Summary of Findings

1. The power of the executive to conduct foreign affairs developed out of the royal prerogatives of the monarch. This strong historical role creates tensions with the need for judicial review in the modern constitutional state. Traditionally, judicial restraint – 'deference' – was awarded to the executive branch in these situations, a notion that courts no longer appear to accept unchallenged. Hence, courts in democratic countries with different judicial systems and on different continents struggle to find the right balance between leeway for the executive to conduct foreign affairs and judicial oversight.
2. The idea of deference is part of a larger conceptualization of foreign affairs as something special, which we refer to as the 'traditional position'. It includes three main traits: (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. The last trait describes the notion of deference itself. The roots of this traditional understanding of foreign affairs can be traced to modern political philosophy. Thomas Hobbes introduced the idea that 'internal' and 'foreign' matters are different, as only the latter sphere is pacified through the creation of a sovereign. Building on Hobbes' ideas, John Locke contributed the second and third notion with his functional separation of the 'executive power' dealing with internal matters and likewise exercising the 'federative power' dealing with foreign affairs, but unshackled by legal constraints. This differentiation was refined by Charles Montesquieu, who also differentiated between the executive acting internally and in foreign affairs.
3. All three reference jurisdictions adopted the traditional position, albeit at different times and to different degrees. South African law was at first strongly influenced by English law. In Great Britain, Blackstone linked the conduct of foreign affairs with the 'crown prerogatives' of the monarch. Victorian scholars and judges developed the idea that the courts should restrain themselves in cases involving foreign affairs. By the end of the 19th century, these ideas became solidified as the act of state doctrine and were equally applied in South Africa, even as it

gained increasing independence from the United Kingdom. Constitutional changes during the apartheid regime left the role of the executive in foreign affairs and the idea of deference untouched. The situation under the new democratic constitution is debated, with provisions declaring the old law applicable as long as it is in accordance with the new constitution.

4. In the United States, the framers consciously deviated from the British approach and distributed foreign affairs powers between the legislative and the executive branch. Nevertheless, post-constitutional writings of Alexander Hamilton started to reinterpret the foreign affairs provisions of the US Constitution, including ideas of executive dominance and deference. This also found entrance in US Supreme Court jurisprudence, and as early as *Marbury v Madison*, the court acknowledged that foreign affairs frequently pose 'political questions' not apt for judicial review. However, these cases were defined rather narrowly until a line of cases in the 1930s, decided under the auspices of Chief Justice Sutherland (referred to as Sutherland Revolution), firmly rooted the traditional position within US constitutional thought.
5. In Germany, the traditional position found reflection in the ideas of Hegel, who, as with authors in the Anglo-American tradition, saw foreign affairs as part of the monarch's competence and not subject to the regular laws of the state. This position became dominant in the German states, including Prussia, where legislation and a special competence court safeguarded the executive's role in foreign affairs. Under the Bismarck Constitution, the executive lead in foreign affairs was enshrined in constitutional provisions, and leading scholars acknowledged judicial restraint in the area. Although the Weimar Constitution saw a more substantial involvement of the legislature in foreign affairs, the executive retained its dominant role, and scholars continued to acknowledge judicial deference. The traditional position was still influential in the early days of the Basic Law, when the Constitutional Court, in various decisions, started to chip away at strongly deferential ideas.
6. The notion of deference as a part of the traditional position can be broken down into four more narrowly defined concepts. The first concept comprises doctrines of procedural non-reviewability, which reject judicial review of a case for 'technical' reasons. In US law, the dominant doctrine in this regard is the common law rules of 'standing' demanding a personal injury. Often, foreign affairs decisions will not

sufficiently affect an individual to satisfy standing requirements. Moreover, standing rules are strictly applied also to legislative challenges of executive acts and de facto block Congress from initiating judicial review in foreign affairs cases. In Germany, the concept of *Befugnis* similarly requires that an individual's 'subjective rights' are at least threatened to initiate judicial review. In contrast to the US, the legislative branch can use special constitutional procedures to hold the executive to account, to a certain extent, including in foreign affairs cases. In South Africa, the common law rules of standing are applied as well. However, in the wake of the constitutional change, the hurdles to initiating judicial review have been considerably lowered, and the courts adopted a very generous approach. In contrast to the US and Germany, in South Africa far fewer cases are prevented from reaching the courts through procedural non-reviewability.

