

BREXIT — Game Changers and Consequences

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A 1,000 days plus on from the referendum instructing the government to leave the European Union (EU) and two weeks after the day of the deadline set by the government to fulfil that undertaking the future of the United Kingdom (UK) and its relationship with the EU are as unclear as ever. For three years the UK and Conservative Party in particular have been in a prolonged existential crisis. More than two years have been squandered by the government and its obdurate Prime Minister (PM), who lacking the imagination, flexibility, flair, or clubbability failed to find a solution acceptable to Parliament that would implement the plebiscite's outcome. PM Theresa May is in government but her party is ungovernable. Her cabinet is discontented and unruly. It neither obeys her nor sacks her. During her tenure as PM she had to accept the resignations of more than 15 members of her Cabinet. The spate of parliamentary votes contributed nothing to a solution. It brought no clarity. It only added to what was already a madhouse of confusion.

Brexit is a foreign-policy issue for the rest of Europe. In London it revolves primarily around a battle for domestic power and the survival of the UK as a political unit. Seldom before has the impact of domestic affairs on foreign affairs been so vividly demonstrated as in the case of political divisions in the UK driving foreign-policy positions on Brexit and, in particular, PM May's red line on the European Court of Justice (ECJ). Because of this preoccupation with the ECJ the UK views many of its position points through the ECJ-prism. The issue of the Irish border touches the soul of the UK. The continuation of its four united entities is at stake, as are peace arrangements that have lasted now for more than 30 years. Of all the remaining EU countries the Republic of Ireland (RI) will experience the consequences of Brexit the most — in whatever shape or form it eventually materialises. The emergence of the Irish backstop border issue as a deal breaker during the parliamentary debates on Brexit in the latter part of 2018 caused havoc. In the final analysis Brexit is not just about tariffs or trade and their consequences: it is about history, and making sure it is not repeated. This is a real concern. The backstop was an attempt to avoid renewed instability in Northern Ireland (NI) and is an effort to avoid a hard border between the RI and NI. Opponents argue that it could keep the UK trapped in the EU's customs union and keep the UK enmeshed in the EU.

But Brexit also raised questions about and created challenges for Scotland and its future status, with ties to England dating back to the union of the crowns in 1603 and parliaments

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in 1707. In a referendum held in September 2014, Scots voted by a considerable margin to remain in the UK. In the Brexit referendum two years later, 62 percent of voters in Scotland (including majorities in all districts) preferred to remain in the EU. During parliamentary debates on her deal PM May had some acrimonious exchanges with the Scottish parliamentarians that surely did not endear her to them. Scottish patience was wearing thin. The words of their anthem are now getting new meaning when they sing about sending English King Edward II back to think again after his encounter with Robert the Bruce (the Brave) in a battle in 1314. When all is said and done it must be realised that the consequences of Brexit may potentially destabilise the very structure of the Union.

As the UK moved along the arduous path of constructing a substantive set of proposals to give full meaning to Brexit, its initial attempts to structure that future relationship with Europe and one without the ECJ were given the cold shoulder from its European interlocutors. The events of July 2018 with the publication of the second White Paper on the UK's future relationship with the EU brought the whole issue of the ECJ out into the open. In November 2018 PM May concluded the Withdrawal Agreement (WA) in which various roles for the Court in a future relationship with the UK were defined. The inclusion of these numerous references to the ECJ caused more headaches for her. On top of it all the backstop brought added controversy in the UK, especially in NI.¹ It also covered the £40bn payment from the UK to the EU and citizens' rights of non-Britons in the UK and British citizens in other EU countries. In addition it detailed the 21-month transition period during which the UK has to abide by EU rules but loses membership of its institutions. The WA had to be passed by the UK and European parliaments before the UK could leave the EU with a deal. On 29 March 2019 the Agreement suffered its third fateful defeat in the House of Commons. The Political Declaration that was negotiated at the same time as the WA was not voted on. It dealt with what the post-Brexit relationship between the EU and the UK would look like and was meant to form the basis of trade talks later on.

