Chapter 3 – Application of Deference

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Tracing deference

1. Treaty interpretation

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

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

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

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a) United States

aa) Treaties and US constitutional law

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

bb) Deference in treaty interpretation

(1) Early jurisprudence and 'zero deference'

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

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

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

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

12 Sloss (n 10) 511.

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

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

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

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

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

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

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

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

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

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

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

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

27 Ibid.

28 Ibid 465 ff.

29 Ibid 472 ff.

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

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

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

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

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

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

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

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

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

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

(3) The situation under contemporary US law

(a) Two conflicting approaches

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

54 Ibid 337 ff.
55 Ibid 325.
56 Chesney (n 25) 1746 f; van Alstine (n 41) fn 299.
57 *Kolovrat v Oregon* 366 US 187 (1961) (US Supreme Court) 194.
58 *Sumitomo Shoji America, Inc v Avagliano* 457 US 176 (1982) (US Supreme Court).
59 Chesney (n 25) 1742 ff; Weiss (n 34) 1594 f.
60 *El Al Israel Airlines, Ltd v Tseng* 525 US 155 (1999) (US Supreme Court).
61 American Law Institute, *Restatement of the law, third: The foreign relations law of the United States, §§ 1 – 488* (American Law Institute Pub 1987) § 326.
62 Dubinsky (n 24) 121 ff.
63 Bederman (n 23).
64 Ibid 1015 and fn 422.
65 Chesney (n 25).
66 Ibid 1754 ff.

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(b) *Chevron* deference in treaty interpretation

With the Supreme Court decision in *Immigration and Naturalization Services (INS) v Cardoza-Fonseca*,[67] a new line of argument arrived on the scene. The Supreme Court in 1984 had handed down its famous *Chevron* decision[68] concerning judicial review of administrative agency determinations. This reasoning now migrated into treaty interpretation questions. In *INS*,[69] the question arose as to what degree of likely persecution a refugee has to show to avoid deportation, especially whether the strict 'more likely than not' test under the Immigration and Nationality Act would equal the 'well-founded fear' test under the US Refugee Act (which implemented the Protocol Relating to the Status of Refugees[70]). The court found for the applicant and decided, contrary to the INS's construction, that the Refugee Act threshold would be lower, referring to the first limb of the *Chevron* test and that Congress clearly intended a different meaning.[71] Justice Stevens, the inventor of *Chevron*, delivered the court's opinion without even acknowledging the specific character of the Refugee Act as an implementing statute.[72] The application of the *Chevron* approach marked a substantial deviation from the former 'weight' approaches as it suggests a delegation of interpretative authority from Congress to the executive. This implies, inter alia, that contrary to decisions like *Elg*, the consistency of the executive's interpretations is of no relevance.[73] Since *INS*, courts have applied the reasoning in several other decisions.[74] Moreover, the application of *Chevron* in treaty cases found academic support.[75] As we have seen,[76] especially Bradley[77] advocated for using *Chevron* in foreign affairs.[78]

67 *INS v Cardoza-Fonseca* 480 US 421 (US Supreme Court) (1987); Dubinsky (n 24) 134.
68 Cf above, Chapter 2, IV., 1.
69 *INS v Cardoza-Fonseca* (n 67) 1208 ff.
70 Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
71 Ibid 445 ff.
72 Ibid 134 f.
73 Harlan G Cohen, 'The Death of Deference and the domestication of treaty law' (2015) BYU Law Review 1473; Dubinsky (n 24) 138.
74 Dubinsky (n 24) 134 ff.
75 Ibid 137.
76 Above Chapter 2, IV., 1.
77 Curtis A Bradley, 'Chevron Deference and Foreign Affairs' (2000) 86 Virginia Law Review 649.
78 Dubinsky (n 24) 137.

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Applying the principle of *Chevron*, he argued[79] that the treaty makers implied delegating interpretation to the executive because of its expertise in foreign affairs.[80] Posner and Sunstein[81] took this further, arguing that the executive interpretation should prevail over other foreign affairs canons like Charming Betsy.[82] Although not consistently applied by the courts, the *Chevron* approach marked a clear swing towards even more executive influence. The degree of deference, although still falling in the category of a doctrine of discretion, is considerably higher[83] and pushes the approach toward conclusiveness.

(c) *Sanchez-Llamas* and *Hamdan*

With the rise of *Chevron* deference and the events of 9/11, the signs were pointing towards even stronger deference.[84] However, a more nuanced picture evolved from two quite conflicting decisions handed down within two days by the Supreme Court.[85]

The first one is the majority opinion in *Sanchez-Llamas*.[86] Here the court had to deal with two complaints by petitioners who had not been informed of their right under Article 36 of the Vienna Convention on Consular Relations[87] (VCCR) to have the consulates of their home states informed of their arrest.[88] One of the main problems concerned whether, in a case where the detained was not correctly informed and failed to claim the violation during the trial, a state may treat their claim as forfeited in

79 Bradley, 'Chevron Deference' (n 77) 702.
80 Dubinsky (n 24) 138.
81 Eric A Posner and Cass R Sunstein, 'Chevronizing Foreign Relations Law' (2006) 116 Yale Law Journal 1170.
82 Charming Betsy is calling for statutory interpretation in accordance with international, cf Posner and Sunstein (n 81) 1207; on this proposal cf Sitaraman and Wuerth (n 46) 1962; Dubinsky (n 24) 138.
83 Robert Knowles, 'American Hegemony and the Foreign Affairs Constitution' (2009) 41 Arizona State Law Journal 87, 104; cf the classification by Chesney (n 25) 1770.
84 Sitaraman and Wuerth (n 46) 1921; Dubinsky (n 24) 134.
85 Cf as well Chesney (n 25) 1726 ff; Cohen (n 73) 1474 ff.
86 *Sanchez-Llamas v Oregon* 548 US 331 (2006) (US Supreme Court).
87 Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.
88 *Sanchez-Llamas v Oregon* (n 86) 340 ff.

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post-conviction proceedings.[89] The ICJ, in its *La Grand*[90] and *Avena*[91] decisions, had held that procedural default rules would run counter to Article 36 VCCR. It reasoned that it was primarily the authorities' fault for not notifying the defendants of their right that led to the procedural forfeiture.[92] The Supreme Court decided not to apply the construction of the ICJ and instead followed the US government's opinion that the ICJ's decision was not binding.[93] It cited the strong deference line of *Kolovrat* and found that the claim was procedurally barred.[94] In contrast, the dissenters[95] applied the weak deference line of *Elg*[96] and held that the plaintiffs may invoke Article 36 VCCR and that procedural forfeiture would violate these rights in certain cases.[97]

One day later, the court handed down its decision in *Hamdan v Rumsfeld*.[98] The case can be seen as part of a whole line of cases relating to the War on Terror and Guantanamo Bay.[99] In *Rasul v Bush*[100] the Supreme Court had rejected arguments that habeas corpus claims of foreign Guantanamo detainees would be unreviewable. In *Hamdi v Rumsfeld*,[101] mentioned in Chapter 2,[102] the court refused to be bound by factual assessments of the executive, which may classify an individual as an enemy combatant. *Hamdan* is finally directly concerned with the question of treaty interpretation. It concerned Salim Ahmed Hamdan who had been one of Osama bin Laden's former bodyguards and drivers. He was captured in 2001 during the Afghanistan War and had subsequently been detained in Guantanamo Bay.[103] The government sought to try him in front of an extraordinary

89 Ibid 337.
90 *LaGrand (Germany v United States of America) Judgment* ICJ Rep 2001, 466 (ICJ) 497.
91 *Avena and Other Mexican Nationals (Mexico v United States of America) Judgment* ICJ Rep 2004, 12 (ICJ) 57.
92 *Sanchez-Llamas v Oregon* (n 86) 352 f.
93 Ibid 355 f.
94 Ibid 355 ff.
95 Ibid 365 ff.
96 Ibid 378.
97 Ibid 365 ff.
98 *Hamdan v Rumsfeld* 548 US 557 (2006) (US Supreme Court).
99 Sitaraman and Wuerth (n 46) 1921 ff; Knowles (n 83) 106 ff.
100 *Rasul v Bush* 542 US 466 (2004) (US Supreme Court).
101 *Hamdi v Rumsfeld* 542 US 507 (2004) (US Supreme Court).
102 Chapter 2, III., 1.
103 *Hamdan v Rumsfeld* (n 98) 566 ff; for an analysis of this case cf as well Sloss (n 10) 499 ff; and Chesney (n 25) 1729.

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military commission.[104] The Supreme Court stopped the proceedings and found the trial to be unlawful.[105] One of the main points concerned whether Hamdan would be entitled to the protection offered by common Article 3 of the Geneva Conventions. The article applies in non-international armed conflicts and, inter alia, prohibits trial in front of non-regular courts and non-regular procedures. The executive stated that the war with Al-Qaeda could not be classified as non-international, and thus the article would be inapplicable.[106] In its respondent's brief, the government held that 'the president's determination is dispositive or, at a minimum, entitled to great weight'[107] and thus even tried to invoke a conclusive determination.[108] The Supreme Court disagreed and found that the established military commission neither constituted a regular court (like ordinary courts-martial) nor did the rules applied constitute a regular procedure.[109] It later continued its strict habeas corpus review in *Boumediene v Bush*.[110] The plurality opinion in *Hamdan* reached a conclusion without referring to any particular deference doctrine at all. In stark contrast, the dissenting Justices Thomas and Scalia applied the strong deference line.[111] They stated that where 'an ambiguous treaty provision ("not of an international character") is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation'.[112]

Sanchez-Llamas and *Hamdan* show that the court is still oscillating between the two deference lines. Also interesting is the court's reluctance in both decisions to continue developing the *Chevron* approach.[113]

104 *Hamdan v Rumsfeld* (n 98) 567 ff.
105 Ibid 566 ff.
106 Ibid 628 ff.
107 *Hamdan v Rumsfeld – Brief for Respondents,* available at <https://www.justice.gov/osg/brief/hamdan-v-rumsfeld-brief-merits> 48.
108 Sloss (n 10) 501 f.
109 *Hamdan v Rumsfeld* (n 98) 628 ff, 651 ff.
110 *Boumediene v Bush* 553 US 723 (2008) (US Supreme Court).
111 *Hamdan v Rumsfeld* (n 98) 718.
112 Ibid 719; cf Sloss (n 10) 504.
113 Although *Chevron* is alluded to, but not applied, in the Hamdan Dissent, *Hamdan v Rumsfeld* (n 98) 706; Dubinsky (n 24) 142.

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(d) Recent developments in treaty interpretation

Where do these decisions lead us concerning the court's future approach? Some commentators see the decision in *Hamdan* as a watershed or at least as a 'speed bump' in contrast to the earlier *Chevron* trend.[114] As has been shown by Cohen,[115] the Robert's Court from 2005 to 2015 showed no deference to the executive determination in at least four of the ten treaty interpretation cases (namely in *Hamdan*,[116] *Permanent Mission of India*,[117] *Bond II*,[118] and *BG Group*[119]). Compared to the high level of deference exercised before, this seems to be a trend pushing back the former strong *Chevron* inclinations.[120] In the same vein, Sitaraman and Wuerth argue that the Robert's Court contributed to the weakening of executive influence in foreign affairs cases.[121] Further pointing in this direction is the Fourth Restatement, published in 2018, which dropped the former independent paragraph on presidential authority concerning treaty interpretation[122] and now only refers to the topic as part of the general paragraph dealing with treaty interpretation.[123] It also added the caveat that courts 'ordinarily' give great weight to the executive interpretation.[124] It remains to be seen whether the Supreme Court, with now three justices appointed by former President Trump and one by President Biden will continue down this road.[125]

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114 Dubinsky (n 24) 142 f.
115 Cohen (n 73) 1475 ff.
116 *Hamdan v Rumsfeld* (n 98).
117 *Permanent Mission of India to the UN v City of New York* 551 US 193 (2007) (US Supreme Court).
118 *Bond v United States (Bond II)* 572 US 844 (2014) (US Supreme Court).
119 *BG Group plc v Republic of Argentina* 572 US 25 (2014) (US Supreme Court).
120 In the same direction Sloss (n 10); Dubinsky (n 24) 142 f.
121 Sitaraman and Wuerth (n 46) 1924 ff.
122 American Law Institute (n 61) § 326.
123 American Law Institute, *Restatement of the Law Fourth – The Foreign Relations Law of the United States – Selected Topics in Treaties, Jurisdiction and Sovereign Immunity* (American Law Institute Pub 2018) § 306 (6) Comment g and Reporters notes 10.
124 American Law Institute, *Fourth* (n 123) § 306 (6); in contrast American Law Institute, *Third* (n 61) § 326 (2) 'will give great weight'; Sean D Murphy and Edward T Swaine, *The law of US foreign relations* (OUP 2023) 498.
125 In *GE Energy Power Conversion Fr SAS, Corp v Outokumpu Stainless USA, LLC* 140 S Ct 1637 (2020) (US Supreme Court) the court with two new justices appointed by President Trump (unanimously) decided not to touch the issue: 'We have never provided a full explanation of the basis for our practice of giving weight to the Executive's interpretation of a treaty. Nor have we delineated the limitations of this practice, if any. But we need not resolve these issues today.'; Jean Galbraith,

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b) Germany

aa) Situation in former German legal orders

In Germany, one of the first traces of the approach towards executive authority in treaty interpretation is enshrined in the mentioned[126] 'Royal Prussian Decree Concerning the Interpretation of Treaties'[127] from 1823. According to the decree, the courts are bound to apply assessments of the Foreign Office regarding the validity, applicability, and interpretation of a treaty.[128] As we have seen, scholars heavily criticized this approach,[129] and in 1843, it was changed to a mere duty to ask for the opinion of the Foreign Office.[130] The trend towards judicial deference, which developed at that time in the United Kingdom,[131] thus never reached the same depths and level of entrenchment in the German tradition. The relatively weak level of deference in treaty questions continued after the founding of a German nation-state. Under previous German constitutional law, no procedural way existed to review an international treaty by challenging its implementing legislation.[132] Nevertheless, questions of treaty interpretation incidentally often became a matter for the courts to decide.

Under the Bismarck Constitution, judges rarely showed special respect for the executive.[133] For example, the Supreme Court of the Reich (*Reich-*

'Derivative Foreign Relations Law' (2023) 91 George Washington Law Review 1449, 1461 predicting executive friendly decisions.

126 Cf above, Chapter 2, III., 2.

127 Königlich-preußische Verordnung wegen streitig gewordener Auslegung von Staatsverträgen, Gesetzessammlung für die königlich preußischen Staaten 1823, 19.

128 Wilfried M Bolewski, *Zur Bindung deutscher Gerichte an Äußerungen und Maßnahmen ihrer Regierung auf völkerrechtlicher Ebene: Ein Beitrag zur Verrechtlichung der Außenpolitik* (Marburg 1971) 50.

129 Klüber, Johann L, *Die Selbstständigkeit des Richteramtes und die Unabhängigkeit seines Urtheils im Rechtsprechen: im Verhältniß zu einer preussischen Verordnung vom 25. Jänner 1823* (Andreä 1832); Bolewski (n 128) 53.

130 § 1 Verordnung vom 24. November 1843; Bolewski (n 128) 53.

131 Cf above, Chapter 1, II., 1., b).

132 Wilhelm Grewe, 'Auswärtige Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts Band III* (CF Müller 1988) 964; Bernhard Kempen, 'Art. 59' in Peter M Huber and Andreas Voßkuhle (eds), *Mangoldt/Klein/Starck: Kommentar* (7th edn, CH Beck 2018) mn 98.

133 For several cases with partial English translation see Ernst Schmitz and others, *Fontes Juris Gentium – Series A – Sectio II – Tomus 1 (Entscheidungen des Reichsgerichts in völkerrechtlichen Fragen)* (Carl Heymanns 1931) 150 ff.

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sgericht) decided independently on the interpretation of a customs treaty[134] and a German British-Extradition treaty.[135] It also decided independently that the latter treaty was terminated with the beginning of the war.[136] Likewise, the German Empire Military Court (*Reichsmilitärgericht*) decided in several cases on the meaning of different provisions of the Hague Convention with Respect to the Laws and Customs of War on Land[137] without asking for executive guidance.[138] In one instance concerning Article 6 of the Hague Convention, which prohibits the use of labour of POW's for tasks related to military operations, the court heavily relied on an executive order of the war ministry.[139] It found that the provision only prohibits tasks directly related to military operations, and thus prisoners may be obliged to deliver coal and other supplies to a factory producing grenades. However, even in wartime, the court did not end its examination with the executive's view but engaged in a thorough interpretation of the provision, taking into account the *travaux préparatoires*.[140] Triepel, who famously conceptualized the idea of dualism,[141] even remarked that the legal position of diplomats 'does not mean more to him [the judge] than the deliberations of a judicial scholar'.[142]

134 *Judgment from 22 May 1911* RGZ 45, 30 (Supreme Court of the Reich) 36; Bolewski (n 128) 74.

135 Albeit mentioning the executive position which is in line with the opinion of the court *Judgment from 22 September 1885* RGSt 12, 381 (Supreme Court of the Reich); Bolewski (n 128) 74.

136 *Decision from 23 August 1916* RGSt 50, 141 (Supreme Court of the Reich); Bolewski (n 128) 74.

137 Convention with respect to the laws and customs of war on land (Hague II) (29 July 1899).

138 *Judgment from 24 October 1917* RMilG 21, 278 (German Empire Military Court); *Judgment from 7 November 1917* RMilG 21, 283 (German Empire Military Court); *Decision from 9 February 1916* RMilG 20, 110 (German Empire Military Court) 115; *Judgment from 14 October 1916* RMilG 21, 85 (German Empire Military Court); Bolewski (n 128) 74 fn 3.

139 *Judgment from 30 December 1915* RMilG 20, 68 (German Empire Military Court); Bolewski (n 128) 75.

140 *Judgment from 30 December 1915* (n 139) 70 ff.

141 Cf already Chapter 1, II., 3., b).

142 Heinrich Triepel, *Völkerrecht und Landesrecht* (CL Hirschfeld 1899) 443 'die Rechtsansicht der Diplomatie bedeutet ihm nicht mehr als etwa die Ausführungen eines juristischen Schriftstellers' [my translation]; cf Bolewski (n 128) 61 f.

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The situation remained the same under the post-war Weimar Constitution.[143] For example, the Supreme Court of the Reich engaged on its own in an interpretation of the Versailles Treaty.[144] It also determined whether German-Russian Trade agreements[145] and the Treaty of Brest-Litovsk[146] remained in force.[147] Thus, in contrast to the United States, the German courts gave no special weight to executive decisions, even in questions of treaty termination. The Nazi period, of course, saw a shift towards executive power. The judges could still operate formally independently, but their actions were subject to the will of the *Führer*.[148] Foreign affairs acts of the *Führer* were not justiciable.[149]

bb) Situation under the Basic Law

(1) Early decisions concerning treaties – the Constitutional Court getting involved in foreign affairs

Except for the Nazi period, Germany had no strong tradition concerning deference to the executive in treaty interpretation. Nevertheless, by the end of the Second World War, many scholars believed that the availability of constitutional adjudication procedures to challenge a treaty was limited and treaties (and their implementing legislation) thus largely non-reviewable.[150] If this approach had been fortified, it would also have meant that the Constitutional Court would have relatively few opportunities to comment on the interpretation of international treaties.

143 For several cases with partial English translation see Schmitz and others (n 133) 140 ff.

144 *Judgment from 1 July 1926* RGZ 114, 188 (Supreme Court of the Reich); *Judgment from 21 January 1931* RGSt 63, 395 (Supreme Court of the Reich); Bolewski (n 128) 74 fn 1.

145 *Judgment from 23 May 1925* RGZ 111, 41 (Supreme Court of the Reich) 41 ff.

146 *Judgment from 20 September 1922* RGZ 105, 169 (Supreme Court of the Reich) 170 ff; *Judgment from 23 May 1925* (n 145) 43.

147 Bolewski (n 128) 74 fn 4.

148 Ibid 93.

149 Cf however Hans Schneider (n 2) 15 pointing out that the courts did not completely accept the general doctrine of 'acts of government', however, referring mainly to questions of damages; Bolewski (n 128) 93.

150 Above Chapter 2, II., 2.

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The first test of how the newly founded Constitutional Court would treat international treaties came about in a case regarding the 'Petersberg Agreement'[151] between the West German government and the occupying forces of the Allies. The agreement extended West Germany's sovereignty and entailed essential steps toward its western integration. As parliament was not involved, the opposition Social Democrats challenged the agreement[152] in front of the Constitutional Court by using *Organstreit* proceedings[153] and by claiming a violation of Article 59 of the Basic Law. The article contains the right of the legislature[154] to vote on treaties that regulate 'political relations'. The Constitutional Court dismissed the claim applying a very narrow reading of Article 59 of the Basic Law.[155] Noteworthy, however, is that the Constitutional Court dealt with the complaint as if it were an ordinary case related to domestic issues. It did not decide to limit the availability of the constitutional *Organstreit* procedure to the domestic sphere or to apply a non-reviewability doctrine. The court followed the same approach in cases brought by the opposition relating to a German-French trade agreement[156] and an agreement regulating the joint German-French administration of the Rhine port of Kehl on the German-French border.[157] In engaging in these kinds of conflicts, the Constitutional Court, in contrast to the US Supreme Court, laid the foundation to becoming a player in foreign affairs cases.[158]

151 *Judgment from 29 July 1952* (*Petersberger Abkommen)* BVerfGE 1, 351 (German Federal Constitutional Court).

152 The suit was explicitly aimed against the agreement itself, the court interpreted it as requesting a determination concerning its domestic applicability, cf *Judgment from 29 July 1952* (*Petersberger Abkommen)* (n 151) 371.

153 Cf above, Chapter 2, I., 2.

154 More specific the parliament (*Bundestag*).

155 Chapter 2, I., 2. and as well below Chapter 4, I., 3., b), aa).

156 *Judgment from 29 July 1952* (*Deutsch-Französisches Wirtschaftsabkommen)* BVerfGE 1, 372 (German Federal Constitutional Court).

157 *Judgment from 30 June 1953 (Kehler Hafen)* BVerfGE 2, 347 (German Federal Constitutional Court).

158 Cf as well below, Chapter 4, I., 3., c), aa).

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(2) The *Saarstatut* decision and the Washington Agreement – widening the scope of review

The Constitutional Court's early decisions involving foreign affairs implied its readiness to engage in foreign affairs cases. This approach came to a real test in the first leading foreign affairs judgment concerning the *Saarstatut* case.[159] The case laid down many themes that would shape the court's reasoning in foreign affairs. It concerned a treaty between Germany and France to put the Saar region, an area at Germany's western frontier with historical ties to Germany and France, under special administration until both parties reached a final agreement on its status. Before the agreement, France, as an occupying power, had used its influence and turned the Saar area into an autonomous region with close ties to the French Republic.[160] Thus, the treaty placing the Saar area under special administration effectively reduced France's influence. However, several members of the Bundestag challenged the domestic implementation of the treaty-making by using the 'abstract judicial review procedure,'[161] claiming that the treaty violated provisions of the Basic Law which call for the German nation's unity.[162]

The first question for the Constitutional Court was again if such a challenge of a treaty – by attacking its implementing legislation – was justiciable. Following a broad scholarly opinion at the time, the government held the view that as a 'government act' in the area of foreign affairs, the implementing statute would not be amenable to an abstract judicial review procedure.[163] Notwithstanding, the Constitutional Court established that statutes implementing treaties (and thus the treaty's content as such) are subject to constitutional review.[164] This meant the beginning of the end of the doctrine of non-reviewability in Germany. On the other hand, the Constitutional Court also used the case to develop doctrines to limit its review of international treaties and hence grant leeway to the executive.

159 *Judgment from 4 May 1955 (Saarstatut)* BVerfGE 4, 157 (German Federal Constitutional Court).
160 Ibid 171.
161 Cf above, Chapter 2, I., 2.
162 *Judgment from 4 May 1955 (Saarstatut)* (n 159) 164 f.
163 Ibid 161.
164 Ibid 162 f.

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It established the 'interpretation in accordance with the Basic Law'.[165] In general, the Constitutional Court will decide on its own on the meaning of a treaty[166] but presumes that the government does not want to enter into an international treaty by violating the Basic Law. If the wording is open to interpretation and more than one meaning appears possible, the meaning complying with the constitution will be applied.[167] Although it is up to the court to determine the understanding of a treaty, the approach ultimately favours the executive, as the text it has negotiated on the international plane will typically prevail.[168] In the *Saarstatut* case, the Constitutional Court went even further and developed the 'approaching the Basic Law doctrine' ('Annäherungstheorie'). Even if a treaty may not (entirely) adhere to the demands of the Basic Law, the court will not deem it unconstitutional if it does not infringe key constitutional provisions, only governs a transitional period and is directed in its overall tendency to achieve full compliance with the constitution.[169] It was within the government's broad discretion to determine if international negotiations lead to a maximum approximation of the Basic Law's demands.[170] Applying these doctrines, the court found no violation of the Basic Law in the *Saarstatut* case.

In the aftermath of the decision, scholars have tried to refine the 'approaching the Basic Law doctrine'.[171] Some authors called for a revival of the concept, applying it outside the historical context of occupation issues.[172] However, the Constitutional Court refrained from further devel-

165 Ibid 168 ff; Henning Schwarz, 'Die verfassungsgerichtliche Kontrolle der Außen- und Sicherheitspolitik' (Duncker & Humblot 1995) 150 ff; Volker Röben, *Außenverfassungsrecht: Eine Untersuchung zur auswärtigen Gewalt des offenen Staates* (Mohr Siebeck 2007) 207.

166 Cf e.g. *Decision from 7 July 1975 (Eastern Treaties Case (Ostverträge))* BVerfGE 40, 141 (German Federal Constitutional Court) 167.

