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The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective

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Abstract

Foreign relations law as a field was traditionally characterised by a distinction between the inside and the outside of the state. Typically, executives enjoyed greater leeway for cooperation on the international law. To that effect, ordinary constitutional law principles would not apply in the realm of foreign relations law to the same extent as they did internally. This contribution analyses shifting paradims in foreign relations law in two jurisdictions, i.e. Germany and the United States of America. Based on the identification of two different conceptions of foreign relations, one open and aiming at the facilitation of international cooperation, one closed which strives for a protection of domestic constitutional arrangements, the contribution makes the argument that the foreign relations law debate in Germany is increasingly moving from an open to a closed conception. This shift is taking place in the name of democracy. A more reserved position towards international law is meant to bolster the democratic legitimacy of international cooperation. This risks undermining the capacity of governments to engage in the traditional forms of international law. An unintended consequence of this development might be a further shift towards informal ways of cooperation which are even more difficult to control from a democratic perspective.

Introduction: Foreign Relations Law and the 'Globalization Paradox'

Is international cooperation compatible with sovereignty and democracy? Harvard economist Dani Rodrik has suggested one possible answer in his analysis of the development of the global free trade regime. Rodrik discussed how societies face a conundrum of how to square participation in free trade regimes with national sovereignty and democracy – he calls this the 'globalization paradox'.[1] In a nutshell, he argued that we face a trilemma insofar as 'we cannot have hyperglobalization, democracy and national self-determination all at once. We can have at most two out of the three.'[2]

As with any catchy categorization, the devil is in the details. Of course, Rodrik does not argue that the three categories are crystal clear and exist as fixed parameters which can only interact in one specific way. Instead, it makes more sense to conceive of them as variables which can be fuzzy around the edges. Democracy can certainly mean different things to different people. Sovereignty is a good candidate for being the single-most contested notion of political theory. It may also be a vehicle for protecting national democracy. At the same time, the exercise of

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[1] Dani Rodrik, *The Globalization Paradox* (Paperback edn, New York: W.W. Norton, 2012).

[2] *ibid.*, 200.

sovereignty can be an expression of democratic decision-making processes. And free trade can take many different forms as the current rows over the imposition of tariffs and the respective threats and virtues of protectionism might come to show. Nonetheless, Rodrik's trilemma captures the essence of a current debate which views international cooperation increasingly as an encroachment on the domestic political process. His take is also helpful as it captures the types of decisions to be made with respect to foreign relations law. Traditionally, the greater leeway given to the executive in this field was meant to enable the executive to play an effective role at the international level. If we think of this narrative, it ties in with Rodrik's view that you can combine international cooperation and sovereignty. Allowing the executive to act with a more or less free hand at the international level is hence seen as strengthening sovereignty. From a democratic perspective, the reverse might be true. Giving the executive a free hand might undermine the democratic legitimacy of political processes.

Indeed, Rodrik's analysis touches upon core questions of what constitutional lawyers call foreign relations law. With respect to many jurisdictions, the field of foreign relations law is a relatively recent creation.[3] True, the legal questions which permeate this field are not new. Foreign relations law is generally concerned with the relationship between the outside of a state and its interior[4] and is thus very much an expression of the double-facing constitution in the sense of this volume.[5] It focuses on the interaction between international and domestic norms and regulates the competences that state organs enjoy when they act with international repercussions. As such, any given state will have some kind of foreign relations law, at least to the extent that its constitution or other relevant legal sources provide for guidance on exactly these questions. What is fairly novel, however, is the field of foreign relations law as an academic discipline, at least if we look beyond the United States. A proper field of foreign relations law has not even materialized in all constitutional systems. Traditionally, foreign relations law was seen as some kind of specialty of US constitutional law.[6] This overlooks, however, that *Äußeres Staatsrecht* was a term prevalent for quite some time in late 19th century

[3] See further Helmut Philipp Aust, 'Foreign Affairs' in Grote, Lachenmann and Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford: Oxford University Press, 2017) para. 7; Curtis Bradley, 'What is Foreign Relations Law?' in Bradley (ed.), *Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, forthcoming) advance copy available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960694 (last visited 28 August 2018).

[4] Campbell McLachlan, 'Five Conceptions of the Function of Foreign Relations Law' in Bradley (ed.), *Oxford Handbook*, forthcoming (text on file with the author), text accompanying footnote 6.

[5] See David Dyzenhaus, in this volume, Chapter XXX.

[6] On the reasons for this state of affairs see Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017), at 104-105; on the particular tradition of foreign relations law as an "Ersatz" international law in the United States see Campbell McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014) para. 1.30; the British tradition of foreign relations law reaches further back, an important starting point being Frederick Alexander Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon Press, 1986).

Germany.[7] It has also recently been rediscovered, although its current day usage does not automatically align with its 19th century roots.[8]

This essay discusses how foreign relations law and domestic notions of democracy relate to each other. To that extent, it engages in a comparative exercise which looks primarily at discourses about foreign relations law in a specific transatlantic context, i.e. in the United States and in Germany; two jurisdictions in which a specific subfield of foreign relations law has been in existence for quite some time. This contribution is sketched with a broad brush, looking for general trends in the field. The impetus for this exercise stems from the changing political environment in which we are currently living. Across a number of states, we are seeing authoritarian and populist movements on the rise.[9] The election of Donald Trump as President of the United States and the popular vote for 'Brexit' are only the most conspicuous signs of a development which aims at 'taking back control' and snubs at a so-called ideology of "globalism".[10] Already in the preface to the 2016 paperback edition of *The Court and the World*, US Supreme Court Justice Stephen Breyer noted that

> 'it has become more popular to ignore transnational problems or turn inward in an effort to find solutions. Many citizens seem ever more likely to understand the word "globalization" as descriptive of a problem, not a solution.'[11]

The crucial question is taking back control 'from whom'? There is certainly not a clear-cut answer in this regard. Both the developments in the United States and in the United Kingdom, but also the electoral successes of right-wing parties in France, Germany and other European states, indicate that a previous latent feeling of frustration about globalization and an ensuing alienation have translated into political momentum. Causes for this development have been analyzed in some detail elsewhere.[12] One facet of 'taking back control' relates to the conditions

[7] See further on this Helmut Philipp Aust, Fundamental Rights of States: Constitutional Law in Disguise?, (2016) 5 *Cambridge Journal of International and Comparative Law*, 521, at 523.

[8] Frank Schorkopf, *Das Staatsrecht der internationalen Beziehungen* (Munich: C.H. Beck, 2017); see also already Volker Röben, *Außenverfassungsrecht* (Tübingen: Mohr Siebeck, 2007).

[9] See, for helpful conceptual clarifications, Jan-Werner Müller, *What is Populism?* (Philadelphia: University of Pennsylvania Press, 2016); more specifically from the perspective of international law and human rights Philip Alston, 'The Populist Challenge to Human Rights Law', (2017) 9 *Journal of Human Rights Practice* 1.

[10] David Goodhart, *The Road to Somewhere: The Populist Revolt and the Future of Politics* (London: Hurst and Company, 2017). US President Trump has recently set out his vision of international cooperation most clearly in his Remarks to the 73rd Session of the UN General Assembly, 25 September 2018. *Inter alia*, he emphasized that 'America will always chose independence and cooperation over global governance, control and domination. (...) We will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy. America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism.', available at www.whitehouse.gov (last visited 2 October 2018).

[11] Stephen Breyer, *The Court and the World. American Law and the New Global Realities* (Paperback edn., New York: Vintage Books, 2016), ix; for an earlier discussion of the relationship between globalization and democracy see already Armin von Bogdandy, 'Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 853, 860-863.

[12] For a take on the related question of how the changing political climate affects international law see James Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81 *Modern Law Review* 1; see also Heike Krieger and Georg Nolte, 'The International Rule of Law – Rise or Decline? Points of Departure' *KFG Working Paper Series No. 1* (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2866940 (last visited 28 August 2018); for a useful

under which states can continue to participate in forms of international cooperation. Railing against free trade was a staple in the campaign speeches of Donald Trump. The North-American Free Trade Agreement ('NAFTA') was singled out as a target as was the planned Trans-Pacific Partnership Agreement ('TPP').[13] It is noticeable that there was considerable convergence between these discourses in the United States and a simultaneously mounting level of frustration with and protest against new free trade and investment agreements on the other side of the Atlantic.[14] In particular in Germany, concerns about the Transatlantic Trade and Investment Partnership ('TTIP') and the Comprehensive Economic and Trade Agreement ('CETA') between the European Union and its member states, on the one hand, and Canada, on the other, were voiced. With a new intensity, people took to the street to protest, inter alia, against so-called shadow tribunals (in legal technical terms: investor-state dispute settlement mechanisms, 'ISDS') and concerns about the impact that such agreements might have on domestic democracy.[15] In the eyes of the general public, these are of course not debates about arcane issues of foreign relations law. Rather, they concern issues of vital interest for the public as a whole. This is noteworthy in its own right as the questions underlying these debates are hitting right at the heart of foreign relations law: who gets to decide on the international commitments of a state? Who is negotiating these agreements? Under which institutional constraints? How is the domestic separation of powers affected? These concerns are all of a sudden in the center of political attention, without necessarily being brought out in the open as such.

