The Role of the Highest Courts of the United States of America and South Africa, and the European Court of Justice in Foreign Affairs

Riaan Eksteen

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To my long-suffering and patient wife, Ria, who has given her love in abundance. That sustained me. She sacrificed a lot by being alone during many days and nights while I was completing my thesis and compiling this book.

To my three sons, Riaan Jr., François and Louis, with their wives, and my nine grandchildren for their endless encouragement and support.

Foreword

In this book, Dr. Riaan Eksteen persuasively demonstrates that the judiciary has incontrovertibly had an impact on the foreign policy behaviour of states, as well as on the policy-makers responsible for foreign policy decision-making. That makes this book a valuable and innovative contribution to foreign policy analysis.

Foreign policy analysis is an eclectic field of inquiry, and scholars have sought to understand the role of a broad array of actors in a variety of foreign policy domains. There are numerous studies on the role of the executive and legislative branches of government, as well as quite a few studies that have sought to understand the role of leaders, advisors and the bureaucracy in foreign policy decision-making. However, studies on the role of the judiciary have been largely absent from the field.

Although there are studies that discuss law or legal principles, these generally focus on the influence of international law and norms on domestic politics or foreign policy obligations. In other words, such studies focus on external influences on foreign policy. Dr. Eksteen's project asks a very different question: his work probes the role of the state's *domestic judiciary*—and specifically its high courts—on its foreign policy. This sets Dr. Eksteen's study apart and makes this book so valuable. Scholarship in foreign policy analysis has been largely silent on the role of the judiciary. In the study of foreign policy, the judiciary has essentially been the forgotten branch of government.

Dr. Eksteen's book begins to rectify this. He correctly argues that the role of the judiciary in foreign policy is largely uncharted terrain. As he begins to set out his course through this terrain, Dr. Eksteen proceeds to show why, how and to what effect the judiciary has played a role in foreign affairs. In doing so, he takes an important step in opening up a new area of inquiry. I fully expect that other scholars will seek to build on this study—this book—with their own inquiries into the role of the high courts in foreign-policy making.

The core of Dr. Eksteen's book is formed by the close examination of a group of precedent-setting legal decisions, not just from a single judiciary but from the high courts of two countries—the USA and South Africa—and the European Union. Dr. Eksteen's examination, which is grounded in both foreign policy analysis and law, starts by delving into decisions made by the US Supreme Court. Given that this court has been in existence longer than the other courts studied in this book, the US Supreme Court has the longest historical track record. Among the many cases, it has decided across its history are a number that have had important implications for the country's foreign policy. Dr. Eksteen subsequently moves on to discuss cases decided by "younger" courts. The book includes cases decided by the two high courts in South Africa—the Constitutional Court and Supreme Court of Appeal—and ends with an investigation of cases before the European Union's European Court of Justice. The selection of the two countries and the European Union allows for worthwhile comparisons across different legal systems, as well as courts with very different histories.

It should be evident that the comparative nature of the book is important: it allows Dr. Eksteen to not only compare the judicial decisions within each setting across time, but also allows him to draw comparisons between the different courts and their national/regional settings. This comparative element enriches the study in important ways and allows Dr. Eksteen to reach nuanced conclusions.

Across the chapters of the book, it is clear that Dr. Eksteen has a clear understanding of the chosen case study methodology, which is consistently applied. He provides an appropriate justification for the selection of the USA, South Africa and the European Union, as well as for the specific court cases, which are all meticulously researched. In addition to discussing the legal cases, Dr. Eksteen provides sufficient background to the settings and the cases to help the reader have a well-rounded understanding of each decision within its proper historical context.

Overall, this book represents a valuable addition to the literature in foreign policy analysis and fills a gap in the literature that begs to be filled. As already mentioned, other branches of government have received ample attention in foreign policy analysis. Although there is good reason to study leaders and their advisors, as well as their relationships with the bureaucracy and the legislature, the judiciary clearly also has a role to play in either constraining or enabling specific actions in foreign policy. The analysis presented in this book is valuable in its own right, but also makes the case that the judiciary's impact on foreign policy is worthy of more scholarly attention than it has received to date.

