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Alexander Silke

Deference to the Executive?

The Development of Judicial Review in Foreign Affairs in the United States of America, Germany and South Africa

Nomos

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Berlin, June 2024

Alexander Silke

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Other Jurisdictions

Abbreviations

AfD	Alternative for Germany ('Alternative für Deutschland')
ANC	African National Congress
AU	African Union
CETA	Comprehensive Economic and Trade Agreement
CIA	Central Intelligence Agency
DA	Democratic Alliance
DIPA	Diplomatic Immunities and Privileges Act
ECB	European Central Bank
ECHR	European Convention on Human Rights
EPA	Environmental Protection Agency
EU	European Union
FSIA	Foreign Sovereign Immunities Act
GDR	German Democratic Republic
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
IO	International Organization
JCPOA	Joint Comprehensive Plan of Action
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NSA	National Security Agency
PAJA	Promotion of Administrative Justice Act
PCIJ	Permanent Court of International Justice
SADC	Southern African Development Community
UN	United Nations
UNC	Charter of the United Nations

UNGA	United Nations General Assembly
VCCR	Vienna Convention on Consular Relations
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization

Introduction

> *So off went the Emperor in procession under his splendid canopy. Everyone in the streets and the windows said, 'Oh, how fine are the Emperor's new clothes! Don't they fit him to perfection? And see his long train!' Nobody would confess that he couldn't see anything, for that would prove him either unfit for his position, or a fool. No costume the Emperor had worn before was ever such a complete success.*[1]

I. The issue of judicial review in foreign affairs – three examples

It appears fitting to start this book about deference to the executive in foreign affairs with a fairy tale. The 'traditional role' of the executive in foreign affairs has often been said to entail an almost mystical notion.[2] Foreign affairs powers developed out of the 'Crown prerogatives,' the exclusive and unreviewable power of the monarch.[3] The word deference itself suggests a gesture of submission in front of a wise king.[4] It is often used by courts to express their restraint in reviewing executive actions in foreign affairs.

This notion clashes with another idea:[5] 'It is emphatically the province and duty of the judicial department to say what the law is'.[6] The quote by Justice Marshall in *Marbury v Madison*[7] prominently established judicial

1 Hans Christian Andersen, 'The Emperors New Clothes', translation by Jean Hersolt, available at the Hans Christian Andersen Centre <https://andersen.sdu.dk/vaerk/hersholt/TheEmperorsNewClothes_e.html>.

2 Eberhard Menzel, 'Die auswärtige Gewalt der Bundesrepublik' (1954) 12 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 179, 186.

3 This is true for civil and common law countries alike, cf in detail Chapter 1.

4 Lord Sumption in *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 (Court of Appeal) mn 22, 'At least part of the difficulty arises from the word, with its overtones of cringing abstention in the face of superior status'.

5 Bradley speaking of the 'Marbury perspective' Curtis A Bradley, 'Chevron Deference and Foreign Affairs' (2000) 86 Virginia Law Review 649, 650.

6 *Marbury v Madison* 5 US 137 (1803) (US Supreme Court) 177.

7 Ibid.

oversight in the modern state.[8] Its simplicity conceals a serious problem: if it is for the judiciary to say what the law is, who determines the boundary between law and politics? This question has always constituted a complicated issue for the courts. It is multiplied in the area of foreign affairs, where the traditional role of the executive has been echoed by kings and queens, presidents, prime ministers, and chancellors. Until today, the courts in democratic states struggle with questions concerning foreign affairs and the correct standard of judicial review in these cases.[9] Three more recent examples illustrate this point.

In 2017, shortly after assuming office, former US President Trump issued the so-called travel ban, barring the entry into the USA of nationals from seven countries with mainly Muslim populations.[10] The executive proclamation establishing the ban was justified with reference to protection from terrorists.[11] However, the underlying motives were questionable, as during his campaign Donald Trump had promised a 'total and complete shutdown of Muslims entering the United States'.[12] Thus, the ban stirred a national and worldwide debate. Only two days after their enactment, a Washington District Court entered a temporary restraining order blocking the entry restrictions.[13] Appealing the decision, the government claimed 'unreviewable authority to suspend the admission of any class of aliens'.[14] The Circuit Court rejected the claim of non-reviewability but held that 'deference to the political branches is particularly appropriate with respect to national security and foreign affairs'.[15] Nonetheless, it upheld the District Court's decision.[16] The government repealed the executive order and replaced it with another version that was challenged in the courts and partially blocked.[17] A third variant of the travel ban finally led to a Supreme Court

8 For the first time including legislative acts, cf David B Robertson, 'The Constitution from 1620 to the Early Republic' in Mark Tushnet, Mark A Garber and Sanford Levinson (eds), *The Oxford Handbook of the U.S. Constitution* (OUP 2016) 39 f.

9 Thomas Giegerich, 'Foreign Relations Law' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 35.

10 President of the United States, Executive Order 13769 of 27 January 2017, 82 FR 8977.

11 Ibid.

12 *Trump v Hawaii* 585 US 667 (2018) (US Supreme Court) 700.

13 *Washington v Trump* 2017 US Dist LEXIS 16012 (United States District Court for the Western District of Washington).

14 *Washington v Trump* [2017] 847 F 3d 1151 (Court of Appeals for the 9th Circuit) 1161.

15 Ibid 1163.

16 Ibid.

17 For an overview over the various proceedings see *Trump v Hawaii* (n 12) 673 ff.

decision on the merits.[18] The central issue was a possible violation of the Establishment Clause,[19] the constitutional provision enshrining non-discrimination on religious grounds in the United States.[20] Again, the Trump administration claimed non-reviewability of the ban.[21] The Supreme Court conceded that 'decisions in these matters may implicate "relations with foreign powers," or involve "classifications defined in the light of changing political and economic circumstances," such judgments "are frequently of a character more appropriate to either the Legislature or the Executive."'[22] For these reasons, in determining whether the executive had violated the Establishment Clause, it only applied a comparatively narrow[23] 'rational basis review'.[24] In a 5–4 decision, it finally upheld the travel ban.

On the other side of the Atlantic, judges are also often involved in highly contentious foreign affairs cases. In 2015 relatives of a victim of a US drone strike in Yemen brought a case in front of the Administrative Court Cologne to compel the German government to stop using the US Ramstein Air Base in Germany for drone strikes.[25] The plaintiffs had also filed a case in front of a US District Court. The US judge found the issue non-reviewable based on the 'political question doctrine,' stating that an 'area in which courts have been particularly hesitant to tread is that of foreign affairs and national security'.[26] The German court chose another approach. It found a considerable 'area of discretion for the foreign affairs power' in which 'international law assessments […] cannot be reviewed without limit'.[27]

18 In previous proceedings the Supreme Court had not reached the merits cf *Trump v Hawaii* (n 12) 673 ff.

19 US Constitution, First Amendment.

20 *Trump v Hawaii* (n 12) 697 ff.

21 Ibid 682 ff.

22 Ibid 702.

23 Cf the dissent by Judges Ginsburg and Sotomayor *Trump v Hawaii* (n 12) 740 'The majority […] incorrectly applies a watered down legal standard in an effort to short circuit plaintiffs' Establishment Clause claim'.

24 *Trump v Hawaii* (n 12) 704.

25 *Judgment from 27 May 2015 (Ramstein Drone Case)* 3 K 5625/14 (Administrative Court Cologne).

26 *Ahmed Salem Bin Ali Jaber v USA February* [2016] F Supp 3d 70 (United States District Court for the District of Columbia) 77 ff.

27 *Judgment from 27 May 2015 (Ramstein Drone Case)* (n 25) mn 76: 'Schließlich äußert sich der erhebliche Spielraum der auswärtigen Gewalt auch darin, dass es den innerstaatlichen Gerichten verwehrt ist, völkerrechtliche Beurteilungen der auswärtigen Gewalt unbeschränkt zu überprüfen' [my translation].

It hence only applied a 'plausibility'[28] review and upheld the executive assessment that no sufficient indications for a violation of humanitarian international law existed.[29] The plaintiffs appealed to the Higher Administrative Court.[30] In line with the previous ruling, the German government claimed a broad area of discretion for the fulfilment of its protective duty towards the claimants, especially as the case touched on the area of 'foreign policy'.[31] However, the court decided that no area of discretion existed to assess the compliance of the drone attacks with international law.[32] It held that whether a person or an object is a legitimate military target is 'not a political question, exempt from judicial review in the first place, but a question of international law'.[33] Contrary to the executive, it doubted the legality of the drone strikes under international law and found the steps taken by the government insufficient.[34] Hence, it ordered the executive to take 'suitable measures' to determine whether the drone strikes in Yemen were in accordance with international law and, if necessary, to work towards their compliance by the United States of America.[35] The government appealed[36] to the Federal Administrative Court.[37] In the first place, the court already

28 Ibid 'Vertretbarkeit' mn 78 [my translation].

29 *Judgment from 27 May 2015 (Ramstein Drone Case)* (n 25) mn 81.

30 For English articles on the case cf Leander Beinlich, 'Drones, Discretion, and the Duty to Protect the Right to Life: Germany and its Role in the US Drone Programme before the Higher Administrative Court of Münster' (2019) 62 German Yearbook of International Law 557 and Thomas Giegerich, 'Can German Courts Effectively Enforce International Legal Limits on US Drone Strikes in Yemen?' (2019) 22 ZEuS 601; case reviews in German: Patrick Heinemann, 'US-Drohneneinsätze vor deutschen Verwaltungsgerichten' (2019) 38 NVwZ 1580; Peter Dreist, 'Anmerkung Ramstein Fall' (2019) 61 NZWehrr 207; Helmut Philipp Aust, 'US-Drohneneinsätze und die grundrechtliche Schutzpflicht für das Recht auf Leben: „German exceptionalism"?' (2020) 75 Juristen Zeitung 303.

31 *Judgment from 19 March 2019 (Ramstein Drone Case)* 4 A 1361/15 (Higher Administrative Court Münster) mn 16.

32 Ibid mn 554.

33 Ibid mn 561 [my translation].

34 Ibid mn 565 ff.

35 Ibid operative part (*Tenor*).

36 German law knows two kinds of appeal, a first appeal (*Berufung*) allowing the court of second instance to review facts and law and a second appeal (*Revision*) allowing the court of third instance only a review of the law. The second appeal thus led to Revision-proceedings before the Federal Administrative Court.

37 *Judgment from 25 November 2020 (Ramstein Drone Case)* BVerwGE 170, 345 (Federal Administrative Court).

doubted whether German fundamental rights were applicable to the case.[38] Moreover, it reversed the decision of the Higher Administrative Court and found that 'the federal government possesses an area of discretion within the spectrum of justifiable legal positions concerning the compatibility of foreign states' actions with international law'.[39] Likewise, it found the steps the federal government took to ensure compatibility with international law sufficient.[40] The case is now pending in the Federal Constitutional Court.[41]

The problem of judicial review in foreign affairs not only causes problems in the Global North but also in the democracies of the South, as can be seen from a case in the South African Constitutional Court. It concerned certain decisions of the Southern African Development Community (SADC) summit in which the then South African President Jacob Zuma had participated. The SADC, inspired by the European Union,[42] created a common market, including a tribunal with direct access for individuals. After several judgements of the tribunal, which found that the Zimbabwean land distribution programme violated the rights of white farmers, the Mugabe administration of Zimbabwe started to lobby for its abolishment. An SACD summit in 2011 suspended the operation of the tribunal and in 2014 limited its jurisdiction to inter-state relations. The Law Society of South Africa challenged the South African government's involvement in the process, first in the High Court of the Gauteng Region. During the proceedings, the executive claimed the decision to be 'one of executive competence in relation to foreign affairs, in respect of which the

38 Ibid mn 40 ff.

39 Ibid mn 55, 'dass die Bundesregierung in Bezug auf die völkerrechtliche Beurteilung des Handelns anderer Staaten innerhalb der Bandbreite der vertretbaren Rechtsauffassungen über einen Einschätzungsspielraum verfügt' [my translation].

40 Ibid mn 75 ff.

41 Pending under file number 2 BvR 508/21, for reviews of the case cf Mehrdad Payandeh and Heiko Sauer, 'Staatliche Gewährleistungsverantwortung für den Schutz der Grundrechte und des Völkerrechts' (2021) 74 NJW 1570 (critical); Thomas Jacob, 'Drohneneinsatz der US-Streitkräfte im Jemen: Keine unbegrenzte Verantwortung Deutschlands für extraterritoriale Sachverhalte' (2021) jM 205 (positive); Patrick Heinemann, 'Tätigwerden der Bundesregierung zur Verhinderung von Drohneneinsätzen der USA im Jemen von der Air Base Ramstein' (2021) 40 NVwZ 800 (positive).

42 Karen Alter, James T Gathii and Laurence Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 EJIL 294, 306.

Executive has a broad discretion'[43] and that '[i]nternational relations lay at the heartland of the Executive, and this fact would constrain any judicial review'.[44] The High Court nevertheless found a violation of international and constitutional law.[45] The case reached the Constitutional Court in 2018. In a not uncontroversial decision,[46] the court agreed with the High Court. Concerning South African constitutional law, it held that, once granted, the right to access to the tribunal is protected by the South African Bill of Rights[47] and cannot be taken away, even though the president has the competence of negotiating and signing treaties.[48] It hence ordered the president to withdraw his signature from the Protocol.[49]

These cases exemplify many common themes in the area of tension between executive competence in foreign affairs and judicial review. In all cases, the executive claimed a 'special role' concerning foreign affairs. Likewise, the courts appear to acknowledge this superior position.[50] Applying different legal techniques, they have tried to transform this general notion into legal doctrines. Nevertheless, in all cases, the courts are mindful of their role as the judicial branch. The 'traditional position' in foreign affairs does not appear to be as uncritically accepted as it may have been previously. Although the executive prevailed in the end, it took then President Trump three attempts and significant softening to finally pass the travel ban. A series of losses in front of courts (not exclusively related to foreign affairs) led the President to tweet: 'Courts in the past have given

43 *Law Society of South Africa and Others v President of the Republic of South Africa and Others (SADC Case)* 2018 2 All SA 806 (GP) (High Court – Gauteng Division) mn 54.

44 Ibid mn 56.

45 Ibid mn 61 ff.

46 The judgment was criticized on different grounds, the separate opinion challenged the clarity of legal reasoning, others also challenged the strong limits imposed on the executive, cf Dire Tladi, 'A Constitution Made for Mandela, A Constitutional Jurisprudence Developed for Zuma: The Erosion of Discretion of the Executive in Foreign Relations' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 215, 221 ff.

47 Especially Section 34 of the South African Constitution.

48 *Law Society of South Africa and others v President of the Republic of South Africa and others (Southern Africa Litigation Centre and another as amici curiae) (SADC Case)* 2019 (3) BCLR 329 (CC) (Constitutional Court) mn 72 ff.

49 Ibid mn 97.

50 In the SADC case, this acknowledgement is rather weak, in general, however, South African courts acknowledge the special position (cf especially Chapter 1, II., 1. for the more critical approach in recent cases cf Chapter 3, II., 2.).

"broad deference". BUT NOT [to] ME!'.[51] This trend does not appear to be exclusively related to Donald Trump[52] or the United States. As the cases from Germany and South Africa have shown, the courts in these countries also do not easily rescind their adjudicative function and have blocked or directed executive action even in the sensitive area of foreign affairs. On the other hand, variance is also apparent. As the *Ramstein* case has shown, courts in different countries, in the very same setting, may apply different approaches. Moreover, even within the same jurisdiction, the correct level of leeway awarded to the executive may be subject to debate.

These observations prove that striking a balance between judicial review and executive leeway in conducting foreign affairs is a general problem in democratic states.[53] This thesis aims to shed light on this problem. For this purpose, it will broadly define 'foreign affairs' as dealing with a state's foreign relations as opposed to, at first sight, purely internal matters.[54] It is guided by five questions that surfaced in the short review above: where does the notion of 'deference' in foreign affairs, which courts in different jurisdictions seem so natural to accept, stem from? How do courts in different jurisdictions implement this notion, and are there common patterns in its implementation? How do courts in different jurisdictions treat comparable foreign affairs cases? Has the level of 'deference' in different jurisdictions changed over time, and if so, what are the reasons for this change? Finally, what will the future of 'deference' look like?

51 President Trump on twitter cited in Eric A Posner and Lee Epstein, 'Trump has the worst record at the Supreme Court of any modern president' Washington Post from 20 July 2020, available at <https://www.washingtonpost.com/outlook/2020/07/20/trump-has-worst-record-supreme-court-any-modern-president/>.

52 See already Eric A Posner and Lee Epstein, 'The Decline of Supreme Court Deference to the President' (2018) 166 University of Pennsylvania Law Review 829.

53 Acknowledging this Thomas Kleinlein, 'Book Review – Oxford Handbook of Comparative Foreign Relations Law' (2020) 114 AJIL 539, 543.

54 Helmut Philipp Aust, 'Foreign Affairs' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (online edition, OUP 2017) mn 1; on the question whether the inside outside dichotomy is still apt cf below Chapter 4, I., 2.

II. Design of the thesis

1. Selection of jurisdictions

As the selection of cases suggests, this thesis will look into the problem of judicial review in foreign affairs by examining three jurisdictions: the United States of America, the Federal Republic of Germany, and the Republic of South Africa.[55] Two main considerations guide this choice.

First, as submitted, judicial review in the area of foreign affairs appears to create an area of tension in all democratic states. Its central core is a separation of powers issue:[56] Every branch should fulfil its constitutionally assigned function to achieve a balance of power. The more a country leans towards authoritarianism,[57] the more the question becomes meaningless.[58] Absent an actual separation of powers, the tension between the judiciary and the executive branch rarely surfaces. In the end, the judiciary will always decide in favour of the governing elite.[59] The choice of candidates for meaningful analysis is thus limited to countries with a largely independent judiciary.

Second, as the problem is understood to be a universal one, this thesis will include countries from three different continents. They reflect three different legal systems and are often cited as their prime representatives.[60] The United States, as the oldest constitutional system in this study, represents common law, albeit in contrast to the UK, it is based on a supreme

55 As the law of the United States as well as of South Africa shares common roots with English common law, by proxy, English law will also play a vital part in this thesis.

56 On the different aspects commonly associated with the separation of powers see Jeremy Waldron, *Political Political Theory* (Harvard University Press 2016) 49; on different traditions see as well Christoph Möllers, *The Three Branches* (OUP 2013).

57 On authoritarian regimes and their 'constitutionalism' see Helena Alviar Garcia and Günter Frankenberg (eds), *Authoritarian Constitutionalism – Comparative Analysis and Critique* (Edward Elgar 2019).

58 In a similar direction Curtis A Bradley, 'What is foreign relations law?' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 3, 4; Felix Lange, *Treaties in Parliaments and Courts: The Two Other Voices* (Edward Elgar 2024) 8.

59 Elaborating on the problems of a separation of powers in China Nicholas Barber, *The Principles of Constitutionalism* (OUP 2018) 105 ff; cf as well Lange (n 58) 8.

60 On the value of legal families; Uwe Kischel, *Rechtsvergleichung* (CH Beck 2015) 217 ff; for a critical assessment: Jaakko Husa, 'Classification of Legal Families Today: Is it Time for a Memorial Hymn?' (2004) 56 Recueil de cours 11 and Mathias Siems, *Comparative law* (CUP 2018) 80 ff; cf as well below, this Chapter, II., 4.

constitution, not the sovereignty of parliament. On the other hand, Germany is a civil law country influenced by ancient Roman law. Finally, South Africa has a hybrid judicial system based on Roman-Dutch civil law and English common law.[61] Moreover, all three jurisdictions are typically cited for their quite different approaches toward judicial control of foreign affairs. The United States is generally perceived as giving a free hand to the executive, whereas German law often serves as the role model for judicial intervention.[62] South Africa finds itself in the middle of these rough pictures, with its roots in common law leaning towards the United States but with its new constitution strongly influenced by the German Basic Law,[63] now searching for a distinctively South African approach.[64] The focus on these three countries hence aims at including variance in examining how courts deal with the problem of judicial review in foreign affairs, while at the same time it may allow some generalization of the findings.

2. Structure

The structure of the thesis will follow the course of the questions set out above. As we have seen, all three jurisdictions appear to accept a special role for the executive in foreign affairs. The first chapter aims to shed light on the origins of the notion of deference typically associated with judicial review of foreign affairs. Its roots lie in modern political philosophy, which has diffused throughout the three countries, albeit to varying degrees and in diverse forms.

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61 Native Law and the philosophy of ubuntu play a role as well, Yvonne Mokgoro, 'Ubuntu and the Law in South Africa' (1998) 1 Potchefstroom Electronic Law Journal 1.

62 Hans-Peter Folz, 'Germany' in Dinah Shelton (ed), *International law and domestic legal systems: Incorporation, transformation, and persuasion* (OUP 2011) 240, 244.

63 Of course, also the new South African constitution is not only influenced by Germany but (among others) also the United States and Canada Dennis M Davis, 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1 I CON 181, 187; Christa Rautenbach and Lourens du Plessis, 'In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges' (2013) 14 German Law Journal 1539.

64 Justice Ackermann in *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC) (Constitutional Court) 804 'I have no doubt that over time our courts will develop a distinctively South African model of separation of powers'.

The second chapter will examine how the courts in the three countries have transformed this general notion into legal terminology. Within the three countries, we see a multiplicity of concepts to accommodate the special role of the executive. I will argue that despite their variance, these concepts show structural similarities, which allows us to group them into different categories of deference. These categories can be brought into an order ranging from strong to weak deference.

In the third chapter, this categorization will be used to examine how courts in the three jurisdictions solve particular foreign affairs cases and how the level of deference has changed over time. This will be done with a double comparison. On a vertical level, the application of different categories of deference in comparable cases within a jurisdiction will be examined. We will see that the courts of a given jurisdiction change the application of different categories of deference and hence the level of deference over time. Five groups of cases will be formed to create a common point of reference for the analyses. These groups encompass 'classical' areas of tension between the executive and the judiciary. The first group is concerned with the sources of international law, namely how far the judiciary accepts the interpretation of international treaties by the executive branch. The focus will then shift to the subjects of international law: in the second group of cases, the question of how far the executive recognition of states and governments is binding on the courts will be analysed. The third group of cases deals with the problem of how far the judiciary may independently determine the immunity of states from jurisdiction. Closely related to these questions but already shifting the focus more towards the individual is the question of executive influence concerning the diplomatic status of foreign officials. Finally, the last group of cases completely turns to the individual and examines how far executive decisions concerning diplomatic protection may be reviewed. Although other topics would have been possible,[65] the selection should serve as a meaningful cross-section of classical areas of tension between the executive and the judiciary in foreign affairs. On a horizontal level, the development of the level of deference in every group of cases will be contrasted with that in the other jurisdictions. The analyses will also reveal country-specific problems in the application of deference and provide suggestions for their solution.

The fourth chapter aims to explain the dynamics of deference. As we will see, the three countries show a trend towards more judicial review in

65 (e.g. treatment of customary international law, treatment of extradition requests).

foreign affairs. However, this trend is not uniform and stronger in some countries than in others. General factors that push towards more judicial review in foreign affairs, especially since the end of the Second World War, will be identified. On the other hand, the three jurisdictions show a different receptiveness concerning this trend. The factors that facilitate or hinder their openness towards the convergence factors will also be examined.

In the last chapter, the likely future of deference will be analysed. I will argue that complementary to the traditional role of the executive in foreign affairs, a 'modern view' has developed through the forces examined in Chapter 4. Finally, a limited normative claim will be made concerning the best way to structure deference further into the 21st century.

3. The thesis within the broader project of comparative foreign relations law

This project is thoroughly rooted in the recently unfolding field of 'comparative foreign relations law'. Comparative projects are, of course, not a novelty[66] but have lately intensified in the area of 'foreign relations law'.[67] This area of law can be defined as 'the domestic law of each nation that governs how that nation interacts with the rest of the world'.[68] Although the main structures of this field are determined by constitutional law, it also encompasses other areas, mostly regular administrative and other statutory law.[69] These laws are not treated as a separate field in all jurisdictions,[70]

66 In fact, especially work in foreign relations law almost always included at least some comparative remarks (cf the literature below in this part); for the transatlantic tradition of comparative foreign relations law see Kleinlein (n 53) 539 fn 1.

67 Describing the hardly existent coverage in the two leading English language books on comparative constitutional law Bradley, 'What is Foreign Relations Law?' (n 58) 19 fn 79.

68 Giegerich, 'German Courts' (n 9) mn 1; Bradley, 'What is Foreign Relations Law?' (n 58) 3; Campbell McLachlan, 'Five conceptions of the function of foreign relations law' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 21; Helmut Philipp Aust and Thomas Kleinlein, 'Introduction: Bridges under Construction and Shifting Boundaries' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 6 ff.

69 Bradley, 'What is Foreign Relations Law?' (n 58) 4.

70 The US and German scholarship have defined a field of foreign relations law. In South Africa arguably such a differentiation is developing.

which does not hinder their comparative examination.[71] Two outstanding contributions have induced intensified comparative scholarship in the field. The first is Campbell McLachlan's *Foreign Relations Law* (2014),[72] in which he compares the law of four Commonwealth states: the United Kingdom, Australia, Canada, and New Zealand. The second is the first edition of the *Oxford Handbook on Comparative Foreign Relations Law* (2019),[73] edited by Curtis Bradley, which collects various contributions in the field from different jurisdictions.[74] Following this lead, other significant contributions have been published: *The Double-Facing Constitution* (2019),[75] edited by David Dyzenhaus, Thomas Poole, and Jacco Bomhoff, including especially contributions concerning theoretic foundations of foreign relations law and *Encounters between Foreign Relations Law and International Law* (2021)[76] edited by Helmut Aust and Thomas Kleinlein, which focuses on the intersection between foreign relations law and international law.

This thesis aims to contribute to the research in this dynamic field. As laid out above, it will focus on the relationship between the executive and the judiciary in foreign affairs. Foreign relations law, over time, developed some classical fields.[77] These include the mode of incorporation of international norms within domestic legal systems, the horizontal allocation of power between the three branches, and the vertical separation of powers, which is primarily the role of federal subunits and cities in international law. The objective of this thesis squarely falls within the second category. National treatises within this subfield often focus on the relationship between the executive and legislative branches. The problem of the executive-judicial relationship in foreign affairs is usually less intensely analysed. The endeavour of this book is hence to illuminate this relatively less examined field of foreign relations law and include it in a comparative analysis.

71 Bradley, 'What is Foreign Relations Law?' (n 58) 8; Kleinlein (n 53) 539.
72 Campbell McLachlan, *Foreign relations law* (CUP 2016).
73 Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019).
74 Acknowledging the character as 'groundwork' for comparative foreign relations law Kleinlein (n 53).
75 David Dyzenhaus, Thomas Poole and Jacco Bomhoff (eds), *The double-facing constitution* (CUP 2019).
76 Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021).
77 Describing similar main fields Bradley, 'What is Foreign Relations Law?' (n 58) 4.

As a basis, we can rely on various domestic works in foreign relations law and some comparative contributions that cover aspects of the topic. The phenomenon is most thoroughly researched within the United States. Classical monographs like Quincy Wright's *Control of American Foreign Relations* (1922),[78] Louis Henkin's *Foreign Affairs and the Constitution* (1972),[79] and, the modern classic, Curtis Bradley's *International Law in the US legal system* (2013)[80] inter alia cover the executive-judicial relationship.[81] More specific works on this question include Thomas Franck's *Judicial Questions – Judicial Answers* (1992)[82] and an influential article by Ganesh Sitaraman and Ingrid Wuerth concerning the 'normalization' of foreign relations law[83] to name just a few.[84] Common for US scholarship is a strong national focus, hardly taking into account foreign jurisdictions.[85] This thesis seeks to provide comparative material to fuel the ongoing debate within the United States.

In Germany, there are also some older works covering foreign relations law in general, including remarks concerning the judiciary.[86] Within con-

78 Quincy Wright, *Control of American Foreign Relations* (The Macmillan Company 1922).

79 Louis Henkin, *Foreign affairs and the constitution* (Minola 1972).

80 Curtis Bradley, *International Law in the U.S. Legal System* (1st edn, OUP 2013).

81 Now as well Sean D Murphy and Edward T Swaine, *The law of US foreign relations* (OUP 2023); an important source as well are of course the 'Restatements on Foreign Relations Law' of the American Law Institute; Paul B Stephan and Sarah A Cleveland (eds), *The Restatement and Beyond: The Past, Present, and Future of US Foreign Relations Law* (OUP 2020).

82 Thomas Franck, *Political questions, judicial answers: Does the rule of law apply to foreign affairs?* (Princeton University Press 1992).

83 Ganesh Sitaraman and Ingrid Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 Harvard Law Review 1897.

84 Other important articles include inter alia Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale Law Journal 597; G Edward White, 'The Transformation of the Constitutional Regime of Foreign Relations' (1999) 85 Virginia Law Review 1; Rachel E Barkow, 'More Supreme than Court?, The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 Columbia Law Review 237; Eric A Posner, and Cass R Sunstein, 'Chevronizing Foreign Relations Law' (2006) 116 Yale Law Journal 1170; important monographs comprise e.g. Alexander M Bickel, *The least dangerous branch: The supreme court at the bar of politics* (2nd edn, Yale University Press 1986) and Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Vintage 2016).

85 Cf however a chapter about the German approach in Franck (n 82) 107 ff.

86 Cf e.g. Johann L Klüber, *Die Selbstständigkeit des Richteramtes und die Unabhängigkeit seines Urtheils im Rechtsprechen: im Verhältniß zu einer preussischen Verordnung vom 25. Jänner 1823* (Andreä 1832); Eduard Droop, 'Über die Zuständigkeit der in-

temporary German law, foreign affairs were first thoroughly discussed during a meeting of the prestigious annual 'Meeting of the Constitutional Law Teachers' in 1953, with essential contributions by Wilhelm Grewe and Eberhard Menzel.[87] Textbooks on foreign relations law evolved when the subject was first included in the standard curriculum of law schools in the 1970s as *Staatsrecht III*;[88] although they cover aspects of the executive-judicial relationship, the topic takes a rather limited role.[89] The same holds for several monographs aimed at placing the foreign affairs power within the architecture of the Basic Law, without a primary focus on the judiciary.[90] Relatively few authors have directly concentrated on the judicial

ländischen Gerichte für Rechtsstreitigkeiten zwischen Inländern und fremden Staaten, insbesondere für Anordnung von Arrest gegen fremde Staaten' (1882) 26 Beiträge zur Erläuterung des deutschen Rechts 289; Heinrich Triepel, *Völkerrecht und Landesrecht* (CL Hirschfeld 1899); Ernst Wolgast, 'Die auswärtige Gewalt des Deutschen Reiches unter besonderer Berücksichtigung des Auswärtigen Amtes. Ein Ueberblick' (1923) 44 AöR 1; Josef L Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht* (Kohlhammer 1928).

87 Ernst Forsthoff and others (eds), *Begriff und Wesen des sozialen Rechtsstaates. Die auswärtige Gewalt der Bundesrepublik* (De Gruyter 1954) (= Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 12).

88 For this development Frank Schorkopf, *Staatsrecht der internationalen Beziehungen* (CH Beck 2017) 636; the term refers to the classical numeration of public law subjects in law schools which teach constitutional law concerning the organisation of the state 'Staatsorganisationsrecht' as 'Staatrecht I' and constitutional law concerning fundamental rights 'Grundrechte' as 'Staatsrecht II', leaving for 'Staatrecht III' the interaction of constitutional law with the international system and with European Union Law.

89 Albert Bleckmann, *Grundgesetz und Völkerrecht* (Duncker & Humblot 1975) 246–63; Rudolf Geiger, *Grundgesetz und Völkerrecht: Die Bezüge des Staatsrechts zum Völkerrecht und Europarecht; ein Studienbuch* (CH Beck 1985) 170–80; Michael Schweitzer, *Staatsrecht, Völkerrecht, Europarecht* (Müller 1986) 214–18.

90 Contributions dealing less directly with the executive-judicial relationship: Hermann Mosler, 'Die auswärtige Gewalt im Verfassungssystem der BRD' in Hermann Mosler and others (eds), *Carl Bilfinger Festschrift* (Heymann 1954) 243; Jürgen Dreher, *Die Kompetenzverteilung zwischen Bund und Ländern im Rahmen der auswärtigen Gewalt nach dem Bonner Grundgesetz: zugleich ein Beitrag zum Wesen der Auswärtigen Gewalt und deren Einordnung in das gewaltenteilende, föderative Verfassungssystem* (Blasaditsch 1969); Siegfried Weiß, *Auswärtige Gewalt und Gewaltenteilung* (Duncker & Humblot 1971); Christian Tomuschat, 'Der Verfassungsstaat im Geflecht der internationalen Beziehungen' (1978) 36 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 7; Ulrich Fastenrath, *Kompetenzverteilung im Bereich der auswärtigen Gewalt* (CH Beck 1986).

branch, but important exceptions include[91] Hans Schneider's *Gerichtsfreie Hoheitsakte* (1951),[92] Wilfried Bolewski's *Zur Bindung deutscher Gerichte an Äußerungen und Maßnahmen ihrer Regierung auf völkerrechtlicher Ebene* (1971),[93] and Franz-Christoph Zeitler's *Verfassungsgericht und völkerrechtlicher Vertrag* (1974).[94] During the 1990s, the topic was also discussed at the 'Meeting of the Constitutional Law Teachers' in a well-received contribution by Kay Hailbronner[95] and an article by Thomas Giegerich.[96] Recent contributions on the executive-judicial relationship are virtually non-existent,[97] but some works with a broader focus have elaborated on the problem and provide valuable resources.[98] Although some authors include remarks on foreign jurisdictions, hardly any comparative works exist.[99]

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91 Other monographs with a more direct focus: Gunnar F Schuppert, *Die verfassungsgerichtliche Kontrolle der auswärtigen Gewalt* (Nomos 1973); cf as well the article by Ernst Petersmann, 'Act of State Doctrine, Political Question Doctrine und gerichtliche Kontrolle der auswärtigen Gewalt' (1976) 25 JöR 587 and Jost Delbrück, 'Die Rolle der Verfassungsgerichtsbarkeit in der innenpolitischen Kontroverse um die Außenpolitik' in Albrecht Randelzhofer and Werner Süß (eds), *Konsens und Konflikt* (De Gruyter 1986) 54.

92 Hans Schneider, *Gerichtsfreie Hoheitsakte: Ein rechtsvergleichender Bericht über die Grenzen richterlicher Nachprüfbarkeit von Hoheitsakten* (Mohr 1951).

93 Wilfried M Bolewski, *Zur Bindung deutscher Gerichte an Äußerungen und Maßnahmen ihrer Regierung auf völkerrechtlicher Ebene: Ein Beitrag zur Verrechtlichung der Außenpolitik* (Marburg 1971).

94 Franz-Christoph Zeitler, *Verfassungsgericht und völkerrechtlicher Vertrag* (Duncker & Humblot 1974).

95 Kay Hailbronner, 'Kontrolle der Auswärtigen Gewalt' (1997) 56 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 8.

96 Thomas Giegerich, 'Verfassungsrechtliche Kontrolle der Auswärtigen Gewalt' (1997) 57 ZaöRV 409; other articles include: Dieter Blumenwitz, 'Kontrolle der Auswärtigen Gewalt' (1996) 42 Bayerische Verwaltungsblätter 577; Klaus Stern, 'Außenpolitischer Gestaltungsspielraum und verfassungsgerichtliche Kontrolle' (1994) 8 NWVBl 241; Juliane Kokott, 'Kontrolle der Auswärtigen Gewalt' (1996) 111 DVBl 937.

97 Stating the lack of contemporary research Gernot Biehler, *Auswärtige Gewalt: Auswirkungen auswärtiger Interessen im innerstaatlichen Recht* (Mohr Siebeck 2005) 96; the most recent monograph on the topic appears to be Sven Fischbach, *Die verfassungsrechtliche Kontrolle der auswärtigen Gewalt* (Nomos 2011).

98 Biehler (n 97) 24 ff; Christian Calliess, 'Auswärtige Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts* (3rd edn, CF Müller 2006) 607 ff; Volker Röben, *Außenverfassungsrecht: Eine Untersuchung zur auswärtigen Gewalt des offenen Staates* (Mohr Siebeck 2007) 281 ff; Martin Nettesheim, 'Verfassungsbindung der Auswärtigen Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts* (CF Müller 2012) 570 ff; Schorkopf (n 88) 343.

99 There appear to be exactly two exceptions Henning Schwarz, *Die verfassungsgerichtliche Kontrolle der Außen- und Sicherheitspolitik* (Duncker & Humblot 1995) (compar-

The lack of contemporary research on the executive-judicial relationship in foreign affairs may be attributed to the feeling that the problem of judicial deference in foreign affairs is solved in Germany,[100] which, as the *Ramstein* case has shown, is far from the truth.[101] In Germany, the question can be termed a 'dormant problem'.[102] This contribution aims to resurface the unsolved questions in German law and contribute to their solution by including them in this comparative project.

The problem of judicial review in foreign affairs was also discussed by some authors in pre-democratic South Africa.[103] Within contemporary South African law, research on the topic is relatively thin. Foreign relations law is covered prominently only by John Dugard's *International Law, A South African Perspective* (1994), which was recently updated.[104] The book covers 'general' foreign relations law but also includes valuable remarks concerning the executive-judicial relationship in foreign affairs.[105] Apart from this, some crucial articles have been published, triggered by major events. In the aftermath of the democratic transition, some scholars examined whether the English concept of 'act of state,' which limits judicial

ing Germany and the United States) and Thomas M Pfeiffer, *Verfassungsgerichtliche Rechtsprechung zu Fragen der Außenpolitik: Ein Rechtsvergleich Deutschland – Frankreich* (Lang 2007) (comparing Germany and France).

100 Already Bleckmann (n 89) 247 notes that the problem is not solved with the renouncement of non-reviewable areas but merely shifted to other legal mechanisms, cf below Chapter 2, II., 2.

101 In fact, the *Ramstein* case led to various articles (cf above n 30) and the judgment of the Federal Administrative Court may trigger more research in the field; for another case concerning arms exports cf *Judgment from 2 November 2020* 4 K 385/19 (Administrative Court Berlin).

102 'schlafendes Rechtsinstitut' when referring to 'gerichtsfreie Hoheitsakte' Biehler (n 97) 99.

103 Cf AJGM Sanders, 'Our State Cannot Speak with Two Voices' (1971) 88 South African Law Journal 413; AJGM Sanders, 'The Justiciability of Foreign Policy Matters under English and South African Law' (1974) 7 Comparative and International Law Journal of Southern Africa 215; Hercules Booysen, *Volkereg – 'n Inleiding* (Juta 1980) 229, 255; Gretchen Carpenter, *Introduction to South African Constitutional Law* (Butterworths 1987) 174.

104 John Dugard and others, *Dugard's International Law – A South African Perspective* (5th edn, Juta 2018); focused much more on 'pure' international law, also it includes ample African jurisprudence is Hennie Strydom's (ed), *International Law* (OUP 2016).

105 Especially Dugard and others (n 104) 104–23.

review in foreign affairs, survived the constitutional change.[106] The problem also surfaced again with the Constitutional Court's *Kaunda* decision concerning diplomatic protection.[107] The *SADC* decision mentioned above and other recent judgements will likely induce more scholarship in the area.[108] Concerning the executive-judicial relationship, the only more specialised source is a recent monograph by the former South African diplomat Riaan Eksteen.[109] However, the book was mainly written from a foreign policy angle and contains only a brief section on South African law.[110] As no general monograph on the topic exists in South Africa, this thesis seeks to create a reference point in South African law for further research. It also offers comparative material, which may prove particularly useful within the relatively young democracy to construct a contemporary South African approach concerning the problem of judicial review in foreign affairs.

4. Methodological remarks and conceptual constraints

As laid down above, we will take a comparative angle to address the question of judicial deference towards executive assessments in foreign affairs. There are various different approaches to comparative methodology.[111] Thus, a brief reflection on the chosen approach may lead to more transparency for the reader and the author as to what can be expected from the analyses and where shortcomings are to be found. This thesis predomi-

106 George N Barrie, 'Judicial review of the royal prerogative' (1994) 111 South African Law Journal 788; Hercules Booysen, 'Has the act of state doctrine survived?' (1995) 20 SAYIL 189; Karin Lehmann, 'The Act of State Doctrine in South African Law: Poised for reintroduction in a different guise?' (2000) 15 SA Public Law 337; George N Barrie, 'Is the absolute discretionary prerogative relating to the conduct of foreign relations alive and well and living in South Africa' (2001) Journal of South African Law 403.

107 Dire Tladi and Polina Dlagnekova, 'The act of state doctrine in South Africa: has Kaunda settled a vexing question?' (2007) 22 SA Public Law 444; Dire Tladi, 'The Right to Diplomatic Protection, The Von Abo Decision, and One Big Can of Worms: Eroding the Clarity of Kaunda' (2009) 20 Stellenbosch Law Review 14.

108 Tladi, 'A Constitution Made for Mandela' (n 46).

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

110 The South African part only amounts to 30 in over 400 pages.

111 Vicki C Jackson, 'Comparative Constitutional Law: Methodologies' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013) 55 ff.

nantly subscribes to a functionalist approach.[112] Its core question is posed in functional terms: how does the judiciary in democratic states deal with executive decisions in foreign affairs? This central question determines the material to be taken into account.[113] As mentioned above, it will also use the idea of different legal 'families' to ensure a certain variance of the material, a method commonly associated with functionalism.[114] On the other hand, it does not subscribe to a strict form or program, e.g. a presumption of similarity, commonly (and partially falsely)[115] associated with traditional functionalism.[116] Apart from the basic assumption of greater variance, the thesis does not rely on any typification of the different legal systems. Nevertheless, because of its functionalist elements, it will suffer from a certain imbalance: it will tend to emphasize similarities over differences.[117] I hope to mitigate this fact by trying to contextualise[118] the legal concepts and openly state singularities. Chapter 1 will show the development of the 'notion of deference' within the respective legal orders, stating the different domestic approaches and historical circumstances under which the concept has been adopted. Chapter 3 will analyse the treatment of executive decisions concerning the respective groups of cases within their original environment.[119] Finally, the fourth chapter will not only focus on convergence factors but also examine differences. With these contextual elements, I hope to evade some of the pitfalls that are inherent in the functionalist method.

Moreover, this thesis is subject to some conceptual constraints, resulting in conscious exclusions that shall be noted. It focuses on three jurisdictions, with South Africa representing the Global South. Although South African legal history in no way started only when the first European settlers set foot

112 Jackson (n 111) 62 ff; in the sense that its core is based on a functional question, cf Kischel (n 60) 180.
113 Kischel (n 60) 94.
114 Ibid 218.
115 E.g. the presumption of similarity has only been made by Kötz and Zweigert for 'unpolitical' private law matters see Konrad Zweigert and Hein Kötz, *Introduction to comparative law* (OUP 1998, 3rd revised edition) 40; Kischel (n 60) 181.
116 The 'traditional' functional approach has been laid down by Konrad Zweigert and Hein Kötz (n 115) 32 ff in notably only 16 pages.
117 Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 Harvard International Law Journal 411; Ruti Teitel, 'Comparative Constitutional Law in a Global Age' (2004) 117 Harvard Law Review 2570; Jackson (n 111) 66 ff.
118 Jackson (n 111) 66 ff; Kischel (n 60) 187 ff; emphasising the need to contextualise in comparative foreign relations law Kleinlein (n 53) 543.
119 Cf Jackson (n 111) 64.

on the Cape,[120] this thesis will not be able to engage in a more in-depth examination of constitutional structures of indigenous South Africans.[121] As the territory making up today's South Africa was first unified in 1910, the historic analysis will primarily start from this point. This starting point means that pre-democratic South African law will vastly be colonial, hence, English law.[122] Thus, despite including South Africa, the thesis will be liable to the charge of taking a Western view.

Concerning Germany, its division in the aftermath of the Second World War and its membership in the European Union warrant special consideration. The German Democratic Republic (GDR), commonly referred to as East Germany, existed for more than 40 years and, as part of the Eastern Bloc, developed its own legal system, which in foreign affairs stressed the ideological leadership of the Soviet Union.[123] However, the apparent systemic rivalry that ended with the peaceful revolution in the GDR and German reunification supports the assumption that its influence on contemporary German Foreign Relations is marginal.[124] The law of the GDR will hence not be included in this analysis. Concerning Germany's membership in the EU, the latter has developed into a highly integrated community and developed a character much different from 'ordinary' international law. German courts have reacted with specific standards and concepts that are exclusively applied within that context. As no equivalent project exists in the United States and South Africa[125], and as the focus of this thesis is 'ordinary' international law, these doctrines will not be included within the examination. German membership in the European

120 Stuart Woolman and Swanepoel Jonathan, 'Constitutional History' in Stuart Woolman and Michael Bishop (eds), *Constitutional law of South Africa* (2nd edn – January 2013 – Revision Service 5, Juta 2002) 2.

121 Likewise, it will also not include the legal system of the independent Boer Republics; cf e.g. concerning the reception of *Marbury v Madison* in the Boer republics Heinz Klug, 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 South African Journal on Human Rights 185, 193.

122 Rautenbach and du Plessis (n 63) 1543.

123 Helmut Philipp Aust, 'The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective' in David Dyzenhaus, Thomas Poole and Jacco Bomhoff (eds), *The double-facing constitution* (CUP 2019) 345, 362; cf as well Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland Bd. 4: Staats- und Verwaltungsrechtswissenschaft in West und Ost 1945–1990* (CH Beck 2012) 562 ff.

124 If at all existent; there appears to be no post-Cold War analysis of the foreign relations law of Eastern Germany.

125 The SADC (cf above n 42 and accompanying text) has not (yet) reached the level of integration of the European Union.

Union will, of course, not be ignored and referred to where it has a bearing on the analysis.

Chapter 1 – Origins of Deference

As the introduction has shown, when used in a legal context, the term 'foreign affairs,' is often surrounded by an almost mystical[1] notion that something about it is 'special'. This opaque idea consists of three main traits, which together will be referred to as the 'traditional position:'[2]

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

The last trait shall be referred to as the 'notion of deference' in contrast to the different doctrines making up this notion, which will be dealt with in the next chapter. This chapter will show how the traditional position developed in specific political ideas, especially those of Thomas Hobbes, John Locke, and Charles Montesquieu, and how it migrated into the law of the United States, Germany, and South Africa.

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1 In the same vein Eberhard Menzel, 'Die auswärtige Gewalt der Bundesrepublik' (1954) 12 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 179, 186.

2 Speaking of the 'traditional approach' Campbell McLachlan, *Foreign relations law* (CUP 2016) 14; cf as well Campbell McLachlan, 'Five conceptions of the function of foreign relations law' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 21, 24 ff where he develops a broader understanding of an 'exclusionist' mindset, my claim here is more limited and only refers to the executive-judicial relationship; describing the traditional conception of foreign affairs Helmut Philipp Aust, 'Foreign Affairs' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (online edition, OUP 2017) mn 1; speaking of 'traditionelle Sichtweise' Christian Calliess, *Staatsrecht III* (3rd edn, CH Beck 2020) 68; in contemporary US scholarship the 'traditional position' is largely congruent with the idea of foreign affairs 'exceptionalism', cf Curtis A Bradley, 'What is foreign relations law?' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 3, 13 (who also coined the term); Ganesh Sitaraman and Ingrid Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 Harvard Law Review 1897, 1906 ff; also using the 'traditional view' terminology in a related but different context Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 EJIL 513, 520.

I. The traditional position in political philosophy

1. Thomas Hobbes

The beginning of modern political and legal theory, not only in the area of foreign affairs, is widely attributed to Thomas Hobbes[3] and especially his book *Leviathan, or the matter, form, and power of a common-wealth ecclesiastical and civil.*[4] According to Hobbes, men 'without a common power to keep them all in awe'[5] live in the state of nature, which essentially means 'war [...] of every man against every man'.[6] The solution to escape these circumstances lies in a 'covenant of every man with every man'[7] and 'the multitude so united is called a commonwealth [...] the great Leviathan, or rather [...] that mortal god, to which we owe under the immortal god, our peace and defence'.[8] The organised state symbolised through one almost godlike person ends the state of nature. What, however, about the outside world?

The relationship between organised communities towards each other remains in the state of nature:[9]

> *As for the law of nations, it is the same with the law of nature. For that which is the law of nature between man and man, before the constitution of commonwealth, is the law of nations between sovereign and sovereign, thereafter.*[10]

The capacity of (wo)men to create an organised society, the 'mortal god,' is not applied to the relation amongst states. 'Man is a God to man, and Man is a wolf to Man. The former is true of the relations of citizens with

3 David Armitage, *Foundations of modern international thought* (CUP 2013) 59.
4 Thomas Hobbes, *Leviathan: or the matter, form, and power of a common-wealth ecclesiastical and civil* (digitized version, printed for Andrew Crooke, at the Green Dragon in St. Pauls Church yard, London 1651).
5 Ibid 62.
6 Ibid.
7 Ibid 87.
8 Ibid.
9 Arguably, in early works Hobbes did not adhere to this position Armitage (n 3) 62; for this part cf especially Thomas Poole, *Reason of state: Law, prerogative and empire* (CUP 2015) 56.
10 Thomas Hobbes, *De Corpore Politico or the Elements of Law, Moral & Politick* (digitized version, Printed for J Ridley, and are to be sold at the Castle in Fleetstreet by Ram-Alley, London 1652) 183; cf as well Poole (n 9) 57.

each other, the latter of relations between commonwealths'.[11] As Armitage aptly observed, 'the commonwealth once constituted as an artificial person took on the characteristics and the capacities of the fearful, self-defensive individuals who fabricated it'.[12] The state of nature is thus projected to the international sphere.

Against this hostile environment, the organised community builds a fortress establishing 'peace at home and mutual aims against their enemies abroad'.[13] The created Leviathan administers both duties, managing internal affairs like giving of laws and external affairs, that is 'the Right of making War, and Peace with other Nations, and Common-wealths'.[14] In this, he has absolute discretion 'to do whatsoever he shall think necessary to be done, both before-hand, for the preserving of Peace and Security, by prevention of discord at home and hostility from abroad; and, when Peace and Security are lost, for the recovery of the same'.[15] Although cooperation is not entirely excluded in Hobbes's theory,[16] international relations are highly volatile. Because of the lack of superior power,[17] the different sovereigns are in a constant state of mistrust:

> *yet in all times kings and persons of sovereign authority, because of their independency, are in continual jealousies and in the state and posture of gladiators, having their weapons pointing, and their eyes fixed on one another, that is, their forts, garrisons, and guns, upon the frontiers of their kingdoms, and continual spies upon their neighbours: which is a posture of war.*[18]

With this, Hobbes prominently introduced the first notion of the traditional position into political thought, the dichotomy between the inside and the outside.[19] The society inside is pacified through the creation of a sovereign, whereas the world outside remains in constant struggle.

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11 Richard Tuck and Michael Silverthorne (eds), *Hobbes – On the citizen* (CUP 2005) 3 f; cf as well Poole (n 9) 58.
12 Armitage (n 3) 64.
13 Hobbes, *Leviathan* (n 4) 88.
14 Ibid 92.
15 Ibid 90 f.
16 Poole (n 9) 59.
17 Armitage (n 3) 67.
18 Hobbes, *Leviathan* (n 4) 63; this view was already articulated by Hobbes in 'De Cive', for further references see Armitage (n 3) 66.
19 Arguably, Hobbes himself did not draw such a clear distinction, but has also undoubtedly been understood in that way by most scholars, Armitage (n 3) 71.

2. John Locke

John Locke built on the ideas of Hobbes and also saw humans as being in an original state of nature.[20] Locke's version of that state is, in its ideal position, more peaceful than that of Hobbes, as long as everyone adheres to the natural law.[21] However, also according to Locke, there is a permanent danger that the 'state of nature' has to give way to the 'state of war' because someone acted against natural law and now the victim can exercise their right to retaliation.[22] To avoid this uncertainty, also for Locke, the solution lies in creating a political society and government.[23]

Like Hobbes, Locke acknowledges that '[t]he whole community is in the state of nature, in respect of all other states or persons out of this community'.[24] In contrast to Hobbes, the powers of the sovereign are not unlimited, and his crucial contribution is to define who has to manage the affairs of the 'outside world'. He differentiates between the 'executive power' having the task of executing municipal laws within a given society and the management of the security and interest of the public outside the state given to the 'federative power'.[25] By way of the 'federative power,' the state is represented externally and may enter into treaties.[26] Although 'the well or ill management'[27] of the federative power is 'of great moment to the common-wealth'[28] one of its main characteristics is that, as opposed to the executive power, it can hardly be guided by law. '[I]t is much less capable to be directed by antecedent, standing, positive laws, than the executive; and must necessarily be left to the prudence and wisdom of those, whose hands it is in, to be managed for the public good'.[29] This distinction between the executive power acting within the society and subject to laws and the

20 John Locke, *Two treatises of government* (digitized version, Printed for Awnsham Churchill, at the Black Swan in Ave-Mary-Lane, by Amen-Corner, London 1690) Book II § 4 ff.
21 Ibid § 6 ff.
22 Ibid § 16 ff.
23 Ibid § 87 ff, § 95 ff.
24 Ibid § 145; unlike Hobbes, he did however not equate the law of nature and law of nations, instead, both apply to states Armitage (n 3) 79 f.
25 Locke (n 20) § 147.
26 Armitage (n 3) 81; the treaties do not change the character of the outside world as being in a state of nature McLachlan, *Foreign Relations Law* (n 2) 38.
27 Locke (n 20) § 147.
28 Ibid.
29 Ibid [my adjustment].

federative power being outside the scope of the law had a crucial influence in developing the traditional position.

It may appear as if Locke created a new power, besides the executive, charged with foreign affairs. However, he acknowledges that even as the 'executive and the federative power of every community be really distinct in themselves, yet they are hardly to be separated'.[30] What is more, 'it is almost impracticable to place the force of the common-wealth in distinct [...] hands; or that the executive and federative power should be placed in persons, that might act separately, whereby the force of the public would be under different commands'.[31] This would 'be apt to some time or other to cause disorder and ruin'.[32] The separation between the 'executive' and the 'federative' is thus rather one of function than that of creating two different powers.[33] Locke thus effectively split the executive competence in a domestic area subject to the law and a foreign area without any checks, introducing the idea of the 'Janus-faced'[34] exercise of executive power into political theory. Moreover, in his warning to separate both traits of the executive power lay the first seeds of the claim that the state 'has to speak with one voice' in foreign affairs.[35]

Another relevant aspect of Locke's thinking in this regard includes his analysis of the 'prerogative' power. He was one of the first scholars to explicitly[36] define the concept, which gained broader academic interest in the early 17th century.[37] Locke described it as the 'power to act according to discretion, for the public good, without the prescription of the law, and

30 Ibid § 148.

31 Ibid [my omission].

32 Ibid.

33 Saikrishna B Prakash and Michael D Ramsey, 'The Executive Power over Foreign Affairs' (2001) 111 Yale Law Journal 231, 267; McLachlan, *Foreign Relations Law* (n 2) 32; Jeremy Waldron, *Political Political Theory* (Harvard University Press 2016) 56; in the same vein Thomas Poole, 'The Idea of the Federative' in David Dyzenhaus, Thomas Poole and Jacco Bomhoff (eds), *The double-facing constitution* (CUP 2019) 54, 71.

34 Term taken from David Dyzenhaus, 'The Janus-Faced Constitution' in David Dyzenhaus, Thomas Poole and Jacco Bomhoff (eds), *The double-facing constitution* (CUP 2019) 17; cf as well this Chapter, II., 3., c) for the adoption in Germany.

35 McLachlan, *Foreign Relations Law* (n 2) 39.

36 Especially in contrast to Hobbes, see Poole, *Reason of State* (n 9) 51.

37 Poole, *Reason of State* (n 9) 19 f; Leander Beinlich, 'Royal Prerogative' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (online edition, OUP 2017) mn 4.

sometimes even against it'.[38] In contrast to the 'federative power,' which at least in principle was designed by Locke as an independent power, the 'prerogative' is only a trait of the executive, and always with 'him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require'.[39] Like the federative power, the prerogative qua definition cannot be subject to the law. If it is abused, 'the people have no other remedy in this, as in all other cases where they have no judge on earth, but appeal to heaven'.[40] With this construction of the prerogative, which is somehow part of the new order but at the same time unfettered by its laws, Locke 'carries vestiges of the pre-modern order over into the modern constitution'.[41] In his *Two Treatises*, Locke did not draw a connection between the federative power and the prerogative.[42] Nevertheless, they share common characteristics: both are, in essence, traits of the executive and outside of judicial control.[43] Therefore, it is not surprising that soon after Locke, as we will see later, the conduct of foreign affairs came to be seen as one of the main aspects of the prerogative power.[44]

Building on Hobbes' ideas, Locke significantly shaped the traditional position. Whereas Hobbes established the difference between the inside and outside of a community and thus gave birth to the first notion, Locke contributed significantly to the second and third point. He established that the executive is best fitted to fulfil this task and while subject to the law acting domestically it is unshackled acting outside.

3. Charles Montesquieu

The political philosophy of Charles Montesquieu finally completed and solidified the traditional position carved out by Hobbes and Locke. Montesquieu famously developed the idea of separating the state's power into

38 Locke (n 20) § 160.
39 Ibid § 159.
40 Ibid § 168.
41 Poole, *Reason of State* (n 9) 52.
42 This 'missing link' was already recognized by Ernst Wolgast, 'Die auswärtige Gewalt des Deutschen Reiches unter besonderer Berücksichtigung des Auswärtigen Amtes. Ein Ueberblick' (1923) 44 AöR 1, 96.
43 Armitage (n 3) 84 even states that Locke in essence referred to the prerogatives.
44 Beinlich (n 37) mn 2 and 13; cf below this Chapter, II., 1., b).

three different branches.[45] In addition to Locke's separation between the executive and the legislative,[46] he conceptualized judicative power:

> *[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.*[47]

Like Locke, Montesquieu perceived the executive power as being charged with two related but different tasks. He distinguished between 'the executive in respect to things dependent on the law of nations; and the executive in regard to things that depend on the civil law'.[48] By virtue of the latter, the sovereign 'makes peace or war, sends or receives embassies, establishes the public security and provides against invasions'.[49] In contrast to Locke, the power to conduct foreign affairs is not established as an independent 'federative' power but as part of the executive.[50] Montesquieu's model of separation of powers became widely accepted and thus ended the peculiar disintegration of executive power introduced by Locke.[51] However, the idea remained of two different tasks fulfilled by the executive, depending on whether it acted inside or outside the community. As we will see, this notion made its way into the legal thought of all three jurisdictions.

II. Adoption of the traditional position in the three jurisdictions

We will start our examination of how the philosophical foundations migrated into the foreign relations law of the three jurisdictions with South Africa. This appears worthwhile because South African law has strongly relied on the English system, the oldest parliamentary democracy. Hence,

45 Also he did not use the phrase 'separation of powers'.
46 For Locke the judicative power vested in part with the legislative and in part with the executive Alex Tuckness, 'Locke's Political Philosophy' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2018 edn, Stanford University 2018) under 6. Separation of Powers and Dissolution of Government.
47 Charles Montesquieu, *The Spirit of Laws* (Printed by Thomas Ruddiman, Edinburgh 1793) 177 [my adjustment].
48 Ibid 176; cf as well Prakash and Ramsey (n 33) 268.
49 Montesquieu (n 47) 177; cf as well Prakash and Ramsey (n 33) 268.
50 Prakash and Ramsey (n 33) 268.
51 Menzel (n 1) 184 f.

incidentally, English law will be examined as well and again become relevant to understanding the development in the US, which will be analysed in due course. Germany, less strongly connected to the Anglo-American tradition, will be examined last.

I. South Africa

As mentioned, the territory which constitutes South Africa in its present form was for the first time unified by the South Africa Act in 1909 as a British dominion. The British Empire managed all foreign relations as an imperial reserve until the 1920s,[52] and even when the colony gained more and more independence, the influence of English law remained dominant. These historical circumstances will guide the description of South African foreign relations law, which started off as purely English law and, with independence, gradually developed into genuinely South African law.[53]

a) Jenkins, Blackstone and foreign affairs as crown prerogatives

The first recognition of the 'deferential role' of the judiciary towards the executive in foreign affairs in England was probably made by Leoline Jenkins, who served as a Judge at the Court of Admiralty and later as Secretary of State in the second half of the 17th century.[54] He suggested that the King's Privy Council should interpret treaties and that this decision should bind the Prize Court and the Court of Admiralty.[55] However, Jenkin's opinion was rejected by other judges[56] and did not develop into a systematic approach. Nevertheless, his idea foreshadowed later developments.[57]

52 McLachlan, *Foreign Relations Law* (n 2) 32.
53 Ibid 33.
54 William S Holdsworth, 'The History of Acts of State in English Law' (1941) 41 Columbia Law Review 1313, 1315.
55 Ibid; Arnold McNair, *Law of Treaties* (OUP 1961) 356.
56 William S Holdsworth, *A history of English law* (Methuen & Co 1937) 653 fn 5.
57 Holdsworth, 'The History of Acts of State' (n 54) 1322 draws a line from Jenkins to Eldon (on Eldon below, this Chapter, II., 1., b)); also Jenkins formulated first deferential ideas, I concur with McLachlan that the notion of deference is, in essence, a development of the Victorian Age, cf below, this Chapter, II., 1., b) and (n 75).

In the 18th century, William Blackstone developed a more systematic account. He directly referred to and built on the ideas of Locke in his *Commentaries on the Laws of England*[58] when describing the nature of the King's prerogative.[59] Blackstone defined these as 'that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity'.[60] In contrast to Locke, he connected the royal prerogative with conducting foreign affairs, describing it as one of its primary traits:[61] first and foremost, 'with regards to foreign affairs, the king is the delegate or representative of his people'.[62] The conduct of foreign matters is explicitly placed in the executive power of the king because in him 'as in a center, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates'.[63] The picture of Hobbes' great Leviathan, built out of the many subjects, that has to deter and wrestle with foreign powers, shines through Blackstone's description. He even asked laconically, 'who would scruple to enter into any engagements, that must afterwards be revised and ratified by a popular assembly'[64]? In contrast to Hobbes, Blackstone's version of the relation between different states seems more regulated,[65] guided by natural law and by 'mutual contracts, treaties, leagues, and agreements'[66] together forming the 'law of nations'.[67]

The making of these 'treaties, leagues, and alliances with foreign states and princes'[68] is part of the foreign affairs power and in the exclusive domain of the king. He also has 'the sole power of sending embassadors to foreign states; and receiving embassadors at home'[69] and the 'sole prerog-

58 William Blackstone, *Commentaries on the Law of England: Book the First* (digitized version, Clarendon Press 1769).
59 Ibid 244.
60 Ibid 232.
61 Ibid 245 ff.
62 Ibid 245.
63 Ibid.
64 Ibid.
65 McLachlan, *Foreign Relations Law* (n 2) 43.
66 Ibid 43.
67 Ibid.
68 Blackstone (n 58) 249.
69 Ibid 245.

ative of making war and peace'[70] or granting 'letters of marque'.[71] Although Blackstone connects the concept of prerogative with the area of foreign affairs, he is not granting foreign relations complete exclusion from judicial control. The law of nations is 'adopted in its full extent by the common law and is held to be part of the law of the land'[72] and thus, at least in principle, in the realm of the judiciary. However, as most regulations will only apply to states, domestic courts can only deal with these matters where they are 'properly the object of its jurisdiction'.[73] Although the occasions will be limited, courts thus have a role to play in foreign affairs.[74]

b) The birth of deference in the Victorian Age

Blackstone thus took up the ideas of Hobbes and Locke and, as we have seen, adhered to the first and second notion of the traditional position. However, the birth of the third notion of judicial deference is not attributed to him but is a development of the 19th century and Victorian scholars and judges.[75]

The first series of cases expanding the scope of non-justiciable areas arose between the Nabob of the Carnatic, a local Indian ruler, and the East India Company.[76] Both had entered into a treaty inter alia concerning the cessation of territory, and on its terms, the Nabob later tried to sue the East India Company. The English courts denied the claim, stating that the East India Company had entered into the treaty as a foreign sovereign and that no municipal jurisdiction would exist in such cases. This approach was

70 Ibid 249.
71 Ibid 251.
72 William Blackstone, *Commentaries on the Law of England: Book the Fourth* (digitized version, Clarendon Press 1769) 67.
73 Ibid, cf as well McLachlan, *Foreign Relations Law* (n 2) 46.
74 Blackstone, *Book the Fourth* (n 72) 66 ff; McLachlan, *Foreign Relations Law* (n 2) 44 ff.
75 For this part cf especially McLachlan, *Foreign Relations Law* (n 2) 49 ff.
76 *Nabob of the Carnatic v East India Company* (1791) 30 ER 391 (Court of Chancery); *Nabob of the Carnatic v East India Company* (1793) 30 ER 521 (Court of Chancery); *The Secretary of State for India v Kamachee Boye Sahaba* (1859) 15 ER 9 (Privy Council); the activities of the East India Company provoked many cases in which courts started to apply 'deference mechanisms' cf *Salaman v Secretary of State in Council of India* [1906] 1 KB 613 (Court of Appeal); Holdsworth, 'The History of Acts of State' (n 54) 1316; the Nabob was also often referred to as the 'Nabob of Arcot' McLachlan, *Foreign Relations Law* (n 2) 49, 282.

taken further in several decisions by Lord Eldon,[77] Lord Chancellor from 1801 to 1826. He introduced the notion that the courts are somehow bound to the view of the executive before granting legal personality to states or governments in front of domestic courts,[78] asking 'what right have I, as the King's Judge, to interfere upon the subject of a contract with a country which he does not recognise'.[79] In developing this doctrine, he appeared to be strongly influenced by the UK's role on the international plane. In the aftermath of the American Revolution, many new states were created by breaking away from imperial powers, especially England, Spain, and France.[80] The question of recognition of these entities and their governments was thus highly political, and English judges appeared to be afraid that taking notice of their existence in court would amount to international recognition and thus create a conflict with the executive's position.[81] The doctrine was solidified in *Taylor v Barclay*,[82] a case posing the question of whether the UK recognised the government of the Federal Republic of Central America, which had broken away from Spain. Vice-chancellor Shadwell consulted with the foreign office and felt bound by its guidance: 'it appears to me that sound policy requires that the Courts of the King should act in unison with the Government of the King'.[83] Other decisions followed the case and accepted that the executive enjoys special privileges in foreign affairs.[84]

Remarkable about this development is not that the courts recognized a special role of the executive in foreign affairs. This notion, as we have seen, had long been accepted. What is notable is that this special role warrants the introduction of self-imposed restrictions to judicial control where these areas are touched upon.[85] More recently, names for these rules like

77 Also, the jurisprudence of other courts at that time developed in this direction, see Holdsworth, 'The History of Acts of State' (n 54) 1324.

78 Louis L Jaffe, *Judicial Aspects of Foreign Relations: In Particular of the Recognition of Foreign Powers* (Harvard University Press 1933) 124 ff; McLachlan, *Foreign Relations Law* (n 2) 35.

79 *Jones v Garcia del Rio* (1823) 37 ER 1113 (Court of Chancery) 1114; Jaffe (n 78) 124; Holdsworth, 'The History of Acts of State' (n 54) 1322; cf McLachlan, *Foreign Relations Law* (n 2) 49.

80 Jaffe (n 78) 124, 139.

81 Ibid 129.

82 *Taylor v Barclay* (1828) 57 ER 769 (Court of Chancery).

83 Ibid 221, cf as well Jaffe (n 78) 128.

84 McLachlan, *Foreign Relations Law* (n 2) 52 f.

85 Ibid 53.

'exclusionary doctrines'[86] and 'avoidance doctrines'[87] have evolved. Their development marks the birth of 'deference,' the idea that the courts have to restrain themselves in their judicial function if foreign affairs are involved. Although these rules may have started as sporadic judicial restraint in a few cases, they would soon crystallize into solid law.

Albert Venn Dicey acknowledged these developments when he laid down the foundations of modern English constitutionalism in his *Lectures introductory to the study of the law of the constitution*.[88] For him, as for Blackstone, foreign affairs are part of the royal prerogatives, as the 'residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown'.[89] He especially stressed how the power to engage in this area had been transferred more and more from the monarch to his or her ministers:[90] 'the far more important matter is to notice the way in which the survival of the prerogative affects the position of the Cabinet. It leaves in the hands of the Premier and his colleagues, large powers which can be exercised and constantly are exercised free from Parliamentary control. This is especially the case in all foreign affairs'.[91] He also listed several cases where issues regarding foreign affairs were excluded from the judiciary.[92]

The pinnacle[93] of the development of 'deference doctrines' can be seen in Harrison Moore's *Act of State in English Law,* written at the end of the 'long 19th century'.[94] Before this book, the term act of state was hardly a staple in English Law. It had only been used in a few judgments, most prominently in cases in front of the Privy Council on appeal from the Supreme Court of the Colony of the Good Hope sparked by the annexation of Pondoland,

86 Ibid 14.
87 Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 EJIL 159, 169.
88 Especially Albert V Dicey, *Lectures introductory to the study of the law of the constitution* (Macmillan 1885); McLachlan, *Foreign Relations Law* (n 2) 54 ff.
89 Ibid 348 f.
90 In this he made clear a position which was also already underlying Blackstone's ideas Arthur Bestor, 'Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined' (1974) 5 Seton Hall Law Review 527, 531.
91 Dicey (n 88) 390 f.
92 Albert V Dicey, *A digest of the law of England with reference to the conflict of laws* (Stevens and Sons 1896) 209 ff; McLachlan, *Foreign Relations Law* (n 2) 55.
93 McLachlan, *Foreign Relations Law* (n 2) 56.
94 The term was coined by the British historian Eric Hobsbawm.

a region in the Eastern Cape, by the British Cape Colony.[95] However, no coherent doctrine existed tying together the acts of state and several of the 'deference doctrines,' which had developed gradually, especially towards the end of the 19th century. Out of the history of the 'crown prerogatives,'[96] Moore developed the 'modern' version of an act of state so defined as 'the matter between States, which, whether it be regulated by international law or not, and whether the acts in question are or are not in accord with international law, is not a subject of municipal jurisdiction'.[97] This definition does not greatly deviate from Blackstone's account, who likewise admitted that only in very narrow circumstances does international law have a place in front of domestic courts. Moore's act of state concept, however, transcends the question of sole relations between states:

> *[T]here is a troublesome borderland of law and politics. On the one hand, out of the relations of independent States there may spring rights and duties in municipal law; on the other,* ***international relations may sometimes overwhelm clear matters of individual right or liability****. In either case there will be grave questions as to when these consequences do happen. Finally, there are some matters of State, or suggested matters of State, which cannot be brought within the general principle above stated. Often in the following pages it will be necessary to follow up for a time subjects which are not matter of State at all, but are sufficiently close thereto to demand attention.*[98]

Thus, possible consequences of an act of state are not confined to the very narrow question of pure inter-state relations but can stretch into areas generally in the clear jurisdiction of the courts. This marks a substantial deviation from Blackstone's account: what started as a question of how far inter-state relations may be adjudicated by municipal courts thus turned

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95 *Cook v Sprigg* [1899] AC 572 (Privy Council); *Sprigg v Sigcau* [1897] AC 238 (Privy Council); cf as well, not related to Pondoland and not directly referring to acts of state *DF Marais v General Officer Commanding the Lines of Communication* [1902] AC 109 (Privy Council); using the expression act of state: *Buron v Denman, Esq* (1848) 154 ER 450 (Court of Exchequer); using the expression act of state: *The Secretary of State for India v Kamachee Boye Sahaba* (n 76); using the expression act of state: *West Rand Central Gold Mining Co Ltd v The King* [1905] 2 KB 391 (King's Bench Division); William Moore, *Act of state in English law* (E P Dutton and Company 1906) 3.

