

Alexander Silke

Deference to the Executive?

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



Nomos

Beiträge zum
ausländischen öffentlichen Recht und Völkerrecht

Edited by
the Max Planck Society
for the Advancement of Science
represented by Prof. Dr. Armin von Bogdandy
and Prof. Dr. Anne Peters

Volume 336

Alexander Silke

Deference to the Executive?

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



Nomos

Open Access funding provided by Max Planck Society.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Berlin, Freie Universität, Diss., 2023

ISBN 978-3-7560-1079-0 (Print)

ISBN 978-3-7489-4385-3 (ePDF)

1st Edition 2024

© Alexander Silke

Published by

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

www.nomos.de

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-7560-1079-0 (Print)

ISBN 978-3-7489-4385-3 (ePDF)

DOI <https://doi.org/10.5771/9783748943853>



Online Version
Nomos eLibrary

D188



This work is licensed under a Creative Commons Attribution 4.0 International License.

Meinen Eltern

Acknowledgments

This book is a revised and updated version of my doctoral dissertation which I defended in 2023 at the Department of Law at Freie Universität Berlin. As one would expect from a thesis in comparative law, writing this book has been a journey, academically, personally, and quite literally. I am grateful for the privilege and opportunity to conduct research on three continents for this book and for the inspiring people I came to meet.

First of all, I have to express my gratitude to my supervisor Professor Helmut Aust. He guided me through developing this book from a rough idea to the final version and always provided helpful feedback. His support in reaching out to different universities and scholars has been invaluable and his academic virtuosity and personal cordiality have made the years working for him as a research and teaching fellow at Freie Universität Berlin a formative experience.

I would also like to thank Professor Christian Calliess for his swift review of the thesis as second examiner. Moreover, I am grateful to Professor Georg Nolte; the years working for him as a student assistant at Humboldt University Berlin were inspiring, sparked my interest in international law, and taught me to always look at an argument from the other side.

Professor Anél du Plessis I thank for her kind invitation to North-West University Potchefstroom to conduct initial research on South African constitutional law. At the same institution, I thank Professor Oliver Fuo, Professor Angela van der Berg, Dr. Melandri Steenkamp, Dr. Allison Geduld, and Myrone Stoffels for their warm welcome and hospitality.

I am indebted to Professor Hugh Corder for inviting me to conduct research at the University of Cape Town and to Professor Cathleen Powell and Professor Hannah Woolaver for the opportunity to present and discuss parts of my work. Professor Henk Botha from Stellenbosch University took the time to talk about my research and provided valuable insights. At the University of Pennsylvania, I am grateful to Professor William Burke-White for inviting me as a guest researcher and to Professor Jean Galbraith for a fruitful conversation on my PhD project.

Moreover, this book profited greatly from discussions during the 6th Transatlantic Seminar in Frankfurt organized by Professor Russell Miller, for which I am indebted to him and all the participants. Likewise, lively

Acknowledgments

debates and intriguing lectures during my studies at the University of Oxford brought new perspectives to this book, for which I thank especially Professor Dapo Akande, Professor Antonios Tzanakopoulos, and Professor Miles Jackson.

My friends and colleagues Dr. Lena Riemer, Dr. Carl Nägele, Dr. Robert Stendel, Amadeus Haux, and Philipp Hülse not only read different parts of the thesis, which greatly profited from their comments, but made taking breaks from academic work replenishing and worthwhile.

Professor Armin von Bogdandy and Professor Anne Peters included this book in the series *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, for which I am much obliged.

My gratitude is also due to the German Academic Exchange Service (DAAD), which funded my research stay at the University of Cape Town. The Freie Universität Open Access Fund and the Ernst-Reuter-Gesellschaft generously contributed to cover the cost of publication of this book.

Finally, I have to thank my family. Without the love and patience of my partner Kristina and the affection and support of my parents, writing this book would not have been possible.

Berlin, June 2024

Alexander Silke

Table of Contents

Table of Cases	15
Abbreviations	29
Introduction	31
I. The issue of judicial review in foreign affairs – three examples	31
II. Design of the thesis	38
1. Selection of jurisdictions	38
2. Structure	39
3. The thesis within the broader project of comparative foreign relations law	41
4. Methodological remarks and conceptual constraints	47
Chapter 1 – Origins of Deference	51
I. The traditional position in political philosophy	52
1. Thomas Hobbes	52
2. John Locke	54
3. Charles Montesquieu	56
II. Adoption of the traditional position in the three jurisdictions	57
1. South Africa	58
a) Jenkins, Blackstone and foreign affairs as crown prerogatives	58
b) The birth of deference in the Victorian Age	60
c) South African adoption of English foreign relations law	64
aa) Older South African constitutions	64
bb) The new South African Constitution	67
2. United States of America	68
a) A new idea of separation of powers in foreign affairs: Continental Congress and Constitutional Convention	69
b) Early constitutional practice and first traits of the traditional position	72

c) Early traces of the traditional position in the Supreme Court	74
d) The late victory of deference: from Quincy Wright to Sutherland	76
3. Germany	80
a) Prussian legal thought and constitutional practice	80
b) The German Empire	85
c) Weimar Republic	89
d) Nazi Germany	91
e) Contemporary German Law	93
III. Conclusion on the Origins of Deference	96
Chapter 2 – Defining Deference	99
I. Doctrines of procedural non-reviewability	100
1. Standing (USA)	100
2. <i>Klage- und Antragsbefugnis</i> (Germany)	105
3. The new South African rules of standing (South Africa)	109
II. Doctrines of substantive non-reviewability	115
1. Political Question Doctrine (USA)	115
2. <i>Justizfreie Hoheitsakte</i> (Germany)	118
3. From Act of State to Political Questions? (South Africa)	120
III. Doctrines of conclusiveness	122
1. Executive law-making and binding ‘suggestions’ (USA)	123
2. <i>Bindungswirkung</i> (Germany)	126
3. Certification (South Africa)	130
IV. Doctrines of discretion	133
1. Deference in the narrow sense (USA)	134
2. Areas of discretion and reduced level of review (Germany)	136
3. Reduced levels of scrutiny (South Africa)	139
V. The spectrum of deference	142
1. Other forms of deference	142
2. The deference scale	143
VI. Conclusion on Defining Deference	144