Accordingly, it is time for a closer look at how different conceptions of foreign relations law impact on these debates and on the possibilities of states to cooperate internationally. To this end, the next section will first briefly describe the legal context in which these debates take place. This context is characterized by changing perceptions of 'the international' which is increasingly viewed as encroaching upon the domestic policy space. The paper will then identify two possible variants of foreign relations law: one leaning more towards a 'closed'

conceptualisation of the current backlash (against human rights) see Leslie Vinjamuri, 'Human Rights Backlash', in Hopgood, Synder and Vinjamuri (eds.), *Human Rights Futures* (Cambridge: Cambridge University Press, 2017), 114, at 120-123.

[13] On the US-Mexican dynamics in this regard see Alejandro Rodiles, 'After TPP is Before TPP: Mexican Politics for Economic Globalization and the Lost Chance for Reflection', *Institute of International Law and Justice Working Paper Series (MegReg Series)* 2018/1, available at https://www.iilj.org/publications/tpp-tpp-mexican-politics-economic-globalization-lost-chance-reflection/ (last visited 29 August 2018).

[14] For a comparison of the legal debates see Thomas Kleinlein, 'TTIP and the Challenges of Investor-State-Arbitration: An Exercise in Comparative Foreign Relations Law' in Kaiser, Petersen and Saurer (eds.), *US Constitutional Law in the Obama Era: A Transatlantic Perspective* (Baden-Baden: Nomos/Routledge, forthcoming), advance copy available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3042524 (last visited 28 August 2018).

[15] For a sophisticated argument on the possible impacts on domestic democracy see Eyal Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law' (2016) 23 *Constellations* 58, at 61 (analysing ISDS as a countermove against assertive domestic courts); for a thoughtful analysis of the debate on ISDS see also Ntina Tzouvala, 'The Academic Debate about Mega-Regionals and International Lawyers: on the Merits and Limits of Certain Public Interventions', Working Paper, available at http://www.academia.edu/36083906/The_academic_debate_about_mega-regionals_and_international_lawyers_on_the_merits_and_limits_of_certain_public_interventions (last visited 29 August 2018).

conception of this field, the other one emphasizing the virtues of being 'open'. On the one hand, the predominant approach of US foreign relations law is increasingly turning inwards, leaning towards a closed conception of foreign relations law. On the other hand, I will look at how German constitutional law has for quite some time maintained that a fundamental principle of the Basic Law was its openness to international cooperation. The contribution will then discuss how this traditional openness is now also coming under pressure in the German context. I will argue that this is a consequence of a growing democratic challenge to foreign relations law in the German context, which, to some extent, mimics the state of affairs in the United States – however, without the central actors in the judiciary and academia openly acknowledging this move. In a final substantive section I will turn to a comparative assessment of these developments, highlighting some structural differences between the two jurisdictions. A brief conclusion follows.

Changing Perceptions of International Law and Cooperation

Among western states, there is a growing level of discontent with the way that the external sphere is impacting on the internal. This wish to become less open intensifies as a society aspires to stabilize the categories of the internal and the external. This trend might have to do with changing perceptions of what international law regulates and for whom. The development of international law from 'co-existence to co-operation'[16] has entailed new forms of regulation of matters which were previously considered to fall into the domestic jurisdiction of states. This development has taken place in a number of fields, most prominently in human rights law and in the law of international investment protection. In some ways, this is a process of international law 'coming of age'. It is no longer just seen as a horizontal law of coordination which does not impact on domestic regulatory questions. Human rights law has pervaded domestic legal systems and domestic courts have, to varying degrees, responded to the need to implement human rights and interpret domestic law in accordance with the international obligations of their respective state.[17] This has occurred despite the different legal techniques and strategies which can be deployed to shield a domestic legal order from international influences.[18] For instance, there is no requirement under international human rights law as such to provide for the direct effect of its provisions.[19] International law traditionally leaves it to states *how* to

[16] Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens & Sons, 1964) 60-73.

[17] For an account of the trajectory of the European Convention of Human Rights see Mikael Rask Madsen, 'The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence' in Christofferson and Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011) 43, 54-59.

[18] On these avoidance techniques see Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of the Attitudes of National Courts' (1993) 4 *European Journal of International Law* 159, 161.

[19] See further Mathias Forteau, 'The Role of the International Rules of Interpretation for the Determination of Direct Effect of International Agreements' in Aust and Nolte (eds.), *The Interpretation of International Law by Domestic Courts – Uniformity, Diversity, Convergence* (Oxford: Oxford University Press, 2016) 96, 99.

implement their international legal obligations.[20] This leeway is one of the core sites for foreign relations law, to the extent that the rules in a given constitution can grant international law a certain rank and effect domestically. Yet, it is of course also true that domestic courts are state organs. Their jurisprudence can therefore give rise to state responsibility if the courts misjudge what international law requires of them.[21] Not surprisingly then, domestic courts have embraced techniques with regard to taking into account international law even when they may not be formally required to do so under their domestic legal framework.[22] Over time, such processes consolidate – and what has started as policy in order to avoid conflicts with international institutions can turn into more or less fixed expectations that international human rights obligations are to be taken into account.[23] With this development, the potential for conflict also increases as requirements under human rights law can come into conflict with other legally protected goods. This then requires constitutional courts to enter into more or less open balancing games – and to identify limits for the openness of a given constitutional system towards international (and, where applicable, EU) law.

It can be debated to what extent this really is a new phenomenon or rather a continuation of forms of the exercise of power which international law always featured. What is new is the perception among wider parts of the population in western states that international law is 'hitting home'. Human rights law and international investment law are no longer regulating merely situations in the 'Global South'.[24] Human rights law is no longer just about preventing the worst atrocities in faraway dictatorships. International investment protection is no longer just a one-way insurance contract for investors from western states. In both fields, domestic constituencies have felt that policy space has become limited by international norms.[25]

This feeling of a shrinking policy space leads to a re-evaluation of the way that foreign relations law allows international rules and principles to impact on domestic legal systems. Out of consideration for the protection of domestic democracy it is questioned whether the executive should continue to enjoy more leeway in conducting a state's foreign affairs. In the political and legal debates, it is noticeable that this form of objection to the traditional prerogatives of the executive in the field of foreign affairs come from different points on the political spectrum. In the case of widespread protests against so-called 'mega-regionals,' such as TTIP and CETA,

[20] Alfred Verdross and Bruno Simma, *Universelles Völkerrecht – Theorie und Praxis* (3rd edn., Berlin: Duncker & Humblot, 1984) § 848.

[21] This a traditional core of the international law pertaining to the reparation for injuries to aliens, see only Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005) 38-44.

[22] Doctrinally, this will turn on variants of 'consistent interpretation', see further André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011) 139-157.

[23] An example is the development of the case law of the German Federal Constitutional Court on the role of the European Convention of Human Rights for the interpretation of the fundamental rights of the German Basic Law, see on this development and the broader European picture Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) Ch. 4.

[24] On these origins see Sundhya Pahuja, *Decolonising International Law – Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011) 99.

[25] Peter-Tobias Stoll, Till Patrik Holterhus and Henner Gött, *Investitionsschutz und Verfassung* (Tübingen: Mohr Siebeck, 2017) 12-14.

there was both 'resistance' from a nationalist left and from the political right – both challenging the way in which these agreements would endanger domestic democracy. Indeed, the challenges against free trade regimes seems to be at the point where previous political opposites seem to converge and coalesce around a political distinction primarily based on open v. closed conceptions of politics.

Two Conceptions of Foreign Relations Law

Political commentators have for some time now maintained that the defining political fracture of our times would no longer be between the right and the left, but rather be 'open' against 'closed'.[26] Across the previous political spectrum, it would be possible to categorize debates along these lines. The distinction itself goes back to the work of philosopher of science Karl Popper, in particular his 1945 book on *The Open Society and its Enemies*.[27] One may wonder to what extent the recent reappropriation of the division between 'open' and 'closed' is analytically coherent. In particular, it strikes me as questionable whether these two notions lend themselves to being generalized. Rather, they will come in different gradations, with some proponents of an 'open' system of trade favoring a 'closed' conception in the sector of migration and vice versa. The field of foreign relations law could of course be conceptualized without paying much attention to this division. But whether one comes down on the open or closed sides of the spectrum impacts on the spin one will give to this field.[28] Proponents of an 'open' foreign relations law might be tempted to preserve the special character of this field and interpret domestic constitutional law so that it can embrace international law effectively. Those arguing with more of a 'closed' mindset will aim to conceptualize foreign relations law as a bulwark against unwanted outside interference. With these observations in mind, it is now time to turn to the jurisdictions of the United States and Germany and to test the value of the categories of open v. closed as parameters of analysis for the field of foreign relations law.

