German Federal Constitutional Court).

have to be sanctioned by the legislature.[242] The court justified its decision inter alia with the need to compensate for the executive's strong role in the subsequent development of treaties.[243] Later judgments refined the requirement of parliamentary approval,[244] and it is now thoroughly rooted in German constitutional law. Deciding on the deployment of military personnel secures another possibility for the legislative branch to shape foreign affairs.

bb) South Africa

Up until the end of apartheid, South Africa followed the British approach (now also changing)[245] to treaty-making. As we have seen, the president would enter into treaties,[246] and parliament's involvement was only necessary to change domestic law.[247] Following the trend of more parliamentary involvement,[248] this exclusion of parliament from the treaty-making process ended with the transition to democracy.[249] Section 231 (2) of the new South African Constitution now establishes that international agreements are only binding on the republic with the approval of the national assembly and the council of provinces.[250] The only exception are mere 'technical, administrative or executive agreements'[251] according to Section 231 (3) of the South

242 Cf as well *Judgment from 7 May 2008 (Awacs Turkey)* BVerfGE 121, 135 (German Federal Constitutional Court); Anne Peters, 'Military operations abroad under the German Basic Law' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 791; Calliess, *Staatsrecht III* (n 4) 186.

243 *Judgment from 12 July 1994 (Out-of-Area-Einsätze)* (n 241) 351; Helmut Philipp Aust, 'Art. 87a' in Jörn Axel Kämmerer and Markus Kotzur (eds), *von Münch / Kunig Grundgesetz Kommentar* (7th edn, CH Beck 2021) mn 52.

244 Peters, 'Military operations' (n 242); for an overview cf Aust, 'Art. 87a' (n 243) mn 56.

245 Harrington (n 191) 127 ff; McLachlan, *Foreign Relations Law* (n 2) 174 ff.

246 Republic of South Africa Constitution Act 110 of 1983 Section 6 (1) (e); Republic of South-Africa Constitution Act 32 of 1961 Section 7 (3) (g).

247 Harrington (n 191) 143; John Dugard and others, *Dugard's International Law – A South African Perspective* (5th edn, Juta 2018) 72.

248 On the trend of including the legislative branch in treaty making Verdier and Versteeg (n 212) 148 and authors cited above (n 212).

249 Cf already Interim Constitution of South Africa 1993 Section 231 (2) 'parliament shall, subject to this Constitution, be competent to agree to the ratification of or accession to an international agreement'.

250 Constitution of the Republic of South Africa 1996 Section 231 (2).

251 Constitution of the Republic of South Africa 1996 Section 231 (3).

African Constitution, which only have to be tabled in both institutions within a reasonable time.

The judiciary has interpreted both provisions in favour of parliament. In the ICC withdrawal case *Democratic Alliance v Minister of International Relations*[252] examined in Chapter 3,[253] it decided that Section 231 (2) of the South African Constitution not only applies to the conclusion but also governs the termination of treaties. Parliament thus gained considerable influence in shaping South Africa's foreign affairs as every treaty commitment can now only be rescinded with its involvement. Also, Section 231 (3) of the South African Constitution has been interpreted in its favour. In the *Earthlife*[254] decision mentioned in Chapter 3,[255] the court decided that the executive is not free to classify agreements as 'technical' at will, but the assessment has to be based on objective factors and is reviewable.[256] Likewise, it found that what constitutes a 'reasonable' time to table technical agreements is not at the liberty of the executive, and agreements not tabled in time can be set aside.[257]

In parallel with the development in Germany, concerning military force, the influence of parliament grew in South Africa. The South African Constitution now stipulates that 'national security is subject to the authority of Parliament and the national executive'.[258] The president may authorize the deployment of the defence force[259] but is subject to detailed parliamentary reporting duties set out in the constitution.[260] If troops are deployed after a 'state of national defence' is declared, parliament's approval is required within seven days.[261] Arguments have been made that parliament, not un-

252 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* 2017 (3) SA 212 (GP) (High Court – Gauteng Division).
253 Cf above, Chapter 3, I., 1., c), bb).
254 *Earthlife Africa v Minister of Energy* 2017 (5) SA 277 (WCC) (High Court – Western Cape Division).
255 Cf above, Chapter 3, I., 1., c), bb).
256 *Earthlife Africa v Minister of Energy* (n 254) 272.
257 *Earthlife Africa v Minister of Energy* (n 254) 261.
258 Constitution of the Republic of South Africa 1996 Section 198 (d).
259 Ibid Section 201 (2).
260 Ibid Section 201 (3).
261 Ibid Section 203 (3); it appears that deployment of troops is possible with and without a declaration of a 'state of national defence', cf Stephen Ellmann, 'War Powers' in Stuart Woolman and Michael Bishop (eds), *Constitutional law of South Africa* (2nd edn – January 2013 – Revision Service 5, Juta 2002) 17.

like under the War Powers Resolution in the United States,[262] can demand an end of hostilities entered into without this consent.[263] Despite the remaining room (and need) for further jurisprudential clarifications in the area, there can be no doubt that under the new South African Constitution, the legislative branch gained considerable influence in the deployment of the military[264] and thus the conduct of foreign affairs.

cc) United States

In the United States, through the Senate's role in treaty-making, the legislative had a more substantial role in foreign affairs than in Germany and South Africa, even before the Second World War. However, a firm executive grip also developed in the US, reaching its height in the 1930s and '40s.[265] This grip was challenged after the Second World War, albeit to a lesser extent than in Germany and South Africa. As recently shown by Galbraith, legislative involvment was primarily brought about in the form of procedural requirements.[266] The developments depicted here, notwithstanding their weaker impact compared to Germany and South Africa, as we shall see, have a bearing on the judiciary's involvement.

A first instrument that limited the executive influence, especially concerning international treaty-making, is the 'Circular 175 procedure'[267] named after a State Department circular issued in 1955.[268] It contains specific guidelines to safeguard '[t]hat timely and appropriate consultation is had with congressional leaders and committees on treaties and other

262 Cf below, this Chapter, I., 3., b), cc).

263 In this direction Stephen Ellmann, 'War Powers Under the South African Constitution' (2006/07) 6 New York Law School Legal Studies Research Paper 333, 343; cf however more doubtful Ellmann, 'War Powers in Woolman and Bishop' (n 261) 10; parliament may also vote if no 'state of defence' has been declared, cf ibid 18.

264 Ibid 3 citing parliamentary involvement as a general principle.

265 Cf this Chapter, I., 3., a).

266 Jean Galbraith, 'From Scope to Process – The Evolution of Checks on Presidential Power in US Foreign Relations Law' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 239.

267 State Department, 'Circular 175 Procedure – 11 Foreign Affairs Manual 720' available at <https://fam.state.gov/FAM/11FAM/11FAM0720.html>.

268 Bradley, *International Law* (n 26) 81.

international agreements'.[269] One of its core provisions lists indicators to determine which domestic option (Article 2 treaty, executive agreement with and without legislative involvement) is appropriate in the light of an intended international commitment.[270] Although the circular is not binding, in several cases, Congress has objected to using a chosen instrument and successfully persuaded the executive to reconsider.[271] Furthermore, the Case-Zablocki Act[272] of 1972 secures legislative involvement.[273] It calls for every international agreement, other than Article 2 treaties, to be tabled in front of Congress within 60 days of its conclusion and thus secures at least an ex-post involvement of Congress.[274] The Circular 175 procedure and the Case-Zablocki Act have been described as attempts to 're-parliamentarize' the making of international agreements, which tipped heavily in favour of the executive through the use of (sole) executive agreements described in Chapters 1 and 3.[275]

Concerning the use of military force, the situation, to a certain extent, mirrors the development in international treaty-making. The framers shared competences between Congress, having the power to 'declare war'[276] and the president, who is the 'commander in chief'[277] of the armed forces. The mainstream interpretation of the constitutional power to declare war includes that Congress' approval (not necessarily in form of a declaration of war) is needed before conducting offensive military operations.[278] As with treaties, the provision from its inception has sometimes been circum-

269 State Department (n 267) 722.
270 Ibid 723.3.
271 Jean Galbraith, 'International Agreements and US Foreign Relations Law' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 157, 166.
272 Case-Zablocki Act 1 USC § 112b.
273 Bradley, *International Law* (n 26) 82.
274 It has also been suggested that the Case Zablocki Act should be applied to the non-binding political agreements (like the JCPOA) which become increasingly popular cf Ryan Harrington, 'A remedy for congressional exclusion from contemporary international agreement making' (2016) 118 West Virginia Law Review 1211, 1236 ff; cf Galbraith, 'International Agreements' (n 271) 163.
275 Harrington, 'Scrutiny' (n 191) 142; Galbraith, 'From Scope to Process' (n 266) 246.
276 Article 1 § 8 (11) US Constitution.
277 Article 2 § 2 (1) US Constitution.
278 This view is not uncontested, with further references Bradley, *International Law* (n 26) 291; Curtis A Bradley, 'U.S. War Powers and the Potential Benefits of Comparativism' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 754.

vented, with the president initiating military operations without declaring war.[279] The Vietnam War induced Congress to take action in the form of the 'War Powers Resolution,'[280] which came into force with two-thirds of both houses overturning a veto of President Nixon.[281] The resolution calls for Congress to be informed before sending the US forces into hostilities and for reports to be filed with Congress when troops were deployed.[282] Moreover, the use of armed forces has to be terminated within 60 days if Congress has not declared war or issued a specific authorization.[283] On the one hand, since its inception, presidents have filed several reports to Congress in compliance with the resolution. On the other hand, troop deployments have continued for over 60 days without congressional approval.[284] The resolution's constitutionality is contested, but the executive rarely argued that it is unconstitutional or can be disregarded but claimed that its actions comply with the resolution.[285] In general, although the effectiveness of the resolution may be debated,[286] it, without doubt, influences the executive's decision to deploy armed military forces.[287] However, congressional control of executive military actions has been further complicated with the enactment of extremely broad 'Authorizations for Use of Military Force' (AUMFs),[288] which often remain active years after their

279 Bradley, *International Law* (n 26) 299.
280 War Powers Resolution, Publ Law No 93 – 148, 87 Stat 555.
281 Bradley, *International Law* (n 26) 306; Bradley, 'U.S. War Powers' (n 278) 757 ff.
282 War Powers Resolution (n 280) § 3, 4.
283 Ibid § 5 (b).
284 Bradley, *International Law* (n 26) 306.
285 Claiming that the resolution is not applying to limited military engagements *Kucinich v Obama* [2011] 821 F Supp 2d 110 (United States District Court for the District of Columbia) 133; Bradley, *International Law* (n 26), 306; Bradley, 'U.S. War Powers' (n 278) 758; President Obama sought congressional approval before ordering airstrikes on Syria despite claiming that it would be within the presidential power to act without the legislative branch, cf Barack Obama, 'Remarks by the President in Address to the Nation on Syria – 10 September 2013' <https://obamawhitehouse.archives.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria> 'So even though I possess the authority to order military strikes, I believed it was right, in the absence of a direct or imminent threat to our security, to take this debate to Congress'; for a review of the practice under the Obama and Trump administrations relating to the War Powers resolution see Bradley, 'U.S. War Powers' (n 278) 761.
286 With further references Bradley, *International Law* (n 26) 306 fn 62.
287 In this direction as well Bradley, 'U.S. War Powers' (n 278) 760.
288 Cf Curtis A Bradley and Jack L Goldsmith, 'Obama's AUMF legacy' (2016) 110 AJIL 628.

initial adoption.[289] Also, bipartisan attempts to reform the War Powers Resolution and strengthen the role of Congress thus far bore no fruit.[290] In general, in contrast to Germany and South Africa, the trend towards a parliamentarization of foreign affairs is thus considerably weaker in the US.

dd) International law

The growing influence of the legislative branch also became accepted in international law. During the 19th century, when the US was the only country in the Western world asking for legislative approval of treaties, the European monarchies often complained that signed treaties were not ratified.[291] This, however, changed with the growing influence of parliaments.[292] Many international treaties now apply the ratification procedure to give time to parliaments to take the constitutionally necessary steps,[293] and the Vienna Convention on the Law of Treaties accordingly codified this process.[294] As illustrated in Chapter 1, when describing the monarchical grip on foreign affairs in the early 19th century, Blackstone could ask contemptuously: 'who would scruple to enter into any engagements, that must afterwards be revised and ratified by a popular assembly?'.[295] Today it appears clear that such general scruples have been extinguished. However, this should not conceal the fact that legislative involvement may be burdensome[296] and could induce the executive to invent circumvention strategies[297] or

289 Patrick Hulme, 'Repealing the 'Zombie' Iraq AUMF(s): A Clear Win for Constitutional Hygiene but Unlikely to End Forever Wars' Lawfare from 14 July 2021 available at <https://www.lawfareblog.com/repealing-zombie-iraq-aumfs-clear-win-constitutional-hygiene-unlikely-end-forever-wars>.

290 On the status of the National Security Powers Act of 2021 see <https://www.congress.gov/bill/117th-congress/senate-bill/2391> and on the National Security Reforms and Accountability Act see <https://www.congress.gov/bill/117th-congress/house-bill/5410>.

291 Bradley, *International Law* (n 26) 36.

292 Bradley, 'Dynamic Relationship' (n 176) 347.

293 Harrington, 'Scrutiny' (n 191) 125.

294 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 14.

295 William Blackstone, *Commentaries on the Law of England: Book the First* (digitized version, Clarendon Press 1769) 245.

296 Cf Aust, 'Democratic Challenge' (n 130) 374 ff.

297 The invention of 'sole executive agreements' may be the earliest example of such a circumvention, cf already above, Chapter 3, I., 1., a), bb), (2); cf as well Jean

choose more informal international instruments not triggering parliaments' involvement.[298]

c) A (not so) silent profiteer: the judiciary

The stronger involvement of the legislative branch in foreign affairs had serious consequences for the judiciary's role.[299] Naturally, the more the foreign affairs power is split between the branches, the more complex their relationship and the more likely constitutional conflicts are. In such situations, calls for a neutral umpire in the form of courts become louder, and thus, foreign affairs have become increasingly judicialized. These disputes ensue especially in countries with a constitutional court like Germany or South Africa, but the US Supreme Court also cannot avoid being drawn into competence conflicts.

aa) Germany

In Germany, as depicted in Chapter 3,[300] the opposition in parliament triggered the first judgments of the Constitutional Court in foreign affairs. It made use of the newly formulated Article 59 (2) of the Basic Law and claimed that parliamentary approval would have been necessary for treaties like the German-French Trade Agreement or an agreement regulating the joint administration of the Rhine port of Kehl.[301] Although the Constitu-

Galbraith, 'From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law' (2017) 84 The University of Chicago Law Review 1675, 1684 ff.

298 Not naming legislative involvement as a reason for the trend to informality but calling for legislative involvement in informal law-making Joost Pauwelyn, Ramses Wessel and Jan Wouters, 'Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable' in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International law making* (OUP 2012) 500, 502 ff and 513 ff; similar points made in Joost Pauwelyn, Ramses Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25 EJIL 733, 738 ff, 751.