7. The second set of concepts developed by the courts to accommodate the notion of deference includes doctrines of substantive non-reviewability, which reject judicial review based on the subject matter of a case. In the US, such a concept in the form of the political question doctrine is frequently applied by lower courts but has fallen into disuse by the Supreme Court. In Germany, in the early days of the Basic Law, a similar doctrine in the form of *justizfreie Hoheitsakte* was invoked by the executive and casually applied by courts but was later declared incompatible with the Basic Law by the Constitutional Court. In South Africa, the act of state doctrine served a similar purpose. It has been part of older South African constitutions, but its current status is subject to debate.
8. A third manifestation of the notion of deference is doctrines of conclusiveness. They bind the court concerning a particular executive determination but do not prevent judicial review of a case as such. US courts accept instances of 'executive-law-making' in at least some areas of foreign relations law and, in some instances, treat factual assessments as binding. In Germany, the concept of conclusiveness, like the concept of substantive non-reviewability, has been found incompatible with the Basic Law. However, concerning factual determinations, the courts award a large area of discretion, almost tantamount to conclusiveness, to the executive. South Africa historically applied the English certification doctrine, which in certain cases substitutes the executive's factual determination for the court's independent determination. Its

current status, like the status of the act of state doctrine, is subject to debate.

9. A last major principle developed to give way to the executive in foreign affairs is doctrines of discretion. The executive suggestion is given weight, without being controlling. In contrast to doctrines of conclusiveness, the courts retain their freedom to object to the executive assessment. In the US, the concept is frequently applied as 'deference' (in the narrow sense) to legal and factual questions alike, even though the exact scope of the area of discretion is intensely debated. In Germany, an area of discretion is also given to the executive. In the face of the non-availability of doctrines of substantial non-reviewability and conclusiveness, this form of deference is of paramount importance within the German legal system. It has frequently been applied to factual determinations and more hesitantly concerning legal questions. South African courts, especially in more recent case law, in light of the uncertainty concerning acts of state and the certification doctrine, have also started to rely more strongly on discretion doctrines.
10. The four manifestations of the notion of deference can be placed on a scale reaching from strong forms of deference (procedural or substantial non-reviewability) to moderate forms (doctrines of conclusiveness) to mild forms (doctrines of discretion). The application of these doctrines or no deference doctrine at all ('de novo' review) can serve as an indicator of how the application of deference has developed.
11. Concerning treaty interpretation, until the end of the 19th century, US courts hardly applied deference doctrines. This only changed with the beginning of the 20th century, especially in the wake of the Sutherland Revolution, when an area of discretion for the executive was established in treaty interpretation. Within the second half of the 20th century, the exact degree of discretion was intensely debated, but the scale appears to have tipped towards smaller areas of discretion for the executive in recent case law. In Prussia, as the most influential German state, executive treaty interpretations were treated as conclusive by the beginning of the 19th century. This executive grip was gradually reduced over the century, and the courts of the Bismarck and Weimar periods rarely took into account the executive's position. This trend continued under contemporary German law. In contrast to factual determinations, the Constitutional Court has been hesitant to acknowledge an area of discretion for treaty interpretations. For most of the 20th century, South Africa, following English law, only allowed

the executive to conclusively certify on the status of a treaty, excluding its interpretation. Under contemporary South African law, executive influence has been cut back even further, and the courts, in their more recent case law, appear to hardly consider the executive's position.