From Exceptionalism to Sovereigntism? The Case of the United States

In the United States, the study of foreign relations law took off to an early start with the first specialist monograph on the topic, authored by Quincy Wright, a towering figure in international law in the interwar United States.[29] His book was written very much in an internationalist spirit. Wright was no sceptic of international law. Quite to the contrary, his interwar writings constantly expanded the boundaries of international law, towards a loosening of the ties of state consent and towards the recognition that international law was not just

[26] N.N., 'Drawbridges up – The new divide in rich countries is not between left and right but between open and closed', *The Economist*, 30 July 2016, available at www.economist.com; also on this divide in the context of foreign relations law Schorkopf, *Staatsrecht*, § 9, para. 41.

[27] Karl Popper, *The Open Society and its Enemies* (London: Routledge, 1945).

[28] McLachlan, 'Five Conceptions', text accompanying footnote 11.

[29] Quincy Wright, *The Control of American Foreign Relations* (New York: Macmillan, 1922); on Wright's contribution to international law see Hatsue Shinohara, *US International Lawyers in the Interwar Era – A Forgotten Crusade* (Cambridge: Cambridge University Press, 2012), 27-29, 64-66, 148-153 (and more often).

translating such consent into norms, but also about regulating 'community interests', long before this term became a staple of the international law discourse in the 1990s.[30]

Louis Henkin's book on *Foreign Affairs and the US Constitution* shared a similar internationalist ethos.[31] It led to a re-emergence of the field some fifty years after Wright wrote the first monograph on the topic. Henkin's book first appeared right after the Vietnam War and then again, in a second edition, in the early 1990s. Published in markedly different times – right after the US defeat in Vietnam and after the vindication of the United States as the 'winner' of the Cold War, the book is characterized by a decidedly enlightened stance towards international law. Henkin was an internationalist, too.[32] He famously said that 'almost all nations comply with almost all of their international obligations almost all of the time'[33] and also proclaimed from the late 1970s onwards that the world had entered an 'age of rights'.[34] At the same time, he was worried about the degree of US absence from the development of large parts of the human rights treaty regime and characterized the US role as a 'flying buttress', not a pillar of the international human rights system.[35] All this informed both his monograph on foreign affairs as well as his work as Rapporteur for the American Law Institute for which he saw to completion the Restatement, third, on Foreign Relations Law which was published in the late 1980s. As Georg Nolte has remarked, the Restatement coincided with a progressive '*Zeitgeist*.'[36] It is fair to say that Henkin's positions were taken very seriously indeed. At the same time, his internationalist outlook did probably not capture the prevalent mood among a majority of US *constitutional* law scholars.[37] In particular, his important treatise on the domestic legal ramifications of US participation in forms of international cooperation did not pay a lot of attention to the substance of the democratic process. Henkin wrote extensively about the separation of powers in the field of foreign relations law, i.e. the partition of roles between

[30] See, for instance, Quincy Wright, 'The Legal Nature of Treaties' (1916) 10 *American Journal of International Law* 706, 717 (for a very early emphasis that individuals hold rights under international agreements); Quincy Wright, 'Collective Rights and Duties' (1932) *Proceedings of the American Society of International Law* 101; later the concept of community interests was fully developed by Bruno Simma, 'From Bilateralism to Community Interest in International Law', (1994-VI) 250 *Recueil des Cours* 217; for the most recent exposition, see the contributions in Eyal Benvenisti and Georg Nolte (eds.), *Community Interests Across International Law* (Oxford: Oxford University Press, 2018).

[31] Louis Henkin, *Foreign Affairs and the US Constitution* (2nd edn., Oxford: Clarendon Press, 1996) [first edn published in 1972].

[32] See the conversation between Henkin and Antonio Cassese, reprinted in Cassese, *Five Masters of International Law* (Hart: Oxford, 2011) 189-224.

[33] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn., New York: Council on Foreign Relations, 1979) 47.

[34] Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990); on the development of Henkin's scholarship in this regard see Samuel Moyn, *The Last Utopia – Human Rights in History* (Cambridge, M.A.: Harvard University Press, 2010), 201-207.

[35] Louis Henkin, 'Rights: American and Human' (1979) 79 *Columbia Law Review* 405, 421; see further Georg Nolte and Helmut Philipp Aust, 'European Exceptionalism?' (2013) 2 *Global Constitutionalism* 407, 419.

[36] Georg Nolte, 'Remarks: The Fourth Restatement of Foreign Relations Law of the United States' (2014) 108 *Proceedings of the American Society of International Law*, 27, 28.

[37] For criticism in this regard, see 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, 835-36.

President and Congress and the role that courts have to play in this arena.[38] Yet, throughout the treatise there is barely a mention of sovereignty or democracy as legal goods or principles that would need protection against a hollowing out affected by international cooperation.[39]

This state of affairs changed markedly with a new generation of scholars that appeared in the late 1990s. In retrospect, an article by Curtis Bradley and Jack Goldsmith can be identified as a game changer.[40] In their 1997 piece on customary international law as federal common law, Bradley and Goldsmith sought to limit the impact of customary international law within the US legal system. Among their arguments a concern for 'American representative democracy' took pride of place. Arguably, their more cautious position towards the effects of international law on the US domestic legal system was more in line with a mainstream position in the US constitutional law scholarship.[41] Nonetheless, their work and the contribution of other more skeptical authors such as Julian Ku or Eric Posner stirred a heated debate[42] about 'The new sovereigntists', as Peter Spiro characterized them in an essay in *Foreign Affairs*.[43] Spiro was outspoken in his critique. He saw an 'anti-internationalism' at work that would seek to develop a 'coherent blueprint for defending American institutions against the alleged encroachment of international ones'.[44] This debate has not abated since. The more skeptical position towards international law which might emanate from the new Restatement[45] can also point to the development of the case law of the US Supreme Court. As has been observed by David Sloss and others, the case law of the Court has become more inward-looking over time.[46] At the time

[38] Henkin, *Foreign Affairs*, 83-130.

[39] Note that Henkin was not ignorant about these issues. In the published version of his 1988 Cooley Lectures he notes in the conclusion that 'In foreign affairs, it has become important to rededicate ourselves to the principles of constitutionalism – to limited, checked, balanced government and respect for the rule of law and individual rights. In foreign affairs we are particularly susceptible to the claims of "efficiency" at the expense of other values, to pleas that we repose full faith in "the experts", to demands of individual sacrifice, including the sacrifice of our obligation to sscrutinize and criticize, and sacrifice individual rights. In foreign affairs we are particularly susceptible to becoming bemused by assertion of "leadership", by appeal to false patriotism, by play on our fears of appearing divided before the world." Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (New York: Columbia University Press, 1990) 108.

[40] Bradley and Goldsmith, 'Customary International Law'.

[41] See now also Ingrid Wuerth, 'The Future of the Federal Common Law of Foreign Relations', (2018) 106 *Georgetown Law Journal* 1825, 1831.

[42] Eric Posner and Cass R. Sunstein, 'Chevronizing Foreign Relations Law' (2006) 116 *Yale Law Journal* 1170; Julian Ku and John Yoo, 'Globalization and Sovereignty' (2013) *Berkeley Journal of International Law* 210; Peter J. Spiro, 'Sovereigntism's Twilight' (2013) *Berkeley Journal of International Law* 307.

[43] Peter J. Spiro, 'The New Sovereigntists – American Exceptionalism and its False Prophets' (2000) 79:6 *Foreign Affairs* 9.

[44] Spiro, 'The New Sovereigntists', 9.

[45] See also Nolte, 'Remarks', 29: 'Given the uncertain status of international law in the United States, and the complicated decisionmaking process within the American Law Institute, the new Restatement will probably not produce results that will be criticized as being too progressive.'