96 Moore (n 95) 5 ff.

97 Ibid 1 f.

98 Ibid 2 [my emphasis and adjustments].

into a question of how far inter-state relations exclude municipal issues normally within the jurisdiction of the courts. Moore's attempted systematization of these cases would soon migrate into English international law books and thoroughly root the notion of deference in English foreign relations law.

c) South African adoption of English foreign relations law

aa) Older South African constitutions

South African law started its independent jurisprudence at the beginning of the 20th century.[99] The South Africa Act of 1909[100] set up the first South African constitution, unifying the two British colonies of the Cape of Good Hope and Natal and the territory of the two formerly independent Boer Republics, the South African Republic (Transvaal) and the Orange Free State (Orange River Colony) in the aftermath of their defeat in the Second Anglo-Boer War. It established a Governor-General as the King's representative and legislative independence for most internal matters. The power of parliament to legislate was limited by safeguard provisions allowing the King to annul laws[101] and subject to the British Colonial Laws Validity Act from 1885,[102] voiding all laws contrary to acts of the UK parliament.[103]

External relations for the time being remained in the hands of the Empire, and only gradually did South Africa gain sovereignty over its foreign policy. The Imperial Conference of 1911 established that dominions should at least be consulted before international obligations affecting their status were entered into.[104] Nevertheless, when the UK went to war with Germany in 1914, all dominions were regarded as having shared this status automatically.[105] On the other hand, the First World War also brought greater inde-

99 Of course the British colonies before this point also had their own jurisprudence, which however was closely tied to the English system. The Boer Republics had their independent legal systems.
100 South Africa Act (1909).
101 Especially ibid Section 64 and Section 65.
102 Colonial Laws Validity Act (1865).
103 Cf as well Iain Currie and Johan de Waal, *The new constitutional and administrative law: Volume 1 – Constitutional Law* (Juta 2001) 44.
104 Henry J May, *The South African Constitution* (3rd edn, Juta 1955) 203.
105 Ibid.

pendence, with South Africa prominently represented by its future Prime Minister Jan Smuts in the Imperial War Cabinet.[106] He would later sign the treaty of Versailles on behalf of South Africa (and famously would be the only person to sign peace treaties after both World Wars).[107] Likewise, South Africa became a founding member of the League of Nations.[108] Complete internal and external independence was nevertheless only gained with the Statute of Westminster 1931,[109] repealing the Colonial Laws Validity Act and granting power to the dominion parliaments to make laws having extra-territorial operation.[110] Adopting these changes, the South African Parliament passed the Status of the Union Act 1934,[111] stating that the power to conduct 'any aspect of its domestic or external affairs'[112] is now vested in the King, represented by his Governor-General, acting on the advice of his ministers. Like in the English system, this meant that effectively the executive government was now in charge, acting in the name of the King.[113]

With these powers of the King, in the English tradition, now the concept of royal prerogatives,[114] including the conduct of foreign affairs like declarations of war,[115] the making of treaties,[116] or the appointment of ambassadors,[117] also became part of the executive power, albeit without being explicitly referred to in the Status of the Union Act.[118] This changed in 1961 with the Republic of South Africa Constitution Act,[119] South Africa's second constitution, under which it left the Commonwealth and, as the name implies, became a republic. Theoretically, this could have meant the end of the concept of prerogatives in South Africa, which was, however, not the case. Instead, to a vast extent, the constitutional structure followed

106 Ibid.
107 Ibid; the treaties of the Paris Peace Conference (1919–1920) and the Paris Peace Treaties (1947).
108 Ibid.
109 Statute of Westminster 1931 Section 2.
110 Ibid Section 3.
111 Status of the Union Act 1934.
112 Ibid Section 4 (1).
113 May (n 104) 203, 205 f.
114 Ibid 202.
115 Ibid 205 f.
116 Ibid 210 ff.
117 Ibid 214.
118 Gretchen Carpenter, *Introduction to South African Constitutional Law* (Butterworths 1987) 174.
119 Republic of South-Africa Constitution Act 32 of 1961.

the former Westminster framework, replacing the former 'governor-general' with the state president. Section 7 (2) of the Act then explicitly pointed out that the powers of appointing ambassadors,[120] making treaties,[121] or declaring war[122] are vested in the president. Moreover, it stated that the state president now has 'such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative'.[123] The prerogatives thus survived the constitutional change largely unaltered.[124] This also holds for South Africa's third and last apartheid constitution, brought into force by the Republic of South Africa Constitution Act of 1983.[125] The act infamously established a tricameral parliament with one chamber for 'whites,' one for 'coloureds,' and one for 'indians'.[126] 'Black' people were supposed to be represented in their own (semi)independent 'homeland' states ('Bantustans'), which were an artificial creation to strip them of South African citizenship.[127] Concerning the prerogative, again, the powers were transferred to the new system. Section 6 of the new constitution was a mere 'carbon copy'[128] of the former Section 7, providing for the same powers in foreign affairs and again stating that the state president has 'such powers and functions as were immediately before the commencement of this Act possessed by the state president by way of prerogative'.[129] In terms of the prerogative, the older South African constitutions thus showed a remarkable continuity, and the thesis will thus in the following only distinguish between them where they deviate.

Together with the prerogatives, the notion of deference migrated into the South African system. Under all three constitutions, the courts made references to the acts of state, e.g. in *Sachs v Dönges*[130] (1909 Constitution), *S v Devoy*[131] (1961 Constitution), and *Boesak v Minister of Home Affairs*

120 Ibid Section 7 (3) (d).
121 Ibid Section 7 (3) (g).
122 Ibid Section 7 (3) (i).
123 Ibid Section 7 (4).
124 Cf as well Carpenter (n 118) 174; Dion A Basson and Henning P Viljoen, *South African Constitutional Law* (Juta 1988) 42.
125 Republic of South Africa Constitution Act 110 of 1983.
126 Currie and Waal (n 103) 56.
127 Ibid 54.
128 Carpenter (n 118) 174.
129 Republic of South Africa Constitution Act (n 125) Section 6 (4); cf as well Carpenter (n 118) 174; Basson and Viljoen (n 124) 42.
130 *Sachs v Dönges NO* 1950 (2) SA 265 (A) (Appellate Division).
131 *S v Devoy* 1971 (3) SA 899 (A) (Appellate Division).

and Another[132] (1983 Constitution) and their possible effect of rendering a dispute in the area of foreign affairs non-justiciable.[133] The judgements often directly referred to English case law and scholars.[134] Moreover, South African authors like Sanders,[135] Booysen,[136] and others[137] endorsed the doctrine as part of the South African legal system. South Africa thus inherited crown prerogatives and the notion of deference from English law.

bb) The new South African Constitution

The democratic change and end of apartheid in South Africa came in two steps. First, an interim constitution was issued in 1993, which paved the way for the current South African Constitution in 1996. What did these changes mean for the fate of the prerogatives?

The interim constitution vested the executive power in the president 'subject to and in accordance with the constitution'.[138] Following the tradition of former constitutions, the interim constitution listed the president's powers in Section 82 (1), among them again the power to appoint ambassadors and negotiate and sign treaties.[139] In contrast to the older constitutions, a direct reference to prerogatives is missing. The same holds for the current South African Constitution from 1996. Like the interim constitution, it lists executive functions, like the appointment of ambassadors.[140] The capacity to negotiate and sign treaties is now closely tied to parliament[141] but still in the power of the executive.[142] The president is also given 'the powers entrusted by the Constitution and legislation, including those necessary

132 *Boesak v Minister of Home Affairs and Another* 1987 (3) SA 665 (C) (Cape Provincial Division).
133 For further cases cf Carpenter (n 118) 172 f; and Basson and Viljoen (n 124) 42 ff.
134 Cf ibid.
135 AJGM Sanders, 'Our State Cannot Speak with Two Voices' (1971) 88 South African Law Journal 413; AJGM Sanders, 'The Justiciability of Foreign Policy Matters under English and South African Law' (1974) 7 Comparative and International Law Journal of Southern Africa 215.
136 Hercules Booysen, *Volkereg – 'n Inleiding* (Juta 1980) 229, 255; Carpenter (n 118) 172 fn 11.
137 Cf as well Carpenter (n 118) 172 ff; Basson and Viljoen (n 124) 41 ff.
138 Interim Constitution of South Africa 1993 Section 75.
139 Although Section 231 demanded much stronger involvement of parliament.
140 Constitution of the Republic of South Africa 1996 Section 84 (2).
141 Cf in detail below Chapter 4, I., 3., b), bb).
142 Constitution of the Republic of South Africa 1996 Section 231.

to perform the functions of Head of State and head of the national executive'.[143] Moreover, the new Constitution provides that all law in force when the Constitution took effect continues in force unless it is repealed by an act of parliament or is inconsistent with the new constitution.[144] Whether these latter two provisions once more provide for the survival of crown prerogatives until today remains an open question. It appears that a textual analysis alone cannot settle the question convincingly.[145] In their case law, the courts seem to be undecided as to whether the old prerogatives and, with them, deference have survived.[146] The same is true for scholars:[147] the fate of the crown prerogatives and the problem of judicial review in foreign affairs are still debated, and this thesis will shed light upon these questions in the course of its examination.

2. United States of America

As we have seen, South Africa explicitly relied on English precedent in foreign affairs cases even after it became a republic. In contrast, the extent to which English law or the ideas of Hobbes and Locke guide the law of the United States is much more controversial. It is part of a general academic debate if foreign affairs powers were intended to and should be placed within the president, the Congress, or shared between these institutions.[148] It is beyond the ambit of this thesis to try to settle this issue. Instead, this part, as with South Africa, will trace where and when the ideas of the leading role of the executive and the notion of deference spread within United States law.

143 Ibid Section 84 (1).
144 Ibid schedule 6 Section 2 (1).
145 Cf in more detail below Chapter 3, II., 1.
146 Cf in more detail below Chapter 3, II., 1.
147 Cf authors cited in Chapter 3 (n 880) and (n 881).
148 For an overview of different positions cf Prakash and Ramsey (n 33) 237 who themselves would come up on the executive side of the argument.

a) A new idea of separation of powers in foreign affairs: Continental Congress and Constitutional Convention

With the beginning of the revolutionary period, the former British colonies organised their governance independently from the crown by establishing the Continental Congress with delegates from the different colonies.[149] In its second meeting, the Congress (1775–1781) passed the Articles of Confederation,[150] which would serve as America's first national constitution, followed by the US Constitution in 1787. In contrast to the United Kingdom, which started with an absolute monarchy, which then conceded more and more powers to parliament, the situation in the United States was the other way around.[151] Its first government was an almighty assembly possessing executive and legislative powers.[152] Amongst these was also the complete tableau of foreign affairs like the sending or receiving of ambassadors, entering into treaties, declaring war, or issuing letters of marque and reprisal.[153] Every crucial foreign policy decision was thus subject to legislative deliberation.[154] The states had only been given residual competences, for example, in cases of an immediate attack.[155]

The challenge faced by the delegates of the Philadelphia Convention, charged with developing a new constitution, was thus deciding how far the powers now owned by the legislative should be transferred to newly created other branches of government.[156] A proposal stated within the Virginia plan[157] to attribute to the executive 'besides a general authority to execute the National laws, […] the Executive rights vested in Congress by the Confederation'[158] caused strong objections by the delegates, which shows a

149 The first Congress from 1774 did not include delegates from Georgia.

150 Articles of Confederation and Perpetual Union, created 15 November 1777, ratified 1 March 1981.

151 Louis Fisher, *The Law of the Executive Branch: Presidential Power* (OUP 2014) 264 f.

152 Ibid 264.

153 Cf especially Articles of Confederation and Perpetual Union (n 150) Articles 6, 9; certain powers like the right of self-defence were however left to the individual states; Fisher (n 151) 364 f.

154 Bestor (n 90) 568.

155 Ibid 567.

156 Ibid 570.

157 The discussions in Philadelphia produced four large plans, the Virginia Plan, the New Jersey Plan, Hamilton's Plan and Pickney's Plan, cf Max Farrand, *The Records of the Federal Convention of 1787 Vol. 3* (Yale University Press 1911).

158 Max Farrand, *The Records of the Federal Convention of 1787 Vol. 1* (Yale University Press 1911) 21.

clear departure from the British model of executive prerogatives.[159] Charles Pinckney (South Carolina) was afraid that 'the Executive powers of (the existing) Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one'.[160] In the same vein, James Wilson (Pennsylvania) 'did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c'.[161] Not even the Hamilton plan, which was called the 'British Plan' for its close orientation towards the Westminster system, gave all foreign affairs powers formerly part of the prerogative to the executive but split them between the executive and the Senate.[162] This was the way finally chosen by the Committee of Detail in constructing the first draft of the constitution. It considered whether a specific power formerly vested in Congress was functionally of legislative nature and, if not, allotted it to the newly created executive or judicative branch.[163]

This process resulted in the final constitution giving certain express foreign affairs powers to Congress and others to the executive. Under Article 1 (8) of the US Constitution, the Congress has the power

> *[…] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;*
> *[…] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;*
> *To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;[…]*

For the president, Article 2 (3) of the US Constitution provides

> *[…] The President shall be commander in chief of the Army and Navy of the United States*
> *[…] He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and*

159 Bestor (n 90) 575.
160 Farrand, *Records Vol. 1* (n 158) 64 f; cf as well Bestor (n 90) 575.
161 Farrand, *Records Vol. 3* (n 157) 65 f; cf as well Bestor (n 90) 575.
162 Farrand, *Records Vol. 3* (n 157) 622 § 8; Bestor (n 90) 589; Curtis Bradley and Martin Flaherty, 'Executive Power Essentialism and Foreign Affairs' (2004) 102 Michigan Law Review 545, 596.
163 Bestor (n 90) 593.

> *he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls […]*[164]

Although using almost the exact same terminology as Blackstone,[165] the text of the new constitution marks an apparent deviation from the 'British approach'. Blackstone lists almost all powers now in the hands of the legislative branch (Congress or Senate) as executive royal prerogatives. Moreover, during the ratification debates, it became clear that the executive of the new constitution was not equal in powers to the British Monarch. In Federalist No. 69,[166] Hamilton compared the foreign affairs powers of the British king and the new presidency and marked out the differences, especially concerning declarations of war and the making of treaties.[167] Nevertheless, it has been argued in more recent times that the president enjoys further foreign affairs powers by virtue of Article 2 (1) of the US Constitution, which states that '[t]he executive power shall be vested in a President of the United States of America'.[168] Proponents of this 'vesting clause thesis'[169] argue that the framers understood 'executive power' to encompass the 'foreign affairs prerogatives'. Hence, all foreign affairs powers not explicitly given to Congress should be vested in the president. Given the apparent deviation of the new constitutional framework from the British concept of royal prerogatives in foreign affairs, it is unlikely that the founders harboured such a view. Their idea of 'executive power' is not to be equated with the British concept.[170] The 'vesting clause thesis'

164 [My omissions].

165 Blackstone's writings were of course well known and thus served as a starting point for the framers Phillip R Trimble, *International law: United States foreign relations law* (The Foundation Press 2002) 19.

166 Alexander Hamilton, 'Number LXIX' in Erastus H Scott (ed), *The Federalist and other constitutional papers* (digitized version, Albert, Scott & Co 1894) 377 ff.

167 Ibid 379 ff; Fisher (n 151) 265.

168 Haywod J Powell, 'The President's Authority Over Foreign Affairs: An Executive Branch Perspective' (1999) 67 George Washington Law Review 527; cf especially Prakash and Ramsey (n 33); Trimble (n 165) 10 ff; John C Yoo, 'War and the Constitutional Text' (2002) 69 University of Chicago Law Review 1639, 1676 ff.

169 Aptly called 'royal residuum thesis' by Julian D Mortenson, 'Article II Vests Executive Power, Not the Royal Prerogative' (2019) 119 Columbia Law Review 1169, 1181.

170 Bestor (n 90) 601.

has been thoroughly rebutted[171] but proved influential in US constitutional thought.[172]

b) Early constitutional practice and first traits of the traditional position

The birthplace of the traditional position in the US thus cannot be found in the drafting era. Nevertheless, the idea of executive dominance in foreign affairs and judicial deference also developed in the United States. The first seeds are visible in Alexander Hamilton's 'Pacificus' letters, written four years after the enactment of the constitution.[173] In these pamphlets, he defends the legality of Washington's proclamation to stay neutral during the post-French Revolution wars in Europe. He argues for the executive as 'the *organ* of intercourse between the Nation and foreign Nations'[174] and bases his reasoning inter alia on the vesting clause,[175] purporting that except for the powers explicitly conferred to Congress 'the EXECUTIVE POWER of the Union is completely lodged in the president'.[176] Moreover, he gives control over the interpretation of treaties to the president. Although he acknowledges the judiciary's power to interpret treaties, he states that, in controversies, the executive is the 'interpreter of the National Treaties in those cases in which the Judiciary is not competent, that is in the cases between Government and Government'.[177] Like Blackstone, he holds that when the conflict is purely between states, the judiciary has no say in the matter. Hamilton's view in the 'Pacificus' clearly deviates from his previous position during the Philadelphia Convention and the ratification debates,[178] an inconsistency also noted by his contemporaries. Thomas Jefferson strongly urged James Madison to write a reply: 'Nobody answers him, & his doctrine will therefore be taken for confessed. For god's sake,

171 Especially considering that the clause was introduced by Wilson who clearly opposed the British concept, see Prakash and Ramsey (n 33) 284; for a thorough rebuttal of the 'vesting clause thesis' see Bradley and Flaherty (n 162) f; Mortenson (n 169).
172 Mortenson (n 169) 1182 ff.
173 Bestor (n 90) fn 190.
174 Alexander Hamilton and James Madison, *The Pacificus-Helvidius Debates of 1793–1794* (Liberty Fund 2007) 11 [italics in the original].
175 Ibid 12 ff.
176 Ibid 13 [capital letters in the original].
177 Ibid 11.
178 Bradley and Flaherty (n 162) 682.

my dear Sir, take up your pen, select the most striking heresies, and cut him to pieces in the face of the public'.[179] Madison, following this call, wrote five letters arguing against Hamilton under the alias of 'Helvidius,'[180] thereby frequently quoting Hamilton's earlier statements in the Federalist papers.[181] In his view, Hamilton borrowed improperly from the British example;[182] refuting Hamilton's new ideas, he asks, 'Whence then can the writer have borrowed it? There is but one answer to this question. The power of making treaties and the power of declaring war, are *royal prerogatives* in the *British government*, and are accordingly treated as Executive prerogatives by *British commentators*'.[183] Indeed, it appears fair to say that Hamilton, who has always been a supporter of a strong executive and the British system, subsequently reinterpreted the foreign affairs articles of the constitution in the light of the British model and thus helped to introduce a British understanding of foreign affairs powers to the US constitutional system.[184] With his 'Pacificus' letters, he makes one of the first legal arguments for executive dominance in foreign affairs under the new US Constitution and hints at a deferential role for the courts.[185] Proponents of a strong executive role and the 'vesting clause thesis' often cite his remarks.[186]

Another essential piece of the puzzle, which, as we will see later, completes the picture of deference, lies in John Marshall's speech[187] in front of Congress concerning the fate of Jonathan Robbins. Robbins, a British subject, was charged with murder following a mutiny on a British ship and extradited by President John Adams according to the Jay Treaty (a British-American friendship treaty in the aftermath of the American Revolution) causing opposition in the House of Representatives.[188] Defending Adams's behaviour in Congress, Marshall stated: 'The President is the sole organ of

179 Letter to Madison, Hamilton and Madison (n 174) 54.
180 Ibid 55 ff.
181 Bestor (n 90) fn 259.
182 Hamilton and Madison (n 174) 63; Bradley and Flaherty (n 162) 684.
183 Hamilton and Madison (n 174) 63 [italics in the original].
184 Henry P Monaghan, 'Protective Power of the Presidency' (1993) 93 Columbia Law Review 1, 49.
185 For Hamilton's role as father of American realism cf Robert Knowles, 'American Hegemony and the Foreign Affairs Constitution' (2009) 41 Arizona State Law Journal 87, 117.
186 Mortenson (n 169) 1172.
187 (Congressman at that time).
188 Ruth Wedgwood, 'The Revolutionary Martyrdom of Jonathan Robbins' (1990) 100 Yale Law Journal 229, 235 ff.

the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand for a foreign nation can only be made on him'.[189] In contrast to Hamilton, Marshall did not claim inherent foreign affairs powers for the president but held that he acted upon a treaty being part of the supreme law of the land.[190] His characterization of the president as 'sole organ,' as we shall see, would soon be taken out of context and used to establish the idea of executive dominance in foreign affairs.[191]

c) Early traces of the traditional position in the Supreme Court

The idea of a special role for the executive and judicial deference slowly made its way into the Supreme Court's jurisprudence. In *Ware v Hilton*,[192] concerning the question of whether a treaty between the US and Great Britain had been violated and was voidable, the concurring opinion mentioned that '[t]hese are considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and definition of a Court of Justice'.[193] The explicit acknowledgment of areas outside the ambit of judicial cognisance ironically came about in the same case that established judicial review of legislative acts for the first time. In *Marbury v Madison*,[194] John Marshall, then chief justice, declared an act assigning original jurisdiction to the Supreme Court, contrary to Article 3 (2) US Constitution, to be void. In an almost mythological dialectic, the court not only introduced judicial review but also, as its twin, gave birth to the 'political question doctrine,' the idea that certain acts of the executive (or legislative) branches are out of judicial reach. In the words of Justice Marshall:

> *[W]hether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. […] By the constitution of the United States, the President is invested with*

189 United States Congress, *Abridgment of the Debate of Congress from 1789 to 1856 – vol II* (digitized version, D Appleton and Company 1856) 466.
190 Fisher (n 151) 267.
191 Ibid 266.
192 *Ware v Hylton* 3 US 199 (1796) (US Supreme Court).
193 Ibid 260; cf as well Jide Nzelibe, 'The Uniqueness of Foreign Affairs' (2004) 89 Iowa Law Review 947.
194 *Marbury v Madison* 5 US 137 (1803) (US Supreme Court).

> *certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.*[195]

This particular type of 'political acts' bears an apparent resemblance to the royal prerogatives only within the king's discretion. As Marshall explained, they can mostly be found in the area of foreign affairs:

> *The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This office, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.*[196]

The Marshall court, in subsequent foreign affairs cases, went on to develop the doctrine. In *Foster v Neilson*,[197] the question arose whether the United States had acquired a piece of land from Spain. In interpreting the treaty, Justice Marshall stated

> *After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to* ***maintain the opposite construction in its own courts would certainly be an anomaly*** *in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature.*[198]

Importantly, Marshall places great emphasis on the position of both the executive and the legislative. In another case, the Cherokee Nation invoked

195 Ibid 165 ff [my adjustments and omissions].
196 Ibid 166.
197 *Foster v Neilson* 27 US 253 (1829) (US Supreme Court).
198 Ibid 309 [my emphasis].

a treaty with the US to prevent the application of US law in its territory.[199] Justice Johnson explicitly relied on the English Nabob cases[200] to dismiss the claim, which exemplifies the 'use of British case law to plant the political-question doctrine on American soil'.[201] In the early years of its existence, the notion of deference thus became part of the Supreme Court's jurisprudence,[202] albeit without developing into a consistent approach.[203] Moreover, the doctrine was applied rather narrowly. As already alluded to in *Marbury v Madison*,[204] when private rights were touched on, courts decided even in highly political cases.[205] This approach was in line with the prevalent position in US jurisprudence by the end of the 19th century holding that questions of law and policy could be distinguished rather clearly.[206]

d) The late victory of deference: from Quincy Wright to Sutherland

This late 19th century position fell under pressure with the beginning of the 20th century,[207] as depicted by Quincy Wright, who wrote one of the first comprehensive monographs on American foreign relations law.[208] In his *Control of American Foreign Relations*,[209] Wright remarks that 'no definite

199 *The Cherokee Nation v Georgia* 30 US 1 (1831) (US Supreme Court).
200 Ibid 29; cf above, this Chapter, II., 1., b).
201 Thomas M Franck, *Political questions, judicial answers: Does the rule of law apply to foreign affairs?* (Princeton University Press 1992) 12.
202 Cf as well *Luther v Borden* 48 US 1 (1849) (US Supreme Court) albeit a rather 'domestic' case, it entails remarks concerning the recognition of governments and acknowledges the limitations of judicial review.
203 Nzelibe (n 193) 947; Ariel N Lavinbuk, 'Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket' (2005) 114 Yale Law Journal 857, 889 ff.
204 *Marbury v Madison* (n 194) 170: 'The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court'.
205 G Edward White, 'The Transformation of the Constitutional Regime of Foreign Relations' (1999) 85 Virginia Law Review 1, 36.
206 Ibid 26 ff, 36.
207 Ibid 8 ff.
208 Curtis A Bradley, 'What is foreign relations law?' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 3, 11.
209 Quincy Wright, *Control of American Foreign Relations* (The Macmillan Company 1922).

line has ever been drawn between principles of international law and treaty provisions which are of a political character and those which are of a legal character'.[210] Perhaps unsurprisingly, around the same time in international law, a debate over justiciability ensued, triggered by the arbitration clause of the League of Nations Covenant and the question of which disputes are 'suitable for submission to arbitration'.[211] In US foreign relations law, Quincy Wright named several cases (e.g., cessation of territory, recognition of states and governments) in which 'the courts ordinarily follow the decisions of the political organs'.[212] According to him, 'political questions' remain confined to these traditional areas.[213] Wright also acknowledges a leading role for the president: 'In foreign affairs […] the controlling force is the reverse of that in domestic legislation. The initiation and development of details is with the president, checked only by the veto of the Senate or Congress upon completed proposals'.[214] It is worth noting that the president's power is not unchecked by the legislative branch. Quincy Wright's account of foreign relations thus marks the transition period between the 'orthodox' 19th century approach and the developments to come in the 20th century.[215]

The first cracks in the armour of the old 'orthodox' approach, which also stressed states' competences,[216] became visible in *Missouri v Holland*.[217] The Supreme Court decided that the government acting on a treaty could override state laws and thus strengthened federal competences.[218] The pinnacle of executive dominance in foreign affairs came about 16 years later

210 Ibid 172; cf as well White (n 205) 37.

211 The most prominent adversaries in this international law debate were certainly Hersch Lauterpacht arguing for the aptness of judicial settlement in general, Hersch Lauterpacht, *The Function of Law in the International Community* (first edition published 1933, OUP 2011) 147 ff and Hans Morgenthau emphasizing that some issues were too political for judicial dispute settlement, Hans Morgenthau, *Die Internationale Rechtspflege, ihr Wesen und ihre Grenzen* (Noske 1929) 72 ff; cf Martti Koskenniemi, 'The Function of Law in the International Community: 75 Years After' (2008) 79 British Yearbook of International Law 353, 355; Oliver Jütersonke, 'Hans J. Morgenthau on the Limits of Justiciability in International Law' (2006) 8 Journal of the History of International Law 181; Martti Koskenniemi, *The Gentle Civilizer of Nations* (CUP 2009) 361 ff, 366, 440 ff.

212 Wright (n 209) 173.

213 Ibid 38, 44.

214 Ibid 149 f [my omission]; cf as well White (n 205) 43.

215 Ibid 42 ff.

216 Ibid 21 ff.

217 *Missouri v Holland* 252 US 416 (1920) (US Supreme Court).

218 White (n 205) 62 ff.

in *Curtiss Wright*.[219] By joint resolution, Congress had delegated broad discretionary power to the president to regulate the arms trade with countries taking part in the Chaco War between Bolivia and Paraguay. Wright Export Corp. sold arms to Bolivia and was subsequently convicted for violating a presidential proclamation based on the resolution. It challenged the resolution as an unconstitutional delegation of legislative power to the president. The case finally reached the Supreme Court. Justice Sutherland delivered the majority opinion and introduced his concept of executive dominance in foreign affairs, which he had developed in an essay in 1909[220] and at a series of lectures given at Columbia University.[221] He upheld the delegation, which in his opinion, would probably be unconstitutional if only related to domestic affairs,[222] thereby clearly relying on the separation of the internal and the external sphere. As the executive proclamation affected the latter, it could be based not only on a legislative act but also on the special powers of the president in foreign affairs.[223] To establish these extraordinary powers, Sutherland refuted the idea that the government could only resort to powers enumerated in the constitution as 'categorically true only in respect of our internal affairs'.[224] Concerning foreign affairs, '[a]s a result of the separation from Great Britain […] the powers of external sovereignty passed from the Crown […] to the colonies in their collective and corporate capacity as the United States of America'.[225] This theory marks an apparent deviation from the 19th century position, which, although accepting a robust executive role and the absence of judicial review in some instances, saw all powers as flowing from the constitution.[226] Sutherland's approach opened the backdoor already introduced by Locke[227] to go behind the constitution and introduce a mystical notion of natural sovereign power into the constitutional framework: 'Rulers come and go; governments end and forms of government change; but sovereignty survives'.[228] Although Sutherland

219 *United States v Curtiss-Wright Export Corp* 299 US 304 (1936) (US Supreme Court).
220 George Sutherland, 'The Internal and External Powers of the National Government' (1910) 191 North American Review 373.
221 George Sutherland, *Constitutional Powers and World Affairs* (Columbia University Press 1919), cf as well White (n 205) 46 ff.
222 *United States v Curtiss-Wright Export Corp* (n 219) 315.
223 Ibid 320.
224 Ibid 316.
225 Ibid [my adjustments and omissions].
226 White (n 205) 8 ff.
227 See above Chapter 1, I., 2.
228 *United States v Curtiss-Wright Export Corp* (n 219) 316.

does not explicitly mention royal prerogatives, he is guided by these powers formerly vested in the crown. He cites Marshall's speech in the Robbins case,[229] referring to the president as 'sole organ,' conveniently dropping the following phrase, which implies a limitation of this statement to communicate with foreign governments.[230] According to Sutherland's account, such limitations not only do not apply, but Marshall's quote is bolstered, and the president is awarded 'the very delicate, plenary and exclusive power [...] as the sole organ of the federal government in the field of international relations'.[231] This view appears even more radical than the 'vesting clause' thesis by attributing all foreign affairs powers to the president 'anything to the contrary in this constitution not withstanding'.[232] Such an approach, of course, has serious repercussions for judicial control. As with the English concept of crown prerogatives, Sutherland's concept of extra-constitutional powers implies a very limited role for courts in controlling foreign affairs.[233]

What drove Sutherland to develop such a theory of executive dominance is not entirely clear. He and his contemporaries, without doubt, had been influenced by the changing international landscape after the First World War, which now saw the US as a global power and authoritarian regimes in Russia, Germany, and Italy on the rise.[234] It was also suggested that the court felt the need to make some kind of concession after being heavily criticised for blocking parts of the New Deal legislation.[235] In his personal experience as a Republican representative and senator, Sutherland had witnessed the problems of explaining an increasing number of executive agreements without the Senate's approval, as well as the challenge to Congress' practice in acquiring and governing new territories like Puerto Rico, for which only a thin constitutional basis existed.[236] His concept of extra-constitutional powers provided an easy fix, and his theory influenced a series of decisions, all considerably strengthening the role of the executive: *United*

229 This Chapter, II., 2., b).
230 *United States v Curtiss-Wright Export Corp* (n 219) 319.
231 Ibid 320.
232 White (n 205) 109.
233 Ibid 47, 110.
234 Ibid 102, 148; Sitaraman and Wuerth (n 2) 1913.
235 Louis Henkin, *Foreign affairs and the United States Constitution* (2nd edn, Clarendon Press 1997) 60 f.
236 White (n 205) 28 ff, 51.

States v Belmont[237] and *United States v Pink*[238] (authorising executive agreements and limiting state's rights)[239] as well as *Ex parte Peru*[240] and *Mexico v Hoffman*[241] (giving the executive influence over immunity questions).[242] This line of decisions, sometimes even referred to as the 'Sutherland Revolution,'[243] firmly established the traditional position in US law. Admittedly, *Curtiss Wright* has been challenged, and judgements like *Youngstown*[244] (denying the president the right to seize steel factories during the Korean War) show that the courts have not entirely acknowledged executive supremacy in foreign affairs. However, although Sutherland's extra-constitutional ideas were soon replaced by functionalist arguments,[245] since Curtiss Wright, the traditional position has been thoroughly rooted in US jurisprudence and proved dominant for most of the 20th century.[246] How it fared in more recent times will be examined in the course of this thesis.

3. Germany

a) Prussian legal thought and constitutional practice

The theories of Hobbes and Locke and other classical scholars[247] were received widely across Europe and also resonated in German legal thought. Hence, it is not surprising that German ideas concerning foreign affairs developed in a similar direction as English jurisprudence.[248]

237 *United States v Belmont* 301 US 324 (1937) (US Supreme Court).
238 *United States v Pink* 315 US 203 (1942) (US Supreme Court).
239 More on executive agreements below Chapter 3, I., 1., a).
240 *Ex parte Republic of Peru* 318 US 578 (1943) (US Supreme Court).
241 *Republic of Mexico v Hoffman* 324 US 30 (1945) (US Supreme Court).
242 White (n 205) 111 ff.
243 Sitaraman and Wuerth (n 2) 1911 ff.
244 *Youngstown Sheet & Tube Co v Sawyer* 343 US 579 (1952) (US Supreme Court).
245 Sitaraman and Wuerth (n 2) 1917.
246 Ibid 1919.
247 Also of course including others like Bodin, Machiavelli or Rousseau.
248 For an early German monograph cf David G Struben, *Gründlicher Unterricht Von Regierungs- Und Justitz-Sachen: Worinn untersuchet wird: Welche Geschäffte ihrer Natur und Eigenschafft nach vor die Regierungs- oder Justitz-Collegia gehören?* (digitized version, Rudolf Schröder 1733); cf remarks by Bolewski, Wilfried M, *Zur Bindung deutscher Gerichte an Äußerungen und Maßnahmen ihrer Regierung auf völkerrechtlicher Ebene: Ein Beitrag zur Verrechtlichung der Außenpolitik* (Marburg

This connection becomes apparent in the ideas of Georg Wilhelm Friedrich Hegel,[249] who was familiar with and often critical of Locke's ideas.[250] However, concerning foreign affairs, his legal philosophy shows a similar approach.[251] He distinguished sharply between the 'the constitution or right within the state'[252] ('*inneres Staatsrecht*') with reference to the individual state as a 'self-referring organism'[253] and the 'right between states'[254] also often translated as 'external public law'[255] ('*äußeres Staatsrecht*') concerning other states. Hence, Hegel followed a terminology that Georg Friedrich von Martens had introduced in his seminal *Précis du droit des gens moderne de l'Europe*.[256] It is contested if, through the choice of language, Hegel intended to deny the normativity and independence of international law or simply aimed to avoid the term 'ius gentium'.[257] Be that as it may, in his sphere of 'external public law' quite like with the theories of Hobbes

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1971) fn 45; cf as well for the ideas of Georg Friedrich von Martens, Martti Koskenniemi, *To the Uttermost Parts of the Earth* (CUP 2021) 936.

249 Wilhelm Grewe, 'Die Auswärtige Gewalt der Bundesrepublik' (1954) 12 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 132; for this part cf as well Gernot Biehler, *Auswärtige Gewalt: Auswirkungen auswärtiger Interessen im innerstaatlichen Recht* (Mohr Siebeck 2005) 40 ff.

250 Cf e.g. Shamsur Rahman, 'Locke's Empiricism and the Opening Arguments in Hegel's Phenomenology of Spirit' (1993) 20 Indian Philosophical Quarterly 2; Jeanne Schuler, 'Empiricism without the dogmas: Hegel's critique of Locke's simple ideas' (2014) 31 History of Philosophy Quarterly 347.

251 Biehler (n 249) 41; the same is true for Georg Friedrich von Martens, Koskenniemi, *To the Uttermost Parts* (n 248) 930 ff, 946.

252 Georg W F Hegel, *Outlines of the Philosophy of Right* (first published 1820, OUP 2008) § 259.

253 Ibid.

254 Ibid.

255 Koskenniemi, *To the Uttermost Parts* (n 248) 930 ff.

256 Georg Friedrich von Martens, *Précis du droit des gens moderne de l'Europe, fondé sur les traités et l'usage. Pour servir d'introduction à un cours politique et diplomatique* (digitized version, 2nd edn, Goettingen 1801) § 4 'droit public exterieur'; Koskenniemi, *To the Uttermost Parts* (n 248) 938 f.

257 Hegel has often been cited as 'Völkerrechtsleugner', citing Hegel in this direction Anne Peters and Bardo Fassbender 'Prospects and Limits of a Global History of International Law: A Brief Rejoinder' (2014) 25 EJIL 337, 340 fn 5; in the same vein Bruno Simma and Alfred Verdross, *Universelles Völkerrecht* (3rd edn, Duncker & Humblot 1984) 15 § 20, however more differentiating towards the end of § 20; doubtful Sebastian M Spitra, 'Normativität aus Vernunft: Hegels Völkerrechtsdenken und seine Rezeption' (2017) 56 Der Staat 593, 594; doubtful as well Sergio Dellavalle, 'Hegels Äußeres Staatsrecht: Souveränität und Kriegsrecht' in Rüdiger Voigt (eds), *Der Staat – eine Hieroglyphe der Vernunft* (Nomos 2009) 177, 178; without doubt, Hegel has been used to deny international law's normativity by

and Locke, states remain in a state of nature without a higher power above them and there is a permanent danger of wars.[258] As a proponent of a constitutional monarchy,[259] within the state, Hegel distinguished between legislative power, governmental power and the 'principal (or monarchical) power'[260] (*fürstliche Gewalt*). He attributes the subject of foreign affairs to the latter:

> *The state's orientation towards the outside stems from the fact that it is an individual subject. Its relation to other states therefore falls to the power of the crown. Hence it directly devolves on the monarch, and on him alone, to command the armed forces, to conduct foreign affairs through ambassadors etc., to make war and peace, and to conclude treaties of all kinds.*[261]

Again, the reference to the state who acts as an individual subject towards other states showcases the Hobbesian influence. Moreover, Hegel also mentions that the 'idea of right as abstract freedom'[262] is placed within the inner sphere, thus establishing that the outer sphere is not subject to the regular laws of the state.[263] In his philosophy, he thus reflects all three notions of the traditional position.

From Hegel's account on, German scholarship of the early 19th century widely accepted the idea of foreign affairs as a field of monarchical power.[264] At that time, the territory of today's Germany was ruled by a plethora of different principalities, with Prussia and Austria competing for hegemony. In Prussia, different legislative instruments were used to safeguard the dominant role of the executive in foreign affairs. As early as in 1793, the 'Procedural Code for the Prussian States' stipulated that the arrest of a foreign consul is only possible with the permission of the

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authors like Philipp Zorn and Adolf Lasson, see Schorkopf (n 88) 596 with further references.

258 Hegel (n 252) § 333; Koskenniemi, *To the Uttermost Parts* (n 248) 947.

259 At least in his later years, in his early years he supported the French revolution but was later appalled by the violent course of events.

260 Georg W F Hegel, *Grundlinien der Philosophie des Rechts* (first published 1820, Duncker & Humblot 1933) § 273 [my translation].

261 Hegel, *Philosophy of Right* (n 252) § 329.

262 Ibid § 336.

263 Dellavalle (n 257) 177, 190; Hegel, *Philosophy of Right* (n 252) § 278; Biehler (n 249) 41; Koskenniemi, *To the Uttermost Parts* (n 248) 947.

264 Frank Schorkopf, *Staatsrecht der internationalen Beziehungen* (CH Beck 2017) 583.

foreign department.[265] The 'Royal-Prussian decree concerning cases of contentious treaty interpretation'[266] passed in 1823 strengthened the role of the executive even more.[267] It provided that concerning the interpretation of a treaty, the application of two concurrent treaties, or the validity of a treaty, the courts should request the binding opinion of the Prussian Minister of Foreign Affairs.[268] The decree even applied to treaties to which Prussia was not a party. As rationale, the decree stated that concerning treaties and their underlying motives, standard rules of interpretation are not applicable. Certain interpretations could be seen as a violation of the treaty by other states, and the government would have better access to negotiation papers. The executive, in general, would be better positioned to gain the necessary knowledge to put a contentious formulation into context. Courts accepted and applied the decree.[269] For example, the Duke of Rovigo tried to receive compensation payments from the Prussian state related to territorial exchanges in the wake of Napoleonic wars, but the courts turned down his claim referring to a binding interpretation of the Treaty of Paris[270] by the Ministry of Foreign Affairs.[271] Contemporary scholars in part welcomed the decree,[272] but it was heavily criticised at large.[273] The main point of critique was that the executive now performed core judicial functions like interpretation and application of the law.[274] This resistance

265 Allgemeine Gerichtsordnung für die Preußischen Staaten 1795, § 65; Bolewski (n 248) 47 fn 1.

266 Königlich preußische Verordnung wegen streitig gewordener Auslegung von Staatsverträgen vom 25. Januar 1823, Gesetzessammlung für die königlich preußischen Staaten 1823, 19.

267 For an analysis of the decree cf especially Bolewski (n 248) 45 ff; cf as well Biehler (n 249) 51 ff.

268 Königlich preußische Verordnung (n 266) 50.

269 Bolewski (n 248) 53.

270 Treaty of Paris 1814.

271 Johann L Klüber, *Die Selbstständigkeit des Richteramtes und die Unabhängigkeit seines Urtheils im Rechtsprechen: im Verhältniß zu einer preussischen Verordnung vom 25. Jänner 1823* (Andreä 1832) 93, 122.

272 Friedrich Weidemann, *Hat seine Majestät, der König von Preußen, das Recht, die Entscheidung der Gerichtsbehörden bei Auslegung von Staatsverträgen von den Äußerungen des Ministeriums der auswärtigen Angelegenheiten abhängig zu machen? Eine polemisch affirmativ beantwortete Frage gegen die negative Behauptung des Publicisten Johann Ludwig Klüber* (Merseburg 1832); Romeo Maurenbrecher, *Grundsätze des heutigen deutschen Staatsrechts* (Frankfurt am Main 1837) 342, cf Bolewski (n 248) 48 fn 2.

273 Klüber (n 271); for further references see Bolewski (n 248) 48 fn 3.

274 Bolewski (n 248) 50.

was fuelled by the Prussian tradition that civil courts could decide on prejudicial questions even if they were part of constitutional law.[275] Due to the heavy criticism, the decree was replaced by a new order in 1843.[276] It now merely demanded that in contentious cases relating to the validity, application, or interpretation of a treaty, the necessary information for the application of the law should be requested from the Ministry of Foreign Affairs.[277]

Another Prussian institution establishing the influence of the executive over foreign affairs was the 'Prussian Court of Competence Conflicts'[278] founded in 1847,[279] which on the application of the executive, decided whether a court was competent to hear a case or whether it remained in the sole discretion of the administrative agencies. It soon developed jurisprudence which excluded certain executive acts in foreign affairs from civil proceedings.[280] This approach applied to territorial claims based on treaties,[281] and the court, in several cases, denied a claim by Count von Pappenheim,[282] based on the Congress of Vienna settlement, for not being justiciable. It referred[283] to a 'Cabinet Order'[284] issued in 1831, which held that 'private objection against an act of the sovereign is not possible'[285] and that 'as the sovereign in exercising his sovereign rights is not subject to any jurisdiction, he also is not to be held judicially accountable for the

275 Bolewski (n 248) 52.
276 Gesetz-Sammlung für die königlich preußischen Staaten 1843, 369.
277 Bolewski (n 248) 53.
278 'Preußischer Gerichtshof zur Entscheidung der Kompetenzkonflikte'.
279 Established by the 'statute concerning the procedure in cases of competence conflicts between the courts and administrative agencies from 8 April 1847' ('Gesetz über das Verfahren bei Kompetenzkonflikten zwischen den Gerichten und Verwaltungsbehörden vom 8. April 1847') [my translation].
280 Bolewski (n 248) 55.
281 L Hartmann, *Das Verfahren bei Kompetenz-Konflikten zwischen den Gerichten und Verwaltungsbehörden in Preußen* (Verlag der königlich geheimen Ober-Hofbuchdruckerei 1860) 138; Bolewski (n 248) 55; Biehler (n 249) 53 ff.
282 Bolewski (n 248) 55 ff.
283 *Decision from 13 November 1858* (1859) 21 Justizministerialblatt 155 (Court of Competence Conflicts); *Decision from 13 May 1865* (1865) 179 Justizministerialblatt 27 (Court of Competence Conflicts).
284 'Cabinet Order referring to the precise observation of sovereign and fiscal legal relationships' ('Kabinetts-Order betreffend die genauere Beobachtung der Grenzen zwischen landes-hoheitlichen und fiskalischen Rechtsverhältnissen') 1831 [my translation].
285 'daß ein privatrechtlicher Widerspruch wider den Akt des Hoheitsrechts selbst nicht stattfinde' [my translation].

consequences of exercising his sovereign rights'.[286] A commentary on the Court's jurisprudence[287] refers to an older Bavarian judgment[288] which even applied Hegelian terminology in denying these claims; such acts are said to be part of the 'external public law'[289] and thus not to be decided in courts.[290] In general, these cases show a certain resemblance to the Nabob cases and later British cases[291] in excluding the possibility of enforcing a treaty claim in municipal courts.

As with the decree concerning treaty interpretation, the court's jurisprudence was subject to severe criticism, especially as the exclusion of treaties from judicial review allowed the executive to infringe on private rights by using its foreign affairs power.[292]

b) The German Empire

So far, the focus has been on Prussian state practice. Prussia and the German principalities since 1815 had been loosely joined together in the German Confederation (*Deutscher Bund*), which did not enjoy international legal subjectivity.[293] An attempt to create a sovereign German nation-state in the wake of the German Revolutions of 1848/49 failed. Only when Prussia finally decided the tug of war over hegemony with Austria in its favour in 1866 and founded the North German Confederation was an entity with international legal personality created.[294] The Confederation was succeeded shortly afterward by the German Empire when Prussia won the war with

286 'So wenig der Souverän in Ausübung seiner Hoheitsrechte selbst von der Einwirkung irgend einer Gerichtsbarkeit abhängt, so wenig hat derselbe die Folgen dieses Gebrauchs seiner Rechte in einem gerichtlichen Verfahren zu verantworten […]' [my translation].

287 Otto Stölzel, *Rechtsweg und Kompetenzkonflikt in Preußen* (Franz Vahlen 1901) 90 fn 7; the court continued its work under the Bismarck Constitution, cf below, this Chapter, II., 3., b).

288 *Decision from 18 February 1851* (OAG, Court of Appeals Munich).

289 Ibid, 'äußeres Staatsrecht'.

290 Cf as well Biehler (n 249) 54.

291 *Rustomjee v R* (1876) 2 QBD 69 (Court of Appeal); Holdsworth (n 54) 1316.

292 Bolewski (n 248) 59 with further references; in this direction already Klüber (n 271) 154 f.

293 Schorkopf (n 264) 588.

294 Ibid 590.

France in 1871.[295] The German Empire was the first constitutional order to cover the whole territory of today's Germany.[296]

Its constitution now codified the idea of foreign affairs as sole executive domain:[297]

> *Art. 11: The Presidency of the Confederation belongs to the King of Prussia, who bears the name of German Emperor. The Emperor has to represent the Empire internationally, to declare war, and to conclude peace in the name of the Empire, to enter into alliances and other Treaties with Foreign Powers, to accredit and to receive Ambassadors.*
> *The consent of the Council of the Confederation is necessary for the declaration of war in the name of the Empire […]*
> *In so far as Treaties with Foreign States have reference to affairs which according to Article IV, belong to the jurisdiction of the Imperial Legislation, the consent of the Council of the Confederation is requisite for their conclusion, and the sanction of the Imperial Diet [Reichstag] for their coming into force.*[298]

It is apparent that the functions given to the emperor mirror those given by Blackstone to the King by virtue of the crown prerogative. The enumeration in the constitution is not conclusive; the term 'represent the Empire internationally' had been taken as a general delegation of foreign affairs power.[299] Parliament had only a minor role to play and was only involved when treaties needed legislative implementation. The non-approval of the Reichstag only had domestic effect.[300] The formerly independent German states represented in the 'Council of the Confederation' had a stronger

295 Ibid.
296 Of course, the territory of the German Empire exceeded the territory of today's Germany.
297 Schorkopf (n 264) 592.
298 Article 11 Constitution of the German Empire 1871, translation available at <https://en.wikisource.org/wiki/Constitution_of_the_German_Empire> [my omission and insertion].
299 Albert Haenel, *Deutsches Staatsrecht. 1, Die Grundlagen des deutschen Staates und die Reichsgewalt* (Duncker & Humblot 1892) 532, not to the extent however, that competences given e.g. to the states can be trumped cf 537 ff.
300 Schorkopf (n 264) 603.

influence through their mandatory involvement in treaty-making and in case of a declaration of war.[301]

The Prussian approach of securing executive influence in foreign affairs by special legislation also continued in the new order.[302] The new 'civil-servant liability law'[303] stated that the chancellor could certify that a questionable act of a civil servant in foreign affairs was in accordance with political and international considerations, which led to the exclusion of liability.[304] This legislation explicitly aimed to exclude foreign affairs as 'political questions' from judicial scrutiny.[305] Also the Prussian Court of Competence Conflicts continued its work and safeguarded the influence of the executive.[306] The court's procedural statute now entitled the minister of foreign affairs to intervene in any civil proceedings which may touch foreign sovereign immunity.[307] Following such intervention, the Court of Competence Conflicts had to rule and, in most cases, decided in favour of the executive.[308]

Although the main focus of legal academia in the late 19th century was internal constitutional law, German scholarship continued to theorize about foreign relations.[309] To describe the 'foreign affairs power' encompassing the acts of the state in the international sphere as well as the domestic acts necessary to facilitate and transform external acts, Albert Haenel[310] coined the term '*Auswärtige Gewalt*'.[311] It does not refer to a separate branch of gov-

301 Which appears to reflect their position as formerly independent states, cf Ernst R Huber, *Deutsche Verfassungsgeschichte seit 1789 – Bismarck und das Reich* (Kohlhammer 1963) 942.

302 In how far it was influenced by the Prussian decree is not entirely clear, but appears to be likely Hans P Ipsen, *Politik und Justiz* (Hanseatische Verlagsanstalt 1937) 65 fn 146; for such a connection Bolewski (n 248) 68.

303 Gesetz über die Haftung des Reiches für seine Beamten vom 22.05.1910, § 5 Nr. 2.

304 Bolewski (n 248) 65 ff.

305 The statute even survived the transition after 1949, cf Karl Doehring, *Pflicht des Staates zur Gewährung diplomatischen Schutzes* (Carl Heymanns 1959) 111; Bolewski (n 248) 67 ff; it was however later found incompatible with the Basic Law for lack of federal competences *Judgment from 19 October 1982* BVerfGE 61, 149 (German Federal Constitutional Court).

306 Bolewski (n 248) 56; Biehler (n 249) 54 f.

307 Using § 5 of the 'Verordnung zur Erhebung des Kompetenzkonflikts' from 1879; Bolewski (n 248) 56 fn 2.

308 Biehler (n 249) 54 fn 174 with further references.

309 Biehler (n 249) 40.

310 Haenel (n 299) 531.

311 Ibid 532 f.

ernment but serves as a functional description of legal acts associated with the conduct of foreign affairs and thus bears a close similarity to Locke's 'federative power,'[312] and some German authors equated the expressions.[313] It found broad resonance and has been used by German scholars to address legal issues concerning foreign affairs through to the present.[314] Paul Laband,[315] one of the most influential constitutional theorists of the Bismarck period,[316] stated that 'in no part of state administration the freedom of legal restraints is more apparent than in administrating foreign affairs'.[317] In the same vein Georg Jellinek,[318] in distinguishing between 'free' and 'legally constrained' 'actions'[319] of the state, saw foreign policy as one of the main areas falling within the first category. He refers to Locke and praises the concept of 'prerogatives' as correctly reflecting this special nature.[320] According to Jellinek, only the influence of French theory[321] covered up the distinction of both actions of the state by treating them as part of the executive branch.[322] On the other hand, this made it necessary for the French system to distinguish between justiciable *actes administratifs* and non-justiciable *actes de gouvernments*.[323] Jellinek is probably the first German[324] scholar to draw a comparison to the French system in this regard, which, as we shall see, proved very influential. Moreover, the strict differentiation between the external and internal spheres succeeded in the

312 Biehler (n 249) 29.
313 Wolgast (n 42) 6; Klaus Stern, 'Außenpolitischer Gestaltungsspielraum und verfassungsgerichtliche Kontrolle' (1994) 8 NWVBl 241, 245.
314 Cf Christian Calliess, '§ 72 – Auswärtige Gewalt' in Hanno Kube and others (eds), *Leitgedanken des Rechts* (CF Müller 2013) 775.
315 For Laband's account of foreign affairs cf Biehler (n 249) 42.
316 Michael Stolleis, *Öffentliches Recht in Deutschland* (CH Beck 2014) 70 ff.
317 'Bei keinem Zweige der gesamten Staatsverwaltung tritt die Freiheit derselben von gesetzlichen Vorschriften deutlicher vor Augen als bei der Verwaltung der auswärtigen Angelegenheiten' [my translation] Paul Laband, *Deutsches Reichsstaatsrecht* (5th edn, Mohr 1909) 208.
318 Biehler (n 249) 43.
319 'Tätigkeiten'.
320 Georg Jellinek, *Allgemeine Staatslehre* (3rd edn, Springer 1921) 617.
321 Ibid, explicitly referring to Rousseau, but probably also having in mind Montesquieu who did not maintain the distinction introduced by Locke between the executive and federative power, see above Chapter 1, I., 2.; Rousseau indeed explicitly relied on the 'act gouvernement'; Biehler (n 249) 37.
322 Jellinek (n 320) 617 f.
323 Jellinek (n 320) 617 f.
324 Jellinek was educated in Austria and Germany and taught in both countries and Switzerland.

scholarship of the German Empire. Heinrich Triepel[325] famously established his dualist conception of the relationship between international and domestic law as two 'two circles which at best touch each other but which never intersect'.[326] The constitution of the German Empire thus, to a wide extent, embraced the traditional position.[327]

However, to a certain degree, the judiciary's role was also strengthened through the creation of the Empire. The new state reformed its court system in 1879, and the Prussian Court of Competence Conflicts became a special Prussian state court subordinate to the newly founded Supreme Court of the Reich. The Supreme Court of the Reich, in some cases, overturned the Court of Competence Conflicts[328] and, in general, developed a tendency to decide prejudicial questions even when they included subjects of foreign affairs.[329] The influence of the strict Prussian approach concerning the judicial exclusion of foreign affairs was thus weakened.

c) Weimar Republic

Germany's defeat in the First World War in 1918 led to the next change in the constitutional system when Germany abolished the monarchy and became a republic in 1919. Concerning foreign affairs, Article 45 of the Weimar Constitution now stipulated:

> *The President of the Reich represents the Reich in international relations. In the name of the Reich he makes alliances and other treaties with foreign powers. He accredits and receives diplomatic representatives.*
> *Declaration of war and conclusion of peace shall be made by national law. Alliances and treaties with foreign states which relate to subjects of national legislation require the consent of the Reichstag.*[330]

325 Schorkopf (n 264) 594.

326 Heinrich Triepel, *Völkerrecht und Landesrecht* (CL Hirschfeld 1899) 111 [my translation]; Jochen von Bernstorff, 'Innen und Außen in der Staats- und Völkerrechtswissenschaft des deutschen Kaiserreiches' (2015) 23 Der Staat (Beiheft) 137.

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

328 *Decision from 10 June 1899* RGZ 44, 377 (Supreme Court of the Reich); *Decision from 22 May 1901* RGZ 48, 195 (Supreme Court of the Reich).

329 Bolewski (n 248) 59; Biehler (n 249) 55.

330 Article 45, translation available at <https://en.wikisource.org/wiki/Weimar_constitution>.

Although this newly created position of President of the Reich (*Reichspräsident*) has often been called a 'surrogate emperor' and inherited many powers of the former monarch, foreign affairs were not entrusted to him alone. The *Reichspräsident* could only act with the government's approval and not in his own right. Thus, he had to share power with the chancellor of the Reich.[331] On the other hand, he had extended powers if no functioning government existed due to a lack of majority in parliament. The legislature was now more strongly involved in foreign affairs. War could only be declared by an act of parliament (*Reichstag*), and treaties also required its consent. Treaties without consent were regarded as invalid under constitutional law and, in contrast to the old constitution, also under international law.[332] Moreover, the strict dualist conception was modified by Article 4 of the new constitution stipulating that '[t]he universally recognised rules of international law are accepted as integral and obligatory parts of the law of the German Reich'.[333]

Concerning the judiciary, contemporary scholars still recognized the special position of foreign affairs. Rudolf Smend,[334] one of the leading scholars of the Weimar Constitution, analysed doctrines of non-justiciability of governmental acts in different countries (especially France)[335] and saw them reflected in Germany, especially in the mentioned 'civil servant liability law'.[336] He did not develop his ideas into a systematic approach but, as we will see, strongly influenced the discussion in Germany after 1945.[337] Ernst Wolgast, a former diplomat of the Empire, was one of the first German scholars to deliver in-depth analysis of the 'foreign affairs power'.[338] He clearly emphasized the dual nature of the state, looking inward and outward, by citing the Swedish conservative political scientist Rudolf Kjellen:

331 Wolgast (n 42) 268; Martin Nettesheim, 'Art. 59' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 12; cf Article 50 of the Weimar Constitution and Schorkopf (n 264) 602.
332 Wolgast (n 42) 33; Schorkopf (n 264) 603.
333 Schorkopf (n 264) 603.
334 Cf as well Biehler (n 249) 47.
335 Rudolf Smend, *Die politische Gewalt im Verfassungsstaat und das Problem der Staatsform* (Mohr 1923) 5 ff.
336 Ibid 12 f.
337 Biehler (n 249) 47.
338 Cf as well ibid 49 ff.

> *Since the word 'state' became naturalised in widely separated linguistic areas, it stands as a Janus with two faces, one looking inward, one looking outward, in our imagination.*[339]

Wolgast was probably the first scholar to directly link the conduct of foreign affairs to the Janus metaphor, which is still frequently used.[340] Strongly relying on Hobbes and Locke, he sees the state as 'one person' acting in the area of foreign affairs.[341] Whereas natural rights internally circumcise the powers of the 'Leviathan,' externally, they have no real reflection and political considerations are dominant.[342] Wolgast assumes that his characterization of the 'foreign affairs power' is a general feature of modern constitutional orders, and he explicitly draws a comparison to the United States.[343] Although later scholars often neglected his work,[344] his ideas offer an exceptional insight into German thought on foreign affairs.

d) Nazi Germany

When the Nazis took power in 1933, the competence to conduct foreign affairs became centred in the person of Adolf Hitler as the 'supreme leader' (*Führer*).[345] Article 4 of the Enabling Act formally brought about the change by removing the necessity of legislative approval for treaties, and the 'Law concerning the Head of State of the German Reich' unified the position of the chancellor and the president.[346] The position of the new 'supreme leader' was summarised by a leading constitutional scholar of the Nazi period as follows:[347]

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339 'Seitdem es (das Wort Staat) ... in weitgetrennten Sprachgebieten naturalisiert worden ist, steht es wie ein Janus mit zwei Gesichtern, eines nach innen, das andere nach außen gewendet, vor unserer Vorstellung' [my translation] Rudolf Kjellen, *Der Staat als Lebensform* (Hirzel 1917) 20.

340 Dyzenhaus (n 34).

341 Wolgast (n 42) 78 ff.

342 Ibid 88 also he sees the principle of 'pacta sunt servanda' as an attempt to limit the powers of states.

343 Kjellen (n 225) 74.

344 Biehler (n 249) 50.

345 For the legal discourse at that time in general cf Michael Stolleis, *The Law under the Swastika* (University of Chicago Press 1998).

346 Schorkopf (n 264) 611.

347 Ibid 610.

> *It is part of the character of the 'Führer-Reich', that the 'Führer' is the autonomous and unlimited bearer of the foreign affairs power. He determines the entire foreign policy of the Reich, he concludes treaties and alliances in the name of the Reich and he is the Lord over War and Peace.*[348]

Although the judges remained formally independent, their room for manoeuvre, including foreign affairs questions, hinged on the will of the *Führer*.[349] As mentioned in the introduction, the question of judicial review of the foreign affairs power becomes more and more futile the more a legal system leans towards authoritarianism.[350] Nevertheless, the ideas of the Nazi period and especially their explicit rejection[351] shape contemporary German law.

Not surprisingly, Nazi period scholars adhered to an extreme version of the traditional position. Carl Schmitt, as a leading figure, strongly relied on Thomas Hobbes in developing his theories,[352] and many authors declared foreign affairs acts as generally unreviewable.[353] Scheuner explicitly referred to non-justiciability doctrines inter alia in the United States to justify this approach.[354] Ipsen went more into detail and developed his concept of *justizfreie Hoheitsakte* ('non-justiciable acts of state') in 1937.[355] He drew on

348 Ernst R Huber, *Das Verfassungsrecht des Großdeutschen Reiches* (2nd edn, Hanseatische Verlagsanstalt Hamburg 1939) 262 'Zum Wesen des Führerreichs gehört, dass der Führer der selbstständige und unbeschränkte Träger der auswärtigen Gewalt ist. Er bestimmt die gesamte Außenpolitik des Reiches, er schließt Verträge und Bündnisse im Namen des Reiches ab, er ist Herr über Krieg und Frieden' [my translation].

349 Bolewski (n 248) 93.

350 Schorkopf (n 264) 610.

351 See *Order from 4 November 2009 (Wunsiedel)* BVerfGE 124, 300 (German Federal Constitutional Court).

352 Timothy Stanton, 'Hobbes and Schmitt' (2011) 37 History of European Ideas 160; Armitage (n 3) 71; stressing the relevance of the Hobbesian conception of the international sphere for Schmitt's enemy-friend distinction also Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory* (OUP 2017) 71 ff.

353 Concerning all acts with a 'political' element Friedrich Schack, 'Die richterliche Kontrolle von Staatsakten im neuen Staat' (1934) 55 Reichsverwaltungsblatt 592, 592; explicitly Ulrich Scheuner, 'Die Gerichte und die Prüfung politischer Staatshandlungen' (1936) 57 Reichsverwaltungsblatt 437, 442; explicitly Siegfried Grundmann, 'Die richterliche Nachprüfung von politischen Führungsakten nach geltendem deutschem Verfassungsrecht' (1940) 100 Zeitschrift für die gesamte Staatswissenschaft 511, 535.

354 Scheuner (n 353) 442.

355 Ipsen (n 302); Biehler (n 249) 88.

the ideas of Jellinek[356] and Smend[357] and argued for the existence of these acts, parallel to the French institute of *acte gouvernement*, in the German legal order. In analogy to the 'civil servant liability law,' he proposed that a competent body (*Qualifikationsträger*) should decide whether or not an act of state is amenable to judicial review.[358] The Nazi courts, in some cases involving foreign affairs, showed an astonishing stubbornness concerning the non-reviewability of executive acts.[359] However, they operated under the permanent threat of political interference[360] and acted in anticipatory obedience, especially in high-profile cases.[361]

e) Contemporary German Law

Germany's last constitutional change occurred after the Second World War. The Allied Forces occupied Germany, which only enjoyed limited sovereignty,[362] with the 'Occupation Statute' explicitly excluding international relations from German self-government.[363] The Federal Republic only gradually regained control of its foreign affairs, especially with the ratification of the Bonn-Paris Conventions in 1955.[364] Acting on the Allies' initiative, a new constitutional framework for West Germany was created and, due to its (intended) provisional character, called the 'Basic Law'. Although this framework was meant as a temporary arrangement, it was designed as a fully-fledged constitution, ignoring the de facto limited sovereignty. Thus,

356 Ipsen (n 302) 65.
357 Ibid 81.
358 Ibid 275 ff.
359 Scheuner (n 353) 441; Grundmann (n 353) 515 fn 3; Hans Schneider, *Gerichtsfreie Hoheitsakte: Ein rechtsvergleichender Bericht über die Grenzen richterlicher Nachprüfbarkeit von Hoheitsakten* (Mohr 1951) 15 ff; Paul van Husen, 'Gibt es in der Verwaltungsgerichtsbarkeit justizfreie Regierungsakte?' (1953) 68 DVBl 70.
360 According to the mainstream scholarly position the executive could at will declare an act to be unreviewable Scheuner (n 353) 442.
361 Cf recognition in the Franco Case below Chapter 3, I., 2., b); especially the Imperial Fiscal Court developed a jurisprudence quite openly allowing the Minister of Finances to decide contentious questions, cf with cases Heinz Meilicke and Klaus Hohlfeld, 'Der Bundesfinanzhof und die Bundesregierung – Neue Steuergesetzgeber im Außensteuerrecht?' (1972) 27 Der Betriebs-Berater 505 fn 12.
362 Cf as well Schorkopf (n 264) 627 ff.
363 Occupation Statute from 10 May 1949, Nr 2 c.
364 Schorkopf (n 264) 632 nevertheless, certain special powers of the allied forces lasted much longer.

it distributed the full 'foreign affairs power' amongst the state branches.[365] The central provision is Article 59 of the Basic Law:

> *(1) The Federal President shall represent the Federation in international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys.*
> *(2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. […]*[366]

The federal president inherited the representing role in foreign affairs from the president of the Reich. In contrast to the latter, the former is more limited in his actions. All of the president's acts, except for very limited residue competences, require the government's consent.[367] The actual foreign affairs power thus lies with the chancellor.[368] The position of parliament was strengthened. Treaties that need to be implemented and treaties regulating political relations require its approval. The Constitutional Court soon defined this expression very narrowly: only 'highly political' questions, e.g., membership in military alliances, require parliamentary consent.[369] The strengthened role of the legislative branch also led to an academic debate at the prestigious 'Meeting of the Constitutional Law Teachers' in 1953.[370] Wilhelm Grewe still saw foreign affairs in the 'tradition of European state theory and constitutional development'[371] as strongly tied to the executive.[372] On the other hand, Eberhard Menzel saw a more substantial involvement of the legislature, which, together with the executive, should

365 Ibid 627.
366 [My omissions], translation available at <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0277>.
367 Article 58 of the Basic Law.
368 Nettesheim (n 331) mn 52.
369 Cf *Judgment from 29 July 1952 (Deutsch-Französisches Wirtschaftsabkommen)* BVerfGE 1, 372 (German Federal Constitutional Court) 381; cf in more detail below Chapter 4, I., 3., b), aa).
370 Ernst Forsthoff and others (eds), *Begriff und Wesen des sozialen Rechtsstaates. Die auswärtige Gewalt der Bundesrepublik* (De Gruyter 1954) (= Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 12).
371 Grewe (n 249) 174.
372 Ibid.

administer foreign affairs as a 'combined power'.[373] This debate still informs the German discussion about foreign affairs.[374]

Concerning the judiciary, the new Article 19 (4) of the Basic Law stipulates that 'should any person's rights be violated by public authority, he may have recourse to the courts' appears to bar the possibility of non-justiciable areas (or other strong forms of deference). However, such a provision in itself does not completely exclude the possibility of non-reviewability. It may be interpreted in a way that in such cases, there simply is no 'right' and hence no need for access to a court. Indeed, Ipsen's considerations were taken up again after the war by Hans Schneider,[375] who argued that in the light of Article 19 (4) of the Basic Law, they have become not less but more pertinent.[376] Drawing on Ipsen's work, he compared the situation in Germany to France, the United Kingdom, the United States, and Switzerland and called for the adoption of non-justiciable acts of state.[377] He already saw traces of such a doctrine in certain provisions of the Basic Law, which grant the government considerable discretion, e.g., in cases of a 'legislative emergency'.[378] Schneider tries to classify such acts of state, inter alia in foreign affairs, mentioning immunity decisions, recognition of foreign states and governments and diplomatic protection.[379] The opinion that non-justiciable acts of state exist under the new Basic Law was shared as well by other scholars[380] and almost all speakers referring to the topic at the 'Meeting of the Constitutional Law Teachers' in 1949 recognized that

373 Menzel (n 1) 197.
374 Nettesheim (n 331) mn 28.
375 Cf as well Biehler (n 249) 88.
376 Schneider (n 359) 36 ff, 80.
377 'Gerichtsfreie Hoheitsakte'.
378 Similar argument Herbert Krüger, 'Der Regierungsakt vor den Gerichten' (1950) 3 DÖV 536, 537; Schneider (n 359) 33.
379 Schneider (n 359) 47.
380 Krüger (n 378); Hellmuth Loening, 'Regierungsakt und Verwaltungsgerichtsbarkeit' (1951) 66 DVBl 233; van Husen (n 359); Klaus Obermayer, 'Der gerichtsfreie Hoheitsakt und die verwaltungsgerichtliche Generalklausel' (1955) 1 Bayerische Verwaltungsblätter 129; Ernst Forsthoff, *Lehrbuch des Verwaltungsrechts* (8th edn, CH Beck 1961) 468 who also refers to the civil servant liability law; for another monograph of that time cf Helmut Rumpf, *Regierungsakte im Rechtsstaat* (Ludwig Röhrscheid Verlag 1955).

Article 19 (4) of the Basic Law did not exclude such a doctrine.[381] Courts as well gradually started to apply the concept.[382]

However, the period of acceptance of the non-justiciable acts of state doctrine under the German Basic Law was very short. The Federal Constitutional Court (as we will see in the next chapter), in its *Saarstatut* decision, soon rejected the idea, which by no means meant that the problem of appropriate deference was solved in Germany. For now, it suffices to conclude that the traditional position was part of older German constitutions and also the current German Basic Law. The common belief that 'in German constitutional law there is no tradition of judicial deference to the executive in foreign policy matters'[383] is plainly wrong.

III. Conclusion on the Origins of Deference

This chapter has first shown how the traditional position concerning foreign affairs developed in early modern political philosophy. The works of Thomas Hobbes introduced the idea of an essential difference between the inner and the outer sphere and thus make a particular contribution to the first notion of the traditional position. John Locke developed the idea that the executive in the form of the 'federative power' manages foreign affairs largely unconstrained by law and hence established the second and third notions of the traditional view. Finally, Montesquieu, who more clearly than Locke saw the management of foreign affairs as an executive function, agreed that the nature of that task differed from the domestic setting and thereby solidified the idea of a 'Janus-faced' executive.

In the following, we examined how the idea of the traditional position migrated into the law of our three reference jurisdictions. South Africa,

381 Walter Jellinek and others, *Veröffentlichung der Vereinigung der deutschen Staatsrechtslehrer – Heft 8* (Walter de Gruyter & Co 1950) 149 ff; speaking of the 'concurring opinion' of the legislative branch, the judicial branch and of scholars Krüger (n 378) 539; Schneider (n 359) 37; Matthias Kottmann, *Introvertierte Rechtsgemeinschaft: Zur richterlichen Kontrolle des auswärtigen Handelns der Europäischen Union* (Springer 2014) 63.

382 *Decision from 23 September 1958* DVBl 1959, 294 (Higher Administrative Court Münster); Constitutional Court of the Federal State of Hesse cited in Krüger (n 378) 538; Administrative Court Düsseldorf cited in Obermayer (n 380) 131; Biehler (n 249) 90 ff.

383 Hans-Peter Folz, 'Germany' in Dinah Shelton (ed), *International law and domestic legal systems: Incorporation, transformation, and persuasion* (OUP 2011) 240, 244.

until the 1930s, was under the strong influence of the UK. In English law, Blackstone's writings, drawing from Locke's philosophy, established foreign affairs as a key part of the monarch's prerogative power. During the 19th century, several decisions by Lord Chancellor Eldon introduced the idea that judicial review of certain foreign affairs issues should be restricted. The several 'exclusionary doctrines' developed in the case law of the Victorian Age were refined and tied to the royal prerogative by Harrison Moore, establishing the idea of 'act of state'. When South Africa grew more and more independent in the early 20th century, it inherited the ideas of the royal prerogatives and acts of state from English law. All three pre-democratic South African constitutions recognized the concept of prerogatives, including the idea of deference in foreign affairs. The current South African Constitution does not explicitly regulate the issue, and whether the idea of act of state survived the constitutional transition will be elaborated on in the course of the thesis.

In the United States, the framers consciously diverted from the British tradition and divided classical foreign affairs powers between the executive and legislative branches. However, after the constitution's enactment, influential politicians like Alexander Hamilton argued for an executive-friendly interpretation of the foreign affairs provisions of the constitution. Likewise, the US Supreme Court starting with *Marbury v Madison* acknowledged the existence of 'political questions' not apt for judicial review, especially in the area of foreign affairs. Still, during the 19th century, the 'orthodox' approach held that these cases were rather rare and narrowly defined. This changed in the 1930s with the decision in *Curtiss Wright*. Justice Sutherland solidified the idea of the exclusive and plenary power of the executive in foreign affairs and the corresponding low level of judicial review. Thus, the traditional position won a delayed victory in the United States. Although scholars and courts challenged Justice Sutherland's rulings, the idea of executive leadership in foreign affairs and judicial deference proved influential for most of the 20th century. More recent developments will be analysed during the course of the thesis.

In Germany, Hegel's ideas concerning foreign affairs showed a similarity to the positions of Hobbes and Locke. Hegel saw foreign affairs as part of the monarchical power and the 'external public law' not subject to the regular laws of the state. These ideas resonated within the German states of the 19th century. In Prussia, several legislative acts granted a special influence to the executive in foreign affairs decisions, and a special 'Competence Court' allowed the executive to block judicial action in contentious cases.

Under the constitution of the German Empire, foreign affairs powers were explicitly awarded to the executive in the form of the Emperor, with only a minor role for the legislative branch and the federal states. Scholars of the Bismarck period like Laband and Jellinek recognized the special character of foreign affairs as largely free from legal constraints. During the Weimar Republic, more influence in the area was given to the legislative branch, especially concerning the conclusion of treaties. Nevertheless, concerning the judicial branch, academics like Smend saw certain foreign affairs decisions as non-justiciable. In the Nazi period, foreign relations were centred in Adolf Hitler as the supreme leader, and most academics argued that foreign affairs decisions were non-reviewable as *justizfreie Hoheitsakte*. Under current German law, the chancellor effectively governs foreign relations, but the legislative branch is influential concerning the conclusion of treaties. In the early years of contemporary Germany, many scholars still believed in the existence of non-justiciable areas. However, the Constitutional Court, starting with the *Saarstatut* case, has gradually chipped away at the idea of areas beyond judicial control. Nevertheless, contrary to common belief, the traditional position was part of the previous and even the current German legal system.

Chapter 2 – Defining Deference

The previous chapter has shown that all three jurisdictions accepted the traditional position, which entails the notion of deference. So far, we have used the term 'notion of deference' to refer to the idea that courts should restrain their review in foreign affairs. The word 'deference' is quite infamous for its vagueness and often functions as an umbrella term[1] to refer to any strategy or doctrine that courts apply to avoid friction with the political branches in foreign affairs cases, especially with the executive.[2] This broad understanding of deference can be divided into different, more narrowly defined concepts.[3] This chapter will argue that all three jurisdictions have developed structurally comparable mechanisms of deference to transform the more general notion into legal concepts.[4] In the following, these mechanisms are referred to as 'doctrines of deference'. Naturally, their usage and relevance vary from country to country. Some of these doctrines are part of the general adjudication process but have a special role in foreign affairs cases.[5] Others developed specifically in the area of foreign affairs. This chapter will categorize the different mechanisms applied by courts, anchor them within the 'spectrum of deference' and place them on a 'deference scale'.

1 Cf Henry P Monaghan, 'Marbury and the Administrative State' (1983) 83 Columbia Law Review 1, 4.

2 In this sense used by Jonathan I Charney, 'Judicial Deference in Foreign Relations' (1989) 83 AJIL 805; Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 EJIL 159; cf also Curtis A Bradley, 'Chevron Deference and Foreign Affairs' (2000) 86 Virginia Law Review 649, 651.

3 For the US foreign relations law cf Bradley (n 2).

4 Speaking of the political question doctrine as 'technical legal basis for courts to refuse to consider the lawfulness of presidential action taken pursuant to either his wartime or his foreign affairs powers' Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Vintage 2016) 19.

5 E.g. the political question doctrine, cf Ganesh Sitaraman and Ingrid Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 Harvard Law Review 1897, 1909.