299 Verdier and Versteeg (n 212) 151.

300 Cf above, Chapter 3, I., 1., b), bb), (1).

301 *Judgment from 29 July 1952 (Deutsch-Französisches Wirtschaftsabkommen)* (n 227); *Judgment from 30 June 1953 (Kehler Hafen)* BVerfGE 2, 347 (German Federal Constitutional Court).

tional Court decided in favour of the executive, the provision had the effect of a gate opener, bringing the judiciary into the constitutional debate. Even when parliamentary approval in form of domestic legislation pursuant to Article 59 (2) of the Basic Law has been attained, the opposition in parliament can make use of the abstract judicial review procedure described in Chapter 2[302] to draw the judiciary into the constitutional power struggle. This mechanism was used to bring the first major foreign relations law case concerning the Saarstatut.[303]As we have seen,[304] the court took the chance to decide against non-reviewable areas under the Basic Law. A similar pattern evolved in the area of European law. Many cases concerning European integration were brought in front of the Constitutional Court by the parliamentary opposition, or even individuals, claiming a violation of legislative competences.[305] The Constitutional Court, in turn, strengthened parliament's role and likewise used the opportunity to claim the competence to decide on the barriers to European integration for itself.[306] Parliament and the Constitutional Court in international and European law often mutually reinforced each other's position vis-à-vis the executive.

This also holds for the deployment of the military. The *Out-of-Area* case mentioned above was also brought in front of the court by parliament, claiming a violation of Article 59 (2) of the Basic Law.[307] The Constitutional Court, in turn, developed the parliamentary right to decide on the deployment of troops. Later decisions refined the requirements leading to parliamentary involvement, which revolves around the 'expectation of armed activities'.[308] In contrast to other factual executive assessments, the Constitutional Court awards no area of discretion to the executive concerning this determination and stresses its full review competence.[309] This has often

302 Cf above, Chapter 2, I., 2.
303 *Judgment from 4 May 1955 (Saarstatut)* BVerfGE 4, 157 (German Federal Constitutional Court); cf above, Chapter 3, I., 1., b), bb), (2).
304 Cf above, Chapter 3, I., 1., b), bb), (2).
305 *Judgment from 30 June 2009* (*Lissabon)* (n 233); *Judgment from 28 February 2012 (Neunergremium)* BVerfGE 130, 318 (German Federal Constitutional Court).
306 *Judgment from 30 June 2009* (*Lissabon)* (n 233); see in detail Calliess, *Staatsrecht III* (n 4) 267 ff.
307 *Judgment from 12 July 1994 (Out-of-Area-Einsätze)* (n 241) 336 ff.
308 Summarizing the case law e.g. *Judgment from 23 September 2015 (Pegasus)* BVerfGE 140, 160 (German Federal Constitutional Court) mn 71 ff; cf Aust, 'Art. 87a' (n 243) mn 55 with further references.
309 Cf e.g. *Judgment from 23 September 2015 (Pegasus)* (n 308) mn 89 ff.

been referred to as a parliamentary-friendly interpretation.[310] Needless to say, it is also a judiciary-friendly approach as it reserves a considerable area of competence for the judges and guarantees that the Constitutional Court is kept in the loop.

Finally, the strengthened role of the legislative branch provided an additional reason against the concept non-reviewable areas. The concept of *justizfreie Hoheitsakte* as Germany's version of non-reviewability has been perceived as strongly tied to the 'monarchical principle'.[311] With the more substantial involvement of the legislative branch, the doctrinal bedrock for the concept has eroded.[312] To conclude, in Germany, the sharing of foreign affairs powers between the legislative and executive and the Constitutional Court's role in demarcating the boundaries between the branches led to a strong judicial involvement in foreign affairs.

bb) South Africa

A similar process can be witnessed in South Africa, as illustrated by the two cases mentioned above and discussed in Chapter 3.[313] Similar to cases in Germany, in the ICC withdrawal case *Democratic Alliance v Minister of International Relations*,[314] the largest opposition party in the South African parliament brought the case in front of the court to challenge the executive.[315] It will be remembered that the case concerned the question of whether the executive could unilaterally withdraw from the Rome Statute or if it would require prior legislative approval. The issue hinged on the interpretation of Section 231 (2) of the South African Constitution, which calls for parliamentary approval before entering into international agreements. In line with the traditional position, the government argued that

310 Cf *Judgment from 23 September 2015 (Pegasus)* (n 308) mn 70 'Considering its function and importance, the requirement of a parliamentary decision enshrined in the Constitution'a [sic!] provisions on armed forces must be interpreted in favour of Parliament' [official English translation]; cf Aust, 'Art. 87a' (n 243) mn 54.

311 Franz-Christoph Zeitler, 'Judicial Review und Judicial Restraint gegenüber der auswärtigen Gewalt' (1976) 25 JöR 621, 634.

312 Ibid.

313 Cf above, Chapter 3, I., 1., c), bb).

314 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 252).

315 On the trend of including the legislative branch in treaty making Verdier and Versteeg (n 212) 148.

international relations are the primary domain of the executive and that Section 231 (2) and parliament's role should thus be interpreted narrowly.[316] However, the court decided differently and held that if parliament's approval is needed to enter into a binding commitment, it is also needed to cease the binding effect.[317] As extensively analysed in Chapter 3,[318] the court declined to acknowledge unreviewable areas in interpreting Section 231 of the South African Constitution and confirmed its readiness to procedurally and substantively review the withdrawal decision. It held that even though the withdrawal was an executive act in foreign affairs, 'it still remained an exercise in public power, which must comply with the principle of legality and is subject to constitutional control'.[319] Thus, like the German Constitutional Court, the South African courts are ready to engage in power struggles between the other two branches and get involved in foreign affairs cases.

This equally applies to the *Earthlife*[320] case mentioned above and analysed in Chapter 3.[321] Although it was brought by a non-governmental organization, using the generous South African standing rules examined in Chapter 2,[322] the core question was one of constitutional competences. The executive had entered into agreements with the USA, South Korea, and Russia concerning the construction of nuclear power plants.[323] The first two agreements were of a 'technical nature,' but they were challenged as they had only been tabled in parliament up to two decades after they were entered into and thus arguably not within a 'reasonable time' as called for by Section 231 (3) of the constitution.[324] The agreement with Russia was challenged as its content would render it a 'proper' treaty in want of parliamentary approval, according to Section 231 (2) of the constitution.[325] The executive claimed that determining the nature of the agreement would

316 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 252) 227 f.
317 Ibid 229 ff; on the ICC withdrawal case and the 'actus contrarius' idea cf Lange, 'Art. 59' (n 228) 442.
318 Cf above, Chapter 3, II., 1., a).
319 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 252) 229 f.
320 *Earthlife Africa v Minister of Energy* (n 254).
321 Cf above, Chapter 3, I., 1., c), bb) and Chapter 3, II., 1.
322 Cf above, Chapter 2., I., 3.
323 *Earthlife Africa v Minister of Energy* (n 254) 232.
324 Ibid 233.
325 Ibid.

be a non-justiciable political question.[326] Under former South African constitutional frameworks, the courts may have followed this line of argument. However, the court distinguished older case law[327] and stated that 'should an international agreement be tabled incorrectly under Section 231 (3) rather than Section 231 (2) of the Constitution the review of any such decision can be seen as upholding rather than undermining the separation of powers'.[328] It thus decided that the Russian agreement warrants parliamentary approval, and the decision merely to table it was unconstitutional.[329] Regarding the US and South Korea agreement, it decided that the time lapsed was not 'reasonable' in the sense of Section 231 (3) of the constitution, and the decision to table them with such considerable delay was also unconstitutional.[330] Again the judiciary affirmed its willingness to police the boundaries between the executive and legislative branches and, at the same time, strengthened its own role in foreign affairs.

Other cases of this sort will most likely lead to similar results. As alluded to, the defence provisions bear ample room for discussion. The current South African President Ramaphosa, in his 2002 textbook on constitutional law, stated 'that the President's use of defence powers would be largely or entirely non-justiciable'.[331] In the wake of cases like *DA v Minister of International Relations* and *Earthlife,* he will probably be proven wrong. The judiciary in South Africa, just as the German Constitutional Court, clearly sees it as its responsibility to act as a watchdog over the assignment of constitutional competences, explicitly including the area of foreign affairs, and hence itself has gained considerable competence in the field.

cc) United States

The United States provides a different picture. Due to the lack of 'congressional standing,' examined in Chapter 2,[332] it is considerably more

326 Ibid.
327 Ibid 260 especially *Swissborough*.
328 Ibid 261.
329 Ibid 268 ff.
330 Ibid 269 ff.
331 Ziyad Motala and Cyril Ramaphosa, *Constitutional Law, Analysis and Cases* (OUP 2002) 218 ff; cf Ellmann, 'War Powers in NY Law School Research Paper' (n 263) fn 38.
332 Cf above, Chapter 2., I., 1.

complicated for inter-branch disputes to reach the courts.[333] For this reason, several attempts of members of Congress to enforce the War Powers Resolution have failed.[334] In other cases, courts have refused to interfere by applying the political question doctrine.[335] Although the claims have thus far not been successful, they have forced courts to engage in these disputes concerning foreign affairs and justify their application of deference doctrines.

In cases brought by individual plaintiffs, the Supreme Court at least appears to be more willing to demarcate the boundaries between the branches. Most famous in this regard is the decision in *Youngstown*[336] rendered in 1952, which was mentioned in Chapter 1.[337] It is often contrasted with the extremely executive-friendly decision in *Curtiss-Wright*,[338] which marked the height of the Sutherland Revolution analysed as well in Chapter 1.[339] In *Youngstown*, amid the Korean War, the president, per executive order, tried to nationalize the US steel industry, primarily to stop its workers from striking. He stressed the industry's relevance for national defence and relied on a broad interpretation of his powers as 'Commander in Chief' under Article 2 of the US Constitution.[340] In defiance of *Curtiss-Wright*'s ideas of extra-constitutional powers, the Supreme Court held that the power of the President to seize the steel mills must either stem from statute or from the Constitution itself.[341] Since no legislation granted such powers, only Article 2 of the US Constitution could support the executive action. However, the court saw law-making as an exclusive competence of Congress and denied a broader reading of executive powers.[342]

333 Bradley, 'U.S. War Powers' (n 278) 760.
334 *Campbell v Clinton* [2000] 203 F3d 19 (United States Court of Appeals for the District of Columbia Circuit); *Kucinich v Obama* (n 285); Bradley, 'U.S. War Powers' (n 278) 760.
335 *Crockett v Reagan* [1983] 720 F2d 1355 (United States Court of Appeals for the District of Columbia Circuit); *Lowry v Reagan* [1987] 676 F Supp 333 (United States District Court for the District of Columbia); Bradley, *International Law* (n 26) 306 f.
336 *Youngstown Sheet & Tube Co v Sawyer* 343 US 579 (1952) (US Supreme Court).
337 Cf above, Chapter 1, II., 2., d).
338 *United States v Curtiss-Wright Export Corp* 299 US 304 (1936) (US Supreme Court).
339 Youngstown is not free of a certain 'exceptionalist' mindset cf Ganesh Sitaraman and Ingrid Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 Harvard Law Review 1897, 1951.
340 *Youngstown Sheet & Tube* (n 336) 583, 587.
341 Ibid 585.
342 Ibid 589.

Recently, the court appears to have revived its more engaging role in policing the border between the executive and legislative branches. In the recognition case *Zivotofsky v Clinton*,[343] analysed in Chapter 3,[344] the question arose as to whether Congress, by statute, could order the executive to indicate 'Israel' as the place of birth in passports when a child was born in Jerusalem. This position was contrary to the Obama administration's decision not to recognize Jerusalem as Israel's official capital. The Supreme Court vacated the judgments of lower courts that had applied the political question doctrine and held the case to be justiciable as a 'familiar judicial exercise'.[345] The decision to interfere has been seen by many as a watershed.[346] Indeed, it seems probable that the court explicitly wanted to comment on the use of the political question doctrine by lower courts, as it granted certiorari in the absence of a circuit split and without the likely prospect of a different outcome for the claimant.[347] Even if the case were considered justiciable, it was very likely that Zivotofsky would lose.[348] This was the exact outcome of the follow-up decision *Zivotofsky v Kerry,*[349] where the court struck down the congressional statute as an infringement of the president's recognition power. It now appears more likely that in similar cases,[350] the court would also step in to safeguard legislative powers in foreign affairs, as alluded to by the court:

> *In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it*

343 *Zivotofsky v Clinton* 566 US 189 (2012) (US Supreme Court).

344 Cf above, Chapter 3, I., 2., a).

345 Ibid 196.

346 Chris Michel, 'There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of Zivotofsky v. Clinton' (2013) 123 Yale Law Journal 253; Jared P Cole, 'The Political Question Doctrine: Justiciability and the Separation of Powers' (2014) Congressional Research Service 22 ff; Harlan G Cohen, 'Formalism and Distrust: Foreign Affairs Law in the Roberts Court' (2015) 83 George Washington Law Review 380, 432; Sitaraman and Wuerth (n 339) 1925; Michael D Ramsey, 'The Vesting Clauses and Foreign Affairs' (2023) 91 George Washington Law Review 1513, 1553; Riaan Eksteen, 'The Role of the Judiciary in Foreign Affairs to Be Duly Recognised, with Special Reference to the Supreme Court of the USA' (2021) 32 Stellenbosch Law Review 330.

347 Cohen (n 346) 432 f.

348 Ibid 432 f.

349 *Zivotofsky v Kerry* 576 US 1 (2015) (US Supreme Court).

350 On the Robert Court's readiness to engage in separation of powers cases Elizabeth Earle Beske, 'Litigating the Separation of Powers' (2022) 73 Alabama Law Review 823.

> *is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. […] It is not for the President alone to determine the whole content of the Nation's foreign policy.*[351]

To conclude, in contrast to Germany and South Africa, the judiciary in the United States is less strongly involved in demarcating the boundaries between the executive and legislative branches. Attempts to draw the courts into power struggles between parliament and the executive have often failed, and the latter thus also developed a weaker role in foreign affairs cases. However, cases like *Zivotofsky* show that US courts also do not always remain on the sidelines. It remains to be seen whether, in the wake of *Zivotofsky,* the US Supreme Court, like the German and South African courts, will intervene more often in inter-branch foreign affairs disputes.

4. Changed relationship between the state and the individual

The last major trend putting pressure on the traditional position is the changed relationship between the state and the individual. Although the idea of individual rights existed previously, e.g., in the philosophy of John Locke,[352] they were not recognized as posing a particular challenge to the executive's prerogative in foreign affairs. Because the internal and external spheres were perceived as strictly separated[353] and individual rights only applied within the former realm, they could not conflict with external executive actions.[354] As we have seen concerning the legislative branch,[355] the separation of powers limiting the executive's influence in favour of parliamentary and judicial oversight only developed within the state.[356] The absolute powers of the executive in foreign affairs remained largely

351 *Zivotofsky v Kerry* (n 349) 21 [my omission].
352 Alex Tuckness, 'Locke's Political Philosophy' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2018 edn, Stanford University 2018) 4.4.
353 Referring to Locke McLachlan, *Foreign Relations Law* (n 2) 38.
354 Ibid 42 referring to Locke.
355 This Chapter, 3., a).
356 This view is shared e.g. by Ernst Wolgast, 'Die auswärtige Gewalt des Deutschen Reiches unter besonderer Berücksichtigung des Auswärtigen Amtes. Ein Ueberblick' (1923) 44 AöR 1, 88.

untouched.[357] The gradual evolution of constitutional rights[358] and their transmission to the international sphere as international human rights,[359] especially after the Second World War, clearly challenged that view.[360] In the following, we will first examine how human rights have contributed to the other convergence trends addressed above before analysing how human and constitutional rights influenced judicial review in foreign affairs in our three reference jurisdictions.

a) General acceleration of convergence trends

One impact of the growing scope of international human rights is an acceleration of the other trends undermining the traditional position outlined above. Several of these trends commenced in the area of international human rights and are inconceivable without them.