12. In cases involving the recognition of states and governments, since the early 19th century, the US courts have treated executive determinations as conclusive with reference to Article 2 of the US Constitution. By the end of the 19th century, scholars held executive decisions concerning recognition to be binding in Germany as well. However, courts began to decide cases involving recognition questions more and more independently by the beginning of the 20th century. The status under contemporary law appears to be unsettled. In some cases, the courts have awarded an area of discretion to the executive; in others, they have decided independently. In South Africa, during most of the 20th century, recognition decisions were treated as conclusive as falling under the certification doctrine. Contemporary South African courts have been hesitant to reiterate this approach, and statutory and constitutional provisions indicate that the executive's decision will no longer be treated as conclusive but only awarded an area of discretion.
13. Regarding state immunity, US courts during the 19th century gave no special consideration to the executive's position. Only in the early 20th century did judges start to award more and more weight to the executive's view and finally, again in the wake of the Sutherland Revolution, began to treat executive assessments as conclusive. In the 1970s, with the enactment of the FSIA, the courts were given back their independent role of deciding on state immunity. In Prussia, during the first half of the 19th century, the executive had a conclusive influence on the question of sovereign immunity. This influence gradually diminished in German law around the turn of the century. Under the Basic Law, the courts decide independently whether or not a state enjoys immunity. In South Africa, through most of the 20th century, the certification doctrine could be used by the executive to determine the status entitling immunity, but not the question of immunity as such. Under contemporary South African law, judicial independence has increased further, and in recent case law, the executive has been granted very little influence.
14. In cases concerning foreign official immunity, the US applied no particular deference doctrine throughout the 19th century. Only in the first half of the 20th century and with the turn towards conclusiveness

in state immunity cases did the courts sporadically allow conclusive influence in foreign official immunity decisions. The enactment of the FSIA and the re-established independence of the courts in state immunity cases led to uncertainty concerning the executive influence in foreign official immunity cases. Some courts treat the executive's view as conclusive, while others only award a margin of discretion, at least concerning conduct-based immunity. In Prussia, by the beginning of the 19th century, the executive could conclusively determine foreign official immunity. This influence gradually waned during the Bismarck and Weimar constitutions. Under contemporary German law, the courts decide independently on foreign official immunity but grant an area of discretion concerning the facts that may entitle to immunity. In South Africa, statutory law enacted in the 1950s gave the executive the power to conclusively settle questions of foreign official immunity. This statutory framework was gradually changed towards less deference. Under contemporary South African law, the courts in their case law show little special consideration for the executive's position.

15. In cases concerning diplomatic protection, the US courts during the 19th century applied a doctrine of procedurally non-reviewability. This non-reviewability was based on substantive considerations in the 20th century and remains so until today. In Germany, the Bismarck and Weimar constitutions explicitly entailed a right to diplomatic protection, which was, however, procedurally non-reviewable. Only under the Basic Law did the courts decide to review these cases but awarded an area of discretion to the executive if and how to exercise diplomatic protection. Likewise, in South Africa, diplomatic protection was treated as non-reviewable during most of the 20th century. Contemporary South African law, similar to German and English law, now allows for the review of diplomatic protection but grants a (large) area of discretion to the executive.
16. Our analysis has revealed three more general problems in the contemporary application of deference in all three countries. In South Africa, the unclear fate of the act of state doctrine created large uncertainty concerning the availability of doctrines of substantive non-reviewability and conclusiveness. It has been argued that the courts, especially in their recent case law, have discarded these doctrines in favour of an area of discretion approach and should continue to do so. In Germany, in the absence of doctrines of substantive non-reviewability

and conclusiveness, doctrines of discretion are applied frequently but lack a coherent framework. Especially contentious is their availability concerning legal questions, and it has been argued that an area of discretion should be available in these cases as well. Within contemporary US law, the usage of doctrines of conclusiveness concerning questions of law causes friction, especially in areas where the courts have (re)gained the competence to decide on related issues. It has been argued that the use of these doctrines should be limited to areas of fact.