Chapter 3 – Application of Deference	149
I. Tracing deference	151
1. Treaty interpretation	151
a) United States	152
aa) Treaties and US constitutional law	152
bb) Deference in treaty interpretation	152
(1) Early jurisprudence and ‘zero deference’	152
(2) Early 20 th century and the birth of deference in treaty interpretation	154
(3) The situation under contemporary US law	157
(a) Two conflicting approaches	157
(b) <i>Chevron</i> deference in treaty interpretation	158
(c) <i>Sanchez-Llamas</i> and <i>Hamdan</i>	159
(d) Recent developments in treaty interpretation	162
b) Germany	163
aa) Situation in former German legal orders	163
bb) Situation under the Basic Law	165
(1) Early decisions concerning treaties – the Constitutional Court getting involved in foreign affairs	165
(2) The <i>Saarstatut</i> decision and the Washington Agreement – widening the scope of review	167
(3) Fundamental Relations Treaty and <i>Hess</i> case – more leeway for the executive?	169
(4) <i>Pershing</i> case and <i>Out of Area</i> - executive influence in the subsequent development of treaties	173
(5) Recent developments	175
(6) Excursus – Cases concerning interim relief	176
c) South Africa	178
aa) Older South African constitutions	178
bb) New South African Constitution	180
d) Conclusion on treaty interpretation	184
2. Recognition of states and governments	186
a) United States	188
b) Germany	192
c) South Africa	197
d) Conclusion on recognition of states and governments	201

Table of Contents

3. State immunity	202
a) United States	203
b) Germany	207
c) South Africa	212
d) Conclusion on state immunity	215
4. Foreign official immunity	216
a) USA	217
aa) Early cases concerning individual immunity	217
bb) Situation post-FSIA and the Supreme Court's decision in <i>Samantar v Yousuf</i>	220
cc) Current developments – a circuit split	222
b) Germany	225
aa) Foreign official immunity during the Bismarck and Weimar Constitutions	225
bb) Foreign official immunity in contemporary German law	228
(1) Statutory foundations	228
(2) The Tabatabai litigation	229
(a) General background of the case	229
(b) The approach of the Regional Court	231
(c) The holding of the higher courts	231
(d) Lessons from the <i>Tabatabai</i> case	232
(3) Further developments in Germany	233
c) South Africa	234
aa) The situation under previous South African constitutions	234
bb) The situation under the new South African Constitution	236
(1) <i>Al-Bashir</i> case	238
(2) <i>Mugabe</i> case	239
(3) Lessons from the <i>Al-Bashir</i> and <i>Mugabe</i> cases	240
d) Conclusion on foreign official immunity	241
5. Diplomatic protection	242
a) United States	243
b) Germany	247
c) South Africa	252
d) Conclusion on diplomatic protection	256
6. Conclusion on the tracing of deference	257

II. General Problems in the application of deference	259
1. Non-reviewability and conclusiveness doctrines in contemporary South African law	259
a) Cases cited as a basis for non-reviewability in South Africa	261
b) Evaluating contemporary case law	264
2. The role of the executive assessments in the absence of a doctrine of non-reviewability in contemporary German law	267
3. The status of conclusiveness doctrines in contemporary US law	275
III. Conclusion on the Application of Deference	279
Chapter 4 – Dynamics of Deference	281
I. Convergence forces – a new calibration of executive and judicial power in foreign affairs	281
1. Globalization	282
a) The ‘deterritorialization’ of the state and its economy	283
b) The changing structure of the international system and international law	287
c) The development of a global legal dialogue	292
2. Entanglement of international and domestic law	297
a) General blurring of the domestic and international law divide	297
b) Closer entanglement in foreign relations law	299
3. Changing role of parliaments in foreign affairs	304
a) Traditional exclusion of the legislative branch from foreign affairs	304
b) Gradual expansion of legislative influence	307
aa) Germany	308
bb) South Africa	311
cc) United States	313
dd) International law	316
c) A (not so) silent profiteer: the judiciary	317
aa) Germany	317
bb) South Africa	319
cc) United States	321
4. Changed relationship between the state and the individual	324
a) General acceleration of convergence trends	325

Table of Contents

b) Strengthening judicial review in foreign affairs	327
II. Divergence Forces – different receptiveness toward the general trend	334
1. Position within the international system	334
2. Constitutional framework	338
3. Historical experience	341
a) German legal tradition and scholarship in the 19 th century	342
b) Openness towards international law	344
c) Focus on constitutional and human rights	349
4. Populism	353
a) Populism and deference	354
b) Instances of a ‘populist’ backlash in the United States, Germany and South Africa	356
c) The impact of the populist backlash	359
III. Conclusion on the Dynamics of Deference	363
Chapter 5 – The Future of Deference	367
I. A ‘modern position’?	367
II. Future dynamics: Russia’s war in Ukraine	369
III. A normative claim	378
1. The ‘foreign affairs fairy tale’	378
2. Towards a balanced and transparent margin of discretion approach	379
IV. Conclusion – The emperor without clothes	383
Summary of Findings	385
Bibliography	397

Table of Cases

Germany

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

Decision from 13 November 1858 (1859) 21 Justizministerialblatt 155 (Court of Competence Conflicts).

Decision from 13 May 1865 (1865) 179 Justizministerialblatt 27 (Court of Competence Conflicts).