International human rights have greatly contributed to the *changing structure of international law*. Treaties like the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples Rights, and the European Convention on Human Rights (ECHR) shifted international law's focus from the states to the individual.[361] To enforce them, the states parties created (to varying degrees influential) international bodies like the UN Human Rights Committee, the African Court of Human and Peoples Rights, and the European Court of Human Rights.[362] Human rights treaties like the ECHR and ICCPR have been found to apply to extraterritorial state actions.[363] Thereby the concept of jurisdiction has been interpreted as not (necessarily) fixed to a territory but to the level of control of a state,[364] and thus, the inside-outside dichotomy

357 Menzel (n 218) 185 f.
358 Kent (n 2) 1065; Auby (n 4) 56.
359 Foundational Louis Henkin, *The Age of Rights* (Columbia University Press 1990) 13 ff; Peters, 'Globalization' (n 5) 296; Kent (n 2) 1074.
360 Ackowledging this Sitaraman and Wuerth (n 339) 1943.
361 Peters, 'Humanity' (n 143); Auby (n 4) 58 f; Calliess, *Staatsrecht III* (n 4) 29 ff.
362 Auby (n 4) 57.
363 Feihle (n 11) mn 34.
364 Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 39 ff, 118 on the different 'models' of extraterritorial application, especially the 'personal model' is at odds with a territorial understanding of jurisdiction.

has been further undermined.[365] In the same vein, the *global legal dialogue* was, and still is, to a large extent, centred around human rights as the central reference point.[366] The international human rights discourse creates strong convergence forces between international and national protection standards and different national understandings of human rights.[367] In particular, new constitutions in countries without a strong human rights tradition often refer to international human rights and foreign constitutional rights.[368] South Africa proves that point with its Bill of Rights being 'to a large extent, an encyclopaedia of international human rights law gleaned from multifarious international declarations, covenants, and conventions'.[369] Moreover, the *entanglement of domestic and international law* is also strengthened by international human rights. Treaties in this area[370] are often directly applicable (or 'self-executing').[371] Thus, they become part of the domestic legal order and may be relied upon by individuals without additional[372] legislative or administrative acts.[373] US,[374] Germany,[375] and South African law[376] all apply the concept, although, as we will analyse below, it is much more contested in the US.[377] The growing international

365 Nicola Wenzel, 'Human Rights, Treaties, Extraterritorial Application and Effects' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 3 ff.

366 Peters, 'Globalization' (n 5) 297; Wen-Chen and Jiunn-Rong (n 1) 1169; Auby (n 4) 57; Fredman (n 99) 3 ff.

367 Peters, 'Globalization' (n 5) 297.

368 Ibid 272; Du Plessis (n 125); L'Heureux-Dubé (n 10) 24; Tom Ginsburg, 'Constitutions and Foreign Relations Law: The Dynamics of Substitutes and Complements' (2017) 111 AJIL Unbound 326, 327.

369 Du Plessis (n 125) 312.

370 Auby (n 4) 57; Karen Kaiser, 'Treaties, Direct Applicability' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 18.

371 Both terms are used synonymously Kaiser (n 370) mn 1.

372 Of course, in dualist states, such as Germany, the US and South Africa, the treaty has to reach the domestic sphere first. The legal techniques to achieve domestic validity vary between dualistic countries (e.g. mere parliamentary approval or implementation legislation) cf Kaiser (n 370) mn 2, 6 ff.

373 Ibid.

374 Bradley, *International Law* (n 26) 43 ff.

375 Sauer (n 231) 100 ff.

376 In South Africa the concept of self-execution is even enshrined in the text of the constitution in Section 231 (4); Dugard and others (n 247) 81 ff.

377 Martin Flaherty, 'Global Power in an Age of Rights: Historical Commentary, 1946–2000' in David Sloss, Michael D Ramsey and William S Dodge (eds), *International law in the U.S. Supreme Court: Continuity and Change* (CUP 2011) 416, 421; the

legal entitlements for individuals also create more and more suits invoking international norms in domestic legal systems and thus force the courts to deal with international matters.[378] The idea of direct applicability, together with the proliferation of individual rights in international treaties, thus contributes significantly to the interpenetration of the domestic and the international sphere.

b) Strengthening judicial review in foreign affairs

Individual rights, in many cases, were the core argument against applying deference doctrines.[379] By accepting domestic and international human rights standards, states necessarily accept a degree of judicial independence.[380] Their application to foreign affairs situations thus has significantly strengthened judicial oversight.

As alluded to above,[381] in *Marbury v Madison,* Chief Justice Marshall mentioned the importance of the right of individuals for the scope of the judicial review.[382] The substantive coverage of constitutional rights in the United States has increased exponentially since the end of the Second World War.[383] However, as will be analysed in more detail below,[384] the United States, in contrast to South Africa and Germany, during the Cold

US are much more conservative in allowing a direct effect, cf already above, this Chapter, I., 2., b) for the Avena and Medellin cases and Bradley, *International Law* (n 26) 43 ff.

378 Amoroso, 'Fresh Look' (n 2) 937; cf the VCCR litigation in the US above, this Chapter, I., 2., b); Nicole Fritz, 'The Courts: Lights That Guide our Foreign Affairs?' (2014) Governance and APRM Programme – Occasional Paper 203, 5; Amoroso, 'Judicial Abdication' (n 21) 101.

379 It may even lead to the change of the doctrine of absolute deference to the executive in treaty interpretation in France in the wake of ECHR litigation Emmanuel Decaux, 'France' in Dinah Shelton (ed), *International law and domestic legal systems: Incorporation, transformation, and persuasion* (OUP 2011) 207, 228; 'the legal and ethical muscle of human rights' quoting Laws J, Dominic McGoldrick, 'The Boundaries of Justiciability' (2010) 59 ICLQ 981, 1019.

380 For international human rights André Nollkaemper, *National courts and the international rule of law* (OUP 2011) 59 ff.

381 Cf above, Chapter 1, II., 2., c) and Chapter 2, II., 1.

382 *Marbury v Madison* 5 US 137 (1803) (US Supreme Court) 170; the doctrine only later shifted as to also bar cases in which individual rights were affected Cole (n 346) 4.

383 Henkin (n 359) 118 ff; Kent (n 2) 1066.

384 Cf below, this Chapter, II., 3., c).

War and even after the fall of the Berlin Wall, was much more hesitant to join international human rights treaties. The application of domestic constitutional rights in the United States is thus less connected to the development of international human rights than in Germany and South Africa.[385] Nevertheless, the changed relationship between the state and the individual found expression in the growing ambit of domestic constitutional rights guarantees, and their application to foreign affairs cases greatly contributed to the closing of 'legal black holes'.[386]

In the US, traits of the influence of constitutional rights can be found in the *Youngstown*[387] case mentioned above, which concerned the seizure of steel mills during the Korean War in 1952.[388] This trend greatly strengthened by the end of the Cold War.[389] The circuit split which developed concerning the law of foreign official immunity, depicted in Chapter 3,[390] was not only sparked by different levels of deference but also by different opinions on whether to recognize an exemption to conduct-based immunity in cases of grave human rights violations.[391] The development of international law, putting more emphasis on the individual, thus contributed to undermining the settled law of granting strong influence to the executive.[392] Further case law illustrates the influence of individual rights. In *Bond I*,[393] examined in Chapter 2,[394] the Supreme Court found that an individual convicted under the domestic implementation statute of the Chemical Weapons Convention could challenge that statute based on the Tenth

385 Flaherty (n 377) 417; in detail below, this Chapter, II., 3., c).

386 The term was coined by Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 ICLQ 1; on the trend of closing 'black holes' see Kent (n 2) 1065 ff; cf as well e.g. case law cited in *Flynn v Schultz* 748 F2d 1186, cert denied, 474 US 830 (United States Court of Appeals for the 7th Circuit) 1191.

387 *Youngstown Sheet & Tube Co v Sawyer* (n 336).

388 Ibid 631, especially the opinion of Justice Frankfurter relying on the fifth amendment.

389 Sitaraman and Wuerth (n 339) 1919.

390 Cf above, Chapter 3, I., 4., a), cc).

391 Christopher Totten, 'The Adjudication of Foreign Official Immunity Determinations in the United States Post-Samantar: A Circuit Split and Its Implications' (2016) 26 Duke Journal of Comparative & International Law 517, 543; William S Dodge and Chimene I Keitner, 'A Roadmap for Foreign Official Immunity Cases in US Courts' (2021) 90 Fordham L Rev 677, 701.

392 For the development of immunity exceptions cf Krieger, 'Evolution and Stagnation' (n 39) 181.

393 *Bond v United States (Bond I)* 564 US 211 (2011) (US Supreme Court).

394 Cf above, Chapter 2, I., 1.

Amendment.[395] Although designed to protect states' competences, not the rights of natural persons, this amendment was given an individualized reading to protect the plaintiff.[396] The court did not even mention that the statute was implementing an international treaty and thus may be entitled to special treatment. In the follow-up case, *Bond II*,[397] as mentioned in Chapter 3,[398] the courts declined to defer to the executive's interpretation of the Chemical Weapons Convention implementation statute, which would have allowed for the claimant's conviction.[399]

The rigorous defence of habeas corpus review by the Supreme Court in cases relating to the War on Terror and Guantanamo Bay,[400] analysed in Chapter 3,[401] also sheds light on the role of constitutional rights in foreign affairs. In *Hamdi,*[402] the court established that American citizens are entitled to full substantial review if they qualify as 'enemy combatants,' even in the light of outspoken executive opposition.[403] The court rebutted demands to apply 'a very deferential "some evidence" standard'[404] stating 'We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the Nation's citizens [citing *Youngstown*]'.[405] Likewise, in *Rasul v Bush,*[406] the court extended habeas corpus review to foreign citizens held captive in Guantanamo and thereby overruled older precedent,[407] which, in line with the traditional position, denied the application of habeas corpus review to foreign citizens on foreign soil.[408] As examined in detail in Chapter 3, the Supreme Court in

395 Cf as well Sitaraman and Wuerth (n 339) 1926 f; Aust, 'Democratic Challenge' (n 130) 359.
396 Cf *Bond v United States (Bond I)* (n 393) 221.
397 *Bond v United States (Bond II)* 572 US 844 (2014) (US Supreme Court).
398 Cf above, Chapter 3, I., 1., a), bb), (3), (d).
399 For the analysis of deference in the case cf Harlan G Cohen, 'The Death of Deference and the domestication of treaty law' (2015) BYU Law Review 1576 f.
400 Knowles (n 51) 106 ff; claiming the strong international pressure on the courts Amoroso, 'Fresh Look' (n 2) 940; for these cases cf as well Sitaraman and Wuerth (n 339) 1922.
401 Cf above, Chapter 3, I., 1., a), bb), (3), (c).
402 *Hamdi v Rumsfeld* 542 US 507 (2004) (US Supreme Court).
403 Ibid 525.
404 Ibid 527.
405 Ibid 536 [my insertion].
406 *Rasul v Bush* 542 US 466 (2004) (US Supreme Court).
407 Especially *Johnson v Eisentrager* 339 US 763 (1950) (US Supreme Court).
408 Cf the dissent *Rasul v Bush* (n 406) 488 ff; for the trend of constitutional protection of foreigners abroad see as well Benvenisti and Versteeg (n 117) 11 ff.

Hamdan[409] neglected an executive interpretation denying the protection of the Common Article 3 of the Geneva Conventions to detainees captured during the War on Terror. It thus ended a trend towards more executive influence in treaty interpretation. Legislative attempts to prevent judicial review were fended off by the Supreme Court; in *Hamdan,*[410] it found the law inapplicable[411] and in *Boumediene*[412] entirely unconstitutional:

> *In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism,* ***proper deference must be accorded to the political branches*** *[citing United States v Curtiss-Wright Export Corp]. […] There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these* ***are freedom from arbitrary and unlawful restraint and the personal liberty*** *that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.*[413]

In Germany, due to the constitutional change after the Second World War, the influence of strengthened individual rights is even more apparent. As examined in Chapter 2,[414] the main argument against non-reviewability is Article 19 (4) of the Basic Law granting a right of recourse to the courts for every violation of a person's rights by public authority. As we have seen,[415] attempts to interpret this provision in line with the traditional judicial exclusion of foreign affairs failed. With the broad application of fundamental rights in Germany, which protect virtually all human behaviour,[416] some form of judicial review is available in most cases. As described in Chapter 3, in the *Washingtoner Abkommen* case,[417] which was decided in 1957, the Constitutional Court granted individuals the right to challenge the implementation statutes of international treaties, even in the face of executive

409 *Hamdan v Rumsfeld* 548 US 557 (2006) (US Supreme Court).
410 Ibid.
411 Ibid 572 ff.
412 *Boumediene v Bush* 553 US 723 (2008) (US Supreme Court).
413 Ibid 796 ff [my emphasis and insertions].
414 Cf above, Chapter 2, II., 2.
415 Cf above, Chapter 2, II., 2.
416 Cf already above, Chapter 2, I., 2., (n 57).
417 *Decision from 21 March 1957 (Washingtoner Abkommen)* BVerfGE 6, 290 (German Federal Constitutional Court).

calls for non-reviewability.[418] The liberal stance concerning standing in fundamental rights cases has also been illustrated by more recent decisions like the Ramstein litigation, assessed in Chapter 3. The Federal Administrative Court found the Yemini applicants had standing to challenge the executive's passive role concerning drone strikes allegedly coordinated by using a US airbase on German territory.[419] On the merits, it confirmed the applicability of German fundamental rights to foreign citizens on foreign soil and thereby followed a recent decision of the German Constitutional Court.[420] In this decision concerning telecommunications surveillance by the German Federal Intelligence Service conducted against foreign citizens on foreign territory, the Constitutional Court explicitly rejected academic literature excluding the extraterritorial application of fundamental rights and expressly relied on the ECHR.[421]

The strong position of the citizen even led to the individualization of diplomatic protection.[422] As described in Chapter 3,[423] historically and (still) under international law,[424] the right to protect its citizens belonged to the state. However, the human rights focus is now encouraging states to grant a domestic right to diplomatic protection, as exemplified by the mentioned Article 19 of the ILC Draft Articles on Diplomatic Protection.[425] Moreover, there appears to be a tendency to weaken the nationality requirement and

418 *Decision from 21 March 1957* (n 417) 295; cf as well *Decision from 7 July 1975 (Eastern Treaties Case (Ostverträge))* BVerfGE 40, 141 (German Federal Constitutional Court) 156; *Judgment from 23 April 1991* (*Bodenreform I)* BVerfGE 84, 90 (German Federal Constitutional Court) 113.

419 *Judgment from 19 March 2019 (Ramstein Drone Case)* (Higher Administrative Court Münster) (n 112) mn 107 f.

420 *Judgment from 19 March 2019 (Ramstein Drone Case)* (Higher Administrative Court Münster) (n 112) mn 43 ff.

