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

[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]

1. 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.