This book represents an innovative study of a neglected actor in foreign policy analysis. It is a solid contribution to the literature in foreign policy analysis and the broader field of international relations. This study also begs to be emulated.

Dr. Eksteen's insightful book is interesting in its own right: it demonstrates that the judiciary *does* influence foreign policy making and should not be overlooked. Hence, the book is worth reading for the insights it offers into the role of the high

courts in foreign policy making. That said, it also opens up an area of inquiry that has been long—too long?—neglected. Foreign policy analysis, as a field of inquiry, would do well to pay more—and more serious—attention to the role of the judiciary in foreign policy.

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Preface

This book is based on the thesis that the author successfully submitted to the University of Johannesburg, South Africa, in fulfilment of the requirements for the *D Litt et Phil* degree in Politics. The degree was awarded on 16 October 2018.

The significance of this book lies in the novel contribution it makes to understanding the judiciary's role in foreign affairs based on a comprehensive case study approach. This created the opportunity to explore in depth the way the three judiciaries studied handled issues with implications for the foreign affairs of the USA, South Africa and the European Union and to prove that judiciaries deserve to be included as a state-related actor in foreign policy analysis (FPA).

It is acknowledged that the subject of the judiciary's involvement and impact on foreign policy is under-researched, and thus, a greater interest has emerged in the influence of various domestic dynamics on foreign policy decision-making. In addition, the book identifies the judiciary as largely uncharted terrain in terms of its impact on foreign affairs.

FPA typically does not address the impact of the judiciary on foreign affairs. Consequently, the field of judicial politics does not focus on the foreign policy impacts of court decisions in a systematic way. That identified vacuum is now filled with this book. It has been done in an authoritative and persuasive way. It is not only instructive, but also makes a contribution to libraries' holdings of publications on foreign affairs. As far as can be established, this is the first such comprehensive and systematic inquiry into the foreign policy role of the four courts.

Important aspects relating to the US Constitution are put into a historical perspective. Similarly, facts about the two South African courts and the ECJ are conveyed in an orderly fashion—contributing to a better understanding of these courts, which are not that well known and understood.

A wide range of non-governmental organisations involved in research and advocacy in areas such as human rights, foreign relations and national politics, and EU issues will also find the book a very useful source of information. Non-students in foreign affairs may well be educated and informed about the three court systems in a way that is not too legalised and easy to understand and appreciated. Even these readers will get an educational experience about issues that are still current and

constantly in the news. These are also placed in a context that is easily understood. Suffice it to refer to Chap. 10 that deals with the ECJ in the context of Brexit. From its inception, the ECJ has been an unusual international forum for the EU. Its influence has become more apparent and contested. It has been hailed as the most powerful supranational court in world history. The court has already had a significant impact on the EU's foreign affairs. Over six decades, the ECJ has grown into a formidable force, so much so that it has not endeared itself to the UK. In the Brexit negotiations between the UK and the EU, the ECJ has become a major bone of contention—a red line for Prime Minister Theresa May.

The subject of this book has not been a static one. New points of view identified in selected case studies as germane to this study were accommodated. Information has been sourced and analysed on a continuous basis. It is an evolving subject, with new aspects constantly coming to the fore because of new rulings being delivered by the relevant courts devoted to court cases related to foreign affairs. Consequently, this book is not confined to developments in the distant past and commentary thereon. Care and notice of all developments taking place during the whole period of its preparation and completion have been taken into account. The position of the UK on its exit strategy from the EU is a prime example of the importance of attending to that issue on a continuous basis, especially given that the UK has had such an extraordinary preoccupation and inordinate obsession with the ECJ leading up to and after the referendum in June 2016. It underscores in no small way to what extent the ECJ is of consequence in foreign affairs. It is not that the UK has singled out a particular ruling to substantiate its abhorrence; instead, it has an overwhelming aversion to the court that has clouded its whole approach to finding a new and mutually accommodating relationship with the EU. The ECJ became a red line, and Prime Minister Theresa May forcefully ensured the country that the UK would never be subjected to the court again. When the Withdrawal Agreement was settled with the EU, that red line was very much blurred. Still, this study had to have a cut-off point. It was 31 December 2018. The UK is destined to leave the EU on 29 March 2019.