421 *Judgment from 19 May 2020 (BND Telecommunications Surveillance)* BVerfGE 154, 152 (German Federal Constitutional Court) mn 97 ff.

422 On the impact of Human Rights for the treatment of aliens cf already Richard Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia 1983) 26 ff.

423 Cf above, Chapter 3, I., 5.

424 John Dugard, 'Diplomatic Protection' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 13.

425 Cf above, this Chapter, I., 2., b); see especially Commentary (3) on Article 19 'Draft Articles on Diplomatic Protection with Commentaries' (2006); cf as well Annemarieke Vermeer-Künzli, 'Restricting Discretion: Judicial Review of Diplomatic Protection' (2006) 75 Nordic Journal of International Law 279; Vasileios Pergantis, 'Towards a "Humanization" of Diplomatic Protection?' (2006) 66 ZaöRV 351; Annemarieke Vermeer-Künzli, 'Diplomatic Protection as a Source of Human Rights Law'

thus individualize the concept even more.[426] Anticipating and fostering this trend in Germany, the *Hess* decision created a de facto constitutional right of diplomatic protection in current German law.[427] Although judicial review in these cases, as we have seen, is relatively weak, it nonetheless bears witness to the fact that formerly unreviewable areas shrink due to individual rights guarantees.

A similar influence of individual rights is apparent in South Africa. As mentioned above, protecting human rights was at the heart of the constitutionalization process of post-apartheid South Africa.[428] The second constitutional principle, which, together with 19 others, served as a guideline for drafting the new constitution, explicitly demanded: 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution'. The Bill of Rights fulfilled this demand, and justiciability is safeguarded by sections 34 (right to access to courts) and 38 (broad standing rules). As shown in Chapter 2,[429] this, like in Germany, led to a situation where an individual may challenge almost every executive act.

NGOs like the South African Litigation Centre[430] have made ample use of the relaxed standing rules and brought many cases like that on alleged

in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 250; McLachlan, *Foreign Relations Law* (n 2) 347 ff.

426 De lege lata cf already 'Draft Articles on Diplomatic Protection with Commentaries' (2006) Article 8; Thomas Kleinlein and David Rabenschlag, 'Auslandsschutz und Staatsangehörigkeit' (2007) 67 ZaöRV 1277; Annemarieke Vermeer-Künzli, 'Nationality and diplomatic protection – A reappraisal' in Serena Forlati and Alessandra Annoni (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 76.

427 Also, the court remained vague concerning the constitutional root of such a right. The Constitutional Court formulated broadly 'von Verfassungs wegen' ('due to constitutional demands') *Decision from 16 December 1980 (Hess Case)* BVerfGE 55, 349 (German Federal Constitutional Court) 364.

428 Riaan Eksteen, *The Role of the highest courts of the United States of America and South Africa and the European Court of Justice in Foreign Affairs* (Springer 2019) 286.

429 Cf above, Chapter 2, I., 3.

430 Fritz (n 378).

torture in Zimbabwe[431] and the *Al-Bashir* case,[432] both analysed with regards to foreign official immunity,[433] before courts. In the case concerning alleged torture in Zimbabwe, the Constitutional Court explicitly referred to the impact of human rights. It held that 'South African investigating institutions may investigate alleged crimes against humanity committed in another country by and against foreign nationals [...] if that country is unwilling or unable to do so itself'.[434] Likewise, in the *Al-Bashir* case, the Supreme Court of Appeal referred to the domestic Bill of Rights to state that, despite Al-Bashir's immunity under general international law, South African domestic law implementing the Rome Statute goes further and does not allow immunity even for sitting heads of state.[435] The South African Bill of Rights, especially Section 34, which grants access to courts, also played an essential role in the case relating to the SADC tribunal, also analysed in Chapter 3.[436] In declaring the South African participation in abolishing the tribunal unconstitutional, the Constitutional Court stressed the value of the provision and held that the president 'lacked the authority to sign any international agreement that seeks to frustrate the pre-existing right of South Africans to access justice'.[437] Finally, in South Africa, like in Germany, the changed relationship of state and citizen led to the individualization of diplomatic protection.[438] The South African Constitutional Court explicitly determined that the foundation of the right to diplomatic protection lies in

431 *Southern Africa Litigation Centre v National Director of Public Prosecutions (Zimbabwe Torture Case)* 2012 (10) BCLR 1089 (GNP) (North Gauteng High Court); *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre* (n 118).

432 *Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others (Bashir Case)* 2016 (3) SA 317 (SCA) (Supreme Court of Appeal).

433 Cf above, Chapter 3, I., 4., c), bb).

434 *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre* (n 118) mn 62 [my omission].

435 *Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others (Bashir Case)* 2016 (3) SA 317 (SCA) (Supreme Court of Appeal) 355 ff.

436 Cf above, Chapter 3, I., 1., c), bb) and II., 1., b).

437 *Law Society of South Africa and others v President of the Republic of South Africa and others (Southern Africa Litigation Centre and another as amici curiae) (SADC Case)* 2019 (3) BCLR 329 (CC) (Constitutional Court) 351.

438 Cf above, Chapter 3, I., 5., b) and c).

South African citizenship[439] and thus followed the German court in closing formerly unreviewable areas in the face of (domestic) human rights.

Thus, the changed relationship between the state and the individual undermines the traditional position's assumptions, which limited the effect of individual entitlements to the domestic sphere. Growing international human rights contributed to many of the abovementioned convergence trends. The expanding ambit of constitutional rights, especially in Germany and South Africa, also fostered by international human rights,[440] puts pressure on formerly unreviewable areas.

II. Divergence Forces – different receptiveness toward the general trend

The factors described above have created a strong convergence force towards more judicial review in foreign affairs. As mentioned, this did not and will not result in a uniform approach. The reasons for this are manifold, and it would be nearly impossible to elaborate on every peculiarity of the three jurisdictions which either weakens or strengthens the impact of the general trend described above. Nevertheless, this subchapter aims to sketch some of the main reasons leading to different developments within the three jurisdictions. Some of these factors, like the weaker involvement of the legislative branch in foreign affairs in the US, have incidentally been addressed above and will not be reiterated here. Instead, we will concentrate on points that were not yet mentioned in detail. It goes without saying that this subchapter cannot provide a closed list of such factors but only tries to describe major points.

1. Position within the international system

A striking difference likely contributing to different levels of deference between the three countries is their position within the international system.[441] During the Cold War, the US was one of the two centres of the

439 *Kaunda and Others v President of the RSA and Others* (n 107) 259.

440 Cf below, this Chapter, II., 3., c)

441 Statistics Concerning Global Power Rank the US on 1, Germany on 4 and South Africa on 31 'World Population Review' available at <https://worldpopulationreview.com/country-rankings/most-powerful-countries>, cf Lange, *Treaties in Parliaments and Courts* (n 217) 3, fn 61; naming the geopolitical status as a possible reason for

global order and, since its end, could claim the title of the 'last superpower'. The rise of China,[442] the recent Russian War in Ukraine,[443] and the general trend toward a multipolar world order now challenge this position. Since the end of the Second World War, Germany sees itself as a middle power[444] with a generally pacifist stance, a position which may also be changing.[445] In the aftermath of the democratic change, South Africa became a member of the BRIC[446] group of newly industrialized countries in 2010 and is a regional power in southern Africa.[447]

Although courts in democratic states governed by the rule of law, at least in theory, should be focused on the law and not on their state's position within the international community, it appears likely that such external factors will influence their decision.[448] As described in Chapter 1,[449] the birth of deference in English law at the beginning of the 19th century was strongly connected to the first colonies breaking away from the British Empire.[450] Whether colonies were recognized as independent states thus gained great importance for British foreign policy and even threatened the very existence of the Empire. This was one of the main

divergence in foreign relations law Curtis A Bradley, 'What is foreign relations law?' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 8.

442 Congyan Cai, *The Rise of China and International Law* (OUP 2019).

443 Cf below Chapter 5, II.

444 Arnulf Baring, 'Einsame Mittelmacht' (2003) Internationale Politik 51, albeit this classification is debated due to Germany's economic power and influence in Europe; speaking of a 'globally connected middle power' Laura Philipps and Daniela Braun, 'The Future of Multilateralism' (2020) available at <https://www.kas.de/de/web/auslandsinformationen/artikel/detail/-/content/die-zukunft-des-multilateralismus>.

445 On the war in Ukraine cf below Chapter 5, II.

446 The BRIC group comprised Brazil, Russia, India and China, and was renamed BRICS after South Africa became a member in 2010. In the wake of the 15th BRICS summit in 2023 the group invited the Argentine Republic, the Arab Republic of Egypt, the Federal Democratic Republic of Ethiopia, the Islamic Republic of Iran, the Kingdom of Saudi Arabia and the United Arab Emirates to join. Following the invitation Egypt, Ethiopia, Iran and the United Arab Emirate joined the group which is now referred to as BRICS plus.

447 Franziska Boehme, '"We Chose Africa": South Africa and the Regional Politics of Cooperation with the International Criminal Court' (2017) 11 International Journal of Transitional Justice 50, 58.

448 Daniel Abebe, 'Great Power Politics and the Structure of Foreign Relations Law' (2009) 10 Chicago Journal of International Law 125, 125.

449 Cf above, Chapter 1, II., 1., b).

450 Jaffe (n 80) 124, 139.

factors which induced Lord Eldon always to follow the executive position in these cases.[451] Likewise, for the United States, which extended its influence on the American continent westwards and to the south, the question of recognition became one of highest importance (e.g., concerning the status of Texas). This was probably one of the reasons why US law in the area of recognition (in contrast to other fields), as seen in Chapter 3,[452] followed the British approach in the early 19th century.[453] At this time, the various German states were still forming a nation-state, and their focus thus much more on 'internal,' that is, 'German' rather than 'foreign' affairs. The engagement of the German states in colonial enterprises before the formation of the Reich was marginal, and questions of recognition were thus not a premiere focus. A further example of world politics influencing judicial review is the Sutherland Revolution analysed in Chapter 1, which led to a very deferential approach in the United States in the 1930s and '40s. The influence of the impending war is apparent, and indeed, contemporaries of Sutherland saw the clear strengthening of the executive position as a necessary reaction in the face of an anticipated war and the deteriorating international situation.[454] The turn also appears connected to the end of American isolationism and its rise to global power.[455]

Hence, it is not far-fetched that a country's international position will influence its foreign relations law. At the very least, courts will consider external factors when vital state interests or even the state's existence as such is called into question.[456] After all, courts are a creation of their domestic legal system and cannot be ignorant of their foundation. This dependence may explain deferential approaches during major wars, occupations or events like the German reunification. The development of the peculiar *Annäherungstheorie*[457] or the deferential decisions concerning the

451 Ibid 139.
452 Cf above, Chapter 3, I., 2., a).
453 Jaffe (n 80) 139; during the founding era recognition only played a minor role cf Robert Reinstein, 'Is the President's Recognition Power Exclusive?' (2013) 86 Temple Law Review 1, 7.
454 White (n 30) 148.
455 Knowles (n 51) 119 f.
456 See Eric A Posner and Adrian Vermeule, *Terror in the balance: Security, liberty, and the courts* (OUP 2010), I however do not share their broader normative claim that courts and the legislative branch should necessarily defer to the executive in times of crisis; mentioning the resistance of large trading nations concerning the restrictive immunity doctrine Krieger, 'Evolution and Stagnation' (n 39) 193.
457 Cf above, Chapter 3, I., 1., b), bb), (2).

German reunification process may prove that point.[458] Moreover, the general role within the international order will have a certain influence,[459] as it determines the general political climate in which the courts operate. For the US, Abebe claimed that during times of bipolar or multipolar world order, deference increases as courts take into account that the state has to struggle over influence with international adversaries.[460] On the other hand, in times of hegemony, deference decreases as the courts will have to step in to set limits on executive actions.[461] If this theory holds up will be tested in the coming decade. With China's growing importance, we should have already seen a more deferential approach in the US, which (at least until now)[462] does not appear to be the case. Nonetheless, the position within the international system will most likely influence a state's foreign relations law. The US has long been the most influential power on the international plane. It has been engaged in shaping the international order, including the use of force, to maintain that position.[463] Politicians and scholars have even voiced the idea of 'US exceptionalism,'[464] entailing the idea that the US is exempt from abiding by international law[465] and should seek to limit its domestic application.[466] Although these arguments have no basis in law, they may have, at least sporadically, induced US courts to take into account the active role of the US and grant the executive greater leverage to act.[467] Germany and South Africa, as smaller powers, are more focused on stability and relatively less active on the international plane. If

458 Cf above, Chapter 2, III., 2.
459 Abebe (n 448); Knowles (n 51).
460 Abebe (n 448) 133 ff.
461 Ibid.
462 Possible effects of the Russian war in Ukraine will be analysed below, Chapter 5, II.
463 It can be safely assumed that US foreign policy is aimed at keeping its influence Knowles (n 51) 147.
464 Including George W Bush and Barack Obama, David Hughes, 'Unmaking an exception: A critical genealogy of US exceptionalism' (2015) 41 Review of International Studies 527; criticizing the 'exceptionalism' critique Anu Bradford and Eric Posner, 'Universal Exceptionalism in International Law' (2011) 52 Harvard International Law Journal 3.
465 Michael Ignatieff, 'Introduction: American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 1, 8, 11 ff.
466 More on the reluctance of the US concerning especially human rights cf below, this Chapter, II., 3., c).
467 Ignatieff (n 465) 12; Knowles (n 51) 119, at least this seems likely from a classical realist perspective.

the actions of their executives were restricted by judicial involvement, this would much less affect their position within the international system, and thus courts may be less cautious about interfering.[468] States like Germany may even be inclined to set an example of an international law-abiding executive to strengthen a norm-based international order.[469]

It is beyond the ambit of this thesis to develop a comprehensive theory on how a state's position within the international system may influence the courts' willingness to interfere in executive foreign affairs decisions. However, the evidence thus far suggests that it does have an influence and thus at least sets apart the United States from Germany and South Africa. Moreover, it appears plausible that the courts of an internationally very active player like the United States are cautious not to undermine its elevated position on the international plane.

2. Constitutional framework

Another factor leading to diverging approaches are the different constitutional frameworks of all three countries. Of course, this at first appears to be a very trivial point; although the global trends described above affect all three jurisdictions, they remain independent legal systems. However, certain constitutional features are primarily responsible for different levels of deference applied by the judiciary. Again, these features especially separate the development in the United States from Germany and South Africa.

468 At least if one follows realist thinking models, Ignatieff (n 465) 12.

469 '[F]or middling powers the cost of their own compliance with human rights and humanitarian law instruments is offset by the advantages they believe they will derive from international law regimes that constrain larger powers' Ignatieff (n 465) 12 [my adjustment]; referring to such a 'constitutionalist' German approach McLachlan, 'Five conceptions' (n 218) 33; for the constitutionalist approach of German international law scholars cf Roberts (n 96) 107.

First, the United States has a presidential system,[470] in contrast to Germany and South Africa, which are parliamentary democracies.[471] The executive in the US thus enjoys independent democratic legitimacy, whereas, in Germany and South Africa, it is only indirectly legitimized by parliament.[472] The fear of a loss of democratic accountability in a national legal order influenced more and more by international treaties entered into by the executive[473] applies to a lesser extent in the United States.[474] This may be one of the reasons why in the United States, as analysed in Chapter 3 regarding treaty-making,[475] the instrument of (sole) executive agreements is widely accepted. It also likely contributes to the fact that the trend towards parliamentarization and corresponding judicialization of foreign affairs examined above[476] has been less influential in the United States.[477] In general, the executive enjoys a much more independent position from the legislative branch, and thus courts are less inclined to interfere.