Judgment from 7 July 1882 Seufferts Archiv 38, 171 (Higher Regional Court Hamburg).

Judgment from 22 September 1885 RGSt 12, 381 (Supreme Court of the Reich).

Judgment from 27 January 1888 RGSt 17, 51 (Supreme Court of the Reich).

Judgment from 26 April 1888 (Elsass Fall) RGSt 17, 334 (Supreme Court of the Reich).

Judgment from 21 June 1888 RGZ 22, 19 (Supreme Court of the Reich).

Judgment from 28 September 1891 RGZ 22, 141 (Supreme Court of the Reich).

Decision from 10 June 1899 RGZ 44, 377 (Supreme Court of the Reich).

Decision from 22 May 1901 RGZ 48, 195 (Supreme Court of the Reich).

Judgment from 14 June 1902 printed in Stölzel, *Die neueste Rechtsprechung des Gerichtshofs zur Entscheidung der Kompetenzkonflikte* (1906) No 2504 (Court of Competence Conflicts).

Judgment from 12 December 1905 (Belgium Railroad Case) RGZ 62, 165 (Supreme Court of the Reich).

Judgment from 25 July 1910 (Hellfeld Case) (1911) 5 JöR 263 (Court of Competence Conflicts).

Judgment from 22 May 1911 RGZ 45, 30 (Supreme Court of the Reich).

Judgment from 30 December 1915 RMilG 20, 68 (German Empire Military Court).

Decision from 9 February 1916 RMilG 20, 110 (German Empire Military Court).

Decision from 23 August 1916 RGSt 50, 141 (Supreme Court of the Reich).

Judgment from 14 October 1916 RMilG 21, 85 (German Empire Military Court).

Judgment from 24 October 1917 RMilG 21, 278 (German Empire Military Court).

Judgment from 7 November 1917 RMilG 21, 283 (German Empire Military Court).

Judgment from 26 April 1918 RGSt 52, 278 (Supreme Court of the Reich).

Judgment from 17 September 1918 RGSt 52, 167 (Supreme Court of the Reich).

Judgment from 29 May 1920 JW 1921, 773 (Court of Competence Conflicts).

Judgment from 29 June 1920 (Stempelmarken Fall) RGSt 55, 81 (Supreme Court of the Reich).

Judgment from 13 November 1920 JW 1921, 1478 (Court of Competence Conflicts).

Table of Cases

- Decision from 4 December 1920* JW 1921, 1480 (Court of Competence Conflicts).
- Decision from 4 December 1920* JW 1921, 1485 (Court of Competence Conflicts).
- Decision from 12 March 1921* JW 1921, 1481 (Court of Competence Conflicts).
- Judgment from 10 May 1921* RGSt 56, 4 (Supreme Court of the Reich).
- Judgment from 10 December 1921 (Ice King Case)* RGZ 103, 274 (Supreme Court of the Reich).
- Judgment from 20 September 1922* RGZ 105, 169 (Supreme Court of the Reich).
- Judgment from 15 December 1923* NJW 1924, 1388 (Court of Competence Conflicts).
- Judgment from 23 May 1925* RGZ 111, 41 (Supreme Court of the Reich).
- Decision from 27 June 1925* JW 1926, 402 (Court of Competence Conflicts).
- Judgment from 16 October 1925* JW 1926, 1987 (Supreme Court of the Reich).
- Judgment from 26 January 1926* JW 1926, 804 (Supreme Court of the Reich).
- Judgment from 1 July 1926* RGZ 114, 188 (Supreme Court of the Reich).
- Decision from 20 December 1926 (Persian Mission Case)* ZaöRV 1929, 204 (Higher Regional Court Darmstadt).
- Judgment from 10 March 1928* ZaöRV 1931, 102 (Court of Competence Conflicts).
- Judgment from 4 June 1930* JW 1931, 150 (Supreme Court of the Reich).
- Judgment from 21 January 1931* RGSt 63, 395 (Supreme Court of the Reich).
- Judgment from 2 May 1932* IPRspr 1932, No 21 (Higher Regional Court Berlin).
- Judgment from 22 June 1933* RGSt 67, 255 (Supreme Court of the Reich).
- Decision from 28 April 1934* JW 1934, 2334 (Supreme Court of the Reich).
- Judgment from 22 June 1937* Seufferts Archiv 91, 336 (Supreme Court of the Reich).
- Judgment from 18 March 1938* JW 1938, 1122 (Higher Regional Court Frankfurt).
- Judgment from 16 May 1938* RGZ 157, 389 (Supreme Court of the Reich).
- Judgment from 17 September 1941* RGZ 167, 274 (Supreme Court of the Reich).
- Judgment from 29 July 1952 (Deutsch-Französisches Wirtschaftsabkommen)* BVerfGE 1, 372 (German Federal Constitutional Court).
- Judgment from 29 July 1952 (Petersberger Abkommen)* BVerfGE 1, 351 (German Federal Constitutional Court).
- Judgment from 7 March 1953 (EVG -Vertrag)* BVerfGE 2, 143 (German Federal Constitutional Court).
- Judgment from 30 June 1953 (Kehler Hafen)* BVerfGE 2, 347 (German Federal Constitutional Court).
- Judgment from 4 May 1955 (Saarstatut)* BVerfGE 4, 157 (German Federal Constitutional Court).
- Decision from 21 March 1957 (Washingtoner Abkommen)* BVerfGE 6, 290 (German Federal Constitutional Court).
- Decision from 23 September 1958* DVBl 1959, 294 (Higher Administrative Court Münster).
- Decision from 12 January 1960* BVerfGE 10, 264 (German Federal Constitutional Court).