Parliamentarians were at the end of their tethers and the process was growing more convoluted. The UK was plunged into deeper chaos and more confusion. Accusations of political dishonesty were levelled against PM May. Brexit was now on course for a lengthy delay. From the EU's side there was not much sympathy for the UK's efforts to remedy what amounted to a mess of its own making. On 10 April 2019 an emergency summit of EU leaders will consider any request by the UK for a longer delay to Brexit. To be granted a further postponement the UK will have to set out what purpose it would serve and it will almost certainly involve taking part in the elections for the European Parliament. On 23 June 2019 — three years after the referendum — it is entirely possible the UK will still be in

¹ Bassett R. 2018 Brexit — Options for the Irish Border. POLITEIA.

the EU, have newly-elected Members of the European Parliament and be contributing to the EU budget.

The siren call of the Brexit campaign was for the UK to “take back control”. It was stubbornly determined to regain its distinctive identity in the world, how it chooses to proceed in the world and to formulate a previously unthinkable policy. To achieve that PM May adopted a hard-line approach to Brexit. She drew red lines and endorsed previous ones. Each one of them — and the one on the ECJ in particular — was incompatible with the relationship between the UK and the EU. But, in an effort to appease the anti-EU wing of her party she drew them nevertheless.² Brexiteers mobilised around this slogan which then became a policy objective. Three years later nobody was in control. The failure to take back control was due to the PM failing to take and keep control. Given that her red lines were foolishly laid and contradictory, breaking them was inevitable.

The EU indicated from the beginning that there were limits to what it would agree with and accept from the UK. The EU was determined to preserve the value of membership for its members and to avoid any unpicking of all the compromises built up so painstakingly and meticulously over many decades. Moreover, surveillance and enforcement mechanisms involving the ECJ should ensure homogeneous application of any agreement to be reached with the UK.³ What had to be kept in mind is that such an agreement will represent an act of an institution of the EU.⁴ Consequently, it would fall within the jurisdiction of the ECJ to review its legality, interpret its provisions and ensure its uniform application.⁵ That was anathema to PM May.

The arduous task was to organise the disentanglement of the UK from the EU’s multitude institutions and policies. Removing the UK from the purview of the ECJ is a delicate and sensitive issue, with questions being raised over whether the UK can totally sever all ties with the Court.⁶ The reasons why any future relationship with the EU will be nearly

² One of the main reasons why voters had chosen to leave the EU was its sweeping nature and the sense that it had penetrated much too far into the affairs of the UK and the daily lives of its citizens. During its 45 years of EU membership the UK had to integrate nearly 19,000 EU laws and regulations. The Lisbon Treaty is the EU’s constitution. It runs to 274 pages. The UK has no such document.

³ Hillion C 2018 Brexit means Br(EEA)xit: The UK withdrawal from the EU and its implications for the EEA. *Common Market Law Review*, Vol. 55, No. 1, pp. 135-156, p. 147.

⁴ Opinion of Advocate General Sharpston 2016, at paragraph 36 confirming that an EU external agreement is an act of the Union.

⁵ Hillion p. 154.

⁶ Sir David Edward, a former judge at the ECJ and one of the UK’s most eminent legal experts, has condemned PM May as ignorant of European law. He warned that the government risked careering towards disaster over Brexit. For him it was a mistake to make the ECJ a red line in Brexit negotiations.

Of course, it was daft, frankly. The ECJ is not this big bogeyman. Why has Theresa May got this obsession in her head? ... She had failed to grasp the ECJ’s role in upholding EU single market rules — something one of her Tory predecessors had understood. It is manifest PM May doesn’t understand the working of the Court or of the single market. She does not totally accept the function of the ECJ, which Mrs Thatcher fully recognised, as the arbiter of the single market.

Rankin J 2017 May’s obsession with ECJ over Brexit ‘daft’, says former senior judge. *The Guardian*, 13 June 2017.

impossible without the Court are equally numerous. Whatever position the UK adopted it would not escape ECJ-related consequences. Given PM May's hard line standpoint on the Court it was a fact that she could hardly stomach. She ignored the four cornerstones of the EU (goods, people, capital and services) that had been meticulously constructed and fully endorsed by the ECJ over many decades. She wanted to focus only on keeping free movement of goods between the UK and the EU — but, not of the other three. It came as no surprise that her Chequers plan was unacceptable. Its proposals were incompatible with the needs and requirements of the EU. They caused a crucial point of friction. Being the major cornerstones of the Union they are enforced as indivisible, inviolable, and inalienable by the EU.⁷ Consequently, they are not only ingrained in the whole EU system but form the heart of the structure for the single market. This attempt to split up the four freedoms never looked viable. All of this resulted in Chequers being disliked and disavowed on all sides, both at home and in Europe. On top of that the UK proposes to apply EU customs rules without being part of the Union's legal order. Thus, the UK wants its sovereignty back and control its own laws and by implication demands from the EU to lose control of its own laws.