Moreover, the United States, in contrast to Germany and South Africa, has no constitutional court as the pinnacle of its legal system.[478] The US Supreme Court itself had to establish the supremacy of the constitution and judicial oversight. As shown in Chapter 1,[479] it did so but only with simultaneously recognizing its limited role and acknowledging the existence of non-justiciable areas, in what has been called a 'Faustian pact' by Thomas Franck.[480] This evolutionary development of judicial oversight contributed

470 On the vices and virtues of both systems Bruce Ackermann, 'The new separation of powers' (2000) 113 Harvard Law Review 633; on the problems of presidentialism cf Juan Linz, 'The Perils of Presidentialism' (1990) 1 Journal of Democracy 51, 52; Héctor Fix-Fierro and Pedro Salazar-Ugarte, 'Presidentialism' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013) 628.

471 Arguing for different interplay in foreign policy of different democratic systems Miriam F Elman, 'Unpacking Democracy: Presidentialism, Parliamentarism, and Theories of Democratic Peace' (2000) 9 Security Studies 91.

472 Fix-Fierro and Salazar-Ugarte (n 470) 630.

473 Cf above, this Chapter, I., 3., b).

474 Hinting on the difference in countries with directly elected executives Peters, 'Globalization' (n 5) 283.

475 Cf above, Chapter 3, I., 1., a).

476 Cf above, this Chapter, I., 3., b).

477 Cf above, this Chapter, I., 3., b).

478 Comparing Constitutional Courts and the US Supreme Court cf Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013) 816 ff.

479 Cf above, Chapter 1, II., 2., c).

480 Franck (n 29) 10 ff.

to the courts' wariness of their role as unelected bodies and the vital force of the 'counter-majoritarian argument'[481] in American jurisprudence. Moreover, the same fear of not reflecting the will of the American people also fuels sentiments concerning foreign case law alluded to above, a topic which will also be dealt with in more detail below.[482] In Germany[483] and South Africa,[484] debates concerning an 'over-juridification' also exist, but the general competence of the courts to review individual constitutional guarantees or engage as an umpire in institutional power struggles is much less contested. In both countries, the constitutional courts have a clear mandate. As examined above, especially in contrast to the United States,[485] the undisputed competence to solve constitutional disputes between the executive and the legislative branch has accelerated the judicialization of foreign affairs.[486]

481 Coined especially by Alexander M Bickel, *The least dangerous branch: The supreme court at the bar of politics* (2nd edn, Yale University Press 1986); cf as well prominently Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346.

482 Cf remarks of Justice Scalia in Dorsen (n 102); Peters, 'Globalization' (n 5) 302 f; mindful of that point also Bradley, 'U.S. War Powers' (n 278) 764; cf above, this Chapter, I., 1., c) and below, this Chapter, II., 3., c).

483 Critical concerning extensive jurisprudence of the German Constitutional Court Matthias Jestaedt and others, *The German Federal Constitutional Court – The Court Without Limits* (OUP 2020); also the decision of the Constitutional Court concerning the PSPP programme led to unusually strong criticism of the judgment, cf the different comments of public law professors in the newspaper 'Frankfurter Allgemeine Zeitung': 'Auf die Europäischen Grundlagen Besinnen' from 4 June 2020 and 'Ohne Absolutheit' from 2 July 2020.

484 Reflecting on the counter-majoritarian argument Heinz Klug, 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 South African Journal on Human Rights 185; warning that the courts should not fetter executive discretion in foreign affairs too much and not become policymakers Dire Tladi, 'A Constitution Made for Mandela, A Constitutional Jurisprudence Developed for Zuma: The Erosion of Discretion of the Executive in Foreign Relations' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 238.

485 Cf already above, Chapter 2., I., 2. and 3., especially the usage of procedural non-reviewability and standing rules to limit the courts engagement in inter-branch disputes.

486 Cf above, this Chapter, I., 3., c).

Finally, the United States, since 1789, has existed under the same constitutional framework.[487] Of course, the US Constitution has been amended and manifestly changed over time.[488] However, it always had to adapt to changes by using the burdensome amendment procedure or by changing constitutional interpretation, which takes considerable time.[489] In contrast, Germany could profit from the experience of older codifications and was at the centre of Western European 'new constitutionalism,' including a strong focus on judicial review.[490] Due to the fundamental constitutional reconstruction, it could also accommodate the changing international environment.[491] The same holds for South Africa, which closely followed the German experience.[492] Both systems had to 'start from scratch' and could develop a new understanding of the judiciary's role in a globalized world.[493]

3. Historical experience

Another central point contributing to different approaches concerning deference is historical experience. Each of our three reference countries has a unique history that shaped its legal system. However, some experiences appear particularly important to explain the different receptiveness towards the trends which push towards more judicial review in foreign affairs. These historical circumstances shape how the respective constitution is perceived and interpreted and create principles and convictions that are not so much directly deductible from the constitution's text but are part of its 'unwritten' constitution.[494] Again, I only focus on features that I find of a particular influence on judicial review in foreign affairs, especially taking into account

487 Referring to the continuity as well Aust, 'Democratic Challenge' (n 130) 363; speculating on differences between post and pre WW2 legal systems Bradley, 'Dynamic Relationship' (n 176) 345 f.

488 Bruce Ackermann, 'Oliver Wendell Holmes Lectures: The Living Constitution' (2007) 120 Harvard Law Review 1737.

489 Aileen Kavanagh, 'The Idea of a Living Constitution' (2013) 16 Canadian Journal of Law & Jurisprudence 55, 73.

490 Stone Sweet (n 478) 816.

491 For the growing awareness concerning the external effects of constitutions cf Benvenisti and Versteeg (n 408).

492 Stone Sweet (n 478) 819.

493 This had special influence on the 'Openness towards International Law' as well as the relations to international human rights, cf below, this Chapter, II., 3., b).

494 Stressing historical experience in 'contextualizing' functional approaches Uwe Kischel, *Rechtsvergleichung* (CH Beck 2015) 187 ff; cf as well Vicki C Jackson, 'Compa-

the areas examined in Chapter 3. I do not claim that this subchapter provides an exhaustive list.

a) German legal tradition and scholarship in the 19th century

A first factor setting apart the developments in Germany from the US and South Africa is the legal tradition and scholarship within the 19th century. As examined in Chapter 3,[495] the Prussian tradition in the first half of the 19th century concerning treaty interpretation or state immunity showed a similar dynamic towards conclusive executive determinations like in the United States and the United Kingdom. This is reflected in provisions of the 'Procedural Code of the Prussian States' from 1815 and the 'Royal Prussian Decree Concerning the Interpretation of Treaties' from 1823.[496] However, the latter provision sparked considerable resistance, especially by the influential pre-revolution (*Vormärz*) scholar Johann Ludwig Klüber.[497] Other liberal academics supported him[498] and also more conservative scholars like Friedrich Carl von Savigny defended judicial independence.[499] As we have seen,[500] the strong academic resistance led to the repeal and gradual replacement of legislation allowing a direct executive influence. In contrast, in the United Kingdom and the United States during the early 19th century, the executive influence, especially concerning questions involving

---

rative Constitutional Law: Methodologies' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013) 66 ff.

495 Cf above, Chapter 3, I., 1., b), aa) and I., 3., b).

496 Cf above, Chapter 3, I., 1., b), aa).

497 Johann L Klüber, *Öffentliches Recht des Teutschen Bundes und der Bundesstaaten* (3rd edn, Andreä 1831) 522; Johann L Klüber, *Die Selbstständigkeit des Richteramtes und die Unabhängigkeit seines Urtheils im Rechtsprechen: im Verhältniß zu einer preussischen Verordnung vom 25. Jänner 1823* (Andreä 1832); on Klüber cf Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland Bd. 2: Staatsrechtslehre und Verwaltungswissenschaft 1800–1914* (CH Beck 1992) 83.

498 E.g., Feuerbach, cf Günther Plathner, *Der Kampf um die richterliche Unabhängigkeit bis zum Jahre 1848* (M & H Marcus 1935) 86; Wilfried M Bolewski, *Zur Bindung deutscher Gerichte an Äußerungen und Maßnahmen ihrer Regierung auf völkerrechtlicher Ebene: Ein Beitrag zur Verrechtlichung der Außenpolitik* (Marburg 1971) 48 fn 3 with further references.

499 Friedrich Carl von Savigny, 'Vorschläge zu einer zweckmäßigen Einrichtung der Gesetzrevision' in Adolf Stölzel (ed), *Brandenburg Preußens Rechtsverwaltung und Rechtsverfassung* (Franz Vahlen 1888) 741; Plathner (n 498) 87.

500 Cf above, Chapter 3, I., 1., b), aa).

recognition, was broadly accepted and even referred to as 'Marshall-Eldon doctrine'.[501] The strong resistance in Germany may be due to the different stage of state formation compared to the US. At the beginning of the 19th century, Germany was neither a unified state nor had the constitutionalization of the state(s) reached the level of the Anglo-American countries. In the United States, the (British) monarch had been irrevocably replaced and the general separation of powers was safeguarded by the constitution, including a Supreme Court which had established its power to review executive and legislative acts.[502] In Germany, judicial independence still had to be defended against 'executive justice' (*Kabinettsjustiz*).[503] Liberal academics like Klüber were thus sensitive concerning executive overreach. Equally important, mentioned above,[504] appears to be that recognition and other foreign (non-German) affairs were, at that time, not as important as in the US and UK. In Germany, in the early 19th century, the trend towards conclusive executive determinations was thus met by a countertrend.

The development of a very positivistic and almost mathematical understanding of the law,[505] which became more and more dominant by the middle of the 19th century, may have contributed to the partial blindness concerning the effects of judicial decisions on foreign affairs. Savigny's 'historical school' emphasized systematic thinking and logical deduction and was further developed by Friedrich Puchta as *Begriffsjurisprudenz*.[506] A positivistic and analytical approach also became the mainstream position in public law and influenced the first important monograph on the new Bismarck Constitution by Paul Laband.[507] This trend, which profoundly influenced legal education, certainly did not strengthen the judges' awareness of the foreign affairs implications of their judgments. Scholars of the Bismarck period like Heinrich Triepel[508] went on to defend judicial independence and the courts' right to incidentally determine the facts necessary for the solution of a case, even if related to foreign affairs.[509]

501 Chen (n 83) 244.
502 *Marbury v Madison* 5 US 137 (1803) (US Supreme Court), cf already above, Chapter 1, II., 2., c).
503 Plathner (n 498) 33 ff; Bolewski (n 498) 50.
504 Cf this Chapter, II., 1.
505 Karl Kroeschell, *Deutsche Rechtsgeschichte: Seit 1650* (5th edn, UTB 2008) 127 ff.
506 Ibid 130.
507 Michael Stolleis, *Öffentliches Recht in Deutschland* (CH Beck 2014) 70 ff.
508 Heinrich Triepel, *Völkerrecht und Landesrecht* (CL Hirschfeld 1899) 442.
509 Bolewski (n 498) 58 ff.

Over the 19th century, the acknowledgement of an executive influence in foreign affairs cases in Germany never reached the same level of entrenchment as in the United States and the United Kingdom (and later South Africa). In these countries, by the beginning of the 20th century, scholars like Moore and Sutherland found solid ground to develop their deference doctrines. In contrast, German scholars advocating for more executive influence had to construct their theories on shakier foundations.[510] Although hard to verify, even today, the rather 'formalistic' approach to law in civil law systems like Germany[511] may make it easier for courts to ignore the foreign affairs implications of their judgments.[512] An example may be the *Rhodesian Bill* case, analysed with regards to recognition in Chapter 3, in which the court, without deeper reflection, applied civil law terminology to a foreign relations case and remained ignorant of the repercussions.[513]

b) Openness towards international law

Another factor contributing to a different receptiveness towards the convergence trends is the shared experience of Germany and South Africa of being ruled by authoritarian regimes within the 20th century. Under both regimes, gruesome human rights violations were committed,[514] and as a result, both

510 Cf above, Chapter 1, II., 3., e).

511 On the German 'formalistic' understanding of law which allegedly served as a 'roadblock' against legal realist approaches see Uwe Kischel, *Comparative Law* (OUP 2019) 400 mn 88; on treating law as a 'legal science' as well Roberts (n 96) 218 ff.

512 Speculating about a difference between civil and common law systems Bradley, 'What is Foreign Relations Law' (n 441) 3, 8; Bradley, 'Dynamic Relationship' (n 176) 345; in this direction also the remarks of Kischel, *Comparative Law* (n 511) 400 mn 88.

513 The court used civil law terminology ('aspiration of powers', 'Anwartschaft') in order to determine the domestic acceptance of acts of unrecognized governments, without further explanation, why such a German private law concept should apply to the case, cf above, Chapter 3, I., 2., b) and Bolewski (n 498) 200.

514 Naming both regimes in the same sentence here does not imply an equation; the shared authoritarian experience is important to understand the constitutional design of both countries, but it is without the ambit of this thesis to engage in a comparison of both regimes and their crimes; on the influence of German constitutionalism on South African law cf Rautenbach and du Plessis (n 100) 1546 f; describing a trend of former authoritarian systems to turn to international openness Peters, 'Globalization' (n 5) 295.

countries were internationally isolated.[515] After the turn to democracy in Germany[516] and South Africa,[517] this led to the wish to reintegrate into the international community, which is underpinned by constitutional provisions and (unwritten) principles.

The German Constitution, in its preamble, expresses that the German people are 'inspired by the determination to promote world peace as an equal partner in a united Europe'. It also already in 1949 included a provision (Article 24 of the Basic Law) that allowed the transfer of sovereign powers to international organizations, a constitutional novelty.[518] As has been aptly formulated by Tomuschat: 'The global interdependence, which in 1949 was more prediction than concrete reality, is legally anticipated by Article 24 (1), the necessity of the international division of labour and cooperation have been recognized as normality'.[519] As stated,[520] the provision has also been used to transfer powers to the European Union until, in 1992, the unprecedented extent of European integration made it necessary to include a new article to that end in the Basic Law.[521] Moreover, unwritten principles were deduced from the constitution's text to strengthen Germany's commitment to 'international cooperation'.[522] Amongst them is the principle of 'friendliness towards international law' (*Völkerrechtsfreundlichkeit*), which, as the name implies, secures that state organs have to give

515 Germany of course isolated itself through its aggressive foreign policy, starting the Second World War and committing the holocaust. It was considered an enemy state after the war ended (see Art. 53, 77, 107 UNC) and only joined the United Nations in 1973; South Africa's apartheid regime became increasingly (though not completely) isolated see Anna Konieczna and Rob Skinner, *A Global History of Anti-Apartheid* (Springer 2019).

516 Aust, 'Democratic Challenge' (n 130) 363.

517 Du Plessis (n 125) 309.

518 Helmut Philipp Aust, 'Art. 24' in Jörn Axel Kämmerer and Markus Kotzur (eds), *von Münch / Kunig Grundgesetz Kommentar* (7th edn, CH Beck 2021) mn 1.