I. Doctrines of procedural non-reviewability

The first set of mechanisms to be considered will be termed doctrines of 'procedural non-reviewability'. As the name suggests, they are based on 'procedural' in contrast to 'substantive' aspects.[6] Their common denominator is the focus on 'technical' considerations, for example, if a particular person can take a case to a particular court at a particular time. Although these doctrines do not directly address the actual merits of a case, they are not entirely free of substantial considerations, especially if applied in foreign affairs cases.[7] Typical for civil law countries like Germany is a neat distinction between a first procedural stage entailing these more technical issues (*Zulässigkeit*) and a second stage concerned with the material questions (*Begründetheit*). Common law countries like the United States usually make no such clear-cut distinction;[8] the same holds (to a lesser extent)[9] for South Africa, which in this regard draws heavily from English law.

1. Standing (USA)

The starting point for the 'technical' bars to adjudication in the United States is Article 3 of the US Constitution, which extends (and limits) the judicial power to 'cases' and 'controversies'.[10] A legal dispute amounts to a 'case or controversy' only if the legal issues in question culminate in the person of the litigant[11] and thus give them sufficient 'standing' to sue. They have to show that (1) they have personally suffered or imminently will suffer an injury, (2) the injury fairly can be traced to the defendant's

6 Cheryl Loots, 'Standing, Ripeness and Mootness' in Stuart Woolman and Michael Bishop (eds), *Constitutional law of South Africa* (2nd edn – January 2013 – Revision Service 5, Juta 2002) 7–1; for the differentiation cf Dominic McGoldrick, 'The Boundaries of Justiciability' (2010) 59 ICLQ 981, 985.

7 Cf e.g. below this Chapter (n 67).

8 Henning Schwarz, *Die verfassungsgerichtliche Kontrolle der Außen- und Sicherheitspolitik* (Duncker & Humblot 1995) 65.

9 Sebastian Seedorf, 'Jurisdiction' in Stuart Woolman and Michael Bishop (eds), *Constitutional law of South Africa* (2nd edn – January 2013 – Revision Service 5, Juta 2002) 4–10 ff; Geo Quinot and others, *Administrative justice in South Africa: An introduction* (OUP 2015) 224.

10 Curtis A Bradley and Jack L Goldsmith, *Foreign relations law: Cases and materials* (Wolters Kluwer 2014) 49.

11 *Baker v Carr* 369 US 186 (1962) 204 (US Supreme Court).

conduct, and (3) they are likely to be redressed by a favourable decision.[12] If the plaintiff lacks standing, the claim may be justiciable, but not by the particular person.[13] Although the standing requirement is textually rooted, it is not free of 'prudential' considerations, which, as we will see, underlie the political question doctrine as well.[14]

Especially concerning executive acts in foreign relations, private interests are seldom directly affected, and thus a personal injury is hard to establish.[15] Moreover, the courts, at least in some cases, appear to apply very strict standards concerning standing if foreign affairs are involved.[16] Nevertheless, individuals can and have successfully proved standing in foreign affairs, although this requires exceptional circumstances. The introduction mentioned a recent example concerning the travel ban:[17] President Trump barred citizens from seven countries with mainly Muslim populations from entry to the US. Three individuals with relatives in these countries then stopped from entering the US could successfully invoke the First Amendment's establishment clause and were granted standing.[18] Another example is provided by the Supreme Court's decision in *Bond I*.[19] The court found that an individual litigant convicted under the domestic implementation statute of the Chemical Weapons Convention could challenge the act.[20]

12 Cf as well *Allen v Wright* 468 US 737 (1984) (US Supreme Court); Erwin Chemerinsky, *Constitutional law: Principles and policies* (5th edn, Wolters Kluwer 2015) 61; Curtis A Bradley, *International law in the U.S. legal system* (3rd edn, OUP 2021) 4; Vicki C Jackson, 'Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy' (2018) 95 Indiana Law Journal 845, 860.

13 Thomas M Franck, *Foreign relations and national security law: Cases, materials, and simulations* (4th edn, West 2012) 926.

14 Albeit also this 'technical' stage draws from 'prudential' considerations which also underlie the political question doctrine, Mark Tushnet, 'Standing to Sue' in Kermit L Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (2nd edn, OUP 2005); Nat Stern, 'The Indefinite Deflection of Congressional Standing' (2015) 43 Pepperdine Law Review 1, 47 ff; Jackson (n 12) 855 ff.

15 Louis Henkin, *Foreign affairs and the United States Constitution* (2nd edn, Clarendon Press 1997) 142; Bradley and Goldsmith (n 10) 53.

16 *Clapper v Amnesty International USA* 568 US 398 (2013) (US Supreme Court); cf Sitaraman and Wuerth (n 5) 1950.

17 Cf above, Introduction, I.

18 *Trump v Hawaii* 585 US 667 (2018) (US Supreme Court) 698; however, the Supreme Court decided to vacate the preliminary injunction granted by the 9th Circuit Court of Appeals.

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

20 Cf as well Sitaraman and Wuerth (n 5) 1926 f; Helmut Philipp Aust, 'The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective' in David Dyzen-

Besides individuals, the legislative branch is an obvious candidate for challenging executive action in the field of foreign affairs. In the US context, this would be a group of members of Congress who could claim an 'institutional injury'[21] of the legislative branch, which is often referred to as 'congressional'[22] or 'legislative'[23] standing. In general, US courts are very reluctant to interfere in inter-branch disputes and favour a 'political solution'.[24] This attitude is also fuelled by the typical US-American fear of counter-majoritarian implications of judicial review.[25] Nevertheless, the Supreme Court recognized the possibility of claiming a violation of legislative branch rights in *Coleman v Miller*,[26] when 20 of the 40 state senators of Kansas voted against a federal constitutional amendment, which thus failed to achieve a majority. In his capacity as presiding officer of the State Senate, the Lieutenant Governor of Kansas then decided to cast a tie-breaking vote, although it was contested whether this was within his power. The Supreme Court held that the vote of the 20 senators opposing the amendment had been virtually nullified and allowed standing.[27] Following this generous line of legislative standing, litigants tried to challenge executive action in foreign affairs. In *Mitchell v Laird*,[28] several members of Congress questioned Presidents Nixon's continuation of the war in 'Indo-China'[29] without a congressional declaration of war (called for by Article 1 (2) of the US Constitution). The court indicated a basis for standing[30] but refrained from

haus, Thomas Poole and Jacco Bomhoff (eds), *The double-facing constitution* (CUP 2019) 345, 359; cf as well below Chapter 4, I., 4., b).

21 In contrast to rather unproblematic cases where the loss of an individual right is claimed by a Senator *Powell v McCormack* 395 US 486 (1969) (US Supreme Court); Stern (n 14) 15; Jackson (n 12) 860.

22 Stern (n 14).

23 Wilson C Freeman and Kevin M Lewis, 'Congressional Participation in Litigation: Article III and Legislative Standing' (2019) Congressional Research Service Report 1.

24 Stern (n 14) 32.

25 Ibid 6; foundational: Alexander M Bickel, *The least dangerous branch: The supreme court at the bar of politics* (2nd edn, Yale University Press 1986); Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346; cf as well below Chapter 4, II., 2.

26 *Coleman v Miller* 307 US 433 (1939) (US Supreme Court).

27 Ibid 438.

28 Similar case *Holtzman v Schlesinger* [1973] 484 F2d 1307 (United States Court of Appeals for the 2nd Circuit); *Mitchell v Laird* [1973] 488 F2d 611 (United States Court of Appeals for the District of Columbia Circuit); Stern (n 14) 17.

29 Meant here as a geographic region, today rather referred to as Mainland South East Asia.

30 *Mitchell v Laird* (n 28) 614.

deciding based on the political question doctrine, which will be examined below.[31]

The generous approach to legislative standing was considerably narrowed in *Raines v Byrd*,[32] where six members of Congress challenged the constitutionality of the Line Item Veto Act, which allowed the president to cancel tax benefits after they had been signed into law. The plaintiffs argued that this would diminish their vote in future cases covered by the act and shift the constitutional balance from Congress to the president.[33] The court distinguished this case from *Coleman* and stressed that the votes were not nullified but counted when Congress passed the Line Item Veto Act. In contrast to *Coleman*, the diminution of future voting power was deemed wholly abstract.[34] Nevertheless, legislative standing seems to have survived the *Byrd* decision. In *Arizona State Legislature v Arizona Independent Redistricting Commission*,[35] the state legislature as a whole was allowed standing when it sued against a commission redistricting congressional districts, a responsibility given qua constitution to the state legislature itself. In essence, the possibility to claim an institutional injury now appears to be limited to cases where the legislator's votes are completely nullified or where the legislative body as a whole is authorising the suit.[36] However, lower courts in recent cases not directly concerned with foreign affairs appear more liberal in granting legislative standing.[37]

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31 Ibid 616.

32 *Raines v Byrd* 521 US 811 (1997) (US Supreme Court).

33 Freeman and Lewis (n 23) 8.

34 *Raines v Byrd* (n 32) 829.

35 *Arizona State Legislature v Arizona Independent Redistricting Commission* 576 US 787 (2015) (US Supreme Court); in contrast see *Va House of Delegates v Bethune-Hill* 139 S Ct 1945 (2019) (US Supreme Court) where standing was denied.

36 Extensively commenting on particular settings Jackson (n 12) 860; Freeman and Lewis (n 23) 11, 21; advocating a narrow reading of *Raines* Elizabeth Earle Beske, 'Litigating the Separation of Powers' (2022) 73 Alabama Law Review 823, 868 ff.

37 *United States House of Representatives v Mnuchin* [2022] 976 F3d 1 (United States Court of Appeals for the District of Columbia Circuit) (on the appropriations clause and funding of the border wall); *Comm on the Judiciary of the United States House of Representatives v McGahn*, 968 F3d 755 (2020) (United States Court of Appeals for the District of Columbia Circuit) (on the houses' subpoena power); *Maloney v Murphy* [2020] 984 F3d 50 (United States Court of Appeals for the District of Columbia Circuit) (concerning right of information from the GSA) however vacated and remanded *Carnahan v Maloney* 143 S Ct 2653 (2023) (US Supreme Court) and dismissed on remand; Oona A Hathaway, 'How the Erosion of U.S. War Powers Constraints Has Undermined International Law Constraints on the Use of Force' (2023) 14 Harvard National Security Journal 335, 362; see however, *Blumenthal v Trump*

Concerning foreign affairs, after *Byrd*, it appears extremely difficult for the legislature to challenge executive behaviour in front of courts. The case *Campbell v Clinton*[38] illustrates that point; quite similarly to *Mitchell v Laird*, a group of members of Congress tried to challenge President Clinton's military involvement in the Yugoslavian conflict. Clinton had ordered airstrikes on Yugoslavia, and Congress had voted against a declaration of war or authorization. At the same time, it decided not to adopt a resolution requiring the president to withdraw the troops and instead funded the operation. Members of Congress claimed a violation of the war powers clause and the war powers resolution,[39] which calls for an end of military actions without a declaration of war or authorization within 60 days (the US military involvement in Yugoslavia lasted two weeks longer). The Court of Appeals applied *Byrd* and denied standing, especially stressing that (in contrast to *Coleman*) legislative remedies were open to the members of Congress if they would have been able to convince their peers to vote to end the military action.[40] The same reasoning was applied to actions challenging President Obama's military engagement in Libya.[41] Another recent case confirming the strict approach is *Crawford v U.S. Department of the Treasury*:[42] Senator Ron Paul challenged several intergovernmental agreements entered into by the executive to avoid tax evasion. The agreements had not been put in front of the Senate under Article 2 (2) of the US Constitution, and the Senator claimed he would have voted against them.[43] In contrast to *Coleman*, the court stressed that his vote alone would not have been sufficient to forestall the agreements and denied standing.[44]

A counter trend seems to be a more recent development that the gap left by the strict rules concerning personal injury and congressional standing is to a certain extent filled by states who claim a violation of their rights

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[2020] 949 F3d 14 (United States Court of Appeals for the District of Columbia Circuit) (denying standing to bring an emoluments clause action).

38 *Campbell v Clinton* [2000] 203 F3d 19 (United States Court of Appeals for the District of Columbia Circuit); Stern (n 14) 35.

39 Cf as well Chapter 4, I., 3., b), cc).

40 *Campbell v Clinton* (n 38) 22 ff, also political question doctrine considerations play a role, cf concurring opinion by Silberman.

41 *Kucinich v Obama* [2011] 821 F Supp 2d 110 (United States District Court for the District of Columbia).

42 *Crawford v United States Department of the Treasury* [2017] 868 F3d 438 (United States Court of Appeals for the 6th Circuit).

43 Ibid 444.

44 Ibid 460.

by executive action, especially concerning immigration issues. In 2015, Texas successfully challenged immigration regulations by President Obama, which rendered the deportation of illegal immigrants who are parents of a US citizen the lowest priority.[45] The courts found standing on the basis that Texas had to issue driver's licenses to these non-deported immigrants, which would result in financial loss.[46] In addition, the states of Washington and Hawaii challenged immigration laws in the mentioned case concerning President Trump's travel ban.[47] The judges allowed standing as students and faculty staff of state-owned universities would not be able to (re)enter the country, which would inflict an injury upon the universities.[48]

Next to the standing requirements, the doctrines of 'ripeness' (an injury must not be speculative)[49] and 'mootness' (the presented issues have become obsolete) dealing with the correct timing of proceedings may be used to bar a claim from reaching the merits phase.[50] The judiciary in the US has thus developed ample possibilities to dismiss cases concerning foreign relations already at the technical stage.

2. *Klage- und Antragsbefugnis* (Germany)

The German legal tradition strictly separates the procedural from the substantial stage of the proceedings. Within the first stage, whether the litigant has a sufficient right of action (*Befugnis*)[51] is of paramount importance.[52] They have to show that the law attributes to them a 'subjective right'[53] to bring the case to court. In contrast, a violation of 'objective law,' which

45 *United States v Texas* 136 S Ct 2271; 579 US 547 (2016) (US Supreme Court); *Texas v United States* [2015] 809 F3d 134 (United States Court of Appeals for the 5th Circuit).

46 *Texas v United States* (n 45) 155 ff.

47 *Trump v Hawaii* (n 18); *Hawaii v Trump* [2017] 878 F3d 662 (United States Court of Appeals for the 9th Circuit); *Washington v Trump* [2017] 847 F3d 1151 (Court of Appeals for the 9th Circuit).

48 *Washington v Trump* (n 43) 1158 ff; *Hawaii v Trump* (n 43) 682.

49 *Dellums v Bush* [1990] 752 F Supp 1141 (United States District Court for the District of Columbia); for a foreign affairs case cf *Doe v Bush* [2003] 323 F3d 133 (United States Court of Appeals for the 1st Circuit).

50 Bradley and Goldsmith (n 10) 56 f; Bradley, *International Law* (n 12) 4; Chemerinsky (n 12) 107 ff.

51 German: 'Antragsbefugnis' or 'Klagebefugnis'.

52 This is true for ordinary administrative as well as constitutional complaints.

53 German: 'Subjektives Recht'; the 'subjective rights doctrine' was developed by Georg Jellinek, *System der subjektiven öffentlichen Rechte* (Mohr 1892); for the historical

does not entail such a right, cannot be claimed.[54] In order to determine if a plaintiff holds a 'subjective right,' the courts evaluate if the law aims to protect the individual in contrast to mere community interests and if it was designated to do so.[55] Fundamental rights contain such subjective rights.[56] Combined with their broad application in Germany, which includes every human activity,[57] almost every state interference may in general be framed as a violation of a subjective right.[58] The chances for an individual to challenge executive actions in foreign affairs thus appear to be on a better footing compared to the United States. On the other hand, the German system also requires that the violation of the subjective right appears 'possible'.[59] Individuals thus face the same problem as in the United States: foreign relations issues often do not directly affect individual rights.[60]

Two cases involving the use of the US Ramstein Air Base in Germany for drone strikes illustrate this difficulty. The introduction mentioned the first case concerning a suit by Yemeni citizens living in an area often targeted by drone strikes who had lost two close relatives to 'targeted killings'.[61] The Higher Administrative Court found a sufficient threat to their right to life

development Hartmut Bauer, *Geschichtliche Grundlagen der Lehre vom subjektiven öffentlichen Recht* (Duncker & Humblot 1986).

54 As a rare exception Article 98 (4) of the Bavarian Constitution allows the challenge of laws without a personal right of action, further exceptions exist in environmental and consumer protection law.

55 German: 'Schutznormlehre', developed by Ottmar Bühler, *Die subjektiven öffentlichen Rechte und ihr Schutz in der deutschen Verwaltungsrechtsprechung* (Kohlhammer, Berlin 1914) 224; for the requirements Wolf-Rüdiger Schenke, Christian Hug and Josef Ruthig, *Verwaltungsgerichtsordnung: Kommentar* (23th edn, CH Beck 2017) § 42 mn 142.

56 At least in their 'defensive dimension', if used to challenge state interference; Wolfgang Kahl and Lutz Ohlendorf, 'Das subjektive öffentliche Recht' (2010) 42 JA 872, 874; Ulrich Ramsauer, 'Die Dogmatik der subjektiven Öffentlichen Rechte' (2012) 52 JuS 769, 772.

57 Article 2 (1) Basic Law, cf *Decision from 6 June 1989 (Reiten im Walde)* BVerfGE 80, 137 (German Federal Constitutional Court).

58 Ramsauer (n 56) 772.

59 German: 'Möglichkeitstheorie' – its origins stem from administrative law, it is however also applied to constitutional litigation Friedhelm Hufen, *Verwaltungsprozessrecht* (CH Beck 2016) 278; Christian Hillgruber and Christoph Goos, *Verfassungsprozessrecht* (5th edn, CF Müller 2020) 74 f.

60 Heiko Sauer, *Auswärtige Gewalt, Bezüge des Grundgesetzes zu Völker- und Europarecht* (6th edn, CH Beck 2020) 63; cf as well already *Decision from 7 July 1975* (*Eastern Treaties Case (Ostverträge))* BVerfGE 40, 141 (German Federal Constitutional Court).

61 *Judgment from 19 March 2019 (Ramstein Drone Case)* 4 A 1361/15 (Higher Administrative Court Münster).

and thus a likely violation of a subjective right.[62] In its appeal decision, the Federal Administrative Court was less forthcoming and denied the likely violation of a subjective right for one of the plaintiffs who had in the meantime moved to Canada.[63] In another case, the same court had applied an even stricter approach. A German citizen living near the Ramstein Air Base also challenged the usage of the area for coordinating drone strikes.[64] He contended that the practice of drone strikes is contrary to international law, which would make him more likely to fall victim to retaliation by international terrorists or foreign military.[65] The court denied standing,[66] and a former judge of the same court criticized the strict approach as 'a judicial creation developed to evade a decision on the merits in "uncharted territory"'.[67] As in the United States, the courts thus seem to be influenced by the political implications of a case in determining standing, although that is hardly openly acknowledged. Both cases illustrate that particular circumstances are required for individuals to challenge executive decisions in foreign affairs in Germany as well.[68]

In contrast to the US system, the legislative branch has two well-defined options to challenge the executive in front of the Federal Constitutional

62 Critical: Peter Dreist, 'Anmerkung Ramstein Fall' (2019) 61 NZWehrr 207, 210; Patrick Heinemann, 'US-Drohneneinsätze vor deutschen Verwaltungsgerichten' (2019) 38 NVwZ 1580, 1582.

63 *Judgment from 25 November 2020 (Ramstein Drone Case)* BVerwGE 170, 345 (Federal Administrative Court) mn 25.

64 *Judgment from 5 April 2016* BVerwGE 154, 328 (Federal Administrative Court).

65 Ibid mn 18.

66 Ibid mn 16 ff; for a similar case concerning the stationing of nuclear missiles cf *Decision from 15 March 2018 (Fliegerhorst Büchel)* 2 BvR 1371/13 (German Federal Constitutional Court) mn 27.

67 Dieter Deiseroth, 'Verstrickung der Airbase Ramstein in den globalen US-Drohnenkrieg und die deutsche Mitverantwortung – Zugleich ein Beitrag zur Bestimmung der individuellen Klagebefugnis nach § 42 II VwGO' (2017) 132 DVBl 985, 991 [my translation].

68 An important exception to this rule the challenge of European primary law by individuals. The Constitutional Court starting with its Maastricht decision has considerably lowered the hurdles for individuals in these cases to trigger judicial review, cf *Judgment from 12 October 1993 (Maastricht)* BVerfGE 89, 155 (German Federal Constitutional Court); in the recent BND decision the Constitutional Court has been quite generous and allowed standing for e.g. investigative journalists challenging telecommunication surveillance of foreigners on foreign soil as they are likely to be subject to surveillance as 'bycatch' *Judgment from 19 May 2020 (BND Telecommunications Surveillance)* BVerfGE 154, 152 (German Federal Constitutional Court) mn 58 ff.

Court. The first one is claiming the violation of 'institutional competences'[69] by way of *Organstreit* proceedings,[70] paralleling to a certain degree the problem surrounding 'congressional standing'. By using the *Organstreit*, a group consisting of 5 % of members of the Bundestag[71] may claim a violation of their own rights or the rights of parliament.[72] In contrast to the US Supreme Court, the Constitutional Court does not leave these disputes to be settled by the political branches but is ready to demarcate the boundaries between the powers, including behaviour that touches foreign relations. The issues mentioned above that arose in *Campell v Clinton*[73] or *Crawford*[74] would, without doubt, have ended up in front of the Constitutional Court. This must not conceal that the claimed violation of the 'institutional competence' also limits the *Organstreit* proceedings.[75] As the German parliament has an institutional 'right' to determine the deployment of troops or to decide on the ratification of a treaty,[76] it can claim a violation of these positions. On the other hand, this does not entail the possibility to indirectly challenge 'objective law' like the constitutional prohibition of the war of aggression[77] or the customary international law regulating the use of force.[78] At second sight, only in cases that directly touch competences awarded to the legislative branch may foreign relations decisions be reviewable with the help of *Organstreit* proceedings.[79]

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69 Almost equivalent to but not to identical to subjective rights: *Judgment from 7 March 1953 (EVG -Vertrag)* BVerfGE 2, 143 (German Federal Constitutional Court) 152; Wolfgang Löwer, 'Zuständigkeiten und Verfahren des Bundesverfassungsgerichts' in Josef Isensee and Paul Kirchhoff (eds), *Handbuch des Staatsrechts Band III* (CF Müller 2005) 1297.

70 Article 93 (1) No 1 of the Basic Law, § 63 ff Act on the Federal Constitutional Court.

71 German: 'Fraktion' § 10 Rules of Procedure of the Bundestag.

72 Cf Article 93 (1) No 1 of the Basic Law; § 64 Act on the Federal Constitutional Court; single members of parliament or other constitutional bodies may claim a violation of their own rights but not a violation of the rights of parliament as a whole.

73 *Campbell v Clinton* (n 38).

74 *Crawford v United States Department of the Treasury* (n 41).

75 *Judgment from 18 December 1984 (Pershing II – Atomwaffenstationierung)* BVerfGE 68, 1 (72) (German Federal Constitutional Court).

76 Cf in more detail below, Chapter 3, I., 1., b), bb), (4) and Chapter 4, I., 3., b), aa).

77 Article 26 of the Basic Law, cf *Decision from 14 July 1999 (Kosovo)* BVerfGE 100, 266 (German Federal Constitutional Court) 268 ff.

78 Which is part of the German law due to Article 25 Basic Law, cf *Judgment from 14 July 1999 (Kosovo)* (n 77).

79 Cf already Schwarz (n 8) 183; Sauer (n 60) 91; on the strict interpretation cf recently *Decision from 17 September 2019 (ISIS Case)* BVerfGE 152, 8 (German Federal Constitutional Court).

The second possibility to question executive behaviour is the abstract judicial review of the constitutionality of a statute, which can be initiated by a group comprising 25 % of the members of parliament.[80] Executive behaviour concerning foreign relations thus may become indirectly reviewable when an implementing statute of a treaty is challenged. This possibility, of course, only exists if the executive chooses to act in the form of a statute. Only if a treaty touches 'highly political issues' or needs to be implemented in national law is such an implementing statute required.[81] Executive behaviour not falling in one of these categories is thus outside the scope of this form of judicial review. The Constitutional Court has emphasized in many decisions that the executive is not bound to act in a manner that triggers the need for domestic legislation.[82]

To conclude, as with standing in the US system, individuals are likely to encounter difficulties in proceeding to the merits stage when foreign affairs issues are concerned. A different picture emerges when the legislative branch challenges executive actions. Here a stronger counterweight exists compared to the United States, which forces the Constitutional Court to engage even in highly political cases.[83]

3. The new South African rules of standing (South Africa)

As with many other subject areas, constitutional and administrative review in South Africa is a combination of the new constitution and older 'layers of law'. In public law, as we have seen, the influence of English law is predominant. Thus, the starting point for judicial review is the English common law principle of standing.[84] This concept underwent sweeping changes during the transition to democracy and through the effect of the

80 German: 'Abstrakte Normenkontrolle', Article 93 (1) No 2 of the Basic Law, § 76 ff Act on the Federal Constitutional Court.

81 Article 59 (2) of the Basic Law; cf already above, Chapter 1, II., 3., e) and below Chapter 4, I., 3., b), aa).

82 *Judgment from 12 July 1994 (Out-of-Area-Einsätze)* BVerfGE 90, 286 (German Federal Constitutional Court) 360; Martin Nettesheim, 'Art. 59' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 29 with further references.

83 Cf Chapter 4, I., 3., c), aa).

84 Lawrence Baxter, *Administrative law* (Juta 1984) 30 ff.

new constitutional law. The rules of standing today are an amalgam[85] of the 'pure' common law doctrine of standing modified by constitutional law[86] and statutory law, especially the Promotion of Administrative Justice Act.[87]

Section 38 of the South African Constitution awards all individuals the right to approach a competent court in alleging that a right of the Bill of Rights has been infringed upon or threatened. Generally, the aggrieved person will do so acting in their own interest, as it had been established under the old common law.[88] Against the backdrop of the rigid judicial review possibilities during the apartheid regime, the drafters of the new constitutional framework made a deliberate decision for relaxed standing rules and added further possibilities.[89] Therefore, Article 38 of the South African Constitution does not only provide standing to act in one's own interest but also provides for class actions as well as actions 'in the public interest'.

However, the familiar problem in foreign affairs, that it is often hard for individuals to prove that they (or others) are at least 'threatened,' applies to South Africa, too, albeit to a more limited degree. When a case is unrelated to the Bill of Rights, Section 38 of the South African Constitution is not directly applicable. Instead, the ordinary (unmodified) common law rules will apply to such cases, which, similarly to the US, focus on the applicant's personal interest.[90] The former 'pure' common law also allowed taking into account aspects of non-reviewability[91] to prevent an individual from 'acting as a general watchdog over the executive'.[92] In order to avoid interference with the executive, the courts could use standing rules to stop proceedings from reaching the merits phase, although those considerations are of

85 In fact, some scholars appear to treat the Common and Constitutional rules of standing as two different systems. This view seems flawed, as the Constitutional Court convincingly decided that there is only one system of law shaped by the Constitution, cf *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44; Cora Hoexter, *Administrative law in South Africa* (2nd edn, Juta 2012) 493.

86 Section 38 of the South African Constitution.

87 Promotion of Administrative Justice Act 3 of 2000, commonly referred to as 'PAJA'.

88 Also Section 38 can be said to go beyond the old common law rules Hoexter (n 85) 494; Quinot (n 9) 222.

89 Jacques de Ville, *Judicial review of administrative action in South Africa* (Butterworths 2005) 400.

90 Baxter (n 84) 650 ff.

91 Cf this Chapter, II.

92 Baxter (n 84) 647.

substantial nature.[93] We have seen this strategy applied by the German Federal Administrative Court in one of the cases involving the Ramstein Air Base and noted that prudential considerations influence American standing rules.[94] Potentially, this old common law trait could live on under the 'new' common law.[95]

Yet, even where Section 38 of the South African Constitution is not directly applicable, the provision will have a certain influence and relax the standing rules.[96] The courts, throughout their jurisprudence, appear to apply a very generous approach. This trend is exemplified by *Von Abo*,[97] a case concerned with diplomatic protection. The applicant relied on Section 3 of the South African Constitution (Citizenship), which is not part of the Bill of Rights.[98] While openly acknowledging this, the court decided to read the provision in conjunction with Section 7 of the South African Constitution (introductory remarks on rights) and allowed standing.[99] In the case *SALC v NDPP*,[100] an NGO challenged the decision of South African agencies not to investigate acts of torture in Zimbabwe committed by high-ranking Zimbabwean officials.[101] The High Court allowed standing in their own interest and the public interest.[102] Even more liberal was the approach taken

93 Chuks Okpaluba, 'Justiciability, constitutional adjudication and the political question in a nascent democracy: South Africa (part 1)' (2003) 18 SA Public Law 331, 338.

94 Cf above, this Chapter, I., 1. and 2.

95 Ville (n 89) 402, 404; Hoexter (n 85) 491.

96 Loots (n 6) 7–13; Ville (n 89) 402; Max Du Plessis, Glenn Penfold and Jason Brickhill, *Constitutional litigation* (Juta 2013) 45.

97 The case will be dealt with in more detail in Chapter 3, I., 5., c).

98 *Von Abo v Government of the Republic of South Africa and Others* 2009 (2) SA 526 (T) (Transvaal Provincial Division) 564.

99 Ibid.

100 *Southern Africa Litigation Centre v National Director of Public Prosecutions (Zimbabwe Torture case)* 2012 (10) BCLR 1089 (GNP) (North Gauteng High Court).

101 Cf Riaan Eksteen, *The Role of the highest courts of the United States of America and South Africa and the European Court of Justice in Foreign Affairs* (Springer 2019) 287.

102 *Southern Africa Litigation Centre v National Director of Public Prosecutions (Zimbabwe Torture case)* (n 100) mn 13.4; confirmed by *National Commissioner, South African Police Service and Another v Southern African Human Rights Litigation Centre and Another* 2014 (2) SA 42 (SCA) (Supreme Court of Appeal); and by *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre* [2014] ZACC 30; 2015 (1) SA 315 (CC) (Constitutional Court).

in *Earthlife*.[103] Here, a constitutional dispute arose if an international treaty concerning nuclear power supply had to be approved by parliament or, similar to the position concerning certain international agreements in Germany,[104] only needed to be tabled as a technical agreement.[105] Notably, the case was brought by two non-profit organizations, not by members of the legislative branch. They relied on their own rights and additionally claimed to act in the public interest.[106] The court decided that 'any actions by the president and the Minister in violation of the Constitution are matters of legal interest to the public and to applicants representing that interest and are not merely a concern of Parliament'.[107] As both organizations were entitled to political rights,[108] which are represented to a large extent by parliament,[109] they were granted standing in their own right and the public interest.[110] In Germany, adjudication of a comparable case could only be initiated as *Organstreit* proceeding by members of parliament.[111] The same holds for the United States (if congressional standing would be allowed and the question would almost certainly fall under the political question doctrine).

The general rules of standing also apply to constitutional litigation.[112] As in the United States, and in contrast to Germany, constitutional litigation is not centralized. In addition, the High Courts[113] and the Supreme Court of Appeal[114] can decide on these matters (subject to confirmation by the Constitutional Court).[115] Nevertheless, the most important decisions are

103 *Earthlife Africa v Minister of Energy* 2017 (5) SA 277 (WCC) (High Court – Western Cape Division); on the case as well John Dugard and others, *Dugard's International Law – A South African Perspective* (5th edn, Juta 2018) 74 ff.
104 Article 59 (2) of the Basic Law, cf as well above and in more detail Chapter 4, I., 3., b), aa).
105 Section 231 (2) and (3).
106 Section 38 (a) and (d).
107 *Earthlife Africa v Minister of Energy* (n 103) 259.
108 Section 19 of the South African Constitution.
109 Section 42 (2) of the South African Constitution.
110 *Earthlife Africa v Minister of Energy* (n 103) 259.
111 Cf this Chapter, I., 2.
112 Seedorf (n 9) 3–16.
113 Section 169 (1) (a) of the South African Constitution; the High Court is divided in nine provincial divisions according to the Superior Courts Act 2013.
114 Section 168 (3) of the South African Constitution.
115 Section 172 (2) (a) of the South African Constitution.

rendered by the Supreme Court of Appeal or the Constitutional Court. The latter also enjoys exclusive jurisdiction concerning special procedures.[116]

Like in Germany, the legislative has some clearly defined options to initiate judicial review of executive actions concerning foreign affairs. The first one is a dispute between organs of state in the national or provincial sphere concerning the constitutional status, powers, or functions of any of these organs of state.[117] To a certain extent, this procedure mirrors the German *Organstreit* proceedings and the US problems around 'congressional standing'. In contrast to the US, the South African Constitutional Court does not shy away from deciding highly charged political cases.[118] However, thus far, the Constitutional Court has only decided cases as a 'dispute between organs of state' that were concerned with questions of provincial executive competences and which were not related to foreign affairs.[119] Although the parliament would have a potential instrument to have executive actions in the field of foreign affairs reviewed, as far as its rights directly conferred by the constitution are touched,[120] it has made no use of it. The second (theoretical) possibility, which is close to the situation in Germany, is an abstract review of an act of parliament.[121] A group comprising one-third of the members of the national assembly may initiate such a procedure.[122] As most treaties in South Africa, like in Germany or the US, have to be implemented in national legislation to have a domestic effect,[123] this gives the legislative another possibility to (indirectly) review executive behaviour in foreign affairs.[124] Parliament, however, has never used the procedure in this way. The reluctance of the legislative branch becomes clearer against

116 Section 167 (4) of the South African Constitution.
117 Section 167 (4) (a) of the South African Constitution.
118 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others – Judgment on recusal application* 1999 (4) SA 147 (CC) (Constitutional Court) para 72 – 73.
119 *Premier, Western Cape v President of the Republic of South Africa and Another* 1999 (3) SA 657 (CC) (Constitutional Court); *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others* 2000 (1) SA 661 (CC) (Constitutional Court).
120 *National Gambling Board v Premier of KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) (Constitutional Court) para 24.
121 Section 167 (4) (c) of the South African Constitution.
122 Section 80 (2) (a) of the South African Constitution.
123 Dugard and others (n 103) 79 ff; Section 331 of the South African Constitution.
124 Section 80 (2) (b) of the South African Constitution.

the background of South Africa's parliamentary system.[125] Like in Germany, the majority in parliament supports the executive. Since the first free elections in 1994, the African National Congress (ANC) has always won the majority of seats in parliament, until 2024 even the absolute majority, and always appointed the president.[126] The majority in parliament is hence unlikely to hamper the executive's actions, and the minority parties have, until now, never managed to join forces to reach the necessary quorum. The parliament in South Africa is thus no strong counterbalance to the executive in foreign affairs.[127] This factor is mitigated to a large extent by the trend of relaxed general standing rules described above. Instead of the burdensome special constitutional procedures, political parties can use the ordinary judicial process. This is exemplified by the case concerning South Africa's (attempt) withdrawal from the ICC, which will be dealt with in more detail below.[128] The Democratic Alliance, as the largest opposition party at that time,[129] was allowed to bring the suit together with various NGOs.[130]

To conclude, as in the other jurisdictions, the procedural stage establishes hurdles to prevent a challenge to executive action in foreign affairs. In contrast to Germany and the USA, the chances for individuals to pass the procedural bars to adjudication are greater, as courts follow a very generous approach. The legislative may challenge executive behaviour with the help of two defined paths to the Constitutional Court, but thus far has not done so.

125 Cf as well Felix Lange, *Treaties in Parliaments and Courts: The Two Other Voices* (Edward Elgar 2024) 313.

126 The ANC lost its absolute majority in the 2024 elections but leads a multi-party coalition with the former oppositional Democratic Alliance and still appoints the president.

127 Abraham Klaasen, 'Public litigation and the concept of "deference" in judicial review' (2016) 18 Potchefstroom Electronic Law Journal 1900, 1902; Francois Venter, 'Judicial Defence of Constitutionalism in the Assessment of South Africa's International Obligations' (2019) 22 Potchefstroom Electronic Law Journal 1, 7.

128 Cf below Chapter 3, I., 1., c), bb).

129 The DA is now part of a multi-party coalition government together with the ANC.

130 The case only reached the High Court level and the problem concerning standing was not even addressed by the court, *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* 2017 (3) SA 212 (GP) (High Court – Gauteng Division).

II. Doctrines of substantive non-reviewability

Thus far, the focus has been on doctrines that allow the judiciary to evade involvement in foreign affairs cases due to 'technical' or 'procedural' considerations.[131] This subchapter will focus on doctrines that declare an issue unreviewable due to the substance of a case.[132] These doctrines are known under different names like 'non-justiciability,'[133] 'political questions,' or *acte de gouvernement* in different jurisdictions.[134] Their common result is that due to substantive considerations, a case as such will not be reviewed by the courts; hence, the term 'substantive non-reviewability' will be used here. In all three jurisdictions, courts have experimented with these doctrines to give way to the executive in foreign affairs.[135]

1. Political Question Doctrine (USA)

The United States is home to the most famous but likewise most 'murky'[136] concept falling in the category of substantive non-reviewability: the 'political question doctrine'. In contrast to the 'standing doctrine' discussed above, it bars not only the admissibility of a claim brought by a particular person but also adjudication on the subject matter in general. As described above, the doctrine was established in *Marbury v Madison*,[137] the same case which developed full judicial oversight in the United States. This coincidence has been aptly called a 'Faustian pact' by Thomas Franck[138] and appears to be the root of the strong force of the counter-majoritarian

131 Also, as we have seen, these doctrines are not free from substantial considerations.
132 For the differentiation cf McGoldrick (n 6) 985.
133 Especially in England, for the distinction from jurisdiction cf McGoldrick (n 6) 983.
134 Daniele Amoroso, 'Judicial Abdication in Foreign Affairs and the Effectiveness of International Law' (2015) 14 Chinese Journal of International Law 99, 102 f.
135 For the comparability of common and civil law doctrines of non-justiciability cf Daniele Amoroso, 'A fresh look at the issue of non-justiciability of defence and foreign affairs' (2010) 23 Leiden Journal of International Law 933, 934 and Amoroso, 'Judicial Abdication' (n 134) 102.
136 'The political question doctrine … is a famously murky one', *Doe v Bush* (n 49) 140; Jared P Cole, 'The Political Question Doctrine: Justiciability and the Separation of Powers' (2014) Congressional Research Service 2.
137 *Marbury v Madison* (1803) 5 US 137 (US Supreme Court).
138 Thomas M Franck, *Political questions, judicial answers: Does the rule of law apply to foreign affairs?* (Princeton University Press 1992) 10 ff.

argument in the United States.[139] Since then, the doctrine has found application in several cases[140] without developing into a coherent framework.[141] The Supreme Court tried to systematize the somewhat undefined case law and gave the concept its current form in *Baker v Carr*.[142] *Baker* established a six-factor test that defined a question as political that shows

> *(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;*
> *(2) a lack of judicially discoverable and manageable standards;*
> *(3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;*
> *(4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;*
> *(5) an unusual need for unquestioning adherence to a political decision already made;*
> *(6) or potentiality of embarrassment from multifarious pronouncements by various departments on one question.*[143]

In Baker, the court moreover designated foreign affairs as a typical area involving political questions:[144]

> *Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature;* ***but many such questions uniquely demand single voiced statement of the Government's views***.[145]

At the same time, the court made clear that 'not every case or controversy which touches foreign relations lies beyond judicial cognizance'.[146] Nevertheless, since *Baker*, several foreign affairs cases have been treated as non-reviewable. Influential in this regard proved the Supreme Court's decision in *Goldwater v Carter*.[147] Senator Goldwater and several members of Congress challenged President Carter's decision to terminate a defence

139 Cf e.g. the work of Bickel (n 25); cf as well in more detail below, Chapter 4, II., 2.
140 E.g. *Luther v Borden* (1849) 48 US 1 (US Supreme Court); Cole (n 136) 5.
141 Bradley and Goldsmith (n 10) 66.
142 Baker v Carr (n 11); cf as well Cole (n 136) 5 ff.
143 Baker v Carr (n 11) 217.
144 Cole (n 136) 6.
145 *Baker v Carr* (n 11) 211 [my emphasis].
146 Ibid.
147 *Goldwater v Carter* 444 US 996 (1979) (US Supreme Court).

treaty with Taiwan without legislative approval. The court found the issue to present a non-justiciable political question.[148] The case again exemplifies the difficulty of the legislative branch in the United States to hold the executive to account. Since *Goldwater*, especially lower courts[149] in numerous cases involving foreign affairs, deemed the matter non-reviewable,[150] including several cases concerning the President's war powers.[151]

Despite its frequent application, the political question doctrine is probably one of the most contested concepts in US constitutional law. It is already highly debated if its basis is to be found in a normative interpretation of the constitution[152] or prudential considerations concerning the judiciary's role.[153] Moreover, the validity of the concept has been under heavy attack[154] and likewise vigorously defended.[155] Until today, it plays an integral part in US jurisprudence. However, in the area of foreign affairs, the more recent decision of *Zivotofsky v Clinton*[156] has arguably limited its application. The case concerned how far the legislative branch can regulate the president's recognition power, and the court decided not to invoke the political question doctrine but to decide on the matter. The decision and its possible repercussions will be examined in more detail below.[157] For now, it suffices to state that with the 'political question doctrine,' the courts in the United States have another exit point to evade a decision concerning foreign affairs.

148 In fact, the case was dismissed per curiam order. It is however often (and in my view correctly) cited as an incidence of the political question doctrine Breyer (n 4) 23.

149 For the use of the doctrine by lower courts Curtis A Bradley and Eric A Posner, 'The Real Political Question Doctrine' (2023) 75 Stanford Law Review 1031.

150 Cf the cases cited in Cole (n 136) 15 fn 150; recently *Smith v Obama* [2016] 217 F Supp 3d 283 (United States District Court for the District of Columbia).

151 Cf the list of cases in Cole (n 136) 1 fn 8.

152 Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73 Harvard Law Review 1.

153 Alexander M Bickel, 'Foreword: The Passive Virtues' (1961) 75 Harvard Law Review 40; on the debate see as well Martin Redish, 'Judicial Review and the 'political question'' (1984/85) 79 North Western University Law Review 1031, 1039 ff; Rachel E Barkow, 'More Supreme than Court?, The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 Columbia Law Review 237, 346 ff; Cole (n 136) 6 ff.

154 Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale Law Journal 597; Franck (n 138).

155 Barkow (n 153); Jide Nzelibe, 'The Uniqueness of Foreign Affairs' (2004) 89 Iowa Law Review 947.

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

157 Cf below Chapter 4, I., 3., c), cc).

2. *Justizfreie Hoheitsakte* (Germany)

Similarly to the US doctrine of 'political questions,' in Germany questions have also arisen if individual governmental acts may be beyond judicial scrutiny as non-justiciable acts of state (*justizfreie Hoheitsakte*) or non-justiciable acts of government (*justizfreie Regierungsakte*).[158] As we have seen,[159] German scholars like Jellinek and Smend started to debate the topic strongly influenced by the French concept of *acte de gouvernement*,[160] which itself has close ties to the English act of state.[161] In the early years of the German Basic Law, a majority of scholars presumed that such a concept would exist under the new German constitution.[162] Hence, it was not surprising that when the question came up during one of the first major cases concerning foreign relations in front of the Constitutional Court on the *Saarstatut*, the government claimed that the statute in question would be an act of government not amenable to judicial review.[163] The Constitutional Court dismissed this assertion stating that 'in general' statutes implementing international treaties are reviewable[164] and thus left open a 'backdoor'.[165] The question remained open if, at least, executive actions which do not need to be implemented by statute would be beyond judicial review.[166] Courts[167] and the government[168] still invoked the concept

158 Sometimes also 'gerichtsfreie Hoheitsakte', cf Hans Schneider, *Gerichtsfreie Hoheitsakte: Ein rechtsvergleichender Bericht über die Grenzen richterlicher Nachprüfbarkeit von Hoheitsakten* (Mohr 1951).

159 Cf above, Chapter 1, II., 3., b) and c).

160 Cf as well Zeitler, Franz-Christoph, *Verfassungsgericht und völkerrechtlicher Vertrag* (Duncker & Humblot 1974) 121.

161 William Moore, *Act of state in English law* (E P Dutton and Company 1906) 6.

162 Most prominent Schneider advocated for the use of the concept Schneider (n 158) 41 ff; cf Kottmann, *Introvertierte Rechtsgemeinschaft: Zur richterlichen Kontrolle des auswärtigen Handelns der Europäischen Union* (Springer 2014) 62 for further references, also with reference to the conference of constitutional law teachers; cf already above, Chapter 1, II., 3., e).

163 *Judgment from 4 May 1955 (Saarstatut)* BVerfGE 4, 157 (German Federal Constitutional Court) 161.

164 Ibid 162.

165 Zeitler (n 160) 127.

166 Ibid 129.

167 *Decision from 23 September 1958* DVBl 1959, 294 (Higher Administrative Court Münster); cf the court of first instance in *Judgment from 12 October 1962* DVBl 1963, 728 (Federal Administrative Court) 729.

168 Deutscher Bundestag, Drucksache 3/756, 11 December 1958; Statement of the foreign office in *Judgment from 12 October 1962* (n 167) 729.

of *justizfreie Hoheitsakte* in the aftermath of the decision.[169] As mentioned, the doctrine is in tension with Article 19 (4) of the Basic Law, which states that access to courts must be granted in case of every violation of a person's rights by public authority.[170] The attempts to interpret this provision in a way as to only encompass ordinary administrative actions and exclude governmental acts concerning foreign relations[171] slowly faded out in the aftermath of the *Saarstatut* decision.[172]

By now, it is widely shared that a doctrine of non-reviewability is incompatible with the German legal system.[173] Even if no subjective rights are concerned, and thus Article 19 (4) of the Basic Law does not apply, e.g. during *Organstreit* proceedings, the Constitutional Court cannot abandon its duty to adjudicate.[174] Nevertheless, lower courts especially seem from time to time to award areas of discretion that are extremely large and thus border on non-reviewability.[175] Even the highest civil court in Germany, in a compensation claim following NATO airstrikes conducted with German assistance, stated that to determine whether a target may be attacked in accordance with humanitarian law lies in a 'non-justiciable area of discre-

169 Gernot Biehler, *Auswärtige Gewalt: Auswirkungen auswärtiger Interessen im innerstaatlichen Recht* (Mohr Siebeck 2005) 90 ff.

170 Christian Calliess, 'Auswärtige Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts, Band IV* (3rd edn, CF Müller 2006) 607; Volker Röben, *Außenverfassungsrecht: Eine Untersuchung zur auswärtigen Gewalt des offenen Staates* (Mohr Siebeck 2007) 147 f; Mattias Wendel, *Verwaltungsermessen als Mehrebenenproblem* (Mohr Siebeck 2019) 410 ff.

171 In this direction Herbert Krüger, 'Der Regierungsakt vor den Gerichten' (1950) 3 DÖV 536, 537; making this suggestion Paul van Husen, 'Gibt es in der Verwaltungsgerichtsbarkeit justizfreie Regierungsakte?' (1953) 68 DVBl 70, 71; cf Zeitler (n 160) 130; cf Kottmann (n 162) 63.

172 Wilhelm Grewe, 'Auswärtige Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts Band III* (CF Müller 1988) 965; Biehler (n 169) 62 f.

173 Eberhard Schmidt-Aßmann, 'Art 19 IV' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 81 with further references; however some argue for a revival of the concept in the interest of more 'dogmatic honesty' Biehler (n 169) 99.

174 Thomas M Pfeiffer, *Verfassungsgerichtliche Rechtsprechung zu Fragen der Außenpolitik: Ein Rechtsvergleich Deutschland – Frankreich* (Lang 2007) 88.

175 *Judgment from 27 May 2015 (Ramstein Drone Case)* 3 K 5625/14 (Administrative Court Cologne).

tion'.[176] The Constitutional Court rejected this assertion[177] but tellingly arrived at the same result applying an extensive (but reviewable) area of discretion.[178]

In conclusion, the concept of *justizfreie Hoheitsakte* as a doctrine of non-reviewability has not found acceptance within contemporary German law. Far from solving the problem of judicial review in foreign affairs, this only shifted the focus from non-reviewability doctrines to area of discretion doctrines.[179] As illustrated by the airstrike case and other cases, which will be examined in chapter 3, the concept of non-reviewability nevertheless often shines through the courts' decisions.[180]

3. From Act of State to Political Questions? (South Africa)

South Africa also developed a concept of non-reviewability, which is now heavily contested. At this stage, it suffices to lay some foundations. As we have seen, although the constitutional structure changed several times up until the first post-apartheid (interim) constitution of 1993, the common feature of South African constitutionalism was a close orientation on the Westminster system.[181] Unsurprisingly, the South African discussion concerning a doctrine of non-reviewability is thus strongly influenced by English law.[182] As described above,[183] Locke had introduced the concept of pre-

176 *Judgment from 2 November 2006 (Varvarin Bridge)* BGHZ 169, 348 (Federal Court of Justice) mn 26: 'Mit Recht hat das Berufungsgericht den Repräsentanten der Beklagten […] einen noch weitergehenden nicht justiziablen Ermessens- bzw. Beurteilungsspielraum zugebilligt'.

177 *Decision from 13 August 2013 (Varvarin Bridge)* 2 BvR 2660/06 (German Federal Constitutional Court) mn 55.

178 Ibid mn 58.

179 Cf already Albert Bleckmann, *Grundgesetz und Völkerrecht* (Duncker & Humblot 1975) 247; cf as well this Chapter, IV., 3.

180 For the Constitutional Court cf as well Pfeiffer (n 174) 86; for a recent case not related to foreign affairs which dealt with the presidential right to pardon convicts *Judgment from 4 April 2024* OVG 6 B 18/22 (Higher Administrative Court Berlin-Brandenburg) mn 23 ff.

181 Iain Currie and Johan de Waal, *The new constitutional and administrative law: Volume 1 – Constitutional Law* (Juta 2001) 40.

182 Cf Gretchen Carpenter, 'Prerogative powers — an anachronism?' (1989) 22 Comparative and International Law Journal of Southern Africa 190, 190 ff starting her analysis with English law.

183 Cf above, Chapter 1, II., 1.

rogatives, which were further refined by Blackstone and Dicey. Out of the ideas of the crown prerogatives, Moore developed his ideas of the doctrine of act of state, which found application, especially in the field of foreign affairs.[184] Despite the different terminology, the act of state parallels, to a wide extent,[185] the concept of 'political questions' in the United States.[186] As with the 'political question doctrine,' when the court is satisfied that the act qualifies as an act of state, it will not further adjudicate the matter.[187] In contrast to the 'political question doctrine,' which finds application in various fields, at least in recent times, acts of state are only used to refer to non-reviewability in the area of foreign affairs.[188]

It is undisputed that the prerogative powers and with them the act of state doctrine were part of South African Law at least until 1993, although some of its traditional areas were transformed into statutory powers.[189] However, it appears unresolved whether the concept survived the constitutional changes in 1993 and 1996. As we have seen,[190] unlike in previous constitutions,[191] the new constitution does not mention executive prerogatives but states that all existing laws continue in force as long as they are not repealed or inconsistent with the new constitution.[192] Such a possible

184 Moore (n 161).

185 Karin Lehmann, 'The Act of State Doctrine in South African Law: Poised for reintroduction in a different guise?' (2000) 15 SA Public Law 337, 341 distinguishes both doctrines in so far as the 'act of state' doctrine ousts the jurisdiction of the courts whereas the political question doctrine turns it merely non-justiciable. The practical consequence of non-reviewability is of course the same; moreover, jurisdiction and non-justiciability can arguably not be completely disentangled, cf McGoldrick (n 6) 983.

186 Cf Lehmann (n 185) 340; Dire Tladi and Polina Dlagnekova, 'The act of state doctrine in South Africa: has Kaunda settled a vexing question?' (2007) 22 SA Public Law 444 fn 3; whereas in the United States this term is used to refer to foreign acts of state cf below this Chapter, V., 1.

187 Tladi and Dlagnekova (n 186) 446.

188 The term however has a broader meaning referring to all acts of the crown, moreover, some authors do not apply the differentiation between internal and external acts Helmut Rumpf, *Regierungsakte im Rechtsstaat* (Ludwig Röhrscheid Verlag 1955) 120 ff.

189 Gretchen Carpenter, 'Prerogative powers in South Africa – dead and gone at last?' (1997) 22 SAYIL 105; Tladi and Dlagnekova (n 186) 447.

190 Above, Chapter 1, II., 1., c), bb).

191 Section 7 (4) 1961 Constitution; Section 6 (4) 1983 Constitution; cf Tladi and Dlagnekova (n 186) 448.

192 Cf South African Constitution, schedule 6 concerning 'transitional arrangements' Tladi and Dlagnekova (n 186) 450.

incompatibility may be triggered by Section 34 of the South African Constitution, which states that 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court'. To a certain degree, this section is reminiscent of Article 19 (4) of the Basic Law. Nevertheless, as in the case of Germany, this provision in itself does not provide a conclusive answer, although it serves as an indicator against large non-reviewable areas. It may also be interpreted in a way as to leave room for non-reviewable questions which cannot be solved 'by the application of law'. Such an interpretation may not appear too farfetched[193] considering that the predecessor of that section in the interim constitution stated that 'every person shall have the right to have *justiciable* disputes settled by a court of law'.[194]

The question remains unsettled until today if the concept survived the constitutional changes and if it fits into the new South African system. While some authors argue for the 'American way' and call for a clearly defined political question doctrine, others disapprove of such ideas and favour the German model of general full reviewability.[195] The current state of the doctrine will be addressed in the next chapter.[196]

III. Doctrines of conclusiveness

Another instrument for courts to give way to the executive is through doctrines of conclusiveness. In contrast to non-reviewability doctrines, which prevent any decision on the merits, doctrines of conclusiveness only substitute the determination made by the executive concerning a particular aspect for the (independent) decision of the court.[197] Only insofar as the executive provided such a determination is the assessment considered conclusive and not reviewable.[198] The difference between the doctrines may

193 In contrast to that, Lehmann argues that the replacement can be interpreted as abandoning the concept of non-justiciability Lehmann (n 185) 348 fn 58.

194 Section 22 Interim Constitution of 1993 [my emphasis].

195 Cf authors cited in Chapter 3 (n 882) and (n 883).

196 Cf below Chapter 3, II., 1.

197 For the connection to 'act of state' cf William S Holdsworth, 'The History of Acts of State in English Law' (1941) 41 Columbia Law Review 1313, 1331; for the connection in English law see as well Schneider (n 158) 53 f; for the connection between conclusiveness and the political question doctrine cf as well Bradley, 'Chevron Deference' (n 2) 661; Dugard and others (n 103) 104.

198 Frederick A Mann, *Foreign Affairs in English Courts* (OUP 1986) 50 f.

be rather quantitative than qualitative, especially if a case hinges on a particular aspect.[199]

1. Executive law-making and binding 'suggestions' (USA)

US judges acknowledge a conclusive character of executive determinations in certain instances. The debate is often centred around the term 'executive law-making'[200] in foreign affairs. The address may be misleading, as it refers to a variety of situations in which an executive decision, taken without Congress, has direct domestic force.

Most relevant for this thesis are situations in which the president decides specific questions concerning the international sphere, which, 'as a by-product,'[201] create law binding on the courts. For example, the power of the president to appoint and receive ambassadors (Article 2 (2) of the US Constitution) is widely acknowledged to entail the presidential power of recognition of foreign states and governments[202] and thus has direct domestic implications.[203] This example is often referred to as an illustration that the constitution grants some express law-making powers to the president.[204] More contested is the question of to what extent this may have repercussions concerning questions of immunity.[205] The state department developed a practice to issue 'suggestions' concerning the immunity of states and foreign officials to courts that treat them as binding. In this, the

199 E.g. if courts are bound to a positive suggestion of (absolute) immunity in fact the case is decided by the executive. A good example may be *Van Deventer v Hancke and Mossop* 1903 TS 401 (Supreme Court of the Transvaal); in the UK both doctrines developed in close proximity to each other cf already their common examination in Moore (n 161) 33; Franck (n 138) 102.

200 Henkin, *Foreign Affairs* (n 15) 54 ff; Bradley, 'Chevron Deference' (n 2) 661 ff; 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; Peter B Rutledge, 'Samantar and Executive Power' (2011) 44 Vanderbilt Journal of Transnational Law 885, 851 ff.

201 Henkin, *Foreign Affairs* (n 15) 54.

202 Cf in detail below Chapter 3, I., 2., a).

203 Henry P Monaghan, 'Protective Power of the Presidency' (1993) 93 Columbia Law Review 1, 53; Michael P van Alstine, 'Executive Aggrandizement in Foreign Affairs Lawmaking' (2006) 54 UCLA Law Review 309, 318.

204 Van Alstine (n 203) 367.

205 Monaghan, 'Protective Power' (n 203) 55; Bradley, 'Chevron Deference' (n 2) 661; van Alstine (n 203) 60 ff.

courts appear to have followed the English concept of certification[206] but expanded the doctrine far beyond its application in English law, where at least in principle, it is confined to determining the (factual) status entitling immunity, not the (legal) question of immunity as such.[207] The current status of the binding force of these 'suggestions' will be examined in the next chapter.[208] A similar development concerns the US act of state doctrine, which deals with the validity of acts of foreign governments within the US legal system. Here, the executive was also given the power to intervene in the courts' assessment.[209]

In the broader sense, the term 'executive law-making' is often used to address the question of how far the president (without Congress) may enforce international obligations (entered into by treaty or otherwise) in domestic law.[210] It is controversial if the president possesses these other unwritten 'implied' law-making powers in the field of foreign affairs.[211] Proponents of the 'inherent foreign affairs powers doctrine' or the 'vesting clause' thesis[212] find it easier to accept this notion than scholars who oppose these concepts.[213] Even when their existence is acknowledged, it appears common ground that they have to be confined to limited areas as they interfere with Congress' right to legislate.[214] The problem concerning the domestic implementation of international obligations is mainly one of internal distribution of foreign affairs power between the executive and the legislative branch. Therefore, it will only be examined in due course as far as affecting the judiciary.

206 On the certification doctrine cf as well this Chapter, III., 3; Damian implies a certain connection between the British and the US approach Helmut Damian, *Staatenimmunität und Gerichtszwang* (Springer 1985) 11.

207 Lassa Oppenheim, *International Law: A Treatise* (8th edn, Longmans, Green and Co 1955) 767; Daniel P O'Connell, *International Law* (2nd edn, Stevens & Sons 1970) 119 f.

208 Cf Chapter 3, I., 3., a).

209 Henkin, *Foreign Affairs* (n 15) 56 ff; so-called 'Bernstein exception' Fausto de Quadros and John H Dingfelder Stone, 'Act of State Doctrine' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 13.

210 Henkin, *Foreign Affairs* (n 15) 54 ff; *Medellín v Texas* 552 US 491 (2008) (US Supreme Court) cf especially van Alstine (n 203) 326 ff.

211 Against such powers concerning the transfer of international obligations van Alstine (n 203) 330.

212 Cf above, Chapter 1, II., 2., a).

213 Van Alstine (n 203) 337.

214 Monaghan, 'Protective Power' (n 203) 54 arguing for limited implied powers.

Moreover, the courts have occasionally accepted executive statements of 'international facts'[215] as conclusive, albeit without developing a coherent framework.[216] Here again, an undeniable influence of the British concept of certification in matters of 'facts of state'[217] shines through. For example, the courts recognized executive determinations concerning[218] the territorial boundaries of the United States[219] or foreign nations[220] or the characterization of a foreign conflict.[221] This approach is also used for predictive assessments concerning foreign affairs. As early as 1827, the Supreme Court decided not to review a decision by President Madison concerning the likelihood of an invasion of New York by the British in the War of 1812.[222] In the same vein, during the Second World War, the court denied independently reviewing if there was a real risk of Japanese invasion and thus upheld a curfew for citizens of Japanese ancestry.[223] Likewise, in the more recent case *Munaf v Geren*,[224] the Supreme Court accepted a determination by the executive that the torture of detainees in Iraqi custody would be unlikely:

> *The Judiciary is not suited to second-guess such determinations — determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area.*[225]

The 'one voice argument' echoes British case law and the famous dictum of Lord Atkin in the *Arantzazu Mendi* case.[226] In other cases, the courts ultimately denied conclusiveness but granted a vast 'substantial deference'

215 Bradley, 'Chevron Deference' (n 2) 661; Jonathan Masur, 'A Hard Look or a Blind Eye: Administrative Law and Military Deference' (2005) 56 Hastings Law Journal 441; Robert Chesney, 'National Security Fact Deference' (2009) 95 Virginia Law Review 1361.

216 For fact finding in general Roisman Shalev, 'Presidential Factfinding' (2019) 72 Vanderbilt Law Review 825.

217 Cf this Chapter, III., 3.

218 Cf Bradley, 'Chevron Deference' (n 2) 662.

219 *Jones v United States* 137 US 202 (1890) (US Supreme Court) 221 ff.

220 *Williams v Suffolk Ins Co* 38 US 415 (1839) (US Supreme Court) 420.

221 *The Three Friends* 166 US 1 (1897) (US Supreme Court) 63.

222 *Martin v Mott* 25 US 19 (1827) (US Supreme Court); Chesney (n 215) 1380; Breyer (n 4) 19 ff.

223 *Hirabayashi v United States* 320 US 81 (1943) (US Supreme Court) 99; *Korematsu v United States* 323 US 214 (1944) (US Supreme Court) 218 f; Chesney (n 215) 1381 f.

224 *Munaf v Geren* 553 US 674 (2008) (US Supreme Court).

225 Ibid 700.

226 Cf in more detail this Chapter, III., 3.

to the executive,[227] e.g. concerning whether an individual was detained in circumstances that would grant them the status of a prisoner of war.[228] Although these cases are referred to as 'international facts'[229] or 'facts deference,'[230] questions of law and fact are often deeply intertwined. For example, if the executive is granted vast deference as to the determination of the circumstances in which an individual is detained, it is indirectly also granted the power to decide upon the individual's status as a prisoner of war. In many cases, the executive's power thus will not be confined to the determination of facts but extends to subsumption and, therefore, to the law itself.

To conclude, in some cases, conclusiveness is accepted and widely acknowledged.[231] In other cases, especially concerning determinations of 'facts,' the executive's statements often have been treated as conclusive or awarded 'substantial deference'. Yet, the courts appear to follow a case-by-case approach without being guided by a consistent doctrine.

2. *Bindungswirkung* (Germany)

Doctrines of conclusiveness are not typically associated with the German legal system or civil law systems. Nevertheless, many civil law systems developed such doctrines, especially concerning factual determinations.[232] Historically such doctrines have been part of German law. As we have seen,[233] in the early 19th century, Prussian courts developed a practice of asking for the binding opinion of the foreign office in cases of treaty interpretation. During the Bismarck period, the 'civil servant liability law' provided for non-reviewable assessments of the executive concerning whether an act was complying with 'international considerations'.[234]

227 Cf this Chapter, IV., 1.
228 *United States v Lindh* [2002] 212 F Supp 2d 541 (United States District Court for the Eastern District of Virginia) 556; *Hamdi v Rumsfeld* 542 US 507 (2004) (US Supreme Court); Chesney (n 215) 1367 ff, 1371 ff.
229 Bradley, 'Chevron Deference' (n 2) 661 f.
230 Chesney (n 215).
231 Bradley, 'Chevron Deference' (n 2) 661 especially concerning recognition.
232 Amoroso, 'Judicial Abdication' (n 134) 122.
233 Cf above, Chapter 1, II., 3., a).
234 Cf above, Chapter 1, II., 3., b).

Although a binding force (*Bindungswirkung*) of executive acts in foreign affairs has been discussed,[235] contemporary German law does not know a formal doctrine of conclusiveness. Like the *justizfreie Hoheitsakte*, it would exclude an area from judicial review and therefore be unconstitutional.[236] In general, courts can review the status of international law[237] as well as domestic foreign relations law. Moreover, judges may also take evidence[238] concerning international facts.[239] The Constitutional Court frequently asked government officials or even the general secretary of NATO[240] to appear in oral hearings.[241]

Nevertheless, the Constitutional Court has developed a jurisprudence that grants considerable discretion to the executive, especially concerning factual determinations in foreign affairs.[242] It includes a plethora of different not necessarily mutually exclusive categories: in the *Saarstatut* decision, the court stated that the question of whether the treaty in question would render the reintegration of the Saar region more or less likely is one of *political assessment* and thus not to be controlled unless evidently flawed.[243] In the same vein, it was decided that the stationing of nuclear missiles in Germany, being expedient in terms of security policy, could only be examined for arbitrariness.[244] In the *Saarstatut* decision, the Constitutional Court also held that *prognoses* like the question of whether France would enter into a peace treaty could not be reviewed.[245] The same standard was

235 Jochen A Frowein, 'Die Bindungswirkung von Akten der auswärtigen Gewalt insb. von rechtsfeststellenden Akten' in Jost Delbrück, Knut Ipsen and Dietrich Rauschnig (eds), *Recht im Dienst des Friedens, Festschrift für Eberhard Menzel* (Duncker & Humblot 1975) 125.

236 Zeitler (n 160) 196; Wilfried M Bolewski, *Zur Bindung deutscher Gerichte an Äußerungen und Maßnahmen ihrer Regierung auf völkerrechtlicher Ebene: Ein Beitrag zur Verrechtlichung der Außenpolitik* (Marburg 1971) 159 fn 4 with further references.

237 Cf already Hermann Mosler, *Das Völkerrecht in der Praxis der deutschen Gerichte* (CF Müller 1957) 45.

238 § 26 – 28 Act on the Federal Constitutional Court.

239 Martin Nettesheim, 'Verfassungsbindung der Auswärtigen Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts* (CF Müller 2012) 574.

240 *Decision from 8 April 1993* BVerfGE 88, 173 (German Federal Constitutional Court) 179.

241 Kay Hailbronner, 'Kontrolle der Auswärtigen Gewalt' (1997) 56 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 19.

242 Schwarz (n 8) 250.

243 *Judgment from 4 May 1955 (Saarstatut)* (n 163) 174; Grewe (n 172) 967.

244 *Judgment from 18 December 1984 (Pershing II – Atomwaffenstationierung)* (n 75).

245 *Judgment from 4 May 1955 (Saarstatut)* (n 163) 175; Grewe (n 172) 967.

applied in a case concerning whether chemical weapons could ever be used in accordance with international law: the Constitutional Court even rejected the suggestion of obtaining an expert opinion and relied on the executive.[246] Furthermore, as we have seen, the court upheld an executive assessment that allowed the classification of a bridge as a valid military target under humanitarian international law.[247] The Constitutional Court also refused to review if the stationing of Pershing rockets during the Cold War would render a Soviet nuclear attack more likely, and it held that it is for the executive to assess such *situations, developments, and risks* as long as they do not violate constitutional boundaries.[248] Again in the *Saarstatut* decision and subsequently, in many other cases, the court has held that it cannot review the assessment of *possible results in negotiations* if the decision remains within an area of discretion.[249] Moreover, factual assessments have been given extreme weight in interim relief procedures in front of the Constitutional Court. The judges have strongly relied on the executive assessment concerning the functioning of a no-flight zone without German contribution[250] or if asylum seekers would be persecuted if deported to another country.[251] The only exception to this trend is cases that concern the executive assessments of whether troops are likely to be involved in armed hostilities. Through its case law, the Constitutional Court developed a right for parliament to authorize the use of military force in these cases.[252] In order to evade its circumvention, it stressed its full review competence in these situations.[253]

246 *Decision from 29 October 1987 (Storage of Chemical Weapons)* BVerfGE 77, 170 (German Federal Constitutional Court) 233.

247 *Decision from 13 August 2013 (Varvarin Bridge)* (n 177) mn 58 and accompanying text.

248 *Judgment from 18 December 1984 (Pershing II – Atomwaffenstationierung)* (n 75) 103.

249 *Decision from 7 July 1975* (*Eastern Treaties Case (Ostverträge))* (n 60) 178; *Judgment from 4 May 1955 (Saarstatut)* (n 163) 178; for early cases cf Zeitler (n 160) 196.

250 *Decision from 8 April 1993* (n 240) 181.

251 *Decision from 12 September 1995 (Sudanesen Beschluss)* BVerfGE 93, 248 (German Federal Constitutional Court).

252 Cf in more detail below Chapter 4, I., 3., b), aa).

253 This also holds true for the ex post review of emergency deployments *Judgment from 23 September 2015 (Pegasus)* BVerfGE 140, 160 (German Federal Constitutional Court); cf e.g. *Judgment from 7 May 2008 (Awacs Turkey)* BVerfGE 121, 135 (German Federal Constitutional Court) 169.

In contrast to administrative law,[254] where the courts have developed clear guidelines as to when a factual area of discretion arises, the language of the Constitutional Court oscillates among 'political assessment,' 'prognosis,' 'evaluations of situations developments and risks,' and so on. The same holds for the boundaries of such areas of discretion which are only left when the executive assessment is 'evidently flawed,' 'arbitrary,' or 'not dutifully exercised'. The vague categories and the corresponding uncertain standards concerning the review of factual assessments in foreign affairs can amount to a de facto conclusiveness.[255] Two cases may illustrate the considerable executive influence in the field. In the *Bodenreform* cases,[256] the Federal Republic of Germany ('West Germany') and the GDR ('East Germany') had entered into a unification treaty which legalized certain expropriations undertaken during the Soviet occupation in the area of the GDR. The court held that the executive's assessment that accepting these expropriations was non-negotiable and not accepting them would have blocked the reunification was not constitutionally reviewable.[257] A few years later, the case reached the Constitutional Court again. In the meantime, different documents and an interview with former Soviet Foreign Minister Shevardnadze implied that his side had not presented the expropriations as non-negotiable during the talks.[258] The court held that it could only review if the discretion was dutifully exercised and that it is not in a position to substitute its own assessment for the one of the government and, even in the light of the new developments, found in favour of the executive.[259] In a more recent case, the question arose if an investigation committee of the Bundestag could force the executive to disclose a list provided by the American intelligence service NSA.[260] The document contained various keywords which had been used by the German intelligence services to scan the internet traffic running through a telecommunication

254 Cf this Chapter, IV., 3.

255 Zeitler (n 160) 214; Grewe (n 172) 967; Hailbronner (n 241) 20; Pfeiffer (n 174) 163; for a summary of judgments Nettesheim (n 239) 574.

256 For these cases cf the detailed description of the context in Biehler (n 169) 74.

257 *Judgment from 23 April 1991* (*Bodenreform I)* BVerfGE 84, 90 (German Federal Constitutional Court) 128.

258 Decision from *18 April 1996 (Bodenreform II)* BVerfGE 94, 12 (German Federal Constitutional Court) 15 ff.

259 Ibid 35 f.

260 *Decision from 13 October 2016 (NSA Case)* BVerfGE 143, 101 (German Federal Constitutional Court); cf as well, *Judgment from 29 October 2009 (CIA flights)* NVwZ 2010, 321 (Federal Administrative Court).

hub near Frankfurt. The executive declined to hand over the list invoking a non-binding agreement with the US obligating it not to share received intelligence information. The Constitutional Court accepted the evaluation of the government that surrendering the list to the investigation committee would cause serious frictions in US-German relations and could have a serious impact on future security cooperation and referred to an area of discretion concerning such assessments and prognoses.[261]

As can be seen from the jurisprudence, the Constitutional Court primarily has referred to the wide margin of discretion concerning factual determinations and has been more hesitant concerning legal assessments.[262] Nevertheless, as it has been shown for the US, the factual determination (e.g. if chemical weapons can be used upholding the distinction between combatants and non-combatants) is often so entangled with the legal question (if the use of chemical weapons is compatible with humanitarian international law) that the executive determination effectively settles the whole question.[263] The same holds for questions involving prognoses, as the NSA case has shown. Although no neatly defined doctrine of conclusiveness exists in German law, applying an extensive margin of appreciation, especially concerning factual determinations, leads to a 'de facto conclusiveness' of the executive's assessments in certain areas.

3. Certification (South Africa)

In contrast to Germany and the US, South Africa has a more clearly defined doctrine of conclusiveness. As in the case of the act of state doctrine, it inherited the 'doctrine of certification' from English law. As we have seen,[264] the development of both concepts is deeply intertwined.[265] If the foreign office certifies a particular question, it conclusively substitutes the government's view for an independent judicial investigation.[266] As laid

261 Ibid 153 ff.
262 Cf below Chapter 3, I., 1., b), bb) (5) and Chapter 3, II., 2.
263 Recognizing this danger already Franz-Christoph Zeitler, 'Judicial Review und Judicial Restraint gegenüber der auswärtigen Gewalt' (1976) 25 JöR 621, 635; in that direction Hailbronner (n 241) 20.
264 Cf above, Chapter 1, II., 1.
265 Cf as well Moore (n 161) 33.
266 For South Africa: AJGM Sanders, 'Our State Cannot Speak with Two Voices' (1971) 88 South African Law Journal 413, 413.

down above,[267] the doctrine's roots can be found in *Taylor v Barclay*.[268] Lord Atkin then famously echoed the principle in the *Arantzazu Mendi*,[269] a case as well concerned with the recognition of a foreign government.[270] In such cases, 'our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another'.[271]

Like the act of state doctrine,[272] the certification doctrine evolved from the crown prerogatives. In some areas, the pure common law power has become part of statutory law.[273] Even before this codification process, the principle had been divided into different groups of cases[274] determining areas in which the executive can issue a certificate to prove 'facts of state'.[275] Typical areas include questions of territory boundaries, the existence of a state of war or recognition of a foreign state.[276] As the name implies, at least in theory, the executive has the power to establish questions only of fact and not of law. On the other hand, the distinction has always been difficult in practice, and, as we have seen in the cases of the United States and Germany, it is often hard to draw a clear line between the two.[277] Moreover, the executive often has a strong incentive to extend the scope of certification,[278] a strategy that, from time to time, courts have tacitly

267 Cf above, Chapter 1, II., 1., b).
268 *Taylor v Barclay* (1828) 57 ER 769 (Court of Chancery).
269 *Spain v Owners of the Arantzazu Mendi* [1939] AC 256 (House of Lords) 264.
270 With further references Campbell McLachlan, *Foreign relations law* (CUP 2016) 240; cf as well already *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797 (House of Lords).
271 *Spain v Owners of the Arantzazu Mendi* (n 269) 264.
272 Sanders even describes the doctrine of certification as part of the doctrine of acts of state, albeit himself acknowledging the different effect AJGM Sanders, 'The Justiciability of Foreign Policy Matters under English and South African Law' (1974) 7 Comparative and International Law Journal of Southern Africa 215, 218.
273 Especially with regards to immunity related determinations, cf Section 21 (a) State Immunity Act 1987 (UK); for further references to common law countries cf McLachlan (n 270) 241 fn 112, 133.
274 Oppenheim (n 207) 765 ff; Mann (n 198) 30 ff.
275 Mann (n 198) 23.
276 Mann (n 198) 29 ff.
277 O'Connell (n 207) 116; Damian (n 206) 14.
278 O'Connell (n 207) 116.

or openly[279] accepted. Hence, the doctrine includes a particular danger of executive encroachment in questions of law.[280]

The leading South African case on certification, *S v Devoy*, exemplifies this pitfall.[281] It will be dealt with in more detail below.[282] Here it suffices to state that the case concerned the recognition of a state (an area where the certification doctrine was accepted) as well as the commencement of a treaty (an area where the certification doctrine's application was contested). In the case, the executive had issued a certificate dealing with both points[283] and the court followed on both accounts, thereby not clearly distinguishing how far the conclusive effect of the certificate guided the judgement.[284] The case not only recognized that the certification doctrine was part of South African law[285] (at least until 1993) but it furthermore shows how deeply intertwined questions of recognition and other legal implications often are. Even if the executive, on the occasion of certifying a fact, certifies as well regarding a question of law, the judiciary will be strongly influenced by this assessment and hardly deviate.