The timing and content of her position taken on the ECJ were governed more by factions in the ruling Conservative Party than by reality. PM May converted slogans into policy. This strategy was doomed to fail. As the political squabbles about the Court intensified it became clear on the other hand that the ECJ has brought its own set of consequences to the process of finding finality on Brexit regardless of the nature of the eventual relationship between the UK and the EU. For the EU these consequences were real and unescapable. For the UK it was a matter first to deny any role for the ECJ in the relationship to be negotiated. Then later, as the reality started to dawn on PM May that the UK would not be able to escape the involvement of the Court entirely, she tried to finesse that role so that its impact could be softened. At home she was accused of duplicity. In Europe the argument was won.

There is no definitive reply to the question: why Brexit? Everyone in the UK may have a different answer. A Google search yields more than 450 million references for Brexit at the present time. The ECJ has caused divisions in important segments of the body politic in the UK over many years. The Court became a cause célèbre in the lead up to the referendum of June 2016. It became one of the main battle cries of the Brexiteers to cut ties with the EU. Following the referendum, the government formulated its hard-line policy towards the EU. It was rash and chaotic.

To understand the UK's inordinate fixation on the ECJ it is important to take several events into due consideration. While charting the unknown, the issue of the ECJ continued to

⁷ Grasso C 2018 The European Court of Justice as a bastion of democracy and rule of law. openDemocracy, 20 September 2018.

figure prominently in the build-up to the general election of 8 June 2017. This issue became more and more the PM's *bête noire*. After the election that went so dreadfully wrong for her, the PM kept repeating her mantra that a no-deal⁸ was better than a bad one — the latter meaning one that would provide, *inter alia*, for a role for the ECJ. With her red line for the ECJ, she wanted all its control over UK affairs to end the moment the country left the EU. Only then would she be satisfied that she had been vindicated with her credo of “Brexit means Brexit”.

In the first White Paper in February 2017 a section was included entitled: “Taking control of our own laws — We will take control of our own statute book and bring an end to the jurisdiction of the Court”.⁹ One of the subsections was headed: “Ending the jurisdiction of the Court of Justice of the European Union in the UK”. In it the government justified its determination to end once and for all the influence of the ECJ over the UK. In no uncertain terms it declared that the Court was amongst the most powerful of supranational courts due to the principles of primacy and direct effect in EU law. The ECJ established these two principles — “supremacy” and “direct effect” — in its rulings of *Van Gend & Loos* and of *E.N.E.L* respectively in 1963 and 1964, fully nine years before the UK joined the EU. So, when the UK joined in 1972 it must have known full well what these principles were and how they guided EU law. By joining the EU, the UK thus accepted them as part of its membership agreement and adhered to them. Now 45 years later the UK found them objectionable and enough reason to reject the ECJ applying them and to continue abiding by them!

The UK experienced the ECJ as a threat to its sovereignty. The Court has accordingly become an extremely divisive factor in UK politics. PM May and her party have staggered from one position on the ECJ to another. A scenario that will ensure the UK an ECJ-free future will leave the UK very much high and dry, with incalculable consequences for the country in every sphere of human activity. While she promoted her suggestions that there could be ways to respect the ECJ's involvement, without direct ECJ jurisdiction, there was little appetite in the EU for creating new mechanisms to help her finesse her red line on the Court. At home this standpoint has not endeared her to all members of her party. The die-hard Brexiteers demanded a clean break with the EU. Accordingly, these hardliners have

⁸ A no-deal does not mean that the UK will maintain the status of its EU membership. Its links with the EU will be broken off abruptly and acrimoniously. A no-deal would constitute a profound shock to the British economy. The UK is much more dependent on trade with the EU as a share of its GDP than the EU is on the UK. It would also have immediate but much less serious consequences for the EU. On average, EU Member States do about 8 percent of their trade with the UK, compared with the UK's 44 percent with the EU. No one knows precisely what would happen if there were to be a no-deal; but it would be a huge political gamble finding out. What is certain beyond doubt, however, is that such an eventuality will have consequences for both the UK and the EU. The reimposition of tariffs and border controls will severely hamper and disrupt commerce on both sides of the English Channel.