- Judgment from 12 October 1962* DVBl 1963, 728 (Federal Administrative Court).
- Decision from 30 October 1962 (Yugoslav Military Mission Case)* BVerfGE 15, 25 (German Federal Constitutional Court).
- Decision from 30 April 1963 (Iranian Embassy Case)* BVerfGE 16, 27 (German Federal Constitutional Court).
- Judgment from 27 January 1967 (Rhodesian Bill Case)* 2/12 Q 30/66 (Regional Court Frankfurt).
- Decision from 7 April 1970* NJW 1970, 1514 (Regional Court Heidelberg).
- Decision from 4 May 1971 (Spanier Beschluss)* BVerfGE 31, 58 (German Federal Constitutional Court).
- Decision from 22 May 1972 (Eastern Treaties Case Interim Relief I)* BVerfGE 33, 195 (German Federal Constitutional Court).
- Decision from 31 May 1972 (Eastern Treaties Case Interim Relief II)* BVerfGE 33, 232 (German Federal Constitutional Court).
- Judgment from 31 July 1972 (Grundlagenvertrag)* BVerfGE 36, 1 (German Federal Constitutional Court).
- Decision from 4 June 1973 (Fundamental Relations Treaty Interim Relief I)* BVerfGE 35, 193 (German Federal Constitutional Court).
- Judgment from 18 June 1973 (Fundamental Relations Treaty Interim Relief II)* BVerfGE 35, 257 (German Federal Constitutional Court).
- Decision from 7 July 1975 (Eastern Treaties Case (Ostverträge))* BVerfGE 40, 141 (German Federal Constitutional Court) = 78 ILR 177.
- Decision from 13 December 1977 (Philippine Embassy Case)* BVerfGE 46, 342 (German Federal Constitutional Court).
- Judgment from 1 March 1979* BVerfGE 50, 290 (German Federal Constitutional Court).
- Decision from 16 December 1980 (Hess Case)* BVerfGE 55, 349 (German Federal Constitutional Court) = 90 ILR 387.
- Decision from 5 February 1981* 7 B 13/80 (Federal Administrative Court).
- Judgment from 24 February 1981 (Hess Case)* BVerwGE 62, 11 (Federal Administrative Court).
- Decision from 23 June 1981 (Eurocontrol)* BVerfGE 58, 1 (German Federal Constitutional Court).
- Judgment from 26 May 1982* I R 16/78 (Federal Fiscal Court).
- Judgment from 19 October 1982* BVerfGE 61, 149 (German Federal Constitutional Court).
- Order from 24 February 1983 (2nd Writ of Arrest)* (1983) EuGRZ 159 (Regional Court Düsseldorf).
- Decision from 7 March 1983 (Tabatabai Case 2nd Release Order)* (1983) 6 MDR 512 (Higher Regional Court Düsseldorf).
- Decision from 12 April 1983 (National Iranian Oil Company)* BVerfGE 64, 1 (German Federal Constitutional Court).

Table of Cases

- Decision from 27 February 1984 (Tabatabai Case)* BGHSt 32, 275 (Federal Court of Justice).
- Judgment from 18 December 1984 (Pershing II – Atomwaffenstationierung)* BVerfGE 68, 1 (German Federal Constitutional Court).
- Decision from 16 December 1986* RPfelger 1987, 311 (Local Court Neumünster).
- Decision from 21 October 1987 (Teso Case)* BVerfGE 77, 137 (German Federal Constitutional Court).
- Decision from 29 October 1987 (Storage of Chemical Weapons)* BVerfGE 77, 170 (German Federal Constitutional Court).
- Decision from 24 January 1989* 7 B 102/88 (Federal Administrative Court).
- Decision from 6 June 1989 (Reiten im Walde)* BVerfGE 80, 137 (German Federal Constitutional Court).
- Judgment from 23 April 1991 (Bodenreform I)* BVerfGE 84, 90 (German Federal Constitutional Court).
- Decision from 8 April 1993* BVerfGE 88, 173 (German Federal Constitutional Court).
- Judgment from 12 October 1993 (Maastricht)* BVerfGE 89, 155 (German Federal Constitutional Court).
- Judgment from 12 July 1994 (Out-of-Area-Einsätze)* BVerfGE 90, 286 (German Federal Constitutional Court).
- Judgment from 10 January 1995 (Zweitregister)* BVerfGE 92, 26 (German Federal Constitutional Court).
- Decision from 12 September 1995 (Sudanesen Beschluss)* BVerfGE 93, 248 (German Federal Constitutional Court).
- Decision from 18 April 1996 (Bodenreform II)* BVerfGE 94, 12 (German Federal Constitutional Court).
- Judgment from 14 June 1996* 21 A 753/95 (Higher Administrative Court North-Rhine Westphalia).
- Decision from 14 July 1999 (Kosovo)* BVerfGE 100, 266 (German Federal Constitutional Court).
- Judgment from 14 July 1999 (Telecommunication Surveillance)* BVerfGE 100, 313 (German Federal Constitutional Court).
- Decision from 16 May 2000* 2 Zs 1330/99 (Higher Regional Court Cologne).
- Judgment from 22 November 2001 (NATO Concept)* BVerfGE 104, 151 (German Federal Constitutional Court).
- Decision from 14 August 2002* 1 StR 265/02 (Federal Court of Justice).
- Decision from 5 November 2003* BVerfGE 109, 13 (German Federal Constitutional Court).
- Judgment from 2 November 2006 (Varvarin Bridge)* BGHZ 169, 348 (Federal Court of Justice).
- Decision from 8 March 2007* BVerfGE 117, 357 (German Federal Constitutional Court).
- Judgment from 3 July 2007 (Afghanistan Einsatz)* BVerfGE 118, 244 (German Federal Constitutional Court).