[46] David L. Sloss, Michael D. Ramsey and William S. Dodge, 'Conclusion: Continuity and Change over Two Centuries' in Sloss, Ramsey and Dodge (eds.), *International Law in the US Supreme Court – Continuity and Change* (Cambridge: Cambridge University Press, 2011) 589, 604-605; see also Helmut Philipp Aust, Alejandro Rodiles and Peter Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 *Leiden Journal of International Law* 75, 86.

that Quincy Wright was writing, the heyday of 'good faith' interpretation and a liberal inclination to pre-empt local courts from overly parochial attitudes were still not that far away. This line of jurisprudence has receded into the distance, however, with avoidance doctrines of various sorts becoming more regular features of the Court's case law.[47]

This case law lends itself easily to an explanation in the light of the sovereigntist position as identified and critiqued by Spiro. A key text in this regard is a contribution by Julian Ku and John Yoo on 'Globalization and Sovereignty' that appeared in a 2013 special issue of the Berkeley Journal of International Law (alongside two contributions by Spiro). The noteworthy feature of this article is that Ku and Yoo do not purport to fend off international law to protect state sovereignty as such. Rather, they distinguish between what they call 'Westphalian sovereignty', i.e. an outdated form of state sovereignty that much of international law has sought to overcome, and 'popular sovereignty' which would need to be shielded from overreaching international institutions.[48] Popular sovereignty taps into the legacy of the American Revolution and has thus an immediately more positive ring to it than what the authors portray as a rigid and formalist concept dating back to 17th century Europe. (We can leave aside here whether their depiction of the Westphalian notion of sovereignty is convincing.) One cannot help but notice an ironic twist in the US debate about democracy vs. international law. A lot of what is portrayed as the 'new international law' by the sovereigntist authors is not binding on the United States. Many human rights treaties have not been ratified, individual complaints procedures not activated. In a way, the sovereigntist position is thus a pre-emptive shield against a potentially overreaching international law and seeks to fortify the status quo.[49]

Arguably, this move inwards also finds support in the case law of the Supreme Court of the United States. Ganesh Sitaraman and Ingrid Wuerth have recently described the development of the case law in the field of foreign relations as one of 'normalization'.[50] By this they mean that the Court has gradually abandoned its stance that foreign relations law is a decidedly different field from 'ordinary' constitutional law. Foreign affairs exceptionalism would be a thing of the past, having given way to an understanding of this body of law as 'ordinary'. In particular, separation of powers cases would no longer automatically see the executive win. And cases supposedly pertaining to deference to the executive would be decided on the same basis as in domestic administrative law contexts where this doctrine also has a key role to play.[51] This move towards 'normalization' can be understood in different ways. At first sight, it seems

[47] For a thorough analysis of the shifting lines of debate in the 1920s and 1930s see G. Edward White, 'The Transformation of the Constitutional Regime of Foreign Relations Law' (1999) 85 *Virginia Law Review* 1, 77 et seq.

[48] Ku and Yoo, 'Globalization and Sovereignty', 232-33.

[49] On the at times bewildering fixation on sovereignty in the US foreign policy debate see Bruce Jones, 'American Sovereignty is Safe from the UN', *Foreign Affairs*, 28 September 2018, available at www.foreignaffairs.com (last visited 2 October 2018); see further Vicki C. Jackson, 'The U.S. Constitution and International Law', in Tushnet, Graber and Levinson (eds.), *The Oxford Handbook of the U.S. Constitution* (Oxford: Oxford University Press, 2015), 921, at 939.

[50] Gatesh Sitaraman and Ingrid Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 *Harvard Law Review* 1897; for a related endeavour see Harlan Grant Cohen, 'Formalism and Distrust: Foreign Affairs and the Roberts Court' (2015) 83 *The George Washington Law Review* 380, at 385 with footnote 25.

[51] Emblematic of this move: Posner and Sunstein, '*Chevronizing* Foreign Relations Law'.

to do away with the kind of foreign affairs exceptionalism that is often understood to be one of the root causes for a lack of international engagement of the United States. Seen from this perspective, American exceptionalism on the international level is mirrored by the peculiar constitutional structures and traditions on the internal level. Yet, this perspective risks overlooking that part of the foreign affairs exceptionalism might actually have been in place to secure the national executive leeway *for* engaging on the international level. In other words, exceptionalism has different foci when assessed with respect to the US position towards international cooperation and the internal division of powers in the field of foreign affairs. At least in some cases, the gradual abandonment of foreign affairs exceptionalism now risks limiting the possibility of the United States to engage in forms of international cooperation. This is not an entirely novel insight. Already in 1964, Richard Falk formulated that

> '(m)any lawyers allege that it is a progressive tendency to encourage substantive review by domestic courts because this tends to increase the application of international norms. Rules of deference – such as act of state – are seen as regressive (...).'[52]

Falk rejected this simplistic claim and insisted that the calculus could be much more complex.[53]

An illustration of this point from recent US judicial practice concerns the domestic effects of decisions by the International Court of Justice ('ICJ'). This question arose in the aftermath of several rulings of the ICJ against the United States[54] which involved the right to consular notification under Article 36 of the Vienna Convention on Consular Relations ('VCCR')[55] and the potential conflict between this right and the so-called 'procedural default' rule of US criminal law which bars the invocation of procedural errors past a certain point in court proceedings.[56] The *Avena* judgment of the ICJ went further into the consequences of a violation of Article 36 VCCR and specified as a legal consequence that the United States should offer a possibility for 'review and reconsideration' of the verdict in some cases.[57] Subsequently, US President George W. Bush issued a memorandum in which he directed state courts to provide review and reconsideration in the cases addressed by the ICJ in *Avena* with a view to ensuring compliance with the ICJ judgment. This move was eventually not successful as a case brought by one of the persons whose prior conviction formed part of the *Avena* case went up to the US Supreme Court. In *Medellin*, the Court found that there was no basis in the UN Charter for ICJ

[52] Richard Falk, *The Role of Domestic Courts in the International Legal Order* (New York: Syracuse University Press, 1964) 75.

[53] Ibid.

[54] *LaGrand* (Germany v. United States), Judgment of 27 June 2001, ICJ Rep. 2001, 466; *Case Concerning Avena and other Mexican Nationals* (Mexico v. United States), Judgment of 31 March 2004, ICJ Rep. 2004, 12.

[55] Vienna Convention on Consular Relations, adopted on 24 April 1963, entered into force 19 March 1967, 596 UNTS 261.

[56] For a vivid description of this conflict see Breyer, *The Court and the World*, 199-218; see also – from the perspective of international law – Bruno Simma and Carsten Hoppe, 'The *LaGrand* Case: A Story of Many Miscommunications', in Noyes, Dickinson and Janis (eds.), *International Law Stories* (New York: Foundation Press, 2007) 371.

[57] ICJ, *Avena*, paras. 130 et seq.

decisions to have immediate effects in the US domestic legal order.[58] What is important in our context is that the US Supreme Court did not consider the *Medellin* case to warrant any special privilege for the US President in order to ensure US compliance with its international obligations.[59] Instead, the Court insisted on upholding the ordinary constitutional framework.[60]

The Court has been more forthcoming also in other contexts to allow a 'normal' form of judicial review over governmental conduct with international implications. A good illustration is provided by the *Bond* cases in which the Court affirmed that an individual had standing to challenge on the grounds of the Tenth amendment a statute implementing the Chemical Weapons Convention.[61] Traditional doctrines of foreign relations law which might have impeded the Court from exercising judicial review here – such as the political questions doctrine, act of state, deference – did not play a role.[62] To the contrary, the Court established a presumption that Congress would not have authorized 'a stark intrusion into traditional state authority' when giving advice and consent to the ratification of the Chemical Weapons Convention. Although this language indicates that a central issue of the case revolved around issues of federalism – and hence the legacy of *Missouri v. Holland*[63] – the opinions strike a chord also with the broader debates about the limits of foreign affairs powers. In his popular book on the Supreme Court and its relation to the world, Justice Breyer accordingly contextualized the *Bond* case by pointing out that *Bond* illustrates a broader concern:

> 'What are the constitutional limits upon the treaty power, including on Congress's authority to implement a treaty through legislation? What *should* they be, given the

[58] Medellin v. Texas, 552 U.S. 491, 508 (2008). The question turned on whether the ICJ's judgment in *Avena* was binding on state courts by virtue of the President's February 28, 2005 Memorandum. In the proceedings, the US government contended that while the *Avena* judgment would not of its own force require domestic courts to set aside ordinary rules of procedural default, 'that judgment became the law of the land with precisely that effect pursuant to the President's Memorandum and his power "to establish binding rules of decision that preempt contrary state law." (...) In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling. Such considerations, however, do not allow us to set aside first principles. The President's authority to act, as with the exercise of any governmental power, "must stem either from an act of Congress or from the Constitution itself." (...) The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.' (Chief Justice Roberts delivering the Opinion of the Court).

[59] See also Ingrid Wuerth, 'Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department' (2011) 51 *Virginia Journal of International Law* 1, 15.

[60] Jackson, 'The U.S. Constitution', 932.

[61] Bond v. United States I, 564 U.S. 211 (2010); Bond v. United States II, 572 U.S. ____ (2014) (slip opinion); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, adopted on 3 September 1992, entered into force on 29 April 1997, 1975 UNTS 45.

[62] Sitaraman and Wuerth, 'Normalization', 1927.

[63] Missouri v. Holland, 252 U.S. 416 (1920); this case concerned the reach of the federal treaty making power. On the occasion of the conclusion of an international agreement with Great Britain on the protection of international migratory birds, the Court held that the treaty-making power is not limited to what may be done with an unaided act of Congress.