167 *Judgment from 31 July 1972 (Grundlagenvertrag)* BVerfGE 36, 1 (German Federal Constitutional Court) 14; *Judgment from 4 May 1955 (Saarstatut)* (n 159) 168.

168 In this direction Klaus Stern, 'Außenpolitischer Gestaltungsspielraum und verfassungsgerichtliche Kontrolle' (1994) 8 NWVBl 241, 249.

169 *Judgment from 4 May 1955 (Saarstatut)* (n 159) 170.

170 Ibid 169, 178.

171 Franz-Christoph Zeitler, 'Verfassungsgericht und völkerrechtlicher Vertrag' (Duncker & Humblot 1974) 267 ff.

172 Christoph Engel, *Völkerrecht als Tatbestandsmerkmal deutscher Normen* (Duncker & Humblot 1989) 176 fn 746 with further references; Röben (n 165) 208.

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oping this line of jurisprudence[173] so that it can and should[174] be seen as confined to the exceptional circumstances of the post-war era. What remained from the *Saarstatut* decision was the decision for broad reviewability while at the same time offering margins of discretion to the executive.

Having already allowed the challenge of treaties by the *Organstreit* procedure and the abstract judicial review procedure, in the wake of the *Saarstatut* decision, the Constitutional Court finally allowed individuals to challenge treaties in the *Washingtoner Abkommen* case.[175] After the Second World War, West Germany and Switzerland had entered into a treaty stipulating that German citizens whose assets in Switzerland had been frozen during the war had to make payments to take back control of their property. The German owner of a house in Switzerland filed a complaint, and again the government insisted that an 'implementing statute would be a non-justiciable act of government in the field of foreign affairs'.[176] In line with the *Saarstatut* case, the Constitutional Court held that implementing statutes (and with them the treaty itself) enjoy no special status concerning the availability of judicial review and allowed the complaint.[177] However, it found no violation of property rights by the agreement.

(3) Fundamental Relations Treaty and *Hess* case – more leeway for the executive?

The Constitutional Court further refined the leeway for the executive in the *Fundamental Relations Treaty* case,[178] which concerned an agreement between West Germany and the GDR in 1972 as part of the 'new eastern policy' (*neue Ostpolitik*) of Chancellor Willy Brandt. According to the agreement, West Germany acknowledged the sovereignty of the GDR but

173 Nettesheim, Martin, 'Verfassungsbindung der Auswärtigen Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts, Band XI* (3rd edn, CF Müller 2013) 577.

174 Nettesheim (n 173) 577; Ulrich Fastenrath and Thomas Groh, 'Art. 59' in Karl H Friauf and Wolfram Höfling (eds), *Berliner Kommentar zum Grundgesetz* (Erich Schmidt Verlag 2018) mn 120.

175 *Decision from 21 March 1957 (Washingtoner Abkommen)* BVerfGE 6, 290 (German Federal Constitutional Court).

176 Ibid 294.

177 Ibid 294 f.

178 *Judgment from 31 July 1972 Grundlagenvertrag* (n 167).

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without formally recognizing it as a state. The government of the federal state of Bavaria challenged the treaty as violating the provisions of the Basic Law calling for unification.[179] The court reiterated its statement made in the *Saarstatut* case concerning the interpretation 'in accordance with the Basic Law'.[180] It continued to explain that when examining international treaties, it has to be kept in mind that the constitutional provisions regulating foreign affairs award an area of discretion[181] (*Spielraum*) for policy-making. It went on to state that

> *the principle of judicial self-restraint, to which the Constitutional Court adheres, does not mean a reduction or mitigation of its previously depicted competence but the renouncement to engage in politics. It aims at keeping open the space of free policy making for other constitutional bodies guaranteed by the constitution.*[182]

It is worth noting that the Constitutional Court used the English expression 'judicial self-restraint' in its original judgment, thus openly acknowledging recourse to US jurisprudence. Commentators criticized this for creating the impression that the Constitutional Court would forsake a competence assigned to it by the constitution.[183] Others described it as awareness of the court not to overstep the boundaries of its competence and not to engage in policy-making.[184] Applying its restrained approach, the court found no violation of the Basic Law. It refrained from further explicitly referring to 'judicial self-restraint' in later case law.[185]

Thus far, the cases had always dealt with situations where the executive had entered into a treaty that had to be tested for compliance with the Basic Law. The *Hess* decision,[186] which will also be discussed in connection with

179 Ibid 8 ff.
180 Ibid 14.
181 Ibid.
182 Ibid 14 f [my translation].
183 Grewe (n 132) 968; Kay Hailbronner, 'Kontrolle der Auswärtigen Gewalt' (1997) 56 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 8, 13; Christian Calliess, 'Auswärtige Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts, Band IV* (3rd edn, CF Müller 2006) 607; Nettesheim (n 173) 573.
184 Similar view Grewe (n 132) 968; only accepting this limited understanding Nettesheim (n 173) 573.
185 Frank Schorkopf, *Staatsrecht der internationalen Beziehungen* (CH Beck 2017) 347.
186 *Decision from 16 December 1980 (Hess Case)* BVerfGE 55, 349 (German Federal Constitutional Court); for an English translation cf 90 ILR 387.

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diplomatic protection below,[187] is probably the first time the court directly acknowledged executive discretion for interpreting a treaty already in existence and not itself under review.[188] It concerned Rudolf Hess who acted as Hitler's deputy until 1941, when he flew to the UK on his own initiative to negotiate a peace treaty and was arrested. After the war, he was tried in Nuremberg, found guilty of crimes against peace and served his sentence in a military prison administrated by the four Allied powers in Berlin. In 1979, he filed a constitutional complaint aimed at obliging the federal government to take appropriate and official steps towards the occupying powers to grant him freedom. In particular, he urged the government to apply to the United Nations for an instruction from the General Assembly to the Allied powers demanding his release.[189] The government denied an appeal to the UN, arguing inter alia that UN bodies would not review a request for relief in favour of Hess in the light of Article 107 UNC ('enemy state clause').[190] The court stated that even if a judge were to consider the executive assessment as flawed by his independent judgment, this would not provide a sufficient basis for an abuse of discretion.[191] In the absence of obligatory international dispute settlement, 'the assertion of the legal position under its own law made by the state itself must therefore bear much greater weight at the international level than it does in the context of a domestic legal order'.[192] It went on to state that

> *In this situation it is of prime importance for safeguarding the interests of the Federal Republic of Germany that it should be seen to act on the international plane* ***with a single*** **voice***, as perceived by the competent organs in foreign affairs. Consequently the courts must apply* ***great restraint in assessing whether or not legal positions adopted by those organs, which might possibly be incorrect from the standpoint of international law, therefore involve an abuse of discretion****. Such errors should only be taken into consideration if the adoption of a questionable legal position has resulted in the arbitrary treatment of a national which is totally in-*

187 Cf below Chapter 3, I., 1., b), bb), (3) and Chapter 3, I., 5., b).
188 Cf as well Nettesheim (n 173) 576.
189 *Hess Case* (n 186) 356; *Hess Case* ILR English Translation (n 186) 388.
190 *Hess Case* ILR English Translation (n 186) 389.
191 *Hess Case* ILR English Translation (n 186) 397.
192 Ibid.

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> *comprehensible from any reasonable standpoint including considerations of foreign policy.*[193]

Hence, the court awarded a very broad area of discretion to the executive, acknowledging a greater role in external than internal matters. Moreover, the court again used language associated with common law doctrines and the 'one voice principle'.[194]

The *Hess* case had a strong connection to the German atrocities during the Nazi period and the continued presence of Allied forces on German soil. However, the court also applied the approach developed in the *Hess* case in its subsequent *Teso* decision.[195] During the period of two Germany's, a key instrument of the Federal Republic of Germany's foreign policy was to claim the identity of the Federal Republic with the previous German *Reich* and to accept only a unitary citizenship for all Germans.[196] In the *Teso* decision, the court had to decide whether citizenship awarded solely based on the law of the GDR[197] also renders the recipient a citizen of the Federal Republic.[198] The Constitutional Court confirmed that view and deliberated whether this result would violate general public international law.[199] The court, directly invoking the *Hess* case,[200] stated that even if Germany's legal status was contested among states, it could only object to an assessment of the competent organs of the Federal Republic in the field of international law if it were evidently contrary to international law.[201] The *Hess* and *Teso* decisions are probably the closest the Constitutional Court ever came in directly acknowledging executive influence concerning questions of law. In contrast to factual determinations,[202] the court appears to be very careful in its formulations if an area of discretion exists to interpret a treaty.

193 Ibid 398 [my emphasis].
194 Schwarz (n 165) 525.
195 *Decision from 21 October 1987 (Teso Case)* BVerfGE 77, 137 (German Federal Constitutional Court) 'leading sentence' (*Leitsatz*) 4; Röben (n 165) 204.
196 Schorkopf (n 185) 81.
197 As opposed to citizenship which could also be based on the law of the Federal Republic.
198 *Decision from 21 October 1987 (Teso Case)* (n 195) 143.
199 *Decision from 21 October 1987 (Teso Case)* (n 195) 153 ff.
200 *Decision from 21 October 1987 (Teso Case)* (n 195) 167.
201 Ibid 166 f.
202 Cf above, Chapter 2, IV., 2.

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(4) *Pershing* case and *Out of Area*- executive influence in the subsequent development of treaties

The continuing west integration[203] and NATO membership led the Constitutional Court to develop another doctrine to secure executive influence in foreign affairs.[204] As mentioned,[205] according to the Basic Law, certain treaties warrant parliamentary approval.[206] In several cases, opposition parties in parliament claimed that the state parties had further developed a treaty without the possibility for the Bundestag to decide (again) on the question. Although the first traits of the doctrine can be found in an earlier decision concerning the establishment of the European Organisation for the Safety of Air Navigation,[207] the Constitutional Court has developed the main contours in decisions concerning the North Atlantic Treaty.[208]

The first *Pershing* case evolved with the NATO double-track decision to station medium-range nuclear-armed missiles within Germany with the consent of the German government. Members of the parliament claimed that this would require renewed approval of the North Atlantic Treaty by the Bundestag. The Constitutional Court held that when the parliament approved the treaty, it agreed to an 'integration framework,'[209] and as long as the decision stayed within that framework, there was no basis for a new parliamentary decision.[210] The court further elaborated on the doctrine in

203 Here used to refer to the political process of West Germany becoming part of the 'West', marked especially by joining the Western European Union, the European Coal and Steel Community and NATO.

204 Schwarz (n 165) 235 ff.

205 Cf Chapter 2, I., 2.

206 See Article 24 and 59 (2) of the Basic Law, cf as well Chapter 4, I., 3., b), aa).

207 *Decision from 23 June 1981* (*Eurocontrol)* BVerfGE 58, 1 (German Federal Constitutional Court) 37.

208 For an overview of the case law cf as well Christian Calliess, *Staatsrecht III* (3rd edn, CH Beck 2020) 83 ff.

209 Within the judgments, the terminology varies between 'integration programme' (*Integrationsprogramm*) and 'integration framework' (*Integrationsrahmen*); cf *Judgment from 22 November 2001 (NATO Concept)* BVerfGE 104, 151 (German Federal Constitutional Court) and English translation provided by the court available at <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2001/11/es20011122_2bve000699en.html;jsessionid=C72FE1B2FED92295EC7FF806EEE3E8D0.1_cid344>.

210 *Judgment from 18 December 1984 (Pershing II – Atomwaffenstationierung)* BVerfGE 68, 1 (German Federal Constitutional Court) 100 ff.

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the *Out of Area* case.[211] For the first time after the end of the Second World War, German troops had been deployed outside Germany to secure a no-flight zone in former Yugoslavia. Again, parts of the Bundestag claimed that this would leave the basis of the North Atlantic Treaty as defensive alliance.[212] The Constitutional Court, in a narrow 4–4 decision, found no violation of the Basic Law and stated that 'an interpretative development of a treaty through authentic interpretation and one on this basis evolving or such legal development enabling treaty practice'[213] is covered by the initial consent of the parliament. The court directly referred to Article 31 (3) (b) on the Vienna Convention on the Law of Treaties (VCLT)[214] and thus enabled the executive (by virtue of constitutional law) to make use of subsequent agreements and practice 'to preserve the foreign policy ability to act of the Federal Republic of Germany'.[215] In another decision concerning the New Strategic NATO Concept,[216] the court directly linked this with the area of discretion doctrine and stated that 'with reference to the traditional concept of the state in the sphere of foreign policy, the Basic Law has granted the Government a wide scope for performing its task [the concretization of the integration programme] in a directly responsible manner'[217] and that this area of discretion also applies to the completion of the 'integration framework'.[218] Thus, the Constitutional Court does not urge the executive to apply a narrow interpretation of a treaty but awards a large area of discretion, especially to enable mutual development of the treaty by the state parties. The Constitutional Court also applied the 'integration framework' doctrine in a case concerning the war in Afghanistan, when the participation of German troops was challenged, and it again found no violation.[219] In a recent decision, it applied the integration framework

211 *Judgment from 12 July 1994 (Out-of-Area-Einsätze)* BVerfGE 90, 286 (German Federal Constitutional Court).
212 *Judgment from 12 July 1994 (Out-of-Area-Einsätze)* (n 211) 320.
213 Ibid 362 [my translation].
214 Ibid 364; cf also later decisions, *Judgment from 22 November 2001 (NATO Concept)* (n 209) 207.
215 *Judgment from 12 July 1994 (Out-of-Area-Einsätze)* (n 211) 364.
216 *Judgment from 22 November 2001 (NATO Concept)* (n 209).
217 Ibid 207, official English translation mn 149 [my insertion].
218 Ibid 210, official English translation mn 155; cf as well *Judgment from 3 July 2007 (Afghanistan Einsatz)* BVerfGE 118, 244 (German Federal Constitutional Court).
219 Applying the integration framework doctrine as well: *Judgment from 7 May 2008 (Awacs Turkey)* BVerfGE 121, 135 (German Federal Constitutional Court) 158; *Judgment from 3 July 2007 (Afghanistan Einsatz)* (n 218).

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doctrine to the UN Charter.[220] A minority of parliament had challenged German military involvement against ISIS in Iraq and Syria. The opposition contested the broad interpretation of Article 51 UNC to allow military action against non-state actors. The Constitutional Court found this to be a reasonable (*vertretbare*) interpretation by the government and covered by the 'integration framework' of the UN Charter.[221]

(5) Recent developments

As we have seen, aside from the integration framework doctrine, the Constitutional Court has been cautious in acknowledging a general area of discretion for executive treaty interpretations.[222] The *Hess* and *Teso* line of case law appears to be 'not [...] expressly overruled but tacitly abandoned or at least restricted'.[223] However, with its recent appeal judgment in the *Ramstein* case, the Federal Administrative Court now puts pressure on the Constitutional Court to rule on the issue.[224] The case, mentioned in the introduction, concerns whether the German government can be obliged to intervene regarding the use of the air base for allegedly illegal drone strikes by the US. The Higher Administrative Court had ruled that no area of discretion exists for the government to decide whether the drone strikes were in accordance with international law.[225] The Federal Administrative Court reversed that decision and explicitly and extensively relied on the

220 *Decision from 17 September 2019 (ISIS Case)* BVerfGE 152, 8 (German Federal Constitutional Court).

221 Ibid.

222 In contrast to factual assessments, cf above, Chapter 2, IV., 2.

223 Thomas Giegerich, 'Can German Courts Effectively Enforce International Legal Limits on US Drone Strikes in Yemen?' (2019) 22 ZEuS 601, 613.

224 *Judgment from 25 November 2020 (Ramstein Drone Case)* BVerwGE 170, 345 (Federal Administrative Court); critical Mehrdad Payandeh and Heiko Sauer, 'Staatliche Gewährleistungsverantwortung für den Schutz der Grundrechte und des Völkerrechts' (2021) 74 NJW 1570; positive review Thomas Jacob, 'Drohneneinsatz der US-Streitkräfte im Jemen: Keine unbegrenzte Verantwortung Deutschlands für extraterritoriale Sachverhalte' (2021) jM 205; positive review Patrick Heinemann, 'Tätigwerden der Bundesregierung zur Verhinderung von Drohneneinsätzen der USA im Jemen von der Air Base Ramstein' (2021) 40 NVwZ 800 f.

225 *Judgment from 19 March 2019 (Ramstein Drone Case)* 4 A 1361/15 (Higher Administrative Court Münster) mn 554; on the case cf Helmut Philipp Aust, 'US-Drohneneinsätze und die grundrechtliche Schutzpflicht für das Recht auf Leben: „German exceptionalism"?' (2020) 75 Juristen Zeitung 303.

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Hess decision.[226] In line with the *Hess* decision, it stressed the absence of an international obligatory dispute settlement body and the resulting importance of the legal positions taken by the states themselves, especially concerning the development of customary law.[227] Hence, the court awarded an area of discretion within a reasonable (*vertretbare*) spectrum of legal assessments to the executive.[228] Although the remarks related primarily to customary international law, they are equally applicable to treaty interpretation.[229] The claimants launched a constitutional complaint procedure[230] and the case is now pending before the Constitutional Court.[231] As the Federal Administrative Court explicitly relied on the *Hess* decision, the Constitutional Court now can hardly avoid ruling on the issue and is given a chance to clarify its jurisprudence.

(6) Excursus – Cases concerning interim relief

This subchapter focused on ordinary procedures before the Constitutional Court. However, it should be mentioned that the Constitutional Court also applies a special standard regarding interim relief procedures.[232] The Constitutional Court may award such interim relief to parties under the 'Act on the Federal Constitutional Court'.[233] Theoretically, this could bar the executive from signing an international treaty.[234] In assessing whether to grant relief, the court ascertains whether the claim is obviously inadmissible or unfounded.[235] It then engages in a 'double hypothesis,' assessing the effects if the claimant succeeded in the main proceedings but would have been denied interim relief and vice versa: if the claimant lost the case but would

226 *Judgment from 25 November 2020 (Ramstein Drone Case)* (n 224) mn 57.
227 Ibid mn 58.
228 Ibid mn 59.
229 In fact, the case itself raises questions not only of customary but also treaty law (especially concerning humanitarian law), cf mn 72 ff.
230 Cf already above, Chapter 2, I., 2.
231 Under file No 2 BvR 508/21.
232 Hailbronner (n 183) 32 ff.
233 § 32 Act on the Federal Constitutional Court.
234 Especially if the main proceedings relate to an abstract judicial review procedure.
235 Hillgruber Christian and Goos Christoph, *Verfassungsprozessrecht* (5th edn, CF Müller 2020) 329.

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have been awarded interim relief.[236] Comparing these consequences, the court awards an injunction if the adverse effects for the claimant prevail.

The first time a treaty was part of such an interim relief procedure concerned the 'Eastern Treaties' that West Germany had entered into with the Soviet Union and Poland. West Germany acknowledged that once Prussian territory was now part of these countries, and a former landowner tried to block the treaty from being signed. The court established that the test to determine if the implementing statute for an international treaty of high political importance has to be blocked is especially strict.[237] This standard was also applied in interim proceedings, which tried to stop the mentioned Fundamental Relations Treaty[238] and the German Reunification Treaty.[239] In these instances, the government almost always claimed that halting the treaty signing would have serious foreign policy consequences.[240] As the Constitutional Court applies its broad area of discretion[241] concerning the possible behaviour of international negotiation partners,[242] the executive assessment in interim relief procedures is tantamount to a binding effect.[243] In a more recent case, the court denied interim relief against the signing of the CETA agreement between Germany and Canada, relying on the executive assessment of Canada's possible reaction if the court were to stop

236 Ibid 330 ff.

237 *Decision from 22 May 1972 (Eastern Treaties Case Interim Relief I)* BVerfGE 33, 195 (German Federal Constitutional Court) 197; *Decision from 31 May 1972 (Eastern Treaties Case Interim Relief II)* BVerfGE 33, 232 (German Federal Constitutional Court) 234.

238 *Decision from 4th June 1973 (Fundamental Relations Treaty Interim Relief I)* BVerfGE 35, 193 (German Federal Constitutional Court) 196.

239 *Decision from 11 December 1990* (*German Reunification Treaty Interim Relief)* BVerfGE 83, 162 (German Federal Constitutional Court) 172.

240 *Judgment from 18 June 1973 (Fundamental Relations Treaty Interim Relief II)* BVerfGE 35, 257 (German Federal Constitutional Court) 262 f; *Decision from 11 December 1990* (*German Reunification Treaty Interim Relief)* (n 239) 174; *Decision from 4th June 1973 (Fundamental Relations Treaty Interim Relief I)* (n 238) 197 f; *Decision from 22 May 1972 (Eastern Treaties Case Interim Relief I)* (n 237) 198; *Decision from 31 May 1972 (Eastern Treaties Case Interim Relief II)* (n 237) 234 f.

241 Cf above, Chapter 2, IV., 2. and III., 2.

242 Cf also already *Decision from 22 May 1972 (Eastern Treaties Case Interim Relief I)* (n 237).

243 Referring to the 'Fundamental Relations Treaty Interim Case' as entailing a 'political questions approach' Christian Tomuschat, 'Auswärtige Gewalt und verfassungsgerichtliche Kontrolle – Einige Bemerkungen zum Verfahren über den Grundvertrag' (1973) 26 DÖV 801, 807; Hailbronner (n 183) 32.

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the treaty.[244] Consequently, the Constitutional Court has never halted the signing of an international treaty in interim proceedings.

c) South Africa

aa) Older South African constitutions

The traditional approach concerning treaty interpretation in South Africa again closely followed the British example. The British Empire's courts treated the interpretation of treaties as pure questions of law and thus also denied applying the certification doctrine[245] to such cases.[246] Even if treaty-making has often been termed an act of state,[247] Moore[248] acknowledged that the mere construction of a treaty does not qualify as an act of state.[249] Mann shared this view:

> *[T]here* ***does not exist in England any counterpart of the principle which has frequently been asserted by the Supreme Court of the United States*** *and according to which 'a construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.*[250]

In the same vein, the South African scholar Sanders held it improper for the executive to 'certify categorically […] on the status or interpretation of a

244 *Judgment from 13 October 2016 (CETA Interim Relief)* BVerfGE 143, 65 (German Federal Constitutional Court) 91.

245 Cf above, Chapter 2, III., 3.

246 Jenkins' approach concerning a binding force in treaty questions was abolished quite early cf above, Chapter 1, II., 1., a) and Arnold McNair, *Law of Treaties* (OUP 1961) 358.

247 Critical: Frederick A Mann, *Studies in International Law* (OUP 1973) 358; AJGM Sanders, 'The Justiciability of Foreign Policy Matters under English and South African Law' (1974) 7 Comparative and International Law Journal of Southern Africa 215, 216; Gretchen Carpenter, *Introduction to South African Constitutional Law* (Butterworths 1987) 172.

248 Cf above, Chapter 1, II., 1., b).

249 William Moore, *Act of state in English law* (EP Dutton and Company 1906) 90 ff.

250 Mann, *Foreign Affairs* (n 2) 112 [my emphasis]; Mann of course was in general opposed to deference see Campbell McLachlan, *Foreign relations law* (CUP 2016) 60, in this regard his ideas however probably reflected the English main stream position.

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treaty'.[251] Accordingly, the South African courts seemed to award no special respect to the executive's view while construing treaties, as can be seen from the *Minister of the Interior v Bechler* case[252] decided in 1948 in front of the Appellate Division.[253] The case concerned the extradition of individuals with German citizenship from South Africa. It raised the question of the correct interpretation of a provision of the Versailles Treaty, which could have rendered the applicants stateless and thus no 'enemy aliens' subject to extradition.[254] Although the executive aimed at extraditing the applicants, the court noted 'the interpretation of [the relevant provision of the treaty] is a matter which this Court must decide itself'[255] and construed the clause without mentioning a special weight for the executive. Admittedly, it found that the applicants could be extradited in the end.

In the United Kingdom, as in the United States,[256] a stronger executive influence was acknowledged concerning whether a treaty was terminated,[257] which also appears to be true for South Africa. As Sanders pointed out, 'whether the State or any foreign State is a party to a treaty, or whether a treaty is in force, are mixed questions of recognition and facts of law'.[258] Although they 'cannot as such be correctly regarded as matters the determination of which is solely in the hands of the executive [...] [T]his does of course not exclude the possibility of information being provided or of assistance to the court'.[259] However, the executive often issued certificates on these mixed questions, and the courts did not clearly spell out how far they accepted the executive assessment as binding. This can be seen in *S v Devoy*[260] decided in 1971, the leading case establishing the certification doctrine in South Africa.[261] It concerned whether an extradition treaty between South Africa and what is today Malawi was still in existence after Malawi (Nyasaland) left the Federation of Rhodesia and Nyasaland and became independent. The executive had issued a certificate dealing with

251 AJGM Sanders, 'Our State Cannot Speak with Two Voices' (1971) 88 South African Law Journal 413, 415 [my omission].
252 *Minister of the Interior v Bechler* 1948 3 All SA 237 (A) (Appellate Division).
253 (South Africa's highest court under the old constitutions).
254 *Minister v Bechler* (n 252) 236 ff.
255 Ibid 237 [my insertion].
256 Cf this Chapter, I., 1., a).
257 Mann, *Foreign Affairs* (n 2) 113.
258 Sanders, 'Two Voices' (n 251) 415.
259 Ibid [my adjustments and omissions].
260 *S v Devoy* 1971 (3) SA 899 (A) (Appellate Division).
261 On the case cf Dugard and others (n 2) 101.