17. Moreover, the analysis revealed a general demise of strong forms of deference, a stronger trend in Germany and South Africa than in the United States. The usage of weaker deference doctrines can be attributed to certain convergence forces, which can be extrapolated from the analysed groups of cases. These factors undermine many premises of the traditional position and hence the notion of deference. Likewise, the different development in the three reference jurisdictions can be traced to divergence factors influencing the receptiveness towards the convergence trend.
18. The first factor pushing toward less deference is globalization. Through the deterritorialization of the state and its economy, cases involving 'foreign' elements became increasingly common. Strong deferential approaches proved burdensome and inflexible in dealing with the growing number and complexity of cases. In addition, the changing structure of the international system from a law of coexistence to a law of cooperation encourages interdependence and discourages the use of force. Thus, the danger of a domestic court decision in foreign affairs causing serious international friction decreased considerably. Moreover, the emergence of a global legal dialogue fosters cross-references by courts and creates 'harmonization networks' which act as catalysts for the convergence trend.
19. A second convergence factor is the growing entanglement between international and domestic law. Contrary to the traditional view, domestic legal systems are not sealed off from other domestic and international legal systems but have become increasingly intertwined and permeable. With this, the distinction between domestic and foreign matters has become blurry, and courts have lost their marker as to when to defer to executive assessments. Moreover, international law has become increasingly codified in areas previously strongly determined by domestic foreign relations law and now frequently includes expectations concerning its domestic implementation. Thus, foreign

relations law now more often directly refers to international law to synchronize both legal spheres. Moreover, due to the codification process, domestic legal systems have a common point of reference which induces further convergence.

20. As a third factor, the changing role of parliaments in foreign affairs contributes to the less deferential trend. The traditional position perceives foreign affairs as an executive domain, and in our three reference jurisdictions, parliament was largely excluded from this area by the beginning of the 20th century. However, in Germany and South Africa, the legislative branch's role changed significantly, especially concerning its involvement in treaty-making and the deployment of military forces. A (weaker) trend toward parliamentarization of foreign affairs can also be noted in the United States. This trend has had major effects on the role of the judiciary, which will often be drawn into competence disputes of the other two branches as a neutral umpire, and thus, especially in Germany and South Africa, the judiciary has increased in profile as a player in the foreign affairs constitution.
21. The last factor pushing towards less deference is the changed relationship between the state and the individual. Traditionally, individual constitutional guarantees were perceived as limited to the domestic sphere and thus could not conflict with the role of the executive in foreign affairs. This was challenged with the transmission of individual rights to the international sphere as human rights, where they contributed to many of the other convergence trends. Moreover, in many cases, especially in Germany and South Africa, the effects of strengthened constitutional rights, in combination with international human rights, were the premiere reason not to apply deference doctrines. The proliferation of individual rights has thus greatly contributed to the closing of legal black holes and has increased judicial review in foreign affairs.
22. The different receptiveness toward the convergence forces can be attributed to divergence factors that accelerate or hinder the influence of the general trend on the domestic system. The first factor is the position within the international system. Such an external factor may not have a basis in positive law, but it nevertheless determines the political climate in which the courts operate and probably influences their decisions. In the past, this factor likely contributed to the deferential 'Sutherland Revolution' in the US on the eve of the Second World War, which coincided with the end of American isolationism. Even today,

the US's position as a very active player on the international plane will probably induce its courts to grant the executive greater leverage to act. Conversely, Germany and South Africa are much more focused on a norm-based international order, and their courts may thus be less cautious about interfering or may even be inclined to set an example of an international law-abiding executive.

23. A second factor leading to different approaches is the constitutional framework of our three reference jurisdictions. In the US, as a presidential system, the executive is endowed with direct democratic legitimacy, strengthening its role vis-à-vis the legislative and judicial branches. Moreover, in contrast to Germany and South Africa, the US has no constitutional court, but the Supreme Court itself had to establish its review competence. Hence, in the US, the counter-majoritarian argument is much more influential, and the courts are wary of engaging in constitutional disputes between the executive and legislative branches, including in foreign affairs cases. Finally, the general constitutional framework of the US has remained unchanged since the 18th century. In contrast, Germany and South Africa, with their 20th century constitutions, could accommodate the changing international environment and the judiciary's role in it.
24. As a third factor, distinct historical experiences strongly influenced the receptiveness towards the convergence forces. At the beginning of the 19th century, when the deferential certification doctrine developed in recognition cases in Anglo-American states, Germany was neither a unified country nor had the constitutionalization of its states reached the level of entrenchment of the United States. Scholars thus heavily opposed the doctrine as executive overreach. In the US, the judiciary's role was already established, and courts found it easier to grant leeway to the executive. Moreover, in the US, in contrast to Germany, the question of recognition was of great importance. The doctrine thus never reached the same level of acceptance in Germany and could not serve as a basis for further deferential approaches.
25. In addition, the experience of an authoritarian past sets apart developments in Germany and South Africa from the United States. In both countries, the wish for reintegration into the international community found expression in constitutional provisions and principles which stress the openness and friendliness toward international law. A comparable trend did not exist in the United States, and the strong 'originalist school' induced many academics and judges to be sceptical