⁹ Cm 9417 (2017) *The United Kingdom's exit from and new partnership with the European Union*. Presented to Parliament by the Prime Minister by Command of Her Majesty. London. [First Brexit White Paper], p. 13.

accused her of betraying her own red line on the ECJ and what Brexit is all about. The pro-EU members of her party wanted to mitigate the impact of leaving. PM May eventually found herself torn between appeasing the hardcore Brexiteers and the EU negotiators, who yielded very little to her demands. The UK's position has all along been aggravated by her decision that Brexit meant not just Brexit but also several red lines — foremost among them leaving the single market, ending free movement and ending the jurisdiction of the ECJ. On exit-day the UK is expected to withdraw from all EU external agreements, all of which have their own set of external implications and consequences that are far-reaching and complex for the departing state.¹⁰ Whatever the outcome, a post-Brexit UK will have challenges on many fronts and will not necessarily be in as strong a position as it was. The EU will also be a different beast to what it was before.¹¹

The impact of Brexit upon the legal structure of the UK's relationship with the EU is significant.¹² Over time PM May discovered that the involvement of the ECJ was inevitable. Slowly but surely she began to acknowledge the fact that the UK would have to accept the ECJ — if not its rulings, its involvement in one way or the other — when it comes to aviation, medicines, Europol, Euratom, or any other area where it wishes to continue participating in EU agencies. The whole issue of European Arrest Warrants (EAW) underscores this fact forcefully. Extradition involves aspects of foreign affairs *ipso facto*. The shape of the UK's extradition relations with the EU after Brexit is unknown. The (current) Home Secretary has described remaining in the EAW as a priority for the UK in Brexit negotiations. This raises the prospect that the UK could find itself subject to the rulings of the ECJ in order to retain membership of the EAW, but with no influence over either legislation or case law — and thus unable to present the UK's interests to the Court. This introduces a most serious question: what role will the ECJ have in regulating the UK's future extradition relations with the EU? The likelihood of the UK being in the EAW but without influence over how it is governed, amended and interpreted is at odds with the UK's stated desire to break the link with the Court.¹³

Conceding on the ECJ led some of her critics to accuse her openly of binding the UK further to European laws when escaping from them — and especially the Court — was one of the main reasons for Brexit was chosen in the referendum. In the end PM May suffered severe political consequences when she pursued her inflexible standpoints and unachievable red lines only to adjust them in order to reach an understanding with the EU. The whole Brexit exercise with PM May's introduction of the ECJ as a red line is certainly a prime example of the fact that foreign affairs start at home and that foreign policy is a

¹⁰ Hillion, 135 and 156.

¹¹ Mare J 2019 SA well placed to forge new deals with the EU and UK. Business Day, 13 March 2019.

¹² Hawkes M 2017 Extradition and Brexit: What comes next? Malcolm-paper, pp. 1-8, p. 1.

¹³ Sternberg D 2017 Frozen in Time? The Court of Justice of the EU after Brexit. DELF — Defence Extradition Lawyers Forum, No. 5, 5 May 2017.

reflection of domestic affairs. She was so preoccupied with efforts to placate her domestic critics that she neglected to see the forest for the trees when it came to crucial foreign-policy issues from which the ECJ could not be extricated and be dealt with in isolation. Eventually the terms of the debate on Brexit shifted fundamentally, with an unknown outcome and unpleasant realities for both the UK and the EU. After two years of negotiations it became clear to the UK that it was not possible to drive a wedge between the EU and its Court and that the latter will continue to play its dominant role in interpreting the treaties guiding the Union and thereby exerting the influence also in foreign affairs that Member States have accepted and adhered to its rulings unreservedly.