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the recognition of the new state of Malawi as well as with the continuation of the treaty,[262] and the court stated that it 'accepts the certificate of the Minister as a statement of the matters therein mentioned'.[263] The court then followed the executive view concerning recognition and arrived at the same conclusion concerning the continuation stating that it was 'fully within the competence of the Government of the Republic of South Africa to recognize, in relation to the Agreement, first Nyasaland and thereafter Malawi'.[264] It thus intermingled both questions and did not clarify how far the conclusive effect of the certificate went.[265]

Under the older South African constitutions, treaty interpretation was thus a matter for the judiciary. However, the executive had a certain influence, especially concerning the status of treaties, by using and arguably overstretching the certification doctrine.

bb) New South African Constitution

Courts and scholars under the new South African system have not directly addressed deference in treaty interpretation cases. However, constitutional provisions and, especially, cases where the executive interpretation and application of a treaty (or its respective domestic incorporation) were challenged, allow us to shed light on the courts' level of independence.

The new South African Constitution, in various provisions, calls upon the judiciary to take into account international (treaty) law and thus implies an essential role for its courts in interpretation. Section 39 (1) (b) of the South African Constitution urges the courts to consider international law when interpreting the Bill of Rights. In the same vein, Section 233 of the Constitution demands that every legislation (including implementing legislation) is to be interpreted consistently with international law. As Tladi correctly observed, 'while these interpretive provisions do not directly call for the interpretation of international law, there is an indirect requirement, or at the very least an expectation, that international law will be interpre-

262 *S v Devoy* 1971 (1) SA 359 (N) (Natal Provincial Division) at 361.
263 *S v Devoy* (n 260) 907.
264 Ibid 908.
265 Sanders appears to be of the opinion that the court only accepted the recognition as conclusive, this however appears to be a very well-meaning reading of the judgment which is at least ambiguous in this part, Sanders, 'Two Voices' (n 251) 416.

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ted'.[266] In several cases involving foreign affairs, the judiciary has shown a very independent approach concerning the interpretation of treaties, often despite contrary interpretations by the executive.

Harksen v President of the Republic of South Africa,[267] decided in 1997, can be seen as a contemporary equivalent to *S v Devoy*.[268] As in *Devoy*, the question arose if an extradition treaty, this time between Germany and South Africa, remained in existence after Germany's surrender in the Second World War. The executive issued a certificate that no extradition treaty existed between the countries,[269] but the court was not ready to apply the certification doctrine and stated

> *[With] regard to the view which we take of this matter, it is unnecessary to decide whether the certificate by the Minister of Justice is binding on the Court and we accordingly proceed on the basis that it is not.*[270]

It then reached the same conclusion as the executive after an independent and lengthy assessment of international law.[271] Although the case does not decisively settle the question, it shows that courts are less than inclined to refer to the certification doctrine in questions of the existence of a treaty. This approach also appears to be followed in more recent jurisprudence. *President of the Republic of South Africa v Quagliani*[272] also concerned whether the parties had entered validly into an extradition agreement. In contrast to *Harksen*, the problems in *Quagliani* primarily concerned not international law but domestic provisions allowing the president to delegate his treaty-making authority.[273] Still, the court could have mentioned a special weight for the executive's position but refrained from doing so, and it likewise did not mention the certification doctrine.

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266 Dire Tladi, 'Interpretation of Treaties in an International Law-Friendly Framework: The Case of South Africa' in Helmut Philipp Aust and Georg Nolte (eds), *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (OUP 2016) 134, 138.

267 *Harksen v President of the Republic of South Africa* 1998 (2) SA 1011 (C) (Cape Provincial Division); cf for the case as well Dugard and others (n 2) 101 f.

268 Cf above, this Chapter, I., 1., c), aa).

269 *Harksen v President of the Republic of South Africa* (n 267) 1019.

270 Ibid 1020 [my adjustment].

271 Ibid 1020 ff.

272 *President of the Republic of South Africa v Quagliani; President of the Republic of South Africa v Van Rooyen; Goodwin v Director General, Department of Justice and Constitutional Development* 2009 (2) SA 466 (CC) (Constitutional Court); on the case cf as well Dugard and others (n 2) 83 ff.

273 Ibid mn 18 ff.

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Another case exemplifying the courts' independent approach concerns the case of the former president of Sudan, Al-Bashir.[274] The facts of the case will be set out in more detail below;[275] here, it suffices to state that the judges had to decide on the meaning of a provision of a 'host country agreement' between South Africa and the African Union. The main question was if Article 8 of the said agreement conferred immunity only to delegates of the African Union or delegates of the member states in general and thus Al-Bashir himself as president of Sudan.[276] The court adopted the former interpretation and held Al-Bashir not to be covered by immunity, even though the executive explicitly took the latter view. Nowhere in the judgment was a special 'weight' for the executive in questions of treaty interpretation mentioned.

Further proof of the courts' independent role can be found in two decisions rendered in 2017 and mentioned in Chapter 2.[277] Although they were primarily concerned with the interpretation of constitutional provisions dealing with treaty-making in South Africa, they incidentally also shed light on the courts' willingness to defer to the executive. The just mentioned case concerning Sudan's President Al-Bashir led to an attempted withdrawal from the ICC statute by the Zuma administration. This triggered the question of whether parliamentary consent is necessary, not only to render a treaty binding on South Africa, as Section 231 (2) of the South African Constitution demands but also to withdraw from an international treaty.[278] In front of the High Court,[279] the executive argued against such an interpretation invoking its 'primary role in international relations'[280] and offered an interpretation of the Vienna Convention on the Law of Treaties to support

274 *Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others (Bashir Case)* 2016 (3) SA 317 (SCA) (Supreme Court of Appeal); cf on the case as well Dugard and others (n 2) 367 ff.

275 Cf this Chapter, I., 4., c).

276 Dire Tladi, 'Interpretation and international law in South African courts, The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 African Human Rights Law Journal 310, 322 ff.

277 Cf above, Chapter 2, I., 3.

278 On the case and the topic in general Dugard and others (n 2) 78 f.

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

280 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279) mn 38.

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its claim.[281] Nevertheless, the court found against the government and did not mention a special weight for the interpretations offered.

The *Earthlife*[282] case provides a similar picture.[283] The court had to decide whether an international treaty concerning nuclear power supply required prior approval by parliament under the South African Constitution or could merely be tabled as a 'technical agreement'. Thus, it first had to decide on the nature of the treaty.[284] The government stated that the issue would be non-justiciable as it required the court to interpret and construe an unincorporated treaty and that, in any case, it had to be interpreted as being only a technical agreement.[285] The court, however, cited the *Kaunda* decision[286] and stated, 'the Constitutional Court has made clear that all such exercises of public power are justiciable in that they must be lawful and rational. These include exercises of public power relating to foreign affairs'.[287] It finally concluded that the treaty was not a mere technical agreement, that it demanded prior parliamentary approval, and that the decision to only table it was unconstitutional.

The last line of cases relevant to the South African approach towards treaty interpretation concerns the Southern African Development Community. As mentioned in the introduction,[288] the Southern African Development Community was established in the early 1990s to foster regional development by emulating the ideas of the common market of the European Union.[289] By additional protocol, a tribunal was created, which allowed direct access to the court for individuals. The tribunal had been used by Zimbabwean farmers who had been expropriated without compensation by the Zimbabwean government during its land reform and found no redress in Zimbabwean courts. Earlier in *Government of the Republic of Zimbabwe*

281 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279) mn 40.
282 *Earthlife Africa v Minister of Energy* 2017 (5) SA 277 (WCC) (High Court – Western Cape Division).
283 Cf above, Chapter 2., I., 3. and below, Chapter 4, I., 3., b), bb); cf Dugard and others (n 2) 74 ff.
284 Dugard and others (n 2) 77.
285 *Earthlife Africa v Minister of Energy* (n 282) 233 f, 260 ff.
286 Chapter 2, IV., 3.
287 *Earthlife Africa v Minister of Energy* (n 282) 261.
288 Cf above, Introduction I.
289 Karen Alter, James T Gathii and Laurence Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 EJIL 294, 306.

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v Fick the Supreme Court of Appeal[290] and the Constitutional Court[291] decided independently on whether the tribunal had been duly established under the provisions of the SADC treaty.[292] In the previously introduced case[293] of *Law Society of South Africa and others v President of the Republic of South Africa*,[294] the question arose if the decision of the South African president to sign an SADC protocol that would bar access of individuals to the SADC tribunal was constitutional. In an unfortunately hard-to-follow judgment,[295] the court found that the protocol was procedurally and substantially not in compliance with the SADC treaty and ordered the president to withdraw his signature.[296] Again, no special role for the executive in interpreting the provisions of the SADC treaty was mentioned. The South African courts thus appear to have shaken off their earlier more cautious remarks in cases like *Harksen* and now determine the meaning of international treaties largely independently.

d) Conclusion on treaty interpretation

As early case law from the United States shows, in the 19th century, the courts rarely acknowledged a special role for the executive branch and independently determined the meaning of a treaty. This is in line with the founders' rejection of the traditional position. By the end of the 19th and

290 *Government of the Republic of Zimbabwe v Fick and others* 2016 JOL 37271 (SCA) (Supreme Court of Appeal) para 32 ff.

291 *Government of the Republic of Zimbabwe v Fick and others* 2013 (5) SA 325 (CC) (Constitutional Court) 338 ff.

292 On the case as well Dugard and others (n 2) 98.

293 Cf above, Introduction I.

294 *Law Society of South Africa and others v President of the Republic of South Africa and others (Southern Africa Litigation Centre and another as amici curiae) (SADC Case)* 2019 (3) BCLR 329 (CC) (Constitutional Court); cf for an analysis of the case Riaan Eksteen, *The Role of the highest courts of the United States of America and South Africa and the European Court of Justice in Foreign Affairs* (Springer 2019) 305; cf as well Dugard and others (n 2) 114 ff (on the High Court decision).

295 I share the critique by Tladi on this point, Dire Tladi, 'A Constitution Made for Mandela, A Constitutional Jurisprudence Developed for Zuma: The Erosion of Discretion of the Executive in Foreign Relations' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 215, 222.

296 *Law Society of South Africa and others v President of the Republic of South Africa and others (Southern Africa Litigation Centre and another as amici curiae) (SADC Case)* (n 294) 343 ff.

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beginning of the 20th century, the courts started to apply a doctrine of discretion to the executive assessments, an approach which solidified during the Sutherland Revolution. From then on, the courts oscillated between a strong deference line and a 'counter deference' line of case law. In the 1990s, the courts started to apply the *Chevron* doctrine to interpretation cases and pushed the approach towards conclusiveness. This trend, however, appears to have been weakened or even reversed in more recent decisions. Although the 'correct' level of deference is still debated, it appears to be settled law that the US courts grant a margin of discretion to executive treaty interpretations.

In contrast to the United States, older German law in the 19th century embraced the traditional position when it enacted the 'Royal Prussian Decree Concerning the Interpretation of Treaties' and established a conclusiveness approach. However, the decree was met with heavy criticism and soon repealed. German scholars and courts saw interpretation as a core judicial function and, in general, determined the meaning of treaties independently. After the Second World War, the German legal system was guided by this basic position, and the Constitutional Court was eager to bring virtually every matter of foreign affairs within its review capacity. As a counterweight, it carved out certain exceptions where it applies a lower review standard. Concerning the subsequent development of treaties, the Constitutional Court endorses an area of discretion for the executive by recourse to the 'integration framework doctrine'. Regarding treaty interpretation in general, it did not reiterate its doctrine of discretion approach, which it alluded to in some decisions in the 1980s. In the light of the recent *Ramstein* case, it will now likely have to rule on the issue.

South Africa adopted the British approach concerning treaty interpretation. By the time of the South Africa Act, the classical canon of areas where an executive certificate could be issued was already in development. Treaty interpretation was never part of that canon, but the doctrine was rarely applied strictly, and this secured a conclusive influence for the executive, especially concerning the status of a treaty. However, the certification doctrine is no longer applied in treaty cases by contemporary South African courts. In the latest case law in particular, the judiciary has shown a very independent approach in determining the meaning of international treaties.

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2. Recognition of states and governments

This subchapter will examine the judicial review of executive decisions concerning the recognition of states and governments. Recognition, in general, is a unilateral act of a state under international law confirming that a specific legal situation or consequence will not be called into question.[297] Concerning states, the recognizing state acknowledges the character of another state as a subject of international law.[298] Regarding governments, the recognizing state acknowledges that a person, group, or party represents the state on the international plane.[299] However, recognition is a purely judicial act and must not be equated with the factual question[300] of whether a state exists or of whether a government has effective control.[301] This distinction entails the possibility that a state or government is objectively existent or in control but not recognized and vice versa.[302]

By the end of the 20th century, many countries, including Germany,[303] the United States,[304] and the United Kingdom,[305] had declared an end to the custom of formal recognition of governments. However, abandoning the practice proved difficult. Especially in situations of regime change, withholding and granting recognition can have serious impacts. Even states which officially subscribe to abstention do still issue recognitions, as has been done recently by Germany and the United Kingdom in the case of Venezuela.[306] The topic has also become relevant again concerning a possi-

297 Stefan Talmon, *Recognition of governments in international law: with particular reference to governments in exile* (OUP 2001) 29 ff; Jochen A Frowein, 'Recognition' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 1.

298 Frowein (n 297) mn 10.

299 Ibid mn 18.

300 Albeit even according to the prevalent declaratory theory, recognition does play at least some role as an entity not recognized by any other state at all will not be a state as it is not able to engage on the international plane.

301 Cf as well Mann, *Foreign Affairs* (n 2) 24.

302 Cf ibid 37.

303 Bundestag, 'Antwort der Staatsministerin Adam-Schwaetzer', Drucksache 11/4682; Helmut Philipp Aust, 'Die Anerkennung von Regierungen: Völkerrechtliche Grundlagen und Grenzen im Lichte des Falls Venezuela' (2020) 80 ZaöRV 73, 74.

304 Matthias Herdegen, *Völkerrecht* (CH Beck 2020) 87.

305 McLachlan (n 250) 382 ff, including further common wealth states.

306 For the UK recognition of Venezuela cf *Deutsche Bank AG London Branch v Receivers Appointed by the Court Central Bank of Venezuela v Governor and Company of the Bank of England and others* [2021] QB 455 (Court of Appeal); for the UK

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ble recognition of the Taliban regime in Afghanistan,[307] Russia's recognition of 'separatist' republics in Ukraine[308] or the recognition of a Palestinian state.[309] The recognition of states and governments thus remains an important field of foreign relations law.

Especially in the case of governments, recognitions have sometimes been qualified as de jure or de facto. The terms are misleading as they *both* relate to the judicial act of recognition, not the actual situation on the ground. A mere de facto recognition implies a degree of hesitancy and a lower amount of legitimacy.[310] The distinction has long been thought to have lost much of its relevance.[311] However, in recent times English courts, in particular, have

recognition of Libya cf *Mohamed v Breish* [2020] EWCA Civ 637 (Court of Appeal); for an analysis of the Deutsche Bank Case Peter Webster, 'The Venezuelan Gold decision: recognition in the English Court of Appeal' EJIL: Talk! from 2 November 2020 available at <https://www.ejiltalk.org/the-venezuelan-gold-decision-recognition-in-the-english-court-of-appeal/>; Aust (n 303) 80; critical of this trend McLachlan (n 250) 414.

307 Lukas Kleinert, 'Recognition of a Taliban Government?: A Short Overview on the Recognition of Governments in International Law' Völkerrechtsblog from 8 September 2021 <https://voelkerrechtsblog.org/de/recognition-of-a-taliban-government/>.

308 Marc Weller, 'Russia's Recognition of the 'Separatist Republics' in Ukraine was Manifestly Unlawful' EJIL: Talk! from 9 March 2022 available at <https://www.ejiltalk.org/russias-recognition-of-the-separatist-republics-in-ukraine-was-manifestly-unlawful/>.

309 James Landale, 'Spain, Norway and Ireland recognise Palestinian state' BBC from 28 May 2024 available at <https://www.bbc.com/news/articles/cl77drw22qjo>.

310 This at least appears to be the common usage, there is much confusion about the definition of 'de facto' and 'de jure', cf the overview in Ti-Chiang Chen, *The international law of recognition – With special reference to practice in Great Britain and the United States* (Frederick A Praeger 1951) 270 ff (referring to the common usage as 'constitutional law sense' in contrast to the 'international law sense'); Oppenheim uses 'de facto' recognition in a sense, which signals a less firm establishment of control but not necessarily a lower amount of legitimacy, see Lassa Oppenheim, *International Law: A Treatise* (8th edn, Longmans Green 1955) para 46 (which appears to correspond to Chen's 'international law sense'); mixing both understandings Rudolf H Bindschedler, *Die Anerkennung im Völkerrecht* (Müller 1961) 5; at least English courts allow a simultaneous recognition of one government de jure and one de facto, cf *Deutsche Bank AG London Branch v Receivers Appointed by the Court Central Bank of Venezuela v Governor and Company of the Bank of England and others* (n 306) 504.

311 Chen (n 310) 270 ff; Dugard and others (n 2) 170; Frowein (n 297) mn 17.

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begun to (once again) distinguish between the types[312] but apply the same standard concerning judicial review.[313]

The recognition of a state or government not only affects the international plane but also acknowledges its existence and certain rights (e.g., the right to sue and state immunity) in the domestic legal system.[314] The question of this chapter is whether the judiciary is free to conduct its independent assessment in this regard or whether and to what extent it has to treat the executive recognition or non-recognition as binding. Most cases in this area arise from private disputes where one party is interested in having a state or government acknowledged in front of a court.[315] Although the recognition of a state and of a government are two different questions, they are often deeply intertwined.[316] Courts often apply the same principles to both issues.[317] This subchapter will only differentiate among the categories where the courts apply different approaches.

a) United States

In their early jurisprudence, US courts closely relied on the executive assessment concerning the existence of states and the related issue of the control of governments. The basis for the strong executive hold in this field lies in the wording of Article 2 (2) and (3) of the US Constitution, which grants the president the right to appoint and receive ambassadors.[318] In his 'Pacificus' letters, which we analysed in Chapter 1,[319] Hamilton inferred from this express power of the president the right to decide 'in the case of a Revolution of Government in a foreign Country, whether the new rulers

312 For the different domestic effect of de jure and de facto recognition in English law cf *Deutsche Bank AG London Branch v Receivers Appointed by the Court Central Bank of Venezuela v Governor and Company of the Bank of England and others* (n 306) 500 ff.

313 Ibid 509: 'Accordingly a formal statement of recognition by HMG is conclusive, regardless of whether it refers to recognition de jure, recognition de facto or both'.

314 Chen (n 310) 133 ff.

315 Daniel P O'Connell, *International Law* (2nd edn, Stevens & Sons 1970) 113.

316 Bolewski (n 128) 181; American Law Institute, *Third* (n 61) § 203 Reporters notes 3.

317 In fact, courts often did not neatly distinguish between both Mann, *Foreign Affairs* (n 2) 39.

318 American Law Institute, *Third* (n 61) § 204 comment; Bradley, *International Law* (n 9) 23.

319 Cf above, Chapter 1, II., 2., b).

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are competent organs of the National Will and ought to ‹be› recognized or not'.[320] In contrast to other more controversial views of Hamilton in his 'Pacificus' letters,[321] courts soon endorsed the view that it was for the president alone to decide whether a foreign state or government was to be recognized. The first hint towards this rule was given as early as *Rose v Himely*.[322] The case concerned a ship captured by privateers in French service for trading with rebels in St. Domingo who tried to end France's rule over the island. The plaintiffs sought to recover cargo from the ship doubting French jurisdiction over the island and thus the authority of French agencies to condemn the captured goods.[323] They argued that St. Domingo should be treated as an independent sovereign in a state of war with France and thus could trade with everyone.[324] To support this claim, the litigants invoked the writings of de Vattel, but Justice Marshall stated that 'the language of that writer is obviously addressed to sovereigns, not to courts. It is for governments to decide whether they will consider St. Domingo as an independent nation […]'.[325] Nevertheless, he held the condemnation of the ship illegal on different grounds.

Justice Marshall did not explicitly state that courts had to defer to executive decisions in foreign affairs; his remarks could be seen as belonging to the group of cases where rules of international law are not apt for domestic application. Furthermore, the statements were made in obiter.[326] Nevertheless, his words were taken up in *Clark v United States*,[327] another case concerned with the status of St. Domingo, which had since expelled France from the island and had declared itself independent.[328] The court

320 Alexander Hamilton and James Madison, *The Pacificus-Helvidius Debates of 1793–1794* (Liberty Fund 2007) 14.

321 Cf above, Chapter 1, II., 2., b).

322 *Rose v Himely* 8 US 241 (1807) (US Supreme Court); cf on the case John G Hervey, *The Legal Effects of Recognition in International Law* (University of Pennsylvania Press 1928) 28.

323 *Rose v Himely* (n 322) 268.

324 Louis L Jaffe, *Judicial Aspects of Foreign Relations: In Particular of the Recognition of Foreign Powers* (Harvard University Press 1933) 129 f.

325 *Rose v Himely* (n 322) 272.

326 Hervey (n 322) 29; against a classification as obiter dictum: Jaffe (n 324) 130; Chen (n 310) 241.

327 *Clark v United States* [1811] 5 F Cas 932 (United States Circuit Court for the District of Pennsylvania).

328 Hervey (n 322) 27 ff; for the case cf as well Robert Reinstein, 'Is the President's Recognition Power Exclusive?' (2013) 86 Temple Law Review 1, 17 f.

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had to determine whether St. Domingo could still be considered as belonging to France under a statute that forbade importing goods from French colonies. The court referred to Marshall's quote[329] and combined it with the executive's view, which still considered the island a French dominion.[330] In contrast to *Rose v Himely*, the reasoning here was decisive and thus fully introduced the idea of conclusiveness of executive determinations concerning the recognition of states and governments. The strict binding effect developed around the same time as Eldon's ideas in the United Kingdom,[331] leading Chen to refer to them as the 'Eldon-Marshall tradition'.[332] The Supreme Court confirmed the approach in *Gelston v Hoyt*[333] and *United States v Palmer*.[334] In some cases, the strict rule was called into question[335] and not applied to 'apolitical' acts (e.g., marriages) of the (unrecognized) governments of the rebel states during the American Civil War.[336] Nevertheless, in general, subsequent jurisprudence confirmed that the executive could conclusively determine the status of a foreign state or government.[337] The development found its pinnacle in *Jones v United States*.[338] The case concerned a conviction for murder on a Caribbean island. The plaintiff challenged the conviction as outside the jurisdiction of the United States. Conversely, the president had declared the island belonging to US territory. The court upheld the executive assessment and summarized the doctrine:

> *Who is the sovereign, de jure or de facto, of a territory is* ***not a judicial, but a political*** **question***, the determination of which by the legislative and executive departments of any government conclusively* ***binds the judges****, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed un-*

329 *Clark v United States* (n 327) 933.
330 Ibid 934 f.
331 Cf above, Chapter 1, II., 1., b).
332 Chen (n 310) 244.
333 *Gelston v Hoyt* 16 US 246 (1818) (US Supreme Court); cf Hervey (n 322) 31.
334 *United States v Palmer* 16 US 610 (1818) (US Supreme Court); cf Hervey (n 322) 31.
335 *The Consul of Spain v La Conception* [1821] 3 F Cas 137 (Circuit Court of South Carolina); Chen (n 310) 89.
336 Hersch Lauterpacht, *Recognition in International Law* (CUP 1948) 145 ff.
337 For further case law cf Hervey (n 322) 34 ff.
338 *Jones v United States* 137 US 202 (1890) (US Supreme Court) 212, the case was treated as authoritative even in England, see Mann, *Foreign Affairs* (n 2) 38.

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der a great variety of circumstances. [citing inter alia Gelston and Palmer] It is equally well settled in England. [citing inter alia Taylor v Barclay][339]

A slight deviation from the strict approach[340] occurred in the 1920s because the United States refused to recognize the Soviet government until 1933. Some courts began to apply the mentioned 'civil war' exception to evade hardships.[341] However, the judgments in *Belmont*[342] and *Pink*[343] strongly reaffirmed the executive recognition power.[344] Both cases concerned the recognition and settlement of claims with the (at that time recognized) Soviet government and, as mentioned, also established the validity of sole executive agreements.[345] Today, the recognition of states and governments is recognized virtually unanimously[346] as a constitutionally legitimized case of 'executive law making'. As in the United Kingdom, courts have treated executive determinations in this area as questions of 'fact'.[347] Likewise, they have held suits of individuals to oblige the executive to recognize certain states (especially Taiwan) as falling under the political question doctrine and hence unreviewable.[348]

Recently, recognition as an exclusive power of the executive unhampered even by Congress[349] has been confirmed in *Zivotofsky v Kerry*.[350] Here, an Act of Congress directed the Secretary of State to issue passports with 'Israel' as the place of birth for citizens born in Jerusalem. This was at odds with the position of the Obama administration, which did not formally recognize Jerusalem as under Israeli sovereignty and only issued passports

339 *Jones v United States* (n 338) 212 [my insertions and emphasis].
340 Cf as well *Oetjen v Cent Leather Co* 246 US 297 (1918) (US Supreme Court) 302.
341 Lauterpacht (n 336) 145 ff (very critical concerning the exception); rejecting such a doctrine for English law Mann, *Foreign Affairs* (n 2) 40.
342 *United States v Belmont* (n 48) 328.
343 *United States v Pink* 315 US 203 (1942) (US Supreme Court) 230.
344 Chen (n 310) 243.
345 Cf also Ingrid Wuerth, 'The Future of the Federal Common Law of Foreign Relations' (2018) 106 Georgetown Law Journal 1840 ff.
346 American Law Institute, *Third* (n 61) § 204; Ingrid Wuerth, 'Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department' (2011) 51 Virginia Journal of International Law 1, 17.
347 White (n 46) 27.
348 *Bor-Tyng Sheen v United States* [2021] WL 1433439 (United States District Court for the Eastern District of North Carolina); *Lin v United States* [2008] 539 F Supp 2d 173 (United States District Court for the District of Columbia).
349 For a thorough analysis for the executive – legislative interplay in historical recognition cases see Reinstein (n 328).
350 *Zivotofsky v Kerry* 576 US 1 (2015) (US Supreme Court).