Thus, the South African-style certification doctrine suffered even more than its British prototype from the problem that the certificate often included questions that mixed law and fact. Contemporary scholars like Sanders even welcomed this uncertainty to a degree:

> *Generally speaking it would indeed be improper for the executive to certify categorically on points of law. But to have a hard and fast rule in this respect would to be undesirable, for the situation may arise that it is of*

279 Cf the Hong Kong case of *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No1)* (2011) 14 HKCFAR 95 (Hong Kong Court of Final Appeal) (accepting that a restrictive immunity concept is to be applied); McLachlan (n 270) 246 ff.

280 Ti-Chiang Chen, *The international law of recognition – With special reference to practice in Great Britain and the United States* (Frederick A Praeger 1951) 251; O'Connell (n 207) 113; McLachlan (n 270) 248.

281 *S v Devoy* 1971 (3) SA 899 (A) (Appellate Division) 906; on the case as well Dugard and others (n 103) 101.

282 See below Chapter 3, I., 1., c), aa) and 2., c).

283 *S v Devoy* 1971 (1) SA 359 (N) (Natal Provincial Division) at 361.

284 *S v Devoy* (n 281) 907 'the court accordingly accepts the certificate of the Minister as a statement of the matters therein mentioned'; Sanders appears to be of the opinion that the court only accepted the recognition as conclusive, this however appears to be a very well-meaning reading of the judgment which is at least ambiguous, cf Sanders, 'Two Voices' (n 266) 416.

285 Ibid 414.

> *material importance to the executive's foreign policy* ***that a particular legal standpoint be taken.***[286]

As the doctrine like the acts of state emanates from the former crown or executive prerogatives,[287] the same problem arises concerning its current validity. Although it has undoubtedly been part of South African law, it is questionable whether it survived the constitutional changes of 1993 and 1996.[288] This question will be dealt with in the next chapter.

IV. Doctrines of discretion

The last doctrines to be considered are those granting a certain 'leeway' or 'discretion' to the executive. The underlying rationale echoed in all three jurisdictions is that, out of a sense of 'respect' for the initial decision-maker, the latter's assessment will be given a certain weight[289] but not be accepted in every case. The concept has close ties with non-reviewability and doctrines of conclusiveness but can be clearly distinguished from them. If a case meets the conditions for non-reviewability, the courts cannot decide on the matter. For doctrines of conclusiveness, this applies partially: concerning the certified subject matter, the executive's view substitutes the court's independent assessment.[290] A conclusive determination cannot be reviewed for the proper exercise of discretion or set aside in the light

286 Sanders, 'Justiciability' (n 272) 219 [my emphasis].
287 Dugard and others (n 103) 100.
288 In *Geuking* a provision entailed in the Extradition Act 1967 allowing conclusive evidence (by a foreign state) was upheld, but only as to the narrow question whether the state has sufficient evidence to warrant prosecution *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC) (Constitutional Court); Ville (n 89) 462.
289 Kirsty McLean, *Constitutional deference, courts and socio-economic rights in South Africa* (Pretoria University Law Press 2009) 72; for Germany Kottmann (n 162) 66; Dugard and others (n 103) 104 speaking of a margin of appreciation; Bradley, *International Law* (n 12) 19 ff.
290 Dugard and others (n 103) 100.

of contradicting evidence.[291] In contrast, the distinguishing feature of doctrines of discretion is continuous freedom for the courts to interfere.[292]

I. Deference in the narrow sense (USA)

In the United States, the term 'deference' often refers to the general notion of judicial restraint in foreign affairs,[293] but a narrower definition is widely used and separated from the 'political question doctrine'.[294] This type of deference developed around the same time as the Sutherland Revolution and is mainly associated with the interpretation of treaties.[295] It is often described by the phrase that courts 'will give great weight to an interpretation made by the executive branch'.[296]

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291 Mann (n 198) 50, 51; e.g., in case of a conclusive interpretation of a treaty, the court can not review if the executive engaged in a proper construction of the text. In case of a conclusive certification of a fact, the executive assessments can not be rebutted by other evidence. Of course, fringe areas remain, e.g., the court at least has to assess if the preconditions for conclusiveness are given, e.g., if the executive act in question amounts to an interpretation at all or if the fact in question falls into an area, where conclusiveness is recognized.

292 Bradley, *International Law* (n 12) 19 ff, differentiating this form of deference from 'binding' deference; Tladi and Dlagnekova (n 186) 455 stressing the reviewability of the exercise of discretion; Paul Horwitz, 'Three Faces of Deference' (2008) 83 Notre Dame Law Review 15, 16, 19; McLean (n 289) 61; Julian Arato, 'Deference to the Executive: The US Debate in Global Perspective' in Helmut Philipp Aust and Georg Nolte (eds), *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (OUP 2016) 205, 'It lies somewhere in between simply adopting executive interpretations (total- deference) and engaging in de novo interpretation in all instances (zero- deference)'.

293 Used in this broader sense by e.g. Charney (n 2) 805.

294 In this direction Bradley, 'Chevron Deference' (n 2) 662; Robert Knowles, 'American Hegemony and the Foreign Affairs Constitution' (2009) 41 Arizona State Law Journal 87, 101 f; cf Bradley and Goldsmith (n 10) 121; mentioning such a more narrow definition Cole (n 136) 11; Arato (n 292) 205.

295 The concept has been used for treaties, their implementing statute and sole executive agreements, for the differentiation within US constitutional law cf below Chapter 3, I., 1., a), aa).

296 American Law Institute, *Restatement of the law, third: The foreign relations law of the United States, §§ 1 – 488* (American Law Institute Pub 1987) § 326 (2); the standard was first cited in *Charlton v Kelly* 229 US 447 (1913) (US Supreme Court).

As with the political question doctrine, the role of deference in the narrow sense is intensely debated.[297] Following an influential article by Bradley,[298] many authors tried to tame the concept by combining it with well-established principles of administrative law.[299] Pride of place in these approaches takes the Supreme Court's decision in *Chevron*.[300] It dealt with a statutory interpretation of the Environmental Protection Agency (EPA) while applying the Clean Air Act. The deputy solicitor general representing the EPA argued that the agency's assessment should prevail in case of interpreting an ambiguous statute.[301] The case established a two limb test:

> *(1) if the wording is unambiguous and clear the question is settled because the agency and courts have to give way to the expressed intent of congress; (2) if not the agency interpretation prevails if it is a permissible construction of the statute.*[302]

This reasoning is then applied to treaty interpretation, resulting in considerable leeway for the executive as long as the interpretation appears 'permissible'.[303] Other authors[304] want to apply the administrative law approach developed in *Skidmore v Swift & Co*,[305] which calls for a 'sliding

297 In fact most authors appear to stir a middle ground cf Joshua Weiss, 'Defining Executive Deference in Treaty Interpretation Cases' (2011) 79 George Washington Law Review 1592, 1692 fn 79 with further references; extreme positions opting for no deference like David J Bederman, 'Deference or Deception: Treaty Rights as Political Questions' (1999) 70 University of Colorado Law Review 1439 and Alex Glashausser, 'Difference and Deference in Treaty Interpretation' (2005) 50 Villanova Law Review 25 or absolute deference like John C Yoo, 'Treaty Interpretation and the False Sirens of Delegation' (2002) 90 California Law Review 1305 appear to be rare; for a detailed analysis of the different positions: Robert Chesney, 'Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations' (2007) 92 Iowa Law Review 1723, 1758 ff and Scott M Sullivan, 'Rethinking Treaty Interpretation' (2008) 86 Texas Law Review 779, 799 ff.

298 Bradley, 'Chevron Deference' (n 2).

299 Cf as well Eric A Posner and Cass R Sunstein, 'Chevronizing Foreign Relations Law' (2006) 116 Yale Law Journal 1170; Sullivan (n 297).

300 *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984) (US Supreme Court).

301 William N Eskridge and Lauren Baer, 'The Continuum of Deference, Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan' (2008) 96 Georgetown Law Journal 1083, 1085.

302 *Chevron* (n 300) 842 f.

303 Weiss (n 297) 1603 (who is not a proponent of the concept himself).

304 Sullivan (n 297) 779.

305 *Skidmore v Swift & Co* 323 US 134 (1944) (US Supreme Court).

scale' approach instead of *Chevron*'s 'binary' character.[306] The search for the right level of review in treaty questions is the subject of an ongoing debate and will be examined in more detail in the next chapter.[307] The concept of applying weight to the executive's decision without forfeiting review altogether is not confined to cases concerning treaties but has crept into other areas of foreign affairs as well. It has arguably been increasing in importance in the determination of foreign official immunity since the Supreme Court's decision in *Samantar*, a trend which will also be dealt with in more detail in the next chapter.[308] Moreover, as we have seen concerning factual assessments, the judiciary partially denied conclusiveness and decided to apply 'deference in the narrow sense' to these cases.[309] In this area, some scholars also try to define the vague concept by recourse to administrative law doctrines.[310]

To conclude, deference in the narrow sense awards considerable freedom to the executive original decision-maker. As long as the latter's interpretation is comprehensible or their factual determination appears plausible, judges will not interfere with their assessment. It thus provides a further tool for the judiciary to give way to the executive in foreign affairs.

2. Areas of discretion and reduced level of review (Germany)

As the German judges have forsaken any form of non-reviewability, the concept of an 'area of discretion' (*Spielraum*) is of paramount importance.[311] Unlike their US equivalents,[312] the German courts – at least in administrative law – distinguish neatly between such freedoms for the original decision-maker while determining facts (*Beurteilungsspielraum*) or choosing the resulting legal consequence (*Ermessensspielraum*).[313] In con-

306 Weiss (n 297) 1598 (not himself subscribing to the concept).
307 Cf below – Chapter 3, I., 1., a).
308 Cf below – Chapter 3, I., 4., a).
309 Bradley, 'Chevron Deference' (n 2) 661 f; Masur (n 215) 445; Chesney, 'National Security Fact Deference' (n 215) 1361.
310 Masur (n 215) 520.
311 Kottmann (n 162) 66; Christian Calliess, *Staatsrecht III* (3rd edn, CH Beck 2020) 81.
312 Georg Nolte, 'Landesbericht Vereinigte Staaten von Amerika' in Jochen A Frowein (ed), *Die Kontrolldichte bei der gerichtlichen Überprüfung von Handlungen der Verwaltung* (Springer 1993) 172, 184; Wendel(n 170) 37, 40.
313 Eckhard Pache, *Tatbestandliche Abwägung und Beurteilungsspielraum: Zur Einheitlichkeit administrativer Entscheidungsfreiräume und zu deren Konsequenzen im*

trast to the US *Chevron* doctrine, not every ambiguous term automatically generates an area of discretion for the agency.[314] Only in particular and very precisely defined cases[315] is such room granted to the executive.[316]

As in the US, the doctrine is best defined in administrative law and gets more opaque when the realm of foreign relations is concerned.[317] As we have seen,[318] the clear distinction[319] between the factual assessment and legal consequence gets blurry, and contrary to the narrowly defined instances in administrative law, no definite case law has been developed in the area of foreign affairs. If a case touches foreign affairs, in an almost blanket fashion, the courts award an area of discretion to the executive.[320] As its other side,[321] the area of discretion results in a lower standard of judicial review (*Kontrolldichte*).[322] In a case that concerned the review of a statute (not related to foreign affairs), the Constitutional Court has developed three different review standards:

(1) the intensified content control, which fully reviews the compatibility with the basic law;

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verwaltungsgerichtlichen Verfahren; Versuch einer Modernisierung (Mohr Siebeck 2001) 20 ff; for the historical development Wendel (n 170) 17 ff.

314 Also *Chevrons* applicability has been limited, cf *United States v Mead Corp* 533 US 218 (2001) (US Supreme Court).

315 Schmidt-Aßmann (n 173) mn 189 ff.

316 Karl E Hain, 'Unbestimmter Rechtsbegriff und Beurteilungsspielraum – ein dogmatisches Problem rechtstheoretisch betrachtet' in Rainer Grote and Peter Badura (eds), *Die Ordnung der Freiheit: Festschrift für Christian Starck zum siebzigsten Geburtstag* (Mohr Siebeck 2007) 35, 36; Hartmut Maurer and Christian Waldhoff, *Allgemeines Verwaltungsrecht* (19th edn, CH Beck 2017) 160 ff.

317 Drawing an analogy to administrative law already Klaus Stern, 'Außenpolitischer Gestaltungsspielraum und verfassungsgerichtliche Kontrolle' (1994) 8 NWVBl 241, 244.

318 Cf this Chapter, III., 1.

319 The distinction is also not uncontested in administrative law, cf Gunnar F Schuppert, 'Self-restraints der Rechtsprechung' (1988) 103 DVBl 1191, 1199; Hain (n 316).

320 Kottmann (n 162) 67.

321 Michael Brenner, 'Die neuartige Technizität des Verfassungsrechts und die Aufgabe der Verfassungsrechtsprechung' (1995) 120 AöR 248, 255 fn 38.

322 Pfeiffer (n 174) 157; the term 'Kontrolldichte' is often used alongside the term 'Kontrollmaßstab' and not clearly distinguished from the latter, cf Matthias Jestaedt, 'Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' (2001) 116 DVBl 1309, 1316 especially fn 69; correctly Wendel (n 170) 377 'Kontrolldichte' is corresponding with the material/substantial law ('Kontrollmaßstab').

(2) the plausibility control, which at least demands a comprehensible assessment and amounts to a procedural control;
(3) the evidentiary control, which only sorts out obviously unconstitutional results.[323]

Some scholars have tried to invoke these categories to systematize judicial review in the area of foreign affairs.[324] On the other hand, the Constitutional Court hardly directly refers to them.[325] As we have seen above, it applies a large area of discretion and a corresponding lower level of review to factual determinations of the executive. It also hinted at such an area for legal assessments in some cases. In contrast to the United States, where executive influence in such cases is widely acknowledged, in Germany the application to legal determinations is intensely debated and will be dealt with in more detail in the next chapter.[326]

In general, the awarding of areas of discretion in foreign affairs in Germany suffers from an unusual vagueness that only becomes plausible in the context of the rejection of any concept of non-reviewability.[327] The problem of judicial review has been dissolved[328] but not solved by strongly relying on the idea of areas of discretion. Although, as we will see later, such an area of discretion approach may be a viable solution for judicial review in foreign affairs, the blunt German renunciation of the non-justiciable acts of state approach only pushed the problem under the waterline, where it is rarely openly discussed.[329] Quite paradoxically, it is nevertheless virtually undisputed that a lower review standard is to be applied in foreign affairs.[330] The next chapter will examine how the concept has been applied

323 *Judgment from 1 March 1979* BVerfGE 50, 290 (German Federal Constitutional Court) 332 f with further references.
324 Schwarz (n 8) 204 f; Pfeiffer (n 174) 159 who also points out that the latter two categories are not always clearly distinguishable.
325 Rare example, dissent in *Judgment from 29 October 1987* (n 235) 234.
326 Cf below Chapter 3, II., 3.
327 Biehler (n 169) 74, 98.
328 Wilhelm Karl Geck, 'Der Anspruch des Staatsbürgers auf Schutz gegenüber dem Ausland nach deutschem Recht' (1956/57) 17 ZaöRV 519 ff; combining the 'non-justiciable acts of state' and areas of discretion already Karl Doehring, *Pflicht des Staates zur Gewährung diplomatischen Schutzes* (Carl Heymanns 1959) 100 ff.
329 Biehler (n 169) 98 f.
330 Similar view Hailbronner (n 241) 14; Calliess, 'Auswärtige Gewalt' (n 170) 607; similar view Nettesheim (n 239) 568; Helmuth Schultze-Fielitz, 'Art. 19 IV' in Horst Dreier and Hartmut Bauer (eds), *Grundgesetz: Kommentar* (3rd edn, Mohr Siebeck 2013) mn 120.

in different foreign affairs cases and where current shortcomings in its application are to be found.

3. Reduced levels of scrutiny (South Africa)

In the same vein, the new South African public law is developing a 'doctrine of discretion' that entails reduced scrutiny levels.[331] As in Germany or the United States, the standard of review applied in a particular case decides how much weight[332] or discretion[333] is given to the original decision-maker.

Similar to the other systems, the concept is intensely discussed in administrative law. As stated above, this area of law underwent thorough changes and is now a combination of common law as well as constitutional and statutory law.[334] Under the apartheid regime, progressive lawyers tried to broaden the application of administrative law review as it was one of the few possibilities to hold the executive to account.[335] In the democratic era, the conviction took shape that judicial interference does not always have positive effects and may be inappropriate in some instances.[336] The constitution now awards everyone the civil right to 'just administrative action' (Section 33 of the South African Constitution), and the Promotion of Administrative Justice Act (PAJA) further refines that right. In administrative law, the PAJA sets out various grounds for review of an administrative action[337] but is silent about the strictness of review that the courts should apply in a particular case.[338] The level of scrutiny will vary, according to

331 Sebastian Seedorf and Sanele Sibanda, 'Separation of Powers' in Stuart Woolman and Michael Bishop (eds), *Constitutional law of South Africa* (2nd edn – January 2013 – Revision Service 5, Juta 2002) 12–59 ff.

332 McLean (n 292) 62.

333 Quinot (n 9) 12.

334 Hoexter (n 85) 493, The notion that two different systems of review exist, one under common law and one under constitutional law, has been rejected by the Constitutional Court in *Pharmaceutical Manufacturers Association* 2000 (2) SA 674 (CC) (Constitutional Court) para 33.

335 Cora Hoexter, 'The Future of Judicial Review in South African Administrative Law' (2000) 117 South African Law Journal 486; Quinot (n 9) 15.

336 Hoexter, 'Future of Judicial Review' (n 335) 488.

337 Promotion of Administrative Justice Act 3 of 2000, Section 6.

338 Kate O'Regan, 'Breaking ground: Some thoughts on the seismic shift in our administrative law' (2004) 121 South African Law Journal 424, 437; Hoexter, *Administrative Law* (n 85) 151.

Hoexter[339] and others,[340] pursuant to various factors, such as the policy content of the decision, the breadth of the discretion and the degree of expertise of the decision-maker or the impact of the decision. The mix of factors amounts to a 'contextual approach'[341] which, according to the circumstances, will determine the margin of appreciation[342] to be given to the agency. The courts made recourse to this academic debate most prominently in *Bato Star Fishing,* where the Constitutional Court stated:

> *In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field.*[343]

Although the courts have made various references to the concept of deference,[344] they have thus far not succeeded in developing a coherent and integrated doctrine of deference in administrative law.[345]

Besides administrative law, the topic of deference is heavily discussed in the field of socio-economic rights.[346] Against the backdrop of denial of social justice for the vast majority of the population under the apartheid regime, the new South African Constitution awards justiciable socio-econom-

339 Hoexter, 'Future of Judicial Review' (n 335) 503.
340 Ville (n 89) 26 ff.
341 Hoexter, *Administrative Law* (n 85) 246.
342 Hoexter, 'Future of Judicial Review' (n 335) 503.
343 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) (Constitutional Court) para 48.
344 Dennis M Davis, 'To defer and then when? Administrative law and constitutional democracy' (2006) Acta Juridica 23 cases in fn 9; P J H Maree and Geo Quinot, 'A decade and a half of deference (part 1)' (2016) Journal of South African Law 268, see cases 272 ff.
345 P J H Maree and Geo Quinot, 'A decade and a half of deference (part 2)' 2016 Journal of South African Law 447; Davis (n 344) 27; Maree and Quinot, 'Deference Part 1' (n 344).
346 Seedorf and Sibanda (n 331) 12 – 61 ff; cf McLean (n 292); Kate O'Regan, 'Checks and Balances reflections on the development of the doctrine of separation of powers under the South African constitution' (2017) 8 Potchefstroom Electronic Law Journal 119, 142 ff.

ic rights to citizens.[347] That poses a particular challenge to courts as these rights not only address the state in the 'classical' way of abstaining from a particular behaviour but also impose positive obligations to act.[348] The courts try to exercise deference in a way as to balance some problems of the enforcement of socio-economic rights, e.g., to leave the final allocation of resources to the political branches, especially the legislative.[349]

Non-administrative action under the old common law was only subject to the 'principle of legality,' which amounted to a mere 'ultra vires control'.[350] In contemporary South African law, it gained broader importance as an emanation of the rule of law and now acts as a 'safety net'.[351] The review standard entailed by the concept appears not to be fixed but includes at least a rationality control.[352] This lower review standard,[353] acting as a baseline, found its way into the realm of foreign relations law. The premier example for this development is the *Kaunda* case.[354] The court had to decide whether and to what extent it could review an individual's request for diplomatic protection. The majority found that although foreign policy is primarily a function of the executive,[355] it could review the government's decision for irrationality and bad faith.[356] It stressed that 'this does not mean that courts would substitute their opinion for that of the government'[357] and that 'the government has broad discretion in such matters'.[358] *Kaunda* can be seen as an acknowledgment of a general approach

347 McLean (n 292) 17; cf especially Section 25 (5), 26, 27, 28, 29 of the South African Constitution.

348 Also positive obligations are not limited to socio-economic rights it is one of their main traits in contrast to 'classical' civil and political rights whose main trait is the duty to abstain from interference; on the 'divide' between civil and political and socio-economic rights cf Sandra Fredman, *Comparative human rights law* (OUP 2018) 58 ff.

349 McLean (n 292) 111, 115.

350 Prerogatives as in English law were almost unreviewable Dion A Basson and Henning P Viljoen, *South African Constitutional Law* (Juta 1988) 42 ff; Hoexter, *Administrative Law* (n 85) 122.

351 Ville (n 89) 60; Hoexter, *Administrative Law* (n 85) 123; Quinot (n 9) 13.

352 Hoexter, *Administrative Law* (n 85) 121 ff.

353 Seedorf and Sibanda (n 331) 12 – 66 ff.

354 *Kaunda and Others v President of the RSA and Others* 2005 (4) SA 235 (CC) (Constitutional Court); cf in more detail Chapter 3, I., 5., c.).

355 *Kaunda* (n 354) 621.

356 Ibid 262.

357 Ibid.

358 Ibid.

of applying lower review standards in the area of foreign affairs.[359] As Tladi and Dlagnekova put it, 'the executive has a broad discretion conducting foreign affairs'[360] and 'the margin of discretion afforded to the state in the exercise of such power is extremely wide'.[361] How far this approach may have taken over the role of other deference doctrines will be examined in more detail in the next chapter.

V. The spectrum of deference

1. Other forms of deference

The categories described above are only the tip of the iceberg of deference.[362] Giving in to the notion of deference, the courts developed a whole spectrum[363] of other concepts to grant leeway to the executive. Typically, these further concepts work at a higher level of abstraction. Benvenisti[364] differentiated two additional broader categories: on the one hand, courts may apply the notion of deference to narrowly interpret the norms of constitutional or statutory law with the aim to limit the impact of international law within the domestic legal system.[365] On the other hand, they may give more room to the executive by restrictively interpreting the application of international norms,[366] a feature that has been achieved in many countries with resort to the concept of 'non-self-executing provisions'.[367]

359 Erika de Wet, 'The reception of international law in the South African legal order: An introduction' in Erika de Wet, Holger P Hestermeyer and Rüdiger Wolfrum (eds), *The implementation of international law in Germany and South Africa* (Pretoria University Law Press 2015) 23, 46; Seedorf and Sibanda (n 331) 12 – 66 ff; O'Regan (n 346) 139 f.

360 Tladi and Dlagnekova (n 186) 455.

361 Ibid.

362 Referring to 'avoidance doctrines' Benvenisti (n 2) 169 ff.

363 For the term see Barkow (n 153) 242; Ewan Smith, 'Is Foreign Policy Special?' (2021) 41 Oxford Journal of Legal Studies 1040, 1041 fn 12, 'I consider justiciability and deference to be similar. We might say 'non-justiciable' questions lie at the extreme end of a spectrum of deference'.; as well Elad D Gil, 'Rethinking Foreign Affairs Deference' (2022) 63 Boston College Law Review 1603, 1612.

364 Benvenisti (n 2).

365 Ibid 162 ff.

366 Ibid 165 ff.

367 Ibid 166 ff.

Somewhat across the categories described above lies the concept of 'foreign act of state' (in English and South African terminology) or 'act of state' (in US terminology). The doctrine is mostly absent in civil law countries, but similar functions are fulfilled here by the concept of 'ordre public'[368] and conflict of laws regulations. However, the common and premier focus of this group of doctrines is not respect for an act of the domestic but of a foreign executive conducted in a foreign territory.[369] They primarily regulate 'external deference' instead of 'internal deference'.[370] This different rationale is the reason why this thesis will largely not focus on their application. However, it is undeniable that they share a common root with the doctrines of non-reviewability described above.[371] Some authors have even referred to the concept as 'foreign political question doctrine'.[372] In the United States, in particular, the act of state doctrine has been developed in a way to defer to the domestic executive,[373] by granting the government the right to decide which foreign acts are to be accepted. To this extent, the US act of state doctrine has been included in the above analysis.[374]

2. The deference scale

In the following, we will focus on the narrower 'doctrines of deference' described in this chapter. They have been chosen as they most directly reflect the judicial treatment of an executive decision in foreign affairs. A court can decide not to review the matter at all (procedural or substantial non-reviewability), to treat the executive assessment concerning a specific question as binding (doctrines of conclusiveness), or to award a lower review standard to the executive assessment (doctrine of discretion). If none of these concepts are applied, the courts' default position will be to engage in a 'de novo' or independent review.

368 Ibid 171; Maria Berentelg, *Die Act of State-Doktrin als Zukunftsmodell für Deutschland?: Zur Nachprüfung fremder Hoheitsakte durch staatliche Gerichte* (Mohr Siebeck 2010).

369 De Quadros and Dingfelder Stone (n 209) mn 2; McLachlan (n 270) 16.

370 Karin Lehmann, 'The Foreign Act of State Doctrine: its implications for the Rule of Law in South Africa' (2001) 16 SA Public Law 68, 73.

371 Holdsworth (n 197) 1318 ff.

372 Given the vast differences rather a misnomer, cf Lehmann, 'Foreign Act of State' (n 370) 73, 91.

373 Especially in *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964) (US Supreme Court).

374 Cf above, this Chapter, III., 1.

The categorization above implies a scale of deference. On this scale, non-reviewability is one extreme,[375] as it prevents any judicial review.[376] Doctrines of conclusiveness only shield particular legal or factual questions from judicial examination. Finally, the discretionary approach awards a certain weight to the executive view without taking away the right of the judiciary to discard an executive assessment.[377] Naturally, the categorization is not clear-cut. As we have seen, courts may apply such a low review standard that this amounts de facto to conclusiveness. On the other hand, conclusiveness may, in some instances, even render the whole dispute non-justiciable.[378] Moreover, the courts may apply a different deference doctrine depending on the nature of the suit. They may treat executive assessments concerning the recognition of states as conclusive if indirectly reviewed and bar direct challenges to the executives' position with the help of a non-reviewability doctrine.[379]

Notwithstanding, the four doctrines establish useful markers and terminology to describe how much deference is typically given to an individual foreign affairs decision within a judicial system. The next chapter will use them to trace the development of deference over time concerning five foreign affairs topics across all three jurisdictions.

VI. Conclusion on Defining Deference

This chapter has argued that all three jurisdictions developed structurally comparable mechanisms to give way to the notion of deference.

The first group of these mechanisms are doctrines of procedural non-reviewability: a case is barred from reaching the merits phase for technical reasons, such as a suit brought by the wrong claimant or at the wrong time. Especially in foreign affairs cases, these mechanisms are not entirely free of substantial considerations and may be used by courts to avoid a decision on the merits. In the United States, the major doctrine used in this regard is the principle of 'standing'. To establish sufficient standing, an individual

375 Concerning the political question doctrine Barkow (n 153) 329.
376 Speaking of absolute deference Bradley, 'Chevron Deference' (n 2) 659; speaking of the 'ultimate form of deference' concerning the political question doctrine Knowles (n 294) 103; cf Smith (n 363).
377 Cf Arato (n 292) 205.
378 E.g. in immunity cases, cf already above (n 199).
379 Cf the US practice concerning recognition below, Chapter 3, I., 2., a).

must prove an 'injury,' which often requires particular circumstances in foreign affairs cases. The possibilities for the legislative branch to challenge executive behaviour are limited as well. The Supreme Court has narrowed its previous, more generous case law in *Raines v Byrd* and now only allows 'legislative standing' in very few circumstances. Hence, legislative attempts to challenge executive decisions in foreign affairs, like the deployment of military forces, have largely been unsuccessful. A more recent trend shows that at least the federal states, in some cases, may step in to hold the executive to account.

In Germany, individual claimants need to show that they have a 'subjective right' to bring a case to court. Like in the United States, this means establishing an actual or possible injury. Although constitutional rights containing subjective rights are applied broadly in Germany, exceptional circumstances are often required for an individual to challenge an act of the executive in foreign affairs. In contrast to the United States, the legislative branch can use two constitutionally predefined procedures to induce judicial review. With the help of *Organstreit* proceedings, an 'institutional injury' of a right of parliament may be claimed, but only where the constitution assigns such a competence to the legislative branch. By using the abstract judicial review procedure, implementing statutes of a treaty may be challenged by a group comprising one-quarter of the members of parliament. Although the legislative branch has more accessible options to challenge executive acts in foreign affairs, the particular requirements for the constitutional procedures also limit the incidents in which parliament may induce judicial review.

South Africa traditionally followed the British approach and thus also relied on the common law concept of standing. However, the requirements for standing were significantly lowered under the influence of Section 38 of the new South African Constitution, which also allows actions in the public interest. In several cases involving foreign affairs, the Constitutional Court allowed NGOs to make use of this provision and established a very generous approach. Moreover, like in Germany, the legislative branch can use two constitutionally predefined procedures to challenge executive acts in foreign affairs. In contrast to Germany, these options are rarely applied. This is due to the ANC's dominance, which since the first democratic elections, has always won a large majority in parliament and the legislative branch is thus unlikely to challenge its 'own' government. Moreover, due to the relaxed standing rules, other major political parties do not have to use

special constitutional instruments but can file cases relying on the general procedures.

A second set of mechanisms to avoid judicial review in foreign affairs cases has been termed 'substantial non-reviewability'. In contrast to the previous category, these doctrines bar judicial review based on the actual subject matter of a case. In the United States, the seminal decision in *Marbury v Madison* recognized the existence of areas beyond judicial control. In the 1960s, the judgment in *Baker v Carr* solidified the previous case law and established a six-factor test according to which a dispute may be declared unreviewable as a 'political question'. Lower courts have used the principle extensively to bar judicial review in foreign affairs cases. However, the recent decision in *Zivotofsky v Clinton* may imply that the Supreme Court aims to scale back the application of the doctrine.

Previous German constitutional systems also experimented with a doctrine of non-reviewability, rendering certain acts of state non-justiciable (*justizfreie Hoheitsakte*). During the Bismarck and Weimar periods, scholars debated the topic. Likewise, in the early years of the Basic Law, a majority of scholars and the government assumed that certain acts of the executive would be beyond judicial review. However, in its *Saarstatut* decision, the Constitutional Court decided in favour of broad reviewability. Contemporary German law now holds non-justiciable areas to violate Article 19 (4) of the Basic Law, which enshrines the right to access to courts. Nevertheless, the problem of judicial review in foreign affairs is not solved in Germany but has been shifted to other deference mechanisms.

South Africa inherited the concept of non-justiciable acts of state from English law, and it became part of all three pre-democratic constitutions. Its status in current South African law is contested. On the one hand, in contrast to the previous constitutions, the prerogative powers of the executive as the basis for the act of state doctrine are not explicitly mentioned within the new South African Constitution. On the other hand, the latter provides for all previous law to remain in force as long as not repealed or in conflict with the new constitution. Such incompatibility may be triggered by Section 34 of the South African Constitution, which, similar to the German provision Article 19 (4) of the Basic Law, guarantees access to courts for all disputes that can be resolved 'by the application of law'. Whether the courts in their jurisprudence have decided for or against the admissibility of non-reviewable areas will be examined in the next chapter.

A further instrument expressing the notion of deference is doctrines of conclusiveness. In contrast to non-reviewability doctrines, which oust every

decision on the merits, doctrines of conclusiveness allow the executive to provide a conclusive determination concerning a particular aspect of the case. In the US, such instances of 'executive law-making' are widely recognized. Thereby, an act of the executive on the international plane, e.g., the recognition of a foreign state as a domestic 'by-product,' likewise binds the courts. Where in some cases, the doctrine is widely accepted, in other areas, especially if the executive attempts to determine the legal consequence of its determination, the reach of the binding force is more contested. Moreover, the courts have occasionally treated determinations of 'international facts' as conclusive, albeit without developing a coherent approach.

Older German constitutional systems also applied doctrines of conclusiveness. Prussian law accepted that certain foreign affairs decisions, such as treaty interpretations, cannot be called into question by courts. Likewise, instances of conclusive evidence were recognized under the Bismarck and Weimar constitutions. In analogy to doctrines of non-reviewability, contemporary German law has rejected doctrines of conclusiveness, as they would violate Article 19 (4) of the Basic Law. However, the Constitutional Court has awarded a large area of discretion concerning the determination of facts in foreign affairs cases, which is almost tantamount to conclusiveness.

Following the British practice, older South African constitutional systems allowed the executive to 'certify' certain facts of state. In contrast to the US, the English certification doctrine has always been limited to questions of fact and did not encompass questions of law. As with the acts of state, it is contested whether the doctrine survived the constitutional changes of the 1990s. Its current status will be examined in the next chapter.

The last major deference mechanism that has been identified in our three reference countries are doctrines of discretion. In contrast to doctrines of conclusiveness, the executive assessment does not 'substitute' the court's decision, but the executive determination is only given 'weight'. The courts thus remain free to discard the executive assessment. In the United States, this type of deference is most commonly used in the area of treaty interpretation but has also migrated to other groups of cases involving foreign affairs. The exact degree of discretion is subject to heavy debate and many authors have tried to refine the doctrine by applying administrative law principles. In addition, in cases where the courts have denied a conclusive effect to executive determinations concerning facts, they have often acknowledged at least an area of discretion.

Within contemporary German foreign relations law, doctrines of discretion are of paramount importance. As the Constitutional Court has declined to acknowledge non-reviewable areas or conclusive determinations, doctrines of discretion are the primary tool to award leeway to the executive. In contrast to administrative law, where the German courts neatly distinguish between an area of discretion for factual assessments and the resulting legal consequence, the concept is rather opaque in the area of foreign affairs. The courts openly acknowledge a large area of discretion, especially concerning factual determinations. Concerning legal assessments, the application of a margin of discretion is intensely debated and will be analysed in more detail below.

Contemporary South African law also applies doctrines of discretion, which results in a reduced level of scrutiny, especially in administrative law. Additionally, the topic is intensely discussed in the area of socio-economic rights. In the wake of the *Kaunda* decision, a lower review standard and a resulting area of discretion also migrated into foreign relations law. How far a doctrine of discretion approach may be taking over from other deference mechanisms within South African foreign relations law will be examined in the next chapter.

Finally, this chapter has argued that the different mechanisms can be put on a scale extending from strong forms of deference (procedural or substantial non-reviewability) to less strict forms (doctrines of conclusiveness) to mild forms (doctrines of discretion). Although the distinction is not always clear-cut, the doctrines provide useful markers and terminology for tracing the development of deference in different groups of cases in foreign affairs. This will be the subject of our next chapter.

Chapter 3 – Application of Deference

As the previous chapter explained, the courts in all three jurisdictions developed structurally comparable 'doctrines of deference'. They range from strong forms of deference (procedural or substantive non-reviewability) to less strict forms (doctrines of conclusiveness) to mild forms (doctrines of discretion) and finally to no deference at all (independent 'de novo' review). The lines between these categories are not always clear-cut, and of course, the executive may still win a case even when the court engages in an independent review. Nevertheless, the nature of the respective doctrine applied by the court can serve as a useful marker to assess what level of deference courts give in general to certain kinds of cases at a particular time.

Using the terminology developed in Chapter 2, this chapter will analyse the courts' approach concerning five areas of executive-judicial tension in foreign affairs. The chapter aims to examine whether the courts' jurisprudence in our three jurisdictions developed towards more or less deference. During this examination, the chapter will likewise identify general country-specific problems in the application of deference doctrines within the three countries and, in its last part, comment on their possible solution.

In order to determine whether the three jurisdictions developed towards a greater or lesser deferential approach, it is necessary to create a common point of reference according to which the development is compared. I chose to use areas of general international law[1] as they must be addressed by the foreign relations law of every country. As the potential number of groups of cases is virtually unlimited, a selection is inevitable. Two primary considerations guide the choice made here. First, the thesis aims to shed light primarily on the executive-judicial relationship. I hence chose to include groups of cases that academics and courts have identified in all three jurisdictions as areas of typical tension between the executive and judicial branches.[2] Following the same logic, I decided not to include

1 On the term cf Lassa Oppenheim, *International Law: A Treatise* (7th edn, Longmans, Green and Co 1948) 4 f.

2 Cf e.g. Hans Schneider, *Gerichtsfreie Hoheitsakte: Ein rechtsvergleichender Bericht über die Grenzen richterlicher Nachprüfbarkeit von Hoheitsakten* (Mohr 1951) 47; Frederick

areas that focus rather on the executive-legislative relationship.[3] Secondly, I aimed to include a wide variety of areas of general international law to provide a meaningful cross-selection. The first group of cases will deal with the interpretation of treaties and hence a significant source of international law. Our second subchapter will deal with the recognition of states and the closely related topic of recognition of governments and, thus, the major subjects of international law. The third and fourth subchapters will address state immunity as well as the connected area of foreign official immunity, and thus immunity as one of the basic rules of the international legal order.[4] In the fifth subchapter, we will turn toward the individual as an object (and arguably new subject) of international law and assess the judiciary's level of deference concerning executive decisions in diplomatic protection cases.

Concerning the cases taken into account, it is not the aim of this chapter to cover every decision in the selected areas. Instead, I try to trace the development and application of different deference doctrines over time, focusing on the 'phase shifts' when courts decided to apply a new approach toward judicial review of executive acts. Often this change may be 'evolutionary,' e.g., the courts may start seeking guidance from the executive and then treat it as conclusive over time.[5] As a considerable body of law in the area is made by judges, such developments often occur without a formal statutory or constitutional framework change. However, sometimes the development will be clear-cut, e.g., when new statutory law is enacted.[6] Likewise, this chapter's aim is not to deliver general 'country reports' on every topic. Each subchapter will focus on the respective issue from the perspective of the executive-judicial relationship and only cover other aspects of the topic to

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A Mann, *Foreign Affairs in English Courts* (OUP 1986) 29 ff; John Dugard and others, *Dugard's International Law – A South African Perspective* (5th edn, Juta 2018) 100; Louis Henkin, *Foreign affairs and the United States Constitution* (2nd edn, Clarendon Press 1997) 54 ff.

3 Nevertheless, the role of the legislative branch will play a certain role and is incidentally examined regarding its influence on the executive-judicial relationship, cf as well Chapter 4, I., 3., b).

4 Peter T Stoll, 'State Immunity' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 1.

5 Cf already the warning of Lord Cross of Chelsea: 'what may begin by guidance as to the principles to be applied may end in cases being decided irrespective of any principle in accordance with the view of the Executive as to what is politically expedient' in *Philippine Admiral v Wallem Shipping (Hong Kong) Ltd* [1977] AC 373 (Privy Council) 399; Mann (n 2) 54.

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

the extent necessary to understand the interaction between the courts and the executive.

Concerning the time frame, the United States, as the oldest continuous constitutional system in this study, allows us to consider cases from the 18th century onwards. Germany's many principalities were only unified in 1871, rendering this the starting point of our analysis, but not excluding some remarks on earlier, especially Prussian, law. Concerning South African law, the introduction mentioned that, despite sporadic references to earlier law, the historical analyses will primarily start from 1910 when the Union of South Africa was proclaimed, uniting the former British Colonies and two Boer Republics under British hegemony.[7] The examination will thus necessarily be asymmetrical to a certain extent. However, keeping this in mind, the imbalance should not preclude us from meaningfully tracing and comparing the application of different deference doctrines in the three jurisdictions over time.

I. Tracing deference

1. Treaty interpretation

The first subchapter will shed light on the deference granted to the executive in treaty interpretation cases. In all three legal systems, treaties have to be implemented by domestic law before gaining domestic effect.[8] I will only differentiate between the interpretation of the treaty itself and its domestic implementation act where it has a particular bearing on the analysis.

7 Iain Currie and Johan de Waal, *The new constitutional and administrative law* (Juta 2001) 41.

8 Cf the respective subparagraphs for more detail; exempt from incorporation are of course self-executing treaty provisions; on self-executing provisions cf as well Chapter 4, I., 4., a).

a) United States

aa) Treaties and US constitutional law

Before we analyse the development of deference in treaty cases in the US, the peculiarities of US law warrant a short introduction. The framers of the US Constitution explicitly awarded treaty-making power to the president. By virtue of Article 2 (2) of the US Constitution, the latter may enter into treaties with the 'advice and consent' of two-thirds of the Senate. However, the responsibility for interpreting treaties has not been explicitly regulated and, as we will see, became subject to continuous debate. To complicate things further, since the early days of US jurisprudence, the executive entered into international agreements without the advice and consent of the Senate as 'executive agreements'.[9] This subchapter will only differentiate between the forms of treaty-making where the chosen mode has repercussions concerning interpretation.

bb) Deference in treaty interpretation

(1) Early jurisprudence and 'zero deference'

In the early years of US jurisprudence, the courts showed no special respect for executive interpretations. As Sloss has shown,[10] the courts applied a 'zero deference' model. One of the earliest cases illustrating that point is the *US v Schooner Peggy*.[11] After a series of hostilities between French and US vessels, the President, based on a statute, commissioned ships to capture armed French vessels within the jurisdictional limits of the US or on the high seas.[12] The Schooner Peggy, a French merchant vessel, was subsequently captured by an American ship and their owners demanded her

9 Cf already above, Chapter 1, II., 2., d); Curtis A Bradley, *International law in the U.S. legal system* (3rd edn, OUP 2021) 79 ff.

10 David Sloss, 'Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective' (2006) 62 NYU Annual Survey of American Law 497; cf as well Scott M Sullivan, 'Rethinking Treaty Interpretation' (2008) 86 Texas Law Review 779, 787 ff.

11 *United States v Schooner Peggy* 5 US 103 (1801) (US Supreme Court); Sloss (n 10) 511.

12 Sloss (n 10) 511.

restoration.[13] Until the case reached the Supreme Court, the US and France had entered into the Treaty of Mortefontaine, ending the skirmishes. The treaty provided that any captured property not yet definitely condemned should be restored.[14] The executive argued that the relevant treaty provision would not apply to the Schooner Peggy as the decision of the Circuit Court, which had found the vessel to be a lawful prize, would constitute a final sentence.[15] The Supreme Court disagreed and held that the schooner had not been definitely condemned as the case was already on appeal when the convention was signed.[16] Nowhere in the case is a special role for the executive regarding the interpretation of the treaty mentioned.

This approach further guided the courts in the *Amiable Isabella*,[17] another case concerning prize law. Here the question arose whether a captured ship would fall under the American-Spanish Friendship Treaty of 1795 ('Pinckney's Treaty'), which would render it immune from seizure. The government argued that it did not,[18] and the majority of the Supreme Court agreed, holding the relevant provision inapplicable as a particular form was never annexed to the treaty, which would have specified how passports for immune vessels would be issued.[19] However, the judges reached the decision by independent assessment.[20] Even more explicit was Justice Johnson, agreeing with the majority on interpretation in his dissenting judgment:

> *[…] considerations of policy, or the views of the administration, are wholly out of the question in this Court. What is the just construction of the treaty is the only question here. And whether it chime in with the views, of the Government or not, this individual is entitled to the benefit of that construction.*[21]

In the first fifty years of its existence, the Supreme Court never awarded any special weight to executive assessments in treaty interpretation questions,[22] the only exception being boundary issues and questions of treaty termina-

13 *United States v Schooner Peggy* (n 11) 103.
14 Ibid 107 ff.
15 *United States v Schooner Peggy* (n 11) 108; Sloss (n 10) 512.
16 *United States v Schooner Peggy* (n 11) 108 ff.
17 *The Amiable Isabella* 19 US 1 (1821) (US Supreme Court); Sloss (n 10) 505 ff.
18 *The Amiable Isabella* (n 17) 36 ff.
19 Ibid 65 ff.
20 Ibid 71.
21 *The Amiable Isabella* (n 17) 92 [my omission]; Sloss (n 10) 505.
22 Sloss (n 10) 505.

tion.[23] Instead, the courts independently construed treaties, often referring to respected scholars like de Vattel or Grotius.[24]

(2) Early 20th century and the birth of deference in treaty interpretation

The first case indicating the departure from an independent assessment is *In re Ross*.[25] Ross was a British citizen and served as a sailor on an American vessel where he killed a fellow seaman while the ship was docked in the harbour of Yokohama in Japan.[26] He was tried by a US consular court in Japan established under an American-Japanese treaty.[27] Ross challenged his conviction contending that the relevant treaty provision granting jurisdiction to the consular court was revoked and not incorporated in a new treaty.[28] Furthermore, he claimed that the provision only allowed trying 'Americans,' not British subjects.[29] In addressing both questions, the court analysed the executive position and stated first that '[t]he President and the department have always construed the treaty of 1858 as carrying with it and incorporating therein the fourth article […] of the convention of 1857'[30] and thus found jurisdiction for the consular court. Moreover, concerning the question of whether 'Americans' would include citizens of other nations serving on US vessels, the court found against Ross and was 'satisfied

23 In this direction as well Franz-Christoph Zeitler, 'Judicial Review und Judicial Restraint gegenüber der auswärtigen Gewalt' (1976) 25 JöR 621, 628; often the case *Foster v Neilsen*, cf as well Chapter 1, II., 2., c), is cited as the beginning of deference to the executive in treaty cases, e.g. by David J Bederman, 'Revivalist Canons and Treaty Interpretation' (1994) 41 UCLA Law Review 954, 961, the case however falls in the category of boundary disputes, moreover, Justice Marshall explicitly deferred not only to the executive but also legislative position, cf Sloss (n 10) 517 ff; termination cases are considered non-justiciable until today, cf *Goldwater v Carter* and already *Ware v Hylton* examined in Chapter 1, II., 2., c).

24 Paul R Dubinsky, 'Competing Models for Treaty Interpretation – Treaty as Contract, Treaty as Statute, Treaty as Delegation' in Brad R Roth, Gregory H Fox and Paul R Dubinsky (eds), *Supreme law of the land?: Debating the contemporary effects of treaties within the United States legal system* (CUP 2017) 92, 100 f.

25 *In re Ross* 140 US 453 (1891) (US Supreme Court); Robert Chesney, 'Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations' (2007) 92 Iowa Law Review 1723, 1741 ff.

26 *In re Ross* (n 25) 454 ff.

27 Ibid.

28 Ibid 465 ff.

29 Ibid 472 ff.

30 *In re Ross* (n 25) 468 [my adjustments and omissions]; Chesney (n 25) 1742.

that the true rule of construction in the present case was adopted by the Department of State in the correspondence with the English government'.[31] Although the court did not expressly defer to the executive's view, the case showed that it placed great emphasis on the executive's position.[32]

The actual diversion from the former approach came in *Charlton v Kelly*[33] in 1913.[34] Porter Charlton, an American citizen, had been charged with having murdered his wife in Italy.[35] He was arrested in the United States, and the Italian government demanded his extradition under an American-Italian extradition treaty where the countries agreed to 'deliver up all persons, who, having been convicted of or charged with any of the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum in the other [...]'.[36] Charlton contended that 'persons' would only refer to citizens of the state seeking extradition and thus not include him as an American citizen. The court found against him and strongly relied on the executive position:

> *[T]he United States has always construed its obligation as embracing its citizens is illustrated by the action of the executive branch of the Government in this very instance. A construction of a treaty by the political department of the Government,* ***while not conclusive*** *upon a court called upon to construe such a treaty in a matter involving personal rights, is* ***nevertheless of much weight****.*[37]

This was the first time the court referred to the 'weight' standard, remarkably without citing any precedent.[38] As has been shown by Chesney,[39] courts subsequently applied the *Ross* and *Charlton* cases, but they developed as independent lines. The *Ross* line relies on the post-ratification practice of the executive without explicitly deferring, whereas the *Charlton* line expressly awards 'weight' to executive assessments.[40] The Supreme Court

31 *In re Ross* (n 25) 479.
32 Chesney (n 25) 1742.
33 *Charlton v Kelly* 229 US 447 (1913) (US Supreme Court); cf as well Chesney (n 25) 1742.
34 Chesney (n 25) 1741 ff; Joshua Weiss, 'Defining Executive Deference in Treaty Interpretation Cases' (2011) 79 George Washington Law Review 1592, 1594.
35 *Charlton v Kelly* (n 33) 471.
36 Ibid 465 [my omission].
37 Ibid 468 [my emphasis].
38 Chesney (n 25) 1742; Weiss (n 34) 1594.
39 Chesney (n 25).
40 Ibid 1744.

finally brought together the two approaches in 1933[41] in *Factor v Laubenheimer*.[42] The case concerned the issue of whether an individual could be deported to England according to an extradition treaty although the offence was not punishable as a crime in the state where he was arrested.[43] Finding against the appellant, the court referred to the executive's view and cited together *Ross* and *Charlton*,[44] thus blending the lines and creating the current form of deference.[45] The case is part of the broader trend in the early 20th century,[46] strengthening the executive in foreign affairs, followed by decisions like *Curtiss Wright*[47] and *Belmont*,[48] in which the Supreme Court gave its approval to the practice of 'sole' executive agreements which entirely lack legislative support.[49]

The decision in *Factor* created a line of cases applying a doctrine of discretion to the executive's determinations. Conversely, another line developed where the executive assessment was rejected or the doctrine's application was limited. One of the first of these cases concerned Marie Elg,[50] who was born in the United States and taken as a minor to Sweden, the native country of her parents.[51] When reaching maturity, Elg returned to the US but was treated as an alien, with the government purporting she had lost her citizenship under a Swedish-American naturalization treaty.[52] One provision of the treaty stipulated such a loss if a citizen resided within Sweden for more than five years and was during that time naturalized.[53] Contrary to the executive, the court held that the provision would only cover voluntary residence and thus would be inapplicable to minors like

41 Chesney (n 25) 1744; Michael P van Alstine, 'Treaties in the Supreme Court, 1901–1945' in David Sloss, Michael D Ramsey and William S Dodge (eds), *International law in the U.S. Supreme Court: Continuity and Change* (CUP 2011) 191, 217.
42 *Factor v Laubenheimer* 290 US 276 (1933) (US Supreme Court).
43 *Factor v Laubenheimer* (n 42) 286 f.
44 Ibid 295.
45 Chesney (n 25) 1744.
46 Cf Chapter 1, II., 2., d); G Edward White, 'The Transformation of the Constitutional Regime of Foreign Relations' (1999) 85 Virginia Law Review 1; Ganesh Sitaraman and Ingrid Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 Harvard Law Review 1897, 1911 ff.
47 *United States v Curtiss-Wright Export Corp* 299 US 304 (1936) (US Supreme Court).
48 *United States v Belmont* 301 US 324 (1937) (US Supreme Court).
49 Chesney (n 25) 1744 ff; Bradley (n 9) 92 ff.
50 *Perkins v Elg* 307 US 325 (1939) (US Supreme Court); cf as well Chesney (n 25) 1745.
51 *Perkins v Elg* (n 50) 325 ff.
52 Ibid 335 ff.
53 Ibid 335 fn 12.

Elg.[54] The court emphasized that the government had applied this latter construction in similar cases with comparable treaty provisions, and the executive's new interpretation was therefore inconsistent with former practice.[55]

(3) The situation under contemporary US law

(a) Two conflicting approaches

Judges subsequently oscillated between the strings of case law, following the strict deference approach in cases like[56] *Kolovrat*[57] and *Somitono*[58] and arguably narrowing the doctrine in cases like[59] *El Al*.[60] The 'weight' standard also found its way in the influential Second and Third Restatements[61] published by the American Law Institute, but the Supreme Court rarely referred to them concerning treaty interpretation.[62] Nevertheless, since, at latest, the publication of the Second Restatement, case law indicates that in a majority of cases, the judiciary has deferred, as has been shown in an analysis of the Supreme Court decisions by Bederman.[63] During the Warren court (1953–69), the executive view prevailed in five of seven cases, during the Burger court (1969–86), in five of six cases, and during the early Rehnquist area (1986–93), in 9 of 10 cases.[64] Chesney followed this analysis[65] and showed a similar trend up to 2005.[66]

54 Ibid 337 ff.
55 Ibid 325.
56 Chesney (n 25) 1746 f; van Alstine (n 41) fn 299.
57 *Kolovrat v Oregon* 366 US 187 (1961) (US Supreme Court) 194.
58 *Sumitomo Shoji America, Inc v Avagliano* 457 US 176 (1982) (US Supreme Court).
59 Chesney (n 25) 1742 ff; Weiss (n 34) 1594 f.
60 *El Al Israel Airlines, Ltd v Tseng* 525 US 155 (1999) (US Supreme Court).
61 American Law Institute, *Restatement of the law, third: The foreign relations law of the United States, §§ 1 – 488* (American Law Institute Pub 1987) § 326.
62 Dubinsky (n 24) 121 ff.
63 Bederman (n 23).
64 Ibid 1015 and fn 422.
65 Chesney (n 25).
66 Ibid 1754 ff.

(b) *Chevron* deference in treaty interpretation

With the Supreme Court decision in *Immigration and Naturalization Services (INS) v Cardoza-Fonseca*,[67] a new line of argument arrived on the scene. The Supreme Court in 1984 had handed down its famous *Chevron* decision[68] concerning judicial review of administrative agency determinations. This reasoning now migrated into treaty interpretation questions. In *INS*,[69] the question arose as to what degree of likely persecution a refugee has to show to avoid deportation, especially whether the strict 'more likely than not' test under the Immigration and Nationality Act would equal the 'well-founded fear' test under the US Refugee Act (which implemented the Protocol Relating to the Status of Refugees[70]). The court found for the applicant and decided, contrary to the INS's construction, that the Refugee Act threshold would be lower, referring to the first limb of the *Chevron* test and that Congress clearly intended a different meaning.[71] Justice Stevens, the inventor of *Chevron*, delivered the court's opinion without even acknowledging the specific character of the Refugee Act as an implementing statute.[72] The application of the *Chevron* approach marked a substantial deviation from the former 'weight' approaches as it suggests a delegation of interpretative authority from Congress to the executive. This implies, inter alia, that contrary to decisions like *Elg*, the consistency of the executive's interpretations is of no relevance.[73] Since *INS*, courts have applied the reasoning in several other decisions.[74] Moreover, the application of *Chevron* in treaty cases found academic support.[75] As we have seen,[76] especially Bradley[77] advocated for using *Chevron* in foreign affairs.[78]

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67 *INS v Cardoza-Fonseca* 480 US 421 (US Supreme Court) (1987); Dubinsky (n 24) 134.
68 Cf above, Chapter 2, IV., 1.
69 *INS v Cardoza-Fonseca* (n 67) 1208 ff.
70 Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
71 Ibid 445 ff.
72 Ibid 134 f.
73 Harlan G Cohen, 'The Death of Deference and the domestication of treaty law' (2015) BYU Law Review 1473; Dubinsky (n 24) 138.
74 Dubinsky (n 24) 134 ff.
75 Ibid 137.
76 Above Chapter 2, IV., 1.
77 Curtis A Bradley, 'Chevron Deference and Foreign Affairs' (2000) 86 Virginia Law Review 649.
78 Dubinsky (n 24) 137.

Applying the principle of *Chevron*, he argued[79] that the treaty makers implied delegating interpretation to the executive because of its expertise in foreign affairs.[80] Posner and Sunstein[81] took this further, arguing that the executive interpretation should prevail over other foreign affairs canons like Charming Betsy.[82] Although not consistently applied by the courts, the *Chevron* approach marked a clear swing towards even more executive influence. The degree of deference, although still falling in the category of a doctrine of discretion, is considerably higher[83] and pushes the approach toward conclusiveness.

(c) *Sanchez-Llamas* and *Hamdan*

With the rise of *Chevron* deference and the events of 9/11, the signs were pointing towards even stronger deference.[84] However, a more nuanced picture evolved from two quite conflicting decisions handed down within two days by the Supreme Court.[85]

The first one is the majority opinion in *Sanchez-Llamas*.[86] Here the court had to deal with two complaints by petitioners who had not been informed of their right under Article 36 of the Vienna Convention on Consular Relations[87] (VCCR) to have the consulates of their home states informed of their arrest.[88] One of the main problems concerned whether, in a case where the detained was not correctly informed and failed to claim the violation during the trial, a state may treat their claim as forfeited in

79 Bradley, 'Chevron Deference' (n 77) 702.
80 Dubinsky (n 24) 138.
81 Eric A Posner and Cass R Sunstein, 'Chevronizing Foreign Relations Law' (2006) 116 Yale Law Journal 1170.
82 Charming Betsy is calling for statutory interpretation in accordance with international, cf Posner and Sunstein (n 81) 1207; on this proposal cf Sitaraman and Wuerth (n 46) 1962; Dubinsky (n 24) 138.
83 Robert Knowles, 'American Hegemony and the Foreign Affairs Constitution' (2009) 41 Arizona State Law Journal 87, 104; cf the classification by Chesney (n 25) 1770.
84 Sitaraman and Wuerth (n 46) 1921; Dubinsky (n 24) 134.
85 Cf as well Chesney (n 25) 1726 ff; Cohen (n 73) 1474 ff.
86 *Sanchez-Llamas v Oregon* 548 US 331 (2006) (US Supreme Court).
87 Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.
88 *Sanchez-Llamas v Oregon* (n 86) 340 ff.

post-conviction proceedings.[89] The ICJ, in its *La Grand*[90] and *Avena*[91] decisions, had held that procedural default rules would run counter to Article 36 VCCR. It reasoned that it was primarily the authorities' fault for not notifying the defendants of their right that led to the procedural forfeiture.[92] The Supreme Court decided not to apply the construction of the ICJ and instead followed the US government's opinion that the ICJ's decision was not binding.[93] It cited the strong deference line of *Kolovrat* and found that the claim was procedurally barred.[94] In contrast, the dissenters[95] applied the weak deference line of *Elg*[96] and held that the plaintiffs may invoke Article 36 VCCR and that procedural forfeiture would violate these rights in certain cases.[97]

One day later, the court handed down its decision in *Hamdan v Rumsfeld*.[98] The case can be seen as part of a whole line of cases relating to the War on Terror and Guantanamo Bay.[99] In *Rasul v Bush*[100] the Supreme Court had rejected arguments that habeas corpus claims of foreign Guantanamo detainees would be unreviewable. In *Hamdi v Rumsfeld*,[101] mentioned in Chapter 2,[102] the court refused to be bound by factual assessments of the executive, which may classify an individual as an enemy combatant. *Hamdan* is finally directly concerned with the question of treaty interpretation. It concerned Salim Ahmed Hamdan who had been one of Osama bin Laden's former bodyguards and drivers. He was captured in 2001 during the Afghanistan War and had subsequently been detained in Guantanamo Bay.[103] The government sought to try him in front of an extraordinary

89 Ibid 337.
90 *LaGrand (Germany v United States of America) Judgment* ICJ Rep 2001, 466 (ICJ) 497.
91 *Avena and Other Mexican Nationals (Mexico v United States of America) Judgment* ICJ Rep 2004, 12 (ICJ) 57.
92 *Sanchez-Llamas v Oregon* (n 86) 352 f.
93 Ibid 355 f.
94 Ibid 355 ff.
95 Ibid 365 ff.
96 Ibid 378.
97 Ibid 365 ff.
98 *Hamdan v Rumsfeld* 548 US 557 (2006) (US Supreme Court).
99 Sitaraman and Wuerth (n 46) 1921 ff; Knowles (n 83) 106 ff.
100 *Rasul v Bush* 542 US 466 (2004) (US Supreme Court).
101 *Hamdi v Rumsfeld* 542 US 507 (2004) (US Supreme Court).
102 Chapter 2, III., 1.
103 *Hamdan v Rumsfeld* (n 98) 566 ff; for an analysis of this case cf as well Sloss (n 10) 499 ff; and Chesney (n 25) 1729.

military commission.[104] The Supreme Court stopped the proceedings and found the trial to be unlawful.[105] One of the main points concerned whether Hamdan would be entitled to the protection offered by common Article 3 of the Geneva Conventions. The article applies in non-international armed conflicts and, inter alia, prohibits trial in front of non-regular courts and non-regular procedures. The executive stated that the war with Al-Qaeda could not be classified as non-international, and thus the article would be inapplicable.[106] In its respondent's brief, the government held that 'the president's determination is dispositive or, at a minimum, entitled to great weight'[107] and thus even tried to invoke a conclusive determination.[108] The Supreme Court disagreed and found that the established military commission neither constituted a regular court (like ordinary courts-martial) nor did the rules applied constitute a regular procedure.[109] It later continued its strict habeas corpus review in *Boumediene v Bush*.[110] The plurality opinion in *Hamdan* reached a conclusion without referring to any particular deference doctrine at all. In stark contrast, the dissenting Justices Thomas and Scalia applied the strong deference line.[111] They stated that where 'an ambiguous treaty provision ("not of an international character") is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation'.[112]

Sanchez-Llamas and *Hamdan* show that the court is still oscillating between the two deference lines. Also interesting is the court's reluctance in both decisions to continue developing the *Chevron* approach.[113]

104 *Hamdan v Rumsfeld* (n 98) 567 ff.
105 Ibid 566 ff.
106 Ibid 628 ff.
107 *Hamdan v Rumsfeld – Brief for Respondents,* available at <https://www.justice.gov/osg/brief/hamdan-v-rumsfeld-brief-merits> 48.
108 Sloss (n 10) 501 f.
109 *Hamdan v Rumsfeld* (n 98) 628 ff, 651 ff.
110 *Boumediene v Bush* 553 US 723 (2008) (US Supreme Court).
111 *Hamdan v Rumsfeld* (n 98) 718.
112 Ibid 719; cf Sloss (n 10) 504.
113 Although *Chevron* is alluded to, but not applied, in the Hamdan Dissent, *Hamdan v Rumsfeld* (n 98) 706; Dubinsky (n 24) 142.

(d) Recent developments in treaty interpretation

Where do these decisions lead us concerning the court's future approach? Some commentators see the decision in *Hamdan* as a watershed or at least as a 'speed bump' in contrast to the earlier *Chevron* trend.[114] As has been shown by Cohen,[115] the Robert's Court from 2005 to 2015 showed no deference to the executive determination in at least four of the ten treaty interpretation cases (namely in *Hamdan*,[116] *Permanent Mission of India*,[117] *Bond II*,[118] and *BG Group*[119]). Compared to the high level of deference exercised before, this seems to be a trend pushing back the former strong *Chevron* inclinations.[120] In the same vein, Sitaraman and Wuerth argue that the Robert's Court contributed to the weakening of executive influence in foreign affairs cases.[121] Further pointing in this direction is the Fourth Restatement, published in 2018, which dropped the former independent paragraph on presidential authority concerning treaty interpretation[122] and now only refers to the topic as part of the general paragraph dealing with treaty interpretation.[123] It also added the caveat that courts 'ordinarily' give great weight to the executive interpretation.[124] It remains to be seen whether the Supreme Court, with now three justices appointed by former President Trump and one by President Biden will continue down this road.[125]

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114 Dubinsky (n 24) 142 f.
115 Cohen (n 73) 1475 ff.
116 *Hamdan v Rumsfeld* (n 98).
117 *Permanent Mission of India to the UN v City of New York* 551 US 193 (2007) (US Supreme Court).
118 *Bond v United States (Bond II)* 572 US 844 (2014) (US Supreme Court).
119 *BG Group plc v Republic of Argentina* 572 US 25 (2014) (US Supreme Court).
120 In the same direction Sloss (n 10); Dubinsky (n 24) 142 f.
121 Sitaraman and Wuerth (n 46) 1924 ff.
122 American Law Institute (n 61) § 326.
123 American Law Institute, *Restatement of the Law Fourth – The Foreign Relations Law of the United States – Selected Topics in Treaties, Jurisdiction and Sovereign Immunity* (American Law Institute Pub 2018) § 306 (6) Comment g and Reporters notes 10.
124 American Law Institute, *Fourth* (n 123) § 306 (6); in contrast American Law Institute, *Third* (n 61) § 326 (2) 'will give great weight'; Sean D Murphy and Edward T Swaine, *The law of US foreign relations* (OUP 2023) 498.
125 In *GE Energy Power Conversion Fr SAS, Corp v Outokumpu Stainless USA, LLC* 140 S Ct 1637 (2020) (US Supreme Court) the court with two new justices appointed by President Trump (unanimously) decided not to touch the issue: 'We have never provided a full explanation of the basis for our practice of giving weight to the Executive's interpretation of a treaty. Nor have we delineated the limitations of this practice, if any. But we need not resolve these issues today.'; Jean Galbraith,

b) Germany

aa) Situation in former German legal orders

In Germany, one of the first traces of the approach towards executive authority in treaty interpretation is enshrined in the mentioned[126] 'Royal Prussian Decree Concerning the Interpretation of Treaties'[127] from 1823. According to the decree, the courts are bound to apply assessments of the Foreign Office regarding the validity, applicability, and interpretation of a treaty.[128] As we have seen, scholars heavily criticized this approach,[129] and in 1843, it was changed to a mere duty to ask for the opinion of the Foreign Office.[130] The trend towards judicial deference, which developed at that time in the United Kingdom,[131] thus never reached the same depths and level of entrenchment in the German tradition. The relatively weak level of deference in treaty questions continued after the founding of a German nation-state. Under previous German constitutional law, no procedural way existed to review an international treaty by challenging its implementing legislation.[132] Nevertheless, questions of treaty interpretation incidentally often became a matter for the courts to decide.

Under the Bismarck Constitution, judges rarely showed special respect for the executive.[133] For example, the Supreme Court of the Reich (*Reich-*

'Derivative Foreign Relations Law' (2023) 91 George Washington Law Review 1449, 1461 predicting executive friendly decisions.

126 Cf above, Chapter 2, III., 2.

127 Königlich-preußische Verordnung wegen streitig gewordener Auslegung von Staatsverträgen, Gesetzessammlung für die königlich preußischen Staaten 1823, 19.

128 Wilfried M Bolewski, *Zur Bindung deutscher Gerichte an Äußerungen und Maßnahmen ihrer Regierung auf völkerrechtlicher Ebene: Ein Beitrag zur Verrechtlichung der Außenpolitik* (Marburg 1971) 50.

129 Klüber, Johann L, *Die Selbstständigkeit des Richteramtes und die Unabhängigkeit seines Urtheils im Rechtsprechen: im Verhältniß zu einer preussischen Verordnung vom 25. Jänner 1823* (Andreä 1832); Bolewski (n 128) 53.

130 § 1 Verordnung vom 24. November 1843; Bolewski (n 128) 53.

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

132 Wilhelm Grewe, 'Auswärtige Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts Band III* (CF Müller 1988) 964; Bernhard Kempen, 'Art. 59' in Peter M Huber and Andreas Voßkuhle (eds), *Mangoldt/Klein/Starck: Kommentar* (7th edn, CH Beck 2018) mn 98.

133 For several cases with partial English translation see Ernst Schmitz and others, *Fontes Juris Gentium – Series A – Sectio II – Tomus 1 (Entscheidungen des Reichsgerichts in völkerrechtlichen Fragen)* (Carl Heymanns 1931) 150 ff.

sgericht) decided independently on the interpretation of a customs treaty[134] and a German British-Extradition treaty.[135] It also decided independently that the latter treaty was terminated with the beginning of the war.[136] Likewise, the German Empire Military Court (*Reichsmilitärgericht*) decided in several cases on the meaning of different provisions of the Hague Convention with Respect to the Laws and Customs of War on Land[137] without asking for executive guidance.[138] In one instance concerning Article 6 of the Hague Convention, which prohibits the use of labour of POW's for tasks related to military operations, the court heavily relied on an executive order of the war ministry.[139] It found that the provision only prohibits tasks directly related to military operations, and thus prisoners may be obliged to deliver coal and other supplies to a factory producing grenades. However, even in wartime, the court did not end its examination with the executive's view but engaged in a thorough interpretation of the provision, taking into account the *travaux préparatoires*.[140] Triepel, who famously conceptualized the idea of dualism,[141] even remarked that the legal position of diplomats 'does not mean more to him [the judge] than the deliberations of a judicial scholar'.[142]

134 *Judgment from 22 May 1911* RGZ 45, 30 (Supreme Court of the Reich) 36; Bolewski (n 128) 74.

135 Albeit mentioning the executive position which is in line with the opinion of the court *Judgment from 22 September 1885* RGSt 12, 381 (Supreme Court of the Reich); Bolewski (n 128) 74.

136 *Decision from 23 August 1916* RGSt 50, 141 (Supreme Court of the Reich); Bolewski (n 128) 74.

137 Convention with respect to the laws and customs of war on land (Hague II) (29 July 1899).

138 *Judgment from 24 October 1917* RMilG 21, 278 (German Empire Military Court); *Judgment from 7 November 1917* RMilG 21, 283 (German Empire Military Court); *Decision from 9 February 1916* RMilG 20, 110 (German Empire Military Court) 115; *Judgment from 14 October 1916* RMilG 21, 85 (German Empire Military Court); Bolewski (n 128) 74 fn 3.

139 *Judgment from 30 December 1915* RMilG 20, 68 (German Empire Military Court); Bolewski (n 128) 75.

140 *Judgment from 30 December 1915* (n 139) 70 ff.

141 Cf already Chapter 1, II., 3., b).

142 Heinrich Triepel, *Völkerrecht und Landesrecht* (CL Hirschfeld 1899) 443 'die Rechtsansicht der Diplomatie bedeutet ihm nicht mehr als etwa die Ausführungen eines juristischen Schriftstellers' [my translation]; cf Bolewski (n 128) 61 f.

The situation remained the same under the post-war Weimar Constitution.[143] For example, the Supreme Court of the Reich engaged on its own in an interpretation of the Versailles Treaty.[144] It also determined whether German-Russian Trade agreements[145] and the Treaty of Brest-Litovsk[146] remained in force.[147] Thus, in contrast to the United States, the German courts gave no special weight to executive decisions, even in questions of treaty termination. The Nazi period, of course, saw a shift towards executive power. The judges could still operate formally independently, but their actions were subject to the will of the *Führer*.[148] Foreign affairs acts of the *Führer* were not justiciable.[149]

bb) Situation under the Basic Law

(1) Early decisions concerning treaties – the Constitutional Court getting involved in foreign affairs

Except for the Nazi period, Germany had no strong tradition concerning deference to the executive in treaty interpretation. Nevertheless, by the end of the Second World War, many scholars believed that the availability of constitutional adjudication procedures to challenge a treaty was limited and treaties (and their implementing legislation) thus largely non-reviewable.[150] If this approach had been fortified, it would also have meant that the Constitutional Court would have relatively few opportunities to comment on the interpretation of international treaties.

143 For several cases with partial English translation see Schmitz and others (n 133) 140 ff.

144 *Judgment from 1 July 1926* RGZ 114, 188 (Supreme Court of the Reich); *Judgment from 21 January 1931* RGSt 63, 395 (Supreme Court of the Reich); Bolewski (n 128) 74 fn 1.

145 *Judgment from 23 May 1925* RGZ 111, 41 (Supreme Court of the Reich) 41 ff.

146 *Judgment from 20 September 1922* RGZ 105, 169 (Supreme Court of the Reich) 170 ff; *Judgment from 23 May 1925* (n 145) 43.

147 Bolewski (n 128) 74 fn 4.

148 Ibid 93.

149 Cf however Hans Schneider (n 2) 15 pointing out that the courts did not completely accept the general doctrine of 'acts of government', however, referring mainly to questions of damages; Bolewski (n 128) 93.