Attention should be given to the book's didactic elements—their importance, reasons for their use and methodology. The first thing to emphasise is the research design and methodology. The role of the judiciary in foreign affairs is investigated in this study by way of qualitative research, or systematic enquiry, whereby the wide range of published material on FPA and the three judiciaries, especially SCOTUS and the ECJ, is interpreted. Hesse-Biber and Leavy call it a knowledge-building process—an intellectual, creative and rigorous craft that can only be learnt and developed through practice.[1] With its well-established modes of enquiry, qualitative research was most appropriate in finding answers to the study's research question.[2] This approach is supported by the statement by Babbie and

[1] Hesse-Biber S, Leavy P (eds) (2011) The Practice of Qualitative Research, 2nd edn. Sage Publications, Inc., London, p. 4.

[2] Marshall C, Rossman GB (eds) (2016) Designing Qualitative Research, 6th edn. Sage Publications, London, p. 1.

Mouton that qualitative research focuses on cases studied and their "structural coherence with a larger context".[3]

Secondly, regarding the book's theoretical framework it is important to record that it is an interdisciplinary study, involving international relations and law, and having FPA as its point of departure. Consequently, FPA has presented the core theoretical framework for research. The relevant literature revealed that judicial institutions have been largely overlooked—basically neglected—in FPA. Hudson maintains that this methodology possesses the required tools to explore questions, such as the role of the judiciary in foreign affairs.[4] There is thus a need to look afresh at the main actor, the state, and its components, in the foreign policy decision-making unit in FPA and to consider the judiciary as a proper entity for inclusion in that unit as well because of its influence. With data collected and interpreted, the merits for that inclusion could be argued and the analytical framework adjusted.

The main structures in that framework include primarily qualitative research focusing on the identification of the research question and engaging in case study research; assessing historical material; interpreting accumulated material; and reaching a conclusion on the contribution of the study.

Thirdly, the qualitative research and the research question are of equal importance. Qualitative research is a process that attempts to arrive at a new understanding of the study's main topic and its numerous, diverse sub-topics.[5] Maxwell elaborates that this is to comprehend the meanings and perspectives so intertwined with that topic.[6]

This process starts with the formulation of the important research question—the backbone of this book. Babbie and Mouton explain that such a conceptual framework requires the aim of a study to be stated as well as the principles guiding it.[7] The question thus has to articulate what this study wants to achieve and know, as well as to fill the knowledge gap with new information and concepts. For Agee, it is critical that the question remains focused at all times.[8] Therefore, an overarching question must be clear, concise and brief.[9] It has to be formulated properly and unambiguously. This will assist in developing new, more specific questions as research progresses. Flick insists that it must be couched in concrete terms with the

[3] Babbie E, Mouton J (eds) (2003) The Practice of Social Research. Oxford University Press, p. 272.

[4] Hudson VM (2014) Foreign Policy Analysis: Classic and Contemporary Theory, 2nd edn. Rowman & Littlefield Publishers, Inc., Lanham, Maryland, pp. 30–31.

[5] Riviera D (2010) Handling Qualitative Data: A Review. The Qualitative Report, Vol. 15, No. 5, p. 1300.

[6] Maxwell JA (2013) Qualitative Research Design: An Interactive Design Approach, 3rd edn. Sage Publications, London, p. viii.

[7] *Supra* n. 3, p. 282.

[8] Agee J (2009) Developing qualitative research questions: a reflective process. International Journal of Qualitative Studies in Education. Vol. 22, No. 4, pp. 431–447, p. 446.

[9] Flick U (2009) An introduction to qualitative research, 4th edn. Sage Publications, London, p. 100.

aim of clarifying what the research must reveal.[10] This will ensure that all components of the framework are directly connected to it and in turn with each other.[11] Maxwell stresses the point that the research question must be constructed and reconstructed as the different components of the design unfold and their implications for one another are assessed.[12] It is vital that the qualitative question reflects the particularity of the study. This will guide the analysis of the researched material.[13] Agee concludes with the following on the critical role of questions in the research process:

> During the inquiry process, a researcher needs to see questions as tools for discovery as well as tools for clarity and focus. In the end, good qualitative questions are dynamic and multi-directional, drawing the reader into the research with a focus on a topic of significance.[14]

With the framework established, it is clear what is going on with the issues to be researched and what theories, principles and doctrines will guide the study. It is essential for the end product that the research has been done effectively and reliably.[15]

For this book, the research question has been formulated as follows: What is the role of the judiciary in foreign affairs?