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indicating 'Jerusalem' as the place of birth. The court held the act unconstitutional as its aim was 'to infringe on the recognition power—a power the Court now holds is the sole prerogative of the President'.[351] Thus, the law of the United States in this field is governed by a doctrine of conclusiveness.[352]

b) Germany

Like their Anglo-American colleagues, German scholars in the second half of the 19th century saw the judiciary as bound by executive decisions concerning recognition.[353] Under the Bismarck Constitution, the Supreme Court of the Reich, in a criminal law case concerning the insult of a foreign head of state, emphasized the executive's non-recognition in deciding whether a relevant criminal law provision was applicable.[354] However, some academics like Triepel began to doubt the strict binding effect of executive assessments in the field.[355] In other criminal law cases, the Supreme Court of the Reich decided independently that Alsace-Lorraine was not a state as it lacked sovereign state authority[356] or that Poland was not an independent state in 1916.[357] The scope of the binding effect of executive decisions was hence less settled than in the United States.

The trend towards more judicial independence continued during the Weimar Constitution.[358] Many scholars still stressed that the judiciary is bound by the executive decision, while at the same time mentioning that courts could decide incidentally on the existence of states in civil and

351 Ibid 2095.

352 Note however that Justice Breyer in *Zivotofsky v Kerry* (n 350) found the whole issue to be governed by the political question doctrine.

353 Concerning governments already Johann K Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (CH Beck 1868) 111; concerning states Triepel (n 142) 44 who was, however, more doubtful, cf below (n 355); cf Bolewski (n 128) 64 fn 3.

354 *Judgment from 28 September 1891* RGZ 22, 141 (Supreme Court of the Reich) 146; for a civil law case see *Judgment from 7 July 1882* Seufferts Archiv 38, 171 ff (Higher Regional Court Hamburg) cited after Bolewski (n 128) 64 fn 3.

355 Triepel (n 142) 442 fn 2; Bolewski (n 128) 64 fn 3.

356 *Judgment from 26 April 1888 (Elsass Fall)* RGSt 17, 334 (Supreme Court of the Reich) 335; cf Bolewski (n 128) 79 fn 4.

357 *Judgment from 26 April 1918* RGSt 52, 278 (Supreme Court of the Reich); cf Bolewski (n 128) 79 fn 3.

358 For this part cf Bolewski (n 128) 76 ff.

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criminal cases.[359] This development[360] is illustrated by a case decided in 1920 by the Supreme Court of the Reich,[361] in which the defendants were charged with forgery of Czechoslovakian revenue stamps. Czechoslovakia was at that time not recognized by Germany. Nevertheless, the court convicted the defendant for 'forgery of foreign revenue stamps'.[362] Although the court saw possible foreign relations implications (it was confronted with supporting a 'foe state' when assuming criminal liability),[363] it did not question its authority to decide on the subject. It held that recognition 'does not matter at all'[364] and instead focused on whether the new state was 'factually established'.[365] Hence, the Supreme Court of the Reich relied on the factual situation, not the government's assessment. In another case, the Prussian Court of Competence Conflicts, in an immunity decision, placed at least strong emphasis on the fact that Germany had recognized the Polish state in the Treaty of Versailles.[366]

The Nazi period[367] saw a return to stronger executive influence, and academics proclaimed a binding force of executive decisions concerning the recognition of states[368] and governments.[369] At least in the early stages

359 Concerning states Julius Hatschek, *Völkerrecht* (Deichert 1923) 147; concerning states as well Josef L Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht* (Kohlhammer 1928) 35 f, concerning governments Kunz saw a stronger binding effect, ibid 128.

360 Other cases include decisions on the existence of the Polish State *Judgment from 16 October 1925* JW 55 (1926) 1987 (Supreme Court of the Reich) 1987 and *Judgment from 10 May 1921* RGSt 56, 4 (Supreme Court of the Reich) 6; on the existence of the Soviet Union cf *Judgment from 2 May 1932* IPRspr 1932, No 21 (Higher Regional Court Berlin) 50; cf Bolewski (n 128) 78 fn 1, 79 fn 2, 77 fn 1.

361 *Judgment from 29 June 1920 (Stempelmarken Fall)* RGSt 55, 81 (Supreme Court of the Reich); cf Bolewski (n 128) 76.

362 § 275 No 2 of the former criminal code.

363 *Elsass Fall* (n 356) 334; in the case *Judgment from 28 September 1891* (n 354) the opinion of the Executive is taken into account but only because of international treaties that allowed Germany and other countries to determine who is to be regarded as the ruler of Bulgaria.

364 *Stempelmarken Fall* (n 361) 82 [my translation].

365 Ibid [my translation].

366 *Judgment from 10 March 1928* ZaöRV 1931, 102 (Court of Competence Conflicts); cf Bolewski (n 128) fn 3.

367 For this part cf Bolewski (n 128) 91 ff.

368 Franz Pfluger, *Die einseitigen Rechtsgeschäfte im Völkerecht* (Schulthess 1936) 141; Heinz-Carl Arendt, *Die Anerkennung in der Staatenpraxis* (Buchdruckerei Franz Linke 1938) 153; cf Bolewski (n 128) 93.

369 Ulrich Scheuner, 'Die Gerichte und die Prüfung politischer Staatshandlungen' (1936) 57 Reichsverwaltungsblatt 437, 442; Siegfried Grundmann, 'Die richterliche

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of the Third Reich and less politically charged matters, the courts continued with their independent assessment. For example, in a civil case, the Supreme Court of the Reich determined independently that the city of Danzig was now an independent state.[370] However, in politically more significant cases, the courts felt bound by the executive assessment. An important incident includes the German recognition of the Franco regime in the early stages of the Spanish Civil War. The executive recognition had been premature and thus contrary to international law.[371] Nevertheless, the courts followed the executive decision to recognize the Franco regime and treated it as binding.[372]

Contemporary German law has returned to more judicial review. The courts are free to weigh evidence[373] on whether a state exists or a government is in de facto control regardless of executive recognition.[374] Executive statements will be considered but only carry weight as expert evidence.[375] The justification for this wide review power lies in Article 25 of the Basic Law, which stipulates that customary international law is part of German

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Nachprüfung von politischen Führungsakten nach geltendem deutschem Verfassungsrecht' (1940) 100 Zeitschrift für die gesamte Staatswissenschaft 511, 535; Peter Stierlin, *Die Rechtsstellung der nichtanerkannten Regierungen im Völkerrecht* (Polygraphischer Verlag Zürich 1940) 141; Bolewski (n 128) 93 f.

370 *Decision from 28 April 1934* JW 1934, 2334 (Supreme Court of the Reich); cf as well *Judgment from 22 June 1933* RGSt 67, 255 (Supreme Court of the Reich).

371 Cf the critique by Lauterpacht (n 336) 95; cf for the case as well Bolewski (n 128) 95.

372 *Judgment from 18 March 1938* JW 1938, 1122 (Higher Regional Court Frankfurt); for a civil law case concerning Poland see *Judgment from 17 September 1941* RGZ 167, 274 (Supreme Court of the Reich) 277.

373 Cf § 286 Code of Civil Procedure, § 108 Code of Administrative Court Procedure, § 261 Code of Criminal Procedure; Stefan Talmon, *Kollektive Nichtanerkennung illegaler Staaten* (Mohr Siebeck 2006) 463 fn 20.

374 This at least appears to be the dominant position in the literature cf Wilhelm Wengler, *Völkerrecht* (Springer 1964) 823; Bolewski (n 128) 160; Jochen A Frowein, 'Die Bindungswirkung von Akten der auswärtigen Gewalt insb. von rechtsfeststellenden Akten' in Jost Delbrück, Knut Ipsen and Dietrich Rauschnig (eds), *Recht im Dienst des Friedens, Festschrift für Eberbard Menzel* (Duncker & Humblot 1975) 125, 127; Bruno Simma and Alfred Verdross, *Universelles Völkerrecht* (3rd edn, Duncker & Humblot 1984) 605 § 968; Reinhold Geimer, *Internationales Zivilprozessrecht* (5th edn, Otto Schmidt 2005) mn 272 f; Talmon, *Nichtanerkennung* (n 373) 463; for a contrary view Albert Bleckmann, *Grundgesetz und Völkerrecht* (Duncker & Humblot 1975) 256; cautiously leaning towards a binding effect if a state has been recognized Ignaz Seidl-Hohenveldern, *Völkerrecht* (Carl Heymanns 1965) 121 mn 494.

375 Bolewski (n 128) 190; Talmon, *Nichtanerkennung* (n 373) 464.

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law, ranking above ordinary statutes but below the constitution.[376] Executive acts contrary to international law (e.g., a premature recognition) can thus be held inapplicable by the courts.[377] Whether executive recognition is at least a precondition for state immunity appears to still be subject to debate.[378]

The *Rhodesian Bill* case[379] exemplifies the German courts' high level of independence. In 1965, South Rhodesia (now Zimbabwe) unilaterally declared its independence from the British Empire and established a suppressive white minority regime. The United Nations Security Council called upon all states not to recognize the new state or regime, and Germany (at that time not a member of the United Nations) acknowledged this duty in a note verbale to the Secretary-General of the UN.[380] It also stated that only the new management of the reserve bank set up in London would be authorized to represent the bank.[381] In the meantime, the new government in Salisbury (Rhodesia) had ordered banknotes produced at a German printing house. On application of the UK government, the Frankfurt Regional Court issued an injunction to prevent the dispatch. Later, it rescinded this ruling. Although it stated that it felt bound by the executive statement (as long as it was not evidently contrary to international law),[382] it also held that the London administration 'is not able to have its way in Salisbury'[383] and that 'the present government in Rhodesia holds factual

376 In contrast to Article 25, the old Article 4 of the Weimar Constitution only applied to law that Germany had recognized as binding, the recognition could also be withdrawn by the legislative branch Matthias Herdegen, 'Art. 25' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 15; Gerhard Anschütz, *Die Verfassung des deutschen Reiches* (14th edn, Stilke 1932) 65 mn 4 'Unter allen Umständen aber muß die betreffende Norm von uns, vom Deutschen Reich, als geltendes Völkerrecht anerkannt sein'.

377 In this direction Wengler (n 374) 827; Bolewski (n 128) 188 f.

378 Citing different positions in the literature Wilfried Schaumann and Walther Habscheid, *Die Immunität ausländischer Staaten nach Völkerrecht und deutschen Zivilprozessrecht* (CF Müller 1968) 47 ff; it appears likely in the light of the case law below (e.g. Kosovo), that at least in cases of intentional non-recognition the courts will follow the executive position.

379 *Judgment from 27 January 1967* (*Rhodesian Bill Case)* 2/12 Q 30/66 (Regional Court Frankfurt) the original case files have been deleted after 50 years and could not be reviewed by the author. The analysis is based on the cited secondary literature.

380 Talmon, *Nichtanerkennung* (n 373) 463.

381 Bolewski (n 128) 199.

382 Ibid.

383 Cited after Leslie C Green, 'Southern Rhodesian Independence' (1969) 14 Archiv des Völkerrechts 155, 188.

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power in Rhodesia'.[384] The court found the London administration entitled to 'formal legitimacy'[385] and the position of an 'aspirant of powers'. However, as the government in exile was in control merely 'on paper,'[386] the de facto management was able to authorize actions that did not impede these aspirational rights, such as replacing old bills.[387] Although the court declared itself to be 'bound' by the executive statement, it relied on de facto control instead of executive decision, even in such a highly political case.[388] The Constitutional Court also relied on the de facto situation in several cases. It considered the GDR a state in terms of international law and thus a subject of international law regardless of the Federal Republic's (West Germany's) refusal of formal recognition.[389]

However, there is also case law placing more emphasis on the executive's role, albeit only by lower courts. In a case in front of the Augsburg Administrative Court, the judge had to decide whether an individual had attained Kosovan citizenship and thus whether Kosovo was a state.[390] It first established the large area of discretion for the executive in foreign affairs and stated that courts should exercise 'utmost deference holding international assessments and valuations of the foreign affairs power to be legally flawed'.[391] It concluded that, in general, courts were bound by the executive determinations of the status of Kosovo unless they were – under every viewpoint – ill-founded and arbitrary.[392] This approach shows a certain similarity to the deferential *Hess* case line in treaty interpretations.[393] Likewise, German courts have refused to acknowledge Palestinian citizenship[394]

384 Cited after Talmon, *Nichtanerkennung* (n 373) 463 [my translation].
385 Cited after Green (n 383) 189.
386 Ibid.
387 Ibid.
388 Bolewski criticised the reasoning and called for declaring the recognition straight up void for lack of effective control Bolewski (n 128) 201.
389 *Judgment from 31 July 1972 (Grundlagenvertrag)* (n 167) 22; Talmon, *Nichtanerkennung* (n 373) 463 fn 27 with further references.
390 *Judgment from 7 April 2009* (*Kosovo Case)* Au 1 K 08.748 (Administrative Court Augsburg).
391 Ibid mn 35 [my translation].
392 Ibid mn 1, 35.
393 Cf above, this Chapter, I., 1., b), bb), (3).
394 *Decision from 16 December 1986* RPfelger 1987, 311 (Local Court Neumünster); Talmon, *Nichtanerkennung* (n 373) 464; the courts are however more willing to give effect to acts of Palestinian authorities in private international law, see Stefan Talmon, 'Acceptance of a Palestinian Nationality Within the Area of Private International Law' GPIL from 5 September 2023 available at <https://gpil.jura.uni-bonn.de

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and the citizenship of the newly founded Balkan states after the collapse of Yugoslavia,[395] referring to the German government's non-recognition. As Talmon correctly observed,[396] according to the dominant opinion in German law, the courts' reasoning was incorrect.[397] Whether the German government had recognized these states should not have played a decisive role, and the courts should have engaged in an independent assessment and only taken into account the position of the German government as evidence, amongst other factors. The picture concerning the level of judicial review in recognition cases is thus mixed. In some cases, the courts almost recklessly neglected the executive's position, while in others, they applied a margin of discretion approach.

c) South Africa

The traditional South African approach concerning judicial control of executive recognition acts relied on English law.[398] As shown above,[399] the strong reliance on the executive's position had been established in recognition cases like *Taylor v Barclay*.[400] One of the earliest South African examples of this approach is *Van Deventer v Hancke & Mossop*,[401] dating back to 1903.[402] Boer forces[403] had seized and sold wool after the Transvaal (the formerly independent South African Republic) had been formally declared part of the British Empire. A buyer of the seized wool had asked the courts to uphold these transactions as they were conducted when the Boers were still in de facto control of the area, arguing that the proclamation had been

/2023/09/acceptance-of-a-palestinian-nationality-within-the-area-of-private-international-law/>.

395 Cf Talmon, *Nichtanerkennung* (n 373) 265 fn 41.

396 Ibid 464.

397 In these cases, I would argue for a doctrine of discretion approach similar to the one I am proposing below, cf this Chapter, II., 2.

398 For the English law Mann, *Foreign Affairs* (n 2) 37 ff; McLachlan (n 250) 391 ff.

399 Cf Chapter 1, II., 1., b).

400 *Taylor v Barclay* (1828) 57 ER 769 (Court of Chancery); cf however Chen (n 310) 247; according to Mann the British rule does not know any hardship exceptions Mann, *Foreign Affairs* (n 2) 40.

401 *Van Deventer v Hancke and Mossop* 1903 TS 401 (Supreme Court of the Transvaal).

402 Cf on the case as well Dugard and others (n 2) 105.

403 The forces of the formerly independent South African Republic, for South African history cf as well Chapter 1, II., 1., c).

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premature in terms of international law.[404] The court refused to review the executive proclamation and stated that

> *[i]n its dealings with other States the Crown acts for the whole nation, and such dealings* ***cannot be questioned or set aside by its Courts.*** *They are acts of State into the validity or invalidity, the wisdom or unwisdom, of which domestic Courts of law have no jurisdiction to inquire.*[405]

Consequently, no effect was given to the transactions of the Boer forces as the judges found the South African Republic had ceased to exist with the proclamation of annexation.[406]

Van Deventer was decided before South African independence, but the courts also applied the classic English certification doctrine in subsequent years. In the mentioned[407] leading case *S v Devoy*[408] from 1971, the judges had to decide on the recognition of Malawi. They endorsed certification as part of South African law and as binding on the courts regarding the recognition of states and governments.[409] This classic approach was called into question by a line of cases in which courts took notice of states and governments without executive approval[410] (e.g., the Congolese government,[411] East Germany,[412] and Rhodesia[413]). However, the cases were seen as reconcilable with the traditional approach in *Inter-Science Research*,[414] a case that dealt with the recognition of the new Mozambican government and questions of immunity. The judges held that in the diverting cases, recognition was a mere question of judicial cognizance and that the judiciary was hence under no obligation to request a certificate.[415] Although this explanation may appear fairly artificial, *Inter-Science Research* confirmed the classical

404 *Van Deventer v Hancke and Mossop* (n 401) 409.
405 Ibid 410 [my emphasis].
406 Ibid 411.
407 Cf this Chapter, I., 1., c), aa).
408 *S v Devoy* (n 260).
409 AJGM Sanders, 'The Courts and Recognition of Foreign States and Governments' (1975) 92 South African Law Journal 167.
410 Dugard and others (n 2) 172 ff.
411 *Parkin v Government of the Republique Democratique du Congo* 1971 (1) SA 259 (W) (Transvaal Provincial Division) 259 E.
412 *Sperling v Sperling* 1975 (3) SA 707 (A) (Appellate Division).
413 *S v Oosthuizen* 1977 (1) SA 823 (N) (Natal Provincial Division).
414 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (Transvaal Provincial Division); Dugard and others (n 2) 173.
415 *Inter-Science Research* (n 414) 118.

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approach that recognizing states and governments are part of the executive prerogatives and conclusive.[416]

Provisions in the Foreign States Immunity Act of 1981, which codified former common law,[417] support this finding. Section 17 (a) provided that 'a certificate by or on behalf of the Minister of Foreign Affairs and Information shall be ***conclusive evidence*** on any question whether any foreign country is a state for the purposes of this Act'.[418] Concerning heads of state, the act provided that a certificate of the foreign minister 'shall be ***conclusive evidence*** on any question as to the person [...] to be regarded [...] as the head of state or government of a foreign state'.[419]

Post-apartheid South African law appears to have deviated from this approach. In *Kolbatschenko v King*,[420] a case concerning a request of assistance from the South African government to Lichtenstein, the court obiter deliberated on the binding force of executive statements in foreign affairs. The government had claimed that South African courts were traditionally reluctant to decide 'political questions'.[421] It also argued that

> *[the executive's] requests for foreign assistance, directed as they are to foreign governments, constitute the conduct of foreign affairs by the Republic. Consequently,* ***neither the decisions to make the requests nor the requests themselves are justiciable*** *in the sense of being susceptible to rescission, review or declaratory proceedings in a South African court.*[422]

The court, in contrast, doubted that certain areas were 'per se beyond judicial scrutiny'[423] under the new constitution. On the other hand, it also stressed the leading role of the executive, especially in recognition cases:

> *South African courts have refused to evaluate decisions or actions in the realm of foreign relations involving issues of a 'high executive nature.' Thus, for example, matters such as the recognition by the South African Government of a foreign State or of a foreign government, or of the*

416 *Inter-Science Research* (n 414) 117 f.
417 Cf this Chapter, I., 3., c), cf Dugard and others (n 2) 100 fn 225.
418 Foreign States Immunities Act 87 of 1981 Section 17 (a) [my emphasis].
419 Foreign States Immunities Act 87 of 1981 Section 17 (c) [my emphasis and omissions].
420 *Kolbatschenko v King NO and Another* 2001 (4) SA 336 (C) (Cape Provincial Division); cf on the case as well Dugard and others (n 2) 107 ff.
421 Ibid 353.
422 Ibid 352 [my emphasis].
423 Ibid 355.

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> *status of diplomatic representatives of a foreign State,* ***have generally been regarded as non-justiciable*** *[…] This type of decision, which falls four-square within the political arena, would include matters such as the making, or the determination of the existence, of treaties between South Africa and foreign States, the declaration of war and the making of peace. In such cases, it is indeed undesirable that the State should 'speak with two voices'* ***and the latitude extended*** *by the Judiciary to the Executive in such matters will be correspondingly large.*[424]

As the court found the request of assistance not to be a matter of 'high executive nature,' it did not further elaborate on the executive's role.[425] The statement provides a mixed picture. On the one hand, the court reiterated the old approach and referred to the 'one voice' doctrine. On the other hand, it refused to follow the executive and treat the case as non-reviewable. Likewise, mentioning a 'latitude' suggests a discretionary instead of a conclusiveness or non-reviewability approach.

That South Africa now applies a discretionary approach also appears to be supported by Section 232 of the new South African Constitution. It provides that customary international law forms part of South Africa's law unless it is inconsistent with the constitution or an act of parliament. Where in former times, customary international law was incorporated *as part* of the common law,[426] it is now *superior* to common law rules.[427] A certificate as to the quality of statehood based on common law would thus be subject to judicial review.[428] To a certain extent, this mirrors the position in current German law, where Article 25 of the Basic Law creates an angle for judicial review.[429] In this regard, current South African law appears to depart from contemporary English law where the conclusiveness of executive recognitions has been affirmed in recent judgments.[430]

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424 Ibid 356 [my emphasis].
425 Ibid 357.
426 Dugard and others (n 2) 63.
427 Ibid 67.
428 John Dugard and Others, *International Law: A South African Perspective* (4th edn, Juta 2013) 71; the same holds if a certificate would be considered to be issued under a power granted by the constitution Dugard and others, *International Law* (5th edn) (n 2) 104.
429 Cf this Chapter, I., 2., b).
430 Cf especially *Deutsche Bank AG London Branch v Receivers Appointed by the Court Central Bank of Venezuela v Governor and Company of the Bank of England and*

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Although the Foreign States Immunity Act of 1981 is still in force, it is doubtful that a statement concerning a state's status is still 'conclusive'. The new post-apartheid Diplomatic Immunities and Privileges Act dealing with foreign official immunity[431] points in this direction. In this act, the word 'conclusive' was substituted for 'prima facie' and indicates that the wording of the Foreign States Immunity Act may be a 'leftover' from the old legal system.[432] The new South African approach appears to be that courts should still request the Department of Foreign Affairs to issue a certificate on the matter in case of doubt.[433] However, its content will no longer be considered conclusive, only awarded weight.[434] Thus, South Africa now applies a doctrine of discretion in recognition cases.

d) Conclusion on recognition of states and governments

In contrast to cases of treaty interpretation which were only later affected by deference considerations, early on the courts treated the recognition of states and governments in the United States as purely executive tasks. Case law affirmed a broad interpretation of the presidential recognition power in Article 2 (2) and (3) of the US Constitution and thus anchored the deferential position within the constitutional text. This was facilitated by the simultaneous development of the certification doctrine in the United Kingdom, which mainly evolved out of recognition cases.[435] The conclusiveness approach of US law in this area is virtually unchallenged.

On the other hand, Germany never came under the influence of the English certification doctrine. Even under the Bismarck Constitution, case law shows a mixed picture, and courts, in many cases, decided independently on the status of states and governments. This trend continued (except for the Nazi period) up to current German law. Most academic commentators stress the independent role of the courts in deciding on the existence of a state or de facto control of a government. However, in some cases, the courts held that the executive decision matters and sporadically developed a margin of discretion approach.

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others (n 306) 515 ff and *Mohamed v Breish* (n 306); Peter Webster (n 306); critical of this trend McLachlan (n 250) 413 ff.

431 Cf this Chapter, I., 4., c), bb).

432 In this direction as well Dugard and others, *International Law* (5th edn) (n 2) 104.

433 Dugard and others, *International Law* (5th edn) (n 2) 173.

434 Ibid 104, 172.

435 Cf Chapter 1, II., 1., b).

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Older South African law explicitly adopted the English certification approach in recognition cases and the conclusive force of executive assessments also found its way into statutory law. After the constitutional change, South African judges were hesitant to apply the doctrine. New constitutional provisions appear to allow the judicial review of executive recognition decisions. Likewise, contemporary statutes have not reiterated the executive's role in issuing conclusive statements but only allow for 'prima facie' evidence to be submitted. South Africa thus shifted to a margin of discretion approach.

3. State immunity

This subchapter will examine the level of deference applied by the courts concerning questions of state immunity. The state's immunity (sometimes also referred to as sovereign immunity) must be differentiated from the immunity of its foreign officials,[436] which we will be analysing in the following subchapter. Until the middle of the 19th century, states' immunity was 'absolute,' covering all its activities. Customary international law then gradually changed to a 'restrictive view' that excludes commercial acts.[437] As we shall see below, the circumstances under which the changed status of customary international law was adopted in our three reference jurisdictions will allow us a particularly clear view of the executive-judicial relationship.

With the adoption of the restrictive approach, current international law now also distinguishes between 'jurisdictional immunity,' which covers administrative, civil, and criminal proceedings, and 'enforcement immunity,' which covers resulting enforcement measures.[438] As our focus lies on the executive-judicial interplay and as these forms of immunity were not neatly separated until recently,[439] I will not differentiate between them.[440]

436 See Hazel Fox and Patricia Webb, *The Law of State Immunity* (3rd edn, OUP 2013) 537.
437 Stoll (n 4) mn 26.
438 Ibid mn 1.
439 Ibid mn 50.
440 However, most cases will refer to what today would be considered jurisdictional immunity.