> Constitution's structural provisions and its concerns with federalism, separation of powers and democratic accountability?'[64]

As also Breyer notes, the Court did not give a principled answer in *Bond* and generally shies away from doing so. Nonetheless, there are indications in the case law that the approach of the Court is consolidating around a certain form of distrust of special privileges of the executive in the field of foreign affairs. A most remarkable decision in this regard is *Zivotofsky v. Clinton* in which the Court ruled that it could review a decision by the executive not to execute a statute allowing for the registration of 'Jerusalem, Israel' as a birthplace in US official documents. Writing for the majority of the Court, Chief Justice Roberts insisted that '(t)he federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be.' Instead, the case was about the enforcement of a specific statutory right – all in all a 'familiar judicial exercise'.[65] The *Zivotofsky* case is remarkable not because the executive eventually won the case – but because it marked with very general language that the Roberts Court would no longer be inclined to see the subject matter of the case – which pertained to the recognition of a foreign government and related issues – as warranting any special form of treatment such as in the form of an invocation of the political questions doctrine. As Harlan Grant Cohen has observed, in this case Chief Justice Roberts 'announced the return of the courts to foreign affairs'.[66] A broader reading of these cases might even consist in pointing to a generally diminishing possibility to clearly distinguish between purely internal and external situations, a move arguably triggered by both the rising concerns about individual rights and domestic democracy playing out.

From Friendliness to Guarded Skepticism? German Foreign Relations Law under the Basic Law

The development of foreign relations law as a field in Germany has followed a somewhat different trajectory. First, we need to clarify the starting point of this development. In light of the various systemic changes in German politics and constitutional orientation, it is a natural inclination to focus only on the developments which have taken place since the end of the Second World War and hence since the Basic Law took effect in 1949. While this will also be the general thrust of this contribution it is nonetheless apt to briefly remark that different stories of German foreign relations law could also be told, tapping into previous historical layers. Jochen von Bernstorff has recently analyzed how German constitutional law doctrine dealt with the imperial ambitions of the German Reich in the period between 1871 and 1918, for

[64] Breyer, *The Court and the World*, 225.

[65] Zivotofsky v. Clinton, 566 U.S. 189 (2012); see also the follow-up case Zivotofsky v. Kerry, 576 U.S. ___ (2015) (slip opinion) which again involved a win for the executive, yet without a special niche of a foreign affairs power carved out which would be devoid of judicial intervention.

[66] Cohen, 'Formalism and Distrust', 433.

instance.[67] In this regard, it is intriguing how the conceptualization of the relationship between the international and domestic in the form of dualism as developed by Heinrich Triepel[68] might have been shaped by the imperial ambitions of a nation-state that was in many ways a latecomer to the imperial games already undertaken by the other European powers.[69] Yet again a different story might be told for the Weimar Republic, where much German international and public law scholarship was united in the fight against the Versailles peace treaty which was viewed as an unjust and oppressive regime imposed on Germany by the victorious powers in the First World War.[70] And, of course, National Socialist Germany brought about its own form of constitutional law scholarship which emphasized the superiority of the Aryan race and delivered arguments for the realization of *Lebensraum* and the implementation of the Holocaust, although both endeavors were not mainly driven by legal arguments but rather coyly accompanied by willing opportunists and zealous anti-Semites alike.[71] And even if we only focus on the post-World War II order, it is readily apparent that concentrating on the Basic Law means overlooking the Eastern part of Germany for a period of more than forty years. The German Democratic Republic was part of the Eastern bloc and accordingly scholarship on 'peaceful co-existence' on the international law level was produced, which translated into constitutional law writings emphasizing the ideological leadership of the Soviet Union, mediated through the Communist Party and its East German incarnation.[72] This brief glance at different historical conjectures helps us to see that there is one significant difference between the US and German stories of foreign relations law: on the United States side, there is much more continuity with respect to the development of the constitutional regime than was the case in Germany, debates in the US about various constitutional transformations notwithstanding.[73] Comparing the development of

[67] Jochen von Bernstorff, 'Innen und Außen in der Staats- und Völkerrechtswissenschaft des deutschen Kaiserreichs' (2015) 23 *Der Staat (Beiheft)* 137.

[68] Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: Hirschfeld, 1899) 111.

[69] This relates to Triepel's emphasis on dualism. A strict divide between international law and domestic law arguably gave the political branches more leeway for both external expansion and internal consolidation of the Reich. On the current significance of this legacy see also Bardo Fassbender, 'Triepel in Luxemburg. Die dualistische Sicht des Verhältnisses von Europa- und Völkerrecht in der „Kadi-Rechtsprechung" des EuGH als Problem des Selbstverständnisses der Europäischen Union' (2010) 63 *Die Öffentliche Verwaltung* 333, 338.

[70] Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Dritter Band 1914-1945* (Munich: C.H. Beck, 1999) 86-89. Opposition to the Versailles treaty was common among the entire political spectrum in Weimar Germany, especially with respect to the war guilt clause of Article 231 and the reparations regime also 'progressive' international lawyers generally supportive of the League of Nations joined in the critique, see further Helmut Philipp Aust, 'Zwischen Freirecht und Völkerpsychologie: Hermann Kantorowicz und die völkerrechtliche Kriegsschuldfrage' in Augsberg et al. (eds.), *Hermann Kantorowicz' Begriff des Rechts und der Rechtswissenschaft* (Tübingen: Mohr Siebeck, 2019, forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3170835 (last visited 2 October 2018); Felix Lange, 'The dream of a *völkisch* colinial empire: international law and colonial law during the National Socialist era' (2017) 5 *London Review of International Law* 343, 348-350.

[71] Detlef Vagts, 'International Law in the Third Reich' (1990) 84 *American Journal of International Law* 661.

[72] See Maria Bauer et al. ('Autorenkollektiv'), *Völkerrecht. Teil 1* (Berlin: Staatsverlag der Deutschen Demokratischen Republik, 1973) 21 (with a very prominent affirmation that compliance with, respect and enforcement of international law would be a constitutional principle and objective of the German Democratic Republic, followed by remarks on class structures of the international system, ibid., 37-45).

[73] See only Bruce Ackerman, 'The Holmes Lectures: The Living Constitution' (2007) 120 *Harvard Law Review* 1737.

foreign relations law under the Basic Law with the development on the other side of the Atlantic is thus a somewhat imbalanced exercise insofar as the American constitutional discourse rests on a longer tradition that has not been interrupted by major systemic changes to the same extent that has been the case in Germany.

Moreover, if we focus on the development of German foreign relations law under the Basic Law, it is apparent that this development was highly contingent on a number of historical conditions. In this regard, the hallmark of German constitutionalism has been its openness for international co-operation and European integration. A whole sub-field of constitutional doctrine has developed which is concerned with the possibility of transferring sovereign rights to international organizations and the 'friendliness' of the German constitutional order towards international and EU law, typically labelled *Staatsrecht III* in the curriculum of law schoools.[74] The construction of this field was arguably influenced to a large degree by the wish to reintegrate Germany into the community of civilized nations after the Holocaust and World War II. To a large extent, the German international law community devoted its work to this cause and turned away from the theoretical conundrums with which it was occupied in the interwar phase.[75] A pragmatic orientation towards reestablishing Germany as a European nation-state, embedded in the ambitious project of European integration, was the order of the day.[76] For the development of foreign relations law, this had a special resonance due to the traditional combination of public law and international law in most law faculties in Germany.[77]

A key text for this development was Klaus Vogel's short 1964 monograph on the openness of the German Basic Law for international cooperation.[78] This text provided the basis for the subsequent canonization of this principle of openness in the literature. Vogel's contribution consisted in a combined reading of different constitutional provisions which were dealing with international cooperation and European integration. Through this reading, he was able to identify a whole that was greater than its parts.[79] This construction made its way into the case

[74] Indicating that this subject is usually taught in the third term, following *Staatsrecht I* (general constitutional law, first term) and *Staatsrecht II* (fundamental rights, second term): Christian Calliess, *Staatsrecht III – Bezüge zum Völker- und Europarecht* (2nd edn, Munich: C.H. Beck, 2018); for the most recent comprehensive treatment see Schorkopf, *Staatsrecht*.

[75] For a somewhat different view on this focus of the interwar era see Daniel-Erasmus Khan, 'Die Deutsche Gesellschaft für Völkerrecht 1917-1933' in Dethloff, Nolte and Reinisch (eds), *Rückblick nach 100 Jahren und Ausblick – Migrationsbewegungen. Berichte der Deutschen Gesellschaft für Internationales Recht* (Heidelberg, C.F. Müller: 2018) 11.

[76] Georg Nolte, 'Zur Zukunft der Völkerrechtswissenschaft in Deutschland' (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 657, 658-659 ; Felix Lange, *Praxisorientierung und Gemeinschaftskonzeption. Hermann Mosler als Wegbereiter der westdeutschen Völkerrechtslehre nach 1945* (Berlin: Springer, 2017) 167-203.

[77] On this tradition see Eyal Benvenisti, 'The Conception of International Law as a Legal System' (2007) 50 *German Yearbook of International Law* 393, 394.

[78] Klaus Vogel, *Die Verfassungsentscheidung des Grundgesetzes für die internationale Zusammenarbeit* (Tübingen: Mohr Siebeck, 1964).