150 Above Chapter 2, II., 2.

The first test of how the newly founded Constitutional Court would treat international treaties came about in a case regarding the 'Petersberg Agreement'[151] between the West German government and the occupying forces of the Allies. The agreement extended West Germany's sovereignty and entailed essential steps toward its western integration. As parliament was not involved, the opposition Social Democrats challenged the agreement[152] in front of the Constitutional Court by using *Organstreit* proceedings[153] and by claiming a violation of Article 59 of the Basic Law. The article contains the right of the legislature[154] to vote on treaties that regulate 'political relations'. The Constitutional Court dismissed the claim applying a very narrow reading of Article 59 of the Basic Law.[155] Noteworthy, however, is that the Constitutional Court dealt with the complaint as if it were an ordinary case related to domestic issues. It did not decide to limit the availability of the constitutional *Organstreit* procedure to the domestic sphere or to apply a non-reviewability doctrine. The court followed the same approach in cases brought by the opposition relating to a German-French trade agreement[156] and an agreement regulating the joint German-French administration of the Rhine port of Kehl on the German-French border.[157] In engaging in these kinds of conflicts, the Constitutional Court, in contrast to the US Supreme Court, laid the foundation to becoming a player in foreign affairs cases.[158]

151 *Judgment from 29 July 1952* (*Petersberger Abkommen)* BVerfGE 1, 351 (German Federal Constitutional Court).

152 The suit was explicitly aimed against the agreement itself, the court interpreted it as requesting a determination concerning its domestic applicability, cf *Judgment from 29 July 1952* (*Petersberger Abkommen)* (n 151) 371.

153 Cf above, Chapter 2, I., 2.

154 More specific the parliament (*Bundestag*).

155 Chapter 2, I., 2. and as well below Chapter 4, I., 3., b), aa).

156 *Judgment from 29 July 1952* (*Deutsch-Französisches Wirtschaftsabkommen)* BVerfGE 1, 372 (German Federal Constitutional Court).

157 *Judgment from 30 June 1953 (Kehler Hafen)* BVerfGE 2, 347 (German Federal Constitutional Court).

158 Cf as well below, Chapter 4, I., 3., c), aa).

(2) The *Saarstatut* decision and the Washington Agreement – widening the scope of review

The Constitutional Court's early decisions involving foreign affairs implied its readiness to engage in foreign affairs cases. This approach came to a real test in the first leading foreign affairs judgment concerning the *Saarstatut* case.[159] The case laid down many themes that would shape the court's reasoning in foreign affairs. It concerned a treaty between Germany and France to put the Saar region, an area at Germany's western frontier with historical ties to Germany and France, under special administration until both parties reached a final agreement on its status. Before the agreement, France, as an occupying power, had used its influence and turned the Saar area into an autonomous region with close ties to the French Republic.[160] Thus, the treaty placing the Saar area under special administration effectively reduced France's influence. However, several members of the Bundestag challenged the domestic implementation of the treaty-making by using the 'abstract judicial review procedure,'[161] claiming that the treaty violated provisions of the Basic Law which call for the German nation's unity.[162]

The first question for the Constitutional Court was again if such a challenge of a treaty – by attacking its implementing legislation – was justiciable. Following a broad scholarly opinion at the time, the government held the view that as a 'government act' in the area of foreign affairs, the implementing statute would not be amenable to an abstract judicial review procedure.[163] Notwithstanding, the Constitutional Court established that statutes implementing treaties (and thus the treaty's content as such) are subject to constitutional review.[164] This meant the beginning of the end of the doctrine of non-reviewability in Germany. On the other hand, the Constitutional Court also used the case to develop doctrines to limit its review of international treaties and hence grant leeway to the executive.

159 *Judgment from 4 May 1955 (Saarstatut)* BVerfGE 4, 157 (German Federal Constitutional Court).
160 Ibid 171.
161 Cf above, Chapter 2, I., 2.
162 *Judgment from 4 May 1955 (Saarstatut)* (n 159) 164 f.
163 Ibid 161.
164 Ibid 162 f.

It established the 'interpretation in accordance with the Basic Law'.[165] In general, the Constitutional Court will decide on its own on the meaning of a treaty[166] but presumes that the government does not want to enter into an international treaty by violating the Basic Law. If the wording is open to interpretation and more than one meaning appears possible, the meaning complying with the constitution will be applied.[167] Although it is up to the court to determine the understanding of a treaty, the approach ultimately favours the executive, as the text it has negotiated on the international plane will typically prevail.[168] In the *Saarstatut* case, the Constitutional Court went even further and developed the 'approaching the Basic Law doctrine' ('Annäherungstheorie'). Even if a treaty may not (entirely) adhere to the demands of the Basic Law, the court will not deem it unconstitutional if it does not infringe key constitutional provisions, only governs a transitional period and is directed in its overall tendency to achieve full compliance with the constitution.[169] It was within the government's broad discretion to determine if international negotiations lead to a maximum approximation of the Basic Law's demands.[170] Applying these doctrines, the court found no violation of the Basic Law in the *Saarstatut* case.

In the aftermath of the decision, scholars have tried to refine the 'approaching the Basic Law doctrine'.[171] Some authors called for a revival of the concept, applying it outside the historical context of occupation issues.[172] However, the Constitutional Court refrained from further devel-

165 Ibid 168 ff; Henning Schwarz, 'Die verfassungsgerichtliche Kontrolle der Außen- und Sicherheitspolitik' (Duncker & Humblot 1995) 150 ff; Volker Röben, *Außenverfassungsrecht: Eine Untersuchung zur auswärtigen Gewalt des offenen Staates* (Mohr Siebeck 2007) 207.

166 Cf e.g. *Decision from 7 July 1975 (Eastern Treaties Case (Ostverträge))* BVerfGE 40, 141 (German Federal Constitutional Court) 167.

167 *Judgment from 31 July 1972 (Grundlagenvertrag)* BVerfGE 36, 1 (German Federal Constitutional Court) 14; *Judgment from 4 May 1955 (Saarstatut)* (n 159) 168.

168 In this direction Klaus Stern, 'Außenpolitischer Gestaltungsspielraum und verfassungsgerichtliche Kontrolle' (1994) 8 NWVBl 241, 249.

169 *Judgment from 4 May 1955 (Saarstatut)* (n 159) 170.

170 Ibid 169, 178.

171 Franz-Christoph Zeitler, 'Verfassungsgericht und völkerrechtlicher Vertrag' (Duncker & Humblot 1974) 267 ff.

172 Christoph Engel, *Völkerrecht als Tatbestandsmerkmal deutscher Normen* (Duncker & Humblot 1989) 176 fn 746 with further references; Röben (n 165) 208.

oping this line of jurisprudence[173] so that it can and should[174] be seen as confined to the exceptional circumstances of the post-war era. What remained from the *Saarstatut* decision was the decision for broad reviewability while at the same time offering margins of discretion to the executive.

Having already allowed the challenge of treaties by the *Organstreit* procedure and the abstract judicial review procedure, in the wake of the *Saarstatut* decision, the Constitutional Court finally allowed individuals to challenge treaties in the *Washingtoner Abkommen* case.[175] After the Second World War, West Germany and Switzerland had entered into a treaty stipulating that German citizens whose assets in Switzerland had been frozen during the war had to make payments to take back control of their property. The German owner of a house in Switzerland filed a complaint, and again the government insisted that an 'implementing statute would be a non-justiciable act of government in the field of foreign affairs'.[176] In line with the *Saarstatut* case, the Constitutional Court held that implementing statutes (and with them the treaty itself) enjoy no special status concerning the availability of judicial review and allowed the complaint.[177] However, it found no violation of property rights by the agreement.

(3) Fundamental Relations Treaty and *Hess* case – more leeway for the executive?

The Constitutional Court further refined the leeway for the executive in the *Fundamental Relations Treaty* case,[178] which concerned an agreement between West Germany and the GDR in 1972 as part of the 'new eastern policy' (*neue Ostpolitik*) of Chancellor Willy Brandt. According to the agreement, West Germany acknowledged the sovereignty of the GDR but

173 Nettesheim, Martin, 'Verfassungsbindung der Auswärtigen Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts, Band XI* (3rd edn, CF Müller 2013) 577.

174 Nettesheim (n 173) 577; Ulrich Fastenrath and Thomas Groh, 'Art. 59' in Karl H Friauf and Wolfram Höfling (eds), *Berliner Kommentar zum Grundgesetz* (Erich Schmidt Verlag 2018) mn 120.

175 *Decision from 21 March 1957 (Washingtoner Abkommen)* BVerfGE 6, 290 (German Federal Constitutional Court).

176 Ibid 294.

177 Ibid 294 f.

178 *Judgment from 31 July 1972 Grundlagenvertrag* (n 167).

without formally recognizing it as a state. The government of the federal state of Bavaria challenged the treaty as violating the provisions of the Basic Law calling for unification.[179] The court reiterated its statement made in the *Saarstatut* case concerning the interpretation 'in accordance with the Basic Law'.[180] It continued to explain that when examining international treaties, it has to be kept in mind that the constitutional provisions regulating foreign affairs award an area of discretion[181] (*Spielraum*) for policy-making. It went on to state that

> *the principle of judicial self-restraint, to which the Constitutional Court adheres, does not mean a reduction or mitigation of its previously depicted competence but the renouncement to engage in politics. It aims at keeping open the space of free policy making for other constitutional bodies guaranteed by the constitution.*[182]

It is worth noting that the Constitutional Court used the English expression 'judicial self-restraint' in its original judgment, thus openly acknowledging recourse to US jurisprudence. Commentators criticized this for creating the impression that the Constitutional Court would forsake a competence assigned to it by the constitution.[183] Others described it as awareness of the court not to overstep the boundaries of its competence and not to engage in policy-making.[184] Applying its restrained approach, the court found no violation of the Basic Law. It refrained from further explicitly referring to 'judicial self-restraint' in later case law.[185]

Thus far, the cases had always dealt with situations where the executive had entered into a treaty that had to be tested for compliance with the Basic Law. The *Hess* decision,[186] which will also be discussed in connection with

179 Ibid 8 ff.
180 Ibid 14.
181 Ibid.
182 Ibid 14 f [my translation].
183 Grewe (n 132) 968; Kay Hailbronner, 'Kontrolle der Auswärtigen Gewalt' (1997) 56 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 8, 13; Christian Calliess, 'Auswärtige Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts, Band IV* (3rd edn, CF Müller 2006) 607; Nettesheim (n 173) 573.
184 Similar view Grewe (n 132) 968; only accepting this limited understanding Nettesheim (n 173) 573.
185 Frank Schorkopf, *Staatsrecht der internationalen Beziehungen* (CH Beck 2017) 347.
186 *Decision from 16 December 1980 (Hess Case)* BVerfGE 55, 349 (German Federal Constitutional Court); for an English translation cf 90 ILR 387.

diplomatic protection below,[187] is probably the first time the court directly acknowledged executive discretion for interpreting a treaty already in existence and not itself under review.[188] It concerned Rudolf Hess who acted as Hitler's deputy until 1941, when he flew to the UK on his own initiative to negotiate a peace treaty and was arrested. After the war, he was tried in Nuremberg, found guilty of crimes against peace and served his sentence in a military prison administrated by the four Allied powers in Berlin. In 1979, he filed a constitutional complaint aimed at obliging the federal government to take appropriate and official steps towards the occupying powers to grant him freedom. In particular, he urged the government to apply to the United Nations for an instruction from the General Assembly to the Allied powers demanding his release.[189] The government denied an appeal to the UN, arguing inter alia that UN bodies would not review a request for relief in favour of Hess in the light of Article 107 UNC ('enemy state clause').[190] The court stated that even if a judge were to consider the executive assessment as flawed by his independent judgment, this would not provide a sufficient basis for an abuse of discretion.[191] In the absence of obligatory international dispute settlement, 'the assertion of the legal position under its own law made by the state itself must therefore bear much greater weight at the international level than it does in the context of a domestic legal order'.[192] It went on to state that

> *In this situation it is of prime importance for safeguarding the interests of the Federal Republic of Germany that it should be seen to act on the international plane* ***with a single*** **voice***, as perceived by the competent organs in foreign affairs. Consequently the courts must apply* ***great restraint in assessing whether or not legal positions adopted by those organs, which might possibly be incorrect from the standpoint of international law, therefore involve an abuse of discretion****. Such errors should only be taken into consideration if the adoption of a questionable legal position has resulted in the arbitrary treatment of a national which is totally in-*

187 Cf below Chapter 3, I., 1., b), bb), (3) and Chapter 3, I., 5., b).
188 Cf as well Nettesheim (n 173) 576.
189 *Hess Case* (n 186) 356; *Hess Case* ILR English Translation (n 186) 388.
190 *Hess Case* ILR English Translation (n 186) 389.
191 *Hess Case* ILR English Translation (n 186) 397.
192 Ibid.

> *comprehensible from any reasonable standpoint including considerations of foreign policy.*[193]

Hence, the court awarded a very broad area of discretion to the executive, acknowledging a greater role in external than internal matters. Moreover, the court again used language associated with common law doctrines and the 'one voice principle'.[194]

The *Hess* case had a strong connection to the German atrocities during the Nazi period and the continued presence of Allied forces on German soil. However, the court also applied the approach developed in the *Hess* case in its subsequent *Teso* decision.[195] During the period of two Germany's, a key instrument of the Federal Republic of Germany's foreign policy was to claim the identity of the Federal Republic with the previous German *Reich* and to accept only a unitary citizenship for all Germans.[196] In the *Teso* decision, the court had to decide whether citizenship awarded solely based on the law of the GDR[197] also renders the recipient a citizen of the Federal Republic.[198] The Constitutional Court confirmed that view and deliberated whether this result would violate general public international law.[199] The court, directly invoking the *Hess* case,[200] stated that even if Germany's legal status was contested among states, it could only object to an assessment of the competent organs of the Federal Republic in the field of international law if it were evidently contrary to international law.[201] The *Hess* and *Teso* decisions are probably the closest the Constitutional Court ever came in directly acknowledging executive influence concerning questions of law. In contrast to factual determinations,[202] the court appears to be very careful in its formulations if an area of discretion exists to interpret a treaty.

193 Ibid 398 [my emphasis].
194 Schwarz (n 165) 525.
195 *Decision from 21 October 1987 (Teso Case)* BVerfGE 77, 137 (German Federal Constitutional Court) 'leading sentence' (*Leitsatz*) 4; Röben (n 165) 204.
196 Schorkopf (n 185) 81.
197 As opposed to citizenship which could also be based on the law of the Federal Republic.
198 *Decision from 21 October 1987 (Teso Case)* (n 195) 143.
199 *Decision from 21 October 1987 (Teso Case)* (n 195) 153 ff.
200 *Decision from 21 October 1987 (Teso Case)* (n 195) 167.
201 Ibid 166 f.
202 Cf above, Chapter 2, IV., 2.

(4) *Pershing* case and *Out of Area*- executive influence in the subsequent development of treaties

The continuing west integration[203] and NATO membership led the Constitutional Court to develop another doctrine to secure executive influence in foreign affairs.[204] As mentioned,[205] according to the Basic Law, certain treaties warrant parliamentary approval.[206] In several cases, opposition parties in parliament claimed that the state parties had further developed a treaty without the possibility for the Bundestag to decide (again) on the question. Although the first traits of the doctrine can be found in an earlier decision concerning the establishment of the European Organisation for the Safety of Air Navigation,[207] the Constitutional Court has developed the main contours in decisions concerning the North Atlantic Treaty.[208]

The first *Pershing* case evolved with the NATO double-track decision to station medium-range nuclear-armed missiles within Germany with the consent of the German government. Members of the parliament claimed that this would require renewed approval of the North Atlantic Treaty by the Bundestag. The Constitutional Court held that when the parliament approved the treaty, it agreed to an 'integration framework,'[209] and as long as the decision stayed within that framework, there was no basis for a new parliamentary decision.[210] The court further elaborated on the doctrine in

203 Here used to refer to the political process of West Germany becoming part of the 'West', marked especially by joining the Western European Union, the European Coal and Steel Community and NATO.

204 Schwarz (n 165) 235 ff.

205 Cf Chapter 2, I., 2.

206 See Article 24 and 59 (2) of the Basic Law, cf as well Chapter 4, I., 3., b), aa).

207 *Decision from 23 June 1981* (*Eurocontrol)* BVerfGE 58, 1 (German Federal Constitutional Court) 37.

208 For an overview of the case law cf as well Christian Calliess, *Staatsrecht III* (3rd edn, CH Beck 2020) 83 ff.

209 Within the judgments, the terminology varies between 'integration programme' (*Integrationsprogramm*) and 'integration framework' (*Integrationsrahmen*); cf *Judgment from 22 November 2001 (NATO Concept)* BVerfGE 104, 151 (German Federal Constitutional Court) and English translation provided by the court available at <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2001/11/es20011122_2bve000699en.html;jsessionid=C72FE1B2FED92295EC7FF806EEE3E8D0.1_cid344>.

210 *Judgment from 18 December 1984 (Pershing II – Atomwaffenstationierung)* BVerfGE 68, 1 (German Federal Constitutional Court) 100 ff.

the *Out of Area* case.[211] For the first time after the end of the Second World War, German troops had been deployed outside Germany to secure a no-flight zone in former Yugoslavia. Again, parts of the Bundestag claimed that this would leave the basis of the North Atlantic Treaty as defensive alliance.[212] The Constitutional Court, in a narrow 4–4 decision, found no violation of the Basic Law and stated that 'an interpretative development of a treaty through authentic interpretation and one on this basis evolving or such legal development enabling treaty practice'[213] is covered by the initial consent of the parliament. The court directly referred to Article 31 (3) (b) on the Vienna Convention on the Law of Treaties (VCLT)[214] and thus enabled the executive (by virtue of constitutional law) to make use of subsequent agreements and practice 'to preserve the foreign policy ability to act of the Federal Republic of Germany'.[215] In another decision concerning the New Strategic NATO Concept,[216] the court directly linked this with the area of discretion doctrine and stated that 'with reference to the traditional concept of the state in the sphere of foreign policy, the Basic Law has granted the Government a wide scope for performing its task [the concretization of the integration programme] in a directly responsible manner'[217] and that this area of discretion also applies to the completion of the 'integration framework'.[218] Thus, the Constitutional Court does not urge the executive to apply a narrow interpretation of a treaty but awards a large area of discretion, especially to enable mutual development of the treaty by the state parties. The Constitutional Court also applied the 'integration framework' doctrine in a case concerning the war in Afghanistan, when the participation of German troops was challenged, and it again found no violation.[219] In a recent decision, it applied the integration framework

211 *Judgment from 12 July 1994 (Out-of-Area-Einsätze)* BVerfGE 90, 286 (German Federal Constitutional Court).
212 *Judgment from 12 July 1994 (Out-of-Area-Einsätze)* (n 211) 320.
213 Ibid 362 [my translation].
214 Ibid 364; cf also later decisions, *Judgment from 22 November 2001 (NATO Concept)* (n 209) 207.
215 *Judgment from 12 July 1994 (Out-of-Area-Einsätze)* (n 211) 364.
216 *Judgment from 22 November 2001 (NATO Concept)* (n 209).
217 Ibid 207, official English translation mn 149 [my insertion].
218 Ibid 210, official English translation mn 155; cf as well *Judgment from 3 July 2007 (Afghanistan Einsatz)* BVerfGE 118, 244 (German Federal Constitutional Court).
219 Applying the integration framework doctrine as well: *Judgment from 7 May 2008 (Awacs Turkey)* BVerfGE 121, 135 (German Federal Constitutional Court) 158; *Judgment from 3 July 2007 (Afghanistan Einsatz)* (n 218).

doctrine to the UN Charter.[220] A minority of parliament had challenged German military involvement against ISIS in Iraq and Syria. The opposition contested the broad interpretation of Article 51 UNC to allow military action against non-state actors. The Constitutional Court found this to be a reasonable (*vertretbare*) interpretation by the government and covered by the 'integration framework' of the UN Charter.[221]

(5) Recent developments

As we have seen, aside from the integration framework doctrine, the Constitutional Court has been cautious in acknowledging a general area of discretion for executive treaty interpretations.[222] The *Hess* and *Teso* line of case law appears to be 'not [...] expressly overruled but tacitly abandoned or at least restricted'.[223] However, with its recent appeal judgment in the *Ramstein* case, the Federal Administrative Court now puts pressure on the Constitutional Court to rule on the issue.[224] The case, mentioned in the introduction, concerns whether the German government can be obliged to intervene regarding the use of the air base for allegedly illegal drone strikes by the US. The Higher Administrative Court had ruled that no area of discretion exists for the government to decide whether the drone strikes were in accordance with international law.[225] The Federal Administrative Court reversed that decision and explicitly and extensively relied on the

220 *Decision from 17 September 2019 (ISIS Case)* BVerfGE 152, 8 (German Federal Constitutional Court).

221 Ibid.

222 In contrast to factual assessments, cf above, Chapter 2, IV., 2.

223 Thomas Giegerich, 'Can German Courts Effectively Enforce International Legal Limits on US Drone Strikes in Yemen?' (2019) 22 ZEuS 601, 613.

224 *Judgment from 25 November 2020 (Ramstein Drone Case)* BVerwGE 170, 345 (Federal Administrative Court); critical Mehrdad Payandeh and Heiko Sauer, 'Staatliche Gewährleistungsverantwortung für den Schutz der Grundrechte und des Völkerrechts' (2021) 74 NJW 1570; positive review Thomas Jacob, 'Drohneneinsatz der US-Streitkräfte im Jemen: Keine unbegrenzte Verantwortung Deutschlands für extraterritoriale Sachverhalte' (2021) jM 205; positive review Patrick Heinemann, 'Tätigwerden der Bundesregierung zur Verhinderung von Drohneneinsätzen der USA im Jemen von der Air Base Ramstein' (2021) 40 NVwZ 800 f.

225 *Judgment from 19 March 2019 (Ramstein Drone Case)* 4 A 1361/15 (Higher Administrative Court Münster) mn 554; on the case cf Helmut Philipp Aust, 'US-Drohneneinsätze und die grundrechtliche Schutzpflicht für das Recht auf Leben: „German exceptionalism"?' (2020) 75 Juristen Zeitung 303.

Hess decision.[226] In line with the *Hess* decision, it stressed the absence of an international obligatory dispute settlement body and the resulting importance of the legal positions taken by the states themselves, especially concerning the development of customary law.[227] Hence, the court awarded an area of discretion within a reasonable (*vertretbare*) spectrum of legal assessments to the executive.[228] Although the remarks related primarily to customary international law, they are equally applicable to treaty interpretation.[229] The claimants launched a constitutional complaint procedure[230] and the case is now pending before the Constitutional Court.[231] As the Federal Administrative Court explicitly relied on the *Hess* decision, the Constitutional Court now can hardly avoid ruling on the issue and is given a chance to clarify its jurisprudence.

(6) Excursus – Cases concerning interim relief

This subchapter focused on ordinary procedures before the Constitutional Court. However, it should be mentioned that the Constitutional Court also applies a special standard regarding interim relief procedures.[232] The Constitutional Court may award such interim relief to parties under the 'Act on the Federal Constitutional Court'.[233] Theoretically, this could bar the executive from signing an international treaty.[234] In assessing whether to grant relief, the court ascertains whether the claim is obviously inadmissible or unfounded.[235] It then engages in a 'double hypothesis,' assessing the effects if the claimant succeeded in the main proceedings but would have been denied interim relief and vice versa: if the claimant lost the case but would

226 *Judgment from 25 November 2020 (Ramstein Drone Case)* (n 224) mn 57.
227 Ibid mn 58.
228 Ibid mn 59.
229 In fact, the case itself raises questions not only of customary but also treaty law (especially concerning humanitarian law), cf mn 72 ff.
230 Cf already above, Chapter 2, I., 2.
231 Under file No 2 BvR 508/21.
232 Hailbronner (n 183) 32 ff.
233 § 32 Act on the Federal Constitutional Court.
234 Especially if the main proceedings relate to an abstract judicial review procedure.
235 Hillgruber Christian and Goos Christoph, *Verfassungsprozessrecht* (5th edn, CF Müller 2020) 329.

have been awarded interim relief.[236] Comparing these consequences, the court awards an injunction if the adverse effects for the claimant prevail.

The first time a treaty was part of such an interim relief procedure concerned the 'Eastern Treaties' that West Germany had entered into with the Soviet Union and Poland. West Germany acknowledged that once Prussian territory was now part of these countries, and a former landowner tried to block the treaty from being signed. The court established that the test to determine if the implementing statute for an international treaty of high political importance has to be blocked is especially strict.[237] This standard was also applied in interim proceedings, which tried to stop the mentioned Fundamental Relations Treaty[238] and the German Reunification Treaty.[239] In these instances, the government almost always claimed that halting the treaty signing would have serious foreign policy consequences.[240] As the Constitutional Court applies its broad area of discretion[241] concerning the possible behaviour of international negotiation partners,[242] the executive assessment in interim relief procedures is tantamount to a binding effect.[243] In a more recent case, the court denied interim relief against the signing of the CETA agreement between Germany and Canada, relying on the executive assessment of Canada's possible reaction if the court were to stop

236 Ibid 330 ff.

237 *Decision from 22 May 1972 (Eastern Treaties Case Interim Relief I)* BVerfGE 33, 195 (German Federal Constitutional Court) 197; *Decision from 31 May 1972 (Eastern Treaties Case Interim Relief II)* BVerfGE 33, 232 (German Federal Constitutional Court) 234.

238 *Decision from 4th June 1973 (Fundamental Relations Treaty Interim Relief I)* BVerfGE 35, 193 (German Federal Constitutional Court) 196.

239 *Decision from 11 December 1990* (*German Reunification Treaty Interim Relief)* BVerfGE 83, 162 (German Federal Constitutional Court) 172.

240 *Judgment from 18 June 1973 (Fundamental Relations Treaty Interim Relief II)* BVerfGE 35, 257 (German Federal Constitutional Court) 262 f; *Decision from 11 December 1990* (*German Reunification Treaty Interim Relief)* (n 239) 174; *Decision from 4th June 1973 (Fundamental Relations Treaty Interim Relief I)* (n 238) 197 f; *Decision from 22 May 1972 (Eastern Treaties Case Interim Relief I)* (n 237) 198; *Decision from 31 May 1972 (Eastern Treaties Case Interim Relief II)* (n 237) 234 f.

241 Cf above, Chapter 2, IV., 2. and III., 2.

242 Cf also already *Decision from 22 May 1972 (Eastern Treaties Case Interim Relief I)* (n 237).

243 Referring to the 'Fundamental Relations Treaty Interim Case' as entailing a 'political questions approach' Christian Tomuschat, 'Auswärtige Gewalt und verfassungsgerichtliche Kontrolle – Einige Bemerkungen zum Verfahren über den Grundvertrag' (1973) 26 DÖV 801, 807; Hailbronner (n 183) 32.

the treaty.[244] Consequently, the Constitutional Court has never halted the signing of an international treaty in interim proceedings.

c) South Africa

aa) Older South African constitutions

The traditional approach concerning treaty interpretation in South Africa again closely followed the British example. The British Empire's courts treated the interpretation of treaties as pure questions of law and thus also denied applying the certification doctrine[245] to such cases.[246] Even if treaty-making has often been termed an act of state,[247] Moore[248] acknowledged that the mere construction of a treaty does not qualify as an act of state.[249] Mann shared this view:

> *[T]here* ***does not exist in England any counterpart of the principle which has frequently been asserted by the Supreme Court of the United States*** *and according to which 'a construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.*[250]

In the same vein, the South African scholar Sanders held it improper for the executive to 'certify categorically […] on the status or interpretation of a

244 *Judgment from 13 October 2016 (CETA Interim Relief)* BVerfGE 143, 65 (German Federal Constitutional Court) 91.

245 Cf above, Chapter 2, III., 3.

246 Jenkins' approach concerning a binding force in treaty questions was abolished quite early cf above, Chapter 1, II., 1., a) and Arnold McNair, *Law of Treaties* (OUP 1961) 358.

247 Critical: Frederick A Mann, *Studies in International Law* (OUP 1973) 358; AJGM Sanders, 'The Justiciability of Foreign Policy Matters under English and South African Law' (1974) 7 Comparative and International Law Journal of Southern Africa 215, 216; Gretchen Carpenter, *Introduction to South African Constitutional Law* (Butterworths 1987) 172.

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

249 William Moore, *Act of state in English law* (EP Dutton and Company 1906) 90 ff.

250 Mann, *Foreign Affairs* (n 2) 112 [my emphasis]; Mann of course was in general opposed to deference see Campbell McLachlan, *Foreign relations law* (CUP 2016) 60, in this regard his ideas however probably reflected the English main stream position.

treaty'.[251] Accordingly, the South African courts seemed to award no special respect to the executive's view while construing treaties, as can be seen from the *Minister of the Interior v Bechler* case[252] decided in 1948 in front of the Appellate Division.[253] The case concerned the extradition of individuals with German citizenship from South Africa. It raised the question of the correct interpretation of a provision of the Versailles Treaty, which could have rendered the applicants stateless and thus no 'enemy aliens' subject to extradition.[254] Although the executive aimed at extraditing the applicants, the court noted 'the interpretation of [the relevant provision of the treaty] is a matter which this Court must decide itself'[255] and construed the clause without mentioning a special weight for the executive. Admittedly, it found that the applicants could be extradited in the end.

In the United Kingdom, as in the United States,[256] a stronger executive influence was acknowledged concerning whether a treaty was terminated,[257] which also appears to be true for South Africa. As Sanders pointed out, 'whether the State or any foreign State is a party to a treaty, or whether a treaty is in force, are mixed questions of recognition and facts of law'.[258] Although they 'cannot as such be correctly regarded as matters the determination of which is solely in the hands of the executive [...] [T]his does of course not exclude the possibility of information being provided or of assistance to the court'.[259] However, the executive often issued certificates on these mixed questions, and the courts did not clearly spell out how far they accepted the executive assessment as binding. This can be seen in *S v Devoy*[260] decided in 1971, the leading case establishing the certification doctrine in South Africa.[261] It concerned whether an extradition treaty between South Africa and what is today Malawi was still in existence after Malawi (Nyasaland) left the Federation of Rhodesia and Nyasaland and became independent. The executive had issued a certificate dealing with

251 AJGM Sanders, 'Our State Cannot Speak with Two Voices' (1971) 88 South African Law Journal 413, 415 [my omission].
252 *Minister of the Interior v Bechler* 1948 3 All SA 237 (A) (Appellate Division).
253 (South Africa's highest court under the old constitutions).
254 *Minister v Bechler* (n 252) 236 ff.
255 Ibid 237 [my insertion].
256 Cf this Chapter, I., 1., a).
257 Mann, *Foreign Affairs* (n 2) 113.
258 Sanders, 'Two Voices' (n 251) 415.
259 Ibid [my adjustments and omissions].
260 *S v Devoy* 1971 (3) SA 899 (A) (Appellate Division).
261 On the case cf Dugard and others (n 2) 101.

the recognition of the new state of Malawi as well as with the continuation of the treaty,[262] and the court stated that it 'accepts the certificate of the Minister as a statement of the matters therein mentioned'.[263] The court then followed the executive view concerning recognition and arrived at the same conclusion concerning the continuation stating that it was 'fully within the competence of the Government of the Republic of South Africa to recognize, in relation to the Agreement, first Nyasaland and thereafter Malawi'.[264] It thus intermingled both questions and did not clarify how far the conclusive effect of the certificate went.[265]

Under the older South African constitutions, treaty interpretation was thus a matter for the judiciary. However, the executive had a certain influence, especially concerning the status of treaties, by using and arguably overstretching the certification doctrine.

bb) New South African Constitution

Courts and scholars under the new South African system have not directly addressed deference in treaty interpretation cases. However, constitutional provisions and, especially, cases where the executive interpretation and application of a treaty (or its respective domestic incorporation) were challenged, allow us to shed light on the courts' level of independence.

The new South African Constitution, in various provisions, calls upon the judiciary to take into account international (treaty) law and thus implies an essential role for its courts in interpretation. Section 39 (1) (b) of the South African Constitution urges the courts to consider international law when interpreting the Bill of Rights. In the same vein, Section 233 of the Constitution demands that every legislation (including implementing legislation) is to be interpreted consistently with international law. As Tladi correctly observed, 'while these interpretive provisions do not directly call for the interpretation of international law, there is an indirect requirement, or at the very least an expectation, that international law will be interpre-

262 *S v Devoy* 1971 (1) SA 359 (N) (Natal Provincial Division) at 361.
263 *S v Devoy* (n 260) 907.
264 Ibid 908.
265 Sanders appears to be of the opinion that the court only accepted the recognition as conclusive, this however appears to be a very well-meaning reading of the judgment which is at least ambiguous in this part, Sanders, 'Two Voices' (n 251) 416.

ted'.[266] In several cases involving foreign affairs, the judiciary has shown a very independent approach concerning the interpretation of treaties, often despite contrary interpretations by the executive.

Harksen v President of the Republic of South Africa,[267] decided in 1997, can be seen as a contemporary equivalent to *S v Devoy*.[268] As in *Devoy*, the question arose if an extradition treaty, this time between Germany and South Africa, remained in existence after Germany's surrender in the Second World War. The executive issued a certificate that no extradition treaty existed between the countries,[269] but the court was not ready to apply the certification doctrine and stated

> *[With] regard to the view which we take of this matter, it is unnecessary to decide whether the certificate by the Minister of Justice is binding on the Court and we accordingly proceed on the basis that it is not.*[270]

It then reached the same conclusion as the executive after an independent and lengthy assessment of international law.[271] Although the case does not decisively settle the question, it shows that courts are less than inclined to refer to the certification doctrine in questions of the existence of a treaty. This approach also appears to be followed in more recent jurisprudence. *President of the Republic of South Africa v Quagliani*[272] also concerned whether the parties had entered validly into an extradition agreement. In contrast to *Harksen*, the problems in *Quagliani* primarily concerned not international law but domestic provisions allowing the president to delegate his treaty-making authority.[273] Still, the court could have mentioned a special weight for the executive's position but refrained from doing so, and it likewise did not mention the certification doctrine.

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266 Dire Tladi, 'Interpretation of Treaties in an International Law-Friendly Framework: The Case of South Africa' in Helmut Philipp Aust and Georg Nolte (eds), *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (OUP 2016) 134, 138.

267 *Harksen v President of the Republic of South Africa* 1998 (2) SA 1011 (C) (Cape Provincial Division); cf for the case as well Dugard and others (n 2) 101 f.

268 Cf above, this Chapter, I., 1., c), aa).

269 *Harksen v President of the Republic of South Africa* (n 267) 1019.

270 Ibid 1020 [my adjustment].

271 Ibid 1020 ff.

272 *President of the Republic of South Africa v Quagliani; President of the Republic of South Africa v Van Rooyen; Goodwin v Director General, Department of Justice and Constitutional Development* 2009 (2) SA 466 (CC) (Constitutional Court); on the case cf as well Dugard and others (n 2) 83 ff.

273 Ibid mn 18 ff.

Another case exemplifying the courts' independent approach concerns the case of the former president of Sudan, Al-Bashir.[274] The facts of the case will be set out in more detail below;[275] here, it suffices to state that the judges had to decide on the meaning of a provision of a 'host country agreement' between South Africa and the African Union. The main question was if Article 8 of the said agreement conferred immunity only to delegates of the African Union or delegates of the member states in general and thus Al-Bashir himself as president of Sudan.[276] The court adopted the former interpretation and held Al-Bashir not to be covered by immunity, even though the executive explicitly took the latter view. Nowhere in the judgment was a special 'weight' for the executive in questions of treaty interpretation mentioned.

Further proof of the courts' independent role can be found in two decisions rendered in 2017 and mentioned in Chapter 2.[277] Although they were primarily concerned with the interpretation of constitutional provisions dealing with treaty-making in South Africa, they incidentally also shed light on the courts' willingness to defer to the executive. The just mentioned case concerning Sudan's President Al-Bashir led to an attempted withdrawal from the ICC statute by the Zuma administration. This triggered the question of whether parliamentary consent is necessary, not only to render a treaty binding on South Africa, as Section 231 (2) of the South African Constitution demands but also to withdraw from an international treaty.[278] In front of the High Court,[279] the executive argued against such an interpretation invoking its 'primary role in international relations'[280] and offered an interpretation of the Vienna Convention on the Law of Treaties to support

274 *Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others (Bashir Case)* 2016 (3) SA 317 (SCA) (Supreme Court of Appeal); cf on the case as well Dugard and others (n 2) 367 ff.

275 Cf this Chapter, I., 4., c).

276 Dire Tladi, 'Interpretation and international law in South African courts, The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 African Human Rights Law Journal 310, 322 ff.

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

278 On the case and the topic in general Dugard and others (n 2) 78 f.

279 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* 2017 (3) SA 212 (GP) (High Court – Gauteng Division).

280 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279) mn 38.

its claim.[281] Nevertheless, the court found against the government and did not mention a special weight for the interpretations offered.

The *Earthlife*[282] case provides a similar picture.[283] The court had to decide whether an international treaty concerning nuclear power supply required prior approval by parliament under the South African Constitution or could merely be tabled as a 'technical agreement'. Thus, it first had to decide on the nature of the treaty.[284] The government stated that the issue would be non-justiciable as it required the court to interpret and construe an unincorporated treaty and that, in any case, it had to be interpreted as being only a technical agreement.[285] The court, however, cited the *Kaunda* decision[286] and stated, 'the Constitutional Court has made clear that all such exercises of public power are justiciable in that they must be lawful and rational. These include exercises of public power relating to foreign affairs'.[287] It finally concluded that the treaty was not a mere technical agreement, that it demanded prior parliamentary approval, and that the decision to only table it was unconstitutional.

The last line of cases relevant to the South African approach towards treaty interpretation concerns the Southern African Development Community. As mentioned in the introduction,[288] the Southern African Development Community was established in the early 1990s to foster regional development by emulating the ideas of the common market of the European Union.[289] By additional protocol, a tribunal was created, which allowed direct access to the court for individuals. The tribunal had been used by Zimbabwean farmers who had been expropriated without compensation by the Zimbabwean government during its land reform and found no redress in Zimbabwean courts. Earlier in *Government of the Republic of Zimbabwe*

281 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279) mn 40.
282 *Earthlife Africa v Minister of Energy* 2017 (5) SA 277 (WCC) (High Court – Western Cape Division).
283 Cf above, Chapter 2., I., 3. and below, Chapter 4, I., 3., b), bb); cf Dugard and others (n 2) 74 ff.
284 Dugard and others (n 2) 77.
285 *Earthlife Africa v Minister of Energy* (n 282) 233 f, 260 ff.
286 Chapter 2, IV., 3.
287 *Earthlife Africa v Minister of Energy* (n 282) 261.
288 Cf above, Introduction I.
289 Karen Alter, James T Gathii and Laurence Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 EJIL 294, 306.

v Fick the Supreme Court of Appeal[290] and the Constitutional Court[291] decided independently on whether the tribunal had been duly established under the provisions of the SADC treaty.[292] In the previously introduced case[293] of *Law Society of South Africa and others v President of the Republic of South Africa*,[294] the question arose if the decision of the South African president to sign an SADC protocol that would bar access of individuals to the SADC tribunal was constitutional. In an unfortunately hard-to-follow judgment,[295] the court found that the protocol was procedurally and substantially not in compliance with the SADC treaty and ordered the president to withdraw his signature.[296] Again, no special role for the executive in interpreting the provisions of the SADC treaty was mentioned. The South African courts thus appear to have shaken off their earlier more cautious remarks in cases like *Harksen* and now determine the meaning of international treaties largely independently.

d) Conclusion on treaty interpretation

As early case law from the United States shows, in the 19th century, the courts rarely acknowledged a special role for the executive branch and independently determined the meaning of a treaty. This is in line with the founders' rejection of the traditional position. By the end of the 19th and

290 *Government of the Republic of Zimbabwe v Fick and others* 2016 JOL 37271 (SCA) (Supreme Court of Appeal) para 32 ff.

291 *Government of the Republic of Zimbabwe v Fick and others* 2013 (5) SA 325 (CC) (Constitutional Court) 338 ff.

292 On the case as well Dugard and others (n 2) 98.

293 Cf above, Introduction I.

294 *Law Society of South Africa and others v President of the Republic of South Africa and others (Southern Africa Litigation Centre and another as amici curiae) (SADC Case)* 2019 (3) BCLR 329 (CC) (Constitutional Court); cf for an analysis of the case Riaan Eksteen, *The Role of the highest courts of the United States of America and South Africa and the European Court of Justice in Foreign Affairs* (Springer 2019) 305; cf as well Dugard and others (n 2) 114 ff (on the High Court decision).

295 I share the critique by Tladi on this point, Dire Tladi, 'A Constitution Made for Mandela, A Constitutional Jurisprudence Developed for Zuma: The Erosion of Discretion of the Executive in Foreign Relations' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 215, 222.

296 *Law Society of South Africa and others v President of the Republic of South Africa and others (Southern Africa Litigation Centre and another as amici curiae) (SADC Case)* (n 294) 343 ff.

beginning of the 20th century, the courts started to apply a doctrine of discretion to the executive assessments, an approach which solidified during the Sutherland Revolution. From then on, the courts oscillated between a strong deference line and a 'counter deference' line of case law. In the 1990s, the courts started to apply the *Chevron* doctrine to interpretation cases and pushed the approach towards conclusiveness. This trend, however, appears to have been weakened or even reversed in more recent decisions. Although the 'correct' level of deference is still debated, it appears to be settled law that the US courts grant a margin of discretion to executive treaty interpretations.

In contrast to the United States, older German law in the 19th century embraced the traditional position when it enacted the 'Royal Prussian Decree Concerning the Interpretation of Treaties' and established a conclusiveness approach. However, the decree was met with heavy criticism and soon repealed. German scholars and courts saw interpretation as a core judicial function and, in general, determined the meaning of treaties independently. After the Second World War, the German legal system was guided by this basic position, and the Constitutional Court was eager to bring virtually every matter of foreign affairs within its review capacity. As a counterweight, it carved out certain exceptions where it applies a lower review standard. Concerning the subsequent development of treaties, the Constitutional Court endorses an area of discretion for the executive by recourse to the 'integration framework doctrine'. Regarding treaty interpretation in general, it did not reiterate its doctrine of discretion approach, which it alluded to in some decisions in the 1980s. In the light of the recent *Ramstein* case, it will now likely have to rule on the issue.

South Africa adopted the British approach concerning treaty interpretation. By the time of the South Africa Act, the classical canon of areas where an executive certificate could be issued was already in development. Treaty interpretation was never part of that canon, but the doctrine was rarely applied strictly, and this secured a conclusive influence for the executive, especially concerning the status of a treaty. However, the certification doctrine is no longer applied in treaty cases by contemporary South African courts. In the latest case law in particular, the judiciary has shown a very independent approach in determining the meaning of international treaties.

2. Recognition of states and governments

This subchapter will examine the judicial review of executive decisions concerning the recognition of states and governments. Recognition, in general, is a unilateral act of a state under international law confirming that a specific legal situation or consequence will not be called into question.[297] Concerning states, the recognizing state acknowledges the character of another state as a subject of international law.[298] Regarding governments, the recognizing state acknowledges that a person, group, or party represents the state on the international plane.[299] However, recognition is a purely judicial act and must not be equated with the factual question[300] of whether a state exists or of whether a government has effective control.[301] This distinction entails the possibility that a state or government is objectively existent or in control but not recognized and vice versa.[302]

By the end of the 20th century, many countries, including Germany,[303] the United States,[304] and the United Kingdom,[305] had declared an end to the custom of formal recognition of governments. However, abandoning the practice proved difficult. Especially in situations of regime change, withholding and granting recognition can have serious impacts. Even states which officially subscribe to abstention do still issue recognitions, as has been done recently by Germany and the United Kingdom in the case of Venezuela.[306] The topic has also become relevant again concerning a possi-

297 Stefan Talmon, *Recognition of governments in international law: with particular reference to governments in exile* (OUP 2001) 29 ff; Jochen A Frowein, 'Recognition' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 1.

298 Frowein (n 297) mn 10.

299 Ibid mn 18.

300 Albeit even according to the prevalent declaratory theory, recognition does play at least some role as an entity not recognized by any other state at all will not be a state as it is not able to engage on the international plane.

301 Cf as well Mann, *Foreign Affairs* (n 2) 24.

302 Cf ibid 37.

303 Bundestag, 'Antwort der Staatsministerin Adam-Schwaetzer', Drucksache 11/4682; Helmut Philipp Aust, 'Die Anerkennung von Regierungen: Völkerrechtliche Grundlagen und Grenzen im Lichte des Falls Venezuela' (2020) 80 ZaöRV 73, 74.

304 Matthias Herdegen, *Völkerrecht* (CH Beck 2020) 87.

305 McLachlan (n 250) 382 ff, including further common wealth states.

306 For the UK recognition of Venezuela cf *Deutsche Bank AG London Branch v Receivers Appointed by the Court Central Bank of Venezuela v Governor and Company of the Bank of England and others* [2021] QB 455 (Court of Appeal); for the UK

ble recognition of the Taliban regime in Afghanistan,[307] Russia's recognition of 'separatist' republics in Ukraine[308] or the recognition of a Palestinian state.[309] The recognition of states and governments thus remains an important field of foreign relations law.

Especially in the case of governments, recognitions have sometimes been qualified as de jure or de facto. The terms are misleading as they *both* relate to the judicial act of recognition, not the actual situation on the ground. A mere de facto recognition implies a degree of hesitancy and a lower amount of legitimacy.[310] The distinction has long been thought to have lost much of its relevance.[311] However, in recent times English courts, in particular, have

recognition of Libya cf *Mohamed v Breish* [2020] EWCA Civ 637 (Court of Appeal); for an analysis of the Deutsche Bank Case Peter Webster, 'The Venezuelan Gold decision: recognition in the English Court of Appeal' EJIL: Talk! from 2 November 2020 available at <https://www.ejiltalk.org/the-venezuelan-gold-decision-recognition-in-the-english-court-of-appeal/>; Aust (n 303) 80; critical of this trend McLachlan (n 250) 414.

307 Lukas Kleinert, 'Recognition of a Taliban Government?: A Short Overview on the Recognition of Governments in International Law' Völkerrechtsblog from 8 September 2021 <https://voelkerrechtsblog.org/de/recognition-of-a-taliban-government/>.

308 Marc Weller, 'Russia's Recognition of the 'Separatist Republics' in Ukraine was Manifestly Unlawful' EJIL: Talk! from 9 March 2022 available at <https://www.ejiltalk.org/russias-recognition-of-the-separatist-republics-in-ukraine-was-manifestly-unlawful/>.

309 James Landale, 'Spain, Norway and Ireland recognise Palestinian state' BBC from 28 May 2024 available at <https://www.bbc.com/news/articles/cl77drw22qjo>.

310 This at least appears to be the common usage, there is much confusion about the definition of 'de facto' and 'de jure', cf the overview in Ti-Chiang Chen, *The international law of recognition – With special reference to practice in Great Britain and the United States* (Frederick A Praeger 1951) 270 ff (referring to the common usage as 'constitutional law sense' in contrast to the 'international law sense'); Oppenheim uses 'de facto' recognition in a sense, which signals a less firm establishment of control but not necessarily a lower amount of legitimacy, see Lassa Oppenheim, *International Law: A Treatise* (8th edn, Longmans Green 1955) para 46 (which appears to correspond to Chen's 'international law sense'); mixing both understandings Rudolf H Bindschedler, *Die Anerkennung im Völkerrecht* (Müller 1961) 5; at least English courts allow a simultaneous recognition of one government de jure and one de facto, cf *Deutsche Bank AG London Branch v Receivers Appointed by the Court Central Bank of Venezuela v Governor and Company of the Bank of England and others* (n 306) 504.

311 Chen (n 310) 270 ff; Dugard and others (n 2) 170; Frowein (n 297) mn 17.

begun to (once again) distinguish between the types[312] but apply the same standard concerning judicial review.[313]

The recognition of a state or government not only affects the international plane but also acknowledges its existence and certain rights (e.g., the right to sue and state immunity) in the domestic legal system.[314] The question of this chapter is whether the judiciary is free to conduct its independent assessment in this regard or whether and to what extent it has to treat the executive recognition or non-recognition as binding. Most cases in this area arise from private disputes where one party is interested in having a state or government acknowledged in front of a court.[315] Although the recognition of a state and of a government are two different questions, they are often deeply intertwined.[316] Courts often apply the same principles to both issues.[317] This subchapter will only differentiate among the categories where the courts apply different approaches.

a) United States

In their early jurisprudence, US courts closely relied on the executive assessment concerning the existence of states and the related issue of the control of governments. The basis for the strong executive hold in this field lies in the wording of Article 2 (2) and (3) of the US Constitution, which grants the president the right to appoint and receive ambassadors.[318] In his 'Pacificus' letters, which we analysed in Chapter 1,[319] Hamilton inferred from this express power of the president the right to decide 'in the case of a Revolution of Government in a foreign Country, whether the new rulers

312 For the different domestic effect of de jure and de facto recognition in English law cf *Deutsche Bank AG London Branch v Receivers Appointed by the Court Central Bank of Venezuela v Governor and Company of the Bank of England and others* (n 306) 500 ff.

313 Ibid 509: 'Accordingly a formal statement of recognition by HMG is conclusive, regardless of whether it refers to recognition de jure, recognition de facto or both'.

314 Chen (n 310) 133 ff.

315 Daniel P O'Connell, *International Law* (2nd edn, Stevens & Sons 1970) 113.

316 Bolewski (n 128) 181; American Law Institute, *Third* (n 61) § 203 Reporters notes 3.

317 In fact, courts often did not neatly distinguish between both Mann, *Foreign Affairs* (n 2) 39.

318 American Law Institute, *Third* (n 61) § 204 comment; Bradley, *International Law* (n 9) 23.

319 Cf above, Chapter 1, II., 2., b).

are competent organs of the National Will and ought to ‹be› recognized or not'.[320] In contrast to other more controversial views of Hamilton in his 'Pacificus' letters,[321] courts soon endorsed the view that it was for the president alone to decide whether a foreign state or government was to be recognized. The first hint towards this rule was given as early as *Rose v Himely*.[322] The case concerned a ship captured by privateers in French service for trading with rebels in St. Domingo who tried to end France's rule over the island. The plaintiffs sought to recover cargo from the ship doubting French jurisdiction over the island and thus the authority of French agencies to condemn the captured goods.[323] They argued that St. Domingo should be treated as an independent sovereign in a state of war with France and thus could trade with everyone.[324] To support this claim, the litigants invoked the writings of de Vattel, but Justice Marshall stated that 'the language of that writer is obviously addressed to sovereigns, not to courts. It is for governments to decide whether they will consider St. Domingo as an independent nation […]'.[325] Nevertheless, he held the condemnation of the ship illegal on different grounds.

Justice Marshall did not explicitly state that courts had to defer to executive decisions in foreign affairs; his remarks could be seen as belonging to the group of cases where rules of international law are not apt for domestic application. Furthermore, the statements were made in obiter.[326] Nevertheless, his words were taken up in *Clark v United States*,[327] another case concerned with the status of St. Domingo, which had since expelled France from the island and had declared itself independent.[328] The court

320 Alexander Hamilton and James Madison, *The Pacificus-Helvidius Debates of 1793–1794* (Liberty Fund 2007) 14.

321 Cf above, Chapter 1, II., 2., b).

322 *Rose v Himely* 8 US 241 (1807) (US Supreme Court); cf on the case John G Hervey, *The Legal Effects of Recognition in International Law* (University of Pennsylvania Press 1928) 28.

323 *Rose v Himely* (n 322) 268.

324 Louis L Jaffe, *Judicial Aspects of Foreign Relations: In Particular of the Recognition of Foreign Powers* (Harvard University Press 1933) 129 f.

325 *Rose v Himely* (n 322) 272.

326 Hervey (n 322) 29; against a classification as obiter dictum: Jaffe (n 324) 130; Chen (n 310) 241.

327 *Clark v United States* [1811] 5 F Cas 932 (United States Circuit Court for the District of Pennsylvania).

328 Hervey (n 322) 27 ff; for the case cf as well Robert Reinstein, 'Is the President's Recognition Power Exclusive?' (2013) 86 Temple Law Review 1, 17 f.

had to determine whether St. Domingo could still be considered as belonging to France under a statute that forbade importing goods from French colonies. The court referred to Marshall's quote[329] and combined it with the executive's view, which still considered the island a French dominion.[330] In contrast to *Rose v Himely*, the reasoning here was decisive and thus fully introduced the idea of conclusiveness of executive determinations concerning the recognition of states and governments. The strict binding effect developed around the same time as Eldon's ideas in the United Kingdom,[331] leading Chen to refer to them as the 'Eldon-Marshall tradition'.[332] The Supreme Court confirmed the approach in *Gelston v Hoyt*[333] and *United States v Palmer*.[334] In some cases, the strict rule was called into question[335] and not applied to 'apolitical' acts (e.g., marriages) of the (unrecognized) governments of the rebel states during the American Civil War.[336] Nevertheless, in general, subsequent jurisprudence confirmed that the executive could conclusively determine the status of a foreign state or government.[337] The development found its pinnacle in *Jones v United States*.[338] The case concerned a conviction for murder on a Caribbean island. The plaintiff challenged the conviction as outside the jurisdiction of the United States. Conversely, the president had declared the island belonging to US territory. The court upheld the executive assessment and summarized the doctrine:

> *Who is the sovereign, de jure or de facto, of a territory is* ***not a judicial, but a political*** **question***, the determination of which by the legislative and executive departments of any government conclusively* ***binds the judges****, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed un-*

329 *Clark v United States* (n 327) 933.
330 Ibid 934 f.
331 Cf above, Chapter 1, II., 1., b).
332 Chen (n 310) 244.
333 *Gelston v Hoyt* 16 US 246 (1818) (US Supreme Court); cf Hervey (n 322) 31.
334 *United States v Palmer* 16 US 610 (1818) (US Supreme Court); cf Hervey (n 322) 31.
335 *The Consul of Spain v La Conception* [1821] 3 F Cas 137 (Circuit Court of South Carolina); Chen (n 310) 89.
336 Hersch Lauterpacht, *Recognition in International Law* (CUP 1948) 145 ff.
337 For further case law cf Hervey (n 322) 34 ff.
338 *Jones v United States* 137 US 202 (1890) (US Supreme Court) 212, the case was treated as authoritative even in England, see Mann, *Foreign Affairs* (n 2) 38.

der a great variety of circumstances. [citing inter alia Gelston and Palmer] It is equally well settled in England. [citing inter alia Taylor v Barclay][339]

A slight deviation from the strict approach[340] occurred in the 1920s because the United States refused to recognize the Soviet government until 1933. Some courts began to apply the mentioned 'civil war' exception to evade hardships.[341] However, the judgments in *Belmont*[342] and *Pink*[343] strongly reaffirmed the executive recognition power.[344] Both cases concerned the recognition and settlement of claims with the (at that time recognized) Soviet government and, as mentioned, also established the validity of sole executive agreements.[345] Today, the recognition of states and governments is recognized virtually unanimously[346] as a constitutionally legitimized case of 'executive law making'. As in the United Kingdom, courts have treated executive determinations in this area as questions of 'fact'.[347] Likewise, they have held suits of individuals to oblige the executive to recognize certain states (especially Taiwan) as falling under the political question doctrine and hence unreviewable.[348]

Recently, recognition as an exclusive power of the executive unhampered even by Congress[349] has been confirmed in *Zivotofsky v Kerry*.[350] Here, an Act of Congress directed the Secretary of State to issue passports with 'Israel' as the place of birth for citizens born in Jerusalem. This was at odds with the position of the Obama administration, which did not formally recognize Jerusalem as under Israeli sovereignty and only issued passports

339 *Jones v United States* (n 338) 212 [my insertions and emphasis].
340 Cf as well *Oetjen v Cent Leather Co* 246 US 297 (1918) (US Supreme Court) 302.
341 Lauterpacht (n 336) 145 ff (very critical concerning the exception); rejecting such a doctrine for English law Mann, *Foreign Affairs* (n 2) 40.
342 *United States v Belmont* (n 48) 328.
343 *United States v Pink* 315 US 203 (1942) (US Supreme Court) 230.
344 Chen (n 310) 243.
345 Cf also Ingrid Wuerth, 'The Future of the Federal Common Law of Foreign Relations' (2018) 106 Georgetown Law Journal 1840 ff.
346 American Law Institute, *Third* (n 61) § 204; Ingrid Wuerth, 'Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department' (2011) 51 Virginia Journal of International Law 1, 17.
347 White (n 46) 27.
348 *Bor-Tyng Sheen v United States* [2021] WL 1433439 (United States District Court for the Eastern District of North Carolina); *Lin v United States* [2008] 539 F Supp 2d 173 (United States District Court for the District of Columbia).
349 For a thorough analysis for the executive – legislative interplay in historical recognition cases see Reinstein (n 328).
350 *Zivotofsky v Kerry* 576 US 1 (2015) (US Supreme Court).

indicating 'Jerusalem' as the place of birth. The court held the act unconstitutional as its aim was 'to infringe on the recognition power—a power the Court now holds is the sole prerogative of the President'.[351] Thus, the law of the United States in this field is governed by a doctrine of conclusiveness.[352]

b) Germany

Like their Anglo-American colleagues, German scholars in the second half of the 19th century saw the judiciary as bound by executive decisions concerning recognition.[353] Under the Bismarck Constitution, the Supreme Court of the Reich, in a criminal law case concerning the insult of a foreign head of state, emphasized the executive's non-recognition in deciding whether a relevant criminal law provision was applicable.[354] However, some academics like Triepel began to doubt the strict binding effect of executive assessments in the field.[355] In other criminal law cases, the Supreme Court of the Reich decided independently that Alsace-Lorraine was not a state as it lacked sovereign state authority[356] or that Poland was not an independent state in 1916.[357] The scope of the binding effect of executive decisions was hence less settled than in the United States.

The trend towards more judicial independence continued during the Weimar Constitution.[358] Many scholars still stressed that the judiciary is bound by the executive decision, while at the same time mentioning that courts could decide incidentally on the existence of states in civil and

351 Ibid 2095.

352 Note however that Justice Breyer in *Zivotofsky v Kerry* (n 350) found the whole issue to be governed by the political question doctrine.

353 Concerning governments already Johann K Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (CH Beck 1868) 111; concerning states Triepel (n 142) 44 who was, however, more doubtful, cf below (n 355); cf Bolewski (n 128) 64 fn 3.

354 *Judgment from 28 September 1891* RGZ 22, 141 (Supreme Court of the Reich) 146; for a civil law case see *Judgment from 7 July 1882* Seufferts Archiv 38, 171 ff (Higher Regional Court Hamburg) cited after Bolewski (n 128) 64 fn 3.

355 Triepel (n 142) 442 fn 2; Bolewski (n 128) 64 fn 3.

356 *Judgment from 26 April 1888 (Elsass Fall)* RGSt 17, 334 (Supreme Court of the Reich) 335; cf Bolewski (n 128) 79 fn 4.

357 *Judgment from 26 April 1918* RGSt 52, 278 (Supreme Court of the Reich); cf Bolewski (n 128) 79 fn 3.

358 For this part cf Bolewski (n 128) 76 ff.

criminal cases.[359] This development[360] is illustrated by a case decided in 1920 by the Supreme Court of the Reich,[361] in which the defendants were charged with forgery of Czechoslovakian revenue stamps. Czechoslovakia was at that time not recognized by Germany. Nevertheless, the court convicted the defendant for 'forgery of foreign revenue stamps'.[362] Although the court saw possible foreign relations implications (it was confronted with supporting a 'foe state' when assuming criminal liability),[363] it did not question its authority to decide on the subject. It held that recognition 'does not matter at all'[364] and instead focused on whether the new state was 'factually established'.[365] Hence, the Supreme Court of the Reich relied on the factual situation, not the government's assessment. In another case, the Prussian Court of Competence Conflicts, in an immunity decision, placed at least strong emphasis on the fact that Germany had recognized the Polish state in the Treaty of Versailles.[366]

The Nazi period[367] saw a return to stronger executive influence, and academics proclaimed a binding force of executive decisions concerning the recognition of states[368] and governments.[369] At least in the early stages

359 Concerning states Julius Hatschek, *Völkerrecht* (Deichert 1923) 147; concerning states as well Josef L Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht* (Kohlhammer 1928) 35 f, concerning governments Kunz saw a stronger binding effect, ibid 128.

360 Other cases include decisions on the existence of the Polish State *Judgment from 16 October 1925* JW 55 (1926) 1987 (Supreme Court of the Reich) 1987 and *Judgment from 10 May 1921* RGSt 56, 4 (Supreme Court of the Reich) 6; on the existence of the Soviet Union cf *Judgment from 2 May 1932* IPRspr 1932, No 21 (Higher Regional Court Berlin) 50; cf Bolewski (n 128) 78 fn 1, 79 fn 2, 77 fn 1.

361 *Judgment from 29 June 1920 (Stempelmarken Fall)* RGSt 55, 81 (Supreme Court of the Reich); cf Bolewski (n 128) 76.

362 § 275 No 2 of the former criminal code.

363 *Elsass Fall* (n 356) 334; in the case *Judgment from 28 September 1891* (n 354) the opinion of the Executive is taken into account but only because of international treaties that allowed Germany and other countries to determine who is to be regarded as the ruler of Bulgaria.

364 *Stempelmarken Fall* (n 361) 82 [my translation].

365 Ibid [my translation].

366 *Judgment from 10 March 1928* ZaöRV 1931, 102 (Court of Competence Conflicts); cf Bolewski (n 128) fn 3.

367 For this part cf Bolewski (n 128) 91 ff.

368 Franz Pfluger, *Die einseitigen Rechtsgeschäfte im Völkerecht* (Schulthess 1936) 141; Heinz-Carl Arendt, *Die Anerkennung in der Staatenpraxis* (Buchdruckerei Franz Linke 1938) 153; cf Bolewski (n 128) 93.

369 Ulrich Scheuner, 'Die Gerichte und die Prüfung politischer Staatshandlungen' (1936) 57 Reichsverwaltungsblatt 437, 442; Siegfried Grundmann, 'Die richterliche

of the Third Reich and less politically charged matters, the courts continued with their independent assessment. For example, in a civil case, the Supreme Court of the Reich determined independently that the city of Danzig was now an independent state.[370] However, in politically more significant cases, the courts felt bound by the executive assessment. An important incident includes the German recognition of the Franco regime in the early stages of the Spanish Civil War. The executive recognition had been premature and thus contrary to international law.[371] Nevertheless, the courts followed the executive decision to recognize the Franco regime and treated it as binding.[372]

Contemporary German law has returned to more judicial review. The courts are free to weigh evidence[373] on whether a state exists or a government is in de facto control regardless of executive recognition.[374] Executive statements will be considered but only carry weight as expert evidence.[375] The justification for this wide review power lies in Article 25 of the Basic Law, which stipulates that customary international law is part of German

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Nachprüfung von politischen Führungsakten nach geltendem deutschem Verfassungsrecht' (1940) 100 Zeitschrift für die gesamte Staatswissenschaft 511, 535; Peter Stierlin, *Die Rechtsstellung der nichtanerkannten Regierungen im Völkerrecht* (Polygraphischer Verlag Zürich 1940) 141; Bolewski (n 128) 93 f.

370 *Decision from 28 April 1934* JW 1934, 2334 (Supreme Court of the Reich); cf as well *Judgment from 22 June 1933* RGSt 67, 255 (Supreme Court of the Reich).

371 Cf the critique by Lauterpacht (n 336) 95; cf for the case as well Bolewski (n 128) 95.

372 *Judgment from 18 March 1938* JW 1938, 1122 (Higher Regional Court Frankfurt); for a civil law case concerning Poland see *Judgment from 17 September 1941* RGZ 167, 274 (Supreme Court of the Reich) 277.

373 Cf § 286 Code of Civil Procedure, § 108 Code of Administrative Court Procedure, § 261 Code of Criminal Procedure; Stefan Talmon, *Kollektive Nichtanerkennung illegaler Staaten* (Mohr Siebeck 2006) 463 fn 20.

374 This at least appears to be the dominant position in the literature cf Wilhelm Wengler, *Völkerrecht* (Springer 1964) 823; Bolewski (n 128) 160; Jochen A Frowein, 'Die Bindungswirkung von Akten der auswärtigen Gewalt insb. von rechtsfeststellenden Akten' in Jost Delbrück, Knut Ipsen and Dietrich Rauschnig (eds), *Recht im Dienst des Friedens, Festschrift für Eberhard Menzel* (Duncker & Humblot 1975) 125, 127; Bruno Simma and Alfred Verdross, *Universelles Völkerrecht* (3rd edn, Duncker & Humblot 1984) 605 § 968; Reinhold Geimer, *Internationales Zivilprozessrecht* (5th edn, Otto Schmidt 2005) mn 272 f; Talmon, *Nichtanerkennung* (n 373) 463; for a contrary view Albert Bleckmann, *Grundgesetz und Völkerrecht* (Duncker & Humblot 1975) 256; cautiously leaning towards a binding effect if a state has been recognized Ignaz Seidl-Hohenveldern, *Völkerrecht* (Carl Heymanns 1965) 121 mn 494.

375 Bolewski (n 128) 190; Talmon, *Nichtanerkennung* (n 373) 464.

law, ranking above ordinary statutes but below the constitution.[376] Executive acts contrary to international law (e.g., a premature recognition) can thus be held inapplicable by the courts.[377] Whether executive recognition is at least a precondition for state immunity appears to still be subject to debate.[378]

The *Rhodesian Bill* case[379] exemplifies the German courts' high level of independence. In 1965, South Rhodesia (now Zimbabwe) unilaterally declared its independence from the British Empire and established a suppressive white minority regime. The United Nations Security Council called upon all states not to recognize the new state or regime, and Germany (at that time not a member of the United Nations) acknowledged this duty in a note verbale to the Secretary-General of the UN.[380] It also stated that only the new management of the reserve bank set up in London would be authorized to represent the bank.[381] In the meantime, the new government in Salisbury (Rhodesia) had ordered banknotes produced at a German printing house. On application of the UK government, the Frankfurt Regional Court issued an injunction to prevent the dispatch. Later, it rescinded this ruling. Although it stated that it felt bound by the executive statement (as long as it was not evidently contrary to international law),[382] it also held that the London administration 'is not able to have its way in Salisbury'[383] and that 'the present government in Rhodesia holds factual

376 In contrast to Article 25, the old Article 4 of the Weimar Constitution only applied to law that Germany had recognized as binding, the recognition could also be withdrawn by the legislative branch Matthias Herdegen, 'Art. 25' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 15; Gerhard Anschütz, *Die Verfassung des deutschen Reiches* (14th edn, Stilke 1932) 65 mn 4 'Unter allen Umständen aber muß die betreffende Norm von uns, vom Deutschen Reich, als geltendes Völkerrecht anerkannt sein'.

377 In this direction Wengler (n 374) 827; Bolewski (n 128) 188 f.

378 Citing different positions in the literature Wilfried Schaumann and Walther Habscheid, *Die Immunität ausländischer Staaten nach Völkerrecht und deutschen Zivilprozessrecht* (CF Müller 1968) 47 ff; it appears likely in the light of the case law below (e.g. Kosovo), that at least in cases of intentional non-recognition the courts will follow the executive position.

379 *Judgment from 27 January 1967* (*Rhodesian Bill Case)* 2/12 Q 30/66 (Regional Court Frankfurt) the original case files have been deleted after 50 years and could not be reviewed by the author. The analysis is based on the cited secondary literature.

380 Talmon, *Nichtanerkennung* (n 373) 463.

381 Bolewski (n 128) 199.

382 Ibid.

383 Cited after Leslie C Green, 'Southern Rhodesian Independence' (1969) 14 Archiv des Völkerrechts 155, 188.

power in Rhodesia'.[384] The court found the London administration entitled to 'formal legitimacy'[385] and the position of an 'aspirant of powers'. However, as the government in exile was in control merely 'on paper,'[386] the de facto management was able to authorize actions that did not impede these aspirational rights, such as replacing old bills.[387] Although the court declared itself to be 'bound' by the executive statement, it relied on de facto control instead of executive decision, even in such a highly political case.[388] The Constitutional Court also relied on the de facto situation in several cases. It considered the GDR a state in terms of international law and thus a subject of international law regardless of the Federal Republic's (West Germany's) refusal of formal recognition.[389]

However, there is also case law placing more emphasis on the executive's role, albeit only by lower courts. In a case in front of the Augsburg Administrative Court, the judge had to decide whether an individual had attained Kosovan citizenship and thus whether Kosovo was a state.[390] It first established the large area of discretion for the executive in foreign affairs and stated that courts should exercise 'utmost deference holding international assessments and valuations of the foreign affairs power to be legally flawed'.[391] It concluded that, in general, courts were bound by the executive determinations of the status of Kosovo unless they were – under every viewpoint – ill-founded and arbitrary.[392] This approach shows a certain similarity to the deferential *Hess* case line in treaty interpretations.[393] Likewise, German courts have refused to acknowledge Palestinian citizenship[394]

384 Cited after Talmon, *Nichtanerkennung* (n 373) 463 [my translation].
385 Cited after Green (n 383) 189.
386 Ibid.
387 Ibid.
388 Bolewski criticised the reasoning and called for declaring the recognition straight up void for lack of effective control Bolewski (n 128) 201.
389 *Judgment from 31 July 1972 (Grundlagenvertrag)* (n 167) 22; Talmon, *Nichtanerkennung* (n 373) 463 fn 27 with further references.
390 *Judgment from 7 April 2009* (*Kosovo Case)* Au 1 K 08.748 (Administrative Court Augsburg).
391 Ibid mn 35 [my translation].
392 Ibid mn 1, 35.
393 Cf above, this Chapter, I., 1., b), bb), (3).
394 *Decision from 16 December 1986* RPfelger 1987, 311 (Local Court Neumünster); Talmon, *Nichtanerkennung* (n 373) 464; the courts are however more willing to give effect to acts of Palestinian authorities in private international law, see Stefan Talmon, 'Acceptance of a Palestinian Nationality Within the Area of Private International Law' GPIL from 5 September 2023 available at <https://gpil.jura.uni-bonn.de

and the citizenship of the newly founded Balkan states after the collapse of Yugoslavia,[395] referring to the German government's non-recognition. As Talmon correctly observed,[396] according to the dominant opinion in German law, the courts' reasoning was incorrect.[397] Whether the German government had recognized these states should not have played a decisive role, and the courts should have engaged in an independent assessment and only taken into account the position of the German government as evidence, amongst other factors. The picture concerning the level of judicial review in recognition cases is thus mixed. In some cases, the courts almost recklessly neglected the executive's position, while in others, they applied a margin of discretion approach.

c) South Africa

The traditional South African approach concerning judicial control of executive recognition acts relied on English law.[398] As shown above,[399] the strong reliance on the executive's position had been established in recognition cases like *Taylor v Barclay*.[400] One of the earliest South African examples of this approach is *Van Deventer v Hancke & Mossop*,[401] dating back to 1903.[402] Boer forces[403] had seized and sold wool after the Transvaal (the formerly independent South African Republic) had been formally declared part of the British Empire. A buyer of the seized wool had asked the courts to uphold these transactions as they were conducted when the Boers were still in de facto control of the area, arguing that the proclamation had been

/2023/09/acceptance-of-a-palestinian-nationality-within-the-area-of-private-international-law/>.

395 Cf Talmon, *Nichtanerkennung* (n 373) 265 fn 41.

396 Ibid 464.

397 In these cases, I would argue for a doctrine of discretion approach similar to the one I am proposing below, cf this Chapter, II., 2.

398 For the English law Mann, *Foreign Affairs* (n 2) 37 ff; McLachlan (n 250) 391 ff.

399 Cf Chapter 1, II., 1., b).

400 *Taylor v Barclay* (1828) 57 ER 769 (Court of Chancery); cf however Chen (n 310) 247; according to Mann the British rule does not know any hardship exceptions Mann, *Foreign Affairs* (n 2) 40.

401 *Van Deventer v Hancke and Mossop* 1903 TS 401 (Supreme Court of the Transvaal).