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a) United States

The law of sovereign immunity in the United States was prominently assessed for the first time in the *Schooner Exchange v McFaddon*[441] in 1812.[442] The American owners of the vessel *Exchange* had sent her on a trip to Spain, where she was captured on the orders of Napoleon and subsequently used as a warship. On a trip to the West Indies, the vessel, now under French command, encountered bad weather conditions and was forced to harbour in Philadelphia. The former owners seized the opportunity and tried to recover the ship. At the instruction of the US government, the Attorney of the United States for the District of Pennsylvania issued a suggestion of immunity 'respectfully praying' that the court would release the vessel.[443] The court, however, engaged in an independent assessment, drawing especially from international law (with Chief Justice Marshall citing de Vattel)[444] and finally concluded that the vessel was immune. This starting point set the tone for foreign immunity considerations. During the nineteenth and early twentieth century, courts generally solved foreign state immunity questions by referring to customary international law.[445]

However, as hinted at in *Schooner Exchange* (where the judges followed the executive opinion in the end), the courts did not completely ignore executive statements but – without developing a coherent approach – awarded 'weight' to the executive statements from time to time.[446] Like in English (and South African) law at that time, only executive statements regarding the status of foreign sovereigns (but not the question of immunity as such) were treated as conclusive.[447] Several cases sparked by the vessel *The Pesaro*[448] in the 1920s illustrate that approach. The Italian government owned the Pesaro but used it for civilian transportation of goods. Certain cargo was damaged during the trip to the US, and the owners sued for

441 *The Schooner Exchange v McFaddon* 11 US 116 (1812) (US Supreme Court).
442 For a brief history cf American Law Institute, *Restatement of the law, third: The foreign relations law of the United States, §§ 501 – end, tables and index* (American Law Institute Pub 1987) Introductory Note Chapter 5; Bradley, *International Law* (n 9) 240.
443 *The Schooner Exchange v McFaddon* (n 441) 118 f.
444 Ibid 143.
445 Henkin (n 2) 55; White (n 46) 27; Wuerth, 'Foreign Official Immunity' (n 346) 10.
446 Bradley, *International Law* (n 9) 241 ff.
447 Henkin (n 2) 55; White (n 46) 27, 134.
448 For the cases surrounding the Pesaro as well White (n 46) 134 ff.

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damages and wanted the ship arrested as security. In one of the cases connected to the events, the executive suggested that the courts should grant no immunity in cases concerning commercial vessels and did not support the Italian request.[449] The judge held these remarks to be 'not without significance […] although I do not mean to say that immunity should be refused in a clear case simply because the executive branch has failed to act'.[450] In line with the executive, the court did not award immunity, the decision being later vacated with the parties' consent.[451] The vacation opened the door for another case surrounding the Pesaro in which the Supreme Court finally (and contrary to the executive statement in the previous case) decided that customary international law awards immunity for all sovereign acts, commercial or not.[452] The courts thus still referred to international law and did not grant conclusive effect to executive suggestions.

Nevertheless, the influence of the State Department grew by the beginning of the 20th century. The decision in *Ex parte Muir*[453] had made clear that foreign sovereigns could only make immunity requests if they joined the case as a party or asked for a suggestion by the State Department.[454] Given that states rarely wanted to be involved directly, this increased the importance of the State Department's suggestions.[455] Nevertheless, these were not given conclusive force until *The Navemar*[456] reached the courts in 1938. The case again concerned the seizure of a ship and further strengthened the trend initiated by *Ex parte Muir*.[457] The judges held that '[i]f the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel'.[458] For the first time, a court acknowledged a conclusive effect of the executive statement not only concerning the status of a foreign sovereign but also concerning the question of immunity as such.[459] However, the remarks were made rather

449 *The Pesaro* [1921] 277 F 473 (New York District Court) 497 fn 3.
450 Ibid 479 f.
451 Henkin (n 2) 350 n 64; White (n 46) 136.
452 *Berizzi Bros Co v SS Pesaro* 271 US 562 (1926) (US Supreme Court) 574 ff.
453 *Ex parte Muir* 254 US 522 (1921) (US Supreme Court).
454 White (n 46) 135 ff.
455 Ibid 137.
456 *Compania Espanola De Navegacion Maritima, S A v The Navemar* 303 US 68 (1938) (US Supreme Court).
457 White (n 46) 138.
458 *Compania Espanola De Navegacion Maritima, S A v The Navemar* (n 456) 74.
459 White (n 46) 138.

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obiter as the executive in *The Navemar* had not issued any suggestion of immunity.[460]

The real change again came in the wake of the Sutherland Revolution,[461] when in 1943 *Ex parte Republic of Peru*[462] found its way to the Supreme Court.[463] The case once more centred on a ship's immunity. The court did not conduct its own assessment but entirely relied on the suggestion of the State Department:

> *The certification [of the State Department] and the request that the vessel be declared immune must be accepted by the courts as a* ***conclusive determination*** *by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations.*[464]

This line of case law was developed further in *Republic of Mexico v Hoffman*,[465] which established that even where the executive had remained silent, the case was to be settled according to principles accepted by the executive branch.[466] The courts thus followed a two-step procedure: the sovereign in question could request a 'suggestion of immunity' from the State Department, which was treated as conclusive if issued.[467] If the State Department remained silent, the courts would decide themselves based on common law[468] and take into account the principles accepted by the executive. Hence, the courts switched from independent assessment and a sporadic discretionary approach to a doctrine of conclusiveness (when a suggestion was issued). With *Ex parte Peru* and *Mexico v Hoffmann* the deferential trend[469] had thus reached the law of state immunity.

However, the executive determinations of immunity proved unsatisfactory for many reasons. Foreign states attempted to influence the State Department in their favour. The State Department, in turn, often issued

460 Bradley, *International Law* (n 9) 242.
461 For the Sutherland revolution cf above, Chapter 1, II., 2., d).
462 *Ex parte Republic of Peru* 318 US 578 (1943) (US Supreme Court).
463 Henkin (n 2) 55.
464 *Ex parte Republic of Peru* (n 462) 589 [my emphasis and adjustment].
465 *Republic of Mexico v Hoffman* 324 US 30 (1945) (US Supreme Court).
466 Ibid 35; Bradley, *International Law* (n 9) 242.
467 *Samantar v Yousuf* 560 US 305 (2010) (US Supreme Court) 15.
468 Ibid 5.
469 Cf above, Chapter 1, II., 2., d).

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incoherent suggestions or no suggestion at all.[470] Moreover, it issued the Tate Letter in 1952, a statement urging the judges to apply the restrictive immunity doctrine,[471] which was subsequently widely accepted by the courts.[472] This led to the confusing situation that foreign sovereigns seeking immunity would either address the State Department asking for a suggestion of immunity, which after *Ex Parte Republic of Peru* was considered binding, or address the court directly claiming that the act in question was non-commercial.[473] Meanwhile, the State Department itself did not consistently comply with the principles set out in the Tate Letter and sometimes issued suggestions of immunity even when the state's conduct was clearly commercial.[474] Finally, the executive encouraged Congress to solve the issue by enacting the Foreign Sovereign Immunities Act (FSIA)[475] in 1976.[476] The act established the restrictive immunity doctrine (previously only applied based on the Tate Letter) and provided a clear framework for when foreign states enjoyed immunity and what kind of exceptions applied. Thus, the act gave back control to the judiciary in state immunity cases.[477] It does not include provisions obliging the courts to consider executive determinations and marks a return to the starting point, that is, independent assessment of immunity by the courts but this time based on statute instead of common law.[478]

470 Wuerth, 'Foreign Official Immunity' (n 346) 12.
471 Cf this Chapter, I., 3.
472 Letter from Jack B Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General Department of Justice from 19 May 1952 reprinted in (1952) 26 Department of State Bulletin 984.
473 Bradley, *International Law* (n 9) 244.
474 Ibid; Christopher Totten, 'The Adjudication of Foreign Official Immunity Determinations in the United States Post-Samantar: A Circuit Split and Its Implications' (2016) 26 Duke Journal of Comparative & International Law 517, 522.
475 Foreign Sovereign Immunites Act 1976.
476 Henkin (n 2) 60; for an overview of the FSIA exceptions cf David P Stewart, 'International Immunities in US Law' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 625, 626 ff.
477 *Samantar v Yousuf* (n 467) 6; Bradley, 'Chevron Deference' (n 77) 713.
478 *Samantar v Yousuf* (n 467) 7; Shobha V George, 'Head-of-State Immunity in the United States Courts: Still Confused After All These Years' (1995) 64 Fordham Law Review 1051, 1064; Lewis S Yelin, 'Head of State Immunity as Sole Executive Lawmaking' (2011) 44 Vanderbilt Journal of Transnational Law 911, 980.

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b) Germany

Concerning the law of state immunity,[479] Prussian tradition, giving considerable influence to the executive, strongly influenced the early German approach. One of the first references to executive control in (state) immunity cases can be found in a Prussian cabinet order[480] from 1795. It provided that a declaration should be obtained from the Foreign Office[481] before foreign princes could be subjected to arrest proceedings.[482] This regulation was later annexed to the Procedural Code of the Prussian States.[483] Although the wording only referred to princes, it was considered applicable to foreign states.[484] Making use of its influence during the early 19th centu-

479 For German monographs on the topic: Edgar Loening, *Die Gerichtsbarkeit über fremde Staaten und Souveräne* (Max Niemeyer 1903); Edwin Gmür, *Gerichtsbarkeit über fremde Staaten* (Polygraphischer Verlag Zürich 1948); Michael Albert, *Völkerrechtliche Immunität ausländischer Staaten gegen Gerichtszwang* (München 1984); Helmut Damian, *Staatenimmunität und Gerichtszwang* (Springer 1985); Siegfried Lorz, *Ausländische Staaten vor deutschen Zivilgerichten* (Mohr Siebeck 2017); Anja Höfelmeier, *Die Vollstreckungsimmunität der Staaten im Wandel des Völkerrechts* (Springer 2018); for an historic overview Friedrich J Sauter, *Die Exemption ausländischer Staaten von der inländischen Zivilgerichtsbarkeit* (Anton Warmuth Buchdruckerei 1907) 15 ff; Botho Spruth, *Gerichtsbarkeit über fremde Staaten* (Universitätsverlag Robert Noske 1929) 21 ff; Haslinger, *Gerichtsbarkeit über fremde Staaten mit besonderer Berücksichtigung der Verhältnisse in Deutschland* (Bernhard Sporn 1935) 13 ff; Jenö Staehlin, *Die gewohnheitsrechtliche Regelung der Gerichtsbarkeit über fremde Staaten im Völkerrecht* (Herbert Lang 1969) 51 ff; Manfred Malina, *Die Völkerrechtliche Immunität Ausländischer Staaten im zivilrechtlichen Erkenntnisverfahren* (Marburg 1978) 121; concerning ships Marius Böger, *Der Immunität der Staatsschiffe* (Verlag des Instituts für Internationales Recht an der Universität Kiel 1928); for one of the few English monographs on German law Eleanor W Allen, *The Position of Foreign States before National Courts – Chiefly in continental Europe* (Macmillan 1933).

480 Kabinettsorder vom 14 April 1795 (1817) Rabe Sammlung preussischer Gesetze 50; the Cabinet consisted of the closest advisors of the King see Ernst R Huber, *Deutsche Verfassungsgeschichte seit 1789 – Reform und Restauration 1789 – 1830* (Kohlhammer 1957) 145 f.

481 At this time called 'Kabinettsministerium' Huber (n 480) 146.

482 Loening (n 479) 27, 34; Allen (n 479) 57.

483 Allgemeine Gerichtsordnung für die Preußischen Staaten (1795); Loening (n 479) 28 (with the slight modification, that the Minister of Justice has to decide after consultation with the foreign office); Allen (n 479) 58.

484 Cf its application in a case against Russia Eduard Droop, 'Über die Zuständigkeit der inländischen Gerichte für Rechtsstreitigkeiten zwischen Inländern und fremden Staaten, insbesondere für Anordnung von Arrest gegen fremde Staaten' (1882) 26 Beiträge zur Erläuterung des deutschen Rechts 289, 292; cf the deliberations in

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ry, the Prussian Foreign Office intervened in several civil law cases, e.g., against the Duchy of Nassau (1819),[485] Russia (1833),[486] and the Electorate of Hesse (1834),[487] and successfully ordered the courts to drop the proceedings.

Following the founding of the German Empire, new legislation was enacted.[488] In line with the previous statute, it explicitly only addressed the immunity of foreign officials[489] and no special influence for the executive was mentioned.[490] However, the executive could still exert a certain influence with the help of the aforementioned[491] Prussian Court of Competence Conflicts,[492] which was established in 1847[493] and continued as a special Prussian state court after a reform of the justice system of the new Empire.[494] The court acted on the executive's initiative and was specifically created to decide whether disputes should be settled by the judiciary or remain in the sole authority of state agencies.[495] With the court, the Prussian tradition remained influential within the new legal order. The *Romanian Railway* case of 1881 illustrates that point. It concerned debts owed by Romania under state bonds.[496] The applicant won against Romania in proceedings in front of the Regional Court,[497] inducing Bismarck, as Prussian Minister of Foreign Affairs, to call upon the Court of Competence Conflicts.[498] During the proceedings, the lower court declared that it would have dismissed the case if it had been aware of the foreign affairs

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

485 Droop (n 484) 291 f; Allen (n 479) 59 (for an English summary).
486 Droop (n 484) 292 f; Allen (n 479) 60 (for an English summary).
487 Droop (n 484) 294 f; Allen (n 479) 60 f (for an English summary).
488 Especially the courts Constitution Act in 1877, cf Allen (n 479) 61.
489 Ibid.
490 Ibid 62.
491 Cf above, Chapter 1, II., 3., a).
492 Georg Lemmer, *Die Geschichte des preußischen Gerichtshofes zur Entscheidung der Kompetenzkonflikte (1847–1945)* (Scienta 1997).
493 Gesetz über das Verfahren bei Kompetenzkonflikten zwischen den Gerichten und Verwaltungsbehörden vom 8. April 1847.
494 Verordnung, betreffend die Kompetenzkonflikte zwischen den Gerichten und den Verwaltungsbehörden, vom 1. August 1879.
495 Lemmer (n 492) 50, 169 including central and provincial administrative agencies.
496 Droop (n 484) 294 ff; Allen (n 479) 62 (for an English summary).
497 Droop (n 484) 295.
498 Ibid 296.

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repercussions.[499] The Court of Competence Conflicts explicitly referred to the Prussian cases mentioned above.[500] It held that foreign states were not subject to German jurisdiction under public international law, which it found to be directly applicable in cases dealing with immunity.[501] In contrast to the earlier Prussian proceedings, the case did not end with the minister's interference, but the court independently determined the status of international law. The Competence Court also decided on similar cases regarding the Ottoman Empire (1902)[502] and Russia in the *Hellfeld* case (1910).[503] Although the executive thus remained influential in starting the proceedings, at least formally, the court decided on its own. After the judicial reform, the Supreme Court of the Reich, as the highest court in the newly created Empire, followed the jurisprudence of the Competence Court.[504] In 1905 in the *Belgium Railroad* case,[505] it decided that public international law was directly applicable in immunity cases and applied the absolute immunity doctrine. It also directly referred to the Competence Court's jurisprudence.[506] The Supreme Court of the Reich also engaged in an independent analysis of state practice without considering any executive position on the matter.[507]

Both courts survived the constitutional change and continued their jurisprudence under the new Weimar Constitution.[508] The new Article 4 of the Weimar Constitution now explicitly provided for the application of recognized rules of public international law as binding law of the German Empire. The Supreme Court of the Reich explicitly[509] confirmed its decision in the *Belgium Railroad* case in a case concerning the US vessel *The Ice*

499 Loening (n 479) 37.
500 Droop (n 484) 301 f.
501 Ibid 300 ff; Loening (n 479) 45 ff.
502 *Judgment from 14 June 1902* printed in Stölzel, *Die neueste Rechtsprechung des Gerichtshofs zur Entscheidung der Kompetenzkonflikte* (1906) No 2504 (Court of Competence Conflicts).
503 *Hellfeld Case 25 July 1910* (n 484); Allen (n 479) 76.
504 Cf already *Judgment from 21 June 1888* RGZ 22, 19 (Supreme Court of the Reich).
505 *Judgment from 12 December 1905 (Belgium Railroad Case)* RGZ 62, 165 (Supreme Court of the Reich); Allen (n 479) 82 (for an English summary).
506 *Belgium Railroad Case* (n 505) 166.
507 Ibid 165 f.
508 For a short overview of the German history concerning sovereign immunity in the 20th century see Lorz (n 479) 11 ff.
509 *Judgment from 10 December 1921* (*Ice King Case)* RGZ 103, 274 (Supreme Court of the Reich) 275.

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King.[510] The ship had been involved in a maritime accident, and the injured party sued for damages. Again, the court engaged in an independent assessment of the state of customary international law to determine whether or not the restrictive immunity doctrine had already replaced the absolute immunity doctrine.[511] Without any executive guidance, it decided the question in the negative and held the vessel to be immune.[512] Additionally, the Court of Competence Conflicts showed remarkable independence in a series of cases[513] against the Ottoman Empire.[514] The Ottoman government, through intermediaries, had purchased several goods in Germany during the First World War and was then being sued by retailers. The executive[515] tried to stop the case with the help of the Court of Competence Conflicts. The latter decided that the Ottoman Empire had submitted to German jurisdiction due to a special paragraph within the purchase agreements and thus explicitly rejected the executive's opinion. The court followed the executive application in other cases against Poland[516] and Romania,[517] although again deciding independently. It mentioned that only states recognized by the German Empire were entitled to immunity, thus acknowledging a certain executive control in the area.[518]

During the Nazi period, scholars treated all acts of foreign affairs, including state immunity, as unreviewable.[519] As mentioned, the courts, in some cases, were reluctant to follow this position. At least in one decision, the

510 Ibid; Allen (n 479) 86 (for an English summary).

511 *Ice King Case* (n 509) 275 ff.

512 For another immunity case against Turkey, as well without executive influence cf *Judgment from 26 January 1926* JW 1926, 804 (Supreme Court of the Reich); for a case against Rumania, as well without executive influence *Judgment from 4 June 1930* JW 1931, 150 (Supreme Court of the Reich).

513 *Judgment from 29 May 1920* JW 1921, 773 (Court of Competence Conflicts); *Judgment from 13 November 1920* JW 1921, 1478 (Court of Competence Conflicts) concerning jurisdiction to enforce; Allen (n 479) 74 (for an English summary).

514 The German courts referred to the Ottoman Empire as 'Turkish Empire', a commonly used terminology at the time.

515 The right to start the proceedings under the Weimar time lay with the Prussian 'Staatsministerium' *Judgment from 26 January 1926* (n 512) 774; Allen (n 479) 71 fn 7.

516 *Decision from 4 December 1920* JW 1921, 1480 (Court of Competence Conflicts); *Decision from 4 December 1920* JW 1921, 1485 (Court of Competence Conflicts); *Decision from 12 March 1921* JW 1921, 1481 (Court of Competence Conflicts); *Judgment from 10 March 1928* (n 338); Allen (n 479) 80.

517 *Decision from 27 June 1925* JW 1926, 402 (Court of Competence Conflicts).

518 *Judgment from 15 December 1923* NJW 1924, 1388 (Court of Competence Conflicts) 1391.

519 Cf Chapter 1, II., 3., d).

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Supreme Court of the Reich continued its independent assessment of state immunity.[520]

Under contemporary German law, there is still no statutory law regulating the question of sovereign immunity.[521] The question is governed by customary international law, which forms part of German law according to Article 25 of the Basic Law, the successor of Article 4 of the Weimar Constitution.[522] In the *Yugoslav Military Mission* case[523] decided in 1962, the Constitutional Court had to determine whether state immunity completely prohibited cases involving embassy grounds or if proceedings that did not impair the functioning of the embassy were admissible. It decided in the latter sense after a thorough independent assessment of state practice.[524]

A year later, in a case concerning the Iranian embassy, the court had to decide whether Iran was immune from a suit demanding payment of costs for reparation works conducted within its embassy building in Germany.[525] The German government had argued that even though international law may have changed to a doctrine of restrictive immunity – and thus allowed proceedings when the state was engaged in commercial activity – the reparation of the embassy was closely connected to its function. Thus, the executive argued that the state acted in its official capacity and was immune.[526] The court first engaged in a thorough analysis of state practice and finally confirmed that international law had changed to restrictive immunity.[527] It then held, outspokenly recognizing the different opinion of the German government, that the reparation works were 'obviously'[528]

520 *Judgment from 16 May 1938* RGZ 157, 389 (Supreme Court of the Reich).

521 As long as the UN Convention on Jurisdictional Immunities of States and their Property (adopted 2 December 2004) is not in force. In contrast to individual immunity which is covered by the Courts Constitution Act; some technical aspects are however covered by the European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) 1495 UNTS 181; cf already Allen (n 479) 65; Fritz Münch, 'Immunität fremder Staaten in der deutschen Rechtsprechung bis zu den Beschlüssen des Bundesverfassungsgerichts vom 30. Oktober 1962 und 30. April 1963' (1964) 24 ZaöRV 265, 266.

522 Article 25 of the Basic Law.

523 *Decision from 30 October 1962 (Yugoslav Military Mission Case)* BVerfGE 15, 25 (German Federal Constitutional Court).

524 Ibid 34 ff.

525 *Decision from 30 April 1963 (Iranian Embassy Case)* BVerfGE 16, 27 (German Federal Constitutional Court).

526 Ibid 30.

527 Ibid 60.

528 Ibid 64.

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not commissioned in an official capacity and thus denied immunity. The case forms the pinnacle of the courts' independence concerning sovereign immunity determinations. Regarding the thorough independent review of the status of international law, foreign judges like Lord Wilberforce congratulated the court for its 'great clarity'[529] and 'instructive review of the law of state immunity over a wide area'.[530] The case also highlights the contrast to US jurisprudence. Whereas the turn to the restrictive immunity doctrine was initiated by the executive's Tate Letter in the US, in Germany, it was executed by the Constitutional Court alone, which determined that customary international law had changed. The court has continued with this independent approach in subsequent case law concerning the Philippine embassy,[531] an Iranian oil company,[532] and other cases.[533]

c) South Africa

The South African approach concerning state immunity again followed British case law,[534] which had been consolidated in *The Parlement Belge*.[535] South Africa adopted this approach in the 1921 case *De Howorth v The SS India*.[536] It concerned the question of whether a Portuguese vessel was immune from suit. Like the courts in the United States and Germany at that time, the court directly referred to international law. It considered British and American case law, explicitly mentioning *The Parliament Belge* and *Schooner Exchange v McFaddon*,[537] and finally found the Portuguese vessel to be immune. The case entails no remarks concerning special respect

529 *Playa Larga v I Congreso del Partido* [1981] 1 AC 244 (House of Lords) 263.
530 Ibid 267; cf Xiaodong Yang, *State immunity in international law* (CUP 2012) 17 fn 74.
531 *Decision from 13 December 1977* (*Philippine Embassy Case)* BVerfGE 46, 342 (German Federal Constitutional Court).
532 *Decision from 12 April 1983 (National Iranian Oil Company)* BVerfGE 64, 1 (German Federal Constitutional Court).
533 *Decision from 17 March 2014* 2 BvR 736/13 (German Federal Constitutional Court); *Decision from 8 March 2007* BVerfGE 117, 357 (German Federal Constitutional Court).
534 Dugard and others, *International Law* (5th edn) (n 2) 348.
535 *The Parlement Belge* (1880) 5 PD 197 (Court of Appeal).
536 *De Howorth v The SS India* 1921 CPD 451 (Cape of Good Hope Provincial Division); cf on the case Dugard and others, *International Law* (5th edn) (n 2) 350.
537 *De Howorth v The SS India* (n 536) 60 f.

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for the executive's position. In contrast, a certain executive influence was alluded to in *Inter-Science Research*[538] decided in 1979, where the court referred to the classic British case of *Arantzazu Mendi*,[539] quoting

> *Our Sovereign has to decide whom he will recognize as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities* ***must flow from that decision alone****.*[540]

However, the certification was confined to the 'status which entitles to immunity'[541] (e.g., if the entity is recognized as a state) and – in contrast to the United States – not extended to immunity as such.[542] This is in line with the roots of the doctrine, which only applies to questions of fact, not questions of law.

As shown,[543] the courts did not always uphold this distinction. The decision to recognize a state or government effectively decided the case, especially in the periods of the absolute immunity doctrine.[544] As in the US and Germany, the absolute immunity doctrine was prevalent in South Africa and applied in many cases.[545] However, the difference to the US approach became more visible when the courts turned to restrictive immunity in the previously mentioned *Inter-Science Research*[546] case. While the court relied on the executive certificate for the question of recognition,[547] it engaged in an assessment of international law (which was at that time part

538 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414).

539 *Spain v Owners of the Arantzazu Mendi* [1939] AC 256 (House of Lords).

540 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414) 117 [my emphasis].

541 Mann, *Foreign Affairs* (n 2) 37.

542 Cf already Moore (n 249) 38; McLachlan (n 250) 247.

543 Above Chapter 2, III., 3.

544 The Arantzazu case itself may serve as an example *Spain v Owners of the Arantzazu Mendi* (n 539).

545 *Ex parte Sulman* 1942 CPD 407 (Cape of Good Hope Provincial Division); *Kavouklis v Bulgaris* 1943 NPD 190 (Natal Provincial Division, Durban and Coast Local Division); question left open in *Lendalease Finance Co (Pty) Ltd v H Corporation de Mercadeo Agricola and Others* 1975 (4) SA 397 (C) (Cape Provincial Division); question left open in *Prentice, Shaw & Schiess Incorporated v Government of the Republic of Bolivia* 1978 (3) SA 938 (W) (Transvaal Provincial Division).

546 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414); cf as well *Kaffraria Property Co Pty Ltd v Govt of the Republic of Zambia* 1980 (2) SA 709 (E) (Eastern Cape Division).

547 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414) 116 ff.