[79] Still debated today; see for a critical view Matthias Jestaedt, 'Selbstand und Offenheit der Verfassung', in Isensee and Kirchhof (eds), *Handbuch des Staatsrechts, Band XII* (3rd edn, Heidelberg: C.F. Müller, 2014), § 264, para. 83; contra: Mehrdad Payandeh, 'Völkerrechtsfreundlichkeit als Verfassungsprinzip' (2009) 57 *Jahrbuch des Öffentlichen Rechts, Neue Folge*, 465, 482-483.

law of the German Federal Constitutional Court ('FCC') which deduced various consequences from the assemblage of constitutional norms, ranging from the affirmation of a general (if qualified) acceptance of the primacy of EU law over German constitutional law to the influence of the European Convention on Human Rights on the interpretation of the fundamental rights of the Basic Law.[80] Already here it can be noted that the subsequent framing of the discouse about foreign relations law has been driven to a much greater extent by the FCC than by the academic literature, at least in comparison to the respective roles in the United States context.

'Open statehood' (*offene Staatlichkeit*) and 'friendliness towards international law' (*Völkerrechtsfreundlichkeit*) have in any case become staples in the business of attempting to transplant parts of German constitutional law along with its open posture towards international cooperation into the global constitutionalist discourse.[81] In more recent years, however, this state of affairs is increasingly contested, not least from the FCC itself. Arguably, this is a parallel movement to the realization that international law can 'hit home' and that therefore a constitutional court should reflect more seriously on the limits of international cooperation.[82]

In the German context, a new line of jurisprudence has materialized in the last ten to fifteen years. These cases have started to incrementally change the traditional openness and friendliness towards international and EU law. They have also sought to at least partly minimize the leeway that the executive used to enjoy in these fields. This came about due to a replication of the Court's previous case law on the limits of European integration for the broader field of foreign relations and international law.[83] With respect to Germany's participation in the European Union, the Court has for quite some time already struck a delicate balance between the affirmation that EU integration is a central goal of the constitutional order and the

[80] See BVerfGE 123, 267 – Lisbon Treaty Case and BVerfGE 111, 307 – Görgülü; 128, 326 – Security Detention II respectively.

[81] One notable expression of this tendency are works of German international law scholars who analyze international law from a constitutionalist perspective, see for instance Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 *Recueil des Cours* 10; for a thorough analysis of this contribution see Armin von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard International Law Journal* 223; see further on constitutionalist discourses in international law Bardo Fassbender, 'Grund und Grenzen der konstitutionellen Idee im Völkerrecht' in Depenheuer et al. (eds.), *Staat im Wort – Festschrift für Josef Isensee* (Heidelberg: C.F. Müller, 2007) 73; Thomas Kleinlein, 'Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law' (2012) 81 *Nordic Journal of International Law* 79.

[82] See also Frank Schorkopf, 'Von Bonn über Berlin nach Brüssel und Den Haag. Europa- und Völkerrechtswissenschaft in der Berliner Republik' in Duve and Ruppert (eds.), *Rechtswissenschaft in der Berliner Republik* (Suhrkamp, 2018) 327, 348 (suggesting to reflect more seriously on the limits for democratic decison-making resulting from EU and international law).

[83] This trajectory becomes quite evident in a recent decision on the fundamental rights limitations for transferring sovereign powers to international organizations under Article 24, para. 1 of the Basic Law. In a case concerning the so-called 'European schools' (an international organization in its own right and independent from the EU) and challenges to school fees brought by parents, the Federal Constitutional Court developed the constitutional limitations in this context with an express reference to its earlier case law on fundamental rights protection against the EU, see BVerfG, 2 BvR 1961/09, decision of 24 July 2018, para. 30 (not yet reported). The case was dismissed for a lack of substantiation by the applicants.

requirement that it should comply with the fundamental principles of the Basic Law.[84] The development of this jurisprudence has taken place against the background of a 'legal dialogue' with the Court of Justice of the European Union, which has shifted back and forth between offers of co-operation and threats of conflict.[85]

For the longest time, this line of case law did not have repercussions for the general field of foreign relations law, in particular not for cases which concerned Germany's participation in 'ordinary' international treaty regimes. Here, the general discourse of openness and friendliness prevailed, coupled with an affirmation of the broader leeway that the executive would enjoy in these fields.[86] An important exception has developed with respect to the use of the German armed forces abroad where the Court insisted since the early 1990s that their use in situations of armed conflict required an authorization by the *Bundestag*.[87] The most important distinction between the case law on European integration and the decisions on 'ordinary' international law might be explained by the perceived 'lack of bite' of the latter.[88] International law was not seen as intruding so deeply into the domestic legal order. Accordingly, it was less risky to emphasize the friendliness and openness of the German legal order for this body of law and to accompany that rhetorical move with corresponding interpretations of the provisions of foreign relations law.

This has changed in recent years. Three developments are particularly important in this regard. First, the FCC felt the need to emphasize the limits of openness also with respect to decisions of the European Court of Human Rights (ECtHR).[89] Whereas the general line of openness and friendliness was continued, a 2004 decision on the implementation of a Strasbourg decision concerning parental rights provided the unlikely occasion to restate that the openness of the

[84] See further on this Mattias Wendel, *Permeabilität im Europäischen Verfassungsverbund: Verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich* (Tübingen: Mohr Siebeck, 2011), at 434-523.

[85] Andreas Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts – *Der Europäische Verfassungsgerichtsverbund*' (2010) 6 *European Constitutional Law Review* 175; see also, especially in historical perspective, Jo Murkens, *From Empire to Union – Conceptions of German Constitutional Law since 1871* (Oxford: Oxford University Press, 2013); for a critical exploration of the case law of the FCC see Sven Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* (Tübingen: Mohr Siebeck, 2016).

[86] Heike Krieger, 'Die Herrschaft der Fremden – Zur demokratietheoretischen Kritik des Völkerrechts' (2008) 133 *Archiv des öffentlichen Rechts* 315, 325.

[87] Starting with BVerfGE 90, 286 – AWACS I, most recently BVerfGE 140, 160 – Pegasus; on the development of the case law see Georg Nolte 'Germany: Ensuring Political Legitimacy for the Use of Military Forces by Requiring Constitutional Accountability' in Ku and Jacobson (eds.), *Democratic Accountability and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003) 231; Thomas Kleinlein, 'Kontinuität und Wandel in Grundlegung und Dogmatik des wehrverfassungsrechtlichen Parlamentsvorbehalts' (2017) 142 *Archiv des öffentlichen Rechts* 43; Anne Peters 'Between Military Deployment and Democracy: Use of Force under the German Constitution' in Bradley (ed.), *Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, forthcoming), advance copy available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3172049 (last visited 8 July 2018).

[88] As opposed to the 'direct effect' of EU law in domestic legal orders, see on this doctrine Bruno de Witte, 'The Continuous Significance of *Van Gend en Loos*', in Maduro and Azoulai (eds), *The Past and the Future of EU Law* (Oxford: Hart, 2010) 9.

[89] BVerfGE 111, 307 – Görgülü; 128, 326 – Security Detention II.

German Constitution to international law in general and the decisions of the European Court of Human Rights in particular was not limitless, but rather contingent upon respect for the most important principles of the Basic Law. The Constitution would not have reneged on the "final world" of sovereignty.[90] Arguably, it would not have been necessary to include these remarks in the decision. This message has been received in other member states of the Council of Europe, for instance in Russia, where it played an important role in justifying the introduction of a mechanism by which decisions of the European Court of Human Rights can now be controlled with respect to their compliance with the Russian Constitution.[91] Most recently, the FCC has further developed its theory on the impact of Strasbourg decisions on German law by emphasizing the need to contextualize decisions of the ECtHR against other Council of Europe member states when considering their impact for the interpretation of the German Basic Law. Accordingly, it did not incorporate findings the ECtHR made against other states into the German context without reflecting on the applicable differences. Findings of the Strasbourg court would need to be attuned to the peculiarities of the German legal system.[92]

Second, in a case on an arcane matter of tax law, the Court ruled that there was no constitutional barrier to so-called 'treaty overrides'.[93] This term refers to a widely used practice in the field of tax law where the federal legislature enacts changes to the federal income tax code which derogate partially from double taxation agreements binding on the Federal Republic. The outcome of the case was not controversial as such. Treaties and ordinary legislation enjoy the same rank in the German legal system.[94] Accordingly, the *lex posterior* rule allows for such a derogation.[95] More noticeable, however, was language in the decision which made rather sweeping statements on the need to allow for such room for manoeuvre in order to protect the freedom of future democratic legislatures.[96] Here again, the Court felt the need to emphasize the remaining policy space of the German political branches, although the case under review did not really call for such general remarks.

Third, the latest battlefield for the limits of foreign relations law now concerns the ongoing constitutional litigation about the CETA agreement. The Court has already passed down two

[90] BVerfGE 111, 307, 319 - Görgülü.

[91] Matthias Hartwig, 'Vom Dialog zum Disput? Verfassungsrecht vs Europäische Menschenrechtskonvention – Der Fall der Russländischen Föderation' (2017) *Europäische Grundrechte-Zeitschrift* 1.