- Judgment from 7 May 2008 (Awacs Turkey)* BVerfGE 121, 135 (German Federal Constitutional Court).
- Decision from 4 September 2008 (Schloss Bensberg)* BVerfGK 14, 192 (German Federal Constitutional Court).
- Judgment from 7 April 2009 (Kosovo Case)* Au 1 K 08.748 (Administrative Court Augsburg).
- Judgment from 30 June 2009 (Lissabon)* BVerfGE 123, 267 (German Federal Constitutional Court).
- Decision from 7 July 2009 (Hansa Stavanger)* NVwZ 2009, 1120 (Administrative Court Berlin).
- Judgment from 29 October 2009 (CIA flights)* NVwZ 2010, 321 (Federal Administrative Court).
- Judgment from 28 February 2012 (Neunergremium)* BVerfGE 130, 318 (German Federal Constitutional Court).
- Decision from 13 August 2013 (Varvarin Bridge)* 2 BvR 2660/06 (German Federal Constitutional Court).
- Decision from 17 March 2014* 2 BvR 736/13 (German Federal Constitutional Court).
- Judgment from 27 May 2015 (Ramstein Drone Case)* 3 K 5625/14 (Administrative Court Cologne).
- Judgment from 23 September 2015 (Pegasus)* BVerfGE 140, 160 (German Federal Constitutional Court).
- Judgment from 5 April 2016* BVerwGE 154, 328 (Federal Administrative Court).
- Judgment from 13 October 2016 (CETA Interim Relief)* BVerfGE 143, 65 (German Federal Constitutional Court).
- Decision from 13 October 2016 (NSA Case)* BVerfGE 143, 101 (German Federal Constitutional Court).
- Decision from 15 December 2016 (Treaty Override)* BVerfGE 141, 1 (German Federal Constitutional Court).
- Decision from 30 May 2017* 504 M 5221/17 (Local Court Dresden).
- Decision from 15 March 2018 (Fliegerhorst Büchel)* 2 BvR 1371/13 (German Federal Constitutional Court).
- Decision from 5 October 2018* StB 43/18, StB 44/18 (Federal Court of Justice).
- Judgment from 19 March 2019 (Ramstein Drone Case)* 4 A 1361/15 (Higher Administrative Court Münster).
- Decision from 17 September 2019 (ISIS Case)* BVerfGE 152, 8 (German Federal Constitutional Court).
- Judgment from 5 May 2020 (PSPP)* BVerfGE 154, 17 (German Federal Constitutional Court).
- Judgment from 19 May 2020 (BND Telecommunications Surveillance)* BVerfGE 154, 152 (German Federal Constitutional Court).
- Judgment from 2 November 2020* 4 K 385/19 (Administrative Court Berlin).

Table of Cases

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

Judgment from 28 January 2021 3 StR 564/19 (Federal Court of Justice).

Decision from 24 March 2021 (Climate Change) BVerfGE 157, 30 (German Federal Constitutional Court).

Decision from 21 February 2024 AK 4/24 (Federal Court of Justice).

Judgment from 4 April 2024 OVG 6 B 18/22 (Higher Administrative Court Berlin-Brandenburg).

South Africa

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) (Constitutional Court).

Boesak v Minister of Home Affairs and Another 1987 (3) SA 665 (C) (Cape Provincial Division).

De Howorth v The SS India 1921 CPD 451 (Cape of Good Hope Provincial Division).

De Lange v Smuts NO and Others 1998 (7) BCLR 779 (CC) (Constitutional Court).

Democratic Alliance v Minister of International Relations and Co-operation and Others (Mugabe Case) 2018 (6) SA 109 (GP) (High Court – Gauteng Division).

Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case) 2017 (3) SA 212 (GP) (High Court – Gauteng Division).

Earthlife Africa v Minister of Energy 2017 (5) SA 277 (WCC) (High Court – Western Cape Division).

Ex parte Sulman 1942 CPD 407 (Cape of Good Hope Provincial Division).

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).

Geuking v President of the Republic of South Africa and Others 2003 (3) SA 34 (CC) (Constitutional Court).

Government of the Republic of South Africa and Others v Von Abo 2011 (5) SA 262 (SCA) (Supreme Court of Appeal).

Government of the Republic of Zimbabwe v Fick and others 2013 (5) SA 325 (CC) (Constitutional Court).

Government of the Republic of Zimbabwe v Fick and others 2016 JOL 37271 (SCA) (Supreme Court of Appeal).

Harksen v President of the Republic of South Africa 1998 (2) SA 1011 (C) (Cape Provincial Division).

Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique 1980 (2) SA 111 (T) (Transvaal Provincial Division).

Kaffraria Property Co Pty Ltd v Govt of the Republic of Zambia 1980 (2) SA 709 (E) (Eastern Cape Division).

- Kaunda and Others v President of the RSA and Others* 2005 (4) SA 235 (CC) (Constitutional Court).
- Kavouklis v Bulgaris* 1943 NPD 190 (Natal Provincial Division, Durban and Coast Local Division).
- Kolbatschenko v King NO and Another* 2001 (4) SA 336 (C) (Cape Provincial Division).
- Law Society of South Africa and Others v President of the Republic of South Africa and Others* (SADC Case) 2018 2 All SA 806 (GP) (High Court – Gauteng Division).
- Law Society of South Africa and others v President of the Republic of South Africa and others* (Southern Africa Litigation Centre and another as amici curiae) (SADC Case) 2019 (3) BCLR 329 (CC) (Constitutional Court).
- Lendlease Finance Co (Pty) Ltd v H Corporation de Mercadeo Agricola and Others* 1975 (4) SA 397 (C) (Cape Provincial Division).
- Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others* (Bashir Case) 2016 (3) SA 317 (SCA) (Supreme Court of Appeal).
- Minister of the Interior v Bechler* 1948 3 All SA 237 (A) (Appellate Division).
- Mohamed v President of the Republic of SA* 2001 (3) SA 893 (CC) (Constitutional Court).
- National Commissioner of the South African Police v Southern African Human Rights Litigation Centre* [2014] ZACC 30; 2015 (1) SA 315 (CC) (Constitutional Court).
- 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).
- National Gambling Board v Premier of KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) (Constitutional Court).
- Parkin v Government of the Republique Democratique du Congo* 1971 (1) SA 259 (W) (Transvaal Provincial Division).
- Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (Constitutional Court).
- Premier, Western Cape v President of the Republic of South Africa and Another* 1999 (3) SA 657 (CC) (Constitutional Court).
- Prentice, Shaw & Schiess Incorporated v Government of the Republic of Bolivia* 1978 (3) SA 938 (W) (Transvaal Provincial Division).
- 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).
- President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (Constitutional Court).
- President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) (Constitutional Court).
- President of the Republic of South Africa v Quagliani; President of the Republic of South Africa v Van Rooyen; Goodwin v Director General, Department of Justice and Constitutional Development* 2009 (2) SA 466 (CC) (Constitutional Court).
- S v Devoy* 1971 (1) SA 359 (N) (Natal Provincial Division).