According to Bogdan and Biklen, in methodological writing the term "qualitative data" is generally taken to encompass the rough materials researchers collect from the field they study.[16] Furthermore, it demonstrates how researchers make decisions along the way that impact on their research findings.[17] The overall research strategy for this study was to collect and analyse material on this book's topic so that a credible end product could be assured. The main guide for conducting the research was relevancy. The strategy relied on was qualitative assessments of written accounts—*i.e.* a literary study—owing to the specificity of the research subject and of the judicial and foreign affairs fields of enquiry.

Swakopmund, Namibia Riaan Eksteen

[10] Ibid., p. 98.

[11] *Supra* n. 6, p. 3.

[12] Ibid.

[13] *Supra* n. 8, pp. 441–442.

[14] Ibid., p. 446.

[15] *Supra* n. 5, p. 1302.

[16] Bogdan RC, Biklen SK (eds) (2006) Qualitative Research for Education: An Introduction to Theories and Methods, 5th edn. Pearson Education Group, Boston, p. 117.

[17] *Supra* n. 1, p. xiii.

Acknowledgements

The stimulus for this book has been my exposure to and never-ending interest in the US political scene. It started from my first days at the SA Embassy in Washington, DC, where I assumed duty on 1 March 1968. It resulted in my M.A. degree (Cum Laude) from the University of South Africa in March 1974 on the subject of the US Senate's role in foreign affairs.

During my 16-month submergence in pursuing the subject matter that first led to my doctoral thesis and has now resulted in this book, exceptional guidance was provided by Prof. Deon Geldenhuys, Department of Politics and International Relations, and Prof. Hennie Strydom, Department of Public Law, at the University of Johannesburg, and South African Research Chair in International Law.

I wish specially to convey my deepest appreciation to Prof. Marijke Breuning for graciously accepting my invitation to write the foreword, and for then honouring me by providing a thorough and generous overview of the book from her distinctive academic vantage point.

Encouragement came from several quarters. My mentor and friend of 55 years, Pik Botha—former South African Foreign Minister for 18 years, to whom I owe so much in various ways—never failed to inspire me during our lifetime friendship. My first lecturer in Political Science and later also my study leader for my M.A. degree, Dan Kriek, egged me on for many years—finally I succumbed. The constant interest shown by countless friends was most valuable, especially that of Frans Stroebel.

Throughout, expert assistance was given by Prof. Craig MacKenzie, who ensured that the text was grammatically up to a high professional standard. Natania du Plessis helped assiduously to keep the end result in a proper format.

Thanks must be bestowed on my Creator, who endowed me with a few qualities and some talents that enabled me to conclude both tasks and to answer the call that has always been uppermost in my mind to guide me to persevere—The Parable of the Talents in Matthew 25.

In the end, I came to appreciate the apt remark of Norbert Elias even more:

We all have to bear in mind the island of our knowledge in the sea of our ignorance.

About This Book

The purpose of this book is to investigate the role of the Supreme Court of the United States of America (SCOTUS), the two Appellate Courts of South Africa (Constitutional Court (CC) and the Supreme Court of Appeal (SCA)) and the European Court of Justice of the European Union (ECJ) in foreign affairs. The first two are of course constitutional democracies institutionalising the separation of powers between different branches of government and observing the rule of law. In all three cases, the courts mentioned are legally entitled to deal with matters related to foreign affairs. In order to examine the role of the four courts in practice, the study reviewed a vast number of judicial decisions, presentations and briefs addressed to the courts, scholarly writings, and various other relevant sources. The latter three courts do not have a history or track record in matters involving foreign affairs to the same extent as SCOTUS. The main focus has consequently been on this court, with a more incisive examination of its role in foreign affairs. The study presents essential material and analysis on foreign affairs by all four courts through their decisions, presentations and briefs to these courts, scholarly contributions and relevant publications. The book recognises the ECJ as the most powerful supra-national court in world history, with defined jurisdiction over Member States of the Union.