[92] BVerfG, Case 2 BvR 1738/12, Judgment of 12 June 2018 [not yet in official collection], para. 132 - *Beamtenstreik*. It should be added that this approach will in many cases be in conformity with the European Convention on Human Rights which stipulates that decisions are binding on the state against which a complaint was raised, see Article 46 of the Convention. That said, an interpretation of the Strasbourg Court could very well be understood to be a particularl authoritative interpretation of the Convention, requiring also other State parties to take it into account (which the FCC did in its above-cited case).

[93] BVerfGE 141, 1 – Treaty Override.

[94] See Ferdinand Wollenschläger, 'Art. 25' in Dreier (ed.), *Grundgesetz Kommentar. Band II Artikel 20-82* (3rd edn., Tübingen: Mohr Siebeck: 2015) para. 52.

[95] On a comparative note it can be observed that similar debates have been held in US constitutional law, see Jackson, 'The U.S. Constitution', 939 with a reference to *Breard v. Greene*, 523 U.S. 371, 376 (1998).

[96] BVerfGE 141, 1, para. 53. In the decision, the Court emphasized that the principle of democracy implies that future legislations are in a position to revisit previous legislative decisions. This would also apply with respect to the consenting act of the German *Bundestag*.

decisions which were concerned with measures of interim protection. In these decisions, there are hints that the Court is of the opinion that the CETA agreement indeed raises fundamental issues for the German constitutional legal order. This contribution is not the right place to enter into a discussion of the highly intricate and technical questions surrounding this agreement which – once it enters into force – will be a so-called mixed agreement, concluded on the one side by Canada and on the other side by the European Union and its member states jointly.[97] This state of affairs follows from the division of competences between the EU and its member states and is a common feature of EU treaty practice.[98] In the CETA case, this adds another layer of complexity and probably also contributes to the impression that the conclusion of this agreement would have particularly severe consequences for domestic democracy as well as the sovereignty of the German Federal Republic. Seen from this perspective, it is not merely an international agreement which sets forth a mechanism of ISDS and creates treaty bodies which can to some extent further develop the economic integration between Canada and the EU. What is more, these features are equipped with the additional bite of supranational EU law, thereby potentially aggravating the consequences that this agreement might have for the domestic legal order.

What are then the main arguments of the sceptics against this agreement? Their reasoning is based largely on a transposition of the arguments and categories which are familiar from the context of the German debates on constitutional limits to European integration. In this context, the Federal Constitutional Court has developed over the course of the years a so-called 'right to democracy' which is derived from Article 38, para. 1 of the Basic Law.[99] This provision, which concerns the election and status of members of the *Bundestag* (the Federal Parliament) has been interpreted to guarantee as well that Parliament still enjoys a sufficiently wide range of competences so as to make elections to the *Bundestag* meaningful. Article 38, para. 1 of the Basic Law can be invoked as a so-called *grundrechtsgleiches Recht* (quasi-fundamental right) in constitutional complaint procedures before the FCC. What is more, its substance was coupled by the Court in a bold argumentative move with the fundamental principle of democracy as set forth by Article 20 of the Basic Law and protected through the so-called 'eternity clause' of

[97] The CETA and TTIP processes have given rise to a whole flurry of publications on the constitutional implications of these agreements, see only Stoll, Holterhus and Gött, *Investitionsschutz*; Markus Krajewski, 'Umweltschutz und internationales Investitionsschutzrecht am Beispiel der Vattenfall-Klagen und des geplanten Transatlantischen Handels- und Investitionsschutzabkommens' (2014) *Zeitschrift für Umweltrecht* 396; Bernd Greszick, 'Völkervertragsrecht in der parlamentarischen Demokratie – CETA als Präzedenzfall für die demokratischen Anforderungen an völkerrechtliche Verträge' (2016) *Neue Zeitschrift für Verwaltungsrecht* 1753; Björn Schiffbauer, 'Investitionsschutz und Grundgesetz – Bilaterale Investitionsschutzabkommen („BITs) aus verfassungsrechtlicher Perspetive' (2016) *Kölner Zeitschrift für Wirtschaftsrecht* 145; Gertrude Lübbe-Wolff, 'Democracy, Separation of Powers, and International Treaty-Making – The Example of TTIP' (2016) 69 *Current Legal Problems* 175.

[98] For an overview of the legal issues see Piet Eeckhout, *EU External Relations Law* (2nd edn, Oxford: Oxford University Press, 2011), 213-222.

[99] BVerfGE 89, 155, 172 – Maastricht; 123, 267, 330 – Lisbon; 134, 366, 391 – OMT I; 142, 123, para. 147 – OMT II.

Article 79, para. 3 of the Basic Law – thus preventing any constitutional amendment as long as the Basic Law is not replaced with a new Constitution under the provision of Article 146.[100]

This set of arguments is then deployed in the CETA context to underline that this agreement would potentially be in breach of this constitutional framework. In particular, decisions reached by the joint committee of CETA would not meet the required standards of democratic legitimacy.[101] With respect to decisions reached under the ISDS mechanism, similar concerns are voiced, coupled also with criticism about the conformity of this mechanism with the ideal of the rule of law (*Rechtsstaatsprinzip*) as guaranteed by Article 20 of the Basic Law.[102]

The aims of this critique are at times hard to identify. Whereas some authors seem to be driven by a general skepticism towards free trade as a political and economic idea, in other cases there seems to be a more fundamental form of resistance against potentially harmful impacts of treaty-making processes on domestic democracy. Yet, it can be wondered whether in some instances this new form of opposition against international cooperation does not give rise to a form of democratic fundamentalism which, if decoupled from the CETA context, would in effect speak against many of the already existing treaty obligations of the Federal Republic. For example, many of the arguments deployed against the ISDS mechanism of CETA could also be used to criticize the judges of the European Court of Human Rights as unelected and based on a weak form of democratic legitimacy.

Before moving on to a comparative assessment of the two jurisdictions two brief disclaimers should be added to the above discussion. First, we still need to see what the FCC will eventually decide with respect to the CETA cases. Not too much should be read into early pronouncements at the interim protection state of the proceedings although the weight of these pronouncements is not formally lower than the one of decisions on the merits. Second, it can be observed that the more skeptical positions in the case law of the FCC towards international cooperation all stem from decisions of the Second Senate. According to the general distribution of business between the two senates of the Court, it is the Second Senate that is tasked with deciding the cases in which fundamental issues of the relationship between German (constitutional) law and EU as well as international law arise.[103] On the other hand, related issues regularly have a role to play as well in the case law of the First Senate. Originally the Senate in place for fundamental rights protection (a division long given up due to the high number of individual constitutional complaint procedures which necessitate an involvement of both senates), it is apparently the case that the First Senate continues to embrace a more open position towards both EU law and international law. This has been noticeable in recent years with decisions, for instance,

[100] For a critical analysis of this move see Martin Nettesheim, 'Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG' (2009) *Neue Juristische Wochenschrift* 2867, 2869; see also Martin Nettesheim, 'Wo endet das Grundgesetz? Verfassungsgebung als grenzüberschreitender Prozess' (2012) 51 *Der Staat* 313.

[101] See the brief for the constitutional complaint raised by Bernhard Kempen on behalf of Roman Huber et al., 106 et seq., available at https://www.ceta-verfassungsbeschwerde.de/ (last visited 8 July 2018).

[102] Ibid., 89 et seq.

[103] On the general allocation of jurisdiction between the two senates see https://www.bundesverfassungsgericht.de/EN/Verfahren/Geschaeftsverteilung/geschaeftsverteilung_node.html (last visited 28 August 2018).

involving the standing of legal persons from EU member states to avail themselves of fundamental rights protection in Germany[104] as well as in a decision turning on the importance of decisions of UN human rights treaty bodies for the interpretation of the German Basic Law.[105] This difference in approach and outlook to 'the international' would merit a more in-depth study on the different sociological dynamics in the two senates of the FCC.[106]

Structural Differences and the Usefulness of Comparisons

What is the significance of these respective developments? And can the comparison between the United States and Germany tell us something relevant for debates about foreign relations law? It is clear that there are obvious limits to comparative exercises of this kind, especially if undertaken on some level of generality. One observation is that the role of the case law of the United States Supreme Court and the German Federal Constitutional Court fulfil different functions. A more coherent and case-law oriented picture emerges from the evolution in Germany even though there is no doctrine of *stare decisis* as such.[107] Yet, the style of reasoning of the Court and the centrality it occupies in the German academic discourse has contributed to the effect that much of the academic discourse follows the parameters of the case law of the Court.[108] In addition, the general inclination of the Karlsruhe judges is to set out in a systematic manner the general rationale behind a case before turning to the concrete facts. This is called the *'Maßstäbeteil*' in the literature.[109] It is hence possible to tell the story of the evolution of

[104] BVerfGE 129, 78, 96 – *Cassina*; BVerfGE 143, 246, paras. 195 et seq. – *Vattenfall*; for academic criticism of these decisions from a Judge of the Second Senate see Peter M. Huber, 'Artikel 19 Abs. 3' in Huber and Vosskuhle (eds), *von Mangoldt/Klein/Starck – Grundgesetz-Kommentar, Band 1* (7th edn, Munich: C.H. Beck, 2018), paras. 307, 311.