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of South African law by virtue of common law)[548] and British case law[549] concerning the scope of immunity. Interestingly, in their shift, the English courts relied heavily on the Tate Letter.[550] Thus, the US approach indirectly also influenced the law in South Africa. In contrast to the US, the change in *Inter-Science Research*, as in Germany's *Iranian Embassy* case, was brought about by independent judicial determination of the status of customary international law and was not initiated by executive statements.[551] As in the United Kingdom (and the United States), the common law approach of the courts in South Africa was later substituted by statute law in the form of the Foreign States Immunity Act of 1981, which closely followed the UK's State Immunity Act of 1978.[552] As introduced above,[553] it provides that a 'certificate by or on behalf of the Minister of Foreign Affairs and Information shall be *conclusive evidence* on any question whether any foreign country is a state for the purposes of this Act'. This again underlines the difference between recognition, which is to be done by the executive, and determination of immunity, now placed in the hands of the courts under statutory law.

The trend towards judicial independence in determining state immunity continued under current South African law. As we have seen, older South African law had developed in this direction, although a certain influence was still given to the executive by certifying on the recognition of a foreign state. The Foreign States Immunity Act of 1981, allowing the executive to submit conclusive evidence, is still in force. However, as mentioned,[554] it is doubtful that courts will still treat this evidence as non-reviewable.[555] Concerning *foreign official* immunity, as we will see below, older statutes that allowed the executive to submit 'conclusive evidence' have been replaced by statutes only granting the status of 'prima facie' evidence,[556] and the

548 Dugard and others, *International Law* (5th edn) (n 2) 63.
549 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414) 118 ff.
550 *Philippine Admiral v Wallem Shipping (Hong Kong) Ltd* (n 5); *Playa Larga v I Congreso del Partido* (n 529); *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414) 121.
551 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414) 120 ff.
552 Dugard and others, *International Law* (5th edn) (n 2) 350.
553 This Chapter, I., 2., c).
554 This Chapter, I., 2., c).
555 In the same vein Dugard and others, *International Law* (5th edn) (n 2) 104.
556 Chapter 3, I., 4., c), bb).

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wording of the Foreign Sovereign Immunities Act may thus be a leftover from older South African law.

The case *Zimbabwe v Fick* shows the continuing independent assessment of the courts in questions of state immunity.[557] It relates to a decision of the SADC tribunal, mentioned above[558] and which will be assessed in more detail below.[559] The tribunal had decided in favour of Zimbabwean farmers expropriated by the Zimbabwean government during land reform. With their claims barred by Zimbabwean courts, some farmers sought to enforce parts of the SADC tribunal's judgment in South Africa. The Zuma government at the time clearly opposed the action.[560] Nevertheless, despite Zimbabwe's view to the contrary, the Constitutional Court held that it had waived its immunity concerning SADC tribunal decisions in accordance with Section 3 (2) of the Foreign Sovereign Immunities Act by ratifying the SADC treaty.[561] The case did not mention a special role for the South African executive.

d) Conclusion on state immunity

To a certain extent, the development concerning state immunity in the United States mirrors the approach in treaty interpretation. In the early 19th century, the courts appeared to award no special deference to the executive. Case law taking into account the executive's position emerged only gradually, but eventually, conclusive force was granted to executive 'suggestions'. This proved unpractical for many reasons, and the common law development was substituted by a statutory framework, allowing the judiciary to assess questions of state immunity independently.

In Germany, like in cases of treaty interpretation, Prussian tradition at first had a strong influence in cases of state immunity and courts applied a conclusiveness approach. This influence was prolonged by the Court of Competence Conflicts and thus still active under the Bismarck Constitution. With the fading significance of the Court of Competence Conflicts and the strengthened role of the Supreme Court of the Reich,

557 *Government of the Republic of Zimbabwe v Fick and others* (n 291).
558 Cf Introduction, I. and this Chapter, I., 1., c), bb).
559 Cf this Chapter, II., 1., b) and Chapter 4, I., 4., b) and Chapter 4, II., 4., b) and c).
560 For the Zuma government's role in dismantling the tribunal this Chapter, II., 1., b) and Chapter 4, II., 4., b) and c).
561 *Government of the Republic of Zimbabwe v Fick and others* (n 291) 335 f.

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the executive's hold on cases of state immunity shrunk. This was facilitated by Article 4 of the Weimar Constitution, explicitly allowing courts to refer to customary international law. Under current German law, the issue of state immunity is still governed by direct reference to international law. Courts have independently determined the status of international law and its application to the respective case, even in the face of differing executive assessments.

In the early 20th century, South African courts followed the UK (and US) approach of the time and independently determined if a state enjoyed immunity. This did not change when the courts solidified the English certification doctrine and started to rely on the executive in recognition cases. In contrast to American practice, the certification was always restricted to the 'status entitling immunity' and not applied to immunity decisions as such. The executive influence on immunity issues was thus a mere 'spill over' from the practice of accepting executive determinations in recognition cases. This became more visible when the 'restrictive immunity' approach prevailed, and recognition of a state did not necessarily lead to its immunity in front of domestic courts. The (limited) reach of executive certification was also finally codified by statutory law in the early 1980s. Under contemporary South African law, this statutory framework is still in force. In its case law, courts have awarded no special weight to executive positions when determining questions of state immunity.

4. Foreign official immunity

This subchapter will examine the courts' review of executive determinations regarding the immunity of (foreign) individuals. I will use the term 'foreign official immunity' to refer to these cases.[562] This type of immunity must be separated from state immunity, as discussed in the previous subchapter, which covers the state as an entity, not its officials. Some US authors apply a narrower definition and only use the term 'foreign official immunity' to refer to a particular subcategory of foreign individuals.[563] As this differ-

562 In this sense also used by Luke Ryan, 'The New Tate Letter: Foreign Official Immunity and the Case for a Statutory Fix' (2016) 84 Fordham Law Review 1773, 1796.

563 Cf e.g. Stewart (n 495) 638 using the term 'foreign official immunity' only for conduct-based immunity not regulated by the Vienna Convention.

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entiation is tied to the peculiarities of US law,[564] I will use the broader definition.

Concerning foreign officials, two forms of immunity have to be differentiated. All foreign government officials hold conduct-based immunity (also referred to as functional immunity or immunity *ratione materiae*), which is granted for official acts, even when they leave office.[565] Some individuals additionally enjoy status-based immunity (also referred to as personal immunity or immunity *ratione personae*), which also covers private acts. It emanates from the position held (e.g., heads of state and government, foreign ministers, and accredited diplomats) and is closely connected to state sovereignty.[566] Status-based immunity only covers incumbent office holders. The following part will deal with both types of immunity and differentiate wherever the courts apply different approaches to the two forms of immunity.[567]

a) USA

aa) Early cases concerning individual immunity

One of the first instances concerning the immunity of a foreign official in the United States evolved in 1795 and concerned the case *Waters v Callot*.[568] Callot had been a former governor of the French colony Guadeloupe and was arrested in Philadelphia on his way back to France. He had allegedly abused his powers to condemn a ship while in office and was being sued by the former captain. Although French officials pressed the US government to interfere, it claimed to have no authority to instruct the courts on the matter.[569] The plaintiff later withdrew his suit and the case was vacated. However, the instance was no singularity. In the late 18th century, several sit-

564 US law applies different approaches to different types of individual immunity, cf this Chapter, I., 4., a.).

565 For the distinction Chimène I Keitner, 'The Common Law of foreign official immunity' (2010) 14 Green Bag 61, 64 f; Wuerth, 'Foreign Official Immunity' (n 346) 14 ff; Bradley, *International Law* (n 9) 264.

566 Bradley, *International Law* (n 9) 264.

567 As we will see, especially the US is arguably applying a different standard to both forms of immunity.

568 Cf the comprehensive reconstruction of the case in Chimène I Keitner, 'The forgotten history of foreign official immunity' (2012) 87 NYU Law Review 704, 713, 751.

569 Ibid 724.

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uations evolved in which a foreign official claimed conduct-based immunity and the executive repeated its conviction to be unable to interfere.[570] This allows for the conclusion that the executive itself saw the determination of foreign official immunity as a judicial task.

The previously described case of the *Schooner Exchange* prominently mentioned the status-based immunity of individuals for the first time.[571] The court alluded to a division between the state itself, the governing monarch as an individual[572] and other representatives such as foreign ministers.[573] However, especially concerning heads of state, the courts hardly differentiated between the state itself and its high-ranking representatives until the enactment of the Foreign Sovereign Immunities Act in the 1970s.[574] In the *Schooner Exchange* case, the differentiation was rather superficial and the individual's immunity was still strongly linked to the immunity of the state itself.[575]

In the absence of cases concerning status-based immunity, it does not come as a surprise that the Supreme Court undertook the first detailed discussion of foreign official immunity in a case dealing with conduct-based immunity. *Underhill v Hernandez*[576] concerned a US citizen working as an engineer during the civil war in Venezuela in the late 19th century. He had been prevented by a general of the later victorious anti-government forces from leaving the city of Bolivar and claimed damages for unlawful detention when he finally returned to the United States. In the meantime, the United States had recognized the new Venezuelan government, and the court found that Hernandez committed the acts in his official capacity

570 Ibid 759.

571 *The Schooner Exchange v McFaddon* (n 441); Christopher Totten, 'Head-of-state and foreign official immunity in the United States after Samantar: A suggested approach' (2011) 34 Fordham International Law Journal 332, 336.

572 *The Schooner Exchange v McFaddon* (n 441) 137.

573 Ibid 138; Bradley, *International Law* (n 9) 264.

574 Rare example *Hatch v Baez* 14 NY Sup Ct 596 (1876) (New York Supreme Court); Jerrold Mallory, 'Resolving the confusion over head-of-state immunity: the defined rights of kings' (1986) 86 Columbia Law Review 169, 171; Totten, 'Head-of-state' (n 571) 337; cf the only rare pre FSIA cases in the comprehensive research of Yelin (n 478) 929, 992 ff; Bradley, *International Law* (n 9) 264.

575 *The Schooner Exchange v McFaddon* (n 441) 144; moreover, the remarks were made obiter as the case primarily concerned state immunity.

576 *Underhill v Hernandez* 168 US 250 (1897) (US Supreme Court) the case also introduced the American 'act of state doctrine' see Bradley, *International Law* (n 9) 265.

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and thus enjoyed immunity.[577] The case does not mention any executive influence on the decision, apart from the executive power to recognize governments.[578] Besides its significance for foreign official immunity, the case is also known for introducing the American doctrine of (foreign) act of state.[579]

After the turn to a conclusiveness approach in state immunity cases was brought about by *Ex parte Peru* in the 1940s,[580] the courts also sporadically applied this approach to cases concerning conduct-based immunity.[581] However, these cases were 'few and far between,'[582] many of them touched on the topic of conclusive assessments as rather obiter dicta,[583] and no coherent approach developed.[584] In 1969 and 1972, the US respectively ratified the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.[585] As international treaties, they do not include special provisions on the executive's role. The same holds for the US Diplomatic Relations Act of 1978, which implemented the Vienna Convention on Diplomatic Relations.[586] In large parts, both treaties are considered self-executing by the courts.[587] In applying the treaties, only executive determinations as to the status of an individual are generally treated as conclusive.[588] The question of immunity as such is not considered bind-

577 Bradley, *International Law* (n 9) 265.
578 *Underhill v Hernandez* (n 576) 253.
579 Bradley, *International Law* (n 9) 265; for the (foreign) act of state doctrine cf already Chapter 2, V., 1.
580 Cf above, this Chapter, I., 3., a).
581 *Greenspan v Crosbie* [1976] US Dist LEXIS 12155 (United States District Court for the Southern District of New York); Bradley, *International Law* (n 9) 266.
582 *Samantar v Yousuf* (n 467) 2291.
583 *Heaney v Government of Spain* [1971] 445 F2d 501 (United States Court of Appeals for the 2nd Circuit) (no suggestion was actually issued by the department of state); *Waltier v Thomson* [1960] 189 F Supp 319 (United States District Court for the Southern District of New York) (not really stating in how far the executive suggestion is binding).
584 Keitner, 'Common Law' (n 565) 73; Bradley, *International Law* (n 9) 264 f.
585 Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95; Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.
586 Arguably some executive influence is left by the reciprocity clause, this is however fundamentally different from the old common law approach Yelin (n 517) 979.
587 American Law Institute, *Third* (n 61) Chapter 6 Introductory Note; Bradley, *International Law* (n 9) 260.
588 Bradley, *International Law* (n 9) 262 f.

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ing but only given weight.[589] Concerning diplomats and consular officials, quite like in the case of state immunity after the enactment of the Foreign Sovereign Immunities Act, the determination of immunity was hence given back to the courts.[590]

bb) Situation post-FSIA and the Supreme Court's decision in *Samantar v Yousuf*

The enactment of the Foreign Sovereign Immunities Act in 1976 settled the law of state immunity,[591] and the Vienna Conventions regulated cases concerning diplomats and consular officials. However, the enactment of the FSIA also caused great uncertainty in how courts should treat cases against individual officials not covered by the Vienna Conventions. Judges only then started to clearly differentiate between head of state immunity and state immunity.[592] Most courts held that the FSIA did not cover head of state immunity and referred to the former common law.[593] Relying on state immunity cases like *Ex parte Peru*, they felt bound by the executive suggestions offered in these situations.[594] If no suggestion was offered, the courts decided independently.[595]

The remaining question was thus regarding how conduct-based immunity would be dealt with after the enactment of the FSIA. It was prominently addressed in *Chuidian v Philippine National Bank*.[596] Chuidian, a Philippine citizen, had sued an official of the Philippine government who had instructed the Philippine National Bank to dishonour a letter of credit issued to Chuidian.[597] The Ninth Circuit held that the FSIA could be applied by treating the defendant as an 'agency or instrumentality of a foreign state'[598] and found the official to be immune. Following this judgment,

589 Ibid; cf however American Law Institute, *Third* (n 61) § 464 f.
590 Mallory (n 574) 181.
591 Cf above, this Chapter, I., 3., a).
592 Mallory (n 574) 171; Totten, 'Head-of-state' (n 571) 337 fn 17.
593 Bradley, *International Law* (n 9) 266.
594 *United States v Noriega* (n 567) 1211 ff; for further case law see Totten, 'Head-of-state' (n 571) 342 ff.
595 Mallory (n 574) 181; Totten, 'Head-of-state' (n 571) 344 ff.
596 *Chuidian v Philippine Nat'l Bank* [1990] 912 F2d 1095 (United States Court of Appeals for the 9th Circuit); cf Bradley, *International Law* (n 9) 268.
597 *Chuidian v Philippine Nat'l Bank* (n 596) 1097.
598 *Chuidian v Philippine Nat'l Bank* (n 596) 1099 ff.

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many Circuit Courts began to apply the FSIA to conduct-based immunity cases, while a smaller number held the act inapplicable.[599] The matter finally reached the Supreme Court in *Samantar v Yousuf*.[600] Samantar was a former military chief in Somalia who left the country to live in the United States after his military regime collapsed. He was allegedly involved in the torture and killing of innocent civilians in Somalia and was sued for damages under the Torture Victim Protection Act and the Alien Tort Statute.[601] The District Court applied the FSIA and held Samantar to be immune,[602] whereas the Court of Appeals disagreed and held that only pre-FSIA common law could apply.[603] Granting certiorari, the US Supreme Court in *Samantar* engaged in a thorough interpretation of the FSIA and held that it did not govern foreign official immunity.[604] However, the court gave little guidance on how judges were to determine the immunity of individuals if the FSIA does not apply.[605] It simply stated

> *We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity.*[606]

Although this speaks for at least some form of executive involvement, it appears fair to hold that it was never entirely settled what degree of deference should apply to executive determinations concerning foreign officials in the pre-FSIA era. To further complicate things, the pre-FSIA common law cannot simply be transferred to the post-FSIA era as the question of sovereign immunity is now one of statutory construction and may have repercussions concerning foreign official immunity.[607] The *Samantar* case was circled back on remand to the District Court, which in *Samantar II* applied the former pre-FSIA common law and followed the executive suggestion (that

599 Cf cases cited in *Samantar v Yousuf* (n 467) 310 fn 4.
600 Ibid.
601 Torture Victim Protection Act 106 Stat 73; Alien Tort Statute 28 USC 1350.
602 *Yousuf v Samantar* 2007 US Dist LEXIS 56227 (United States District Court for the Eastern District of Virginia).
603 *Yousuf v Samantar* [2009] 552 F3d 371 (United States Court of Appeals for the 4th Circuit).
604 *Samantar v Yousuf* (n 467) 315 f.
605 Ryan (n 562) 1777.
606 *Samantar v Yousuf* (n 467) 323.
607 E.g. when a suit against an individual is in essence aimed against the state itself the courts would have to independently determine that the FSIA, not the Common Law applies, see Wuerth, 'Foreign Official Immunity' (n 346) 28 ff.

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the State Department had meanwhile issued) that Samantar did not enjoy immunity.[608] This view was shared on appeal by the Fourth Circuit, albeit differentiating between status-based and conduct-based forms of immunity:

> *In sum we give **absolute deference** to the State Department's position on status-based immunity doctrines such as head-of-state immunity. The State Department's determination regarding conduct-based immunity, by contrast, is not controlling, but it carries **substantial weight** in our analysis of the issue.*[609]

Thus, the courts cemented the differentiation between the forms of immunity, which evolved after the FSIA had been enacted. The rationale behind this distinction is that the Fourth Circuit views head of state immunity as a function of state immunity and thus closely connected to the president's recognition power,[610] warranting a higher degree of deference.[611] This differentiation is highly controversial, as ongoing developments have shown.

cc) Current developments – a circuit split

It took some time for the issue to reach the circuit level again, but finally, the Second Circuit had to deal with the question in *Rosenberg v Pasha*.[612] Two former directors of the Pakistani intelligence service had been charged with their alleged involvement in the 2008 terror attacks in Mumbai, in which 166 individuals died. The State Department issued a suggestion of immunity ('Rosenberg Statement'[613]) in which it claimed (conduct-based) immunity for the defendants. The District Court treated this view as con-

608 *Yousuf v Samantar* 2012 US Dist LEXIS 122403 (United States District Court for the Eastern District of Virginia).

609 *Yousuf v Samantar II* [2012] 699 F3d 763 (United States Court of Appeals for the 4th Circuit) 773 [my emphasis].

610 Cf this Chapter, I., 2., a).

611 *Yousuf v Samantar II* (n 609) 772.

612 *Rosenberg v Pasha* [2014] 577 Fed Appx 22 (United States Court of Appeals for the 2nd Circuit).

613 United States Attorney General, 'Statement of Interest and Suggestion of Immunity, Rosenberg v Lashkar-e-Taiba', 980 F Supp 2d 336 available at <perma.cc/JW9C-AUNL>; Ryan (n 562) fn 16.

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clusive ('the Court's inquiry ends here'[614]) and held that both individuals were immune from jurisdiction. On appeal, the Second Circuit affirmed this view.[615] This reasoning is blatantly at odds with the Fourth Circuit's decision in *Samantar II*, according to which the suggestion of conduct-based immunity is not binding on the courts but merely entitled to 'substantial weight'.[616]

The Fourth Circuit reaffirmed its position in *Warfaa v Ali*[617] and arguably in other decisions,[618] thus leading to a circuit split. *Warfaa* again was concerned with Somali officials allegedly engaged in torture. The Fourth Circuit held that Warfaa did not enjoy immunity without treating the executive suggestion as binding.[619] The Supreme Court would have had the chance to solve the issue when Warfaa applied for certiorari. However, on the circumstances of the case, the executive also held that Warfaa was not immune and, in the absence of an effect on the outcome, certiorari was denied.[620] In his amicus curiae brief, the Solicitor General heavily criticized the 'erroneous reasoning' of the Fourth Circuit as impairing the executive's task to conduct foreign relations.[621]

The current role of the State Department in determinations of foreign official immunity thus remains open. Some authors strongly argue against immunity determinations by the State Department,[622] while others emphasize its dominant role in shaping foreign relations.[623]

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614 *Rosenberg v Lashkar-e-Taiba* [2013] 980 F Supp 2d 336 (United States District Court for the Eastern District of New York) 343.

615 *Rosenberg v Pasha* (n 612).

616 *Yousuf v Samantar II* (n 609) 773.

617 *Warfaa v Ali* [2016] 811 F 3d 653 (United States Court of Appeals for the 4th Circuit).

618 Ryan (n 562) 1785 ff.

619 *Warfaa v Ali* (n 589) 661 holding to be bound by its own precedent.

620 *Warfaa v Ali* 137 S Ct 2289 (cert denied) (2017) (US Supreme Court).

621 United States Solicitor General, 'Warfaa Amicus Brief' available at <https://www.justice.gov/osg/brief/ali-v-warfaa> 12 ff.

622 Wuerth, 'Foreign Official Immunity' (n 346); Peter B Rutledge, 'Samantar and Executive Power' (2011) 44 Vanderbilt Journal of Transnational Law 885, 909; Christine E Ganley, 'Re-evaluating the Common Law of Foreign Official Immunity: Ascertaining the Proper Role of the Executive' (2014) 21 George Mason Law Review 1317 (concerning conduct-based immunity); Ryan (n 562) 1795 ff (concerning conduct-based immunity).

623 Harold H Koh, 'Foreign Official Immunity After Samantar: A United States Government Perspective' (2011) 44 Vanderbilt Journal of Transnational Law 1141, 1147 ff; John B Bellinger, 'The Dog That Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities' (2011) 44 Vanderbilt Journal of Transnational Law 819, 825; Yelin (n 478).

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Recent cases have left the question unanswered. In *Dogan v Barak*[624] the relatives of Dogan, an 18-year-old humanitarian worker, brought a suit against former Israeli Minister of Defence (and previous Prime Minister) Ehud Barak. Dogan had been on board a vessel trying to breach a blockade of the Gaza strip in 2010 and was killed by the Israeli military when it took control of the ship. As Minister of Defence, Barak had authorized the action, and the State Department issued a suggestion of immunity. The District Court used a classical 'even if' approach and held that, also when examined independently, Barak was entitled to immunity.[625] During the appeal proceedings, the State Department affirmed its view that its assessment is binding in an amicus brief.[626] Nevertheless, the Ninth Circuit, in its 2019 appeal decision, held that 'we need not decide the level of deference owed to the State Department's suggestion of immunity in this case, because even if the suggestion of immunity is afforded "substantial weight" (as opposed to absolute deference), based on the record before us we conclude that Barak would still be entitled to immunity'.[627]

A similar picture evolved from *Lewis v Mutond*[628]. It concerned the director of the Democratic Republic of Congo's intelligence service allegedly involved in the torture of an US-citizen in Congo. In the absence of a suggestion of immunity the court (erroneously)[629] referred to a section of the Second Restatement and denied immunity. The State Department in its amicus brief for review strongly opposed the approach as the court did not refer to 'the long-stated views and practice of the Executive Branch' which in its opinion should have governed the case in absence of a suggestion

624 *Dogan v Barak* 2019 US App LEXIS 23193 (United States Court of Appeals for the 9th Circuit); *Doğan v Barak* 2016 US Dist LEXIS 142055 (United States District Court Central District of California).

625 *Doğan v Barak* (n 624) 26 ff.

626 Brief for the United States as Amicus Curiae Supporting Affirmance, Dogan v. Barak, 932 F. 3d 888, No. 16–56704, 12 ff.

627 *Dogan v Barak* (n 624) 12 f.

628 *Lewis v Mutond* [2017] 258 F Supp 3d 168 (United States District Court for the District of Columbia); *Lewis v Mutond* [2019] 918 F 3d 142 (United States Court of Appeals for the District of Columbia Circuit); *Mutond v Lewis* 141 S Ct 156 (cert denied) (2020) (US Supreme Court).

629 The provision is arguably outdated after the FSIA, William S Dodge and Chimene I Keitner, 'A Roadmap for Foreign Official Immunity Cases in US Courts' (2021) 90 Fordham L Rev 677, 692.

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of immunity.[630] However, the Supreme Court did not grant certiorari. The issue thus remains open until the Supreme Court has a chance to clarify its ruling in *Samantar*.

b) Germany

aa) Foreign official immunity during the Bismarck and Weimar Constitutions

The 'Procedural Code for the Prussian States' of 1793 entails the first traits of the German approach concerning individual immunity. It stipulated that the arrest of a foreign consul was only possible with the permission of the Foreign Department.[631] The law was further developed in the previously mentioned Prussian cabinet order[632] of 1795, providing that a declaration should be obtained from the Foreign Office[633] before foreign princes could be subjected to arrest proceedings.[634] In 1815, the regulation became part of the Procedural Code of the Prussian States.[635] The immunity of foreign diplomats and consuls also found its way into the Courts Constitution Act (*Gerichtsverfassungsgesetz*) of 1877, albeit without referring to the executive's role in determining their status.[636]

During the Bismarck Constitution, the courts began to decide independently whether foreign officials were immune. In a case concerning the Duke of Cumberland, the Supreme Court of the Reich, without executive guidance, held that the Duke did not enjoy immunity.[637] The court also

630 United States, 'Mutond v Lewis Amicus Brief', 2020 US S Ct BRIEFS LEXIS 5337, 14 f.
631 Allgemeine Gerichtsordnung (n 483) Zweiter Teil § 65; Allen (n 479) 57 appears to cite the wrong paragraph; Bolewski (n 128) 47 fn 1.
632 Rabe (n 480) 50, the Cabinet consisted of the closest advisors of the King cf Huber (n 480) 145 f.
633 At this time called 'Kabinettsministerium' Huber (n 481) 146.
634 Loening (n 479) 27, 34; Allen (n 479) 56 f.
635 Allgemeine Gerichtsordnung (n 483) § 202 Title 29 § 90; Loening (n 479) 28 (with the slight modification, that the Minister of Justice has to decide after consultation with the foreign office); Allen (n 479) 58.
636 Allen (n 479) 70; Münch (n 521) 266.
637 Schmitz and others (n 133) 133, 458 f; Bolewski (n 128) 82 fn 4.