Table of Cases

S v Devoy 1971 (3) SA 899 (A) (Appellate Division).
S v Makwanyane 1995 (3) SA 391 (CC) (Constitutional Court).
S v Oosthuizen 1977 (1) SA 823 (N) (Natal Provincial Division).
S v Penrose 1966 (1) SA 5 (N) (Natal Provincial Division).
Sachs v Dönges NO 1950 (2) SA 265 (A) (Appellate Division).
Southern Africa Litigation Centre v National Director of Public Prosecutions (Zimbabwe Torture Case) 2012 (10) BCLR 1089 (GNP) (North Gauteng High Court).
Sperling v Sperling 1975 (3) SA 707 (A) (Appellate Division).
Van Deventer v Hancke and Mossop 1903 TS 401 (Supreme Court of the Transvaal).
Van Zyl and others v Government of the Republic of South Africa and Others 2008 (3) SA 294 (SCA) (Supreme Court of Appeal).
Von Abo v Government of the Republic of South Africa and Others 2009 (2) SA 526 (T) (Transvaal Provincial Division).
Von Abo v Government of the Republic of South Africa and Others 2010 (3) SA 269 (GNP) (North Gauteng High Court).

United Kingdom

Buron v Denman, Esq (1848) 154 ER 450 (Court of Exchequer).
Calvin's Case (1608) 7 Co Rep 1a (Court of the Queen's Bench).
China Navigation [1932] 2 KB 197 (Court of Appeal).
Cook v Sprigg [1899] AC 572 (Privy Council).
Delvalle v Plomer (1811) 170 ER 1301 (High Court).
Deutsche Bank AG London Branch v Receivers Appointed by the Court Central Bank of Venezuela v Governor and Company of the Bank of England and others [2021] QB 455 (Court of Appeal).
DF Marais v General Officer Commanding the Lines of Communication [1902] AC 109 (Privy Council).
Duff Development Co Ltd v Government of Kelantan [1924] AC 797 (House of Lords).
Fenton Textile Association v Krassin (1921) 38 TLR 259 (Court of Appeal).
Jones v Garcia del Rio (1823) 37 ER 1113 (Court of Chancery).
Mohamed v Breish [2020] EWCA Civ 637 (Court of Appeal).
Mutasa v Attorney-General [1980] 1 QB 114 (Queen's Bench Division).
Nabob of the Carnatic v East India Company (1791) 30 ER 391 (Court of Chancery).
Nabob of the Carnatic v East India Company (1793) 30 ER 521 (Court of Chancery).
Philippine Admiral v Wallem Shipping (Hong Kong) Ltd [1977] AC 373 (Privy Council).
Playa Larga v I Congreso del Partido [1981] 1 AC 244 (House of Lords).
R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598 (Court of Appeal).
Rustomjee v R (1876) 2 QBD 69 (Court of Appeal).
Salaman v Secretary of State in Council of India [1906] 1 KB 613 (Court of Appeal).

Spain v Owners of the Arantzazu Mendi [1939] AC 256 (House of Lords).
Sprigg v Sigcau [1897] AC 238 (Privy Council).
Taylor v Barclay (1828) 57 ER 769 (Court of Chancery).
The Parlement Belge (1880) 5 PD 197 (Court of Appeal).
The Secretary of State for India v Kamachee Boye Sahaba (1859) 15 ER 9 (Privy Council).
West Rand Central Gold Mining Co Ltd v The King [1905] 2 KB 391 (King's Bench Division).

USA

Ahmed Salem Bin Ali Jaber v USA February [2016] F Supp 3d 70 (United States District Court for the District of Columbia).
Allen v Wright 468 US 737 (1984) (US Supreme Court).
Arizona State Legislature v Arizona Independent Redistricting Commission 576 US 787 (2015) (US Supreme Court).
Baker v Carr 369 US 186 (1962) (US Supreme Court).
Banco Nacional de Cuba v Sabbatino 376 US 398 (1964) (US Supreme Court).
Berizzi Bros Co v SS Pesaro 271 US 562 (1926) (US Supreme Court).
BG Group plc v Republic of Argentina 572 US 25 (2014) (US Supreme Court).
Blumenthal v Trump [2020] 949 F3d 14 (United States Court of Appeals for the District of Columbia Circuit).
Bond v United States (Bond I) 564 US 211 (2011) (US Supreme Court).
Bond v United States (Bond II) 572 US 844 (2014) (US Supreme Court).
Bor-Tyng Sheen v United States [2021] WL 1433439 (United States District Court for the Eastern District of North Carolina).
Boumediene v Bush 553 US 723 (2008) (US Supreme Court).
Boynton v Blaine 139 US 306 (1891) (US Supreme Court).
Campbell v Clinton [2000] 203 F3d 19 (United States Court of Appeals for the District of Columbia Circuit).
Carnahan v Maloney 143 S Ct 2653 (2023) (US Supreme Court).
Charlton v Kelly 229 US 447 (1913) (US Supreme Court).
Chevron USA Inc v Natural Resources Defense Council Inc 467 US 837 (1984) (US Supreme Court).
Chuidian v Philippine Nat'l Bank [1990] 912 F2d 1095 (United States Court of Appeals for the 9th Circuit).
Clapper v Amnesty International USA 568 US 398 (2013) (US Supreme Court).
Clark v United States [1811] 5 F Cas 932 (United States Circuit Court for the District of Pennsylvania).
Coleman v Miller 307 US 433 (1939) (US Supreme Court).