402 Cf on the case as well Dugard and others (n 2) 105.

403 The forces of the formerly independent South African Republic, for South African history cf as well Chapter 1, II., 1., c).

premature in terms of international law.[404] The court refused to review the executive proclamation and stated that

> *[i]n its dealings with other States the Crown acts for the whole nation, and such dealings* ***cannot be questioned or set aside by its Courts.*** *They are acts of State into the validity or invalidity, the wisdom or unwisdom, of which domestic Courts of law have no jurisdiction to inquire.*[405]

Consequently, no effect was given to the transactions of the Boer forces as the judges found the South African Republic had ceased to exist with the proclamation of annexation.[406]

Van Deventer was decided before South African independence, but the courts also applied the classic English certification doctrine in subsequent years. In the mentioned[407] leading case *S v Devoy*[408] from 1971, the judges had to decide on the recognition of Malawi. They endorsed certification as part of South African law and as binding on the courts regarding the recognition of states and governments.[409] This classic approach was called into question by a line of cases in which courts took notice of states and governments without executive approval[410] (e.g., the Congolese government,[411] East Germany,[412] and Rhodesia[413]). However, the cases were seen as reconcilable with the traditional approach in *Inter-Science Research*,[414] a case that dealt with the recognition of the new Mozambican government and questions of immunity. The judges held that in the diverting cases, recognition was a mere question of judicial cognizance and that the judiciary was hence under no obligation to request a certificate.[415] Although this explanation may appear fairly artificial, *Inter-Science Research* confirmed the classical

404 *Van Deventer v Hancke and Mossop* (n 401) 409.
405 Ibid 410 [my emphasis].
406 Ibid 411.
407 Cf this Chapter, I., 1., c), aa).
408 *S v Devoy* (n 260).
409 AJGM Sanders, 'The Courts and Recognition of Foreign States and Governments' (1975) 92 South African Law Journal 167.
410 Dugard and others (n 2) 172 ff.
411 *Parkin v Government of the Republique Democratique du Congo* 1971 (1) SA 259 (W) (Transvaal Provincial Division) 259 E.
412 *Sperling v Sperling* 1975 (3) SA 707 (A) (Appellate Division).
413 *S v Oosthuizen* 1977 (1) SA 823 (N) (Natal Provincial Division).
414 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (Transvaal Provincial Division); Dugard and others (n 2) 173.
415 *Inter-Science Research* (n 414) 118.

approach that recognizing states and governments are part of the executive prerogatives and conclusive.[416]

Provisions in the Foreign States Immunity Act of 1981, which codified former common law,[417] support this finding. Section 17 (a) provided that 'a certificate by or on behalf of the Minister of Foreign Affairs and Information shall be ***conclusive evidence*** on any question whether any foreign country is a state for the purposes of this Act'.[418] Concerning heads of state, the act provided that a certificate of the foreign minister 'shall be ***conclusive evidence*** on any question as to the person [...] to be regarded [...] as the head of state or government of a foreign state'.[419]

Post-apartheid South African law appears to have deviated from this approach. In *Kolbatschenko v King*,[420] a case concerning a request of assistance from the South African government to Lichtenstein, the court obiter deliberated on the binding force of executive statements in foreign affairs. The government had claimed that South African courts were traditionally reluctant to decide 'political questions'.[421] It also argued that

> *[the executive's] requests for foreign assistance, directed as they are to foreign governments, constitute the conduct of foreign affairs by the Republic. Consequently,* ***neither the decisions to make the requests nor the requests themselves are justiciable*** *in the sense of being susceptible to rescission, review or declaratory proceedings in a South African court.*[422]

The court, in contrast, doubted that certain areas were 'per se beyond judicial scrutiny'[423] under the new constitution. On the other hand, it also stressed the leading role of the executive, especially in recognition cases:

> *South African courts have refused to evaluate decisions or actions in the realm of foreign relations involving issues of a 'high executive nature.' Thus, for example, matters such as the recognition by the South African Government of a foreign State or of a foreign government, or of the*

416 *Inter-Science Research* (n 414) 117 f.
417 Cf this Chapter, I., 3., c), cf Dugard and others (n 2) 100 fn 225.
418 Foreign States Immunities Act 87 of 1981 Section 17 (a) [my emphasis].
419 Foreign States Immunities Act 87 of 1981 Section 17 (c) [my emphasis and omissions].
420 *Kolbatschenko v King NO and Another* 2001 (4) SA 336 (C) (Cape Provincial Division); cf on the case as well Dugard and others (n 2) 107 ff.
421 Ibid 353.
422 Ibid 352 [my emphasis].
423 Ibid 355.

> *status of diplomatic representatives of a foreign State,* ***have generally been regarded as non-justiciable*** *[…] This type of decision, which falls four-square within the political arena, would include matters such as the making, or the determination of the existence, of treaties between South Africa and foreign States, the declaration of war and the making of peace. In such cases, it is indeed undesirable that the State should 'speak with two voices'* ***and the latitude extended*** *by the Judiciary to the Executive in such matters will be correspondingly large.*[424]

As the court found the request of assistance not to be a matter of 'high executive nature,' it did not further elaborate on the executive's role.[425] The statement provides a mixed picture. On the one hand, the court reiterated the old approach and referred to the 'one voice' doctrine. On the other hand, it refused to follow the executive and treat the case as non-reviewable. Likewise, mentioning a 'latitude' suggests a discretionary instead of a conclusiveness or non-reviewability approach.

That South Africa now applies a discretionary approach also appears to be supported by Section 232 of the new South African Constitution. It provides that customary international law forms part of South Africa's law unless it is inconsistent with the constitution or an act of parliament. Where in former times, customary international law was incorporated *as part* of the common law,[426] it is now *superior* to common law rules.[427] A certificate as to the quality of statehood based on common law would thus be subject to judicial review.[428] To a certain extent, this mirrors the position in current German law, where Article 25 of the Basic Law creates an angle for judicial review.[429] In this regard, current South African law appears to depart from contemporary English law where the conclusiveness of executive recognitions has been affirmed in recent judgments.[430]

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424 Ibid 356 [my emphasis].
425 Ibid 357.
426 Dugard and others (n 2) 63.
427 Ibid 67.
428 John Dugard and Others, *International Law: A South African Perspective* (4th edn, Juta 2013) 71; the same holds if a certificate would be considered to be issued under a power granted by the constitution Dugard and others, *International Law* (5th edn) (n 2) 104.
429 Cf this Chapter, I., 2., b).
430 Cf especially *Deutsche Bank AG London Branch v Receivers Appointed by the Court Central Bank of Venezuela v Governor and Company of the Bank of England and*

Although the Foreign States Immunity Act of 1981 is still in force, it is doubtful that a statement concerning a state's status is still 'conclusive'. The new post-apartheid Diplomatic Immunities and Privileges Act dealing with foreign official immunity[431] points in this direction. In this act, the word 'conclusive' was substituted for 'prima facie' and indicates that the wording of the Foreign States Immunity Act may be a 'leftover' from the old legal system.[432] The new South African approach appears to be that courts should still request the Department of Foreign Affairs to issue a certificate on the matter in case of doubt.[433] However, its content will no longer be considered conclusive, only awarded weight.[434] Thus, South Africa now applies a doctrine of discretion in recognition cases.

d) Conclusion on recognition of states and governments

In contrast to cases of treaty interpretation which were only later affected by deference considerations, early on the courts treated the recognition of states and governments in the United States as purely executive tasks. Case law affirmed a broad interpretation of the presidential recognition power in Article 2 (2) and (3) of the US Constitution and thus anchored the deferential position within the constitutional text. This was facilitated by the simultaneous development of the certification doctrine in the United Kingdom, which mainly evolved out of recognition cases.[435] The conclusiveness approach of US law in this area is virtually unchallenged.

On the other hand, Germany never came under the influence of the English certification doctrine. Even under the Bismarck Constitution, case law shows a mixed picture, and courts, in many cases, decided independently on the status of states and governments. This trend continued (except for the Nazi period) up to current German law. Most academic commentators stress the independent role of the courts in deciding on the existence of a state or de facto control of a government. However, in some cases, the courts held that the executive decision matters and sporadically developed a margin of discretion approach.

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others (n 306) 515 ff and *Mohamed v Breish* (n 306); Peter Webster (n 306); critical of this trend McLachlan (n 250) 413 ff.

431 Cf this Chapter, I., 4., c), bb).

432 In this direction as well Dugard and others, *International Law* (5th edn) (n 2) 104.

433 Dugard and others, *International Law* (5th edn) (n 2) 173.

434 Ibid 104, 172.

435 Cf Chapter 1, II., 1., b).

Older South African law explicitly adopted the English certification approach in recognition cases and the conclusive force of executive assessments also found its way into statutory law. After the constitutional change, South African judges were hesitant to apply the doctrine. New constitutional provisions appear to allow the judicial review of executive recognition decisions. Likewise, contemporary statutes have not reiterated the executive's role in issuing conclusive statements but only allow for 'prima facie' evidence to be submitted. South Africa thus shifted to a margin of discretion approach.

3. State immunity

This subchapter will examine the level of deference applied by the courts concerning questions of state immunity. The state's immunity (sometimes also referred to as sovereign immunity) must be differentiated from the immunity of its foreign officials,[436] which we will be analysing in the following subchapter. Until the middle of the 19th century, states' immunity was 'absolute,' covering all its activities. Customary international law then gradually changed to a 'restrictive view' that excludes commercial acts.[437] As we shall see below, the circumstances under which the changed status of customary international law was adopted in our three reference jurisdictions will allow us a particularly clear view of the executive-judicial relationship.

With the adoption of the restrictive approach, current international law now also distinguishes between 'jurisdictional immunity,' which covers administrative, civil, and criminal proceedings, and 'enforcement immunity,' which covers resulting enforcement measures.[438] As our focus lies on the executive-judicial interplay and as these forms of immunity were not neatly separated until recently,[439] I will not differentiate between them.[440]

436 See Hazel Fox and Patricia Webb, *The Law of State Immunity* (3rd edn, OUP 2013) 537.
437 Stoll (n 4) mn 26.
438 Ibid mn 1.
439 Ibid mn 50.
440 However, most cases will refer to what today would be considered jurisdictional immunity.

a) United States

The law of sovereign immunity in the United States was prominently assessed for the first time in the *Schooner Exchange v McFaddon*[441] in 1812.[442] The American owners of the vessel *Exchange* had sent her on a trip to Spain, where she was captured on the orders of Napoleon and subsequently used as a warship. On a trip to the West Indies, the vessel, now under French command, encountered bad weather conditions and was forced to harbour in Philadelphia. The former owners seized the opportunity and tried to recover the ship. At the instruction of the US government, the Attorney of the United States for the District of Pennsylvania issued a suggestion of immunity 'respectfully praying' that the court would release the vessel.[443] The court, however, engaged in an independent assessment, drawing especially from international law (with Chief Justice Marshall citing de Vattel)[444] and finally concluded that the vessel was immune. This starting point set the tone for foreign immunity considerations. During the nineteenth and early twentieth century, courts generally solved foreign state immunity questions by referring to customary international law.[445]

However, as hinted at in *Schooner Exchange* (where the judges followed the executive opinion in the end), the courts did not completely ignore executive statements but – without developing a coherent approach – awarded 'weight' to the executive statements from time to time.[446] Like in English (and South African) law at that time, only executive statements regarding the status of foreign sovereigns (but not the question of immunity as such) were treated as conclusive.[447] Several cases sparked by the vessel *The Pesaro*[448] in the 1920s illustrate that approach. The Italian government owned the Pesaro but used it for civilian transportation of goods. Certain cargo was damaged during the trip to the US, and the owners sued for

441 *The Schooner Exchange v McFaddon* 11 US 116 (1812) (US Supreme Court).
442 For a brief history cf American Law Institute, *Restatement of the law, third: The foreign relations law of the United States, §§ 501 – end, tables and index* (American Law Institute Pub 1987) Introductory Note Chapter 5; Bradley, *International Law* (n 9) 240.
443 *The Schooner Exchange v McFaddon* (n 441) 118 f.
444 Ibid 143.
445 Henkin (n 2) 55; White (n 46) 27; Wuerth, 'Foreign Official Immunity' (n 346) 10.
446 Bradley, *International Law* (n 9) 241 ff.
447 Henkin (n 2) 55; White (n 46) 27, 134.
448 For the cases surrounding the Pesaro as well White (n 46) 134 ff.

damages and wanted the ship arrested as security. In one of the cases connected to the events, the executive suggested that the courts should grant no immunity in cases concerning commercial vessels and did not support the Italian request.[449] The judge held these remarks to be 'not without significance [...] although I do not mean to say that immunity should be refused in a clear case simply because the executive branch has failed to act'.[450] In line with the executive, the court did not award immunity, the decision being later vacated with the parties' consent.[451] The vacation opened the door for another case surrounding the Pesaro in which the Supreme Court finally (and contrary to the executive statement in the previous case) decided that customary international law awards immunity for all sovereign acts, commercial or not.[452] The courts thus still referred to international law and did not grant conclusive effect to executive suggestions.

Nevertheless, the influence of the State Department grew by the beginning of the 20th century. The decision in *Ex parte Muir*[453] had made clear that foreign sovereigns could only make immunity requests if they joined the case as a party or asked for a suggestion by the State Department.[454] Given that states rarely wanted to be involved directly, this increased the importance of the State Department's suggestions.[455] Nevertheless, these were not given conclusive force until *The Navemar*[456] reached the courts in 1938. The case again concerned the seizure of a ship and further strengthened the trend initiated by *Ex parte Muir*.[457] The judges held that '[i]f the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel'.[458] For the first time, a court acknowledged a conclusive effect of the executive statement not only concerning the status of a foreign sovereign but also concerning the question of immunity as such.[459] However, the remarks were made rather

449 *The Pesaro* [1921] 277 F 473 (New York District Court) 497 fn 3.
450 Ibid 479 f.
451 Henkin (n 2) 350 n 64; White (n 46) 136.
452 *Berizzi Bros Co v SS Pesaro* 271 US 562 (1926) (US Supreme Court) 574 ff.
453 *Ex parte Muir* 254 US 522 (1921) (US Supreme Court).
454 White (n 46) 135 ff.
455 Ibid 137.
456 *Compania Espanola De Navegacion Maritima, S A v The Navemar* 303 US 68 (1938) (US Supreme Court).
457 White (n 46) 138.
458 *Compania Espanola De Navegacion Maritima, S A v The Navemar* (n 456) 74.
459 White (n 46) 138.

obiter as the executive in *The Navemar* had not issued any suggestion of immunity.[460]

The real change again came in the wake of the Sutherland Revolution,[461] when in 1943 *Ex parte Republic of Peru*[462] found its way to the Supreme Court.[463] The case once more centred on a ship's immunity. The court did not conduct its own assessment but entirely relied on the suggestion of the State Department:

> *The certification [of the State Department] and the request that the vessel be declared immune must be accepted by the courts as a* ***conclusive determination*** *by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations.*[464]

This line of case law was developed further in *Republic of Mexico v Hoffman*,[465] which established that even where the executive had remained silent, the case was to be settled according to principles accepted by the executive branch.[466] The courts thus followed a two-step procedure: the sovereign in question could request a 'suggestion of immunity' from the State Department, which was treated as conclusive if issued.[467] If the State Department remained silent, the courts would decide themselves based on common law[468] and take into account the principles accepted by the executive. Hence, the courts switched from independent assessment and a sporadic discretionary approach to a doctrine of conclusiveness (when a suggestion was issued). With *Ex parte Peru* and *Mexico v Hoffmann* the deferential trend[469] had thus reached the law of state immunity.

However, the executive determinations of immunity proved unsatisfactory for many reasons. Foreign states attempted to influence the State Department in their favour. The State Department, in turn, often issued

460 Bradley, *International Law* (n 9) 242.
461 For the Sutherland revolution cf above, Chapter 1, II., 2., d).
462 *Ex parte Republic of Peru* 318 US 578 (1943) (US Supreme Court).
463 Henkin (n 2) 55.
464 *Ex parte Republic of Peru* (n 462) 589 [my emphasis and adjustment].
465 *Republic of Mexico v Hoffman* 324 US 30 (1945) (US Supreme Court).
466 Ibid 35; Bradley, *International Law* (n 9) 242.
467 *Samantar v Yousuf* 560 US 305 (2010) (US Supreme Court) 15.
468 Ibid 5.
469 Cf above, Chapter 1, II., 2., d).

incoherent suggestions or no suggestion at all.[470] Moreover, it issued the Tate Letter in 1952, a statement urging the judges to apply the restrictive immunity doctrine,[471] which was subsequently widely accepted by the courts.[472] This led to the confusing situation that foreign sovereigns seeking immunity would either address the State Department asking for a suggestion of immunity, which after *Ex Parte Republic of Peru* was considered binding, or address the court directly claiming that the act in question was non-commercial.[473] Meanwhile, the State Department itself did not consistently comply with the principles set out in the Tate Letter and sometimes issued suggestions of immunity even when the state's conduct was clearly commercial.[474] Finally, the executive encouraged Congress to solve the issue by enacting the Foreign Sovereign Immunities Act (FSIA)[475] in 1976.[476] The act established the restrictive immunity doctrine (previously only applied based on the Tate Letter) and provided a clear framework for when foreign states enjoyed immunity and what kind of exceptions applied. Thus, the act gave back control to the judiciary in state immunity cases.[477] It does not include provisions obliging the courts to consider executive determinations and marks a return to the starting point, that is, independent assessment of immunity by the courts but this time based on statute instead of common law.[478]

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470 Wuerth, 'Foreign Official Immunity' (n 346) 12.

471 Cf this Chapter, I., 3.

472 Letter from Jack B Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General Department of Justice from 19 May 1952 reprinted in (1952) 26 Department of State Bulletin 984.

473 Bradley, *International Law* (n 9) 244.

474 Ibid; Christopher Totten, 'The Adjudication of Foreign Official Immunity Determinations in the United States Post-Samantar: A Circuit Split and Its Implications' (2016) 26 Duke Journal of Comparative & International Law 517, 522.

475 Foreign Sovereign Immunites Act 1976.

476 Henkin (n 2) 60; for an overview of the FSIA exceptions cf David P Stewart, 'International Immunities in US Law' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 625, 626 ff.

477 *Samantar v Yousuf* (n 467) 6; Bradley, 'Chevron Deference' (n 77) 713.

478 *Samantar v Yousuf* (n 467) 7; Shobha V George, 'Head-of-State Immunity in the United States Courts: Still Confused After All These Years' (1995) 64 Fordham Law Review 1051, 1064; Lewis S Yelin, 'Head of State Immunity as Sole Executive Lawmaking' (2011) 44 Vanderbilt Journal of Transnational Law 911, 980.

b) Germany

Concerning the law of state immunity,[479] Prussian tradition, giving considerable influence to the executive, strongly influenced the early German approach. One of the first references to executive control in (state) immunity cases can be found in a Prussian cabinet order[480] from 1795. It provided that a declaration should be obtained from the Foreign Office[481] before foreign princes could be subjected to arrest proceedings.[482] This regulation was later annexed to the Procedural Code of the Prussian States.[483] Although the wording only referred to princes, it was considered applicable to foreign states.[484] Making use of its influence during the early 19th centu-

479 For German monographs on the topic: Edgar Loening, *Die Gerichtsbarkeit über fremde Staaten und Souveräne* (Max Niemeyer 1903); Edwin Gmür, *Gerichtsbarkeit über fremde Staaten* (Polygraphischer Verlag Zürich 1948); Michael Albert, *Völkerrechtliche Immunität ausländischer Staaten gegen Gerichtszwang* (München 1984); Helmut Damian, *Staatenimmunität und Gerichtszwang* (Springer 1985); Siegfried Lorz, *Ausländische Staaten vor deutschen Zivilgerichten* (Mohr Siebeck 2017); Anja Höfelmeier, *Die Vollstreckungsimmunität der Staaten im Wandel des Völkerrechts* (Springer 2018); for an historic overview Friedrich J Sauter, *Die Exemption ausländischer Staaten von der inländischen Zivilgerichtsbarkeit* (Anton Warmuth Buchdruckerei 1907) 15 ff; Botho Spruth, *Gerichtsbarkeit über fremde Staaten* (Universitätsverlag Robert Noske 1929) 21 ff; Haslinger, *Gerichtsbarkeit über fremde Staaten mit besonderer Berücksichtigung der Verhältnisse in Deutschland* (Bernhard Sporn 1935) 13 ff; Jenö Staehlin, *Die gewohnheitsrechtliche Regelung der Gerichtsbarkeit über fremde Staaten im Völkerrecht* (Herbert Lang 1969) 51 ff; Manfred Malina, *Die Völkerrechtliche Immunität Ausländischer Staaten im zivilrechtlichen Erkenntnisverfahren* (Marburg 1978) 121; concerning ships Marius Böger, *Der Immunität der Staatsschiffe* (Verlag des Instituts für Internationales Recht an der Universität Kiel 1928); for one of the few English monographs on German law Eleanor W Allen, *The Position of Foreign States before National Courts – Chiefly in continental Europe* (Macmillan 1933).

480 Kabinettsorder vom 14 April 1795 (1817) Rabe Sammlung preussischer Gesetze 50; the Cabinet consisted of the closest advisors of the King see Ernst R Huber, *Deutsche Verfassungsgeschichte seit 1789 – Reform und Restauration 1789 – 1830* (Kohlhammer 1957) 145 f.

481 At this time called 'Kabinettsministerium' Huber (n 480) 146.

482 Loening (n 479) 27, 34; Allen (n 479) 57.

483 Allgemeine Gerichtsordnung für die Preußischen Staaten (1795); Loening (n 479) 28 (with the slight modification, that the Minister of Justice has to decide after consultation with the foreign office); Allen (n 479) 58.

484 Cf its application in a case against Russia Eduard Droop, 'Über die Zuständigkeit der inländischen Gerichte für Rechtsstreitigkeiten zwischen Inländern und fremden Staaten, insbesondere für Anordnung von Arrest gegen fremde Staaten' (1882) 26 Beiträge zur Erläuterung des deutschen Rechts 289, 292; cf the deliberations in

ry, the Prussian Foreign Office intervened in several civil law cases, e.g., against the Duchy of Nassau (1819),[485] Russia (1833),[486] and the Electorate of Hesse (1834),[487] and successfully ordered the courts to drop the proceedings.

Following the founding of the German Empire, new legislation was enacted.[488] In line with the previous statute, it explicitly only addressed the immunity of foreign officials[489] and no special influence for the executive was mentioned.[490] However, the executive could still exert a certain influence with the help of the aforementioned[491] Prussian Court of Competence Conflicts,[492] which was established in 1847[493] and continued as a special Prussian state court after a reform of the justice system of the new Empire.[494] The court acted on the executive's initiative and was specifically created to decide whether disputes should be settled by the judiciary or remain in the sole authority of state agencies.[495] With the court, the Prussian tradition remained influential within the new legal order. The *Romanian Railway* case of 1881 illustrates that point. It concerned debts owed by Romania under state bonds.[496] The applicant won against Romania in proceedings in front of the Regional Court,[497] inducing Bismarck, as Prussian Minister of Foreign Affairs, to call upon the Court of Competence Conflicts.[498] During the proceedings, the lower court declared that it would have dismissed the case if it had been aware of the foreign affairs

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Judgment from 25 July 1910 (Hellfeld Case) (1911) 5 JöR 263 (Court of Competence Conflicts).

485 Droop (n 484) 291 f; Allen (n 479) 59 (for an English summary).

486 Droop (n 484) 292 f; Allen (n 479) 60 (for an English summary).

487 Droop (n 484) 294 f; Allen (n 479) 60 f (for an English summary).

488 Especially the courts Constitution Act in 1877, cf Allen (n 479) 61.

489 Ibid.

490 Ibid 62.

491 Cf above, Chapter 1, II., 3., a).

492 Georg Lemmer, *Die Geschichte des preußischen Gerichtshofes zur Entscheidung der Kompetenzkonflikte (1847–1945)* (Scienta 1997).

493 Gesetz über das Verfahren bei Kompetenzkonflikten zwischen den Gerichten und Verwaltungsbehörden vom 8. April 1847.

494 Verordnung, betreffend die Kompetenzkonflikte zwischen den Gerichten und den Verwaltungsbehörden, vom 1. August 1879.

495 Lemmer (n 492) 50, 169 including central and provincial administrative agencies.

496 Droop (n 484) 294 ff; Allen (n 479) 62 (for an English summary).

497 Droop (n 484) 295.

498 Ibid 296.

repercussions.[499] The Court of Competence Conflicts explicitly referred to the Prussian cases mentioned above.[500] It held that foreign states were not subject to German jurisdiction under public international law, which it found to be directly applicable in cases dealing with immunity.[501] In contrast to the earlier Prussian proceedings, the case did not end with the minister's interference, but the court independently determined the status of international law. The Competence Court also decided on similar cases regarding the Ottoman Empire (1902)[502] and Russia in the *Hellfeld* case (1910).[503] Although the executive thus remained influential in starting the proceedings, at least formally, the court decided on its own. After the judicial reform, the Supreme Court of the Reich, as the highest court in the newly created Empire, followed the jurisprudence of the Competence Court.[504] In 1905 in the *Belgium Railroad* case,[505] it decided that public international law was directly applicable in immunity cases and applied the absolute immunity doctrine. It also directly referred to the Competence Court's jurisprudence.[506] The Supreme Court of the Reich also engaged in an independent analysis of state practice without considering any executive position on the matter.[507]

Both courts survived the constitutional change and continued their jurisprudence under the new Weimar Constitution.[508] The new Article 4 of the Weimar Constitution now explicitly provided for the application of recognized rules of public international law as binding law of the German Empire. The Supreme Court of the Reich explicitly[509] confirmed its decision in the *Belgium Railroad* case in a case concerning the US vessel *The Ice*

499 Loening (n 479) 37.
500 Droop (n 484) 301 f.
501 Ibid 300 ff; Loening (n 479) 45 ff.
502 *Judgment from 14 June 1902* printed in Stölzel, *Die neueste Rechtsprechung des Gerichtshofs zur Entscheidung der Kompetenzkonflikte* (1906) No 2504 (Court of Competence Conflicts).
503 *Hellfeld Case 25 July 1910* (n 484); Allen (n 479) 76.
504 Cf already *Judgment from 21 June 1888* RGZ 22, 19 (Supreme Court of the Reich).
505 *Judgment from 12 December 1905 (Belgium Railroad Case)* RGZ 62, 165 (Supreme Court of the Reich); Allen (n 479) 82 (for an English summary).
506 *Belgium Railroad Case* (n 505) 166.
507 Ibid 165 f.
508 For a short overview of the German history concerning sovereign immunity in the 20th century see Lorz (n 479) 11 ff.
509 *Judgment from 10 December 1921* (*Ice King Case)* RGZ 103, 274 (Supreme Court of the Reich) 275.

King.[510] The ship had been involved in a maritime accident, and the injured party sued for damages. Again, the court engaged in an independent assessment of the state of customary international law to determine whether or not the restrictive immunity doctrine had already replaced the absolute immunity doctrine.[511] Without any executive guidance, it decided the question in the negative and held the vessel to be immune.[512] Additionally, the Court of Competence Conflicts showed remarkable independence in a series of cases[513] against the Ottoman Empire.[514] The Ottoman government, through intermediaries, had purchased several goods in Germany during the First World War and was then being sued by retailers. The executive[515] tried to stop the case with the help of the Court of Competence Conflicts. The latter decided that the Ottoman Empire had submitted to German jurisdiction due to a special paragraph within the purchase agreements and thus explicitly rejected the executive's opinion. The court followed the executive application in other cases against Poland[516] and Romania,[517] although again deciding independently. It mentioned that only states recognized by the German Empire were entitled to immunity, thus acknowledging a certain executive control in the area.[518]

During the Nazi period, scholars treated all acts of foreign affairs, including state immunity, as unreviewable.[519] As mentioned, the courts, in some cases, were reluctant to follow this position. At least in one decision, the

510 Ibid; Allen (n 479) 86 (for an English summary).

511 *Ice King Case* (n 509) 275 ff.

512 For another immunity case against Turkey, as well without executive influence cf *Judgment from 26 January 1926* JW 1926, 804 (Supreme Court of the Reich); for a case against Rumania, as well without executive influence *Judgment from 4 June 1930* JW 1931, 150 (Supreme Court of the Reich).

513 *Judgment from 29 May 1920* JW 1921, 773 (Court of Competence Conflicts); *Judgment from 13 November 1920* JW 1921, 1478 (Court of Competence Conflicts) concerning jurisdiction to enforce; Allen (n 479) 74 (for an English summary).

514 The German courts referred to the Ottoman Empire as 'Turkish Empire', a commonly used terminology at the time.

515 The right to start the proceedings under the Weimar time lay with the Prussian 'Staatsministerium' *Judgment from 26 January 1926* (n 512) 774; Allen (n 479) 71 fn 7.

516 *Decision from 4 December 1920* JW 1921, 1480 (Court of Competence Conflicts); *Decision from 4 December 1920* JW 1921, 1485 (Court of Competence Conflicts); *Decision from 12 March 1921* JW 1921, 1481 (Court of Competence Conflicts); *Judgment from 10 March 1928* (n 338); Allen (n 479) 80.

517 *Decision from 27 June 1925* JW 1926, 402 (Court of Competence Conflicts).

518 *Judgment from 15 December 1923* NJW 1924, 1388 (Court of Competence Conflicts) 1391.

519 Cf Chapter 1, II., 3., d).

Supreme Court of the Reich continued its independent assessment of state immunity.[520]

Under contemporary German law, there is still no statutory law regulating the question of sovereign immunity.[521] The question is governed by customary international law, which forms part of German law according to Article 25 of the Basic Law, the successor of Article 4 of the Weimar Constitution.[522] In the *Yugoslav Military Mission* case[523] decided in 1962, the Constitutional Court had to determine whether state immunity completely prohibited cases involving embassy grounds or if proceedings that did not impair the functioning of the embassy were admissible. It decided in the latter sense after a thorough independent assessment of state practice.[524]

A year later, in a case concerning the Iranian embassy, the court had to decide whether Iran was immune from a suit demanding payment of costs for reparation works conducted within its embassy building in Germany.[525] The German government had argued that even though international law may have changed to a doctrine of restrictive immunity – and thus allowed proceedings when the state was engaged in commercial activity – the reparation of the embassy was closely connected to its function. Thus, the executive argued that the state acted in its official capacity and was immune.[526] The court first engaged in a thorough analysis of state practice and finally confirmed that international law had changed to restrictive immunity.[527] It then held, outspokenly recognizing the different opinion of the German government, that the reparation works were 'obviously'[528]

520 *Judgment from 16 May 1938* RGZ 157, 389 (Supreme Court of the Reich).

521 As long as the UN Convention on Jurisdictional Immunities of States and their Property (adopted 2 December 2004) is not in force. In contrast to individual immunity which is covered by the Courts Constitution Act; some technical aspects are however covered by the European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) 1495 UNTS 181; cf already Allen (n 479) 65; Fritz Münch, 'Immunität fremder Staaten in der deutschen Rechtsprechung bis zu den Beschlüssen des Bundesverfassungsgerichts vom 30. Oktober 1962 und 30. April 1963' (1964) 24 ZaöRV 265, 266.

522 Article 25 of the Basic Law.

523 *Decision from 30 October 1962 (Yugoslav Military Mission Case)* BVerfGE 15, 25 (German Federal Constitutional Court).

524 Ibid 34 ff.

525 *Decision from 30 April 1963 (Iranian Embassy Case)* BVerfGE 16, 27 (German Federal Constitutional Court).

526 Ibid 30.

527 Ibid 60.

528 Ibid 64.

not commissioned in an official capacity and thus denied immunity. The case forms the pinnacle of the courts' independence concerning sovereign immunity determinations. Regarding the thorough independent review of the status of international law, foreign judges like Lord Wilberforce congratulated the court for its 'great clarity'[529] and 'instructive review of the law of state immunity over a wide area'.[530] The case also highlights the contrast to US jurisprudence. Whereas the turn to the restrictive immunity doctrine was initiated by the executive's Tate Letter in the US, in Germany, it was executed by the Constitutional Court alone, which determined that customary international law had changed. The court has continued with this independent approach in subsequent case law concerning the Philippine embassy,[531] an Iranian oil company,[532] and other cases.[533]

c) South Africa

The South African approach concerning state immunity again followed British case law,[534] which had been consolidated in *The Parlement Belge*.[535] South Africa adopted this approach in the 1921 case *De Howorth v The SS India*.[536] It concerned the question of whether a Portuguese vessel was immune from suit. Like the courts in the United States and Germany at that time, the court directly referred to international law. It considered British and American case law, explicitly mentioning *The Parliament Belge* and *Schooner Exchange v McFaddon*,[537] and finally found the Portuguese vessel to be immune. The case entails no remarks concerning special respect

529 *Playa Larga v I Congreso del Partido* [1981] 1 AC 244 (House of Lords) 263.
530 Ibid 267; cf Xiaodong Yang, *State immunity in international law* (CUP 2012) 17 fn 74.
531 *Decision from 13 December 1977* (*Philippine Embassy Case)* BVerfGE 46, 342 (German Federal Constitutional Court).
532 *Decision from 12 April 1983 (National Iranian Oil Company)* BVerfGE 64, 1 (German Federal Constitutional Court).
533 *Decision from 17 March 2014* 2 BvR 736/13 (German Federal Constitutional Court); *Decision from 8 March 2007* BVerfGE 117, 357 (German Federal Constitutional Court).
534 Dugard and others, *International Law* (5th edn) (n 2) 348.
535 *The Parlement Belge* (1880) 5 PD 197 (Court of Appeal).
536 *De Howorth v The SS India* 1921 CPD 451 (Cape of Good Hope Provincial Division); cf on the case Dugard and others, *International Law* (5th edn) (n 2) 350.
537 *De Howorth v The SS India* (n 536) 60 f.

for the executive's position. In contrast, a certain executive influence was alluded to in *Inter-Science Research*[538] decided in 1979, where the court referred to the classic British case of *Arantzazu Mendi*,[539] quoting

> *Our Sovereign has to decide whom he will recognize as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities* ***must flow from that decision alone****.*[540]

However, the certification was confined to the 'status which entitles to immunity'[541] (e.g., if the entity is recognized as a state) and – in contrast to the United States – not extended to immunity as such.[542] This is in line with the roots of the doctrine, which only applies to questions of fact, not questions of law.

As shown,[543] the courts did not always uphold this distinction. The decision to recognize a state or government effectively decided the case, especially in the periods of the absolute immunity doctrine.[544] As in the US and Germany, the absolute immunity doctrine was prevalent in South Africa and applied in many cases.[545] However, the difference to the US approach became more visible when the courts turned to restrictive immunity in the previously mentioned *Inter-Science Research*[546] case. While the court relied on the executive certificate for the question of recognition,[547] it engaged in an assessment of international law (which was at that time part

538 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414).

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

540 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414) 117 [my emphasis].

541 Mann, *Foreign Affairs* (n 2) 37.

542 Cf already Moore (n 249) 38; McLachlan (n 250) 247.

543 Above Chapter 2, III., 3.

544 The Arantzazu case itself may serve as an example *Spain v Owners of the Arantzazu Mendi* (n 539).

545 *Ex parte Sulman* 1942 CPD 407 (Cape of Good Hope Provincial Division); *Kavouklis v Bulgaris* 1943 NPD 190 (Natal Provincial Division, Durban and Coast Local Division); question left open in *Lendalease Finance Co (Pty) Ltd v H Corporation de Mercadeo Agricola and Others* 1975 (4) SA 397 (C) (Cape Provincial Division); question left open in *Prentice, Shaw & Schiess Incorporated v Government of the Republic of Bolivia* 1978 (3) SA 938 (W) (Transvaal Provincial Division).

546 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414); cf as well *Kaffraria Property Co Pty Ltd v Govt of the Republic of Zambia* 1980 (2) SA 709 (E) (Eastern Cape Division).

547 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414) 116 ff.

of South African law by virtue of common law)[548] and British case law[549] concerning the scope of immunity. Interestingly, in their shift, the English courts relied heavily on the Tate Letter.[550] Thus, the US approach indirectly also influenced the law in South Africa. In contrast to the US, the change in *Inter-Science Research*, as in Germany's *Iranian Embassy* case, was brought about by independent judicial determination of the status of customary international law and was not initiated by executive statements.[551] As in the United Kingdom (and the United States), the common law approach of the courts in South Africa was later substituted by statute law in the form of the Foreign States Immunity Act of 1981, which closely followed the UK's State Immunity Act of 1978.[552] As introduced above,[553] it provides that a 'certificate by or on behalf of the Minister of Foreign Affairs and Information shall be *conclusive evidence* on any question whether any foreign country is a state for the purposes of this Act'. This again underlines the difference between recognition, which is to be done by the executive, and determination of immunity, now placed in the hands of the courts under statutory law.

The trend towards judicial independence in determining state immunity continued under current South African law. As we have seen, older South African law had developed in this direction, although a certain influence was still given to the executive by certifying on the recognition of a foreign state. The Foreign States Immunity Act of 1981, allowing the executive to submit conclusive evidence, is still in force. However, as mentioned,[554] it is doubtful that courts will still treat this evidence as non-reviewable.[555] Concerning *foreign official* immunity, as we will see below, older statutes that allowed the executive to submit 'conclusive evidence' have been replaced by statutes only granting the status of 'prima facie' evidence,[556] and the

548 Dugard and others, *International Law* (5th edn) (n 2) 63.
549 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414) 118 ff.
550 *Philippine Admiral v Wallem Shipping (Hong Kong) Ltd* (n 5); *Playa Larga v I Congreso del Partido* (n 529); *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414) 121.
551 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414) 120 ff.
552 Dugard and others, *International Law* (5th edn) (n 2) 350.
553 This Chapter, I., 2., c).
554 This Chapter, I., 2., c).
555 In the same vein Dugard and others, *International Law* (5th edn) (n 2) 104.
556 Chapter 3, I., 4., c), bb).

wording of the Foreign Sovereign Immunities Act may thus be a leftover from older South African law.

The case *Zimbabwe v Fick* shows the continuing independent assessment of the courts in questions of state immunity.[557] It relates to a decision of the SADC tribunal, mentioned above[558] and which will be assessed in more detail below.[559] The tribunal had decided in favour of Zimbabwean farmers expropriated by the Zimbabwean government during land reform. With their claims barred by Zimbabwean courts, some farmers sought to enforce parts of the SADC tribunal's judgment in South Africa. The Zuma government at the time clearly opposed the action.[560] Nevertheless, despite Zimbabwe's view to the contrary, the Constitutional Court held that it had waived its immunity concerning SADC tribunal decisions in accordance with Section 3 (2) of the Foreign Sovereign Immunities Act by ratifying the SADC treaty.[561] The case did not mention a special role for the South African executive.

d) Conclusion on state immunity

To a certain extent, the development concerning state immunity in the United States mirrors the approach in treaty interpretation. In the early 19th century, the courts appeared to award no special deference to the executive. Case law taking into account the executive's position emerged only gradually, but eventually, conclusive force was granted to executive 'suggestions'. This proved unpractical for many reasons, and the common law development was substituted by a statutory framework, allowing the judiciary to assess questions of state immunity independently.

In Germany, like in cases of treaty interpretation, Prussian tradition at first had a strong influence in cases of state immunity and courts applied a conclusiveness approach. This influence was prolonged by the Court of Competence Conflicts and thus still active under the Bismarck Constitution. With the fading significance of the Court of Competence Conflicts and the strengthened role of the Supreme Court of the Reich,

557 *Government of the Republic of Zimbabwe v Fick and others* (n 291).
558 Cf Introduction, I. and this Chapter, I., 1., c), bb).
559 Cf this Chapter, II., 1., b) and Chapter 4, I., 4., b) and Chapter 4, II., 4., b) and c).
560 For the Zuma government's role in dismantling the tribunal this Chapter, II., 1., b) and Chapter 4, II., 4., b) and c).
561 *Government of the Republic of Zimbabwe v Fick and others* (n 291) 335 f.

the executive's hold on cases of state immunity shrunk. This was facilitated by Article 4 of the Weimar Constitution, explicitly allowing courts to refer to customary international law. Under current German law, the issue of state immunity is still governed by direct reference to international law. Courts have independently determined the status of international law and its application to the respective case, even in the face of differing executive assessments.

In the early 20th century, South African courts followed the UK (and US) approach of the time and independently determined if a state enjoyed immunity. This did not change when the courts solidified the English certification doctrine and started to rely on the executive in recognition cases. In contrast to American practice, the certification was always restricted to the 'status entitling immunity' and not applied to immunity decisions as such. The executive influence on immunity issues was thus a mere 'spill over' from the practice of accepting executive determinations in recognition cases. This became more visible when the 'restrictive immunity' approach prevailed, and recognition of a state did not necessarily lead to its immunity in front of domestic courts. The (limited) reach of executive certification was also finally codified by statutory law in the early 1980s. Under contemporary South African law, this statutory framework is still in force. In its case law, courts have awarded no special weight to executive positions when determining questions of state immunity.

4. Foreign official immunity

This subchapter will examine the courts' review of executive determinations regarding the immunity of (foreign) individuals. I will use the term 'foreign official immunity' to refer to these cases.[562] This type of immunity must be separated from state immunity, as discussed in the previous subchapter, which covers the state as an entity, not its officials. Some US authors apply a narrower definition and only use the term 'foreign official immunity' to refer to a particular subcategory of foreign individuals.[563] As this differ-

562 In this sense also used by Luke Ryan, 'The New Tate Letter: Foreign Official Immunity and the Case for a Statutory Fix' (2016) 84 Fordham Law Review 1773, 1796.

563 Cf e.g. Stewart (n 495) 638 using the term 'foreign official immunity' only for conduct-based immunity not regulated by the Vienna Convention.

entiation is tied to the peculiarities of US law,[564] I will use the broader definition.

Concerning foreign officials, two forms of immunity have to be differentiated. All foreign government officials hold conduct-based immunity (also referred to as functional immunity or immunity *ratione materiae*), which is granted for official acts, even when they leave office.[565] Some individuals additionally enjoy status-based immunity (also referred to as personal immunity or immunity *ratione personae*), which also covers private acts. It emanates from the position held (e.g., heads of state and government, foreign ministers, and accredited diplomats) and is closely connected to state sovereignty.[566] Status-based immunity only covers incumbent office holders. The following part will deal with both types of immunity and differentiate wherever the courts apply different approaches to the two forms of immunity.[567]

a) USA

aa) Early cases concerning individual immunity

One of the first instances concerning the immunity of a foreign official in the United States evolved in 1795 and concerned the case *Waters v Callot*.[568] Callot had been a former governor of the French colony Guadeloupe and was arrested in Philadelphia on his way back to France. He had allegedly abused his powers to condemn a ship while in office and was being sued by the former captain. Although French officials pressed the US government to interfere, it claimed to have no authority to instruct the courts on the matter.[569] The plaintiff later withdrew his suit and the case was vacated. However, the instance was no singularity. In the late 18th century, several sit-

564 US law applies different approaches to different types of individual immunity, cf this Chapter, I., 4., a.).

565 For the distinction Chimène I Keitner, 'The Common Law of foreign official immunity' (2010) 14 Green Bag 61, 64 f; Wuerth, 'Foreign Official Immunity' (n 346) 14 ff; Bradley, *International Law* (n 9) 264.

566 Bradley, *International Law* (n 9) 264.

567 As we will see, especially the US is arguably applying a different standard to both forms of immunity.

568 Cf the comprehensive reconstruction of the case in Chimène I Keitner, 'The forgotten history of foreign official immunity' (2012) 87 NYU Law Review 704, 713, 751.

569 Ibid 724.

uations evolved in which a foreign official claimed conduct-based immunity and the executive repeated its conviction to be unable to interfere.[570] This allows for the conclusion that the executive itself saw the determination of foreign official immunity as a judicial task.

The previously described case of the *Schooner Exchange* prominently mentioned the status-based immunity of individuals for the first time.[571] The court alluded to a division between the state itself, the governing monarch as an individual[572] and other representatives such as foreign ministers.[573] However, especially concerning heads of state, the courts hardly differentiated between the state itself and its high-ranking representatives until the enactment of the Foreign Sovereign Immunities Act in the 1970s.[574] In the *Schooner Exchange* case, the differentiation was rather superficial and the individual's immunity was still strongly linked to the immunity of the state itself.[575]

In the absence of cases concerning status-based immunity, it does not come as a surprise that the Supreme Court undertook the first detailed discussion of foreign official immunity in a case dealing with conduct-based immunity. *Underhill v Hernandez*[576] concerned a US citizen working as an engineer during the civil war in Venezuela in the late 19th century. He had been prevented by a general of the later victorious anti-government forces from leaving the city of Bolivar and claimed damages for unlawful detention when he finally returned to the United States. In the meantime, the United States had recognized the new Venezuelan government, and the court found that Hernandez committed the acts in his official capacity

570 Ibid 759.

571 *The Schooner Exchange v McFaddon* (n 441); Christopher Totten, 'Head-of-state and foreign official immunity in the United States after Samantar: A suggested approach' (2011) 34 Fordham International Law Journal 332, 336.

572 *The Schooner Exchange v McFaddon* (n 441) 137.

573 Ibid 138; Bradley, *International Law* (n 9) 264.

574 Rare example *Hatch v Baez* 14 NY Sup Ct 596 (1876) (New York Supreme Court); Jerrold Mallory, 'Resolving the confusion over head-of-state immunity: the defined rights of kings' (1986) 86 Columbia Law Review 169, 171; Totten, 'Head-of-state' (n 571) 337; cf the only rare pre FSIA cases in the comprehensive research of Yelin (n 478) 929, 992 ff; Bradley, *International Law* (n 9) 264.

575 *The Schooner Exchange v McFaddon* (n 441) 144; moreover, the remarks were made obiter as the case primarily concerned state immunity.

576 *Underhill v Hernandez* 168 US 250 (1897) (US Supreme Court) the case also introduced the American 'act of state doctrine' see Bradley, *International Law* (n 9) 265.

and thus enjoyed immunity.[577] The case does not mention any executive influence on the decision, apart from the executive power to recognize governments.[578] Besides its significance for foreign official immunity, the case is also known for introducing the American doctrine of (foreign) act of state.[579]

After the turn to a conclusiveness approach in state immunity cases was brought about by *Ex parte Peru* in the 1940s,[580] the courts also sporadically applied this approach to cases concerning conduct-based immunity.[581] However, these cases were 'few and far between,'[582] many of them touched on the topic of conclusive assessments as rather obiter dicta,[583] and no coherent approach developed.[584] In 1969 and 1972, the US respectively ratified the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.[585] As international treaties, they do not include special provisions on the executive's role. The same holds for the US Diplomatic Relations Act of 1978, which implemented the Vienna Convention on Diplomatic Relations.[586] In large parts, both treaties are considered self-executing by the courts.[587] In applying the treaties, only executive determinations as to the status of an individual are generally treated as conclusive.[588] The question of immunity as such is not considered bind-

577 Bradley, *International Law* (n 9) 265.
578 *Underhill v Hernandez* (n 576) 253.
579 Bradley, *International Law* (n 9) 265; for the (foreign) act of state doctrine cf already Chapter 2, V., 1.
580 Cf above, this Chapter, I., 3., a).
581 *Greenspan v Crosbie* [1976] US Dist LEXIS 12155 (United States District Court for the Southern District of New York); Bradley, *International Law* (n 9) 266.
582 *Samantar v Yousuf* (n 467) 2291.
583 *Heaney v Government of Spain* [1971] 445 F2d 501 (United States Court of Appeals for the 2nd Circuit) (no suggestion was actually issued by the department of state); *Waltier v Thomson* [1960] 189 F Supp 319 (United States District Court for the Southern District of New York) (not really stating in how far the executive suggestion is binding).
584 Keitner, 'Common Law' (n 565) 73; Bradley, *International Law* (n 9) 264 f.
585 Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95; Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.
586 Arguably some executive influence is left by the reciprocity clause, this is however fundamentally different from the old common law approach Yelin (n 517) 979.
587 American Law Institute, *Third* (n 61) Chapter 6 Introductory Note; Bradley, *International Law* (n 9) 260.
588 Bradley, *International Law* (n 9) 262 f.

ing but only given weight.[589] Concerning diplomats and consular officials, quite like in the case of state immunity after the enactment of the Foreign Sovereign Immunities Act, the determination of immunity was hence given back to the courts.[590]

bb) Situation post-FSIA and the Supreme Court's decision in *Samantar v Yousuf*

The enactment of the Foreign Sovereign Immunities Act in 1976 settled the law of state immunity,[591] and the Vienna Conventions regulated cases concerning diplomats and consular officials. However, the enactment of the FSIA also caused great uncertainty in how courts should treat cases against individual officials not covered by the Vienna Conventions. Judges only then started to clearly differentiate between head of state immunity and state immunity.[592] Most courts held that the FSIA did not cover head of state immunity and referred to the former common law.[593] Relying on state immunity cases like *Ex parte Peru*, they felt bound by the executive suggestions offered in these situations.[594] If no suggestion was offered, the courts decided independently.[595]

The remaining question was thus regarding how conduct-based immunity would be dealt with after the enactment of the FSIA. It was prominently addressed in *Chuidian v Philippine National Bank*.[596] Chuidian, a Philippine citizen, had sued an official of the Philippine government who had instructed the Philippine National Bank to dishonour a letter of credit issued to Chuidian.[597] The Ninth Circuit held that the FSIA could be applied by treating the defendant as an 'agency or instrumentality of a foreign state'[598] and found the official to be immune. Following this judgment,

589 Ibid; cf however American Law Institute, *Third* (n 61) § 464 f.
590 Mallory (n 574) 181.
591 Cf above, this Chapter, I., 3., a).
592 Mallory (n 574) 171; Totten, 'Head-of-state' (n 571) 337 fn 17.
593 Bradley, *International Law* (n 9) 266.
594 *United States v Noriega* (n 567) 1211 ff; for further case law see Totten, 'Head-of-state' (n 571) 342 ff.
595 Mallory (n 574) 181; Totten, 'Head-of-state' (n 571) 344 ff.
596 *Chuidian v Philippine Nat'l Bank* [1990] 912 F2d 1095 (United States Court of Appeals for the 9th Circuit); cf Bradley, *International Law* (n 9) 268.
597 *Chuidian v Philippine Nat'l Bank* (n 596) 1097.
598 *Chuidian v Philippine Nat'l Bank* (n 596) 1099 ff.

many Circuit Courts began to apply the FSIA to conduct-based immunity cases, while a smaller number held the act inapplicable.[599] The matter finally reached the Supreme Court in *Samantar v Yousuf*.[600] Samantar was a former military chief in Somalia who left the country to live in the United States after his military regime collapsed. He was allegedly involved in the torture and killing of innocent civilians in Somalia and was sued for damages under the Torture Victim Protection Act and the Alien Tort Statute.[601] The District Court applied the FSIA and held Samantar to be immune,[602] whereas the Court of Appeals disagreed and held that only pre-FSIA common law could apply.[603] Granting certiorari, the US Supreme Court in *Samantar* engaged in a thorough interpretation of the FSIA and held that it did not govern foreign official immunity.[604] However, the court gave little guidance on how judges were to determine the immunity of individuals if the FSIA does not apply.[605] It simply stated

> *We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity.*[606]

Although this speaks for at least some form of executive involvement, it appears fair to hold that it was never entirely settled what degree of deference should apply to executive determinations concerning foreign officials in the pre-FSIA era. To further complicate things, the pre-FSIA common law cannot simply be transferred to the post-FSIA era as the question of sovereign immunity is now one of statutory construction and may have repercussions concerning foreign official immunity.[607] The *Samantar* case was circled back on remand to the District Court, which in *Samantar II* applied the former pre-FSIA common law and followed the executive suggestion (that

599 Cf cases cited in *Samantar v Yousuf* (n 467) 310 fn 4.
600 Ibid.
601 Torture Victim Protection Act 106 Stat 73; Alien Tort Statute 28 USC 1350.
602 *Yousuf v Samantar* 2007 US Dist LEXIS 56227 (United States District Court for the Eastern District of Virginia).
603 *Yousuf v Samantar* [2009] 552 F3d 371 (United States Court of Appeals for the 4th Circuit).
604 *Samantar v Yousuf* (n 467) 315 f.
605 Ryan (n 562) 1777.
606 *Samantar v Yousuf* (n 467) 323.
607 E.g. when a suit against an individual is in essence aimed against the state itself the courts would have to independently determine that the FSIA, not the Common Law applies, see Wuerth, 'Foreign Official Immunity' (n 346) 28 ff.

the State Department had meanwhile issued) that Samantar did not enjoy immunity.[608] This view was shared on appeal by the Fourth Circuit, albeit differentiating between status-based and conduct-based forms of immunity:

> *In sum we give **absolute deference** to the State Department's position on status-based immunity doctrines such as head-of-state immunity. The State Department's determination regarding conduct-based immunity, by contrast, is not controlling, but it carries **substantial weight** in our analysis of the issue.*[609]

Thus, the courts cemented the differentiation between the forms of immunity, which evolved after the FSIA had been enacted. The rationale behind this distinction is that the Fourth Circuit views head of state immunity as a function of state immunity and thus closely connected to the president's recognition power,[610] warranting a higher degree of deference.[611] This differentiation is highly controversial, as ongoing developments have shown.

cc) Current developments – a circuit split

It took some time for the issue to reach the circuit level again, but finally, the Second Circuit had to deal with the question in *Rosenberg v Pasha*.[612] Two former directors of the Pakistani intelligence service had been charged with their alleged involvement in the 2008 terror attacks in Mumbai, in which 166 individuals died. The State Department issued a suggestion of immunity ('Rosenberg Statement'[613]) in which it claimed (conduct-based) immunity for the defendants. The District Court treated this view as con-

608 *Yousuf v Samantar* 2012 US Dist LEXIS 122403 (United States District Court for the Eastern District of Virginia).

609 *Yousuf v Samantar II* [2012] 699 F3d 763 (United States Court of Appeals for the 4th Circuit) 773 [my emphasis].

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

611 *Yousuf v Samantar II* (n 609) 772.

612 *Rosenberg v Pasha* [2014] 577 Fed Appx 22 (United States Court of Appeals for the 2nd Circuit).

613 United States Attorney General, 'Statement of Interest and Suggestion of Immunity, Rosenberg v Lashkar-e-Taiba', 980 F Supp 2d 336 available at <perma.cc/JW9C-AUNL>; Ryan (n 562) fn 16.

clusive ('the Court's inquiry ends here'[614]) and held that both individuals were immune from jurisdiction. On appeal, the Second Circuit affirmed this view.[615] This reasoning is blatantly at odds with the Fourth Circuit's decision in *Samantar II*, according to which the suggestion of conduct-based immunity is not binding on the courts but merely entitled to 'substantial weight'.[616]

The Fourth Circuit reaffirmed its position in *Warfaa v Ali*[617] and arguably in other decisions,[618] thus leading to a circuit split. *Warfaa* again was concerned with Somali officials allegedly engaged in torture. The Fourth Circuit held that Warfaa did not enjoy immunity without treating the executive suggestion as binding.[619] The Supreme Court would have had the chance to solve the issue when Warfaa applied for certiorari. However, on the circumstances of the case, the executive also held that Warfaa was not immune and, in the absence of an effect on the outcome, certiorari was denied.[620] In his amicus curiae brief, the Solicitor General heavily criticized the 'erroneous reasoning' of the Fourth Circuit as impairing the executive's task to conduct foreign relations.[621]

The current role of the State Department in determinations of foreign official immunity thus remains open. Some authors strongly argue against immunity determinations by the State Department,[622] while others emphasize its dominant role in shaping foreign relations.[623]

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614 *Rosenberg v Lashkar-e-Taiba* [2013] 980 F Supp 2d 336 (United States District Court for the Eastern District of New York) 343.

615 *Rosenberg v Pasha* (n 612).

616 *Yousuf v Samantar II* (n 609) 773.

617 *Warfaa v Ali* [2016] 811 F 3d 653 (United States Court of Appeals for the 4th Circuit).

618 Ryan (n 562) 1785 ff.

619 *Warfaa v Ali* (n 589) 661 holding to be bound by its own precedent.

620 *Warfaa v Ali* 137 S Ct 2289 (cert denied) (2017) (US Supreme Court).

621 United States Solicitor General, 'Warfaa Amicus Brief' available at <https://www.justice.gov/osg/brief/ali-v-warfaa> 12 ff.

622 Wuerth, 'Foreign Official Immunity' (n 346); Peter B Rutledge, 'Samantar and Executive Power' (2011) 44 Vanderbilt Journal of Transnational Law 885, 909; Christine E Ganley, 'Re-evaluating the Common Law of Foreign Official Immunity: Ascertaining the Proper Role of the Executive' (2014) 21 George Mason Law Review 1317 (concerning conduct-based immunity); Ryan (n 562) 1795 ff (concerning conduct-based immunity).

623 Harold H Koh, 'Foreign Official Immunity After Samantar: A United States Government Perspective' (2011) 44 Vanderbilt Journal of Transnational Law 1141, 1147 ff; John B Bellinger, 'The Dog That Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities' (2011) 44 Vanderbilt Journal of Transnational Law 819, 825; Yelin (n 478).

Recent cases have left the question unanswered. In *Dogan v Barak*[624] the relatives of Dogan, an 18-year-old humanitarian worker, brought a suit against former Israeli Minister of Defence (and previous Prime Minister) Ehud Barak. Dogan had been on board a vessel trying to breach a blockade of the Gaza strip in 2010 and was killed by the Israeli military when it took control of the ship. As Minister of Defence, Barak had authorized the action, and the State Department issued a suggestion of immunity. The District Court used a classical 'even if' approach and held that, also when examined independently, Barak was entitled to immunity.[625] During the appeal proceedings, the State Department affirmed its view that its assessment is binding in an amicus brief.[626] Nevertheless, the Ninth Circuit, in its 2019 appeal decision, held that 'we need not decide the level of deference owed to the State Department's suggestion of immunity in this case, because even if the suggestion of immunity is afforded "substantial weight" (as opposed to absolute deference), based on the record before us we conclude that Barak would still be entitled to immunity'.[627]

A similar picture evolved from *Lewis v Mutond*[628]. It concerned the director of the Democratic Republic of Congo's intelligence service allegedly involved in the torture of an US-citizen in Congo. In the absence of a suggestion of immunity the court (erroneously)[629] referred to a section of the Second Restatement and denied immunity. The State Department in its amicus brief for review strongly opposed the approach as the court did not refer to 'the long-stated views and practice of the Executive Branch' which in its opinion should have governed the case in absence of a suggestion

624 *Dogan v Barak* 2019 US App LEXIS 23193 (United States Court of Appeals for the 9th Circuit); *Doğan v Barak* 2016 US Dist LEXIS 142055 (United States District Court Central District of California).

625 *Doğan v Barak* (n 624) 26 ff.

626 Brief for the United States as Amicus Curiae Supporting Affirmance, Dogan v. Barak, 932 F. 3d 888, No. 16–56704, 12 ff.

627 *Dogan v Barak* (n 624) 12 f.

628 *Lewis v Mutond* [2017] 258 F Supp 3d 168 (United States District Court for the District of Columbia); *Lewis v Mutond* [2019] 918 F 3d 142 (United States Court of Appeals for the District of Columbia Circuit); *Mutond v Lewis* 141 S Ct 156 (cert denied) (2020) (US Supreme Court).

629 The provision is arguably outdated after the FSIA, William S Dodge and Chimene I Keitner, 'A Roadmap for Foreign Official Immunity Cases in US Courts' (2021) 90 Fordham L Rev 677, 692.

of immunity.[630] However, the Supreme Court did not grant certiorari. The issue thus remains open until the Supreme Court has a chance to clarify its ruling in *Samantar*.

b) Germany

aa) Foreign official immunity during the Bismarck and Weimar Constitutions

The 'Procedural Code for the Prussian States' of 1793 entails the first traits of the German approach concerning individual immunity. It stipulated that the arrest of a foreign consul was only possible with the permission of the Foreign Department.[631] The law was further developed in the previously mentioned Prussian cabinet order[632] of 1795, providing that a declaration should be obtained from the Foreign Office[633] before foreign princes could be subjected to arrest proceedings.[634] In 1815, the regulation became part of the Procedural Code of the Prussian States.[635] The immunity of foreign diplomats and consuls also found its way into the Courts Constitution Act (*Gerichtsverfassungsgesetz*) of 1877, albeit without referring to the executive's role in determining their status.[636]

During the Bismarck Constitution, the courts began to decide independently whether foreign officials were immune. In a case concerning the Duke of Cumberland, the Supreme Court of the Reich, without executive guidance, held that the Duke did not enjoy immunity.[637] The court also

630 United States, 'Mutond v Lewis Amicus Brief', 2020 US S Ct BRIEFS LEXIS 5337, 14 f.
631 Allgemeine Gerichtsordnung (n 483) Zweiter Teil § 65; Allen (n 479) 57 appears to cite the wrong paragraph; Bolewski (n 128) 47 fn 1.
632 Rabe (n 480) 50, the Cabinet consisted of the closest advisors of the King cf Huber (n 480) 145 f.
633 At this time called 'Kabinettsministerium' Huber (n 481) 146.
634 Loening (n 479) 27, 34; Allen (n 479) 56 f.
635 Allgemeine Gerichtsordnung (n 483) § 202 Title 29 § 90; Loening (n 479) 28 (with the slight modification, that the Minister of Justice has to decide after consultation with the foreign office); Allen (n 479) 58.
636 Allen (n 479) 70; Münch (n 521) 266.
637 Schmitz and others (n 133) 133, 458 f; Bolewski (n 128) 82 fn 4.

decided that Greek soldiers who entered German territory without official orders were not immune from prosecution.[638]

The independent assessment continued during the Weimar Constitution. In the mentioned cases concerning Turkish purchases during the First World War in front of the Competence Court,[639] a Turkish diplomat's bank account was found not immune from German jurisdiction without any executive guidance.[640] The role of the executive was assessed in greater detail for the first time in the *Persian Mission* case[641] in 1926. The case in front of the Darmstadt Higher Regional Court concerned a member of the Persian mission charged with tax evasion. The German Foreign Office issued a statement that no immunity should be granted since, months before the proceedings, it had declared vis-à-vis the Persian embassy that it found the particular staff member not agreeable.[642] In preliminary proceedings, the court denied granting immunity, holding that it was not for the ordinary courts to ascertain if an individual possesses immunity and that it was formally bound by the statement of the Foreign Office, thereby following an expert opinion.[643] This position resembles the classical English certification doctrine and the executive suggestions in the United States.[644] During the second round of proceedings, the Higher Regional Court explicitly changed its view. It stated that, in general, due to German constitutional and administrative law, every government agency had to decide autonomously on fundamental questions for its respective decision, even though these questions lie in the area of competence of a different agency.[645] Therefore, the courts were only bound to agency statements if provided for by (statutory) law,

638 *Judgment from 17 September 1918* RGSt 52, 167 (Supreme Court of the Reich); for a case concerning an US consul see *Judgment from 27 January 1888* RGSt 17, 51 (Supreme Court of the Reich) (as well independent assessment).

639 Cf this Chapter, I., 3., b).

640 *Judgment from 13 November 1920* (n 513).

641 *Decision from 20 December 1926 (Persian Mission Case)* ZaöRV 1929, 204 (Higher Regional Court Darmstadt); for an English summary: *Persian Mission Case* Annual Digest of Public International Law Cases, 1925–1926, Case No 244; the case also reached the Reichswirtschaftsgericht which followed the view of the Higher Regional Court cf Karl Strupp, 'Persian Mission Case with annotations' (1929) 58 JW 970 ff; cf as well Bolewski (n 128) 81 ff.

642 *Persian Mission Case from 20 December 1926* (n 641) 207.

643 Opinion of Conrad Bornhak cited ibid 204.

644 Cf Chapter 2, III., 1. and 3.

645 *Persian Mission Case from 20 December 1926* (n 641) 205.

which did not apply to the case.[646] The German Foreign Office agreed with the court and stated that it 'at no time […] held the view that its opinion is binding on the German courts'.[647] With its decision, the court also followed new expert opinions, which had been provided in the meantime.[648] The experts stated that due to judicial independence, even if some agencies appeared more suited to settle certain questions, there was no room for a binding effect.[649] Nevertheless, the foreign office's statement warranted 'careful consideration'[650] and was to be given 'heightened weight'.[651] The court followed this view. However, even though it denied a binding effect, it decided in favour of the executive and contrary to the suggestions of many scholars did not grant immunity.[652] The case shows that as early as in the Weimar Republic, courts and scholars[653] dismissed a doctrine of conclusive evidence in favour of a margin of discretion approach.

During the Nazi period, judicial review was restricted. The recognition of ambassadors and other diplomatic personnel lay in the unreviewable competence of the *Führer*[654] and effectively also included the question of immunity.[655]

646 Ibid.
647 Ibid directly citing the German Foreign Office [my translation].
648 Ibid 204; Karl Strupp, 'Rechtsgutachten' (1926) 13 Zeitschrift für Völkerrecht 18; Friedrich Giese, 'Rechtsgutachten über die Frage der persönlichen Extraterritorialität des ausländischen Gesandschaftsattachés Herrn A.' (1926) 13 Zeitschrift für Völkerrecht 3.
649 Giese (n 648) 4.
650 Ibid 5.
651 Strupp (n 648) 27.
652 Carl Heyland, 'Persian Mission Case Annotations' (1928) 14 Zeitschrift für Völkerrecht 594, 597 f; Eugen Josef, 'Annotations to Persian Mission Case' (1928) 57 JW 76; Giese (n 648).
653 Strupp, 'Persian Mission Case with annotations' (n 641); Strupp, 'Rechtsgutachten' (n 648); Giese (n 648).
654 Grundmann (n 369) 535; Bolewski (n 128) 83 ff.
655 Especially since at that time the absolute immunity doctrine was applied in Germany.

bb) Foreign official immunity in contemporary German law

(1) Statutory foundations

Under current German law, the Courts Constitution Act (*Gerichtsverfassungsgesetz*) continues to regulate the immunity of foreign officials.[656] The statute exempts individuals covered by the Vienna Convention on Diplomatic[657] and Consular[658] relations from German jurisdiction. It also provides immunity to invited foreign representatives[659] and officials who are immune due to customary law and other treaties.[660] The majority of academic commentators hold that the judiciary has to determine independently whether the requirements for immunity are fulfilled.[661] Nevertheless, the Foreign Office has issued a detailed circular concerning the 'treatment of diplomats and other privileged personal' to secure the 'appropriate treatment' in front of agencies and courts.[662] Courts refer to it as guidance.[663]

Case law shows the considerable independence of German courts and their struggle to give appropriate weight to executive decisions. In a case at the Heidelberg Regional Court, a diplomat of the Republic of Panama had been charged with drink-driving and various traffic offences.[664] He claimed diplomatic immunity under the statute implementing the Vienna

656 However, concerning the Vienna conventions the provisions are merely declaratory, as both treaties are directly applicable in Germany due to their ratification statute Otto Kissel and Herbert Mayer, *Gerichtsverfassungsgesetz – Kommentar* (9th edn, CH Beck 2018) § 18 mn 4.

657 § 18 Courts Constitution Act.

658 § 19 I Courts Constitution Act.

659 § 20 I Courts Constitution Act.

660 § 20 (2) Courts Constitution Act.

661 Kissel and Mayer (n 656) § 18 mn 5; Brian Valerius, '§ 18 GVG' in Jürgen Graf (ed), *Beck OK GVG* (13th edn, CH Beck 2021) mn 7; on § 20 cf Steffen Pabst, '§ 20 GVG' in Thomas Rauscher and Wolfgang Krüger (eds) *Münchener Kommentar ZPO* (6th edn, CH Beck 2022) mn 8.

662 German Foreign Office, 'Zur Behandlung von Diplomaten und anderen bevorrechtigten Personen in der Bundesrepublik Deutschland' Circular from 15 September 2015 available at <https://www.auswaertiges-amt.de/blob/259366/95fb05e9a6a89de129f15d27f92f00aa/rundschreiben-beh-diplomaten-data.pdf>; previously a circular of the Ministry of the Interior was in place cf Kissel and Mayer (n 656) § 19 mn 5.

663 Chapter 3, I., 4., b), bb), (3) and *Decision from 5 October 2018* StB 43/18, StB 44/18 (Federal Court of Justice).

664 *Decision from 7 April 1970* NJW 1970, 1514 (Regional Court Heidelberg); Zeitler (n 171) 203.

Convention on Diplomatic Relations.[665] The German Ministry of Foreign Affairs and the Justice Ministry held that no immunity existed as Panama had been notified of his non-recognition under Article 9 (2) of the Vienna Convention on Diplomatic Relations.[666] However, the court held that on proper interpretation, the note only included a declaration as persona non grata under Article 9 (1) of the Convention and that no subsequent note of non-recognition had followed.[667] It explicitly stressed not being bound by a contradicting interpretation of the executive and decided that the suspect was still covered by immunity.[668]

The contemporary German approach concerning foreign official immunity has been particularly elaborated on in the litigation triggered by the Iranian diplomat Tabatabai, a case we will examine in greater detail.

(2) The Tabatabai litigation

(a) General background of the case

Sadegh Tabatabai[669] had worked in various positions in the Iranian government and, in 1983, entered Germany, where he also owned a private residence. In his possession, customs officials found 1.7 kilograms of opium.[670] He claimed diplomatic immunity upon his arrest and was subsequently released.[671] However, the Regional Court continued the trial on the merits. One day before the final judgment, Tabatabai left the country, and the

665 Article 18.
666 *Order from 7 April 1970* (n 664) 1515.
667 Ibid.
668 Ibid.
669 The facts of the case are based on the court decisions *Decision from 27 February 1984* (*Tabatabai Case)* BGHSt 32, 275 (Federal Court of Justice); *Decision from 7 March 1983 (Tabatabai Case 2nd Release Order)* (1983) 6 MDR 512 (Higher Regional Court Düsseldorf); *Judgment from 10 March 1983* (*Tabatabai Case)* (1983) EuGRZ 440 (Regional Court Düsseldorf); *Order from 24 February 1983* (*2nd Writ of Arrest)* (1983) EuGRZ 159 (Regional Court Düsseldorf); cf as well Klaus Bockslaff and Michael Koch, 'The Tabatabai Case: The Immunity of Special Envoys and the Limits of Judicial Review' (1982) 25 German Yearbook of International Law 539.
670 A criminal offense in Germany due to § 30 Narcotics Law (*Betäubungsmittelgesetz*).
671 In fact he was arrested two times by the Regional Court and set free two times by the Higher Regional Court cf *Tabatabai Case 2nd Release Order* (n 669).

court ruled in his absence.[672] The main legal issue concerned whether Tabatabai was exempted from German jurisdiction according to customary international law as provided for by the Courts Constitution Act.[673]

From the facts, the only possibility for such immunity could have been his recognition as a special envoy.[674] This would have required a concrete agreement between Germany and Iran on a specific task for Tabatabai.[675] Whether or not such an agreement had been concluded sparked the central question of the dispute. Three days before his arrival, Tabatabai had met the German ambassador in Tehran and had informed him that he had been ordered to enter into negotiations with various European powers. He had also requested the assistance of the ambassador because of the latter's good contacts in France. The German ambassador, in turn, had agreed to meet again in Germany but had not informed the German Foreign Office. When Tabatabai was taken into custody, the senior prosecutor called the German Foreign Office, which stated that it knew nothing of a special mission and that, from its view, there was no reason for immunity. When the German ambassador arrived from Tehran six days later, he informed the Foreign Office of his talks with Tabatabai. However, the Foreign Office did not intervene in favour of Tabatabai. Nine days after the arrest, the Iranian ambassador contacted the Foreign Office for the first time and expressed his concern. He subsequently issued a diplomatic note to the German Foreign Minister asking to grant Tabatabai all privileges which are typically granted to envoys on a special mission. The German Foreign Office accepted this note. According to the Foreign Office, Tabatabai hence acquired the status of a special envoy and was therefore exempted from German jurisdiction under the Courts Constitution Act.

672 Because Tabatabai had participated in previous stages of the proceedings, the court could rule in his absence based on § 231 Code of Criminal Procedure.

673 As provided for by § 20 (2) Courts Constitution Act, cf above, this Chapter, I., 4., b), bb), (1).

674 Note that Germany is not a member to the UN Convention on Special Missions (which only entered into force in 1985).

675 Cf the opinion of the expert witnesses (law professors Doehring, Wolfrum, Bothe and Delbrück) who agreed on that point *Judgment from 10 March 1983* (*Tabatabai Case)* (n 669) 445.

(b) The approach of the Regional Court

The Regional Court nevertheless denied immunity to Tabatabai. It did not treat the statement of the German Foreign Office as binding but instead examined whether both states had agreed on a task for the special mission. It held that such a mission had not been established at the meeting with the German ambassador in Tehran as both had never discussed a special task, diplomatic status, or the exact composition or dates of the mission.[676] It also remarked that if such a task had been agreed upon, it would have been unnecessary for Germany and Iran to exchange notes after Tabatabai had been arrested.[677] In the eyes of the court, the meeting was a mere 'private arrangement'.[678] It denied later conferral of immunity by the exchanged notes as these did not entail a specific purpose for a special mission.[679] Concluding from the circumstances, the Regional Court held that the real purpose of the notes was to grant Tabatabai immunity and protect him from criminal prosecution. It found that both states had only 'feigned'[680] the special mission, which may be permissible as an act of 'courtesy' in international law but could not be accepted as a rule of international law and thus did not confer any immunity on Tabatabai. It hence sentenced Tabatabai to three years in prison.

(c) The holding of the higher courts

The Higher Regional Court already touched on the question of immunity when it ordered the release of Tabatabai pending the decision on the merits. In contrast to the Regional Court, it applied a lower standard for a 'special task' and thus found that both parties had established a special mission with the exchange of notes.[681] Moreover, the court was especially critical that the Regional Court had called into question the motives for accepting the Iranian request. It held that these motives were 'exempted from judicial

676 Ibid 446.
677 Ibid 447.
678 Ibid.
679 Ibid 448.
680 Ibid.
681 *Tabatabai Case 2nd Release Order* (n 669) 513.

review with regards to their legality'.[682] In contrast to the Regional Court, the Higher Regional Court held that because the Basic Law assigns foreign affairs to the executive, it has a broad area of discretion.[683] Within this area, the courts were not free to review legal facts (*Rechtstatsachen*) but were bound by the executive determination.[684]

After Tabatabai had been convicted on the merits by the Regional Court, he appealed[685] to the Federal Court of Justice. The court affirmed the view of the Regional Court not to be bound by the statement of the Foreign Office.[686] It held that it was up to the courts to decide whether the requirements for immunity were fulfilled in the case in question.[687] However, it agreed with the Higher Regional Court that the Regional Court had set too high a standard concerning a special purpose and did not follow the view that the statements were merely 'feigned' to confer immunity on Tabatabai.[688] In its opinion, the German ambassador's promise in Iran to contact French officials was enough to render the trip to Germany a 'mission en passant'.[689] According to the Federal Court of Justice, the German Foreign Office thus had an objective basis for accepting the note of the Iranian Foreign Minister and thus, under general international law, established retroactive immunity for this special mission.[690]

(d) Lessons from the *Tabatabai* case

The *Tabatabai* case sheds light on typical German problems concerning executive determinations. On the one hand, a doctrine of non-reviewability and a doctrine of conclusive evidence would be contrary to the Basic Law. Hence, the Regional Court and the Federal Court of Justice are in line in so far as they agree that an executive statement does not bind them. For a

682 Ibid, 'der hier zu treffenden gerichtlichen Nachprüfung in bezug auf Rechtmäßigkeit der getroffenen Entscheidung entzogen' [my translation].
683 Ibid 514.
684 Ibid.
685 German 'Revision', see Chapter 1, (n 36) above.
686 *Tabatabai Case* (n 669) 276.
687 Ibid.
688 Ibid 276, 289.
689 Ibid 282.
690 Ibid 282 and 288.