In this study, the author addresses a vastly neglected question in the scholarly domain of foreign policy analysis (FPA): What role does the judiciary play in the foreign-policy process of states? Courts are not formally authorised to formulate foreign policy, a task that states typically assign to the executive and to a lesser extent the legislature—or what the author calls the political branches of government. This long-standing and familiar distribution of functions has led to the presumption in the FPA literature that the judiciary does not merit serious consideration as a factor in the foreign policy process. The author records the current state of FPA in his literature review in Chaps. 1 and 2, which is dedicated to an overview of foreign policy analysis as a research tool.

Since SCOTUS has a long history of dealing with foreign policy issues and hence has generated a large volume of related documentation, the author devotes four chapters to this court. He traced the evolution of SCOTUS through four eras in

terms of its handling of matters concerned with US foreign policy. As the court continuously re-examined its role in this regard, SCOTUS developed into a powerful and bold constitutional adjudicator that did not shrink from judging (and often overturning) the foreign policy actions of the political branches in terms of constitutional provisions. The author illustrates very clearly that SCOTUS has become an important influencer of foreign policy by reviewing the decisions and actions of the foreign policy makers.

Because the two South African courts have by contrast dealt with relatively few foreign affairs cases, their role is examined in a single chapter. Still, the courts have already decided a number of benchmark cases in which human rights issues featured prominently. Their rulings in these hearings, the author concluded, have already left an indelible reminder that the judiciary will not be kept from adjudicating cases that may have implications for the country's foreign affairs.

The three chapters on the ECJ draw on a wealth of cases related to the foreign affairs of the EU. Known for its judicial activism, the court's jurisdiction has extended to areas such as human rights, monetary policy, immigration and citizenship. The pronouncements show that the ECJ is committed to guiding the EU in its foreign relations. It is especially with regard to human rights, which the court placed at the apex of the EU's edifice, that the ECJ has taken a forceful and uncompromising stand. The book's overall conclusion, based on the three judiciaries studied, is that the courts involved do not shy away from using their judicial power when dealing with cases relating to foreign affairs. As a result, the author argues that the executive has to bend to the judiciary.

Through in-depth and wide-ranging inquiry, the author has demonstrated conclusively that the judiciaries involved have assumed a definite role in the foreign policy processes of the USA, South Africa and the EU, respectively. This is where the book's original contribution to knowledge lies. It is, as far as the author could determine, the first such comprehensive and systematic inquiry into the foreign policy role of the four courts. With his findings, the author has thrown down the gauntlet to foreign policy analysts: they need to give due recognition to the role of the judiciary in the formulation and conduct of the foreign relations of the USA, South Africa and the EU and also take the study a step further by examining the same question in other democratic states.

The book consists of five parts with eleven chapters. Each chapter has its own Reference List and, in some instances, also Further Reading suggestions.

Part I

Chapter 1 introduces the book by providing a background, explaining the selection of case studies, defining the research problem and conducting a literature review. The key question of the work is defined as why, how and to what effect the judiciary is involved in foreign affairs.

Chapter 2 is devoted to foreign policy analysis as the appropriate research technique for this study and focuses on what the author defines as the state-centred

approach by FPA that has its focal point the two political branches of government. His critique that follows is aimed at this approach.

The bottom line is that the author has correctly identified a gap in the literature that is well worth exploring—the lack of recognition of the judiciary's role in foreign affairs is still noticeable in FPA literature. Among the domestic impacts on foreign policy, the judiciary has been largely ignored. And this matters in an environment where the boundary between domestic and international politics has become quite porous, as the author rightly notes. The chapter concludes that FPA has to move away from its state-centred orientation, which focuses on the two political branches of government and gives due recognition to the judiciary and its increasing relevance and influence in foreign affairs.