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decided that Greek soldiers who entered German territory without official orders were not immune from prosecution.[638]

The independent assessment continued during the Weimar Constitution. In the mentioned cases concerning Turkish purchases during the First World War in front of the Competence Court,[639] a Turkish diplomat's bank account was found not immune from German jurisdiction without any executive guidance.[640] The role of the executive was assessed in greater detail for the first time in the *Persian Mission* case[641] in 1926. The case in front of the Darmstadt Higher Regional Court concerned a member of the Persian mission charged with tax evasion. The German Foreign Office issued a statement that no immunity should be granted since, months before the proceedings, it had declared vis-à-vis the Persian embassy that it found the particular staff member not agreeable.[642] In preliminary proceedings, the court denied granting immunity, holding that it was not for the ordinary courts to ascertain if an individual possesses immunity and that it was formally bound by the statement of the Foreign Office, thereby following an expert opinion.[643] This position resembles the classical English certification doctrine and the executive suggestions in the United States.[644] During the second round of proceedings, the Higher Regional Court explicitly changed its view. It stated that, in general, due to German constitutional and administrative law, every government agency had to decide autonomously on fundamental questions for its respective decision, even though these questions lie in the area of competence of a different agency.[645] Therefore, the courts were only bound to agency statements if provided for by (statutory) law,

638 *Judgment from 17 September 1918* RGSt 52, 167 (Supreme Court of the Reich); for a case concerning an US consul see *Judgment from 27 January 1888* RGSt 17, 51 (Supreme Court of the Reich) (as well independent assessment).

639 Cf this Chapter, I., 3., b).

640 *Judgment from 13 November 1920* (n 513).

641 *Decision from 20 December 1926 (Persian Mission Case)* ZaöRV 1929, 204 (Higher Regional Court Darmstadt); for an English summary: *Persian Mission Case* Annual Digest of Public International Law Cases, 1925–1926, Case No 244; the case also reached the Reichswirtschaftsgericht which followed the view of the Higher Regional Court cf Karl Strupp, 'Persian Mission Case with annotations' (1929) 58 JW 970 ff; cf as well Bolewski (n 128) 81 ff.

642 *Persian Mission Case from 20 December 1926* (n 641) 207.

643 Opinion of Conrad Bornhak cited ibid 204.

644 Cf Chapter 2, III., 1. and 3.

645 *Persian Mission Case from 20 December 1926* (n 641) 205.

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which did not apply to the case.[646] The German Foreign Office agreed with the court and stated that it 'at no time […] held the view that its opinion is binding on the German courts'.[647] With its decision, the court also followed new expert opinions, which had been provided in the meantime.[648] The experts stated that due to judicial independence, even if some agencies appeared more suited to settle certain questions, there was no room for a binding effect.[649] Nevertheless, the foreign office's statement warranted 'careful consideration'[650] and was to be given 'heightened weight'.[651] The court followed this view. However, even though it denied a binding effect, it decided in favour of the executive and contrary to the suggestions of many scholars did not grant immunity.[652] The case shows that as early as in the Weimar Republic, courts and scholars[653] dismissed a doctrine of conclusive evidence in favour of a margin of discretion approach.

During the Nazi period, judicial review was restricted. The recognition of ambassadors and other diplomatic personnel lay in the unreviewable competence of the *Führer*[654] and effectively also included the question of immunity.[655]

646 Ibid.
647 Ibid directly citing the German Foreign Office [my translation].
648 Ibid 204; Karl Strupp, 'Rechtsgutachten' (1926) 13 Zeitschrift für Völkerrecht 18; Friedrich Giese, 'Rechtsgutachten über die Frage der persönlichen Extraterritorialität des ausländischen Gesandschaftsattachés Herrn A.' (1926) 13 Zeitschrift für Völkerrecht 3.
649 Giese (n 648) 4.
650 Ibid 5.
651 Strupp (n 648) 27.
652 Carl Heyland, 'Persian Mission Case Annotations' (1928) 14 Zeitschrift für Völkerrecht 594, 597 f; Eugen Josef, 'Annotations to Persian Mission Case' (1928) 57 JW 76; Giese (n 648).
653 Strupp, 'Persian Mission Case with annotations' (n 641); Strupp, 'Rechtsgutachten' (n 648); Giese (n 648).
654 Grundmann (n 369) 535; Bolewski (n 128) 83 ff.
655 Especially since at that time the absolute immunity doctrine was applied in Germany.

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bb) Foreign official immunity in contemporary German law

(1) Statutory foundations

Under current German law, the Courts Constitution Act (*Gerichtsverfassungsgesetz*) continues to regulate the immunity of foreign officials.[656] The statute exempts individuals covered by the Vienna Convention on Diplomatic[657] and Consular[658] relations from German jurisdiction. It also provides immunity to invited foreign representatives[659] and officials who are immune due to customary law and other treaties.[660] The majority of academic commentators hold that the judiciary has to determine independently whether the requirements for immunity are fulfilled.[661] Nevertheless, the Foreign Office has issued a detailed circular concerning the 'treatment of diplomats and other privileged personal' to secure the 'appropriate treatment' in front of agencies and courts.[662] Courts refer to it as guidance.[663]

Case law shows the considerable independence of German courts and their struggle to give appropriate weight to executive decisions. In a case at the Heidelberg Regional Court, a diplomat of the Republic of Panama had been charged with drink-driving and various traffic offences.[664] He claimed diplomatic immunity under the statute implementing the Vienna

656 However, concerning the Vienna conventions the provisions are merely declaratory, as both treaties are directly applicable in Germany due to their ratification statute Otto Kissel and Herbert Mayer, *Gerichtsverfassungsgesetz – Kommentar* (9th edn, CH Beck 2018) § 18 mn 4.

657 § 18 Courts Constitution Act.

658 § 19 I Courts Constitution Act.

659 § 20 I Courts Constitution Act.

660 § 20 (2) Courts Constitution Act.

661 Kissel and Mayer (n 656) § 18 mn 5; Brian Valerius, '§ 18 GVG' in Jürgen Graf (ed), *Beck OK GVG* (13th edn, CH Beck 2021) mn 7; on § 20 cf Steffen Pabst, '§ 20 GVG' in Thomas Rauscher and Wolfgang Krüger (eds) *Münchener Kommentar ZPO* (6th edn, CH Beck 2022) mn 8.

662 German Foreign Office, 'Zur Behandlung von Diplomaten und anderen bevorrechtigten Personen in der Bundesrepublik Deutschland' Circular from 15 September 2015 available at <https://www.auswaertiges-amt.de/blob/259366/95fb05e9a6a89de129f15d27f92f00aa/rundschreiben-beh-diplomaten-data.pdf>; previously a circular of the Ministry of the Interior was in place cf Kissel and Mayer (n 656) § 19 mn 5.

663 Chapter 3, I., 4., b), bb), (3) and *Decision from 5 October 2018* StB 43/18, StB 44/18 (Federal Court of Justice).

664 *Decision from 7 April 1970* NJW 1970, 1514 (Regional Court Heidelberg); Zeitler (n 171) 203.

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Convention on Diplomatic Relations.[665] The German Ministry of Foreign Affairs and the Justice Ministry held that no immunity existed as Panama had been notified of his non-recognition under Article 9 (2) of the Vienna Convention on Diplomatic Relations.[666] However, the court held that on proper interpretation, the note only included a declaration as persona non grata under Article 9 (1) of the Convention and that no subsequent note of non-recognition had followed.[667] It explicitly stressed not being bound by a contradicting interpretation of the executive and decided that the suspect was still covered by immunity.[668]

The contemporary German approach concerning foreign official immunity has been particularly elaborated on in the litigation triggered by the Iranian diplomat Tabatabai, a case we will examine in greater detail.

(2) The Tabatabai litigation

(a) General background of the case

Sadegh Tabatabai[669] had worked in various positions in the Iranian government and, in 1983, entered Germany, where he also owned a private residence. In his possession, customs officials found 1.7 kilograms of opium.[670] He claimed diplomatic immunity upon his arrest and was subsequently released.[671] However, the Regional Court continued the trial on the merits. One day before the final judgment, Tabatabai left the country, and the

665 Article 18.
666 *Order from 7 April 1970* (n 664) 1515.
667 Ibid.
668 Ibid.
669 The facts of the case are based on the court decisions *Decision from 27 February 1984* (*Tabatabai Case)* BGHSt 32, 275 (Federal Court of Justice); *Decision from 7 March 1983 (Tabatabai Case 2nd Release Order)* (1983) 6 MDR 512 (Higher Regional Court Düsseldorf); *Judgment from 10 March 1983* (*Tabatabai Case)* (1983) EuGRZ 440 (Regional Court Düsseldorf); *Order from 24 February 1983* (*2nd Writ of Arrest)* (1983) EuGRZ 159 (Regional Court Düsseldorf); cf as well Klaus Bockslaff and Michael Koch, 'The Tabatabai Case: The Immunity of Special Envoys and the Limits of Judicial Review' (1982) 25 German Yearbook of International Law 539.
670 A criminal offense in Germany due to § 30 Narcotics Law (*Betäubungsmittelgesetz*).
671 In fact he was arrested two times by the Regional Court and set free two times by the Higher Regional Court cf *Tabatabai Case 2nd Release Order* (n 669).

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court ruled in his absence.[672] The main legal issue concerned whether Tabatabai was exempted from German jurisdiction according to customary international law as provided for by the Courts Constitution Act.[673]

From the facts, the only possibility for such immunity could have been his recognition as a special envoy.[674] This would have required a concrete agreement between Germany and Iran on a specific task for Tabatabai.[675] Whether or not such an agreement had been concluded sparked the central question of the dispute. Three days before his arrival, Tabatabai had met the German ambassador in Tehran and had informed him that he had been ordered to enter into negotiations with various European powers. He had also requested the assistance of the ambassador because of the latter's good contacts in France. The German ambassador, in turn, had agreed to meet again in Germany but had not informed the German Foreign Office. When Tabatabai was taken into custody, the senior prosecutor called the German Foreign Office, which stated that it knew nothing of a special mission and that, from its view, there was no reason for immunity. When the German ambassador arrived from Tehran six days later, he informed the Foreign Office of his talks with Tabatabai. However, the Foreign Office did not intervene in favour of Tabatabai. Nine days after the arrest, the Iranian ambassador contacted the Foreign Office for the first time and expressed his concern. He subsequently issued a diplomatic note to the German Foreign Minister asking to grant Tabatabai all privileges which are typically granted to envoys on a special mission. The German Foreign Office accepted this note. According to the Foreign Office, Tabatabai hence acquired the status of a special envoy and was therefore exempted from German jurisdiction under the Courts Constitution Act.

672 Because Tabatabai had participated in previous stages of the proceedings, the court could rule in his absence based on § 231 Code of Criminal Procedure.

673 As provided for by § 20 (2) Courts Constitution Act, cf above, this Chapter, I., 4., b), bb), (1).

674 Note that Germany is not a member to the UN Convention on Special Missions (which only entered into force in 1985).

675 Cf the opinion of the expert witnesses (law professors Doehring, Wolfrum, Bothe and Delbrück) who agreed on that point *Judgment from 10 March 1983* (*Tabatabai Case)* (n 669) 445.

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(b) The approach of the Regional Court

The Regional Court nevertheless denied immunity to Tabatabai. It did not treat the statement of the German Foreign Office as binding but instead examined whether both states had agreed on a task for the special mission. It held that such a mission had not been established at the meeting with the German ambassador in Tehran as both had never discussed a special task, diplomatic status, or the exact composition or dates of the mission.[676] It also remarked that if such a task had been agreed upon, it would have been unnecessary for Germany and Iran to exchange notes after Tabatabai had been arrested.[677] In the eyes of the court, the meeting was a mere 'private arrangement'.[678] It denied later conferral of immunity by the exchanged notes as these did not entail a specific purpose for a special mission.[679] Concluding from the circumstances, the Regional Court held that the real purpose of the notes was to grant Tabatabai immunity and protect him from criminal prosecution. It found that both states had only 'feigned'[680] the special mission, which may be permissible as an act of 'courtesy' in international law but could not be accepted as a rule of international law and thus did not confer any immunity on Tabatabai. It hence sentenced Tabatabai to three years in prison.

(c) The holding of the higher courts

The Higher Regional Court already touched on the question of immunity when it ordered the release of Tabatabai pending the decision on the merits. In contrast to the Regional Court, it applied a lower standard for a 'special task' and thus found that both parties had established a special mission with the exchange of notes.[681] Moreover, the court was especially critical that the Regional Court had called into question the motives for accepting the Iranian request. It held that these motives were 'exempted from judicial

676 Ibid 446.
677 Ibid 447.
678 Ibid.
679 Ibid 448.
680 Ibid.
681 *Tabatabai Case 2nd Release Order* (n 669) 513.

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review with regards to their legality'.[682] In contrast to the Regional Court, the Higher Regional Court held that because the Basic Law assigns foreign affairs to the executive, it has a broad area of discretion.[683] Within this area, the courts were not free to review legal facts (*Rechtstatsachen*) but were bound by the executive determination.[684]

After Tabatabai had been convicted on the merits by the Regional Court, he appealed[685] to the Federal Court of Justice. The court affirmed the view of the Regional Court not to be bound by the statement of the Foreign Office.[686] It held that it was up to the courts to decide whether the requirements for immunity were fulfilled in the case in question.[687] However, it agreed with the Higher Regional Court that the Regional Court had set too high a standard concerning a special purpose and did not follow the view that the statements were merely 'feigned' to confer immunity on Tabatabai.[688] In its opinion, the German ambassador's promise in Iran to contact French officials was enough to render the trip to Germany a 'mission en passant'.[689] According to the Federal Court of Justice, the German Foreign Office thus had an objective basis for accepting the note of the Iranian Foreign Minister and thus, under general international law, established retroactive immunity for this special mission.[690]

(d) Lessons from the *Tabatabai* case

The *Tabatabai* case sheds light on typical German problems concerning executive determinations. On the one hand, a doctrine of non-reviewability and a doctrine of conclusive evidence would be contrary to the Basic Law. Hence, the Regional Court and the Federal Court of Justice are in line in so far as they agree that an executive statement does not bind them. For a

682 Ibid, 'der hier zu treffenden gerichtlichen Nachprüfung in bezug auf Rechtmäßigkeit der getroffenen Entscheidung entzogen' [my translation].
683 Ibid 514.
684 Ibid.
685 German 'Revision', see Chapter 1, (n 36) above.
686 *Tabatabai Case* (n 669) 276.
687 Ibid.
688 Ibid 276, 289.
689 Ibid 282.
690 Ibid 282 and 288.

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US court, almost certainly, the immunity question would have been settled after the executive's intervention.[691]

On the other hand, the Higher Regional Court and the Federal Court of Justice try to carve out room for the executive to manoeuvre. The Higher Regional Court tries to find a way around the complete reviewability and to establish a limited binding effect.[692] It struggles to find the correct language, speaking of a 'binding effect' as long as the executive is 'within an area of discretion'.[693] Bockslaff and Koch[694] have tried to refine that reasoning. They suggested that although the courts have to review if the requirements for immunity (like Germany accepting the note granting Tabatabai immunity) are fulfilled, they may not go behind that 'operative act' and scrutinize the motives for consent. As long as the 'operative act' is in accordance with international law and no special constitutional provision applies, only a very limited review singling out arbitrary decisions and blatant errors of law would remain possible.[695] Unfortunately, the Federal Court of Justice did not take up the chance to elaborate on these ideas but simply set the bar for a 'special task' very low, thus giving way to the executive without going into detail concerning the binding effect or the reach of the area of discretion in foreign affairs.

(3) Further developments in Germany

Since the *Tabatabai* litigation, the courts,[696] including the Federal Court of Justice,[697] have independently determined the immunity of foreign in-

691 Thomas M Franck, *Political questions, judicial answers: Does the rule of law apply to foreign affairs?* (Princeton University Press 1992) 112.

692 Thereby relying on Frowein (n 374).

693 *Tabatabai Case 2nd Release Order* (n 669) 514 'Wollten hier die Gerichte für sich das Recht in Anspruch nehmen, die von der auswärtigen Gewalt innerhalb ihres Ermessensspielraumes gesetzten Rechtstatsachen selbständig und ohne Bindung hieran zu beurteilen, würde dies die außenpolitische Handlungsfähigkeit der Bundesrepublik in unzuträglichem Maße beeinträchtigen'.

694 Bockslaff and Koch (n 669).

695 Ibid 562.

696 *Decision from 16 May 2000* 2 Zs 1330/99 (Higher Regional Court Cologne); *Decision from 30 May 2017* 504 M 5221/17 (Local Court Dresden).

697 *Order from 5 October 2018* (n 663); *Decision from 14 August 2002* 1 StR 265/02 (Federal Court of Justice).

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dividuals. In contentious cases, they have asked the Foreign Office for evidence[698] or referred to the Office's circular.[699]

In a case decided in 2021 the Federal Court of Justice after a lengthy review of state practice, without referring to the executive's opinion on that matter, decided that conduct-based immunity does not cover war crimes of a former Afghan soldier.[700] This was taken even further in a recent pre-trial decision on detention of the same court, where it held that conduct-based immunity does not apply to crimes under international law,[701] even though the German government had been hesitant to accept such a categorical exception.[702] In the aftermath of the judgment parliament now passed an amendment of the Courts Constitution Act which codifies the court's jurisprudence and denies conduct-based immunity for all crimes under the German Code of Crimes under International Law.[703]

The German approach may thus be described as a largely independent assessment but places weight on the factual evidence provided by the Foreign Office.

c) South Africa

aa) The situation under previous South African constitutions

Concerning the status of foreign officials, South African courts again relied on the English certification doctrine, which had been developed in the early 19th century.[704] Like in cases of state immunity, the thin line between

698 *Order from 30 May 2017* (n 696).
699 *Order from 5 October 2018* (n 663).
700 *Judgment from 28 January 2021* 3 StR 564/19 (Federal Court of Justice).
701 *Decision from 21 February 2024* AK 4/24 (Federal Court of Justice); Aziz Epik and Julia Geneuss, 'Without a Doubt: German Federal Court Rules No Functional Immunity for Crimes Under International Law' Verfassungsblog from 19 April 2024 available at <https://verfassungsblog.de/without-a-doubt/>.
702 Federal Republic of Germany, 'Comments and observations by the Federal Republic of Germany on the draft articles on "Immunity of State officials from foreign criminal jurisdiction"' available at <https://legal.un.org/ilc/sessions/75/pdfs/english/iso_germany.pdf>.
703 Bundestag, 'Entwurf eines Gesetzes zur Fortentwicklung des Völkerstrafrechts', Drucksache 20/11661.
704 For one of the earliest cases cf *Delvalle v Plomer* (1811) 170 ER 1301 (High Court); O'Connell (n 315) 114.

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certifying the 'status entitling immunity'[705] and the question of immunity as such often became blurry.[706] Additionally, the executive had considerable control by certifying on the recognition of states and governments.[707]

This tendency was also reflected in South African law. In the mentioned *Inter-Science Research* case,[708] the court held that 'the status of diplomatic representatives of a foreign state'[709] was in the exclusive domain of the executive.[710] This leaves open the question as to whether the executive's view is only binding as to the 'status which entitles to immunity' or as to the 'status of immunity' as such.[711] Statutory law favours the latter interpretation. The Diplomatic Privileges Act of 1951[712] granted immunity to individuals like heads of state or diplomatic agents[713] and also to 'any other person who is recognized by the Minister as being entitled to diplomatic immunity in accordance with the recognized principles of international law and practice'.[714] The last part of the provision appears to have allowed the judiciary to review whether the conferral of immunity is in accordance with international law. However, another section of the same act stated that any certificate concerning the diplomatic status of a person issued by the executive 'shall *be conclusive proof of the facts or conclusions* stated therein in any court of law'.[715] The conclusiveness of the certificate *does* also extend to the conclusion (that is, immunity) itself.[716] The executive could hence confer immunity on persons at will.

705 Cf this Chapter, I., 3., c).
706 Stating the problem O'Connell (n 315); concerning state immunity cf McLachlan (n 250) 247.
707 The executive could use the non-recognition to effectively deny immunity to individuals *Fenton Textile Association v Krassin* (1921) 38 TLR 259 (Court of Appeal); the same holds true for 'wrongful recognition' Mann, *International Law* (n 247) 337 fn 2; Mann, *Foreign Affairs* (n 2) 85.
708 *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (n 414).
709 Ibid 117.
710 Dugard and others, *International Law* (5th edn) (n 2) 171.
711 Cf Mann, *Foreign Affairs* (n 2) 37.
712 Dugard and others, *International Law* (5th edn) (n 2) 376.
713 Diplomatic Privileges Act 71 of 1951 Section 2.
714 Ibid Section 2 (1) f.
715 Ibid Section 4 (4) [my emphasis].
716 The Act was applied in *Penrose*. An executive statement given was however treated as not conclusive as the individual concerned (a consul) was not covered by the act. The court however arrived at the same conclusion as the executive *S v Penrose* 1966 (1) SA 5 (N) (Natal Provincial Division).

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The executive's influence was cut back only on the eve of apartheid when the act of 1951 was replaced by the Diplomatic Immunities and Privileges Act 71 of 1989.[717] Like its predecessor, it offered the opportunity for the president to

> *confer upon any person, irrespective of whether such person is a representative contemplated in the Vienna Convention on Diplomatic Relations, 1961, or in the Vienna Convention on Consular Relations, 1963 […] such immunities and privileges as he may so specify.*[718]

However, the conclusive force of the executive's certificate was restricted. Now it only stipulated 'a certificate under the hand or issued under the authority of the Director-General stating any fact relating to that question, shall be conclusive evidence of that fact'.[719] This mirrors the wording of the UK's Diplomatic Privileges Act of 1964[720] and thus, at least concerning the evidentiary force,[721] brought South African law back in line with its British roots.

bb) The situation under the new South African Constitution

The remaining executive hold was challenged again with the new South African Constitution in 1996. In 2001, a new Diplomatic Immunities and Privileges Act (DIPA) was enacted.[722] Like the 1951 and 1989 versions, it regulates immunity for heads of state and diplomatic agents and contains the power to confer immunity upon other individuals.[723] However, concerning the binding force of an executive statement, the wording changed considerably:

> *If any question arises as to whether or not any person enjoys any immunity or privilege under this Act or the Conventions, a certificate under the*

717 On the codifications in the area cf Dugard and others, *International Law* (5th edn) (n 2) 376.
718 Diplomatic Immunities and Privileges Act 71 of 1989 Section 4 (c) [my omission].
719 Ibid Section 7 (3).
720 *Diplomatic Privileges Act 1964* Section 4.
721 British statutory law does not offer the possibility to unilaterally confer immunities, this may only be done by bilateral arrangement, cf *Diplomatic Privileges Act 1964* Section 7.
722 *Diplomatic Immunities and Privileges Act 37 of 2001.*
723 Section 7 (2).

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*hand or issued under the authority of the Director-General stating any fact relating to that question, is **prima facie** evidence of that fact.*[724]

In contrast to conclusive evidence, the nature of such prima facie evidence is that (even though it contains an assumption that the statement is true) it can be rebutted. Compared to the corresponding section in the 1951 and 1989 acts, the wording implies a change towards less deference.

The courts have shown little deference concerning immunity suggestions of the executive under the new South African Constitution. This was already hinted at in the aforementioned case[725] concerning alleged acts of torture committed by high-ranking Zimbabwean police officials against members of the Zimbabwean opposition party. A South African NGO had investigated the incidents and sued the South African police authorities, which had declined to open investigations.[726] The executive agencies claimed that an investigation might damage South Africa's relations with Zimbabwe.[727] However, the High Court rejected this argument with reference to South Africa's obligations under the Rome statute.[728] It also held that diplomatic immunity would not stand in the way of investigations[729] and ordered the South African police to examine the case.[730] The Supreme Court of Appeal[731] and the Constitutional Court[732] upheld the judgment. The question of executive influence in foreign official immunity cases found even more attention in two more recent cases, to which we now turn.

724 Section 9 (3) [in the original 'prima facie' is emphasized in italics].
725 Cf Chapter 2, I., 3.
726 *Southern Africa Litigation Centre v National Director of Public Prosecutions (Zimbabwe Torture Case)* 2012 (10) BCLR 1089 (GNP) (North Gauteng High Court); for the case cf as well Eksteen (n 294) 287 ff.
727 *Southern Africa Litigation Centre v National Director of Public Prosecutions (Zimbabwe Torture case)* (n 726) para 4, 10.
728 Ibid para 31.
729 Ibid.
730 Ibid para 33.
731 *National Commissioner, South African Police Service and Another v Southern African Human Rights Litigation Centre and Another* 2014 (2) SA 42 (SCA) (Supreme Court of Appeal).
732 With modifications, but explicitly endorsing the irrelevance of foreign policy considerations *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre* [2014] ZACC 30; 2015 (1) SA 315 (CC) (Constitutional Court) mn 74.