519 Christian Tomuschat, 'Der Verfassungsstaat im Geflecht der internationalen Beziehungen' (1978) 36 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 7, 17 f ('Die weltweite Interdependenz, im Jahr 1949 eher Vorahnung denn handfeste Realität, ist von Art. 24 Abs. 1 GG rechtlich vorweggenommen, die Notwendigkeit internationaler Arbeitsteilung und Kooperation als Normalzustand zur Kenntnis genommen worden.') [my translation]; cf as well Christian Calliess, 'Art. 24' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 2.

520 Cf above, this Chapter, I., 3., b), aa).

521 Article 23 is not new but rather 'newly formulated' – the old Article 23 concerned the German reunification.

522 Aust, 'Democratic Challenge' (n 130) 363 f.

special consideration to international law's demands.[523] In the same vein, the principle of 'open statehood'[524] expresses the German Constitution's ambition to foster integrated international and European cooperation.[525]

South Africa also subscribes to an open approach toward international law. As the preamble of the South African Constitution makes clear, the people of South Africa strive to '[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'. Specifically, the previously mentioned[526] Section 39 of the South African Constitution calls for taking into account foreign and international law in interpreting the Bill of Rights. Moreover, the German terminology of 'international law friendliness' and 'openness' to international law found way into South African legal discourse.[527] With this generally positive disposition towards international law, many of the convergence trends, like participation in the global legal dialogue or the entanglement of international and domestic law, take a powerful role in Germany and South Africa.[528]

The United States' position in this regard is much more ambivalent.[529] Although US history is not free of blemishes,[530] its role in the 20th century poses a stark contrast to Germany and South Africa. The US took a large role in the victories of two World Wars and was considered the leading nation of the West.[531] Accordingly, there was no need for a 'reintegration'

523 Matthias Herdegen, 'Art. 25' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 7; for its effect in the Ramstein litigation cf Mauri (n 112) 19; Helmut Philipp Aust, 'Art. 25' in Jörn Axel Kämmerer and Markus Kotzur (eds), *von Münch / Kunig Grundgesetz Kommentar* (7th edn, CH Beck 2021) mn 7.

524 Klaus Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit* (Mohr 1964) 42; Di Fabio (n 12); Stephan Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz: Eine Studie zur Wandlung des Staatsbegriffs der deutschsprachigen Staatslehre im Kontext internationaler institutionalisierter Kooperation* (Duncker & Humblot 1998).

525 Heike Krieger, 'Die Herrschaft der Fremden – Zu demokratietheoretischen Kritik des Völkerrechts' (2008) 133 AöR 315, 323 f; Scholz (n 230) mn 3; Calliess, *Staatsrecht III* (n 4) 6 ff.

526 Cf above, this Chapter, I., 1., c).

527 Du Plessis (n 125) 310 f; Tladi, 'Interpretation of Treaties' (n 154) 136.

528 Mentioning the openness towards international law of both countries Du Plessis (n 125) 335.

529 Biehler (n 11) 5.

530 Cf the still provocative and insightful Howard Zinn, *A people's history of the United States* (Harper and Row 1980).

531 Cf in general Heinrich A Winkler, *Geschichte des Westens – Vom Kalten Krieg zum Mauerfall* (CH Beck 2014).

within the international community comparable to Germany and South Africa.[532] Moreover, due to the mentioned continuous constitutional framework since the 18th century, no written constitutional obligation towards the integration into the international community exists.[533] In light of the mentioned burdensome amendment procedure, which at least in the current political climate renders amendments virtually impossible, the US approach towards international law is shaped mainly by the jurisprudence of its courts and influential scholars. As we have seen, especially regarding treaty interpretation and state immunity cases analysed in Chapter 3,[534] courts frequently referred to international law during the (long) 19th century.[535] However, since the 1930s, mainstream academics and judges tend to be much more sceptical and inward-looking.[536] In contrast to the mainstream position in Germany (and post-apartheid South Africa), which after the Second World War became explicitly open toward international law,[537] the Supreme Court jurisprudence in the US provides a mixed picture. As Flaherty has shown, the Supreme Court case law oscillates between an 'internationalist' and a 'nationalistic' view.[538] Moreover, in reaction to progressive decisions by the Warren Court,[539] the influential orginalist school of constitutional interpretation developed.[540] Originalist approaches vary, but their common denominator is a close orientation on the 'original' understanding of the constitution[541] coupled with a rejection of using 'foreign' international and comparative material in constitutional

532 On the perception that international human rights are only useful for new democracies cf below, this Chapter, II., 3., c).

533 To the contrary, at the time of the inception of the US constitution the US clearly distinguished itself from the absolute and constitutional monarchies.

534 Cf above, Chapter 3, I., 1., a), bb), (1) and I., 3., a).

535 Ibid.

536 For the 'Sutherland Revolution' cf above, Chapter 1, II., 2., d), for the development of US scholarship in Foreign Relations Law cf Aust, 'Democratic Challenge' (n 130) 353 ff.

537 In contrast to the US, Lange, *Treaties in Parliaments and Courts* (n 217) 217 ff.

538 Flaherty (n 377) 416.

539 1953 – 1969.

540 Vicki C Jackson, 'The U.S. Constitution and International Law' in Mark Tushnet, Mark A Garber and Sanford Levinson (eds), *The Oxford Handbook of the U.S. Constitution* (OUP 2016) 938 f; Lange, *Treaties in Parliaments and Courts* (n 217) 218.

541 Jackson, 'US Constitution and International Law' (n 540) 938 ff; Will Waluchow, 'Constitutionalism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2018 edn, Stanford University 2018) under 'Originalism'.

interpretation.[542] The originalist approach's strength in the US also ties back to the mentioned force of the counter-majoritarian argument.[543] As an influential proponent of originalism, especially the late Justice Scalia[544] critiqued the use of international case law as introducing 'foreign moods, fads and fashions'.[545] The originalist movement strongly contributed to the Supreme Court's hesitant engagement in the 'Global Legal Dialogue'.[546] With the three new judges, outspokenly sceptical towards international and foreign law, appointed by former President Trump, it seems likely that the hesitant approach will continue.[547] Moreover, the 'conservative movement'[548] also influenced foreign relations law. By the late 1990s, an influential group of academics[549] termed 'new sovereigntist' by its critics[550] argued for a more limited influence of international law within the US's legal system.[551] Generally, the relationship between international and domestic law is much more contested in the United States than in South Africa and Germany. With that, the participation in the global legal dialogue and the entanglement between international and domestic law are weaker in the United States.

542 Jackson, 'US Constitution and International Law' (n 540) 938 f.
543 Drawing the connection Krieger, 'Die Herrschaft der Fremden' (n 525) 322.
544 Scalia himself describes himself as 'textualist' Antonin Scalia, *A Matter of Interpretation* (Princeton University Press 1997) 3 ff.
545 Scalia Dissent in *Lawrence v Texas* (n 103) 598; see on the US debate especially with regards to the 8th Amendment Fredman (n 99) 153; cf as well Lange, *Treaties in Parliaments and Courts* (n 217) 212 ff.
546 Cf above, especially (n 102).
547 On the new judges and their views concerning the use of foreign case law Lange, *Treaties in Parliaments and Courts* (n 217) 221.
548 Ibid 217 ff.
549 Influential Curtis A Bradley and Jack L Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 Harvard Law Review 815; on the very conservative end John C Yoo, 'Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding' (1999) 99 Columbia Law Review 1955.
550 Peter J Spiro, 'The New Sovereigntists – American Exceptionalism and its False Prophets' (2000) 79 Foreign Affairs 9.
551 Aust, 'Democratic Challenge' (n 130) 355 f; on the 'new sovereigntists' cf Lange, *Treaties in Parliaments and Courts* (n 217) 220.

c) Focus on constitutional and human rights

In Germany and South Africa, the historical experience of authoritarian regimes also led to a strong emphasis on constitutional and human rights protection and deep-felt scepticism towards unchecked executive power.

In Germany, as an answer to the authoritarian past, the framers of the Basic Law decided to include justiciable fundamental rights provisions. Human dignity as the 'highest constitutional principle'[552] has been chosen as the first article, followed by a detailed fundamental rights catalogue. Article 1 (2) of the Basic Law connects the domestic fundamental rights guarantees to the international human rights project[553] and 'acknowledge[s] inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world,'[554] which relates to the mentioned openness towards international law. Based on this provision, the Constitutional Court awarded particular weight to human rights treaties, especially the ECHR, in interpreting German fundamental rights.[555] It also relied heavily on Article 1 (2) of the Basic Law in the mentioned[556] recent decision concerning telecommunications surveillance conducted by the Federal Intelligence Service[557] against foreigners in foreign countries,[558] which then found application in the *Ramstein* case.[559] In the telecommunications surveillance judgment, the Constitutional Court continued its broad application of fundamental rights protection and held that it is not restricted to German citizens or German territory. Although acknowledging foreign telecommunications surveillance as part of the foreign affairs power,[560] it struck down the regulations allowing the measures for insufficiently

552 Matthias Herdegen, 'Art. 1' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 4.

553 Horst Dreier, 'Art. 1 II' in Horst Dreier and Hartmut Bauer (eds), *Grundgesetz: Kommentar* (3rd edn, Mohr Siebeck 2013) mn 3.

554 Article 1 (2) of the Basic Law [my adjustment].

555 Dreier (n 553) mn 21.

556 Cf above, this Chapter, I., 4., b).

557 'Bundesnachrichtendienst' ('BND').

558 *Judgment from 19 May 2020 (BND Telecommunications Surveillance)* (n 421) mn 93; Helmut Philipp Aust, 'Auslandsaufklärung durch den Bundesnachrichtendienst – Rechtsstaatliche Einhegung und grundrechtliche Bindungen im Lichte des Urteils des Bundesverfassungsgerichts zum BND-Gesetz' (2020) 73 DÖV 715, 717.

559 Cf above, this Chapter, I., 4., b).

560 *Judgment from 19 May 2020 (BND Telecommunications Surveillance)* (n 217) mn 122.

protecting fundamental rights. Likewise, the mentioned 'right to a legal remedy' in Article 19 (4) of the Basic Law is a reaction to the Nazi past.[561] The Constitutional Court soon interpreted it as a counterweight against the 'self-indulgence'[562] of the executive.[563] Against this background, it is no wonder that the Constitutional Court in the *Saarstatut* case and following judgments decided that, in general, its review capacity covers the entire field of foreign affairs. As we saw above,[564] the provision served and still serves as one of the main arguments against a doctrine of substantial non-reviewability in Germany.

South African governments under the old constitutions had been notoriously critical of the international human rights movement as it openly undermined the apartheid regime.[565] This completely changed when the Mandela government took over and acknowledged the role of human rights in its struggle against racial segregation.[566] Even more explicitly than in Germany, the often-mentioned Section 39 of the South African Constitution connects the domestic Bill of Rights to the international human rights project. The Constitutional Court has stressed the importance of foreign and international material in one of its earliest decisions in *Makwanyane*.[567] Justice Chaskalson acknowledged the value of 'comparative bill of rights jurisprudence,' especially in the early years, until the courts developed more 'indigenous jurisprudence'.[568] As we saw above and in Chapter 2,[569] like in Germany, the focus on individual rights also led to a broad right to access courts (section 34) and broad standing rules (section 38), which allow individuals to challenge virtually every executive action in foreign af-

561 Karl Doehring, *Pflicht des Staates zur Gewährung diplomatischen Schutzes* (Carl Heymanns 1959) 103; cf as well Matthias Kottmann, *Introvertierte Rechtsgemeinschaft: Zur richterlichen Kontrolle des auswärtigen Handelns der Europäischen Union* (Springer 2014) 61; Mattias Wendel, *Verwaltungsermessen als Mehrebenenproblem* (Mohr Siebeck 2019) 410 ff.

562 *Decision from 12 January 1960* BVerfGE 10, 264 (German Federal Constitutional Court) 267.

563 Herdegen (n 552) mn 1.

564 Cf above, Chapter 2, II., 2. and this Chapter, I., 4., b).

565 Cf the Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243, Lange, *Treaties in Parliaments and Courts* (n 217) 145, 207.

566 Ibid 54, 165.

567 *S v Makwanyane* 1995 (3) SA 391 (CC) (Constitutional Court).

568 Ibid mn 37.

569 Cf above, Chapter 2, I., 3.

fairs. The latter development may also have been facilitated by the (South) African (constitutional) concept of 'Ubuntu', which emphasizes the interdependence between the individual and the community.[570] In contrast to Germany and the United States, and due to the particular challenges after the end of apartheid, the South African Constitution also includes broad socio-economic rights and subscribes to a 'transformative' understanding of constitutional rights.[571] In contrast to 'classical' first-generation rights, these rights demand a much higher judiciary involvement in balancing exercises.[572] Thus, the judges in South Africa are, quite in contrast to their US colleagues, much more used to intervening in executive and legislative decisions. The general acceptance of a more significant role for the judicial branch appears to facilitate its involvement in foreign affairs. Moreover, since the end of apartheid, South Africa has suffered from corrupt leadership, especially during the later years of Jacob Zuma's presidency. As has been persuasively argued by Tladi, the courts, also in foreign affairs, reacted with less deference and more scepticism towards the executive.[573] This scepticism may explain the partially harsh language and very invasive approach used in the SADC or Grace Mugabe decisions.

As examined above, the constitutional protection of individual rights in the US increased dramatically after the Second World War. However, a more mixed picture concerning the openness towards international human rights law evolves.[574] As early as the 1950s, conservative senators opposed US participation in the developing human rights regimes, culminating in the (in)famous attempt to pass the 'Bricker amendment' to limit the conclusion and effect of international treaties.[575] Although unsuccessful, the 'Bricker amendment' controversy created a political climate that led to the United States not joining major human rights treaties.[576] In the 1970s, the Carter administration signed the ICCPR and the ICESCR but failed

570 For Ubuntu as constitutional principle cf Christa Rautenbach, 'Exploring the Contribution of Ubuntu in Constitutional Adjudication' in Charles M Fombad (ed), *Constitutional adjudication in Africa* (OUP 2017) 293.

571 James Fowkes, 'Constitutional Review in South Africa' in Charles M Fombad (ed), *Constitutional adjudication in Africa* (OUP 2017) 233 ff.

572 Cf Fredman (n 99) 79 ff on the problems of adjudicating socio-economic rights.

573 Tladi, 'A Constitution Made for Mandela' (n 484).

574 Foundational Henkin (n 359) 65 ff.

575 Duane Tananbaum, *The bricker amendment controversy: A test of Eisenhower's political leadership* (Cornell UP 1988); Flaherty (n 377) 421; Lange, *Treaties in Parliaments and Courts* (n 217) 25 ff.