[105] BVerfGE 142, 313, para. 90 – *Forced Medical Treatment* (for a measured discussion about the effects of decisions of UN treaty bodies which identifies limits in this regard without engaging in unnecessary deliberations about fundamentals of German constitutional law).

[106] Some relevant aspects for such a study shine through the magisterial work on the decision-making process of the Court by Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses – Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts* (VS Verlag für Sozialwissenschaften: Wiesbaden, 2010). In the early years of the Court's existence, there was widespread discussion about one 'red' and one 'black' senate of the Court, referring to different predominant political attitudes among the judges. This clear-cut division along party-political lines is a thing of the past, see Christoph Schönberger, 'Anmerkungen zu Karlsruhe', in Jestaedt et al., *Das entgrenzte Gericht – Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Berlin: Suhrkamp, 2011) 9, 21-22.

[107] See Antje von Ungern-Sternberg, 'Normative Wirkungen von Präjudizien nach der Rechtsprechung des Bundesverfassungsgerichts' (2013) 138 *Archiv des öffentlichen Rechts* 1,

[108] For a critical view on this so-called 'Bundesverfassungsgerichtspositivismus' see Bernhard Schlink, 'Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit' (1989) 28 *Der Staat* 161, 163; with respect to the case law on EU and international law also (in a positive sense) Schorkopf, 'Von Bonn über Berlin nach Brüssel und Den Haag', 345.

[109] Oliver Lepsius, 'Die maßstabsetzende Gewalt' in Jestaedt et al., *Das entgrenzte Gericht*, 159, 168-170; generally this style of reasoning is limited to case law on fundamental rights and is less prevalent in decisions which pertain to other constitutional issues such as competences and federalism issues, see further Helmut Philipp Aust, 'Grundrechtsdogmatik im Staatsorganisationsrecht?' (2016) 141 *Archiv des öffentlichen Rechts* 415.

German foreign relations law largely through the lens of the development of the case law of the Court.

In this regard, a particularity of the German debate is that it can rely on the constitutionally protected principle of democracy. This distinguishes the German context from the situation in the United States.[110] The US Constitution is obviously based on the very idea of democracy. However, democracy is not set forth as a constitutional rule or principle as it is the case in Germany. Instead, questions of democracy are operationalized through the system of checks and balances that the US Constitution enshrines.[111] The German Basic Law knows of course its own principle of the separation of powers and sets forth rules which provide for the concrete allocation of competences to flesh this out.[112] Yet, it also adds the principle of democracy as a kind of superstructure which can then be used in constitutional litigation. This provides the Constitutional Court with a (partly self-constructed) reservoir from which to draw general insights into the optimal allocation of powers in the German constitutional system.

In comparison, the United States Supreme Court has rarely set out a general vision of how foreign relations law would operate. It has also, according to one commentator, so far managed to avoid going into the 'structural constitutional limitations' of the US Constitution for US engagement with international law but has decided cases on narrower grounds.[113] Its case law is much more anecdotal and characterized by the possibility of this Court to decide cases not just on the level of constitutional law, but also on the statutory level. This might help explain why the general construction of foreign relations law is a topic of a greater scholarly discourse in the United States as compared to Germany where there is less of a marked dissent against the case law of the FCC.

These structural differences between the debates in the two jurisdictions are not just of academic concern. They have broader political implications. They also point to the limited space for a significant political debate among the issues of foreign relations law in the German context. Or, to be more precise, the limited space for a political debate which is not immediately caught up in the language of constitutional law and the existing 'precedents' of the FCC case law. These occupy such a powerful role in the debate precisely because of the borrowing of language from the case law about the limits of European integration. Here, much of the case law of the Court has been charged with the absolutist language of Articles 20 and 79, para. 3 of the Basic Law. These decisions convey the sense that it cannot be any other way. What should be an open and pluralistic debate about the contours of foreign relations law thus turns into a legalistic debate about the leeway under the Karlsruhe case law. What is problematic about the evolution of the jurisprudence of the FCC is that it conveys the sense that European integration and international

[110] See, for a similar remark with respect to a comparison between Germany and the United Kingdom Lübbe-Wolff, 'Democracy', 191.

[111] See Henkin, *Constitutionalism*, 14 (noting that redistributions in the political branches of the United States in the field of foreign relations law did not take place 'according to some theory of democracy').

[112] See, for a comparison between Germany, the United States and the EU, Christoph Möllers, *The Three Branches – A Comparative Model of Separation of Powers* (Oxford: Oxford University Press, 2013).

[113] Curtis A. Bradley, 'The Supreme Court as a Filter Between International Law and American Constitutionalism' (2016) 104 *California Law Review* 1567, 1578.

cooperation can be easily guarded by domestic constitutional courts applying their domestic constitutional frameworks in a responsible manner, allegedly also taking into account the interests of the greater whole. Now the FCC might be in a position to do just that. But a serious problem is that it overlooks the spillover effects in other European jurisdictions where its case law helps bolster the position that it is legitimate to question the uniformity and primacy of European law as well as international law in the name of domestic democracy.

Conclusion and Outlook

This contribution has argued that gradually the Court-driven discourse in the German context is following the more 'closed' model of foreign relations law which has become prevalent in the United States context. It thereby also follows a broader political trend which questions the special character of foreign relations in the name of democracy. The problem with this development is that it is arguably more difficult in the German system to undo previous decisions of the Court due to their linkage with key constitutional principles.

For both jurisdictions, the trend towards a 'closed' conception of foreign relations law risks aggravating a loss of confidence in democratic decision-making processes as well as in the conduct of international relations. At first sight, this is not obvious.[114] The challenge to foreign relations law is undertaken in the name of democracy, with a view to safeguarding domestic democratic procedures. Yet, by making international cooperation more difficult as far as the traditional forms of international law are concerned, the case law of both courts and the accompanying academic discourse might drive executives further towards an embrace of more informal instruments.[115] For too many issues, there is a pressing need for some form of international cooperation. If it becomes ever more difficult, for instance, to enter into a legally binding international agreement, governments may further intensify the turn towards the kind of agreements they can enter into without any form of democratic oversight and participation. This risks strengthening the general distrust in elites and technocratic forms of governance. Seen from this perspective, a little more flexibility with respect to the conduct of foreign relations might be in the longer term interest of democratic societies, as it allows governments to cooperate in forms of international law which allow for some form of democratic participation.

At the time of writing, there is ample evidence of the drawbacks of the turn to informal mechanisms which we have already been witnessing. In the current political situation in the United States, it has become possible for President Trump to withdraw (or announce intended withdrawals) from important international agreements like the Paris Agreement on Climate

[114] For a different diagnosis Schorkopf, 'Von Bonn über Berlin nach Brüssel und Den Haag', 347 who emphasizes of the positive virtues of "taking back control".

[115] On the general trend of de-formalization of international cooperation and global governance see Eyal Benvenisti, *The Law of Global Governance* (Leiden: Brill, 2014) 25; Alejandro Rodiles, *Coalitions of the Willing and International Law: The Interplay between Formality and Informality* (Cambridge: Cambridge University Press, 2018).

Change[116] and the Joint Plan for Comprehensive Action[117] on the nuclear programme of Iran for the precise reason that these two agreements – very different in kind, as they are – did not go through the advice and consent procedure established under the US Constitution for the ratification process of treaties. Now that did happen for good reasons – as it would have been impossible to obtain advice and consent for these agreements for President Obama in the first place. The flexibility sought for in the recourse to executive agreements (in the case of the Paris Agreement) and a mere political agreement (in the instance of the six powers agreement on Iran) then also paves the way for an easy way out of these agreements. If important agreements for the solution of genuine global problems fall victim to such haphazard forms of foreign policy on the go, we risk further undermining the trust and confidence of wider parts of the population in the capability of international law to deliver meaningful results through the established channels of international cooperation. It may not be in the interest of current executives in the United States and beyond to strengthen such beliefs. Yet, for the long-term stability of international relations, a more measured approach to foreign relations law which grants reasonably acting executives enough leeway to engage in the established forms of international law and diplomacy might not be the worst idea.

[116] Paris Agreement on Climate Change of 12 December 2015, entered into force on 4 November 2016, not yet in UNTS; for the statement of President Trump announcing the withdrawal of the United States of 1 June 2017 see https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/ (last visited 28 August 2018).

[117] For the text of the JCPOA see UN Doc. S/RES/2231 (2015), Annex A; for a transcript of the remarks by President Trump of 8 May 2018 see https://www.nytimes.com/2018/05/08/us/politics/trump-speech-iran-deal.html (last visited 28 August 2018).