US court, almost certainly, the immunity question would have been settled after the executive's intervention.[691]

On the other hand, the Higher Regional Court and the Federal Court of Justice try to carve out room for the executive to manoeuvre. The Higher Regional Court tries to find a way around the complete reviewability and to establish a limited binding effect.[692] It struggles to find the correct language, speaking of a 'binding effect' as long as the executive is 'within an area of discretion'.[693] Bockslaff and Koch[694] have tried to refine that reasoning. They suggested that although the courts have to review if the requirements for immunity (like Germany accepting the note granting Tabatabai immunity) are fulfilled, they may not go behind that 'operative act' and scrutinize the motives for consent. As long as the 'operative act' is in accordance with international law and no special constitutional provision applies, only a very limited review singling out arbitrary decisions and blatant errors of law would remain possible.[695] Unfortunately, the Federal Court of Justice did not take up the chance to elaborate on these ideas but simply set the bar for a 'special task' very low, thus giving way to the executive without going into detail concerning the binding effect or the reach of the area of discretion in foreign affairs.

(3) Further developments in Germany

Since the *Tabatabai* litigation, the courts,[696] including the Federal Court of Justice,[697] have independently determined the immunity of foreign in-

691 Thomas M Franck, *Political questions, judicial answers: Does the rule of law apply to foreign affairs?* (Princeton University Press 1992) 112.

692 Thereby relying on Frowein (n 374).

693 *Tabatabai Case 2nd Release Order* (n 669) 514 'Wollten hier die Gerichte für sich das Recht in Anspruch nehmen, die von der auswärtigen Gewalt innerhalb ihres Ermessensspielraumes gesetzten Rechtstatsachen selbständig und ohne Bindung hieran zu beurteilen, würde dies die außenpolitische Handlungsfähigkeit der Bundesrepublik in unzuträglichem Maße beeinträchtigen'.

694 Bockslaff and Koch (n 669).

695 Ibid 562.

696 *Decision from 16 May 2000* 2 Zs 1330/99 (Higher Regional Court Cologne); *Decision from 30 May 2017* 504 M 5221/17 (Local Court Dresden).

697 *Order from 5 October 2018* (n 663); *Decision from 14 August 2002* 1 StR 265/02 (Federal Court of Justice).

dividuals. In contentious cases, they have asked the Foreign Office for evidence[698] or referred to the Office's circular.[699]

In a case decided in 2021 the Federal Court of Justice after a lengthy review of state practice, without referring to the executive's opinion on that matter, decided that conduct-based immunity does not cover war crimes of a former Afghan soldier.[700] This was taken even further in a recent pre-trial decision on detention of the same court, where it held that conduct-based immunity does not apply to crimes under international law,[701] even though the German government had been hesitant to accept such a categorical exception.[702] In the aftermath of the judgment parliament now passed an amendment of the Courts Constitution Act which codifies the court's jurisprudence and denies conduct-based immunity for all crimes under the German Code of Crimes under International Law.[703]

The German approach may thus be described as a largely independent assessment but places weight on the factual evidence provided by the Foreign Office.

c) South Africa

aa) The situation under previous South African constitutions

Concerning the status of foreign officials, South African courts again relied on the English certification doctrine, which had been developed in the early 19th century.[704] Like in cases of state immunity, the thin line between

698 *Order from 30 May 2017* (n 696).
699 *Order from 5 October 2018* (n 663).
700 *Judgment from 28 January 2021* 3 StR 564/19 (Federal Court of Justice).
701 *Decision from 21 February 2024* AK 4/24 (Federal Court of Justice); Aziz Epik and Julia Geneuss, 'Without a Doubt: German Federal Court Rules No Functional Immunity for Crimes Under International Law' Verfassungsblog from 19 April 2024 available at <https://verfassungsblog.de/without-a-doubt/>.
702 Federal Republic of Germany, 'Comments and observations by the Federal Republic of Germany on the draft articles on "Immunity of State officials from foreign criminal jurisdiction"' available at <https://legal.un.org/ilc/sessions/75/pdfs/english/iso_germany.pdf>.
703 Bundestag, 'Entwurf eines Gesetzes zur Fortentwicklung des Völkerstrafrechts', Drucksache 20/11661.
704 For one of the earliest cases cf *Delvalle v Plomer* (1811) 170 ER 1301 (High Court); O'Connell (n 315) 114.

certifying the 'status entitling immunity'[705] and the question of immunity as such often became blurry.[706] Additionally, the executive had considerable control by certifying on the recognition of states and governments.[707]

This tendency was also reflected in South African law. In the mentioned *Inter-Science Research* case,[708] the court held that 'the status of diplomatic representatives of a foreign state'[709] was in the exclusive domain of the executive.[710] This leaves open the question as to whether the executive's view is only binding as to the 'status which entitles to immunity' or as to the 'status of immunity' as such.[711] Statutory law favours the latter interpretation. The Diplomatic Privileges Act of 1951[712] granted immunity to individuals like heads of state or diplomatic agents[713] and also to 'any other person who is recognized by the Minister as being entitled to diplomatic immunity in accordance with the recognized principles of international law and practice'.[714] The last part of the provision appears to have allowed the judiciary to review whether the conferral of immunity is in accordance with international law. However, another section of the same act stated that any certificate concerning the diplomatic status of a person issued by the executive 'shall *be conclusive proof of the facts or conclusions* stated therein in any court of law'.[715] The conclusiveness of the certificate *does* also extend to the conclusion (that is, immunity) itself.[716] The executive could hence confer immunity on persons at will.

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705 Cf this Chapter, I., 3., c).

706 Stating the problem O'Connell (n 315); concerning state immunity cf McLachlan (n 250) 247.

707 The executive could use the non-recognition to effectively deny immunity to individuals *Fenton Textile Association v Krassin* (1921) 38 TLR 259 (Court of Appeal); the same holds true for 'wrongful recognition' Mann, *International Law* (n 247) 337 fn 2; Mann, *Foreign Affairs* (n 2) 85.

708 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414).

709 Ibid 117.

710 Dugard and others, *International Law* (5th edn) (n 2) 171.

711 Cf Mann, *Foreign Affairs* (n 2) 37.

712 Dugard and others, *International Law* (5th edn) (n 2) 376.

713 Diplomatic Privileges Act 71 of 1951 Section 2.

714 Ibid Section 2 (1) f.

715 Ibid Section 4 (4) [my emphasis].

716 The Act was applied in *Penrose*. An executive statement given was however treated as not conclusive as the individual concerned (a consul) was not covered by the act. The court however arrived at the same conclusion as the executive *S v Penrose* 1966 (1) SA 5 (N) (Natal Provincial Division).

The executive's influence was cut back only on the eve of apartheid when the act of 1951 was replaced by the Diplomatic Immunities and Privileges Act 71 of 1989.[717] Like its predecessor, it offered the opportunity for the president to

> *confer upon any person, irrespective of whether such person is a representative contemplated in the Vienna Convention on Diplomatic Relations, 1961, or in the Vienna Convention on Consular Relations, 1963 […] such immunities and privileges as he may so specify.*[718]

However, the conclusive force of the executive's certificate was restricted. Now it only stipulated 'a certificate under the hand or issued under the authority of the Director-General stating any fact relating to that question, shall be conclusive evidence of that fact'.[719] This mirrors the wording of the UK's Diplomatic Privileges Act of 1964[720] and thus, at least concerning the evidentiary force,[721] brought South African law back in line with its British roots.

bb) The situation under the new South African Constitution

The remaining executive hold was challenged again with the new South African Constitution in 1996. In 2001, a new Diplomatic Immunities and Privileges Act (DIPA) was enacted.[722] Like the 1951 and 1989 versions, it regulates immunity for heads of state and diplomatic agents and contains the power to confer immunity upon other individuals.[723] However, concerning the binding force of an executive statement, the wording changed considerably:

> *If any question arises as to whether or not any person enjoys any immunity or privilege under this Act or the Conventions, a certificate under the*

717 On the codifications in the area cf Dugard and others, *International Law* (5th edn) (n 2) 376.
718 Diplomatic Immunities and Privileges Act 71 of 1989 Section 4 (c) [my omission].
719 Ibid Section 7 (3).
720 *Diplomatic Privileges Act 1964* Section 4.
721 British statutory law does not offer the possibility to unilaterally confer immunities, this may only be done by bilateral arrangement, cf *Diplomatic Privileges Act 1964* Section 7.
722 *Diplomatic Immunities and Privileges Act 37 of 2001.*
723 Section 7 (2).

*hand or issued under the authority of the Director-General stating any fact relating to that question, is **prima facie** evidence of that fact.*[724]

In contrast to conclusive evidence, the nature of such prima facie evidence is that (even though it contains an assumption that the statement is true) it can be rebutted. Compared to the corresponding section in the 1951 and 1989 acts, the wording implies a change towards less deference.

The courts have shown little deference concerning immunity suggestions of the executive under the new South African Constitution. This was already hinted at in the aforementioned case[725] concerning alleged acts of torture committed by high-ranking Zimbabwean police officials against members of the Zimbabwean opposition party. A South African NGO had investigated the incidents and sued the South African police authorities, which had declined to open investigations.[726] The executive agencies claimed that an investigation might damage South Africa's relations with Zimbabwe.[727] However, the High Court rejected this argument with reference to South Africa's obligations under the Rome statute.[728] It also held that diplomatic immunity would not stand in the way of investigations[729] and ordered the South African police to examine the case.[730] The Supreme Court of Appeal[731] and the Constitutional Court[732] upheld the judgment. The question of executive influence in foreign official immunity cases found even more attention in two more recent cases, to which we now turn.

724 Section 9 (3) [in the original 'prima facie' is emphasized in italics].
725 Cf Chapter 2, I., 3.
726 *Southern Africa Litigation Centre v National Director of Public Prosecutions (Zimbabwe Torture Case)* 2012 (10) BCLR 1089 (GNP) (North Gauteng High Court); for the case cf as well Eksteen (n 294) 287 ff.
727 *Southern Africa Litigation Centre v National Director of Public Prosecutions (Zimbabwe Torture case)* (n 726) para 4, 10.
728 Ibid para 31.
729 Ibid.
730 Ibid para 33.
731 *National Commissioner, South African Police Service and Another v Southern African Human Rights Litigation Centre and Another* 2014 (2) SA 42 (SCA) (Supreme Court of Appeal).
732 With modifications, but explicitly endorsing the irrelevance of foreign policy considerations *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre* [2014] ZACC 30; 2015 (1) SA 315 (CC) (Constitutional Court) mn 74.

(1) *Al-Bashir* case

The first case concerns the mentioned[733] visit of the former Sudanese President Al-Bashir to South Africa.[734] In 2015, Al-Bashir attended a meeting of the African Union (AU) in Johannesburg even though an arrest warrant from the International Criminal Court had been issued against him. While Al-Bashir was present in the country, a South African NGO obtained an interim order from the High Court in Pretoria, ordering the government to stop Al-Bashir from leaving the country. Despite the order, Al-Bashir left unhindered, and the case finally reached the Supreme Court of Appeal.[735]

The executive's first major argument was that Al-Bashir enjoyed immunity by virtue of Article 8 of the 'host agreement' concluded with the AU and under an executive proclamation issued under the DIPA. However, the wording of the host agreement and the proclamation under the DIPA only granted immunity to officials of the AU as an international organization, not to heads of state of its member states.[736] The executive tried to counter that argument by stressing that at least the erroneous proclamation was never revoked. The court quite bluntly rejected the argument, stressing that the provisions never covered Al-Bashir and '[t]he fact that the cabinet may have thought that it would is neither here nor there […] [a]n erroneous belief cannot transform an absence of immunity into immunity'.[737]

The second argument of the executive pointed out that Al-Bashir enjoyed immunity under customary international law as a head of state, under a special section in the DIPA.[738] However, the court held that South Africa, in its Rome Statute Implementation Act,[739] based on its strong commitment to human rights,[740] regulated that head of state immunity may not hinder an arrest under an ICC warrant. The court thus found that Al-Bashir was not

733 Chapter 3, I., 1., c), bb).
734 On the case cf as well Eksteen (n 294) 294.
735 As the government has withdrawn its appeal against the judgment the case will not reach the Constitutional Court.
736 *Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others (Bashir Case)* (n 274) 338.
737 Ibid 339 [my adjustments and omissions].
738 *Diplomatic Immunities and Privileges Act* (n 722) Section (4) (1) (a).
739 Implementation of the Rome statute of the International Criminal Court Act 27 of 2002 Section 4(2) and 10 (9).
740 *Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others (Bashir Case)* (n 274) 356 ff.

protected by any form of immunity[741] and the executive consequently acted unlawfully by not detaining and surrendering him.[742]

(2) *Mugabe* case

Another recent case concerned the wife of late Zimbabwean Prime Minister Robert Mugabe.[743] While her husband was attending a head of state summit of the SADC, Grace Mugabe allegedly assaulted three women in a hotel in Johannesburg. The government had claimed that she was immune from prosecution for two reasons. First, as the wife of a head of state, she enjoyed immunity under customary international law; second, that immunity had been conferred upon her by an executive decision according to Section 7 (2) of the DIPA.[744] The section allows the Minister of Foreign Affairs to confer immunity and privileges if it is 'in the interest of the republic'. The executive justified its decision with foreign policy considerations, in particular possible tensions with Zimbabwe and the paramount importance of the SADC summit as one of the pillars of South African foreign policy.[745] The executive acknowledged its decision was reviewable, but only a low rationality standard should be applied as it concerned foreign affairs.[746]

The court first determined the status of customary international law and found that no rule of customary international law existed that would award the wife of a head of state status-based immunity.[747] The court then briefly turned to the question concerning conferral of immunity under the DIPA. In a relatively obscure paragraph, it decided that the executive chose not to defend its decision to confer immunity in court but only argued that it 'recognized' immunity – which turned out to be non-existent.[748] Unfortunately, by using this rather semantic trick, the court avoided stating how far the

741 *Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others (Bashir Case)* (n 274) 362.
742 Ibid 365.
743 On the case as well Dugard and others, *International Law* (5th edn) (n 2) 377; also Ntombizozuko Dyani-Mhango, 'Revisiting Personal Immunities for Incumbent Foreign Heads of State in South Africa in Light of the Grace Mugabe Decision' (2021) 21 African Human Rights Law Journal 1135.
744 *Democratic Alliance v Minister of International Relations and Co-operation and Others (Mugabe Case)* 2018 (6) SA 109 (GP) (Gauteng Division) 113 ff.
745 Ibid.
746 Ibid 114.
747 Ibid 120 ff.
748 Ibid 119, 129 f.

executive could use Section 7 (2) of the DIPA to confer immunity at will and to what extent such a decision would be reviewable.

On the other hand, the court's deliberations on American cases while examining case law concerning immunity for spouses of heads of state are very illuminating. It found that the US decisions that granted immunity to family members are an expression of US domestic law and thus should not be considered influential in determining the status of international law.[749] Incidentally, the court also commented on the relation between South African and US law:

> *Thus in all the [US] cases the decision of the executive to grant or refuse immunity is determinative, as the courts treat this as a matter that falls exclusively within the preserve of the executive arm of the state.* ***This is not the law in South Africa.*** *Here the executive is constrained by the Constitution and by national legislation enacted in accordance with the Constitution. In terms of the Constitution the executive can only grant immunity rationae personae to an official from a foreign state if such immunity is derived from (i) a customary norm that is consonant with the prescripts of the Constitution; or (ii) the prescripts of an international treaty which is constitutionally compliant; or (iii) national legislation which is constitutionally compliant. A decision to grant immunity to a foreign state official that does not fall into one of the three categories will not withstand the test of legality, rationality or reasonableness. That is our law.*[750]

(3) Lessons from the *Al-Bashir* and *Mugabe* cases

The *Al-Bashir* and *Mugabe* cases show contemporary South African courts' astonishing level of independence in determining questions of foreign official immunity.

In the *Al-Bashir* case, the court harshly rejected the suggestion by the executive that its proclamation – even when based on a false legal assumption – still carried a legal effect. In like manner, the second line of defence concerning the scope of head of state immunity was decided completely independently by the court. What is more, the judges did not find it necessary

749 Ibid 125.
750 Ibid [my insertion and emphasis].

even to mention a special role for the executive in conducting foreign affairs or that some form of weight should be attached to its assertions.[751]

The *Grace Mugabe* case also supports this view. The remarks on US law clarify that the courts will not blindly accept executive immunity suggestions. However, as the DIPA permits such suggestions, the executive can exercise influence concerning the diplomatic status of individuals. Such a decision will, without doubt, be subject to review under the principle of legality for rationality. Unfortunately, these cases do not answer the question of how strict such a review would be. However, it appears clear that the courts have done away with a doctrine of conclusiveness.

The South African government shied away from testing the issue again. When Russia's President Putin planned to visit the country in 2023 to attend the BRICS summit, the debate about his possible arrest in compliance with an ICC arrest warrant in connection with the Russian War in Ukraine[752] finally led to both countries' 'mutual agreement' that he will not attend in person.[753]

d) Conclusion on foreign official immunity

For a long time, the law concerning foreign official immunity in the United States followed the law on state immunity, as the courts did not differentiate between the state and the individuals representing it. Thus, as with state immunity, no special role for the executive existed in the 19th century. This changed after binding suggestions were introduced in the law of state immunity in the 1940s and the courts began to (at least in some cases) apply a conclusiveness approach to foreign official immunity as well. After the Supreme Court clarified that the FSIA, which gave back control to the courts concerning state immunity, does not apply to foreign official immunity, the law in the United States became unsettled. Whereas some courts give binding force to executive assessments, others differentiate and apply a margin of discretion approach in cases of conduct-based immunity and a conclusiveness approach in cases of status-based immunity.

751 Similar analysis by Eksteen (n 294) 300.

752 See below Chapter 5, II.

753 Zoe Jay and Matt Killingsworth, 'To Arrest or Not Arrest? South Africa, the International Criminal Court, and New Frameworks for Assessing Noncompliance' (2024) 68 International Studies Quarterly 1, 10.

Prussian law concerning foreign official immunity awarded a special role to executive assessments. However, under the Bismarck Constitution, courts showed their willingness to decide independently, an approach that solidified in the Weimar period. The courts based their reasoning on the functional argument that each agency has to determine the fundamental elements for its decision autonomously, even if they touch on an area of competence of another authority. In the Federal Republic, the general position established in the Weimar period was reinforced with the new dogma that every state authority must be kept within its constitutional limits. However, as the Tabatabai cases have shown, German courts accepted a certain executive influence and granted a margin of discretion as to the facts which may entitle an individual to immunity.

Under the older constitutions, South African courts were again strongly influenced by English law and used the certification doctrine in cases of foreign official immunity. In contrast to the approach in the United Kingdom, South African statutory law even allowed the executive to render decisions on the question of immunity as such, not only on the status entitling immunity. Foreign official immunity was thus governed by a doctrine of conclusiveness. The strong statutory basis for this approach was already weakened by the end of the apartheid regime. Under contemporary South African law, the statutory framework still allows the executive to confer immunity ad hoc but is subject to review by the courts. In recent case law, the courts have shown great independence in controlling executive assertions of immunity and have not even recognized an area of discretion in these decisions.

5. Diplomatic protection

The law of diplomatic protection is a relatively young institution of international law.[754] Although the roots of the concept can already be found in de Vattel's treatises,[755] it was not until the middle of the 19th century that most governments began to treat the protection of nationals abroad consistently as a legal issue.[756] Diplomatic protection is generally defined as a state's invocation of the responsibility of another state for an injury caused by

754 Chittharanjan F Amerasinghe, *Diplomatic Protection* (OUP 2008) 8.
755 Ibid 10.
756 Ibid 14.

an internationally wrongful act to a national[757] of the invoking state.[758] Its exercise is tied to the requirement of the exhaustion of local remedies in the host state.[759] Current international law provides for no duty of the state to intervene in case of a wrongful act affecting its citizens.[760] It is left to the domestic legal system whether the state is obligated to exercise diplomatic protection and to what degree courts may enforce this obligation. This chapter sheds light on how the judiciary in the three countries reviews executive action or inaction regarding diplomatic protection.

a) United States

The US Constitution includes no express provision granting the right to diplomatic protection. Nevertheless, by the end of the 19th century, a discussion concerning the state's duty to protect its citizens ensued. Secretary of State Frelinghuysen stated in 1882 that 'the right of an American citizen to claim the protection of his own government while in a foreign land and the duty of this government to exercise such protection, are reciprocal [...]'.[761] Following this approach, the US Supreme Court in 1913 confirmed in *Luria v U.S.* that

> *Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part*

757 Exceptions apply for stateless persons and refugees *Draft Articles on Diplomatic Protection with Commentaries* (2006) Article 8; analysing diplomatic protection of non-nationals Thomas Kleinlein and David Rabenschlag, 'Auslandsschutz und Staatsangehörigkeit' (2007) 67 ZaöRV 1277; on the weakening of the nationality requirement cf as well Annemarieke Vermeer-Künzli, 'Nationality and diplomatic protection – A reappraisal' in Serena Forlati and Alessandra Annoni (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 76.

758 *Draft Articles on Diplomatic Protection with Commentaries* (n 757) cf Article 1; John Dugard, 'Diplomatic Protection' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 1.

759 *Draft Articles on Diplomatic Protection with Commentaries* (n 757) Article 14.

760 At least this is the classical position stated in *Barcelona Traction (Belgium v Spain) Judgment* ICJ Rep 1970, 3 (ICJ) 44, although under pressure this still seems to reflect the status of customary international law; *Draft Articles on Diplomatic Protection with Commentaries* (n 757) Article 19 Commentary 3.

761 State Department, 'Foreign Relations of the United States 1882' No 215, 395 cited after Burt E Howard, *Das amerikanische Bürgerrecht* (Heidelberg 1903) 149 [my omission].

> *of the society. These are reciprocal obligations, one being a compensation for the other.*[762]

Scholars were divided on whether such a legally enforceable duty exists. Howard,[763] on the one hand, argued for it. On the other hand, Borchard[764] opposed such a view:

> *In the exercise of the extraordinary remedy known as diplomatic protection, the government acts politically upon its own responsibility as a sovereign, free from any legal restrictions by or legal obligations to the claimant.*[765]

In the 19th century, Mexico's independence sparked the first cases alluding to diplomatic protection. Several disputes between US citizens and the Mexican government (especially concerning expropriations) arose and were dealt with by different commissions under bilateral treaties.[766] In some of these cases, awards had been attained fraudulently, and the US government withheld the money.[767] The courts dismissed attempts to force the US government to distribute the money and held that the executive was endowed with discretion in this regard. They especially denied applying the common law instrument of a writ of mandamus[768] and thus used a doctrine of procedural non-reviewability. Likewise, judges in these cases stated that the US government could decide on its own whether to intervene in favour of its citizens against foreign encroachment.[769]

The first US case in a classical diplomatic protection constellation is probably *Holzendorf v Hay*[770] decided in 1902. Holzendorf, a naturalized

762 *Luria v US* 231 US 9 (1913) (US Supreme Court) 22 f.
763 Howard (n 761) 149.
764 Edwin M Borchard, *Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co 1919); for another early US monograph on the topic cf Frederick S Dunn, *The protection of nationals; a study in the application of international law* (Baltimore 1932).
765 Borchard (n 764) 356.
766 Later, both countries would establish the well-known General Claims Commission.
767 *Boynton v Blaine* 139 US 306 (1891) (US Supreme Court); *United States v La Abra Silver Mining Company* 175 US 423 (1899) (US Supreme Court); Borchard (n 764) 364.
768 *Boynton v Blaine* (n 767).
769 *La Abra Silver Mining Company v United States* 29 Ct Cl 432 (1894) (United States Court of Claims) 513; Borchard (n 764) 364.
770 *Holzendorf v Hay* [1902] 20 App DC 576 (Court of Appeals of District of Columbia) 577; Borchard (n 764) 364.

citizen of the United States, had travelled to his home country Germany and was wrongfully imprisoned. He was released after one year and started judicial proceedings to oblige the Secretary of State to initiate 'vigorous and proper proceedings against the Empire of Germany, and the Emperor'[771] to recover damages. The court denied the claim and stated that:

> *The duty of righting the wrong that may be done to our citizens in foreign lands is a political one, and appertains to the executive and legislative departments of the government. The judiciary is charged with no duty and invested with no power in the premises.*[772]

This indicates a (substantive) non-reviewability approach adopted by the courts. The judges remained faithful to this jurisprudence in the 1954 case *Keefe v Dulles*.[773] The wife of a US soldier imprisoned in France sued the Secretary of State to obtain her husband's release through diplomatic negotiations. The court held that 'the commencement of diplomatic negotiations with a foreign power is completely in the discretion of the President and the head of the Department of State, who is his political agent'[774] and that '[t]he Executive is not subject to judicial control or direction in such matters'.[775] The court also explicitly relied on *Curtiss-Wright*.[776]

Another line of cases has been based on the Hostage Act,[777] which provides the following:

> *Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release […].*

771 *Holzendorf v Hay* (n 770) 577.
772 Ibid 580.
773 *Keefe v Dulles* [1954] 222 F 2d 390 (United States Court of Appeals for the District of Columbia Circuit).
774 Ibid 394.
775 Ibid [my adjustment].
776 Ibid.
777 22 USC § 1732 [my omission].

The act dates back to 1868, and the courts could have interpreted it as an expression of a constitutional right to diplomatic protection.[778] However, in a number of cases evolving after the Second World War, the act was given a very narrow interpretation. This is exemplified by *Redpath v Kissinger*[779] decided in 1976, a case concerning an US-American citizen incarcerated in Mexico. The court swiftly stated that to take action or not was solely within the discretion of the executive.[780] A similar picture evolved from the 1984 case *Flynn v Schultz,*[781] again concerning an US-American held captive in Mexico. Here the court explicitly referred to the political question doctrine and held that, save for the duty to inquire if the arrest was unjust, the compliance with the Hostage Act posed a non-justiciable political question.[782] Even with regards to the inquiry, the court stated that '[w]hile it might be appropriate for a court to order such an inquiry in the absence of any meaningful action by the executive with respect to this duty, review of the substance of the inquiry and subsequent decision clearly presents a nonjusticiable political question'.[783] Apart from prohibiting complete inactivity, the Hostage Act thus imposes no legally enforceable duty on the president, and apparently, the courts saw no constitutional necessity to apply a more generous interpretation.

The decision in *Smith v Reagan*[784] in 1988 confirmed this ruling. The claimants, family members of detained US-American service members in Vietnam, had invoked the Hostage Act to force the executive to take action. The court relied on the political question doctrine and stated that 'the judiciary may speak with multiple voices in an area where it is imperative that the nation speak as one. These difficulties lead us to conclude that

778 On statutory interpretation in the US and Germany cf Patrick Melin, *Gesetzesauslegung in den USA und in Deutschland* (Mohr Siebeck 2005), on the influence of the constitution in statutory interpretation 163 f; cf as well Richard A Posner, 'Statutory Interpretation: In the Classroom and in the Courtroom' (1983) 50 University of Chicago Law Review 800, 815.

779 *Redpath v Kissinger* [1976] 415 F Supp 566 (United States District Court for the Western District of Texas).

780 Ibid 569.

781 *Flynn v Schultz* 748 F2d 1186, cert denied, 474 US 830 (United States Court of Appeals for the 7th Circuit).

782 Ibid 1193 ff.

783 Ibid 1193 [my adjustment].

784 *Smith v Reagan* [1988] 844 F2d 195, cert denied 488 US 954 (United States Court of Appeals for the 4th Circuit).

this suit presents a nonjusticiable political question'.[785] The court referred to *Baker v Carr* and held that in the case at bar, there was a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' and 'a lack of judicially discoverable and manageable standards for resolving it'.[786]

This approach has also continued in more recent decisions. A special constellation of 'diplomatic protection'[787] concerned a US citizen and former employee of the US Embassy in Italy. Sabrina De Sousa[788] was allegedly involved in the kidnapping and torturing of a terror suspect in Milan. A Europol warrant was issued against her, and Italian courts finally sentenced her to five years in prison. De Sousa had already returned to the US, but the warrant and conviction barred her from visiting family in countries which would extradite her to Italy. She requested the State Department invoke diplomatic immunity in her favour, without avail. The court declined to intervene and held the issue to be 'a non-justiciable foreign policy question'.[789] In the United States, requests for diplomatic protection are thus non-reviewable.

b) Germany

In Germany, the Bismarck Constitution was one of the very rare constitutions at the time, which entailed an express clause on diplomatic protection.[790] Its Article 3 (6) stated

> *Towards foreign countries all Germans are equally entitled to the protection of the Empire.*[791]

Although the word 'entitled' may imply that an individual has an enforceable right to diplomatic protection, the legal nature of the clause was con-

785 Ibid 198.
786 Ibid.
787 Admittedly, the case concerns no 'classic' diplomatic protection constellation. However, it nevertheless shows how similar questions are dealt with by US courts.
788 *De Sousa v Department of State* [2012] 840 F Supp 2d 92 (United States District Court for the District of Columbia).
789 Ibid 107.
790 Karl Doehring, *Pflicht des Staates zur Gewährung diplomatischen Schutzes* (Carl Heymanns 1959) 25.
791 'Dem Auslande gegenüber haben alle Deutschen gleichmäßig Anspruch auf den Schutz des Reiches' [my translation].

tested. Some authors were of the opinion that it contained no 'real' legal entitlement[792] and argued that to hold otherwise could have far-reaching repercussions on foreign relations, e.g., when the state would be obliged to protect a merchant abroad by sending gunboats.[793] Nevertheless, most scholars saw the clause as a genuine individual entitlement.[794] The discussion was not perceived as too important, as judicial review of sovereign acts only slowly developed.[795] No direct[796] judicial procedure was available to enforce such a right,[797] and no court consequently had a chance to settle the issue.[798]

Within the new Weimar Constitution, the wording of the clause changed only slightly: Article 112 (2) stated

> *Towards foreign countries all dependents of the Empire within or outside the territory of the Empire are entitled to its protection.*[799]

The debate concerning its legal nature continued with scholars arguing for and against a legally enforceable right.[800] Again the discussion remained abstract, as also during the Weimar Republic, no direct judicial procedure was available to hold the executive to account.[801]

During the Nazi period, diplomatic protection was treated as non-reviewable. As the provisions on civil liability were the only possibility to (indirectly) bring up the question of diplomatic protection, some authors saw the problem as explicitly regulated by the mentioned 'Civil Servant Liability Law,'[802] which allowed the chancellor to certify that an act of a civil

792 Georg Jellinek, *System der subjektiven öffentlichen Rechte* (2nd edn, Mohr 1905) 119; Wilhelm Karl Geck, 'Der Anspruch des Staatsbürgers auf Schutz gegenüber dem Ausland nach deutschem Recht' (1956/57) 17 ZaöRV 480.

793 Von Seydel, *Bayerisches Staatsrecht 2, Die Staatsverwaltung* (Mohr 1913) 55 cited after Geck (n 792) 480 fn 11.

794 See authors cited by Geck (n 792) 480 f; and authors cited by Doehring (n 790) 28.

795 Geck (n 792) 480.

796 But see the case below where civil servant liability provisions were used by the litigants.

797 Geck (n 792) 481.

798 Doehring (n 790) 28.

799 'Dem Auslande gegenüber haben alle Reichsangehörigen inner- und außerhalb des Reichsgebiets Anspruch auf den Schutz des Reiches' [my translation]. The wording 'within the territory' is due to the Versailles Treaty, which allowed foreign powers to be active on German soil; Doehring (n 790) 34.

800 Cf references cited by Doehring (n 790) 31 and references cited by Geck (n 792) 482.

801 Geck (n 792) 508 ff; Doehring (n 790) 42.

802 Scheuner (n 369) 442 fn 35.

servant is 'in accordance with political and international considerations'.[803] The Nazi regime also introduced additional regulations to limit the liability of its officials.[804] The Supreme Court of the Reich endorsed this position in a case triggered by an inheritance dispute concerning property abroad. The litigants had tried to invoke the civil liability of foreign office officials, claiming that they had not been sufficiently supported in their proceedings with the Netherlands. The court held that

> *The extent of the protection to be granted to a German national abroad, and the choice of means to ensure such protection are matters for the exercise of political discretion. An allegation that officials of the foreign service ought to have taken more forceful diplomatic measures is not subject to judicial review, it being left entirely to the discretion of the officials concerned how and to what extent they should intervene diplomatically.*[805]

In contrast to its constitutional predecessors, the new Basic Law does not contain an express provision regulating diplomatic protection. However, the omission was not the result of a conscious decision to abolish such protection; instead, the absence of an explicit provision is related to Germany's special status as an occupied country during the drafting of the Basic Law.[806] The occupying countries exercised the power to conduct foreign affairs when the Basic Law was drafted. Nevertheless, regulations of the Basic Law – foreshadowing later independence – entail regulations concerning foreign affairs. However, the drafters refrained from including diplomatic protection as it may have been met with suspicion by the Allies.[807]

The discussion concerning the legal nature of the duty to protect citizens abroad went on. In the early years of the Basic Law some scholars argued that despite the lack of mention in the constitution, citizens would, in continuance with a line of scholars under the Weimar Republic,[808] at least have a right to 'legally unflawed exercise of discretion' concerning their claim of

803 Cf above, Chapter 1, II., 3., b).
804 Geck (n 792) 507.
805 *Judgment from 22 June 1937* Seufferts Archiv 91, 336 (Supreme Court of the Reich); translation by Günther Jaenicke, Karl Doehring and Erich Zimmermann, *Fontes Iuris Gentium – Series A – Sectio II – Tomus 2 (Entscheidungen des deutschen Reichsgerichts in Völkerrechtlichen Fragen 1929–1945)* (Carl Heymanns 1960) 77.
806 Doehring (n 790) 43 ff.
807 Ibid 44 f.
808 Geck (n 792) 518.

diplomatic protection.[809] As we have seen above, others were of the opinion that under the new Basic Law, certain public acts, especially in foreign relations,[810] should be exempt from judicial review. They specifically included the question of diplomatic protection as falling under these non-reviewable acts.[811] In contrast to the older constitutions, where the relevance of the discussion was limited due to the lack of judicial procedures to control public acts, the situation changed significantly under the new constitution. As mentioned,[812] Article 19 (4) of the Basic Law guarantees access to courts for any violation of a person's rights by a public authority. However, Article 19 (4) of the Basic Law does not provide such a right by itself. Within the new constitutional order, the question of whether or not a material right to diplomatic protection exists was thus no longer a mere academic topic but warranted a real solution.

The first appearance of the concept in the Constitutional Court's jurisdiction can be found in 1957 in the mentioned *Washingtoner Abkommen* case,[813] dealing with the liquidation of the property of Germans in Switzerland.[814] The Constitutional Court only briefly referred to the duty of diplomatic protection and held that it was not violated as the government did not act arbitrarily.[815] The *Eastern Treaties* case[816] entails elaboration that is more substantial. It concerned complaints lodged by former landowners in the area east of the Oder river, claiming that treaties with Moscow and Warsaw confirming Germany's eastern borders infringed their right to property under the constitution. The court stated obiter that 'the organs of the Federal Republic are constitutionally obliged to protect German nationals and their interests in relation to Foreign States. If this duty was neglected, it would represent an objective breach of the constitution'.[817]

809 Ibid; Doehring (n 790) 127.
810 Ernst Forsthoff, *Lehrbuch des Verwaltungsrechts 1, Allgemeiner Teil* (6th edn, CH Beck 1956) 444 f.
811 Herbert Krüger, 'Der Regierungsakt vor den Gerichten' (1950) 3 DÖV 536, 540; Schneider (n 2) 46 f.
812 Cf Chapter 2, I., 2.
813 Cf this Chapter, I., 1., b), bb), (1).
814 *Decision from 21 March 1957* (*Washingtoner Abkommen)* (n 175).
815 Ibid 290.
816 *Decision from 7 July 1975 (Eastern Treaties Case (Ostverträge))* BVerfGE 40, 141 (German Federal Constitutional Court) = 78 ILR 177; cf as well Christopher Tran, 'Government duties to provide diplomatic protection in a comparative perspective' (2011) 85 Australian Law Journal 300, 306.
817 *Eastern Treaties Case (Ostverträge)* (n 816) 78 ILR 192.

However, the court went on to state that this 'says nothing about the conditions under which the infringement of the rights of individuals by such an omission could be relied upon in constitutional complaint proceedings'.[818]

The court had a chance to define these conditions in the leading *Hess* case.[819] As described above,[820] Rudolf Hess was Hitler's former deputy who had been found guilty in the Nuremberg trials of crimes against peace, and who served his sentence in a military prison administrated by the four Allied powers in Berlin. He filed a constitutional complaint to oblige the federal government to take all appropriate and official steps towards the occupying powers to grant his immediate release. In particular, he urged the government to apply to the United Nations for an instruction from the General Assembly to the Allied powers demanding his release.[821]

The Constitutional Court held 'that the organs of the Federal Republic, and in particular the Federal Government, have a constitutional duty to provide for German nationals and their interests in relation to foreign States'.[822] It went on to explain that the federal government 'enjoys wide discretion in deciding the question of whether and in what manner to grant protection against foreign States'[823] and 'that the role of the administrative courts was consequently confined to the review of actions and omissions of the Federal Government for abuses of discretion'.[824] Consequently, it found that there is no duty for the government to take precisely the measures requested by Hess and held that the decision of the government not to approach the UN was covered by its broad discretion.[825] The 'civil servant liability law,' which was still in force at the time of the judgment, was not mentioned by the court. The Constitutional Court also remained silent about the basis of the right to diplomatic protection in the absence of a written clause in the constitution. Scholars still do not agree if this basis can be found in the claimant's status as a citizen, fundamental rights or both.[826]

818 Ibid.
819 *Hess Case* (n 186).
820 Cf this Chapter, I., 1., b), bb), (3).
821 *Hess Case* (n 186) 356; *Hess Case* ILR English Translation (n 186) 388.
822 *Hess Case* (n 186) 364; *Hess Case* ILR English Translation (n 186) 395.
823 *Hess Case* (n 186) 364 f; *Hess Case* ILR English Translation (n 186) 395.
824 *Hess Case* (n 186) 365; *Hess Case* ILR English Translation (n 186) 395.
825 *Hess Case* (n 186) 365 ff; *Hess Case* ILR English Translation (n 186) 396 ff.
826 Ulrich Fastenrath, 'Verfassungsrecht: Ermessen der Bundesregierung bei der Gewährung diplomatischen Schutzes' (1981) 3 JA 510, 510; Eckart Klein, 'Anspruch auf diplomatischen Schutz' in Georg Ress and Torsten Stein (eds), *Der diplomatische Schutz im Völker und Europarecht* (Nomos 1996) 128 and discussion 137 ff.

Nevertheless, German courts subsequently accepted the approach.[827] In Germany, every citizen thus has a subjective right[828] to the legally unflawed exercise of discretion if and how diplomatic protection should be granted.[829]

c) South Africa

The older South African constitutions entailed no explicit right to diplomatic protection, and again English law had a significant influence on the South African approach. In England, as early as *Calvin's Case*[830] had the reciprocal duty between the king and his subjects been recognized 'as the subject oweth to the king his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects'.[831] Blackstone established that this duty persists 'at all times and in all countries'.[832] Although a duty to protect 'subjects' and now citizens abroad was thus acknowledged, the courts, until recently, never enforced it. This 'hands off approach' was established at the beginning of the 20th century in *China Navigation*.[833] It concerned an overseas trading company that tried to oblige the crown to protect its vessels against pirates.[834] The court held that the king's duty

827 *Judgment from 26 May 1982* I R 16/78 (Federal Fiscal Court); *Judgment from 24 February 1981 (Hess Case)* BVerwGE 62, 11 (Federal Administrative Court); *Decision from 4 September 2008 (Schloss Bensberg)* BVerfGK 14, 192 (German Federal Constitutional Court) 200; *Decision from 7 July 2009* (*Hansa Stavanger)* NVwZ 2009, 1120 (Administrative Court Berlin); *Decision from 24 January 1989* 7 B 102/88 (Federal Administrative Court); *Decision from 5 February 1981* 7 B 13/80 (Federal Administrative Court); *Judgment from 14 June 1996* 21 A 753/95 (Higher Administrative Court North-Rhine Westphalia).

828 For the notion of a subjective right cf above, Chapter 2, I., 2.; differentiating between a fundamental right and a right based on fundamental rights reasoning Rainer Hofmann, *Grundrechte und Grenzüberschreitende Sachverhalte* (Springer 1994) 108.

829 Fastenrath (n 826) 510; Klein (n 826) 127 f.

830 *Calvin's Case* (1608) 7 Co Rep 1a (Court of the Queen's Bench).

831 Ibid 4b; cf McLachlan (n 250) 354, McLachlan also sees a connection between Locke's philosophy and diplomatic protection (n 250) 40.

832 William Blackstone, *Commentaries on the Law of England: Book the First* (digitized version, Clarendon Press 1769) 370; cf McLachlan (n 250) 354.

833 *China Navigation* [1932] 2 KB 197 (Court of Appeal).

834 McLachlan (n 250) 356.

is 'entirely in his discretion'[835] and only an 'imperfect obligation'[836] and went on that there are 'no legal means […] by which the Crown could be forced to perform that duty'.[837] Other cases recited these statements,[838] and traditionally the Crown's duty to protect its citizens was perceived as non-justiciable.[839] South African authors like Booysen, even in 1989, were of the opinion that there is no legal obligation to diplomatic protection in South Africa and relied on English precedent.[840]

This position came under attack with the beginning of the constitutional change. In 2000, Dugard (who in this year also became the ILC Special Rapporteur on diplomatic protection) argued that the question should be considered 'open' in South African law[841] and found academic support.[842] The traditional position also fell under pressure in the UK. In its 2002 *Abbasi* decision, the Court of Appeal held that British citizens had a legitimate expectation of having their request for diplomatic protection considered by the executive and that this decision could be reviewed for rationality.[843] These developments paved the way for the development of the law of diplomatic protection in South Africa, where a whole line of cases revolves around the topic.[844]

The first case in that line is *Kaunda v President of the Republic of South Africa*.[845] A group of South African citizens had been arrested in Zimbabwe

835 *China Navigation* (n 833) 222.
836 Ibid.
837 Ibid 223.
838 *Mutasa v Attorney-General* [1980] 1 QB 114 (Queen's Bench Division).
839 Tran (n 816) 305; McLachlan tries to rebut that as a false reading of the traditional case law. In my view, it correctly reflects the traditional position in English law, which however now appears to be changing McLachlan (n 250) 353 ff, 373.
840 Hercules Booysen, *Volkereg en sy verhouding tot die Suid-Afrikaanse reg* (2nd edn, Juta 1989) 389; John Dugard, *International law: A South African perspective* (2nd edn, Juta 1994) 214 fn 42; Gerhard Erasmus and Lyle Davidson, 'Do South Africans have a right to Diplomatic Protection' (2000) 25 SAYIL 113, 116.
841 Dugard, *International Law* (2nd edn) (n 840) 214 fn 42; Erasmus and Davidson (n 840) 166 fn 9.
842 Erasmus and Davidson (n 840).
843 *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 (Court of Appeal) para 106.
844 Annemarieke Vermeer-Künzli, 'Restricting Discretion: Judicial Review of Diplomatic Protection' (2006) 75 Nordic Journal of International Law 279, 297 ff; Tran (n 816) 307 ff; for analysis of the case law cf McLachlan (n 250) 948; Dugard and others, *International Law* (5th edn) (n 2) 417 ff; Eksteen (n 294) 290 ff.
845 *Kaunda and Others v President of the RSA and Others* 2005 (4) SA 235 (CC) (Constitutional Court).

for arms trafficking and allegedly being involved in an attempt coup d'état in Equatorial Guinea.[846] The detained applied for a court order to direct the South African government to take the necessary steps for their release to South Africa and ensure that they would not be extradited from Zimbabwe to Equatorial Guinea, where they may be subject to torture or capital punishment.[847] The court found that South African citizens were entitled to ask for protection[848] and that the government had a 'corresponding obligation to consider the request and deal with it consistently with the Constitution'.[849] In determining how far the judiciary can review the fulfilment of this obligation, the court directly referred to the judgment in *Abbasi*[850] and the German *Hess* case.[851] It finally stated that if the 'government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly'[852] but also '[t]his does not mean that courts would substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection'.[853] In general, the 'government has a broad discretion in such matters which must be respected by our courts'.[854] Consequently, the court found the steps taken by the government as covered by the latter's discretion.[855]

Diplomatic protection came up again in the *Van Zyl*[856] case. The government of Lesotho had cancelled and revoked mineral leases of a South African national who approached the South African government for diplomatic protection. The Supreme Court endorsed the ruling in *Kaunda*[857] but

846 Ibid 243 ff.
847 Ibid.
848 Ibid 258.
849 Ibid 259.
850 Ibid 261.
851 Ibid 260.
852 Ibid 262.
853 Ibid [my adjustment].
854 Ibid.
855 For a critical assessment of Kaunda cf Stephen Peteé and Max Du Plessis, 'South African Nationals Abroad and Their Right to Diplomatic Protection — Lessons from the 'Mercenaries Case" (2006) 22 South African Journal on Human Rights 439.
856 *Van Zyl and others v Government of the Republic of South Africa and Others* (2008) (3) SA 294 (SCA) (Supreme Court of Appeal).
857 Ibid 309 ff.

already denied that the prerequisites for diplomatic protection, especially a wrongful act committed by Lesotho,[858] were given in the case at hand.[859]

The topic found a more thorough discussion in *Von Abo*. Von Abo, a South African citizen, had owned several agricultural facilities in Zimbabwe, which the Zimbabwean government confiscated during its land reform in the early 2000s. He asked the South African government to intervene on his behalf, which, in contrast to German and other governments, remained comparatively passive, although it alleged that it was engaged in diplomatic talks with the Zimbabwean government.[860] Prinsloo J referred to the *Kaunda* judgment and, based on the correspondence between Von Abo and the South African authorities, held that, although the government answered the request, it 'failed to respond appropriately and dealt with the matter in bad faith and irrationally'.[861] He ordered that within 60 days, the government had to take the necessary steps to protect Von Abo's rights and inform the court of the measures taken.[862] The government subsequently engaged in talks with the Zimbabwean government on a junior official level.[863] In contrast to other states, the South African interference was rather reluctant.[864] In the follow-up proceedings, the court held that the steps taken were ineffective and weak and thus could not pass the *Kaunda* test.[865] It awarded constitutional damages for the failure to provide diplomatic protection to Von Abo.[866] The case finally reached the Supreme Court of Appeal, which quashed the lower court's finding that Von Abo was entitled to diplomatic protection for the violation of his rights in Zimbabwe.[867] The court relied on the *Van Zyl* case and endorsed the finding that *Kaunda* only awards the right to have a request *considered* and does not entitle one to a specific type of diplomatic protection.[868] It consequently found the

858 Ibid 315 ff.
859 Critical of the judgment Vermeer-Künzli, 'Restricting Discretion' (n 844) 305.
860 *Von Abo v Government of the Republic of South Africa and Others* 2009 (2) SA 526 (T) (Transvaal Provincial Division) 550 ff.
861 Ibid 562.
862 Ibid 567.
863 *Von Abo v Government of the Republic of South Africa and Others* 2010 (3) SA 269 (GNP) (North Gauteng High Court) 278 ff.
864 Ibid 281.
865 Ibid 286 ff.
866 Ibid 289 ff.
867 *Government of the Republic of South Africa and Others v Von Abo* 2011 (5) SA 262 (SCA) (Supreme Court of Appeal) 272.
868 Ibid.

order directing the government to take necessary steps within 60 days to be unlawful[869] and rescinded the damages awarded in the judgment.[870] The Supreme Court of Appeal only upheld the ruling that the government did not consider the initial request for diplomatic protection rationally and in good faith but stressed that this only had 'theoretical value'.[871]

In *Kaunda,* strong minority opinions argued for a broader right to diplomatic protection.[872] The first two *Von Abo* judgments partially relied on these minority opinions and thus arrived at their high level of protection.[873] The Supreme Court of Appeal's ruling in *Von Abo* can be seen as a clarification and narrow interpretation of the *Kaunda* judgment. The position in South African law thus largely mirrors German law, which served as a model in developing the review standards in *Kaunda*.[874] In both countries, individuals are only entitled to have their request for diplomatic protection considered, subject to the standard of 'abuse of discretion' (Germany) or 'rationally and in good faith' (South Africa).

d) Conclusion on diplomatic protection

In the United States, by the beginning of the 20th century, there was a debate concerning the legal nature and enforceability of diplomatic protection. However, the courts early on held attempts of individuals to oblige the executive to intervene in their favour to be non-reviewable. In a similar manner, the provisions of the Hostage Act providing a statutory angle to induce executive action were interpreted extremely narrowly. In the wake of the Sutherland Revolution, the courts explicitly connected their earlier case law to the 'political question doctrine'. In the United States, cases of diplomatic protection are non-reviewable.

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869 Ibid 272 ff.
870 Ibid 275 f.
871 Ibid 278.
872 Especially Ngcobo and O' Reagan *Kaunda and Others v President of the RSA and Others* (n 845) 278 ff, 295 ff.
873 *Von Abo v Government of the Republic of South Africa and Others* (n 860) 652 ff; Dire Tladi, 'The Right to Diplomatic Protection, The Von Abo Decision, and One Big Can of Worms: Eroding the Clarity of Kaunda' (2009) 20 Stellenbosch Law Review 14, 22; Sandhiya Singh, 'Constitutional and international law at a crossroads: diplomatic protection in the light of the Von Abo judgment' (2011) 36 SAYIL 298, 306.
874 *Kaunda and Others v President of the RSA and Others* (n 845) 260.

In Germany, the Bismarck and Weimar period constitutions included explicit provisions concerning diplomatic protection. Their legal nature was subject to academic debate. However, no procedures were available to induce the courts to decide on the issue. The discussion continued under the Basic Law. The Constitutional Court finally explicitly rejected non-reviewability in favour of a margin of discretion approach.

South Africa first relied on the British approach and treated diplomatic protection as non-reviewable. This changed under the new constitution, where the Constitutional Court, based on new British and German case law, opted for a margin of discretion approach. Case law suggesting an even stricter review of diplomatic protection has been overturned. South Africa applies a discretionary approach comparable to Germany in cases of diplomatic protection.

6. Conclusion on the tracing of deference

The review of the application of different deference doctrines in our three reference countries shows three results.

First, across all three jurisdictions, a general trend appears to be the application of weaker forms of deference. In *treaty interpretation,* all three countries now apply a margin of discretion approach or even decide independently and, in general, have lowered the influence of the executive.

Concerning the *recognition of states and governments,* the situation in the United States remained unchanged, and the executive can still conclusively decide on the issue. In Germany, the courts always enjoyed considerable independence within this area and only sporadically attached weight to the executive's opinion. South Africa had historically allowed the executive to conclusively determine recognition questions but now only applies a margin of discretion approach.

In *state immunity* decisions, the United States first applied a margin of discretion approach, which gradually developed into a conclusiveness approach. This was replaced by introducing a statutory framework that now allows the judiciary to decide independently on questions of state immunity. Within German law, over time, the conclusiveness approach in questions of state immunity was replaced by the judiciary's independent assessment. South African law had always called for an independent assessment of the courts in this area and eliminated remaining executive influence when it rejected applying a conclusiveness doctrine in recognition questions.

With regards to *foreign official immunity*, in parallel with the law of state immunity, the US approach first developed from a margin of discretion towards a conclusiveness doctrine. As the statutory framework covering state immunity was found not applicable to foreign official immunity, uncertainty exists concerning the correct approach. Some courts only grant the executive a margin of discretion in determining certain forms of foreign official immunity, while others continue to allow the executive to conclusively settle the issue. In Germany, executive influence in foreign official immunity cases was gradually pushed back, and today, discretion is only sporadically awarded as to the facts which may entitle an individual to immunity. The same holds for South Africa. Historically statutory law allowed for a conclusive determination of foreign official immunity, which was eventually watered down to a margin of discretion approach.

Finally, concerning *diplomatic protection*, the US law remained essentially unchanged, and the area is still treated as non-reviewable. In contrast, in Germany, a previous non-reviewability was substituted for a margin of discretion doctrine. A similar development took place in South Africa: here the formerly unreviewable area is also now governed by a margin of discretion approach.

Secondly, our analyses show that the United States appears less strongly affected by the general trend toward more judicial review than Germany and South Africa. The latter two countries, throughout all groups of cases, either preserved the strong role for the judiciary in the (few) areas where it already existed or now apply less intense forms of deference. In contrast, in the US, in two fields (recognition and diplomatic protection), the strong influence of the executive has remained untouched. In two others (treaty interpretation and foreign official immunity), the trend towards more judicial review is much weaker than in Germany and South Africa.

Thirdly, our examination has revealed that each country appears to be occupied with more general problems in the application of deference, which are displayed throughout the analysed groups of cases. This ties back to the different country-specific adoption of the notion of deference analysed in Chapter 1.[875] In South Africa, historically, the reliance on English law was strong. With the unclear fate of the prerogatives and the act of state doctrine under the new constitution, the current status of non-reviewability and conclusiveness doctrines is also disputed, leading to uncertainty and evasive judgments. In Germany, the Constitutional Court under the Basic

875 Cf above, Chapter 1, II.

Law soon decided in favour of full reviewability of executive acts. However, now the circumstances under which the executive's assessments deserve special weight appear unclear. In the United States, the Sutherland Revolution granted the executive strong influence, especially by allowing the use of conclusive determinations for questions of law. This strong executive role now causes problems, particularly in areas where the courts have (re)gained the competence to decide independently on related issues.

The first two findings, on the reasons for the trend towards less deference and the unequal receptiveness towards this trend, especially concerning Germany and South Africa on the one hand and the United States, on the other hand, will be dealt with in Chapter 4. The third result, the country-specific general problems in applying deference and possible solutions, will be the subject of our following subchapter.

II. General Problems in the application of deference

1. Non-reviewability and conclusiveness doctrines in contemporary South African law

As the case law analysed above shows, courts in contemporary South Africa show a certain insecurity concerning the correct application of doctrines of conclusiveness and doctrines of non-reviewability. This is exemplified by the *Harksen* case, where the court appeared hesitant to recognize the executive certificate concerning the existence of a treaty as binding but evaded ruling directly on the issue.[876] A similar strategy was applied in *Kolbatschenko*, where the judges acknowledged that there might be areas where the state should speak 'with one voice' but determined that the case did not fall into that category.[877] In the same vein, the court in the *Grace Mugabe* case went out of its way to avoid addressing the question of how far executive conferrals of foreign official immunity are reviewable.[878]

The uncertainty of the courts' ties back to the unsettled status of the act of state doctrine, which provides the basis for non-reviewability and conclusiveness doctrines and which was analysed in Chapters 1 and 2.[879] Some

876 Cf above, this Chapter, I., 1., c), bb).
877 Cf above, this Chapter, I., 2., c).
878 Cf above, this Chapter, I., 4., c), bb), (2).
879 Cf Chapter 1, II., 1., b) and Chapter 2, II., 3.

authors argue that the act of state doctrine has survived the constitutional transitions of 1993 and 1996,[880] while others argue it has not.[881] Moreover, some scholars favour a doctrine of non-reviewability in South Africa,[882] while others reject it.[883] The text of the constitution does not conclusively settle the issue. Opponents of the doctrine often refer to Section 34 of the South African Constitution, which states that 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court'. Nevertheless, as mentioned,[884] the provision could easily be reconciled with a concept of non-reviewability

880 Booysen argues that at act of states still are not reviewable with regards to the Bill of rights Hercules Booysen, 'Has the act of state doctrine survived?' (1995) 20 SAYIL 189, 196; Gretchen Carpenter, 'Prerogative Powers gone at last?' (1997) 22 SAYIL 104, 111; Cheryl Loots, 'Standing, Ripeness and Mootness' in Stuart Woolman and Michael Bishop (eds), *Constitutional law of South Africa* (2nd edn – January 2013 – Revision Service 5, Juta 2002) 7 – 1; Ignatius M Rautenbach, *Rautenbach-Malherbe Constitutional Law* (6th edn, LexisNexis 2012) 35, 146.

881 George N Barrie, 'Judicial review of the royal prerogative' (1994) 111 South African Law Journal 788, 791; Sebastian Seedorf and Sanele Sibanda, 'Separation of Powers' in Stuart Woolman and Michael Bishop (eds), *Constitutional law of South Africa* (2nd edn – January 2013 – Revision Service 5, Juta 2002) 12 – 26; Hugh Corder, 'Reviewing "Executive Action"' in Jonathan Klaaren (ed), *A delicate balance: The place of the judiciary in a constitutional democracy: proceedings of the symposium to mark the retirement of Arthur Chaskalson, former chief justice of the Republic of South Africa* (Siber Ink 2006) 73, 75.

882 Loots (n 880) 7 – 1; Mtendeweka Owen Mhango, 'Is It Time for a Coherent Political Question Doctrine in South Africa? Lessons from the United States' (2014) 7 African Journal of Legal Studies 457, 493; Mtendeweka Owen Mhango and Ntombizozuko Dyani-Mhango, 'Deputy Chief Justice Moseneke's approach to the separation of powers in South Africa' (2017) Acta Juridica 75.

883 Karin Lehmann, 'The Act of State Doctrine in South African Law: Poised for reintroduction in a different guise?' (2000) 15 SA Public Law 337, 355 f; Seedorf and Sibanda (n 881) 12 – 26, 12 – 52; Lourens Wepener Hugo Ackermann, 'Opening Remarks on the Conference Theme' in Jonathan Klaaren (ed), *A delicate balance: The place of the judiciary in a constitutional democracy: proceedings of the symposium to mark the retirement of Arthur Chaskalson, former chief justice of the Republic of South Africa* (Siber Ink 2006) 8, 10; Dire Tladi and Polina Dlagnekova, 'The act of state doctrine in South Africa: has Kaunda settled a vexing question?' (2007) 22 SA Public Law 444, 444; Dikgang Moseneke, 'A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa' (2013) 101 Georgetown Law Journal 749, 767 f; Moses R Phooko and Mkhululi Nyathi, 'The revival of the SADC Tribunal by South African courts: A contextual analysis of the decision of the Constitutional Court of South Africa' (2019) 52 De Jure 415, 426.

884 Cf above, Chapter 2, II., 3.

by assuming that political questions are simply questions that cannot be resolved by 'the application of law'.[885] In addition, Section 2 of the South African Constitution, stipulating that the constitution is supreme and conduct inconsistent with it invalid,[886] does not provide an answer.[887] If the constitution were to sanction non-reviewability, the Constitutional Court would not act unconstitutionally when it exercises judicial restraint, and likewise, the executive would act constitutional if it used its unreviewable powers.

Thus, the answer cannot simply be deduced from the constitutional text but must be found by the courts through careful constitutional interpretation. Considering the case law in the previous subchapters, have the South African courts under the new legal system endorsed or rejected a doctrine of non-reviewability in foreign affairs? To answer this question, we will first analyse cases that have been put forward as supporting a doctrine of non-reviewability (or conclusiveness)[888] before engaging in a general review of the cases analysed in this chapter and commenting on the development.

a) Cases cited as a basis for non-reviewability in South Africa

Proponents of a non-reviewability doctrine in South Africa have relied on some of the abovementioned cases. One such case is *Kolbatschenko v King*, dealing with the recognition of governments.[889] Mhango contends that in the case, the court established a political question doctrine but found it inapplicable from the facts of the case.[890] According to Mhango, *Kolbatschenko* 'can be credited with founding the basis for a potential

885 Respondents in *Kolbatschenko v King NO and Another* (n 420) 353; arguing in this direction as well Chuks Okpaluba, 'Justiciability, constitutional adjudication and the political question in a nascent democracy: South Africa (part 1)' (2003) 18 SA Public Law 331, 333.

886 Ignatius M Rautenbach, 'Policy and Judicial Review – Political Questions, Margins of Appreciation and the South African Constitution' (2012) Journal of South African Law 20, 28.

887 On this point I tend to agree with Mtendeweka Owen Mhango (n 882) 488.

888 As shown in Chapter 2, conclusiveness doctrines share a common trait with non-reviewability doctrines as ousting judicial review, but only concerning a particular aspect of the case – cf above, Chapter 2, III.

889 Okpaluba (n 885) 343 seems to argue in the same direction; Mhango (n 882) 479.

890 Mhango (n 882) 479.

application of the political question doctrine in a future case'.[891] This conclusion is rather questionable. As mentioned above, the court's reasoning was fairly opaque[892] and obviously aimed at avoiding the question. The judges indeed accepted that there were areas of 'high executive nature' and that the case was not one of them.[893] However, all statements concerning these 'high executive nature areas' were made obiter and thus should be handled with care. The closest the court came to recognizing a political question doctrine is that it mentioned that in 'highly exceptional cases'[894] it 'will adopt a "hands-off" approach'[895] albeit without further elaborating if 'hands-off' would mean non-reviewability. On the other hand, the court clearly stated, 'even if one were to accept that the Executive retains certain discretionary non-statutory powers to enable it to conduct foreign relations [...] it would appear that such powers are no longer per se beyond the scrutiny of the South African Courts'.[896] Even in the classical area of recognition of governments, where older English law provided for the certification doctrine,[897] the court only held that '*the latitude* extended by the Judiciary to the Executive in such matters will be correspondingly large,'[898] not that the decision is unreviewable. The language (although obiter) is one of a doctrine of discretion, not a doctrine of non-reviewability. Thus, *Kolbatschenko* cannot serve as evidence for political question doctrine.

It has also been brought forward that *Kaunda*[899] is based on 'political question doctrine sentiments'.[900] This also appears implausible. Of course, *Kaunda* accepted a special role for the executive in conducting foreign affairs.[901] However, the court rejected non-reviewable areas and held that '[t]he exercise of all public power is subject to constitutional control'.[902] It decided to give leeway to the executive not by abdicating its judicial

891 Ibid.
892 Cf this Chapter, II., 1., a).
893 *Kolbatschenko v King NO and Another* (n 420) 357.
894 Ibid 356.
895 Ibid.
896 Ibid 355.
897 Cf above, Chapter 2, III., 3.
898 *Kolbatschenko v King NO and Another* (n 420) 356 [my emphasis].
899 Cf this Chapter, I., 5., c).
900 Mhango (n 882) 476.
901 *Kaunda and Others v President of the RSA and Others* (n 845) 261.
902 Ibid.

function but by awarding 'broad discretion'.[903] Kaunda is proof of a clear and distinctive decision for a doctrine of discretion approach.[904]

Lastly, the ICC withdrawal case *Democratic Alliance v Minister of International Relations and Cooperation and Others*[905] has been cited as evidence for the political question doctrine.[906] We have mentioned the case above and will again discuss it below.[907] It dealt with the question of whether the South African Constitution demands parliamentary approval before the executive can withdraw from an international treaty. The court found that as the ratification of a treaty explicitly warrants prior parliamentary approval, a withdrawal has first to be decided upon by parliament. It held the given notice of withdrawal by the executive unconstitutional.[908] This finding of the court underlines that, in contrast to the US courts, it does not leave such questions to the political power plays of the elected branches. It is clearly willing to decide the correct constitutional interpretation on its own. Nevertheless, the court only decided on the 'procedural irrationality' of the executive's withdrawal. It found it unnecessary to review 'substantive irrationality,' that is to say, to review if the executive decision to withdraw would violate further material provisions of the South African Constitution.[909] In this choice not to substantially review the executive decision, Mhango and Dyani-Mhango find support for a political question doctrine.[910] However, this appears to be a misreading of the judgment. The court indeed stated that the decision to withdraw is 'in the heartland of the national executive in the exercise of foreign policy, international relations and treaty making […]'[911] but continued the sentence '[…] subject, of course, to the Constitution'.[912] Both authors also quoted the court stating 'there is nothing patently unconstitutional about the national executive's policy decision to withdraw from the Rome Statute, because it is within

903 Ibid 262 [my adjustment].
904 In the same vein Tladi and Dlagnekova (n 883).
905 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279).
906 Mhango and Dyani-Mhango (n 882).
907 Cf below Chapter 4, I., 3., b), bb).
908 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279) 229 ff.
909 Ibid 273 ff.
910 Mhango and Dyani-Mhango (n 882) 79 ff.
911 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279) 240.
912 Ibid.

its powers and competence to make such a decision'.[913] The quote omits a substantial part; in full, the court stated 'There is nothing patently unconstitutional, *at least at this stage*, about the national executive's policy decision to withdraw from the Rome Statute, because it is within its powers and competence to make such a decision'.[914] The real reason why the court did not decide on substantial irrationality is not due to a political question doctrine but due to procedural economy. As explicitly stated, it found it unnecessary to decide on the issue at the particular stage of proceedings. It further explained that when parliament would decide upon the withdrawal and repeal of the domestic legislation implementing the Rome Statute, this legislation could be reviewed for compatibility with the Bill of Rights.[915] This goes hand in hand with the court's finding '[i]t is now axiomatic that the exercise of all public power, including the conducting of international relations, must accord with the Constitution'.[916] *Democratic Alliance* can thus not serve as an indicator for a South African political question doctrine. On the contrary, it has shown the court's readiness to solve constitutional disputes between the elected branches of government, even when foreign affairs are involved.

b) Evaluating contemporary case law

The analysis thus far has shown that cases like *Kolbatschenko*, *Kaunda*, and *Democratic Alliance* do not support a doctrine of non-reviewability. On the contrary, they indicate that the courts have decided against it. This is in line with the other early and recent case law of the new democratic South Africa analysed above. As early as in *Harksen,*[917] the court (although hesitantly) refused to treat an executive certificate concerning the termination of a treaty as binding. The *Mohamed* case,[918] not included in the examination above, likewise shows the willingness of the courts to engage in foreign

913 Mhango and Dyani-Mhango (n 882) 80.
914 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279) 241 [my emphasis].
915 Ibid 239.
916 Ibid 229 [my adjustment].
917 *Harksen v President of the Republic of South Africa* (n 267).
918 *Mohamed v President of the Republic of SA* 2001 (3) SA 893 (CC) (Constitutional Court).

affairs cases.[919] It concerned the illegal extradition of a terror suspect to the US, where the detainees faced the death penalty. The South African government had urged the court not to decide on the issue as it would allegedly infringe the separation of powers.[920] The court outright rejected the argument and ordered the government to inform the US courts of the illegality of the extradition under South African law.[921]

Recent case law shows an even stronger trend towards judicial review. The courts appear to have shaken off the more cautious remarks in older cases like *Harksen* and *Kolbatschenko*. In the *Fick* case, the Constitutional Court denied immunity for Zimbabwe despite the clear opposition of the Zuma government.[922] In the *Al-Bashir* case,[923] which triggered the attempt to withdraw from the ICC, the Supreme Court of Appeal explicitly rejected the executive interpretation of an international agreement. Moreover, it denied giving force to an executive proclamation granting immunity for Bashir. Likewise, in the *Mugabe* case,[924] the court ignored the executive conferral of immunity, clearly distinguishing the South African approach from that of the US.[925] In the *Earthlife*[926] decision, the judges explicitly rejected contentions that they would be incompetent to review whether the implementing statute met constitutional demands. The *SADC tribunal* case[927] is the pinnacle of this recent line of case law. The court found the president's participation in the attempt to bar individuals from accessing the tribunal unconstitutional.[928]

In none of these cases involving highly political matters in foreign affairs did the courts renounce their competence to review the executive action. They did not even hint at special deference towards the executive branch

919 For the reviewability of extradition decisions cf as well *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC) (Constitutional Court).
920 *Mohamed v President of the Republic of SA* (n 918) 896, 921.
921 Ibid 897, 922.
922 *Government of the Republic of Zimbabwe v Fick and others* (n 291).
923 *Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others (Bashir Case)* (n 274).
924 *Democratic Alliance v Minister of International Relations and Co-operation and Others (Mugabe Case)* (n 744).
925 Cf above, this Chapter, I., 4., c), bb), (2).
926 *Earthlife Africa v Minister of Energy* (n 282).
927 *Law Society of South Africa and others v President of the Republic of South Africa and others (Southern Africa Litigation Centre and another as amici curiae) (SADC Case)* (n 294).
928 Sharing this analysis Eksteen (n 294) 311.

in most cases. In the *Earthlife*[929] and *Democratic Alliance*[930] cases, the *Kaunda case* was explicitly cited to establish the reviewability of executive action. It appears that the decision in *Kaunda* marks the new baseline in South African foreign relations law: every public action appears to be at least reviewable as against the principle of legality.[931] Other cases not related to foreign affairs like *Pharmaceutical Manufacturers*,[932] *Hugo*,[933] and *SARFU*,[934] in which the courts have rejected unreviewable areas, support this finding.[935]

In an often-quoted remark, Justice Ackerman stated

> *I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.*[936]

From the case law analysed, it appears South African courts have lived up to Justice Ackerman's request and decided that the new South African legal system is better assisted without act of state or political question doctrines.[937]

South African courts should continue down this road and unmistakeably state the break with the past. The crown prerogatives or the act of state doctrine have not survived the transition to democracy and should not

929 *Earthlife Africa v Minister of Energy* (n 282) 260.
930 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279).
931 Dire Tladi and Polina Dlagnekova (n 883); Dugard and others, *International Law* (5th edn) (n 2) 106.
932 *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).
933 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (Constitutional Court).
934 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (Constitutional Court).
935 Cf Corder (n 881) 75.
936 *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC) (Constitutional Court) 804.
937 Cf as well Dugard and others, *International Law* (5th edn) (n 2) 106; sharing this conclusion Eksteen (n 294) 313.

be reintroduced. Clear language in this regard would diminish the last uncertainties and help to clarify the law. To balance the executive-judicial relationship with the help of a doctrine of discretion instead of non-reviewability also fits South African constitutional history. As we will analyse in the next chapter, the new South African system, like the German Basic Law, after painful experiences of the past, strongly focuses on fundamental rights[938] and is sceptical towards unchecked executive power. Thus, the South African constitution is much closer to the German than the American ideal of a separation of powers between the executive and judiciary and German law (which abolished non-reviewability) seems a more suitable source of inspiration in further developing the South African approach. Moreover, as we will argue in our last chapter, weaker forms of deference in general offer more flexibility for the executive and judiciary alike to deal with the challenges of the 21st century.[939]

2. The role of the executive assessments in the absence of a doctrine of non-reviewability in contemporary German law

In Germany, the cases analysed above underline the findings of Chapter 2. In the absence of a doctrine of non-reviewability and a doctrine of conclusiveness, the only possibility to grant leeway to the executive in foreign affairs is doctrines of discretion. However, under the influence of the general paradigm of full reviewability, the courts appear to be insecure about if and how much weight should be given to executive assessments.

This is exemplified by the recent *Ramstein* case analysed above.[940] The Higher Administrative Court denied an area for discretion concerning the question of whether the conducted drone strikes complied with international law, a position which the Federal Administrative Court reversed. Other cases examined in this chapter show a similar uncertainty as to how much leeway should be granted to executive assessments. In the *Rhodesian Bill* case, the court almost recklessly ignored the executive decision not to

938 Cf second constitutional principle which informed the development of the South African constitution: 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution'; cf below Chapter 4, II., 3., b) and c).

939 Cf below Chapter 5, III., 2.

940 Cf above, Introduction and this Chapter, I., 1., b), bb), (5).

recognize the oppressive minority regime in Salisbury and seriously undermined Germany's effort to reintegrate into the international community.[941] Likewise, the *Tabatabai* litigation has shown that the courts appear to be insecure in how far a margin of discretion for factual or legal questions should be awarded to the executive.[942]

As we have seen above, in various cases, the Constitutional Court acknowledged an area of discretion for the executive concerning factual determinations. It has been much more careful concerning whether an area of discretion exists to determine legal questions, especially concerning the interpretation of treaties or customary international law. Only in the *Hess* case and the *Teso decision*[943] did the Constitutional Court explicitly mention such leeway for the executive,[944] remarkably without elaborating on its foundations. The law in this area is largely under-theorized,[945] and the courts have issued conflicting judgments.[946] In the latest *Ramstein* judgment, the Federal Administrative Court explicitly relied on the *Hess* case, and the Constitutional Court can now hardly evade the question. The academic literature is divided as well. Some authors dispute lower review standards in foreign affairs in general[947] and others are particularly critical as far as legal questions are concerned.[948] On the other hand, several

941 Cf above, this Chapter, I., 2., b).

942 Cf above, this Chapter, I., 4., b), bb), (2).

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

944 Claims that this case law 'has not been expressly overruled but tacitly abandoned or at least restricted' Giegerich (n 223) 613.

945 With regards to lower review standards in foreign affairs in general see already the critique by Juliane Kokott, 'Kontrolle der Auswärtigen Gewalt' (1996) 111 DVBl 937, 949; lining out the conflicting case law Nettesheim (n 173) 576 ff.

946 Awarding an area of discretion *Judgment from 27 May 2015 (Ramstein Drone Case)* 3 K 5625/14 (Administrative Court Cologne) mn 78; awarding discretion as well *Judgment from 14 June 1996* (n 827) mn 11 and *Judgment from 25 November 2020 (Ramstein Drone Case)* (Federal Administrative Court) (n 224); awarding no discretion, albeit basing this on the fact the executive itself did not took a clear position *Judgment from 19 March 2019 (Ramstein Drone Case)* (Higher Administrative Court Münster) (n 225) mn 564.

947 Kokott (n 945) 947 ff; Ingolf Pernice, 'Art. 59' in Horst Dreier (ed), *Grundgesetz Kommentar* (2nd edn, Mohr Siebeck 2006) mn 52 ff; acknowledging the scepticism within the scholarly debate Schorkopf (n 185) 346.

948 Beinlich appears to argue in this direction Leander Beinlich, 'Drones, Discretion, and the Duty to Protect the Right to Life: Germany and its Role in the US Drone Programme before the Higher Administrative Court of Münster' (2019) 62 German Yearbook of International Law 557, 566 f; differentiating Aust, who is critical of the Administrative Court Cologne's low review standard but likewise criticises

authors acknowledge areas of discretion for factual determinations[949] while others also endorse them for legal questions.[950]

In my view, there are compelling reasons linked to the functioning of the international system for allowing executive discretion not only for factual assessments but also for the interpretation of treaties and the existence and interpretation of rules of customary international law. Regardless of whether the 'foreign affairs power' is almost exclusively vested within the executive or distributed between the executive and the legislative branches,[951] it is undisputed that in Germany, the executive represents the state on the international plane.[952] International law assigns special powers to the representative state organs concerning the formation of customary international law and the conclusion and subsequent development of treaties.[953] In the horizontal order of the international system, the executive takes over

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the simplification of the status of international law by the Higher Administrative Court, in the end, Aust as well appears to acknowledge a certain leeway for the executive, albeit applying a higher review standard than the Higher Administrative Court, Aust, 'US-Drohneneinsätze' (n 225) 303, 308, 309; in a similar direction Max Erdmann, 'Grundrechtliche Schutzpflichten nach Maßgabe des Völkerrechts' (2022) 75 DÖV 325, 333.