576 Flaherty (n 377) 421.

to achieve Senate approval.[577] The opposition was particularly fuelled by politicians who feared that human rights treaties might challenge racial segregation.[578] Moreover, the ICESCR attracted criticism as the US scholarship was especially wary of 'socio-economic' rights.[579] The US's position within the international system[580] and the systemic rivalry with the Soviet Union also influenced the resistance towards joining 'restrictive' human rights treaties.[581] In general, human rights standards in the US were, for a long time, rather seen as external standards for developing democracies and not suited for application in already settled political communities with a domestic bill of rights like the United States itself.[582] This also ties back to the idea of American exceptionalism, which on the one hand, promotes international human rights while, on the other hand, tries to limit their domestic applicability.[583] In contrast to Germany and South Africa, where constitutional rights are strongly connected to the international human rights project, the US civil rights movement was largely unconnected to the international standards. In the US, 'the rights revolution was a domestic affair'.[584] Only after the end of the Cold War did the US join major UN human rights treaties like the ICCPR.[585] However, even today, scepticism towards international human rights 'hitting home'[586] is strong,[587] and the

577 Lange, *Treaties in Parliaments and Courts* (n 217) 26.
578 Ibid.
579 Cass R Sunstein, 'Why Does the American Constitution Lack Social and Economic Guarantees?' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 90, 101.
580 Cf already above, this Chapter, II., 1.
581 Flaherty (n 377) 418.
582 Ibid 421.
583 Ignatieff (n 465) 3 ff.
584 Flaherty (n 377) 418.
585 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, signed by the US in 1977, ratified in 1992; other treaties include the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 1, signed by the US in 1966, ratified in 1994; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1564 UNTS 85, signed by the US in 1988 and ratified in 1994; some treaties were already ratified prior to the end of the Cold War like the Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) signed by the US in 1948, ratified in 1988.
586 Aust, 'Democratic Challenge' (n 130) 351.
587 Ibid 357.

US has not ratified many important human rights treaties.[588] Thus, it is no wonder that domestic courts can less frequently rely on international treaties.[589] The entanglement between international and domestic law in the area of human rights, quite in contrast to international trade and commercial law,[590] is much weaker. Considering this background, it is less surprising that, in contrast to Germany and South Africa, the US did not follow the international trend towards an individualization of diplomatic protection.[591]

The historical experience of an authoritarian regime thus sets apart Germany and South Africa from the United States and contributed to a stronger focus on constitutional rights strongly connected to international human rights. This focus again facilitates the receptiveness to the global legal dialogue, the entanglement between international and domestic law and the use of individual rights to close 'legal black holes'.

4. Populism

A last major point that has influenced and in the future may continue to influence the receptiveness of our three reference jurisdictions towards the convergence factors is the impact of populism.[592] Of course, populism has

588 E.g., Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, signed by the US in 2009; the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 1, signed by the US in 1980; the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 signed by the US in 1977; the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 signed by the US in 1995; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, not signed by the US; the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) not signed by the US.

589 Flaherty (n 377) 422.

590 Ibid 416.

591 Cf above, Chapter 3, I., 5., a).

592 Dealing with the influence of populism on foreign relations law McLachlan, 'The Present Salience of Foreign Relations Law' (n 219) 367.

existed for a long time[593] but only its recent incarnation in the wake of Donald Trump's bid for presidency in 2016 started to play a central role in (international) political discourse as a threat to international law and the international order.[594] This part will connect the phenomenon of populism to deference, offer an overview of the manifestations of populism in the United States, Germany, and South Africa and tries to evaluate its future importance for the dynamics of deference.

a) Populism and deference

'Populism' has been used to characterize various politicians and policies without a clear-cut definition.[595] However, most commentators agree that it is marked by at least two main criteria.[596] It always claims to be 'anti-elitist,' that is, it is aimed against the 'establishment'.[597] Moreover, populist movements are always anti-pluralist, claiming that they, and only they, are the rightful representative of the people.[598] This national identity focus[599] leads to the fact that most populist movements are also anti-international-

593 Jan W Müller, *What is Populism* (University of Pennsylvania Press 2016) 7 ff; for a short history Janne E Nijman and Wouter Werner, 'Populism and International Law: What Backlash and Which Rubicon?' (2018) 49 Netherlands Yearbook of International Law 3, 11 ff.

594 Noticing this Dire Tladi, 'Populism's Attack on Multilateralism and International Law: Much Ado About Nothing' (2020) 19 Chinese Journal of International Law 369; the 'new wave' appears to coincide with Brexit and the announcement of Donald Trump to run for the 2016 US elections, see Georg Löfflmann, 'Introduction to special issue: The study of populism in international relations' (2022) 24 BJPIR 403.

595 Heike Krieger, 'Populist Governments and International Law' (2019) 30 EJIL 971, 974.

596 This at least appears to be the formalistic approach followed by most legal commentators Krieger, 'Populist Governments' (n 595) 974; Nijman and Werner (n 593) 6 applying a formal approach as well; applying both factors as well Tladi, 'Populism's Attack' (n 594) 372; following a more material approach Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A very short introduction* (OUP 2017); outlying the shortcomings of a material approach Müller (n 593) 11 ff.

597 Even though its leaders are often themselves part of the 'high society' (Donald Trump) or have been in power for several years (Viktor Orban); Müller (n 593) 20; Posner, 'Liberal Internationalism' (n 62) 2.

598 Müller (n 593) 20; Posner, 'Liberal Internationalism' (n 62) 2.

599 Müller (n 593) 29; McLachlan, 'The Present Salience of Foreign Relations Law' (n 219) 355.

ist.[600] Globalization and 'international cooperation,' especially international courts, are framed as a project of the global elite in which the 'true people' do not have a say.[601] The result is a backlash, a counter-reaction to rewind the so-perceived 'invasion of the international'.[602] That aspect is what connects the 'populist backlash' to the question of deference.

The populist backlash opposes many developments, which brought about the trend towards less deference. In particular, populists often criticize certain effects of globalization and the changed structure of international law. They prefer international law to be retransformed to a law of coordination instead of cooperation[603] and, in quite Hobbesian fashion, subscribe to a view of the international system as 'not a "global community" but an arena where nations, nongovernmental actors and businesses engage and compete for advantage'.[604] Likewise, international human rights are particularly opposed and treated as foreign intrusions within the domestic domain.[605] Populism generally adheres to a 'closed statehood' ideology[606] and thus seeks to limit the impact of international law on the respective national legal system.[607]

However, the possible influence of the populist movement on the convergence factors is hard to assess, as populists rarely follow a coherent ap-

600 Mikael R Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash against international courts: explaining the forms and patterns of resistance to international courts' (2018) 14 International Journal of Law in Context 197, 198; Posner naming Modi and Xi as exceptions, cf Posner, 'Liberal Internationalism' (n 62) 2; critical Alejandro Rodiles, 'Is There a 'Populist' International Law (in Latin America)?' (2018) 49 Netherlands Yearbook of International Law 69, 74 who argues with reference to Latin America that populist movements may not necessarily be 'anti-international'; differentiating between right-wing and left-wing populists Dani Rodrik, 'Populism and the economics of globalization' (2018) 1 Journal of International Business Policy 12.

601 Krieger, 'Populist Governments' (n 595) 971.

602 Madsen, Cebulak and Wiebusch (n 600) 199.

603 Krieger, 'Populist Governments' (n 595) 978.

604 Herbert R McMaster and Gary Cohn, 'America First Doesn't Mean America Alone' (2017) June Wall Street Journal (Europe edition); cf as well Krieger, 'Populist Governments' (n 595) 984; McLachlan, 'The Present Salience of Foreign Relations Law' (n 219) 355.

605 Philip Alston, 'The populist challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1.

606 Cf this Chapter, I., 2., a).

607 Krieger, 'Populist Governments' (595) 977 f; this philosophy goes in hand with stressing a classical Westphalian understanding of sovereignty McLachlan, 'The Present Salience of Foreign Relations Law' (n 219) 362 ff.

proach. Although rhetorically often stating their principled opposition, they neither completely oppose globalization nor multinational cooperation, as long as it serves their needs.[608] Krieger aptly characterized this behaviour as 'cherry-picking'.[609] Most likely, populists will at least rhetorically subscribe to a more traditional position[610] but may also rely on the risen influence of the legislature[611] and the judiciary[612] to limit the domestic application of international law. Nevertheless, in light of the general 'anti-internationalist' stance of populism, at least in the form in which it is prevalent in our reference jurisdictions,[613] it will likely rather weaken than strengthen the factors which thus far pushed towards judicial review in foreign affairs. All three jurisdictions have, to varying degrees, experienced incidents of the 'populist backlash'.

b) Instances of a 'populist' backlash in the United States, Germany and South Africa

The first example is, obviously, the United States. With Donald Trump, the premier example of a populist has been the president of the United States. As his often-recited slogan 'America First' implies, he harbours deep-felt sentiments against international cooperation. Notwithstanding the more sceptical view of the US towards areas like international environmental, criminal and human rights law in general;[614] the level of criticism certainly reached an unprecedented new stage under President Trump. While in

608 Cf the United States-Mexico-Canada Agreement negotiated by Trump; cf Nijman and Werner (n 593) 10 ff; Krieger, 'Populist Governments' (n 595) 986 (with further examples); Jean Galbraith, 'Contemporary Practice of the United States – United States-Mexico-Canada Agreement Enters into Force' (2020) 114 AJIL 772; for Trump's lobbying for binational trade deals see Bellinger (n 173) 22; Krieger, 'Populist Governments' (n 595) 979.

609 Krieger, 'Populist Governments' (n 595) 996.

610 Concerning Trump see Harold H Koh, *The Trump administration and International Law* (OUP 2019) 5.

611 Aust, 'Democratic Challenge' (n 130) 347.

612 Cf the Hungarian and Russian constitutional courts Krieger, 'Populist Governments' (n 595) 983.

613 On the more international-friendly populism in Latin America see Rodiles (n 600).

614 Cf already above, this Chapter, II., 3., c) for human rights; cf Lange, *Treaties in Parliaments and Courts* (n 217) 25 ff.

office, he 'withdrew'[615] the United States from the Paris Agreement, the 'Iran Deal' (JCPOA)[616] and, in the wake of the Covid crisis, announced withdrawal from the WHO.[617] He challenged many other international institutions and agreements, including NAFTA, NATO, WTO, the ICC, the ICJ, and the UN[618] and continues to do so during his current presidential campaign.[619]

Germany also came under the influence of populism, primarily due to the rise of Alternative for Germany (*Alternative für Deutschland*, AfD), a party founded in 2013 in the wake of the Eurozone crisis. It advocates a return of the European Union to its pre-1992 state as focused primarily on the common market, if not the complete dissolution of the European Union.[620] Concerning international law, the party is especially wary of the domestic influence of international organizations.[621] Although the AfD is not part of the federal government and probably will not be in the near future, it may gain further influence especially in the eastern German states (*Länder*).[622] Moreover, the party stirs anti-European and anti-internationalist sentiments, which may induce individuals, politicians, and institutions to follow their approach.[623] German populists and Euro-sceptics have tried to use the Constitutional Court to strengthen their agenda. In 2009, due to suits from conservative right-wing litigants, the court introduced barriers

615 The term is here not used in a technical sense, as e.g. the Iran deal is not a treaty under the VCLT.

616 Bellinger (n 173) 21.

617 Jean Galbraith, 'Contemporary Practice of the United States – Trump Administration Submits Notice of U.S. Withdrawal from the World Health Organization Amid COVID-19 Pandemic' (2020) 114 AJIL 765.

618 Jack L Goldsmith, 'Review of Harold Hongju Koh, The Trump Administration and International Law' (2019) 113 AJIL 408, 415; Bellinger (n 173) 21.

619 James FitzGerald, 'Trump says he would 'encourage' Russia to attack Nato allies who do not pay their bills' BBC from 11 January 2024 available at <https://www.bbc.com/news/world-us-canada-68266447>.

620 Alternative for Germany, 'Manifesto for Germany' available at <https://www.afd.de/grundsatzprogramm/#englisch> 15 ff.

621 Ibid 29.

622 The party polls high in the upcoming elections in three eastern states (Thuringia, Brandenburg and Saxony-Anhalt), Volker Witting and Jens Thurau, 'Germany's AfD: Euroskeptics turned far-right populists' DW from 11 March 2024 available at <https://www.dw.com/en/germanys-afd-euroskeptics-turned-far-right-populists/a-64607308>.

623 For the actors which might induce a backlash Madsen, Cebulak and Wiebusch (n 600) 207 f.

to the transfer of competences to the European Union.[624] This new 'scepticism' was subsequently also applied to international law.[625] In 2020, in the wake of a constitutional complaint initiated by a former AfD party leader, the court ruled on certain measures taken by the European Central Bank to preserve monetary stability and the subsequent decision of the European Court of Justice to uphold these measures.[626] The Constitutional Court declared the decision of the European Court of Justice to be manifestly flawed and inapplicable in Germany. As we will analyse below, it would, of course, be far-fetched to argue that populists have captured the highest German court. Members of the court, including the former president and 'reporting Justice'[627] in the ECB case, warned against the rise of populism.[628] However, the cases exemplify how populist movements try to use institutions to promote their agenda. Although to another degree than in the United States, a backlash against international (and European) law can be felt in Germany.

South Africa also experienced incidents of a populist backlash under the Zuma government, often relying on 'anti-Western and pan-African rhetoric'.[629] An example, mentioned above,[630] is the Zuma government's role in

624 *Judgment from 30 June 2009* (*Lissabon)* (n 233).

625 Often mentioned in this regard *Decision from 15 December 2016 (Treaty Override)* BVerfGE 141, 1 (German Federal Constitutional Court); Aust, 'Democratic Challenge' (n 130) 366.

626 *Judgment from 5 May 2020 (PSPP)* BVerfGE 154, 17 (German Federal Constitutional Court); on the judgment see Christian Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH?' (2020) 39 NVwZ 897 and Christian Calliess, 'Struggling About the Final Say in EU Law: The ECB Ruling of the German Federal Constitutional Court' Oxford Business Law Blog from 25 June 2020 available at <https://www.law.ox.ac.uk/business-law-blog/blog/2020/06/struggling-about-final-say-eu-law-ecb-ruling-german-federal>.

627 'Berichterstatter' – one judge is appointed reporting justice and plays an important role in the preparation of the judgment.

628 Andreas Voßkuhle, 'Demokratie und Populismus' (2018) 57 Der Staat 119.

629 Erik Voeten, 'Populism and Backlashes against International Courts' (2020) 18 Perspectives on Politics 407, 418; on the ANC and populism in general Gillian Hart, *Rethinking the South African crisis: Nationalism, populism, hegemony* (University of Georgia Press 2014) 189 ff; Henning Melber, 'Populism in Southern Africa under liberation movements as governments' (2018) 45 Review of African Political Economy 678; cf as well Jonathan Hyslop, 'Trumpism, Zumaism, and the fascist potential of authoritarian populism' (2020) 21 Safundi 264; naming Zuma as part of the populist 'attack' Tladi, 'Populism's Attack' (n 594) 379; on the inward looking constitutional populism of Zuma, the Zuma fraction (RET) and the EFF see Theunis Roux, 'Constitutional Populism in South Africa' in Martin Krygier, Adam Czarnota and Wojciech Sadurski (eds), *Anti-Constitutional Populism* (CUP 2022) 99.