Part II

Chapters 3–6 deal with SCOTUS. This court is not charged explicitly by the Constitution with any responsibility in foreign affairs. It does, however, embody the crucial principles of the separation of powers and checks and balances. Together with the doctrine of judicial review that the court explicitly defined in 1803, SCOTUS is assured of being a formidable force in US society—and one no less in that country's foreign affairs from a very early stage. In the past 25 years, SCOTUS has dealt more and more with issues pertaining to foreign affairs. The result has been that the executive paid the price when SCOTUS started cutting the President down to constitutional size. Therefore, while SCOTUS may not formulate foreign policy, nor engage in relations with foreign entities, many judicial actions directly and indirectly affect foreign affairs. The point is thus not whether the judiciary has a role to play in foreign affairs, but rather how great its influence is. The stage has now been reached where the President can no longer merely assume that his actions —defined as constitutional overreach—will not be critically scrutinised and he himself not be beyond rebuke. The court has thus determined that the point has been reached that a President has to be called constitutionally to order when he has gone too far. The conclusion reached is that SCOTUS is a de facto element in US foreign affairs. SCOTUS does decide cases that affect the relationship of the USA with the rest of the world; and as the Justices decide these cases, they are doing as much as anyone to influence US foreign affairs. The court's pronouncements in an age of globalisation, international terror, economic turmoil and, now lately, also with the ever-growing international debate on immigration, and their consequential impact on the country's foreign affairs are not to be underestimated. With the decision on President Trump's travel ban, the court admitted what the President had underlined all along: the crux of his immigration actions has been national security. The decision gives credence to a statement that in the case of the USA, SCOTUS has now concretised its role in foreign affairs. Consequently, the stage is set for a greater involvement of SCOTUS in foreign affairs than before.

Chapter 3 provides a well-developed review of the role of the judiciary in the foreign affairs of the USA. It provides detailed background and overview of the judiciary's involvement in foreign affairs. The chapter is well researched and

appropriately structured. It focuses on the framing of the US Constitution with its foreign affairs and judicial content and their implications; judicial review and the various doctrines and principles applied by SCOTUS, such as deference to the executive; and important rulings up to 1952.

Chapter 4 gives a structured overview of legal decisions that had an impact on the powers of the US president. Especially important is the discussion of the Curtiss-Wright case, which expanded presidential power, and the subsequent seminal case of Youngstown, which contracted it in 1952 by delivering such a devastating rebuke to the President in foreign affairs in the midst of the Korean War. The remaining cases continue to constrain presidential power after 9/11. These cases differ in that they pertain to convictions of foreign nationals in the USA. However, they also directly relate to matters of national security and what Presidents can lawfully do in the name of national security. Full attention is given to the entry of human rights issues on the court's calendar.

This chapter is well developed and demonstrates that SCOTUS, after initially creating a precedent that helped expand the powers of the executive, later served to constrain those powers (and to make clear that the President needed to act within the parameters of the Constitution). Special focus is placed on presidential overreach.

It furthermore concentrates on the entry of human rights issues on the court's calendar; and the effects of a changing world with the advent of globalisation, war on terror and national security issues after 9/11, highlighting how the court began to curtail the President's exercise of security measures and the treatment of detainees at Guantánamo.

Chapter 5 explores in full aspects relating to the Alien Tort Statute (ATS) of 1789 and its impact on foreign policy. The discussion persuasively shows the intersection between the ATS and foreign affairs. The question is interesting: the chapter shows the debate on the reach of US courts (i.e. whether they have jurisdiction beyond the USA) as well as the (potential) implications of these decisions for foreign policy, including foreign economic policy.

Here, too, there seems to be a broadening of the use of ATS in one time period, followed by a narrowing of its applicability, at least in the view of the court, after 9/11. The author shows why this development makes sense. In the process, the chapter shows the intersection between court decisions and international diplomacy.

Overall, this chapter changes the frame somewhat (in comparison to the previous two chapters). Rather than court decisions that affect the President's power, this chapter discusses court cases that affect diplomacy and relations with other states.

Chapter 6 discusses recent cases with implications for foreign affairs. The author argues persuasively that one case of a person with dual citizenship and who is asking to have the place of birth affixed in his son's passport as "Jerusalem, Israel" actually has significant implications for US foreign policy. Moreover, the case is important for its implications for the political question doctrine, which specifies that the court cannot rule on explicitly political matters.