Over time she became more adamant about keeping her party intact. In that process she destroyed her own credibility as a reliable and trusted interlocutor. Indeed her approach startled governments in Europe and the EU establishment. For some months she managed to keep her party intact. She won the temporary support of Brexit hardliners. Then negotiations on how to structure the UK's exit became acrimonious. The EU dug in its heels. It refused to discuss trade-offs. It insisted that the withdrawal issue had to be finalised before anything else could even be considered.¹⁴ The pressure on her to define Brexit became immense. The complexity of Brexit grew beyond the slogans of the referendum that had caused Brexit. More Gordian knots appeared as the negotiations with the EU continued. Withdrawing from the ECJ meant that the UK would have to leave more or less every regulatory mechanism devised by the EU, from drug safety to aviation rules.¹⁵ European agencies, which she wanted the UK to continue participating in, are policed by the ECJ.¹⁶

In her worst nightmares PM May surely could not have foreseen the tumultuous political storm that broke over her and her efforts to achieve what Brexit and the referendum of 2016 were all about. In the process she became mortally wounded politically. She was now tolerated more than accepted. Confidence in her was at an all-time low. After humiliating events in Parliament and in her own party she proceeded to Brussels on several occasions in efforts to elicit more firm commitments, especially in relation to the Irish backstop. Her interlocutors at the EU were brutally blunt with the PM. Each time their response was short and to the point: the deal will not be renegotiated. The deal on the table was the best. It was the only deal possible. By the end of each of those encounters she was politically devastated. Each of the possibilities that presented itself brought with its own set of problems. The involvement of Parliament was not helpful. On the contrary, there was no majority for any policy at all. The worst-case scenario was that the UK might leave the EU

¹⁴ Hopkin J 2018 Will Brexit Bring Down Theresa May's Government? – The Chequers Plan and Its Discontents. *Foreign Affairs (Snapshot)*, 24 July 2018.

¹⁵ Knight S 2018 Theresa May's impossible choice. *The New Yorker*, 30 July 2018.

¹⁶ Payne A 2018 Theresa May surrenders her Brexit red line on taking back control from EU judges. *Business Insider*, 30 July 2018.

chaotically with no deal at all, and all parties were terrified of the chaos that would entail. The various permutations of what could happen next were numerous, and each was as confusing as the next one.

For PM May even bigger hurdles loomed at the start of 2019. She had to persuade Parliament to back her plan. A legal opinion of the Attorney General on the Irish backstop contributed in no small measure to the PM's misery. In a series of votes Parliament not only voted down her Brexit deal, but also insisted that the UK could not leave the EU with a no deal — a “cliff edge” scenario that could create economic havoc for both the UK and Europe. On top of all of this came the ruling by the Speaker on 18 March 2019 that he would not allow the PM to present her deal comprising the WA and the Political Declaration to the House of Commons again unless that deal was “substantially” different from the first two times it was voted down. In his ruling, the Speaker relied on a longstanding convention dating back to 1604. The events that followed left the UK in uncharted territory and it was impossible to determine with any certainty what the final outcome would be. That the whole Brexit process would have been difficult, long, tortuous and at times confrontational at home and with the EU was expected. What was very surprising was, however, that a few weeks before the deadline of 29 March 2019 the government was still incapable of coming to a coherent conclusion about what kind of Brexit it wanted. It failed to define the future relationship it desired with Europe. The political crisis was ongoing. What the world witnessed was a dismal failure of statecraft. The loss of credibility was tangible. Questions about the continued geo-strategic value of the UK started to surface. The new UK with new control at home and new authority abroad — PM May's vision of a “Global Britain” — remained a vision. It was in control of neither its present nor its future.¹⁷ What those outside the UK witnessed was a government with a PM so consumed with internal political wrangling that it was oblivious to what was happening on continental Europe and beyond. For the RI the reality set in that border and customs controls were due to come to the border with NI with all of the ghastly consequences that may cause.

The UK's world standing is based not only on its economic and political role as a G7 power, its global trading and ties with the Commonwealth and fellow European powers. Rather it retains a leadership because its international role is the consequence of a strong democratic tradition in a country where the exercise of political power owes less to patronage, money, favours or interests than to the authority vested in it by voters. Were it to violate the democratic mandate to appease the EU or others opposed to a genuine Brexit and do so on the pretext of Ireland, it would be making two ills instead of curing one. At a stroke it would endanger relations between the people of these islands and violate the trust

¹⁷ Paduano S 2019 This Is What 'Taking Back Control' Looks Like. Foreign Policy 27 March 2019.

of its own voters. The real danger for the UK is thus failure to execute the referendum decision as it would damage the UK's democratic system of government.¹⁸