630 Cf already Introduction, I. and Chapter 3, I., 1., c), bb).

weakening the Southern African Development Community's tribunal.[631] In many of its decisions, the tribunal had found that the Zimbabwean land redistribution programme violated the rights of white farmers and the Mugabe administration started to lobby against it. Giving in to that pressure, the SADC summit in 2014, including South Africa's President Jacob Zuma, decided to sign a protocol that removed the right of individuals to direct access. As well discussed above[632] was the decision of the Zuma administration in 2015 to allow Al-Bashir to leave South Africa despite an ICC arrest warrant. This incident led to the subsequent decision of the South African government to withdraw from the Rome Statute, which we have also analysed above.[633] Also Zuma was replaced as president by Cyril Ramaphosa in 2018, he remains influential and his newly founded party won 15 % in the 2024 elections.[634]

c) The impact of the populist backlash

The described events leave us with the question of how populism may influence the receptiveness towards the convergence factors in our three reference jurisdictions. The general success of the populist movement is subject to heavy debate.[635] In the United States, Joe Biden defeated Donald Trump in the 2020 presidential election. The new administration has

631 Madsen, Cebulak and Wiebusch (n 600) 197; Karen Alter, James T Gathii and Laurence Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 EJIL 294, 306 ff; Daniel Abebe and Tom Ginsburg, 'The Dejudicialization of International Politics?' (2019) 63 International Studies Quarterly 521, 526 ff.

632 Chapter 3, I., 4., c), bb), (1).

633 Chapter 3, I., 1., c), bb) and this Chapter, I., 3., b), bb); for the difficult relationship of South African governments with the ICC see also Lange, *Treaties in Parliaments and Courts* (n 217) 166 ff.

634 Barbara Plett Usher, Nomsa Maseko and Basillioh Rukanga, 'South Africa's Ramaphosa vows 'new era' at inauguration' BBC from 19 June 2024 available at <https://www.bbc.com/news/articles/c3gge414vk9o>.

635 Goldsmith (n 618); Koh (n 610); e.g., finding it premature of speaking of international law in the age of Trump Krieger and Nolte (n 61) 8; seeing the Trump policy as a prolonging of traditional US foreign policy 'on steroids' Tladi, 'Populism's Attack' (n 594) 381; sceptical that Trump's agenda will be revoked in full Jose E Alvarez, 'Biden's International Law Restoration' (2021) 53 New York University Journal of International Law and Politics 20.

pledged that 'America is back'[636] on the international plane. It re-joined the Paris Agreement, rescinded the withdrawal from the WHO,[637] and revived the commitment to NATO.[638] Nevertheless, populism in the form of 'Trumpism' is well and alive in the United States, and Trump himself will run for the 2024 election. Moreover, through the actions of Donald Trump, the United States lost credibility as a reliable sponsor of a liberal world order.[639] Likewise, the Biden administration has not reverted all of President Trump's foreign policy decisions, e.g., regarding China, Russia and Iran.[640] Nevertheless, the US under Biden returned to foster the cooperative aspects of the international order, at least amongst its allies.[641] The future trajectory of populism in the US will very much hinge on the outcome of the 2024 presidential elections.

In Germany, the populist AfD lost seats in the last general election and, at least in the middle run, will not form part of a federal government

636 Joe Biden, 'Remarks by President Biden on America's Place in the World – 4 February 2021' available at <https://perma.cc/RAB9-WP95>.

637 Kristen E Eichensehr, 'Contemporary Practice of the United States – Biden Administration Reengages with International Institutions and Agreements' (2021) 115 AJIL 323, 323.

638 Sheikh Abbas Bin Mohd, 'Globalisation and the Changing Concept of NATO: Role of NATO in Russia-Ukraine Crisis' (2022) 5 International Journal of Management and Humanities 683, 687; Joe Biden, 'Statement from President Joe Biden on NATO's 75th Anniversary' from 4 April 2024 available at <https://www.whitehouse.gov/briefing-room/statements-releases/2024/04/04/statement-from-president-joe-biden-on-natos-75th-anniversary/>.

639 However, the US even before Trump often chose to not become part of international regimes Alter (n 66) 9; Goldsmith (n 618) 411; stressing lost credibility Alvarez (n 635) 525.

640 Alvarez (n 635) 546; M Jashim Uddin and Raymond Kwun-Sun Lau, 'Rules-Based International Order and US Indo-Pacific Strategy: What Does It Mean for China's BRI?' (2023) 9 Journal of Liberty and International Affairs 386; Thomas J Schoenbaum, 'The Biden Administration's Trade Policy: Promise and Reality' (2023) 24 German Law Journal 102; on the problems to revive the JCPOA Suzanne Maloney, 'After the Iran Deal: A Plan B to Contain the Islamic Republic' (2023) 102 Foreign Affairs 142, which after Iran's attack on Israel on 13 April 2024 appear even worse; on the Russian War in Ukraine cf below Chapter 5, II.

641 Alvarez (n 635) 585 f; Frédéric Charillon, 'The United States from Trump to Biden: A Fragile Return to Multilateralism' in Auriane Guilbaud, Franck Petiteville and Frédéric Ramel (eds), *Crisis of Multilateralism? Challenges and Resilience* (Palgrave Macmillan 2023) 113, 123, 127 f; Lars Brozus and Naomi Shulman, 'Multilateral Cooperation in Times of Multiple Crises' (2022) 47 SWP Comment; Anna Dimitrova, 'Transatlantic Relations from Trump to Biden: Between Continuity and Change' (2022) 394 L'Europe en Formation 2; on 'decoupling' cf below Chapter 5, II.

coalition. Likewise unlikely is its participation in a state (*Länder*) government coalition.[642] It thus cannot induce a formal change in German foreign policy, which is outspokenly multilateralist.[643] Moreover, even though the Constitutional Court, in some decisions, showed a certain scepticism towards EU and international law, it cannot be argued that the court follows a general anti-international course stirred by a populist atmosphere. Just ten days after it decided that the ECB acted outside its competences, in another landmark decision, mentioned above,[644] it determined that German national intelligence legislation is unconstitutional as it failed to acknowledge that also foreigners on foreign soil are protected by German fundamental rights.[645] Likewise, in a widely debated decision on the German Climate Change Act, it stressed that certain provisions of the Basic Law entail a duty to 'international cooperation' to tackle climate change on a global level.[646]

The picture is also much more complex in South Africa. The decision to not arrest Al-Bashir led to a Supreme Court of Appeal judgment, which declared that the executive acted unconstitutionally.[647] Moreover, the decision may have not been driven by a neglect of the international order so much as by South Africa's ambition to maintain its role as a regional power in Africa and secure its ability to host African Union events.[648] The following decision to withdraw from the ICC without parliamentary approval

642 Even if the AfD wins the majority of seats in the upcoming elections in Thuringia, Brandenburg or Saxony-Anhalt it will probably find no coalition partner, the conservative CDU adopted an 'incompatibility declaration' available at <https://archiv.cdu.de/system/tdf/media/dokumente/cdu_deutschlands_unsere_haltung_zu_linkspartei_und_afd_0.pdf?file=1>.

643 Cf Federal Foreign Office, 'International cooperation in the 21st century: A Multilateralism for the People' available at <https://www.auswaertiges-amt.de/en/aussenpolitik/multilateralism-white-paper/2460318>; Olaf Scholz, 'Speech by Federal Chancellor at the 78th General Debate of the United Nations General Assembly New York' from 19 September 2023 available at <https://new-york-un.diplo.de/un-en/-/2618622>.

644 Cf above, this Chapter, I., 4., b) and II., 3., c).

645 *Judgment from 19 May 2020 (BND Telecommunications Surveillance)* BVerfGE 154, 152 (German Federal Constitutional Court); cf above, this Chapter I., 4., b).

646 *Decision from 24 March 2021 (Climate Change)* BVerfGE 157, 30 (German Federal Constitutional Court); on the judgment see Christian Calliess, 'Das „Klimaurteil" des Bundesverfassungsgerichts: „Versubjektivierung" des Art. 20a GG?' (2021) 32 ZUR 355.

647 *Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others (Bashir Case)* 2016 (3) SA 317 (SCA) (Supreme Court of Appeal).

648 Boehme (n 447) 52.

has also been declared unconstitutional,[649] and South Africa has revoked its withdrawal from the ICC.[650] A similar fate reached the governmental decision concerning the SADC tribunal. The Constitutional Court declared the executive participation in emasculating the court unconstitutional.[651] As a result, President Ramaphosa has officially withdrawn the South African signature from the protocol.[652] In the wake of the 2024 elections, he also decided not to form a coalition with the newly founded party of former President Zuma, which thus can not (directly) influence government policy.[653]

Thus, the populist backlash has suffered setbacks in all three countries, and its further development is hard to predict. In the US, it may foster the trend towards less openness towards international law and scepticism towards human rights and thus enlarge the influence of these divergence forces,[654] especially if Donald Trump wins the upcoming election in November 2024. Even though populism took a less firm grip on the policies of Germany and South Africa, it will continue to influence public debate in these countries. However, as of yet, populism did not succeed in permanently influencing the government (foreign)policy of our three reference countries and did not succeed in rewinding the general structure of international law towards a law of coordination.[655]

649 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 252).

650 However, ICC membership is still up to debate Eksteen, *Role of the highest courts* (n 428) 301 ff; Julian Borger, 'South Africa's president and ANC sow confusion over leaving ICC' The Guardian from 25 April 2023 available at <https://www.theguardian.com/world/2023/apr/25/south-africas-president-and-party-sow-confusion-over-leaving-icc>.

651 *Law Society of South Africa and others v President of the Republic of South Africa and others (Southern Africa Litigation Centre and another as amici curiae) (SADC Case)* (n 437).

652 Moses R Phooko and Mkhululi Nyathi, 'The revival of the SADC Tribunal by South African courts: A contextual analysis of the decision of the Constitutional Court of South Africa' (2019) 52 De Jure 415.

653 Plett Usher, Maseko and Rukanga (n 634).

654 Cf above, this Chapter, II., 3., b) and c).

655 Alter (n 66) 4; on the related question of 'decoupling' cf below Chapter 5, II.

III. Conclusion on the Dynamics of Deference

This chapter has argued that the interplay of convergence and divergence forces can explain the development of the level of judicial review in foreign affairs in our three reference countries. In particular, four trends have been identified which undermine the traditional position and push toward less deferential approaches. The first factor is globalization, which challenges the idea of a territorially closed nation-state. With an interconnected world economy and high individual mobility, the number of cases entailing transnational components rises. The sheer number of litigations stands in the way of case-by-case assessments by the executive. Moreover, in certain areas, governments realized that court decisions might be more convenient than executive interference. The changed structure of international law contributes to that development. Its emphasis on cooperation lowers the risk of existential international frictions caused by judicial decisions in foreign affairs. Moreover, transnational cooperation of companies and individuals contributes to the understanding that the state is not only speaking with 'one voice' on the international plane. Finally, globalization also fostered a global legal dialogue encompassing various fields, including foreign relations law. With more than one forum open to litigants, courts in different countries may have to deal with the same case and necessarily interact. In other cases, courts dealing with similar problems cross-reference each other and thus contribute to exchanging ideas. Although not leading to simple 'transplants' or uniformity, the global legal dialogue acts as a catalyst for convergence.

A second factor closely related to globalization is the stronger entanglement between domestic and international law. The latter expanded in scope and now regulates more and more areas that were formerly purely domestic affairs. National legal systems also changed their interaction with international law and have become increasingly 'permeable'. This challenges assumptions of the traditional position, which presupposes a clear distinction between the internal and external sphere. Moreover, international law has become more sophisticated and largely codified in areas traditionally regulated by foreign relations law domestically. The growing demand for specific standards and procedures contributes to a homogenization of foreign relations law.

As a third trend, parliaments have become more and more involved in the conduct of foreign affairs. This directly challenges the traditional executive monopoly in foreign affairs. Especially in Germany and South

Africa, the legislature's competences in treaty-making and the deployment of military forces increased. In the US, Congress always had a strong influence in treaty-making and concerning declarations of war but was often circumvented. Here procedural mechanisms were introduced to strengthen its role. The more prominent involvement of the legislative branch, especially in South Africa and Germany, strengthened the judicial role through cases in which the courts had to delineate the competences of both branches. Although to a lesser degree, the US Supreme Court has been drawn into disputes over foreign affairs competences as well.

Finally, the relationship between the state and the individual changed considerably. Traditionally, individual rights were perceived as related to the domestic sphere and thus could not conflict with foreign affairs. With the growing ambit of domestic constitutional and international human rights, individuals now often invoke their entitlements to fend off deferential claims of the executive. The room for 'legal black holes' is thus shrinking.

The receptiveness towards these four general trends is influenced by certain 'divergence forces' that hinder or facilitate the turn towards more judicial review. A first factor is the position within the international system. It has been shown that historically the national importance of a foreign affairs decision contributed to its deferential treatment by the judicial branch. It has been argued that, even today, the US's position as a very active player on the international plane contributes to a heightened judicial restraint of its courts. In contrast, Germany and South Africa, as strong proponents of a 'norm-based international order,' may have a particular interest in displaying an international law abiding executive.

Another factor that leads to diverging approaches is the constitutional design of our three reference countries. Three features have been identified as strengthening or weakening judicial review. Presidential systems like the US endow the executive with an independent democratic legitimacy vis-à-vis the legislative branch, and courts thus appear less inclined to challenge their decisions. Moreover, a constitutional court system with a clear mandate for judicial review like in Germany and South Africa facilitates interference by courts. Finally, the newer constitutions of these two countries could already account for the changing international environment, whereas adaption in the US is de facto only possible by constitutional interpretation and thus is relatively slow. The constitutional design in Germany and South Africa thus appears to facilitate judicial review in foreign affairs.

Additionally, historic experience sets apart our three reference countries. In Germany, during the 19th century, statutes that strengthened the executive's influence in foreign affairs decisions were heavily opposed by academics. This opposition and the development of a technical understanding of the law facilitated the courts' engagement in foreign affairs decisions. In Germany and South Africa, the experience of an authoritarian regime and international isolation also led to the wish for reintegration within the international community. Both countries' constitutions thus entail provisions and principles that contribute to the interaction of their domestic legal systems with the international sphere. On the other hand, in the United States, the relationship between international and domestic law is much more contentious. In particular, the orginalist school of constitutional interpretation and the vital force of counter-majoritarian arguments hamper the openness towards international law. The experience of authoritarian regimes in which gruesome human rights violations were committed also led to a strong focus on constitutional and international human rights in Germany and South Africa. This shared understanding contributed strongly to applying individual rights in foreign affairs and fostered domestic and international law's entanglement. In the United States, constitutional protection of individual rights also expanded, but, especially during the Cold War, it was mainly unconnected to the international human rights development. Individual litigants can thus not profit to the same extent from the additional layer of individual rights protection.

Finally, the different impact of populism in our three reference jurisdictions has been analysed concerning its possible effect on deference. It has been shown that populism in the form prevalent in our three reference jurisdictions, due to its general anti-internationalist stance, mitigates the effect of the convergence factors. All three countries have been exposed to populist movements, with the US most directly affected during the Trump presidency. On the other hand, populism itself suffered some setbacks and is currently not directly influencing the government policy in the three countries and likewise did not succeed in rewinding the general structure of international law. It will likely remain influential, especially in the US, and thus potentially weaken the receptiveness towards the convergence forces.

In general, the diverging factors in the United States largely hamper the effect of the convergence forces and act as roadblocks. On the other hand, in Germany and South Africa, they enlarge the receptiveness for the general trend toward more judicial review in foreign affairs. Notwithstanding the divergence forces, it is submitted that the convergence factors led to a mate-

rial recalibration of the executive-judicial relationship in our three reference jurisdictions. They undermined many basic assumptions of the traditional position and gave rise to a new modern understanding of judicial review in foreign affairs, which will be the subject of our next chapter.