Table of Cases

- Compania Espanola De Navegacion Maritima, S A v The Navemar* 303 US 68 (1938) (US Supreme Court).
- Crawford v United States Department of the Treasury* [2017] 868 F3d 438 (United States Court of Appeals for the 6th Circuit).
- Crockett v Reagan* [1983] 720 F2d 1355 (United States Court of Appeals for the District of Columbia Circuit).
- De Sousa v Department of State* [2012] 840 F Supp 2d 92 (United States District Court for the District of Columbia).
- Dellums v Bush* [1990] 752 F Supp 1141 (United States District Court for the District of Columbia).
- Doe v Bush* [2003] 323 F3d 133 (United States Court of Appeals for the 1st Circuit).
- Doğan v Barak* 2016 US Dist LEXIS 142055 (United States District Court Central District of California).
- Dogan v Barak* 2019 US App LEXIS 23193 (United States Court of Appeals for the 9th Circuit).
- El Al Israel Airlines, Ltd v Tseng* 525 US 155 (1999) (US Supreme Court).
- Ex parte Muir* 254 US 522 (1921) (US Supreme Court).
- Ex parte Republic of Peru* 318 US 578 (1943) (US Supreme Court).
- Factor v Laubenheimer* 290 US 276 (1933) (US Supreme Court).
- Federal Republic of Germany et al v United States et al* 526 US 111 (1999) (US Supreme Court).
- Flynn v Schultz* [1984] 748 F2d 1186, cert denied, 474 US 830 (United States Court of Appeals for the 7th Circuit).
- Foster v Neilson* 27 US 253 (1829) (US Supreme Court).
- GE Energy Power Conversion Fr SAS, Corp v Outokumpu Stainless USA, LLC* 140 S Ct 1637 (2020) (US Supreme Court).
- Gelston v Hoyt* 16 US 246 (1818) (US Supreme Court).
- Goldwater v Carter* 444 US 996 (1979) (US Supreme Court).
- Greenspan v Crosbie* 1976 US Dist LEXIS 12155 (United States District Court for the Southern District of New York).
- Guar Trust Co of NY v United States* 304 US 126 (1938) (US Supreme Court).
- Hamdan v Rumsfeld* 548 US 557 (2006) (US Supreme Court).
- Hamdi v Rumsfeld* 542 US 507 (2004) (US Supreme Court).
- Hatch v Baez* 14 NY Sup Ct 596 (1876) (New York Supreme Court).
- Hawaii v Trump* [2017] 878 F3d 662 (United States Court of Appeals for the 9th Circuit).
- Heaney v Government of Spain* [1971] 445 F2d 501 (United States Court of Appeals for the 2nd Circuit).
- Hirabayashi v United States* 320 US 81 (1943) (US Supreme Court).
- Holtzman v Schlesinger* [1973] 484 F2d 1307 (United States Court of Appeals for the 2nd Circuit).

- Holzendorf v Hay* [1902] 20 App DC 576 (Court of Appeals of District of Columbia).
- In re Ross* 140 US 453 (1891) (US Supreme Court).
- Johnson v Eisentrager* 339 US 763 (1950) (US Supreme Court).
- Jones v United States* 137 US 202 (1890) (US Supreme Court).
- Keefe v Dulles* [1954] 222 F 2d 390 (United States Court of Appeals for the District of Columbia Circuit).
- Kolovrat v Oregon* 366 US 187 (1961) (US Supreme Court).
- Korematsu v United States* 323 US 214 (1944) (US Supreme Court).
- Kucinich v Obama* [2011] 821 F Supp 2d 110 (United States District Court for the District of Columbia).
- La Abra Silver Mining Company v United States* 29 Ct Cl 432 (1894) (United States Court of Claims).
- Lawrence v Texas* 539 US 558 (2003) (US Supreme Court).
- Lewis v Mutond* [2017] 258 F Supp 3d 168 (United States District Court for the District of Columbia).
- Lewis v Mutond* [2019] 918 F 3d 142 (United States Court of Appeals for the District of Columbia Circuit).
- Lin v United States* [2008] 539 F Supp 2d 173 (United States District Court for the District of Columbia).
- Lowry v Reagan* [1987] 676 F Supp 333 (United States District Court for the District of Columbia).
- Luria v US* 231 US 9 (1913) (US Supreme Court).
- Luther v Borden* 48 US 1 (1849) (US Supreme Court).
- Maloney v Murphy* [2020] 984 F3d 50 (United States Court of Appeals for the District of Columbia Circuit).
- Marbury v Madison* 5 US 137 (1803) (US Supreme Court).
- Martin v Mott* 25 US 19 (1827) (US Supreme Court).
- Medellín v Texas* 552 US 491 (2008) (US Supreme Court).
- Missouri v Holland* 252 US 416 (1920) (US Supreme Court).
- Mitchell v Laird* [1973] 488 F2d 611 (United States Court of Appeals for the District of Columbia Circuit).
- Munaf v Geren* 553 US 674 (2008) (US Supreme Court).
- Mutond v Lewis* 141 S Ct 156 (cert denied) (2020) (US Supreme Court).
- Oetjen v Cent Leather Co* 246 US 297 (1918) (US Supreme Court).
- Perkins v Elg* 307 US 325 (1939) (US Supreme Court).
- Permanent Mission of India to the UN v City of New York* 551 US 193 (2007) (US Supreme Court).
- Powell v McCormack* 395 US 486 (1969) (US Supreme Court).
- Raines v Byrd* 521 US 811 (1997) (US Supreme Court).
- Rasul v Bush* 542 US 466 (2004) (US Supreme Court).