How, when, and even if the UK leaves the EU has been unclear for months. What is clear is that when it does eventually happen the nature of its departure will shape its future relations with the EU and *vice versa*.¹⁹ Inevitably, they will be tied together for year to come. The protracted and contentious negotiations of the past two years have so severely diminished trust between the EU and the UK. The latter's reputation throughout Europe has been damaged. The antipathy of the Brexiteers has been fueled. Even the goodwill between the UK and the RI is dwindling. The economic consequences of Brexit and the lessons of Brexit for the future of European and global integration are subjects that will dominate media space and scholarly discussion, and cause political headaches for the foreseeable future.²⁰

Parliament also contributed greatly to all the confusion. While eager to become involved it failed hopelessly to provide guidance. Not once but in series of votes on different occasions. Lawmakers were not capable of finding any way out of the Brexit impasse. Neither could the PM present a plan nor could the Parliament find a compromise to take the UK out of the EU while maintaining its economic strength and its political cohesion. How clarity would be achieved and when sanity would prevail were difficult questions and created near-endless speculation and frustration.

On Brexit the EU stands united as never before; the UK, on the other hand, is a deeply divided entity. It has become abundantly clear that the UK government consistently underestimated the EU's resolve to stay united. Furthermore, it tried and failed dismally to drive a wedge between Member States and the EU Commission. Its Ministers misled themselves and the public in the UK into believing that the continentals would cave in because of their trade surplus with the UK, the UK's geopolitical importance or its special status as a future ex-Member State.²¹ Ministers were either not briefed thoroughly or ignored briefings on critical core features of the EU that conditioned its approach and drove its ambition to stay united and speak with one voice. Seldom before have 27 States acted in such unison. No one spoke out of turn. No one contradicted another. Moreover, they trusted and followed their leader. On each of these scores the UK performed poorly and failed the tests.

UK officials knew right from the start that a candidate or leaving State was required to accept the EU position as the basis for the talks. In the Brexit talks, it was 27 against one. But they, their Ministers and not least of all their PM gave the impression that the UK had

¹⁸ Lawlor S 2018 Deal, No Deal? The Battle for Britain's Democracy. POLITEIA

¹⁹ Sloat A 2019 The Brexit Breakup Gets Messier. Foreign Affairs. Snapshot, 27 March 2019.

²⁰ Sampson T 2017 Brexit: The Economics of International Disintegration. Journal of Economic Perspectives, Vol. 31, No. 4, Fall 2017, pp. 163–184

²¹ Leigh M 2019 How Britain got it so wrong on Brexit. The Guardian, 27 March 2019.

equal political weight to the EU in the negotiations. They downplayed the difficulties. They implied the talks would be a walkover.²² When reality dawned, they accused the EU of stubbornness and unwillingness to cooperate. They questioned the good faith of their EU interlocutors. They cried victory after every encounter with the EU negotiators. It would serve the UK well to approach the new round of negotiations to give substance to a future relationship with the EU with a new frame of mind — one that treats European counterparts as worthy negotiating partners and not as foil for use in domestic politics.²³

It is unclear where the respective foreign policies of the EU and UK will head after Brexit. The PM's foreign policies have been submerged by Brexit. The impression has now been created that the UK has checked out of world debates. Thus the UK's decision to leave the EU resulted in a wider strategic crisis. The engagement between national and EU foreign policies will continue to cause problems and tension. Public opinion will henceforth be more sceptical.

The EU has one common purpose. Never before has the EU been so strong and united. It has been galvanised into unity. First and foremost, it was determined to ensure that its Court continues to be the protector of all that have been created by the Union for the well-being of its Member States and their citizens, whether the negotiations with the UK succeed or fail. European integration has brought peace and prosperity to Europe and allowed for an unprecedented level of cooperation on matters of common interest in a rapidly changing world. The ECJ has been instrumental in creating and advancing that unity. Therefore, the Union's overall objective in its negotiations with the UK has been to preserve not only its own interests, but also those of its businesses, its Member States, and its citizens — all 3.7 million of them in the UK. And for this, the EU owes much gratitude to the ECJ for its role in influencing policies and decisions, in particular in the field of foreign affairs. When the EU's uncompromising stand on the ECJ is analysed the bottom line that emerges is of material interest to this review on Brexit: the Court has become an influential force not only in the EU establishment as a whole, but also in the Union's foreign affairs in particular.