of international and comparative influences. A similar picture is provided in the area of human rights. Due to the authoritarian experience, Germany and South Africa focus on individual constitutional protections, which are strongly connected to international human rights. In contrast, in the US, the civil rights revolution was largely unconnected to international law, and even today, the US is cautious about joining major human rights treaties. Thus, convergence factors like the entanglement of domestic and international law could take a much stronger hold in Germany and South Africa.

26. The fourth and final factor which has contributed and in the future may continue to contribute to different approaches is the influence of populism. Populism, in the form in which it is prevalent in our three reference jurisdictions, is essentially anti-internationalist and thus runs counter to many of the convergence forces. All three countries, especially the United States during the Trump presidency, experienced populist movements. However, in all three countries, populism was also met by counter-trends. It appears unlikely that populism will lead to a rewind of the general cooperative structure of the international system. Nevertheless, it will likely remain influential, especially in the United States, and decrease its receptiveness towards the convergence factors.
27. The convergence factors, far from having only a temporary effect, led to the emergence of a new understanding of judicial review in foreign affairs. As a counter-part to the traditional position, a modern position evolved. This modern position calls into question the claims made by traditionalists: (1) foreign affairs are not (essentially) different from domestic matters, (2) the executive is not the sole branch equipped to deal with foreign affairs, and (3) judicial review in this area should not be (categorically) restricted. The traditional and modern positions provide two templates to think about foreign relations law. Whereas courts and scholars have explicitly referred to the traditional position, the modern position has not been very articulated and yet can help explain many changes in the jurisprudence of the courts. Although the modern position developed historically later, there is no necessarily linear development towards the modern position.
28. The Russian War against Ukraine poses a serious challenge to the international order and the factors which brought about the modern position. The likely effects are difficult to assess in light of the ongoing conflict. The war could lead to a 'de-globalization' or 'decoupling',

especially if sanctions spill over to relations between the West and China, and also openly discards the prohibition of the use of force. Also, the trend of legislative involvement in the deployment of military forces may be reversed, and the applicability of human rights, at least in Russia, has been seriously weakened. On the other hand, war-related sanctions are momentarily addressed at Russia alone, Western countries decided in favour of 'de-risking' as a softer variant of 'de-coupling' and in any case economic integration will continue between Western countries. The war has been condemned by an overwhelming majority in the UN General Assembly and the prohibition of the use of force thus reaffirmed. As of yet, a rewind of parliamentary involvement in the deployment of military forces has not taken place, and in the area of human rights, pressure is exerted through various international channels to induce Russian compliance. It is unlikely that the war will lead to a complete rewind of the international system, but it will shape and also be shaped by its structure. The factors which brought about the modern position may be weakened, but the latter emerged as a template to think about foreign relations law and will not vanish, even when the forces which led to its inception are slowed down.

29. Simple references by courts to the executive's traditional role concealed that many of its basic presumptions have changed. Weaker forms of deference, especially doctrines of discretion, are better suited to deal with the new international environment. They can create a middle ground between independent judicial review and judicial abstention and provide greater flexibility. Factors like institutional competence, availability of judicial standards, need for uniformity, and speed can be used to determine the level of review apt in a particular case. The courts should assess these factors from case to case and develop indicators instead of alluding to a traditional executive role. Applying an open and transparent discretionary approach will add legitimacy to courts' decisions in dealing with the challenges of the 21st century.