Table of Cases

- Redpath v Kissinger* [1976] 415 F Supp 566 (United States District Court for the Western District of Texas).
- Republic of Mexico v Hoffman* 324 US 30 (1945) (US Supreme Court).
- Roper v Simmonds* 543 US 551 (2005) (US Supreme Court).
- Rose v Himely* 8 US 241 (1807) (US Supreme Court).
- Rosenberg v Lashkar-e-Taiba* [2013] 980 F Supp 2d 336 (United States District Court for the Eastern District of New York).
- Rosenberg v Pasha* [2014] 577 Fed Appx 22 (United States Court of Appeals for the 2nd Circuit).
- Samantar v Yousuf* 560 US 305 (2010) (US Supreme Court).
- Sanchez-Llamas v Oregon* 548 US 331 (2006) (US Supreme Court).
- Skidmore v Swift & Co* 323 US 134 (1944) (US Supreme Court).
- Smith v Obama* [2016] 217 F Supp 3d 283 (United States District Court for the District of Columbia).
- Smith v Reagan* [1988] 844 F2d 195, cert denied 488 US 954 (United States Court of Appeals for the 4th Circuit).
- Sunitomo Shoji America, Inc v Avagliano* 457 US 176 (1982) (US Supreme Court).
- Texas v United States* [2015] 809 F3d 134 (United States Court of Appeals for the 5th Circuit).
- The Cherokee Nation v Georgia* 30 US 1 (1831) (US Supreme Court).
- The Consul of Spain v La Concepcion* [1821] 3 F Cas 137 (Circuit Court of South Carolina).
- The Pesaro* [1921] 277 F 473 (New York District Court).
- The Schooner Exchange v McFaddon* 11 US 116 (1812) (US Supreme Court).
- The Three Friends* 166 US 1 (1897) (US Supreme Court).
- Trump v Hawaii* 585 US 667 (2018) (US Supreme Court).
- Underhill v Hernandez* 168 US 250 (1897) (US Supreme Court).
- United States House of Representatives v Mnuchin* [2022] 976 F3d 1 (United States Court of Appeals for the District of Columbia Circuit).
- United States v Belmont* 301 US 324 (1937) (US Supreme Court).
- United States v Curtiss-Wright Export Corp* 299 US 304 (1936) (US Supreme Court).
- United States v La Abra Silver Mining Company* 175 US 423 (1899) (US Supreme Court).
- United States v Lindh* [2002] 212 F Supp 2d 541 (United States District Court for the Eastern District of Virginia).
- United States v Mead Corp* 533 US 218 (2001) (US Supreme Court).
- United States v Palmer* 16 US 610 (1818) (US Supreme Court).
- United States v Pink* 315 US 203 (1942) (US Supreme Court).
- United States v Schooner Peggy* 5 US 103 (1801) (US Supreme Court).
- United States v Texas* 136 S Ct 2271; 579 US 547 (2016) (US Supreme Court).
- Va House of Delegates v Bethune-Hill* 139 S Ct 1945 (2019) (US Supreme Court).

- Verlinden BV v Central Bank of Nigeria* 461 US 480 (1983) (US Supreme Court).
- Waltier v Thomson* [1960] 189 F Supp 319 (United States District Court for the Southern District of New York).
- Ware v Hylton* 3 US 199 (1796) (US Supreme Court).
- Warfaa v Ali* [2016] 811 F 3d 653 (United States Court of Appeals for the 4th Circuit).
- Warfaa v Ali* 137 S Ct 2289 (cert denied) (2017) (US Supreme Court).
- Washington v Trump* [2017] 847 F3d 1151 (United States Court of Appeals for the 9th Circuit).
- Washington v Trump* 2017 US Dist LEXIS 16012 (United States District Court for the Western District of Washington).
- Williams v Suffolk Ins Co* 38 US 415 (1839) (US Supreme Court).
- Youngstown Sheet & Tube Co v Sawyer* 343 US 579 (1952) (US Supreme Court).
- Yousuf v Samantar* [2009] 552 F3d 371 (United States Court of Appeals for the 4th Circuit).
- Yousuf v Samantar* 2007 US Dist LEXIS 56227 (United States District Court for the Eastern District of Virginia).
- Yousuf v Samantar* 2012 US Dist LEXIS 122403 (United States District Court for the Eastern District of Virginia).
- Yousuf v Samantar II* [2012] 699 F3d 763 (United States Court of Appeals for the 4th Circuit).
- Zivotofsky v Clinton* 566 US 189 (2012) (US Supreme Court).
- Zivotofsky v Kerry* 576 US 1 (2015) (US Supreme Court).

Other Jurisdictions

- Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation) Provisional Measures, Order of 16 March 2022* ICJ Rep 2022, 211 (ICJ).
- Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) Provisional Measures, Order of 26 January 2024* (ICJ).
- Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v Belgium) Judgment* ICJ Rep 2002, 3 (ICJ).
- Avena and Other Mexican Nationals (Mexico v United States of America) Judgment* ICJ Rep 2004, 12 (ICJ).
- Barcelona Traction (Belgium v Spain) Judgment* ICJ Rep 1970, 3 (ICJ).
- Democratic Republic of the Congo v FG Hemisphere Associates LLC (No1)* (2011) 14 HKCFAR 95 (Hong Kong Court of Final Appeal).
- LaGrand (Germany v United States of America) Judgment* ICJ Rep 2001, 466 (ICJ).

Abbreviations

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

Abbreviations

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