On an expansive array of issues the ECJ has already pronounced itself to be committed to guiding the EU in its foreign affairs. In doing so the Court has ensured that all EU actions are commensurate with and in harmony with its treaty obligations and that this is what is supreme for the Union. Over six decades the ECJ has grown into a powerful force, so much so that it has not endeared itself to the UK. For the UK the Court became a contentious issue. In the ensuing Brexit negotiations the ECJ remained a major bone of contention. The ECJ linkage to a solution was a given. The moment the UK decided to sever its ties with the EU every aspect of Brexit became and remained a foreign affairs issue — for the UK as

²² Leigh

²³ Ibid.

well as for the EU. In that process the ECJ has emerged as an issue on which the EU was not prepared to compromise for the simple reason that for the Union its Court has been and must continue to be involved in overseeing its treaty and other international obligations.

For all the chaos of Brexit, things have never been this bad with the deadline of 12 April 2019 looming, the country is unprepared for a no-deal Brexit. Parliament is unable to support any other plan. The UK has no solid case for another extension from the EU. PM May could try making such a case, nonetheless, but European countries have already braced themselves for a no-deal Brexit and might not easily agree this time. Still on the table is the option of revoking the UK's Article 50 withdrawal — i.e., canceling Brexit — but that would only make sense as a stall tactic, buying time for a new referendum or general election, and it might encounter legal problems to be done in time.

With days to go before the UK is due to leave the EU, the way in which it will exit remains unclear. Uncertainty and distrust abound. Without a negotiated withdrawal deal or an alternative plan, the country will suffer an abrupt and chaotic departure. On 2 April 2019 PM May took the unconventional step of indicating that she would engage her Labour Party arch-rival and Leader of the Official Opposition, Jeremy Corbyn, in final desperate attempt to assemble approval that will carry the day in Parliament and break the deadlock. By going this cross-party route she openly admitted that her deal was dead. All her red lines and tough talk of Brexit means Brexit have come to naught.

As Brexit devolves into a Shakespearean tragicomedy everyone fears what will come next. What political price PM May will eventually pay for this effort only time will tell. She is ruined. It may be terminal for her party. Hardline Brexiteers in the party reacted with outrage at her reaching out to Corbyn. Within 24 hours two Ministers resigned from Cabinet and one of her staunch supporters left the Party in disgust. Corbyn on the other hand will make the most of it. He will no doubt extract maximum political gain that will require PM May to concede some of her infamous red lines that shaped the doomed deal she formulated in the Withdrawal Agreement. But even more consequential will be the likelihood of the PM agreeing to the Labour Party's long-held position of a permanent Customs Union with the EU. Such an arrangement will first and foremost prevent the UK from signing independent trade agreements; secondly, the option of a single market is removed; and thirdly, it requires the UK to accept unlimited immigration from the EU. Her antagonists in the UK have wasted no time in reminding the country that PM May was a staunch supporter of the Remain-group in the referendum of 2016. Brexiteers are now openly accusing her of what they all along suspected – her commitment to Brexit was more of an act.

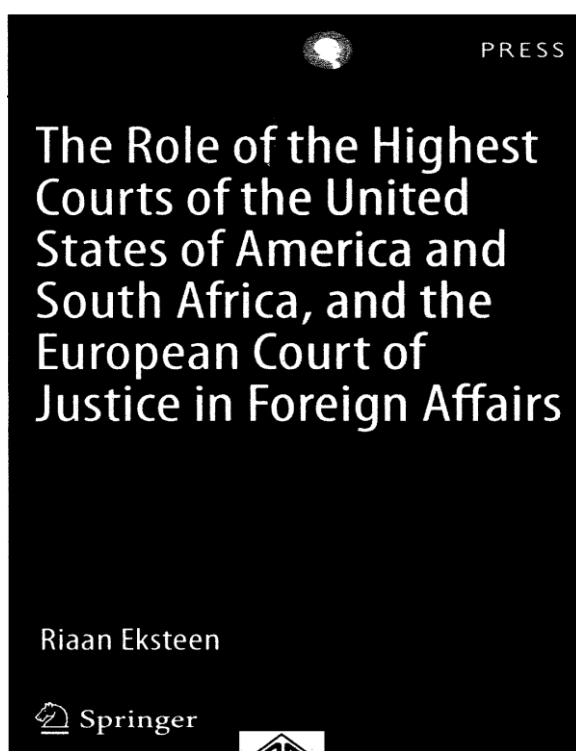
Furthermore, the devil in the detail of Corbyn's willingness to cooperate may well be to demand Parliament's agreement that any deal concluded must be subject to a confirmatory

public vote. This may well imply another referendum. That will certainly kill Brexit once and for all and leave PM May retreating from one of her positions she so vehemently defended — no second referendum as that would in her view destroy what the majority of voters demanded in the first one. The first step in the direction of the second plebiscite has been taken.