The chapter further provides interesting and useful information about the role of amicus curiae briefs.

The chapter concludes by demonstrating how judicial trust once placed in the executive has been replaced by distrust. The closing section of the chapter sums up the arguments of Chaps. 3–6 regarding the role of SCOTUS in matters related to US foreign affairs.

Part III

Chapter 7 helpfully outlines the basic structure of South Africa's highest courts (Constitutional Court (CC) and the Supreme Court of Appeal (SCA)), before discussing specific cases. The highest judicial authority in South Africa has not shied away from involving itself in issues that may have an impact on foreign affairs. These two courts have already decided benchmark cases with profound statements on human rights. The treatment of the South African judiciary must of necessity rely on a lot less material, since the current court structure has been in place for much shorter time than the court systems in the USA and the EU.

With a determined approach to human rights issues, their rulings have already left an indelible reminder that the judiciary will not be kept from adjudicating cases that may have implications for the country's foreign affairs. This chapter examines these two courts with their profound statements on human rights and the impact of their rulings on the country's foreign affairs. With its stern reprimands in these cases, the two courts have lived up to their role of upholding the rule of law in exemplary fashion. Their rulings carried another equally important message: the judiciary has an unmistakable role to play in foreign affairs. These cases support the author's conclusion that the South African courts have been willing to address questions related to matters of foreign policy. In doing so these two courts will not only hold the executive to the principles enshrined in the Constitution, but also keep the executive within constitutional limits. This they have done in several cases without fear or favour.

Part IV

From its inception, the ECJ has been an unusual international forum for the EU. Over the years, it has expanded its jurisdictional authority well beyond its original, narrow boundaries. Its influence has become more apparent and contested. Contrariwise, the ECJ has been hailed as the most powerful supranational court in world history. It has already had a significant impact on the EU's foreign affairs by placing human rights unequivocally at the heart of the EU legal order. It secured an appropriate balance between fighting terrorism and protecting those rights. The court's central argument was that the protection of fundamental rights forms part of the very foundation of the EU's legal order whereby the court is committed to guide the EU in its foreign affairs. In doing so the court has ensured that all EU actions are commensurate with and in harmony with obligations encompassed in all EU treaties. Over six decades, the ECJ has grown into a formidable force, so much so that it has not endeared itself to the UK. In the Brexit negotiations between the

UK and the EU, the ECJ has become a major bone of contention and stands central in the efforts to finalise the UK's exit from the Union by the end of March 2019.

Chapter 8 provides a review of the authority of the ECJ, as well as its place in the EU more broadly. The ECJ differs from national courts in that it does not have a mechanism whereby it can enforce its decisions. Even so, the ECJ has been influential with respect to the foreign policy of the EU. In addition to the general introduction to the ECJ, this chapter contains a review of the several related Kadi cases. The discussion of these cases clearly confirms their relevance to the Union's foreign policy, although they are quite different from the sort of cases presented in the other chapters. These cases involving Kadi are especially informative because of their intersection with UNSC decisions. Hence, these decisions are also about the role of international governance in foreign policy.

While this chapter analyses the role of the ECJ in the foreign affairs of the EU and the crucial Kadi-saga and accompanying cases with their focus on human rights, Chap. 9 pays attention to a series of additional case studies of the ECJ. Chapter 10 deals with the importance of the ECJ in relation to Brexit. The author maintains that even after Brexit, the UK will probably need to recognise the ECJ's authority in some respects for cooperation with EU countries to be able to work smoothly. The discussion of the impact of Brexit on the relationship between the UK and the EU/ECJ is grounded in research and solid knowledge of the role of the ECJ in European politics and foreign policy. The author makes a credible argument, and time will tell how the relationship between the UK and the EU (including the ECJ) will evolve post-Brexit.

Part V

While the political branches of government most directly determine outcomes in foreign affairs, the contributions of the judiciary are no less significant. Many questions impacting on foreign affairs require constitutional interpretations relating to the authority vested in the executive and legislative branches. Only the judiciary possesses the authority to interpret constitutional and treaty stipulations. In doing so judicial decisions define the parameters and boundaries within which the political branches can and should operate—in domestic affairs and most definitely also in the foreign affairs of the USA, South Africa and the EU.