949 Stern (n 168) 249; Hailbronner (n 183) 19, 23; Calliess, 'Auswärtige Gewalt' (n 183) 608.

950 Given the weight as special expert evidence Bolewski (n 128) 161; Thomas Giegerich, 'Verfassungsrechtliche Kontrolle der Auswärtigen Gewalt' (1997) 57 ZaöRV 409, 446 ff, 459 ff; for the question whether a non-international armed conflict exists Daniel Thym, 'Zwischen "Krieg" und "Frieden": Rechtmaßstäbe für operatives Handeln der Bundeswehr im Ausland' (2010) 63 DÖV 621, 627; Patrick Heinemann, 'US-Drohneneinsätze vor deutschen Verwaltungsgerichten' (2019) 38 NVwZ 1580, 1581.

951 Cf already Grewe – Menzel dispute above Chapter 1, II., 3., e) with further references; Stefan Kadelbach and Ute Guntermann, 'Vertragsgewalt und Parlamentsvorbehalt' (2001) 126 AöR 563, 567.

952 Hailbronner (n 183) 10; Calliess, 'Auswärtige Gewalt' (n 183) 601.

953 The Constitutional Court itself recognizes the special role of the 'representative state organs' and thus especially the executive in its decisions on the existence of a rule of customary international law Helmut Philipp Aust, 'Art. 25' in Jörn Axel Kämmerer and Markus Kotzur (eds), *von Münch / Kunig Grundgesetz Kommentar* (7th edn, CH Beck 2021) mn 30; cf as well *Decision from 5 November 2003* BVerfGE 109, 13 (German Federal Constitutional Court) 28; also international law takes into account all organs of state, particular weight is placed on the assertions of the executive Tullio Treves, 'Customary International Law' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 32.

a legislative function that requires corresponding room to manoeuvre.[954] That is not to say that the judiciary has no role to play on the international plane.[955] Domestic courts are vital in upholding the international rule of law.[956] However, their primary role is related to norm application not norm creation.[957] As we will explore in the next chapter, the structure of international law has arguably changed from pure state (and executive) centrism. Nevertheless, executive control of foreign relations is still the 'default position' of international law.[958] Moreover, it is questionable whether a completely independent role for the judiciary concerning customary international law and the subsequent development of treaties would be normatively desirable.[959] The closer the courts shift to norm creation, the more the question of comparatively less democratic legitimacy vis-à-vis the executive branch becomes relevant.[960]

954 Julian Arato, 'Deference to the Executive: The US Debate in Global Perspective' in Helmut Philipp Aust and Georg Nolte (eds), *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (OUP 2016) 213.

955 André Nollkaemper, *National courts and the international rule of law* (OUP 2011) 10.

956 George Scelle, 'Le phénmène du dédoublement fonctionnel' in Walter Schätzel and Hans-Jürgen Schlochauer (eds), *Festschrift Wehberg – Rechtsfragen der Internationalen Organisation* (Klostermann 1956) 324; Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 454; Nollkaemper (n 955); mentioning the 'Courts' Proactive Role in a Globalized World' Heike Krieger, 'Between Evolution and Stagnation – Immunities in a Globalized World' (2014) 6 Goettingen Journal of International Law 177, 194; Helmut Philipp Aust, 'Between Universal Aspiration and Local Application' in Helmut Philipp Aust and Georg Nolte (eds), *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (OUP 2016) 333, 342; Arato (n 954) 210.

957 Stressing the role of the executive Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 453; critical of the view that constitutional law may not constrain the application of international law by domestic courts Campbell McLachlan, 'Five conceptions of the function of foreign relations law' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 30; also international law takes into account all organs of state, particular weight is placed in the assertions of the executive Treves (n 953) mn 32.

958 Curtis A Bradley, 'The Dynamic and Sometimes Uneasy Relationship Between Foreign Relations Law and International Law' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 343, 350; for parliamentary involvement cf below Chapter 4, I., 3., b).

959 Appear to argue for independent judicial review Payandeh and Sauer (n 224) 1573.

960 This problem is often neglected by German authors, cf Payandeh and Sauer (n 224) 1574 who argue for a strong role of the courts in interpreting international law without mentioning the question of democratic legitimacy; acknowledging the problem Felix Lange, *Treaties in Parliaments and Courts: The Two Other Voices*

One argument brought forward against executive discretion in foreign affairs, in general, is Article 1 (3) of the Basic Law. The provision obliges all three branches to observe the fundamental rights enshrined in the constitution.[961] Pernice argued that, as the article does not differentiate between public authorities acting internally and externally, it stood in the way of lower review standards in foreign affairs.[962] This argument is too broad: as we have seen,[963] areas of discretion and lower levels of scrutiny are well established within German administrative law. If Article 1 (3) of the Basic Law prohibited varying degrees of review, it would also do so in administrative law.[964] Article 1 (3) certainly strongly argues for applying German fundamental rights to foreign affairs cases,[965] but is silent on the concrete level of review.[966]

Another and stronger argument against executive influence in interpreting treaty and customary law is based on Article 25 and Article 100 (2) of the Basic Law.[967] Article 25 of the Basic Law provides that customary international law is an integral part of federal law, which implies a role for the courts in its identification and application.[968] Article 100 (2) of the Basic Law provides a special procedure concerning the recognition of a rule of customary international law. In contentious cases, courts must obtain a

(Edward Elgar 2024) 296; for contrast cf the remarks by Ewan Smith, 'Is Foreign Policy Special?' (2021) 41 Oxford Journal of Legal Studies 1040, 1055.

961 'The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law'.

962 Pernice (n 947) 52 ff; in this direction as well Winfried Kluth, 'Die verfassungsrechtlichen Bindungen im Bereich der auswärtigen Gewalt nach dem Grundgesetz' in Rudolf Wendt and others (eds), *Staat Wirtschaft Steuern – Festschrift für Karl Heinrich Friauf* (CF Müller 1996) 197.

963 Cf above, Chapter 2, IV., 2.

964 Refuting the argument as well Calliess, 'Auswärtige Gewalt' (n 183) 608; Calliess, *Staatsrecht III* (n 208) 81; in the same vein Thomas M Pfeiffer, *Verfassungsgerichtliche Rechtsprechung zu Fragen der Außenpolitik: Ein Rechtsvergleich Deutschland – Frankreich* (Lang 2007) 145.

965 More on German fundamental rights and their applicability in foreign affairs cases Chapter 4, I., 4., b) and Chapter 4, II., 3., b) and c); for the different opinions concerning the applicability cf Carl-Wendelin Neubert, *Der Einsatz tödlicher Waffengewalt durch die deutsche auswärtige Gewalt* (Duncker & Humblot 2016) 135 ff.

966 Cf already Meinhard Schröder, 'Zur Wirkkraft der Grundrechte bei Sachverhalten mit grenzüberschreitenden Elementen' in Ingo von Münch (ed), *Staatsrecht – Völkerrecht – Europarecht (Festschrift Schlochauer)* (De Gruyter 1981) 137, 138.

967 In this direction Payandeh and Sauer (n 224) 1573.

968 For the method applied by the Constitutional Court for the identification of customary international law cf Aust, 'Art. 25' (n 953) mn 30.

decision from the Constitutional Court to ascertain whether a rule of international law is part of German law. Both provisions thus assign a vital role to the courts concerning the interpretation and application of customary international law in general and particularly to the Constitutional Court in contentious cases. However, correctly construed, Article 100 (2) of the Basic Law does not stand in the way of awarding an area of discretion to the executive in cases of customary international law. The provision's primary purpose is to regulate the relationship between ordinary courts and the Constitutional Court and to avoid different judgments in contentious cases that may trigger Germany's state responsibility.[969] It does not award the sole competence for interpreting customary law, let alone treaty law, to the Constitutional Court.[970] The position of the executive can be given special weight in the procedure in front of the Constitutional Court.[971]

Better arguments speak for recognizing executive discretion in interpreting customary and treaty law, especially in cases of doubt.[972] The Basic Law, with its general principles of 'friendliness towards international law' and 'openness towards international law,' respects the unique attributes of the international order.[973] If the judiciary (on a global scale) were to fix the executive on a particular understanding of customary international law, this could lead to a petrification of international law.[974] Within the German context, it would deny, qua domestic law, a power granted to the executive qua international law and ignore its basic functioning mechanism.[975] This would, in essence, amount to the exclusion of the German executive from

969 'Es ist der primäre Zweck des Verifikationsverfahrens, Verletzungen des Völkerrechts, die in der fehlerhaften Anwendung oder Nichtbeachtung völkerrechtlicher Normen durch deutsche Gerichte liegen und eine völkerrechtliche Verantwortlichkeit Deutschlands begründen können, nach Möglichkeit zu verhindern und zu beseitigen' *Decision from 5 November 2003* (n 953) mn 36; Hans-Georg Dederer, 'Art. 100' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 275; Joachim Wieland, 'Art. 100' in Horst Dreier and Hartmut Bauer (eds), *Grundgesetz: Kommentar* (3rd edn, Mohr Siebeck 2018) mn 38.

970 Contrary view Payandeh and Sauer (n 224) 1573.

971 Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 463.

972 Bleckmann (n 374) 257; Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 459 ff.

973 Cf Nettesheim (n 173) 579 f.

974 Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 460; Aust, 'Drohneneinsätze' (n 948) 309 warning of the danger of completely limiting the executive ability to develop international law.

975 In this direction Frowein (n 374) 136.

the development of customary international law.[976] As we have seen, concerning the subsequent development of treaties, the Constitutional Court has refrained from applying a strict approach and granted leeway to the executive with its 'integration framework' doctrine. There is no reason why such a discretionary approach should not generally be adopted concerning the interpretation of treaties and customary law.

However, the general decision for an executive role in these cases has to be further refined. The level of weight granted cannot be the same in every case but has to vary according to the circumstances. In particular, the more fundamental and human rights are directly involved, the lower the leeway for the executive.[977] This is based on the very nature of human rights, which aim to protect the individual from (especially executive) infringements. In the case of international human rights, the states implicitly or even expressly accepted independent judicial oversight.[978] Thus, if international human rights law becomes relevant in a direct vertical application,[979] the control of the executive assessment must be strict. On the other hand, if human rights are only indirectly affected, the executive leeway will be higher. This will give rise to a sliding scale approach,[980] and it is upon the courts to openly define and explain the indicators which argue for more or less weight of the executive assessment.

Concerning German fundamental rights, the Constitutional Court acknowledged that they find extraterritorial application.[981] On the other hand,

976 The German state practice determined by the courts would always follow the current status of customary international law developed by other states, that is to say, the state practice largely set by the executive of other states.

977 Making this argument for factual determinations Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 445 ff; Hailbronner (n 183) 21 ff; Arato (n 954) 214; Giegerich, 'German Courts' (n 223) 613.

978 Nollkaemper (n 955) 59 ff.

979 E.g. concerning rights of the European Convention on Human Rights which will be applied in combination with German fundamental rights.

980 For factual determinations Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 448.

981 Recently *Judgment from 19 May 2020 (BND Telecommunications Surveillance)* BVerfGE 154, 152 (German Federal Constitutional Court); for the decision see Helmut Philipp Aust, 'Auslandsaufklärung durch den Bundesnachrichtendienst – Rechtsstaatliche Einhegung und grundrechtliche Bindungen im Lichte des Urteils des Bundesverfassungsgerichts zum BND-Gesetz' (2020) 73 DÖV 715; already *Decision from 21 March 1957 (Washingtoner Abkommen)* (n 175) 295; for older scholarly opinions excluding the application of fundamental rights cf Pfeiffer (n 964) 115 ff; for a more recent and comprehensive review on the positions on general application in extraterritorial situations cf Neubert (n 965) 135 ff.

their effect is weakened in many situations entailing extraterritorial components.[982] This weakened effect (*gelockerte Grundrechtsbindung*)[983] may be brought about by a combination of different legal mechanisms and vary from case to case.[984] Foreign citizens may only invoke certain fundamental rights with a weaker protection standard,[985] and international law norms like international humanitarian law may act as a justification for the infringement[986] of fundamental rights.[987] Moreover, when fundamental rights are used not as a defence against the German state but to demand positive protective action towards other sovereign states (*Schutzpflichten*), the executive is awarded an additional leeway concerning how to fulfil this duty to protect.[988] Furthermore, foreign affairs aspects will typically allow the executive to invoke arguments like the need for 'international cooperation,' which will carry weight in determining the proportionality of an infringement of fundamental rights.[989] These considerations, which are mainly discussed with reference to modified fundamental rights protection, can also inform the level of judicial review given to executive interpretations of treaty and customary law in a particular case. Instead of rather opaque

982 Often discussed under the quite unfitting term of 'Grundrechtsbindung' Nettesheim (n 173) 581 ff; *Judgment from 14 July 1999 (Telecommunication Surveillance)* BVerfGE 100, 313 (German Federal Constitutional Court) 363; *Decision from 4 May 1971 (Spanier Beschluss)* BVerfGE 31, 58 (German Federal Constitutional Court); *Judgment from 10 January 1995 (Zweitregister)* BVerfGE 92, 26 (German Federal Constitutional Court) 41; *Judgment from 19 May 2020 (BND Telecommunications Surveillance)* (n 981) 104; Horst Dreier, 'Art. 1 III' in Horst Dreier and Hartmut Bauer (eds), *Grundgesetz: Kommentar* (3rd edn, Mohr Siebeck 2013) mn 45; Hofmann (n 828); Calliess, 'Auswärtige Gewalt' (n 183) 608; Martin Nettesheim, 'Art. 59' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 214 ff; Schorkopf (n 185) 348.

983 The term is a misnomer, as fundamental rights remain binding, but their level of protection may be modified.

984 Nettesheim, 'Verfassungsbindung' (n 173) 583; Dreier (n 982) mn 45; Neubert (n 981) 169.

985 Horst Dreier, 'Vorbemerkung Grundrechte' in Horst Dreier and Hartmut Bauer (eds), *Grundgesetz: Kommentar* (3rd edn, Mohr Siebeck 2013) mn 71 ff.

986 German legal terminology would rather speak of an 'interference' (*Eingriff*).

987 Thym (n 950) 630.

988 Hailbronner (n 183) 16; Nettesheim, 'Verfassungsbindung' (n 173) 585 ff; cf the recent judgment on the German Climate Change Act *Decision from 24 March 2021 (Climate Change)* BVerfGE 157, 30 (German Federal Constitutional Court) mn 173 ff; for a recent analysis of the concept in relation to extraterritorial situations cf Erdmann (n 948).

989 For different arguments which may be used especially on the justification stage of fundamental rights review cf Neubert (n 981) 170 ff referring to them as 'topoi'.

language and generalizing statements, the courts should openly balance these factors to determine the appropriate level of judicial scrutiny.[990]

3. The status of conclusiveness doctrines in contemporary US law

In contrast to contemporary German and (as has been argued above) South African law, the legal system of the United States clearly embraces non-reviewability in the form of the political question doctrine. Likewise, doctrines of conclusiveness have found frequent application. The extent of the latter doctrine in particular now appears to cause uncertainty concerning the application of deference. As our analysis has shown, this is especially the case with executive assessments concerning legal questions, and even more so in areas where the courts have (re)gained the competence to decide on related issues.[991] In the area of treaty interpretation, the courts have refused to develop the margin of discretion doctrine in the direction of conclusiveness and pushed back against the very deferential *Chevron* approach.[992] In cases of state immunity, the conclusive influence of the executive led to so many problems that the State Department itself argued for a stronger judicial solution of these cases.[993] Still, the conclusive effect of legal assessments is applied to questions of foreign official immunity and continues to cause great uncertainty and has even led to a circuit split.[994]

In my view, the availability of conclusiveness doctrines should be limited to factual determinations within US law. This would bring US law in line with its British roots. As we have seen, the certification doctrine developed in recognition cases and traditionally only referred to questions of 'fact'[995] not questions of law.[996] Only the Sutherland Revolution in the early 20th century manifested its (over-)extensive application to questions

990 The recent decision concerning the BND can be seen as a step towards more openly defining the review standard *Judgment from 19 May 2020 (BND Telecommunications Surveillance)* (n 981).

991 Especially concerning immunity questions, cf above, this Chapter, I., 4., a) and I., 3., a).

992 Cf above, this Chapter, I., 1., a), bb), (3), (d).

993 Cf above, this Chapter, I., 3., a).

994 Cf above, this Chapter, I., 4., a), cc).

995 Mann, *Foreign Affairs* (n 2) 23 ff.

996 Using the example of state immunity White (n 46) 27.

of law.[997] Hence, to allow the executive to conclusively determine the legal consequence of a certified fact, e.g., in questions of state immunity, not only the status entitling immunity but immunity as such have always overstretched the historical roots of the concept.[998] In state immunity cases, this development was curtailed by legislative intervention in the form of the FSIA. The same has been done for foreign officials who are covered by the Vienna Conventions. It appears to be about time to acknowledge the general unsuitability of conclusive executive determinations in legal questions and reform the remaining areas where the doctrine is still applied.

Its principal field of application now appears to be foreign official immunity in cases not covered by the Vienna Conventions. As we have seen, the Supreme Court in *Samantar* ruled that the FSIA is not applicable in cases concerning individuals.[999] The Fourth and the Second Circuit are now in disagreement over the degree of deference that should be awarded to foreign official immunity decisions. Whereas the Fourth Circuit does not allow for conclusive determinations of conduct-based immunity (but only for status-based immunity), the Second Circuit advocates for conclusive executive determination of both questions.

It appears clear that solving the problem by simply reapplying the old pre-FSIA common law is not a viable option. It concerned cases before the restrictive theory of immunity was established and would hardly be instructive concerning a modern common law of foreign official immunity.[1000] As conclusive executive determinations of state immunity have been abolished with the enactment of the FSIA, conflicting positions are very likely if some immunity decisions are made by the courts and others by the executive.[1001] For example, based on the FSIA courts may find a state to be immune but the executive could deny immunity for a foreign official, or vice versa,[1002] e.g., because they apply a different standard in determining what constitutes

997 White (n 46) 27, 134 ff (referring to state immunity); Dodge and Keitner (n 629) 685, 712 f.

998 This appears clear from the view of English Law, cf already Moore (n 232) 38; Mann, *Foreign Affairs* (n 2) 37; McLachlan, *Foreign Relations Law* (n 250) 247.

999 Cf above, this Chapter, I., 4., a), bb).

1000 Ryan (n 562) 1799.

1001 Mentioning many possible conflicting situations Wuerth, 'Foreign Official Immunity' (n 346) 28 ff, 37.

1002 Wuerth, 'Foreign Official Immunity' (n 346) 29.

a 'commercial activity'.[1003] Moreover, international law and US law,[1004] in the light of growing human rights jurisprudence, have progressed and now appear to hold foreign officials accountable for grave human rights violations in some instances.[1005] The old common law does not reflect these new circumstances.

The current uncertainty should be solved by a statutory fix eradicating executive conclusiveness for questions of law in cases of foreign official immunity.[1006] Some authors advocate such a solution[1007] and correctly point out that the current state of affairs mirrors the state of the law concerning *state* immunity decisions before the enactment of the FSIA.[1008] Instead of deciding whether the state engaged in a commercial or non-commercial activity, the question is now whether an act is pursued in an official or non-official (including commercial activity) capacity.[1009] As with pre-FSIA state immunity determinations, the executive's suggestions are not always guided by this distinction, and the State Department is under constant pressure from foreign governments to intervene.

In line with my proposal to limit the availability of conclusiveness to questions of fact, this fix, contrary to some suggestions,[1010] should not be limited to conduct-based immunity but also encompass head of state immunity.[1011] Here, the executive's ability to conclusively settle questions of law will also cause problems. The mainstream position in international law

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1003 Ibid 32.

1004 Especially the Alien Tort Statute (although already long in existence) and the newer Torture Victim Protection Act are invoked in Human Rights cases Wuerth, 'Foreign Official Immunity' (n 346) 35.

1005 Beth Stephens, 'The modern common law of foreign official immunity' (2011) 79 Fordham Law Review 2669, 2702; cf as well the approach taken by the Fourth Circuit *Yousuf v Samantar II* (n 609).

1006 For a statutory fix (albeit limited to conduct-based immunity) Bellinger (n 623) 835, speaking of possible future codification; acknowledging that a statute might be preferable to judicial or executive law making Wuerth, 'Foreign Official Immunity' (n 346) 4 fn 16; Ryan (n 562).

1007 Ryan (n 562).

1008 In the same vein Totten, 'Adjudication' (n 474) 542.

1009 Ryan (n 562) 1783, 1796 f.

1010 Wuerth, 'Foreign Official Immunity' (n 346) 4 fn 16 (raising doubt if status-based immunity can be regulated by statute); Ryan (n 562) 1802 wants to keep the old role of the executive concerning status-based immunity.

1011 Mallory (n 574) 187 ff; Joseph W Dellapenna, 'Case Note – Lafontant v. Aristide. 844 F.Supp. 128.' (1994) 88 AJIL 528, 532; George (n 478) 1076 ff; doubtful concerning the executive influence concerning status-based immunity as well Dodge and Keitner (n 629) 685, 713.

holds heads of state immune from civil and criminal law.[1012] However, state practice is less settled concerning civil jurisdiction.[1013] In the past, US courts have also shown a tendency to apply the restrictive immunity doctrine to heads of state.[1014] Moreover, at least concerning former heads of state, international law has shown a tendency to allow for exemptions concerning grave human rights violations,[1015] a debate that is likely to continue.[1016] The arguments against an executive determination of head of state immunity in these cases mirror the arguments made against such an executive role in state immunity cases before the FSIA and concerning conduct-based immunity. If subjected to a suit, heads of state will request suggestions from the State Department, which will always have to consider foreign policy repercussions and thus is unlikely to offer suggestions based on a principled approach.[1017] In the absence of executive suggestions, the courts will have no clear guidance and will have develop their own standards, which may conflict with the executive's approach.[1018]

An argument often made against statutory regulation of head of state immunity is that it lies close to the presidential recognition power[1019] recently confirmed in *Zivotofsky v Kerry*.[1020] However, as the name implies, the president's exclusive power, correctly construed, only extends to decisions concerning recognition, not immunity. The presidential power is not touched when understood to be controlling only as to the status entitling immunity, not immunity as such.[1021] Such a construction is perfectly in line with the (pre-Sutherland) courts' approach from *Schooner Exchange* up

1012 This is drawn from *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v Belgium) Judgment* ICJ Rep 2002, 3 (ICJ) mn 51; Arthur Watts, 'Heads of State' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 18; Calliess, *Staatsrecht* III (n 208) 21.

1013 Watts (n 1012) mn 20.

1014 Mallory (n 574) 181 ff; citing cases George (n 478) 1077 ff; this problem appears to be overlooked by Ryan (n 562) 1788.

1015 Krieger (n 956) 185 ff; especially triggered by the arrest of Pinochet, cf Andrea Gattini, 'Pinochet Cases' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013).

1016 Especially in the light of the debate concerning conduct-based immunity, cf above, this Chapter, I., 4., a), cc).

1017 Mallory (n 574) 186; George (n 478) 1069.

1018 Mallory (n 574) 181; George (n 478) 1069.

1019 Article II (2) (3) US Constitution.

1020 *Zivotofsky v Kerry* (n 350).

1021 *Guar Trust Co of NY v United States* 304 US 126 (1938) (US Supreme Court) 138; in this vein also Wuerth, 'Foreign Official Immunity' (n 346) 17, 56; Yelin (n 478) 965.

to *Ex parte Peru*, where executive decisions were only treated as binding regarding the status entitling immunity. As mentioned above, until today, it is also the approach taken by English courts, which served as a prototype for the development in the United States. If the presidential recognition power entailed a broader meaning and gave the executive conclusive force concerning immunity determinations, the FSIA would have been unconstitutional, which the Supreme Court held not to be the case.[1022] The role of the executive should thus be limited to whether the individual holds a government position to which immunity is accorded.[1023] Only in this regard, the courts should be bound by the executive determination, which may play an important role, e.g., when the head of state loses de facto control but is still recognized by the US government.[1024]

Such a statutory fix would eradicate the last major field of application of the conclusiveness doctrine for questions of law. It would settle the executive role, which would be confined to recognizing states and governments (including its officials). In line with the historical roots, this would limit the availability of conclusive executive assessments to questions of fact.

III. Conclusion on the Application of Deference

This chapter has analysed the application of different deference doctrines within the three reference jurisdictions. Thereby it revealed three main findings. First, throughout all examined groups of cases, a trend towards less deference is visible. Secondly, this trend is much weaker in the United States than in Germany and South Africa. Thirdly, all three reference jurisdictions struggle with country-specific problems concerning the application of deference, which are rooted in the different historical adaption of the traditional position and the notion of deference.

1022 *Verlinden BV v Central Bank of Nigeria* 461 US 480 (1983) (US Supreme Court); Wuerth, 'Foreign Official Immunity' (n 346) 17; Yelin (n 478) 980 sees the president's power to confer immunity not as a function of the reception clause but of the president's diplomatic power, nevertheless, he concedes that Congress may curtail the executive's binding suggestions; Ryan (n 562) 1795.

1023 Critical towards binding executive immunity decisions concerning heads of state Ingrid Wuerth, 'Does President Trump Control Head-of-State Immunity Determinations in US Courts' Lawfare from 22 February 2017 available at <https://www.lawfareblog.com/does-president-trump-control-head-state-immunity-determinations-us-courts>; Wuerth, 'Foreign Official Immunity' (n 346) 56.

1024 George (n 478) 1085; Stephens (n 1005) 2704 ff (in the context of common law); Totten, 'Head-of-state' (n 571) 346.

Concerning the last finding, solutions have been proposed that generally prefer margin of discretion doctrines over more rigid forms of deference in balancing the executive-judicial relationship. In South Africa, the existence and usefulness of doctrines of non-reviewability have been contested in the aftermath of the constitutional transition. It has been argued that the courts have and should continue to renounce their revival in favour of a margin of discretion approach. In Germany, due to the constitutional decision for complete judicial reviewability of executive acts, great uncertainty exists, in which cases the executive assessment should nevertheless be awarded weight. It has been argued that German law should recognize an area of discretion for legal questions like it does for factual assessments, and indicators for the level of review have been proposed. In the United States, the broad application of doctrines of conclusiveness in questions of law has led to problems, especially in areas where courts (re)gained the competence to decide closely related issues. It has been proposed that the usage of conclusiveness doctrines in the US, in line with its historical roots, should be limited to factual questions. The first two findings, the trend toward less deference and its asymmetrical reception in Germany, the United States, and South Africa, will be the subject of our next chapter.

Chapter 4 – Dynamics of Deference

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

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

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

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

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

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

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

1. Globalization

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

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

3 Tushnet (n 2) 987.

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

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

6 Peters (n 5) 252.

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

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

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

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

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

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

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

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

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

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

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

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

15 Peters (n 5) 252.

16 Auby (n 4) 7.

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

18 Feihle (n 11) mn 6.

19 Peters (n 5) 253.

20 Auby (n 4) 16.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55 Leben (n 54) 401.

56 Friedmann (n 53) 60 ff.

57 Leben (n 54) 402.

58 Spiro (n 2) 660 ff.

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

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

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

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

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

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

63 Krieger and Nolte (n 61).

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

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

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

67 Spiro (n 2) 722 f.

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

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

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

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

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

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

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

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

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

76 Spiro (n 2) 674 ff.

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

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

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

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

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

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

81 Spiro (n 2) 682.

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

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

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

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

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

c) The development of a global legal dialogue

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

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

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

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

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

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

90 L'Heureux-Dubé (n 10) 21.

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

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

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

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

93 L'Heureux-Dubé (n 10) 25.

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

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

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

97 Tushnet (n 2) 989.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

123 Rautenbach and du Plessis (n 100).

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

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

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

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

2. Entanglement of international and domestic law

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

a) General blurring of the domestic and international law divide

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

127 Breyer (n 21) 245.

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

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

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

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

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

131 Mégret (n 61) mn 21.

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

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

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

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

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

137 Auby (n 4) 81, 192.

138 Ibid 80.

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

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

b) Closer entanglement in foreign relations law

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

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

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

142 Ibid mn 31.

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

144 Berman (n 136) 527.

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

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

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

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

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

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

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

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

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

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

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

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

155 Shaw (n 140) 70.

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

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

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

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

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

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

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

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

171 *Medellín v Texas* (n 170).

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

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

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

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

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

177 Ibid 348, Consular Notification Compliance Act of 2011.

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

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

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

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

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

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

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

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

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

3. Changing role of parliaments in foreign affairs

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

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

a) Traditional exclusion of the legislative branch from foreign affairs

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

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

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

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

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

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

192 McLachlan (n 2) 36.

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

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

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

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

197 Zeitler (n 186) 122 f.

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

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

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

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

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

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

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

b) Gradual expansion of legislative influence

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

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

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

214 McLachlan (n 2) 156 f.

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

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

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

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

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

aa) Germany

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

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

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

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

221 Menzel (n 218) 186.

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

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

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

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

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

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

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

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

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

229 Especially Article 24 of the Basic Law.

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

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

232 Article 23 (2) of the Basic Law.

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

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

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

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

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

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

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

238 Sauer (n 231) 79 f.

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

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

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

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

bb) South Africa

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

cc) United States

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

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

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

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

264 Ibid 3 citing parliamentary involvement as a general principle.

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

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

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

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

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

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

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

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

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

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

dd) International law

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

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

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

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

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

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

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

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

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

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

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

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

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

aa) Germany

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

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

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

299 Verdier and Versteeg (n 212) 151.

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

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

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

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

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

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

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

bb) South Africa

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

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

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

312 Ibid.

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

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

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

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

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

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

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

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

cc) United States

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

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

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

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

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333 Bradley, 'U.S. War Powers' (n 278) 760.

334 *Campbell v Clinton* [2000] 203 F3d 19 (United States Court of Appeals for the District of Columbia Circuit); *Kucinich v Obama* (n 285); Bradley, 'U.S. War Powers' (n 278) 760.

335 *Crockett v Reagan* [1983] 720 F2d 1355 (United States Court of Appeals for the District of Columbia Circuit); *Lowry v Reagan* [1987] 676 F Supp 333 (United States District Court for the District of Columbia); Bradley, *International Law* (n 26) 306 f.

336 *Youngstown Sheet & Tube Co v Sawyer* 343 US 579 (1952) (US Supreme Court).

337 Cf above, Chapter 1, II., 2., d).

338 *United States v Curtiss-Wright Export Corp* 299 US 304 (1936) (US Supreme Court).

339 Youngstown is not free of a certain 'exceptionalist' mindset cf Ganesh Sitaraman and Ingrid Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 Harvard Law Review 1897, 1951.

340 *Youngstown Sheet & Tube* (n 336) 583, 587.

341 Ibid 585.

342 Ibid 589.

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

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

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

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

345 Ibid 196.

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

347 Cohen (n 346) 432 f.

348 Ibid 432 f.

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

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

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

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

4. Changed relationship between the state and the individual

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

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

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

a) General acceleration of convergence trends

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

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

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

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

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

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

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

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

369 Du Plessis (n 125) 312.

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

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

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

373 Ibid.

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

375 Sauer (n 231) 100 ff.

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

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

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

b) Strengthening judicial review in foreign affairs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

389 Sitaraman and Wuerth (n 339) 1919.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

430 Fritz (n 378).

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

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

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

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

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

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

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

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

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

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

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

II. Divergence Forces – different receptiveness toward the general trend

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

1. Position within the international system

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

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

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

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

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

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

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

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

443 Cf below Chapter 5, II.

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

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

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

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

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

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

450 Jaffe (n 80) 124, 139.

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

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

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

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

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

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

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

2. Constitutional framework

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

480 Franck (n 29) 10 ff.

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

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

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

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

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

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

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

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

3. Historical experience

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

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

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

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

490 Stone Sweet (n 478) 816.

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

492 Stone Sweet (n 478) 819.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b) Openness towards international law

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

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

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

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

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

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

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

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

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

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

517 Du Plessis (n 125) 309.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

529 Biehler (n 11) 5.

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

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

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

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

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

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

535 Ibid.

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

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

538 Flaherty (n 377) 416.

539 1953 – 1969.

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

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

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

542 Jackson, 'US Constitution and International Law' (n 540) 938 f.

543 Drawing the connection Krieger, 'Die Herrschaft der Fremden' (n 525) 322.

544 Scalia himself describes himself as 'textualist' Antonin Scalia, *A Matter of Interpretation* (Princeton University Press 1997) 3 ff.

545 Scalia Dissent in *Lawrence v Texas* (n 103) 598; see on the US debate especially with regards to the 8th Amendment Fredman (n 99) 153; cf as well Lange, *Treaties in Parliaments and Courts* (n 217) 212 ff.

546 Cf above, especially (n 102).

547 On the new judges and their views concerning the use of foreign case law Lange, *Treaties in Parliaments and Courts* (n 217) 221.

548 Ibid 217 ff.

549 Influential Curtis A Bradley and Jack L Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 Harvard Law Review 815; on the very conservative end John C Yoo, 'Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding' (1999) 99 Columbia Law Review 1955.

550 Peter J Spiro, 'The New Sovereigntists – American Exceptionalism and its False Prophets' (2000) 79 Foreign Affairs 9.

551 Aust, 'Democratic Challenge' (n 130) 355 f; on the 'new sovereigntists' cf Lange, *Treaties in Parliaments and Courts* (n 217) 220.

c) Focus on constitutional and human rights

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

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

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

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

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

555 Dreier (n 553) mn 21.

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

557 'Bundesnachrichtendienst' ('BND').

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

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

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

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

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

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

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

563 Herdegen (n 552) mn 1.

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

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

566 Ibid 54, 165.

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

568 Ibid mn 37.

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

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

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

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

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

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

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

574 Foundational Henkin (n 359) 65 ff.

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

576 Flaherty (n 377) 421.

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

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

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

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

4. Populism

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

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

589 Flaherty (n 377) 422.

590 Ibid 416.

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

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

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

a) Populism and deference

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

616 Bellinger (n 173) 21.

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

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

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

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

621 Ibid 29.

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

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

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

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

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

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

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

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

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

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

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

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

c) The impact of the populist backlash

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

648 Boehme (n 447) 52.

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

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

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

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

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

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

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

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

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

III. Conclusion on the Dynamics of Deference

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

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

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

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

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

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

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

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

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

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

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

Chapter 5 – The Future of Deference

I. A 'modern position'?

As described in the previous chapter, the traditional position in all three jurisdictions (and arguably in other democratic states like the United Kingdom)[1] has come under pressure. As we have seen, courts have increasingly given way to that pressure, albeit in most cases, seemingly unaware of the fundamentality of the change. It is submitted that the convergence forces, far from having only a temporary effect, have fundamentally changed the way of thinking about foreign affairs in general and judicial review in particular. From our analyses above, it can be inferred that a modern position in foreign relations law has evolved as a counterpart to the former traditional position. This modern position calls into question the claims made by traditionalists:

(1) foreign affairs are not (essentially) different from domestic matters,
(2) the executive is not the sole branch equipped to deal with foreign affairs, and
(3) judicial review in this area should not be (categorically) restricted.

To avoid misunderstandings, a few explanatory remarks are in order. I have chosen the terms 'traditionalist' and 'modern' because they best reflect the historical evolution of the two different understandings of foreign affairs.[2] We have described in Chapter 1 how the traditional position developed in political philosophy and in Chapter 4 how a modern view developed. However, there is no inevitable linear development toward the modern position.[3] As we have seen, the framers in the US had a relatively modern

1 Dominic McGoldrick, 'The Boundaries of Justiciability' (2010) 59 ICLQ 981; Ewan Smith, 'Is Foreign Policy Special?' (2021) 41 Oxford Journal of Legal Studies 1040.

2 Using the term 'modern view' in relation to diplomatic protection Thomas Kleinlein and David Rabenschlag, 'Auslandsschutz und Staatsangehörigkeit' (2007) 67 ZaöRV 1277, 1336; cf McGoldrick (n 1) 1016 ('Within this rapidly evolving constitutional context, judges' modern inclination is to find that issues are justiciable').

3 Criticizing such a position (concerning globalization) Eric A Posner, 'Liberal Internationalism and the Populist Backlash' (2017) University of Chicago Public Law & Legal Theory Paper Series No 606, 3.

understanding of foreign affairs, which gave way to a more traditional interpretation of the constitution. I understand both positions as a 'template' to think about foreign relations law. Moreover, the terms as such should be treated as descriptive, not as entailing a normative claim that 'modern' is superior to 'traditional' or vice versa.[4] Furthermore, I do not claim that both positions are mutually exclusive in a legal system. They are at two ends of a spectrum, and as we have seen, it is very well possible that a legal system in one area of foreign affairs applies a more modern approach, in others a more traditional one.[5] The traditional position has often been referred to or implicitly relied upon by courts and scholars. The modern position has barely been articulated and yet can help explain many changes in the jurisprudence of all three jurisdictions. The dynamics of deference, that is, the change between more or less judicial review, manifests itself by the oscillation between the modern and the traditional position.

This idea of a modern position relates to the phenomenon of normalization of US foreign relations law described by Sitaraman and Wuerth.[6] In their influential article, they show that cases dealing with foreign affairs in the US are treated less 'exceptionally' and more like domestic 'normal' matters. Our analysis here broadens the description of Sitaraman and Wuerth in at least three senses. First, like many debates concerning foreign relations law in the United States, their work is exclusively focused on the domestic situation. The analysis here provides a broader picture and compares the development in the US with other liberal democracies, thus putting it in a larger context. Secondly, Sitaraman and Wuerth explicitly excluded the reasons for normalization from their analysis.[7] Our examination in Chapter 4 sought to explain the changing level of deference in foreign relations law. It has been argued that this change is directly tied to the development of the international system and hence a further example of the mutual inter-

4 For a normative claim see below, this Chapter, III.

5 Which may be related to a different impact of factors pushing towards the traditional or modern position, with reference to the position within the international system cf Daniel Abebe, 'Great Power Politics and the Structure of Foreign Relations Law' (2009) 10 Chicago Journal of International Law 125, 137.

6 Ganesh Sitaraman and Ingrid Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 Harvard Law Review 1897.

7 Ibid 1905.

dependence of foreign relations and international law.[8] Thirdly, Sitaraman and Wuerth connect the beginning of 'normalization' to the end of the Cold War.[9] It has been argued here that the development of the modern view is indeed a process reaching back further, at least to the end of the Second World War.[10] In general, our analysis thus builds on the works of scholars describing 'normalization' but applies the ideas to a larger setting.

II. Future dynamics: Russia's war in Ukraine

So far, the forces strengthening the modern position have gained influence since the end of the Second World War. If this dynamic continues, they will likely go on to overcome domestic particularities and push domestic foreign relations law towards a modern position. This assumption rests on the basis that the convergence factors will outweigh the divergence forces and will continue to work as they have done thus far. As alluded to above, I do not subscribe to the idea that linear development is inevitable. If one of these two basic assumptions changes, the pendulum may very well swing towards a 'traditionalist' approach.

Krieger, Nolte, and Zimmermann have examined such a swing of the pendulum concerning the structure of international law.[11] Together with others, they try to answer whether the post-Cold War developments of the international legal system have been scaled back.[12] Populism has been described as one of the factors which may induce a scale back and already been examined above.[13] Now the Russian invasion of Ukraine, next to the

8 Helmut Philipp Aust and Thomas Kleinlein, 'Introduction: Bridges under Construction and Shifting Boundaries' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021).

9 Sitaraman and Wuerth (n 6) 1919.

10 Cf as well the judicialization of immunity determination in sovereign immunity decision through the FSIA in the 1970s; it is however conceded, that the modern view profited from the enhanced development of the international order in the aftermath of the Cold War, especially in the US.

11 Heike Krieger and Georg Nolte, 'The International Rule of Law— Rise or Decline?— Approaching Current Foundational Challenges' in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds), *The international rule of law: rise or decline?: Foundational challenges* (OUP 2019) 3; relying on Josef L Kunz, 'Swing of the Pendulum: From Overestimation to Underestimation of International Law' (1950) 44 AJIL 135.

12 Ibid.

13 Cf above, Chapter 4, II., 4.

terrorist attacks of 9/11, constitutes the second major rift in the international legal order since the end of the Cold War.[14]

At the time of this writing, the war is still waging in Ukraine. With many developments still uncertain, it is near impossible to foresee the effects on the international order. Nevertheless, I will examine some predictions and assessments which have been made so far and try to evaluate their influence on the dynamics of deference.

It appears evident that the Russian war in Ukraine runs counter to the convergence trends analysed above. The Covid crisis already sparked a discussion about 'de-globalization,'[15] which is a stop, if not a rewind, of the ever-closer integration and interdependence of the world's economies. This, under the label of 'decoupling',[16] now equally applies to the economic effects of Russia's war in Ukraine.[17] Western countries have imposed severe economic sanctions, limiting trade between some of the world's largest economies.[18] European countries like Germany rally to achieve independence from Russian energy imports.[19] Depending on how this development is going to affect economic relations with China, it could reach an even greater dimension and divide trade along political lines.[20] Many US commentators already speak of a 'New Cold War'.[21] In the US, trade with China

14 Cf as well Ingrid (Wuerth) Brunk and Monica Hakimi, 'Russia, Ukraine, and the Future World Order' (2022) 116 AJIL 687, 688.

15 Pol Atràs, 'De-Globalisation? Global Value Chains in the Post-COVID-19 Age' (2021) ECB Forum, available at <https://scholar.harvard.edu/antras/publications/de-globalisation-global-value-chains-post-covid-19-age>.

16 Thomas J Christensen, 'Mutually Assured Disruption: Globalization, Security, and the Dangers of Decoupling' (2023) 75 World Politics 1; Anthea Roberts, 'From Risk to Resilience: How Economies Can Thrive in a World of Threats' (2023) 102 Foreign Affairs 123, 124.

17 Spencer Bokat-Lindel, 'Will the Ukraine War Spell the End of Globalization?' New York Times from 1 April 2022; Adam Tooze, 'Ukraine's War Has Already Changed the World's Economy' Foreign Policy from 5 April 2022.

18 For an updated list of the European sanctions see <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/sanctions-adopted-following-russias-military-aggression-against-ukraine_en#sanctions>.

19 Anatole Boute, 'Weaponizing Energy: Energy, Trade, and Investment Law in the New Geopolitical Reality' (2022) 116 AJIL 740, 742.

20 Bokat-Lindel (n 17).

21 Cf the Volume 55 of the Case Western Reserve Journal of International Law under the title 'International Law and the new Cold War'; Stuart Ford, 'The New Cold War with China and Russia: Same as the Old Cold War?' (2023) 55 Case Western Reserve Journal of International Law 423 and authors cited in fn 96.

had already been under pressure during the Trump administration,[22] a trend which continued under the Biden presidency[23] and may spill over to other Western countries, likely also depending on how strongly China is going to support the Russian cause and pursues its hegemonic ambitions in Southeast Asia.

The war has an equally adverse effect on the structure of the international system, especially the law governing the use of force. Some commentators argue that '[t]he post 1945 world order has collapsed into a new world disorder'[24] and that the 'new Cold War is a Hobbesian war of all against all'.[25] Already above, we have mentioned the link between a realist understanding of international relations and deference.[26] With a world that now appears to stronger resemble the realist picture, the call for deference may also increase. Likewise above, we have analysed how a country's position within the international system may affect its courts' approach towards deference.[27] With the open military conflict between Russia and Ukraine, the latter supported by the US and its allies, the trend towards a multipolar world order challenging US hegemony[28] now appears even more evident. Following Abebe's thesis set out above,[29] US courts may respond with

22 Holger Janus and Daniel Lorberg, 'Maximum Pressure, Minimum Deal: President Trump's Trade War with a Rising China' (2020) 38 Sicherheit und Frieden 94; Weijan Shan, 'The unwinnable Trade War' (2019) 98 Foreign Affairs 99.

23 Christensen (n 16) 5; Rishi Iyengar, 'Biden Turns a Few More Screws on China's Chip Industry' Foreign Policy from 19 October 2023 available at <https://foreignpolicy.com/2023/10/19/biden-china-semiconductor-chip-industry-regulations-sanctions>; recently the so-called 'TikTok-Ban' in form of the 'Protecting Americans from Foreign Adversary Controlled Applications Act' signed into law 24 April 2024.

24 Philip Allott, 'Anarchy and Anachronism: An Existential Challenge for International Law' EJIL: Talk! from 1 April 2022 available at <https://www.ejiltalk.org/anarchy-and-anachronism-an-existential-challenge-for-international-law/> [my adjustment].

25 Allott (n 24), similar pessimistic view David Brooks, 'The Dark Century' International New York Times from 22 February 2022; in the same vein German historian Herfried Münkler, Margit Hufnagel, 'Interview: Historiker Münkler: "Wir erleben eine Rückkehr zur klassischen Machtpolitik"' Augsburger Allgemeine from 04 June 2022, available at <https://www.augsburger-allgemeine.de/politik/interview-historiker-muenkler-wir-erleben-eine-rueckkehr-zur-klassischen-machtpolitik-id62899276.html>.

26 Cf above, Chapter 4, I., 1., b).

27 Cf above, Chapter 4, II., 1.

28 Cf Nico Krisch, 'After Hegemony: The Law on the Use of Force and the Ukraine Crisis' EJIL: Talk! from 2 March 2022 available at <https://www.ejiltalk.org/after-hegemony-the-law-on-the-use-of-force-and-the-ukraine-crisis/>.

29 Cf above, Chapter 4, II., 1.

stronger deference. In addition, Germany's position within the international system may change. Its role as a 'middle power' emphasizing its pacifist stance came under intense pressure. In the wake of the Russian aggression, the German chancellor declared that a watershed moment in history (*Zeitenwende*) occurred and not only decided to deliver weapons to Ukraine[30] but also to build up the underfinanced German military.[31] Hence, German courts could be inclined to act more deferential.[32]

Moreover, the trend towards parliamentary involvement, especially concerning the deployment of military forces, may be stopped if not reversed. The changing international environment may call for a strong executive role in commanding the use of military force. In Germany, under the influence of the Russian aggression, the leader of the opposition argued not only for a joint European Military Force but also for a reform of the German constitutional framework governing the deployment of the armed forces.[33] He stated that, 'In the long run, we will not be able to speak of an army of parliament. Parliament does not have an army. The federal government is accountable for the armed forces'.[34] Finally, also the influence of international human rights may be decreasing. Russia declared that it is leaving the Council of Europe in March 2022 and was subsequently expelled, thus limiting the jurisdiction of the European Court of Human Rights.[35]

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30 Germany is currently (June 2024) the second largest supplier of military aid in absolute terms behind the United States, for an updated list of the German supplies see <https://www.bundesregierung.de/breg-en/service/military-support-ukraine-2054992>.

31 Olaf Scholz, 'Speech delivered in front of the Bundestag (Zeitenwende)' from 27 February 2022 available at <https://dserver.bundestag.de/btp/20/20019.pdf#P.1349>; English translation available at <https://www.bundesregierung.de/breg-en/news/policy-statement-by-olaf-scholz-chancellor-of-the-federal-republic-of-germany-and-member-of-the-german-bundestag-27-february-2022-in-berlin-2008378>.

32 On the connection between a state's position within the international system and deference cf above, Chapter 4, II., 1.

33 Friedrich Merz, cited in Thomas Vitzthum, 'Merz nennt drei Bedingungen für Zustimmung zu Sondervermögen der Bundeswehr' Welt from 15 March 2022 available at <https://www.welt.de/politik/article237542513/Friedrich-Merz-Drei-Bedingungen-fuer-Zustimmung-zu-Sondervermoegen-der-Bundeswehr.html>.

34 Merz (n 33) 'Wir werden nicht dauerhaft von einer Parlamentsarmee sprechen können. Das Parlament hat keine Armee. Eine Bundesregierung ist für die Streitkräfte verantwortlich' [my translation].

35 COE, 'The Russian Federation is excluded from the Council of Europe' from 16 March 2022 available at <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe>.

On the other hand, the picture painted above may be too pessimistic. It is very unlikely that globalization will be unwound completely and that we will see a return to isolated national economies. Until now, war-related sanctions are addressed at Russia alone. Developing countries like India and South Africa have completely stayed out of the economic sanctions.[36] Moreover Europe's attempts to gain economic independence are mainly targeted against Russia. If there will be a 'New Cold War' will very much depend on the degree economic relations with China come under pressure, a development which is hard to foresee.[37] In their Leaders' Communiqué following the G7-Summit in Hiroshima in 2023 the G7 leaders, including President Biden, stated the aim towards China is not 'decoupling or turning inwards' but 'de-risking and diversifying'.[38] Thus, economic disentanglement may not be directed at complete independence but instead at curbing asymmetric interdependence like Europe's dependence on Russian energy, which can be abused.[39] 'De-risking' appears to have replaced 'decoupling' as softer alternative.[40] Even scholars who speak of a 'New Cold War' in the context of US-China relations note the main differences to the original Cold War, namely the strong economic links to China and the multipolar world order, which limit the effect of the confrontation. Finally, even if a new 'cold war'-like situation between the West and Russia (and possibly China) ensues, economic integration within the West will likely continue.[41]

In addition, the prophecies concerning the end of the post-Second World War order may go too far.[42] Even if tensions between Russia (and possibly

36 Eusebius McKaiser, 'South Africa's Self-Defeating Silence on Ukraine' Foreign Policy from 18 March 2022.

37 Bokat-Lindel (n 17).

38 G7, 'Hiroshima Leaders' Communiqué', Point 51, from 20 May 2023 available at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/20/g7-hiroshima-leaders-communique/>.

39 Nicole Deitelhoff, 'Arming for Peace' Verfassungsblog from 11 April 2022 available at <https://verfassungsblog.de/arming-for-peace/>; in this direction Christensen (n 16).

40 Roberts (n 16) 124.

41 On this point, it seems worth noting that Friedmann did develop his ideas concerning a law of cooperation during the height of the Cold War, cf above, Chapter 4, I., 1., b).

42 More optimistic outlook Oona Hathaway, 'International Law Goes to War in Ukraine' Foreign Affairs from 15 March 2022; Oona Hathaway and Scott Shapiro, 'Putin Can't Destroy the International Order by Himself' Just Security from 24 February 2022 available at <https://www.justsecurity.org/80351/putin-cant-destroy-the-international-order-by-himself/>; Fleur Johns and Anastasiya Kotova, 'Ukraine: Don't write off the international order – read and rewrite it' from 4 March 2022 available at <https:/

China) and the West are rising, they will not replace the current system with anarchy. The Russian invasion certainly puts a heavy strain on the international order, especially the rules governing the use of force. On the other hand, as widely known, Article 2 (4) of the UN charter has already been declared dead numerous times[43] and still remains the centrepiece of the *ius ad bellum*. Russia's veto, of course, blocked the condemnation of the war in the UN Security Council, but it likewise revived the long-forgotten instrument of Uniting for Peace.[44] A large majority in the General Assembly condemned the Russian aggression, with only five notorious states voting against it (Belarus, Eritrea, North Korea, Syria, and Russia itself).[45] The resolution vehemently reaffirms the prohibition of the use of force as the cornerstone of the international order[46] and '[d]eplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter'.[47] Also, the International Court of Justice, in a swift and by then unprecedented ruling based on the Genocide Convention, ordered Russia to stop its military activities in Ukraine.[48] Of course, these condemnations did not stop the hostilities, but the interna-

/www.lowyinstitute.org/the-interpreter/ukraine-don-t-write-international-order-read-rewrite-it>; Barrie Sander and Immi Tallgren, 'On Critique and Renewal in Times of Crisis: Reflections on International Law(yers) and Putin's War on Ukraine' Völkerrechtsblog from 16 March 2022 available at <https://voelkerrechtsblog.org/de/on-critique-and-renewal-in-times-of-crisis/>; on the role of international law after the Russian War in Ukraine as well Heike Krieger, 'Von den völkerrechtlichen Fesseln befreit? – Zur Ordnungsfunktion des Völkerrechts in einer Welt im Umbruch' (2023) 62 Der Staat 579.

43 Thomas M Franck, 'Who killed Article 2(4)? or: Changing Norms Governing the Use of Force by States' (1970) 64 AJIL 809; Thilo Marauhn, 'How many Deaths can Article 2(4) die?' in Lothar Brock and Hendrick Simon (eds), *The Justification of War and International Order: From Past to Present* (OUP 2021); in the wake of the Russian War in Ukraine now again cited by Tom Ginsburg, 'Article 2(4) and Authoritarian International Law' (2022) 116 AJIL Unbound 130.

44 Michael P Scharf, 'Power Shift: The Return of the Uniting for Peace Resolution' (2023) 55 Case Western Reserve Journal of International Law 217.

45 UNGA, 'Aggression against Ukraine' A/RES/ES-11/1 from 2 March 2022.

46 On the importance on reaffirmation Hathaway and Shapiro (n 42).

47 UNGA, 'Aggression against Ukraine' (n 45) [my adjustment].

48 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation) Provisional Measures, Order of 16 March 2022* ICJ Rep 2022, 211 (ICJ); now mimicked to a certain degree by *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) Provisional Measures, Order of 26 January 2024* (ICJ).

tional system is increasing the pressure on Russia. As Benvenisti, Cohen,[49] Hathaway,[50] and Shapiro[51] have pointed out, international law on its own cannot prevent the use of force but render military solutions less attractive and 'outcast'[52] the aggressor. The reactions of the international community show that the normative core of Art. 2 (4) of the UN Charter remained untouched.[53] Likewise, the Russian war is not simply setting aside the international order that developed since 1945 but is also shaped by its features. According to Johns and Kotova, pluralism is one such factor.[54] The war is not only fought by the two (or more) Leviathans but also by private actors like hacktivists,[55] international law associations,[56] social media companies, and tech giants, which even delivered vital equipment especially in the early stages of the war.[57]

The effect of the war on the trend toward parliament participation in foreign affairs is also hard to predict at the moment. At least in Germany, the call for shifting competence to the executive has not been taken up. In

49 Eyal Benvenisti and Amichai Cohen, 'Bargaining About War in the Shadow of International Law' Just Security from 28 March 2022 available at <https://www.justsecurity.org/80853/bargaining-about-war-in-the-shadow-of-international-law/>.

50 Hathaway (n 42).

51 Hathaway and Shapiro (n 42).

52 Oona Hathaway and Scott Shapiro, *The Internationalists: How A Radical Plan to Outlaw War Remade The World* (Simon and Schuster 2017) 371 ff.

53 Sharing this view Ginsburg (n 43); Michael J Kelly, 'The Role of International Law in the Russia-Ukraine War' (2023) 55 Case Western Reserve Journal of International Law 85; Felix Lange, *Der russische Angriffskrieg gegen die Ukraine und das Völkerrecht* (De Gruyter 2023) 8.

54 Johns and Kotova (n 42); Sander and Tallgren (n 42).

55 Laurens Cerulus, 'Hacktivists come to Ukraine's defense' Politico from 25 February 2022 available at <https://www.politico.eu/article/hacktivists-come-to-ukraines-defense/>.

56 Vivek Bhatt, 'A Visible College: Public Engagement with International Law(yers) During the Ukraine Invasion' Opinio Juris from 8 March 2022 available at <http://opiniojuris.org/2022/03/08/a-visible-college-public-engagement-with-international-lawyers-during-the-ukraine-invasion/>.

57 Rachel Lerman and Cat Zakrzewski, 'Elon Musk's Starlink is keeping Ukrainians online when traditional Internet fails' Washington Post from 19 March 2022 available at <https://www.washingtonpost.com/technology/2022/03/19/elon-musk-ukraine-starlink/>; Alexander Freud, 'Ukraine is using Elon Musk's Starlink for drone strikes' DW from 27 March 2022 available at <https://www.dw.com/en/ukraine-is-using-elon-musks-starlink-for-drone-strikes/a-61270528>; also part of this category are companies which 'voluntarily' leave Russia withouth being targeted by sanctions in order to preserve reputation; Kristen E Eichensehr, 'Ukraine, Cyberattacks, and the Lessons for International Law' (2022) 116 AJIL Unbound 145, 147.

the wake of the necessary constitutional amendment to enlarge the security budget for the armed forces, some scholars called for a reform of the Basic Law's provisions governing military deployment.[58] However, none of these suggestions included a stronger role for the executive. Conversely, many authors have demanded a stronger connection between the Basic Law and international law,[59] and some even argue for a stronger involvement of the judiciary.[60]

Also in the area of human rights, there is pushback against the Russian aggression. Just days into the war, the ICC prosecutor decided to open an investigation.[61] Although the structure of the Rome Statute bars investigations concerning the crime of aggression, investigations concerning war crimes, crimes against humanity, and genocide can be conducted.[62] The investigation led to an ICC warrant against Vladimir Putin in connection with the alleged unlawful deportation of Ukrainian children.[63] Far from having only symbolic value, reminiscent of the *Al-Bashir* case, it effectively barred Putin's personal attendance of the BRICS summit 2023 in South

58 Daniel Hinze, 'Die Bundeswehr braucht klare Rechtsgrundlagen' Verfassungsblog from 7 March 2022 available at <https://verfassungsblog.de/die-bundeswehr-braucht-klare-rechtsgrundlagen>; Felix Lange, 'A Constitutional Framework for Bundeswehr Operations Abroad Based on International Law' Verfassungsblog from 5 April 2022 available at <https://verfassungsblog.de/a-constitutional-framework-for-bundeswehr-operations-abroad-based-on-international-law/>.

59 Already Helmut Philipp Aust and Claus Kreß 'Evakuierungen ohne Rechtsgrundlage?' from 7 September 2021 <https://www.faz.net/einspruch/exklusiv/afghanistan-evakuierungen-ohne-rechtsgrundlage-17526259.html>; Hinze (n 58); Lange (n 58).

60 Christian Marxsen, '"Juridified" Control' Verfassungsblog from 13 April 2022 available at <https://verfassungsblog.de/juridified-control/>.

61 ICC, 'Statement of ICC Prosecutor, Karim A A Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation."' from 28 February 2022 available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>; Milena Sterio, 'The Ukraine Crisis and the Future of International Court and Tribunals' (2023) 55 Case Western Reserve Journal of International Law 479, 490.

62 The investigation of the crime of aggression with regards to a non-state party hinges on a referral by the UNSC, cf Jennifer Trahan, 'Revisiting the History of the Crime of Aggression in Light of Russia's Invasion of Ukraine' ASIL Insights from 19 April 2022 available at <https://www.asil.org/insights/volume/26/issue/2>.

63 ICC, 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' from 17 March 2023 available at <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

Africa.[64] Even the creation of an ad-hoc tribunal to prosecute the crime of aggression has been discussed, although this idea is not uncontroversial.[65] In Germany, the Federal Public Prosecutor General (*Generalbundesanwalt*) opened structural investigations under the German Code of Crimes against International Law with a focus on war crimes and crimes against humanity[66] and identified first suspects.[67] Similar investigations have already been successfully conducted against members of the Syrian regime.[68] Meanwhile, the UN General Assembly voted to suspend Russia from the Human Rights Council for gross and systematic human rights violations in connection with the invasion[69] and Russia's attempts to rejoin the council failed.[70]

The effects of the Russian War in Ukraine on the dynamics of deference are thus hard to assess. It will likely restrain many of the convergence factors set out above. On the other hand, the conflict has not replaced the international order and will not only shape but also be shaped by its structure. Thus, it is rather unlikely that it will lead to a complete rewind of globalization or the international legal system. What is more, the modern view evolved as a template of thinking about foreign relations law. It will not vanish, even if the war may weaken the forces that led to its inception.

64 See already above Chapter 3, I., c), bb), (3); Zoe Jay and Matt Killingsworth, 'To Arrest or Not Arrest? South Africa, the International Criminal Court, and New Frameworks for Assessing Noncompliance' (2024) 68 International Studies Quarterly 1, 10.

65 Cautious Trahan (n 62); negatory Kevin Jon Heller, 'Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea' Opinio Juris from 7 March 2022 <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>; Kai Ambos, 'A Ukraine Special Tribunal with Legitimacy Problems?' Verfassungsblog from 6 January 2023 <https://verfassungsblog.de/a-ukraine-special-tribunal-with-legitimacy-problems/>.

66 Johannes Block, 'Committed in Ukraine, Prosecuted in Germany?' Völkerrechtsblog from 7 April 2022 <https://voelkerrechtsblog.org/de/committed-in-ukraine-prosecuted-in-germany/>.

67 LTO, 'Bundesanwaltschaft ermittelt gegen russische Soldaten' from 27 September 2023 available at <https://www.lto.de/recht/nachrichten/n/gba-kriegsverbrechen-ukraine-russland-soldaten-ermitteln-ermittlungen-verfahren-bundesanwalt-voelkermord-genozid/>.

68 Block (n 66).

69 Rosa Freedman, 'Russia and the UN Human Rights Council: A Step in the Right Direction' EJIL: Talk! from 8 April 2022 available at <https://www.ejiltalk.org/russia-and-the-un-human-rights-council-a-step-in-the-right-direction/>.

70 Phelan Chatterjee, 'Russia fails to rejoin UN's human rights council' BBC from 10 October 2023 available at <https://www.bbc.com/news/world-europe-67071697>.

Moreover, it may even provide greater flexibility to deal with the challenges of the 21st century, as we will come to claim below.

III. A normative claim

1. The 'foreign affairs fairy tale'

As we have seen, since early modern political philosophy, foreign affairs have been treated as something 'mystical'. The waves of constitutionalization, parliamentarization, separation of powers, and judicial review penetrated many areas but left the foreign affairs fairy tale largely untouched. The time has come to 'demystify' foreign affairs. Today, courts still bluntly refer to a 'traditional role of the executive' or 'executive core area'[71] without reflecting on why such a traditional role is apt or if the conditions in which it developed have changed. Given the development of the international and constitutional systems described above, it is outdated to hold that '[t]he President does […] suddenly mutate into a Leviathan once she/he enters the international relations arena'.[72] Sometimes the mystification is concealed by functionalist arguments, which are, however, not sincere endeavours to assess the institutional competence of the executive branch but rather ill-covered attempts to justify the old executive role.[73]

The international system, as well as domestic legal systems, will continue to change. Most likely, many of the developments that brought about a more 'modern' understanding of foreign affairs are here to stay. As has been shown, weaker forms of deference, especially discretionary approaches, have proven better suited to adapt to this new environment.[74] They have

71 Nettesheim, 'Art. 59' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 26.

72 Moses R Phooko and Mkhululi Nyathi, 'The revival of the SADC Tribunal by South African courts: A contextual analysis of the decision of the Constitutional Court of South Africa' (2019) 52 De Jure 415, 417 (who are opposing this view).

73 Cf below, this Chapter, III., 2., in this direction Volker Röben, *Außenverfassungsrecht: Eine Untersuchung zur auswärtigen Gewalt des offenen Staates* (Mohr Siebeck 2007) 74; Sitaraman and Wuerth (n 6) 1909; in this direction as well Smith (n 1) 26.

74 Calling for a discretionary approach as well Daniele Amoroso, 'A fresh look at the issue of non-justiciability of defence and foreign affairs' (2010) 23 Leiden Journal of International Law 933, 943; McGoldrick (n 1) 1014 ff; Daniele Amoroso, 'Judicial Abdication in Foreign Affairs and the Effectiveness of International Law' (2015) 14 Chinese Journal of International Law 99, 123 ff; arguing for a margin of discretion

been tested in domestic administrative law, where they have a similar task of allowing institutionally competent agencies to make decisions without giving them unfettered power. They can stir a 'middle ground' between independent judicial review and judicial abstention.[75] In line with that, I argued in the third chapter that all three jurisdictions should enhance the usage of discretionary doctrines and limit the usage of non-reviewability and conclusiveness doctrines.[76]

Although administrative law doctrines can serve as a role model, they cannot be taken ready-made out of context and applied to executive decisions in foreign affairs.[77] Domestic courts will have to determine factors that enlarge or narrow the room for executive discretion. It is outside the ambit of this thesis to develop such a framework, let alone a universal one. However, some guiding factors may be sketched.

2. Towards a balanced and transparent margin of discretion approach

Although foreign affairs are not fundamentally different from other areas of law, they, like every other area of law, have a unique framework in which they operate. States and their governments still have a central role within the international system, and international law attributes special powers to domestic executives, e.g., concerning the formation of customary international law.[78] Domestic frameworks have to take this into account in

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approach in treaty interpretation Julian Arato, 'Deference to the Executive: The US Debate in Global Perspective' in Helmut Philipp Aust and Georg Nolte (eds), *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (OUP 2016) 208 ff; Diego Mauri, 'The political question doctrine vis-à-vis drones' 'outsized power': Antithetical approaches in recent case-law' (2020) 68 Questions of International Law 3, 18; Elad D Gil, 'Rethinking Foreign Affairs Deference' (2022) 63 Boston College Law Review 1603.

75 Curtis A Bradley, 'Chevron Deference and Foreign Affairs' (2000) 86 Virginia Law Review 649, 674 (however, I do not subscribe to Bradley's idea of applying a *Chevron* approach).

76 Cf above, Chapter 3, II.

77 Correctly noting this in the area of treaty interpretation Joshua Weiss, 'Defining Executive Deference in Treaty Interpretation Cases' (2011) 79 George Washington Law Review 1592, 1607.

78 Cf already above, Chapter 3, II., 2.; calling it the 'Default position' of international law Curtis A Bradley, 'The Dynamic and Sometimes Uneasy Relationship Between Foreign Relations Law and International Law' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law*

order to allow the smooth functioning of international relations. There may be reasons for more or less leeway for the executive. These factors are not the same for every case in 'foreign affairs'. Courts will have to engage in a balancing exercise and develop guidelines on the appropriate degree of review for specific kinds of cases.[79] Many of the arguments used to justify a doctrine of non-reviewability may serve as an indicator towards granting more leeway to the executive. However, they should not be uncritically accepted but tested for their validity, especially in the light of the changes that brought about the modern position.

A first factor often used to argue for more executive leeway is the greater expertise vis-à-vis the courts.[80] In general, of course, this claim is very simplistic. The courts' function is to adjudicate on virtually every matter of society, but judges are not experts in every field.[81] They hear expert witnesses or request information from various agencies if they lack specific knowledge. There is no reason why this should not also be possible for foreign affairs. In fact, due to globalization, courts today already have to decide many cases with strong transnational and international components.[82] In some cases, the executive indeed enjoys special knowledge due to the foreign ministry, embassies, or intelligence agencies. Courts should give facts provided in these cases special weight or even the force of prima facia evidence.[83] As we have seen,[84] the South African DIPA has already applied this approach. However, there appears to be no reason why such a presumption may not be rebutted if contrary or conflicting evidence surfaces.[85]

A second factor is the 'lack of judicially discoverable and manageable standards,' which, at least since *Baker v Carr,* has been used to argue against judicial review in foreign affairs. Again, this argument is rather simplistic.

(CUP 2021) 343, 350; Tullio Treves, 'Customary International Law' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 32; of course, that is not to say that courts do not play a role, cf André Nollkaemper, *National courts and the international rule of law* (OUP 2011) 10.

79 In this direction as well Felix Lange, *Treaties in Parliaments and Courts: The Two Other Voices* (Edward Elgar 2024) 302.

80 Sitaraman and Wuerth (n 6) 1936.

81 Ibid 1937; Smith (n 1) 21.

82 Cf as well above Chapter 4, I., 1., a) and Robert Knowles, 'American Hegemony and the Foreign Affairs Constitution' (2009) 41 Arizona State Law Journal 87, 129.

83 Making this suggestion Amoroso, 'Judicial Abdication' (n 74) 121 f.

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

85 Amoroso, 'Judicial Abdication' (n 74) 122.

In foreign affairs, as in domestic cases, where no law governs an issue, a court cannot render a judgment. However, in the vast majority of cases, foreign affairs are regulated in one way or another and either domestic law or international law[86] (or both) will apply.[87] In some cases, domestic law will contain detailed provisions regulating an area of foreign affairs (e.g., concerning immunity through statutes like the FSIA or DIPA). In other fields, domestic provisions, especially in constitutional law, will have less regulatory depth. In particular, in constitutional rights cases, the courts will have to refine how far constitutional guarantees apply to a particular case.[88] Again, this is not a speciality of foreign affairs.[89] Abstract constitutional rights also need to be interpreted in domestic cases. Aside from (genuine) domestic law, international law may also govern a case related to foreign affairs. Human rights law, international humanitarian law, and other treaty regimes or customary international law will have to be interpreted if they apply to a given case. Especially concerning international law, sometimes no rule prohibits a specific state action, and thus, according to the 'Lotus principle,' it will be permissible,[90] even though these areas will probably shrink due to the changes of the international system described above. In other cases, the interpretation of a treaty or a rule of customary international law or the existence of a rule of customary law will be contentious. The special role attributed by international law to the executive concerning the interpretation of treaties (especially by using subsequent agreements and practice) and the formation of international law again calls for a particular weight being attached to the executive's position.[91] However, this does not mean that executive statements in this regard should be treated as binding or simply trump other aspects of the case which call for a more robust judicial review.

86 To the extent that it is applicable within the domestic legal system.
87 Amoroso, 'Judicial Abdication' (n 74) 118 f (concerning international law).
88 Ibid 117.
89 Knowles (n 82) 129; Amoroso, 'Judicial Abdication' (n 74) 117.
90 Amoroso, 'Judicial Abdication' (n 74) 117; at least this appears to be the position under current international law, albeit especially the presumption of freedom of the *Lotus* case is not unchallenged, cf Armin v Bogdandy and Markus Rau, 'The Lotus' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 18.
91 Cf already above, Chapter 3, II., 2., cf as well (n 78).

Another argument for more executive influence is the necessity to 'speak with one voice'.[92] As we saw above, this assumption has never been entirely accurate,[93] and especially in the second half of the 20th century, the state constantly speaks with many voices. Additionally, as has been pointed out, the understanding (at least amongst democracies) that the courts act independently is now widely shared.[94] Still, there may be cases where the international system calls for uniformity. A state recognized by another state has a legitimate expectation under international law that its existence is not called into question by entities of the recognizing state.[95] Thus, there is a sound reason attributed to the unique context of the international system, which requires more substantial deference towards the executive.[96]

In addition, the factor of speed is often used to lobby for executive dominance.[97] It is purported that the executive has to react quickly to international situations and thus should be unhampered by courts when acting. Again, this aspect is not exclusive to foreign affairs[98] and can be easily provided for by courts. In most cases, judicial review is retrospective, and the challenged executive action already happened and thus speed is no issue at all.[99] In the small number of cases where executive actions are subject to preliminary proceedings,[100] the courts will only engage in plausibility control, as they do in general in such proceedings.[101] If the executive indeed enjoys particular expertise in the area in question, the courts in these cases will again apply a considerably lower review standard.

A factor that will strengthen the judicial review in a given case is the involvement of domestic constitutional or international human rights. Executive actions strongly linked to domestic constitutional or international human rights will likely lead to less deference by the courts.[102] The protection of constitutional rights (and human rights), like habeas corpus review,

92 Sitaraman and Wuerth (n 6) 1942 ff.
93 Knowles (n 82) 131; Sitaraman and Wuerth (n 6) 1945.
94 In this direction Knowles (n 82) 132.
95 Amoroso, 'Judicial Abdication' (n 74) 134.
96 Ibid 131, 134.
97 Knowles (n 82) 135; Sitaraman and Wuerth (n 6) 1938 ff.
98 Sitaraman and Wuerth (n 6) 1938.
99 Knowles (n 82) 136; Sitaraman and Wuerth (n 6) 1938.
100 Recognising the problem Knowles (n 82) 136.
101 For Germany, cf Chapter 3, I., 1., b), bb), (6).
102 Amoroso, 'Fresh Look' (n 74) 943; Amoroso, 'Judicial Abdication' (n 74) 124 ff.

has always been a core function of the courts and will tilt the balance towards strong judicial review.[103]

Of course, the points outlined here can only offer a general idea of how different factors will call for more or less judicial review. Domestic courts have to develop the exact approach to be applied in the various groups of cases involving foreign affairs.[104] It will vary with the demands of the respective constitutional law, especially the constitutional allocation of foreign affairs powers to the three branches and the place offered to international law within the domestic legal system.

IV. Conclusion – The emperor without clothes

In this last chapter, it has been argued that the factors that undermined the traditional position have had a fundamental effect on states' foreign relations law. They led to the gradual development of a modern position that challenged the traditional view's claims and established a new paradigm of thinking about foreign affairs and judicial review.

We have also examined the likely effect of the Russian War in Ukraine on the modern position. As assessed above, it is unlikely that the conflict will completely rewind the changes of the international system since the Second World War. The modern position evolved as a template to think about foreign relations law and will remain influential in the minds of scholars and judges, even if the forces which led to its inception are weakened.

Finally, it has been argued that a doctrine of discretion approach is best suited to balance the executive-judicial relationship in light of the changes of the international and domestic legal systems. I sketched some factors which may weaken or strengthen judicial review from case to case. Many of the abovementioned points have been subconsciously accepted and applied by the courts. In most cases, however, this adherence to a 'modern' understanding of judicial review in foreign affairs has not been made explicit. Sometimes lip service has been paid to old ideas of foreign affairs before quashing an executive action. Instead, courts should openly discard the 'foreign affairs fairy tale' and acknowledge that the emperor is without clothes. Applying an open and transparent discretionary approach

103 As argued for Germany, cf Chapter 3, II., 2.

104 Developing a margin of discretion approach for the US Gil (n 74).

will add legitimacy to courts' decisions in dealing with the challenges of the 21st century.

Summary of Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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