Another parliamentary contribution to this saga came on 3 April 2019. By a single vote, a bill was approved that forces the PM to avoid a no-deal scenario by seeking a further extension from the EU if a deal is not approved by Parliament by the dead line of 12 April. This was a clear signal from Parliament that there was total lack of trust in the PM and felt the need to bind her by law. The EU, however, is firm in its attitude. It will consider such an extension only if Parliament has taken a decisive decision on the way forward. In the midst of her talks with Corbyn she came with another surprise move on 5 April 2019 by requesting an extension until 30 June 2019 to give Parliament time to pass the Withdrawal Agreement. This request in terms of Article 50 will be discussed at a forthcoming summit when all 27 remaining Member State will have to agree to it. On a previous occasion the EU rejected that date of 30 June 2019 when the UK last sought a delay. The PM will have to explain how she would get her Brexit deal accepted by Parliament before the EU could justify another extension. One possibility may be for the EU to consider granting an extension of about a year to the Brexit process that could be cancelled the moment Parliament passes the Withdrawal Agreement that MPs had rejected three times. However, PM May's three-page letter was not very convincing. The EU leaders will no doubt request much more definite details about what makes her request this time so much different and about her talks with Corbyn.

In the span of a few weeks the whole Brexit-process has unravelled. Events have ruined PM May. Her legacy is in tatters. She and her government will not be remembered for any decisive events or moments, rather for a series of failures that led to the most catastrophic non-event in the recent history of the UK — Brexit. From June 2016 up to April 2019 the whole Brexit exercise and negotiating process provided valuable lessons. One that was ever so difficult for PM May to swallow was the high premium the EU placed on protecting the integrity of its legal order, with the ECJ being inextricably part of that regime, and the accompanying solidarity of its members. The other one was that for foreign affairs to be successful it requires a policy that depends on important conditioning factors and circumstances domestically that are conducive to unity. After all these years the UK has not advanced to the end of Brexit. It has not even completed the beginning. What it has to show for all its efforts is that faith in the democracy is at a low point and contempt for Parliament is growing.

Front cover of book



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Dr. Riaan Eksteen is a Former South African Ambassador residing in Namibia; from 1968-1973 he served at the South African Embassy in Washington D.C. He subsequently served as Ambassador and Head of Mission at the U.N. in New York (1976-81), in Namibia (1990-91), at the U.N. in Geneva (1992-94), and in Turkey, with accreditation also to Azerbaijan, Kyrgyzstan, Turkmenistan and Uzbekistan (1995-97).

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[To be released in Europe during July 2019]

Rear cover of book

This book deals with what the author considers a sorely neglected question, namely the role of the judiciary in states' foreign policy processes. Eksteen argues that the impact of the judiciary on foreign affairs is understudied and that recognition of its role in foreign affairs is now due. This makes it a ground-breaking scholarly contribution that should first of all prove of value to students, scholars, researchers and practitioners in the two broad fields of politics and law for the wide scope of issues it covers and the very comprehensive reference lists it contains. Secondly, professionals working within politics, including members of the legislatures of the United States, the European Union and South Africa, as well as members of the judiciaries there, should find this book of benefit.

A detailed examination has been undertaken of the role of the United States Supreme Court, the two high courts in South Africa, namely the Constitutional Court and the Supreme Court of Appeal, and the European Court of Justice of the European Union in foreign affairs. The author substantiates the unmistakable fact that these Courts have become involved in and influence foreign affairs. Furthermore, that they have not shied away from using their judicial authority when dealing with cases touching on foreign affairs and especially presidential overreach.

The lack of recognition of the judiciary's role in foreign affairs is still noticeable in Foreign Policy Analysis (FPA) literature. This book concludes that FPA has to accept and give proper recognition to the judiciary and its increasing relevance in foreign affairs.