The study produces a carefully considered argument that draws on a wealth of literature to address its key research question. Its originality lies in the fact that it conducts a comparative study of the role of the judiciary in foreign affairs that enables it to make a contribution to the understanding of the specificities of the part played by the judiciary in each political system and, more broadly, to make general points about the nature of that influence. In the study, the author points out that the scholarly literature in FPA does not fully recognise the judiciaries' growing influence, nor does it theorise the process or even the impact in any structured way.

Chapter 11 concludes by giving prominence to the rationale for and role of all of these Courts in foreign affairs and hence the need to revise established FPA frameworks. It summarises the findings reached on the role of the courts in foreign

affairs and how this role is growing in substance. This concluding chapter points to the relative paucity of studies addressing the role of the judiciary in FPA. This is the result of the field's strong focus on the executive branch. The study persuasively shows that FPA would do well to pay more systematic attention to the judiciary as an important actor in influencing foreign affairs.

Contents

About the Author

Riaan Eksteen was a member of the South African Foreign Service for 27 years and served during that period at the Foreign Ministry in Pretoria from 1964 to 1967 (in the Namibian division with South Africa's involvement in a court case in the International Court of Justice in The Hague), 1973 to 1976 (Head of the UN and Namibian divisions) and 1981 to 1983 (Head of Planning).

He served from 1968 to 1973 at the South African Embassy in Washington, DC., and later on as Ambassador and Head of Mission for 12 years at the U.N. New York (1976 to 1981); Namibia (1990 to 1991); U.N. Geneva (1992 to 1994); and Turkey, with accreditation also to Azerbaijan, Kyrgyzstan, Turkmenistan and Uzbekistan (1995 to 1997). The ambassadorial assignments to Windhoek and Geneva were appointments by President De Klerk. The one to Ankara was by President Nelson Mandela.

He was Director-General of the South African Broadcasting Corporation from 1983 to 1988.

He was Political Analyst at the Johannesburg Stock Exchange from 1988 to 1990.

From 1997, he has been active as an international consultant and business facilitator in Southern Africa.

He obtained B.A. degree from the University of Pretoria (1963) majoring in Political Science, Roman-Dutch Law and German; B.A. Honours (Political Science) degree from the University of South Africa (1971); M.A. degree (Cum Laude) from the University of South Africa (1974) with the dissertation in Afrikaans entitled: "The Role of the USA Senate in Foreign Affairs"; *D Litt et Phil* Degree from the University of Johannesburg (October 2018) with the thesis entitled: "The Role of the High Courts of the United States of America, South Africa and the European Union in Foreign Affairs".

He is the author of an unpublished article: "Does your company have a foreign policy and the instruments to execute it?"

He is married and resides in Swakopmund, Namibia.

Abbreviations

9/11	11 September 2001
ANC	African National Congress of South Africa
ATS	Alien Tort Statute of 1789
AU	African Union
BREXIT	Br(itain)exit (impending withdrawal of the UK from the EU)
CC	Constitutional Court of SA
CFI	Court of First Instance of the European Court of Justice
CFSP	Common Foreign and Security Policy of the EU
CJ	Chief Justice
EC	European Commission
ECJ	European Court of Justice
EU	European Union
FPA	Foreign Policy Analysis
FSIA	Foreign Sovereign Immunities Act of 1976
HC	High Court of South Africa
ICC	International Criminal Court
ICJ	International Court of Justice
IFC	International Finance Corporation
INA	Immigration and Nationality Act of 1952
IOIA	International Organizations Immunities Act of 1945
J	Justice (in the highest courts of the USA and SA)
PM	Prime Minister (of the UK)
RICO	Racketeer Influenced and Corrupt Organizations Act of 1970
SA	South Africa
SADC	Southern African Development Community
SCA	Supreme Court of Appeal of SA
SCOTUS	Supreme Court of the USA
TEU	Treaty on European Union (The Treaty of Lisbon 2009)
UK	United Kingdom
UN	United Nations

UNSC	United Nations Security Council
USA/US	United States of America
VCCR	Vienna Convention on Consular Relations of 1963
WTO	World Trade Organisation