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(1) *Al-Bashir* case

The first case concerns the mentioned[733] visit of the former Sudanese President Al-Bashir to South Africa.[734] In 2015, Al-Bashir attended a meeting of the African Union (AU) in Johannesburg even though an arrest warrant from the International Criminal Court had been issued against him. While Al-Bashir was present in the country, a South African NGO obtained an interim order from the High Court in Pretoria, ordering the government to stop Al-Bashir from leaving the country. Despite the order, Al-Bashir left unhindered, and the case finally reached the Supreme Court of Appeal.[735]

The executive's first major argument was that Al-Bashir enjoyed immunity by virtue of Article 8 of the 'host agreement' concluded with the AU and under an executive proclamation issued under the DIPA. However, the wording of the host agreement and the proclamation under the DIPA only granted immunity to officials of the AU as an international organization, not to heads of state of its member states.[736] The executive tried to counter that argument by stressing that at least the erroneous proclamation was never revoked. The court quite bluntly rejected the argument, stressing that the provisions never covered Al-Bashir and '[t]he fact that the cabinet may have thought that it would is neither here nor there […] [a]n erroneous belief cannot transform an absence of immunity into immunity'.[737]

The second argument of the executive pointed out that Al-Bashir enjoyed immunity under customary international law as a head of state, under a special section in the DIPA.[738] However, the court held that South Africa, in its Rome Statute Implementation Act,[739] based on its strong commitment to human rights,[740] regulated that head of state immunity may not hinder an arrest under an ICC warrant. The court thus found that Al-Bashir was not

733 Chapter 3, I., 1., c), bb).
734 On the case cf as well Eksteen (n 294) 294.
735 As the government has withdrawn its appeal against the judgment the case will not reach the Constitutional Court.
736 *Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others (Bashir Case)* (n 274) 338.
737 Ibid 339 [my adjustments and omissions].
738 *Diplomatic Immunities and Privileges Act* (n 722) Section (4) (1) (a).
739 Implementation of the Rome statute of the International Criminal Court Act 27 of 2002 Section 4(2) and 10 (9).
740 *Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others (Bashir Case)* (n 274) 356 ff.

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protected by any form of immunity[741] and the executive consequently acted unlawfully by not detaining and surrendering him.[742]

(2) *Mugabe* case

Another recent case concerned the wife of late Zimbabwean Prime Minister Robert Mugabe.[743] While her husband was attending a head of state summit of the SADC, Grace Mugabe allegedly assaulted three women in a hotel in Johannesburg. The government had claimed that she was immune from prosecution for two reasons. First, as the wife of a head of state, she enjoyed immunity under customary international law; second, that immunity had been conferred upon her by an executive decision according to Section 7 (2) of the DIPA.[744] The section allows the Minister of Foreign Affairs to confer immunity and privileges if it is 'in the interest of the republic'. The executive justified its decision with foreign policy considerations, in particular possible tensions with Zimbabwe and the paramount importance of the SADC summit as one of the pillars of South African foreign policy.[745] The executive acknowledged its decision was reviewable, but only a low rationality standard should be applied as it concerned foreign affairs.[746]

The court first determined the status of customary international law and found that no rule of customary international law existed that would award the wife of a head of state status-based immunity.[747] The court then briefly turned to the question concerning conferral of immunity under the DIPA. In a relatively obscure paragraph, it decided that the executive chose not to defend its decision to confer immunity in court but only argued that it 'recognized' immunity – which turned out to be non-existent.[748] Unfortunately, by using this rather semantic trick, the court avoided stating how far the

741 *Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others (Bashir Case)* (n 274) 362.
742 Ibid 365.
743 On the case as well Dugard and others, *International Law* (5th edn) (n 2) 377; also Ntombizozuko Dyani-Mhango, 'Revisiting Personal Immunities for Incumbent Foreign Heads of State in South Africa in Light of the Grace Mugabe Decision' (2021) 21 African Human Rights Law Journal 1135.
744 *Democratic Alliance v Minister of International Relations and Co-operation and Others (Mugabe Case)* 2018 (6) SA 109 (GP) (Gauteng Division) 113 ff.
745 Ibid.
746 Ibid 114.
747 Ibid 120 ff.
748 Ibid 119, 129 f.

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executive could use Section 7 (2) of the DIPA to confer immunity at will and to what extent such a decision would be reviewable.

On the other hand, the court's deliberations on American cases while examining case law concerning immunity for spouses of heads of state are very illuminating. It found that the US decisions that granted immunity to family members are an expression of US domestic law and thus should not be considered influential in determining the status of international law.[749] Incidentally, the court also commented on the relation between South African and US law:

> *Thus in all the [US] cases the decision of the executive to grant or refuse immunity is determinative, as the courts treat this as a matter that falls exclusively within the preserve of the executive arm of the state.* ***This is not the law in South Africa.*** *Here the executive is constrained by the Constitution and by national legislation enacted in accordance with the Constitution. In terms of the Constitution the executive can only grant immunity rationae personae to an official from a foreign state if such immunity is derived from (i) a customary norm that is consonant with the prescripts of the Constitution; or (ii) the prescripts of an international treaty which is constitutionally compliant; or (iii) national legislation which is constitutionally compliant. A decision to grant immunity to a foreign state official that does not fall into one of the three categories will not withstand the test of legality, rationality or reasonableness. That is our law.*[750]

(3) Lessons from the *Al-Bashir* and *Mugabe* cases

The *Al-Bashir* and *Mugabe* cases show contemporary South African courts' astonishing level of independence in determining questions of foreign official immunity.

In the *Al-Bashir* case, the court harshly rejected the suggestion by the executive that its proclamation – even when based on a false legal assumption – still carried a legal effect. In like manner, the second line of defence concerning the scope of head of state immunity was decided completely independently by the court. What is more, the judges did not find it necessary

749 Ibid 125.
750 Ibid [my insertion and emphasis].

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even to mention a special role for the executive in conducting foreign affairs or that some form of weight should be attached to its assertions.[751]

The *Grace Mugabe* case also supports this view. The remarks on US law clarify that the courts will not blindly accept executive immunity suggestions. However, as the DIPA permits such suggestions, the executive can exercise influence concerning the diplomatic status of individuals. Such a decision will, without doubt, be subject to review under the principle of legality for rationality. Unfortunately, these cases do not answer the question of how strict such a review would be. However, it appears clear that the courts have done away with a doctrine of conclusiveness.

The South African government shied away from testing the issue again. When Russia's President Putin planned to visit the country in 2023 to attend the BRICS summit, the debate about his possible arrest in compliance with an ICC arrest warrant in connection with the Russian War in Ukraine[752] finally led to both countries' 'mutual agreement' that he will not attend in person.[753]

d) Conclusion on foreign official immunity

For a long time, the law concerning foreign official immunity in the United States followed the law on state immunity, as the courts did not differentiate between the state and the individuals representing it. Thus, as with state immunity, no special role for the executive existed in the 19th century. This changed after binding suggestions were introduced in the law of state immunity in the 1940s and the courts began to (at least in some cases) apply a conclusiveness approach to foreign official immunity as well. After the Supreme Court clarified that the FSIA, which gave back control to the courts concerning state immunity, does not apply to foreign official immunity, the law in the United States became unsettled. Whereas some courts give binding force to executive assessments, others differentiate and apply a margin of discretion approach in cases of conduct-based immunity and a conclusiveness approach in cases of status-based immunity.

751 Similar analysis by Eksteen (n 294) 300.

752 See below Chapter 5, II.

753 Zoe Jay and Matt Killingsworth, 'To Arrest or Not Arrest? South Africa, the International Criminal Court, and New Frameworks for Assessing Noncompliance' (2024) 68 International Studies Quarterly 1, 10.

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Prussian law concerning foreign official immunity awarded a special role to executive assessments. However, under the Bismarck Constitution, courts showed their willingness to decide independently, an approach that solidified in the Weimar period. The courts based their reasoning on the functional argument that each agency has to determine the fundamental elements for its decision autonomously, even if they touch on an area of competence of another authority. In the Federal Republic, the general position established in the Weimar period was reinforced with the new dogma that every state authority must be kept within its constitutional limits. However, as the Tabatabai cases have shown, German courts accepted a certain executive influence and granted a margin of discretion as to the facts which may entitle an individual to immunity.

Under the older constitutions, South African courts were again strongly influenced by English law and used the certification doctrine in cases of foreign official immunity. In contrast to the approach in the United Kingdom, South African statutory law even allowed the executive to render decisions on the question of immunity as such, not only on the status entitling immunity. Foreign official immunity was thus governed by a doctrine of conclusiveness. The strong statutory basis for this approach was already weakened by the end of the apartheid regime. Under contemporary South African law, the statutory framework still allows the executive to confer immunity ad hoc but is subject to review by the courts. In recent case law, the courts have shown great independence in controlling executive assertions of immunity and have not even recognized an area of discretion in these decisions.

5. Diplomatic protection

The law of diplomatic protection is a relatively young institution of international law.[754] Although the roots of the concept can already be found in de Vattel's treatises,[755] it was not until the middle of the 19th century that most governments began to treat the protection of nationals abroad consistently as a legal issue.[756] Diplomatic protection is generally defined as a state's invocation of the responsibility of another state for an injury caused by

754 Chittharanjan F Amerasinghe, *Diplomatic Protection* (OUP 2008) 8.
755 Ibid 10.
756 Ibid 14.

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an internationally wrongful act to a national[757] of the invoking state.[758] Its exercise is tied to the requirement of the exhaustion of local remedies in the host state.[759] Current international law provides for no duty of the state to intervene in case of a wrongful act affecting its citizens.[760] It is left to the domestic legal system whether the state is obligated to exercise diplomatic protection and to what degree courts may enforce this obligation. This chapter sheds light on how the judiciary in the three countries reviews executive action or inaction regarding diplomatic protection.

a) United States

The US Constitution includes no express provision granting the right to diplomatic protection. Nevertheless, by the end of the 19th century, a discussion concerning the state's duty to protect its citizens ensued. Secretary of State Frelinghuysen stated in 1882 that 'the right of an American citizen to claim the protection of his own government while in a foreign land and the duty of this government to exercise such protection, are reciprocal [...]'.[761] Following this approach, the US Supreme Court in 1913 confirmed in *Luria v U.S.* that

> *Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part*

757 Exceptions apply for stateless persons and refugees *Draft Articles on Diplomatic Protection with Commentaries* (2006) Article 8; analysing diplomatic protection of non-nationals Thomas Kleinlein and David Rabenschlag, 'Auslandsschutz und Staatsangehörigkeit' (2007) 67 ZaöRV 1277; on the weakening of the nationality requirement cf as well Annemarieke Vermeer-Künzli, 'Nationality and diplomatic protection – A reappraisal' in Serena Forlati and Alessandra Annoni (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 76.

758 *Draft Articles on Diplomatic Protection with Commentaries* (n 757) cf Article 1; John Dugard, 'Diplomatic Protection' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 1.

759 *Draft Articles on Diplomatic Protection with Commentaries* (n 757) Article 14.

760 At least this is the classical position stated in *Barcelona Traction (Belgium v Spain) Judgment* ICJ Rep 1970, 3 (ICJ) 44, although under pressure this still seems to reflect the status of customary international law; *Draft Articles on Diplomatic Protection with Commentaries* (n 757) Article 19 Commentary 3.

761 State Department, 'Foreign Relations of the United States 1882' No 215, 395 cited after Burt E Howard, *Das amerikanische Bürgerrecht* (Heidelberg 1903) 149 [my omission].

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> *of the society. These are reciprocal obligations, one being a compensation for the other.*[762]

Scholars were divided on whether such a legally enforceable duty exists. Howard,[763] on the one hand, argued for it. On the other hand, Borchard[764] opposed such a view:

> *In the exercise of the extraordinary remedy known as diplomatic protection, the government acts politically upon its own responsibility as a sovereign, free from any legal restrictions by or legal obligations to the claimant.*[765]

In the 19th century, Mexico's independence sparked the first cases alluding to diplomatic protection. Several disputes between US citizens and the Mexican government (especially concerning expropriations) arose and were dealt with by different commissions under bilateral treaties.[766] In some of these cases, awards had been attained fraudulently, and the US government withheld the money.[767] The courts dismissed attempts to force the US government to distribute the money and held that the executive was endowed with discretion in this regard. They especially denied applying the common law instrument of a writ of mandamus[768] and thus used a doctrine of procedural non-reviewability. Likewise, judges in these cases stated that the US government could decide on its own whether to intervene in favour of its citizens against foreign encroachment.[769]

The first US case in a classical diplomatic protection constellation is probably *Holzendorf v Hay*[770] decided in 1902. Holzendorf, a naturalized

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762 *Luria v US* 231 US 9 (1913) (US Supreme Court) 22 f.

763 Howard (n 761) 149.

764 Edwin M Borchard, *Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co 1919); for another early US monograph on the topic cf Frederick S Dunn, *The protection of nationals; a study in the application of international law* (Baltimore 1932).

765 Borchard (n 764) 356.

766 Later, both countries would establish the well-known General Claims Commission.

767 *Boynton v Blaine* 139 US 306 (1891) (US Supreme Court); *United States v La Abra Silver Mining Company* 175 US 423 (1899) (US Supreme Court); Borchard (n 764) 364.

768 *Boynton v Blaine* (n 767).

769 *La Abra Silver Mining Company v United States* 29 Ct Cl 432 (1894) (United States Court of Claims) 513; Borchard (n 764) 364.

770 *Holzendorf v Hay* [1902] 20 App DC 576 (Court of Appeals of District of Columbia) 577; Borchard (n 764) 364.

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citizen of the United States, had travelled to his home country Germany and was wrongfully imprisoned. He was released after one year and started judicial proceedings to oblige the Secretary of State to initiate 'vigorous and proper proceedings against the Empire of Germany, and the Emperor'[771] to recover damages. The court denied the claim and stated that:

> *The duty of righting the wrong that may be done to our citizens in foreign lands is a political one, and appertains to the executive and legislative departments of the government. The judiciary is charged with no duty and invested with no power in the premises.*[772]

This indicates a (substantive) non-reviewability approach adopted by the courts. The judges remained faithful to this jurisprudence in the 1954 case *Keefe v Dulles*.[773] The wife of a US soldier imprisoned in France sued the Secretary of State to obtain her husband's release through diplomatic negotiations. The court held that 'the commencement of diplomatic negotiations with a foreign power is completely in the discretion of the President and the head of the Department of State, who is his political agent'[774] and that '[t]he Executive is not subject to judicial control or direction in such matters'.[775] The court also explicitly relied on *Curtiss-Wright*.[776]

Another line of cases has been based on the Hostage Act,[777] which provides the following:

> *Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release […].*

771 *Holzendorf v Hay* (n 770) 577.
772 Ibid 580.
773 *Keefe v Dulles* [1954] 222 F 2d 390 (United States Court of Appeals for the District of Columbia Circuit).
774 Ibid 394.
775 Ibid [my adjustment].
776 Ibid.
777 22 USC § 1732 [my omission].

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The act dates back to 1868, and the courts could have interpreted it as an expression of a constitutional right to diplomatic protection.[778] However, in a number of cases evolving after the Second World War, the act was given a very narrow interpretation. This is exemplified by *Redpath v Kissinger*[779] decided in 1976, a case concerning an US-American citizen incarcerated in Mexico. The court swiftly stated that to take action or not was solely within the discretion of the executive.[780] A similar picture evolved from the 1984 case *Flynn v Schultz,*[781] again concerning an US-American held captive in Mexico. Here the court explicitly referred to the political question doctrine and held that, save for the duty to inquire if the arrest was unjust, the compliance with the Hostage Act posed a non-justiciable political question.[782] Even with regards to the inquiry, the court stated that '[w]hile it might be appropriate for a court to order such an inquiry in the absence of any meaningful action by the executive with respect to this duty, review of the substance of the inquiry and subsequent decision clearly presents a nonjusticiable political question'.[783] Apart from prohibiting complete inactivity, the Hostage Act thus imposes no legally enforceable duty on the president, and apparently, the courts saw no constitutional necessity to apply a more generous interpretation.

The decision in *Smith v Reagan*[784] in 1988 confirmed this ruling. The claimants, family members of detained US-American service members in Vietnam, had invoked the Hostage Act to force the executive to take action. The court relied on the political question doctrine and stated that 'the judiciary may speak with multiple voices in an area where it is imperative that the nation speak as one. These difficulties lead us to conclude that

778 On statutory interpretation in the US and Germany cf Patrick Melin, *Gesetzesauslegung in den USA und in Deutschland* (Mohr Siebeck 2005), on the influence of the constitution in statutory interpretation 163 f; cf as well Richard A Posner, 'Statutory Interpretation: In the Classroom and in the Courtroom' (1983) 50 University of Chicago Law Review 800, 815.

779 *Redpath v Kissinger* [1976] 415 F Supp 566 (United States District Court for the Western District of Texas).

780 Ibid 569.

781 *Flynn v Schultz* 748 F2d 1186, cert denied, 474 US 830 (United States Court of Appeals for the 7th Circuit).

782 Ibid 1193 ff.

783 Ibid 1193 [my adjustment].

784 *Smith v Reagan* [1988] 844 F2d 195, cert denied 488 US 954 (United States Court of Appeals for the 4th Circuit).

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this suit presents a nonjusticiable political question'.[785] The court referred to *Baker v Carr* and held that in the case at bar, there was a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' and 'a lack of judicially discoverable and manageable standards for resolving it'.[786]

This approach has also continued in more recent decisions. A special constellation of 'diplomatic protection'[787] concerned a US citizen and former employee of the US Embassy in Italy. Sabrina De Sousa[788] was allegedly involved in the kidnapping and torturing of a terror suspect in Milan. A Europol warrant was issued against her, and Italian courts finally sentenced her to five years in prison. De Sousa had already returned to the US, but the warrant and conviction barred her from visiting family in countries which would extradite her to Italy. She requested the State Department invoke diplomatic immunity in her favour, without avail. The court declined to intervene and held the issue to be 'a non-justiciable foreign policy question'.[789] In the United States, requests for diplomatic protection are thus non-reviewable.

b) Germany

In Germany, the Bismarck Constitution was one of the very rare constitutions at the time, which entailed an express clause on diplomatic protection.[790] Its Article 3 (6) stated

> *Towards foreign countries all Germans are equally entitled to the protection of the Empire.*[791]

Although the word 'entitled' may imply that an individual has an enforceable right to diplomatic protection, the legal nature of the clause was con-

785 Ibid 198.
786 Ibid.
787 Admittedly, the case concerns no 'classic' diplomatic protection constellation. However, it nevertheless shows how similar questions are dealt with by US courts.
788 *De Sousa v Department of State* [2012] 840 F Supp 2d 92 (United States District Court for the District of Columbia).
789 Ibid 107.
790 Karl Doehring, *Pflicht des Staates zur Gewährung diplomatischen Schutzes* (Carl Heymanns 1959) 25.
791 'Dem Auslande gegenüber haben alle Deutschen gleichmäßig Anspruch auf den Schutz des Reiches' [my translation].

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tested. Some authors were of the opinion that it contained no 'real' legal entitlement[792] and argued that to hold otherwise could have far-reaching repercussions on foreign relations, e.g., when the state would be obliged to protect a merchant abroad by sending gunboats.[793] Nevertheless, most scholars saw the clause as a genuine individual entitlement.[794] The discussion was not perceived as too important, as judicial review of sovereign acts only slowly developed.[795] No direct[796] judicial procedure was available to enforce such a right,[797] and no court consequently had a chance to settle the issue.[798]

Within the new Weimar Constitution, the wording of the clause changed only slightly: Article 112 (2) stated

> *Towards foreign countries all dependents of the Empire within or outside the territory of the Empire are entitled to its protection.*[799]

The debate concerning its legal nature continued with scholars arguing for and against a legally enforceable right.[800] Again the discussion remained abstract, as also during the Weimar Republic, no direct judicial procedure was available to hold the executive to account.[801]

During the Nazi period, diplomatic protection was treated as non-reviewable. As the provisions on civil liability were the only possibility to (indirectly) bring up the question of diplomatic protection, some authors saw the problem as explicitly regulated by the mentioned 'Civil Servant Liability Law,'[802] which allowed the chancellor to certify that an act of a civil

792 Georg Jellinek, *System der subjektiven öffentlichen Rechte* (2nd edn, Mohr 1905) 119; Wilhelm Karl Geck, 'Der Anspruch des Staatsbürgers auf Schutz gegenüber dem Ausland nach deutschem Recht' (1956/57) 17 ZaöRV 480.

793 Von Seydel, *Bayerisches Staatsrecht 2, Die Staatsverwaltung* (Mohr 1913) 55 cited after Geck (n 792) 480 fn 11.

794 See authors cited by Geck (n 792) 480 f; and authors cited by Doehring (n 790) 28.

795 Geck (n 792) 480.

796 But see the case below where civil servant liability provisions were used by the litigants.

797 Geck (n 792) 481.

798 Doehring (n 790) 28.

799 'Dem Auslande gegenüber haben alle Reichsangehörigen inner- und außerhalb des Reichsgebiets Anspruch auf den Schutz des Reiches' [my translation]. The wording 'within the territory' is due to the Versailles Treaty, which allowed foreign powers to be active on German soil; Doehring (n 790) 34.

800 Cf references cited by Doehring (n 790) 31 and references cited by Geck (n 792) 482.

801 Geck (n 792) 508 ff; Doehring (n 790) 42.

802 Scheuner (n 369) 442 fn 35.

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servant is 'in accordance with political and international considerations'.[803] The Nazi regime also introduced additional regulations to limit the liability of its officials.[804] The Supreme Court of the Reich endorsed this position in a case triggered by an inheritance dispute concerning property abroad. The litigants had tried to invoke the civil liability of foreign office officials, claiming that they had not been sufficiently supported in their proceedings with the Netherlands. The court held that

> *The extent of the protection to be granted to a German national abroad, and the choice of means to ensure such protection are matters for the exercise of political discretion. An allegation that officials of the foreign service ought to have taken more forceful diplomatic measures is not subject to judicial review, it being left entirely to the discretion of the officials concerned how and to what extent they should intervene diplomatically.*[805]

In contrast to its constitutional predecessors, the new Basic Law does not contain an express provision regulating diplomatic protection. However, the omission was not the result of a conscious decision to abolish such protection; instead, the absence of an explicit provision is related to Germany's special status as an occupied country during the drafting of the Basic Law.[806] The occupying countries exercised the power to conduct foreign affairs when the Basic Law was drafted. Nevertheless, regulations of the Basic Law – foreshadowing later independence – entail regulations concerning foreign affairs. However, the drafters refrained from including diplomatic protection as it may have been met with suspicion by the Allies.[807]

The discussion concerning the legal nature of the duty to protect citizens abroad went on. In the early years of the Basic Law some scholars argued that despite the lack of mention in the constitution, citizens would, in continuance with a line of scholars under the Weimar Republic,[808] at least have a right to 'legally unflawed exercise of discretion' concerning their claim of

803 Cf above, Chapter 1, II., 3., b).
804 Geck (n 792) 507.
805 *Judgment from 22 June 1937* Seufferts Archiv 91, 336 (Supreme Court of the Reich); translation by Günther Jaenicke, Karl Doehring and Erich Zimmermann, *Fontes Iuris Gentium – Series A – Sectio II – Tomus 2 (Entscheidungen des deutschen Reichsgerichts in Völkerrechtlichen Fragen 1929–1945)* (Carl Heymanns 1960) 77.
806 Doehring (n 790) 43 ff.
807 Ibid 44 f.
808 Geck (n 792) 518.

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diplomatic protection.[809] As we have seen above, others were of the opinion that under the new Basic Law, certain public acts, especially in foreign relations,[810] should be exempt from judicial review. They specifically included the question of diplomatic protection as falling under these non-reviewable acts.[811] In contrast to the older constitutions, where the relevance of the discussion was limited due to the lack of judicial procedures to control public acts, the situation changed significantly under the new constitution. As mentioned,[812] Article 19 (4) of the Basic Law guarantees access to courts for any violation of a person's rights by a public authority. However, Article 19 (4) of the Basic Law does not provide such a right by itself. Within the new constitutional order, the question of whether or not a material right to diplomatic protection exists was thus no longer a mere academic topic but warranted a real solution.

The first appearance of the concept in the Constitutional Court's jurisdiction can be found in 1957 in the mentioned *Washingtoner Abkommen* case,[813] dealing with the liquidation of the property of Germans in Switzerland.[814] The Constitutional Court only briefly referred to the duty of diplomatic protection and held that it was not violated as the government did not act arbitrarily.[815] The *Eastern Treaties* case[816] entails elaboration that is more substantial. It concerned complaints lodged by former landowners in the area east of the Oder river, claiming that treaties with Moscow and Warsaw confirming Germany's eastern borders infringed their right to property under the constitution. The court stated obiter that 'the organs of the Federal Republic are constitutionally obliged to protect German nationals and their interests in relation to Foreign States. If this duty was neglected, it would represent an objective breach of the constitution'.[817]

809 Ibid; Doehring (n 790) 127.
810 Ernst Forsthoff, *Lehrbuch des Verwaltungsrechts 1, Allgemeiner Teil* (6th edn, CH Beck 1956) 444 f.
811 Herbert Krüger, 'Der Regierungsakt vor den Gerichten' (1950) 3 DÖV 536, 540; Schneider (n 2) 46 f.
812 Cf Chapter 2, I., 2.
813 Cf this Chapter, I., 1., b), bb), (1).
814 *Decision from 21 March 1957* (*Washingtoner Abkommen)* (n 175).
815 Ibid 290.
816 *Decision from 7 July 1975 (Eastern Treaties Case (Ostverträge))* BVerfGE 40, 141 (German Federal Constitutional Court) = 78 ILR 177; cf as well Christopher Tran, 'Government duties to provide diplomatic protection in a comparative perspective' (2011) 85 Australian Law Journal 300, 306.
817 *Eastern Treaties Case (Ostverträge)* (n 816) 78 ILR 192.

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However, the court went on to state that this 'says nothing about the conditions under which the infringement of the rights of individuals by such an omission could be relied upon in constitutional complaint proceedings'.[818]

The court had a chance to define these conditions in the leading *Hess* case.[819] As described above,[820] Rudolf Hess was Hitler's former deputy who had been found guilty in the Nuremberg trials of crimes against peace, and who served his sentence in a military prison administrated by the four Allied powers in Berlin. He filed a constitutional complaint to oblige the federal government to take all appropriate and official steps towards the occupying powers to grant his immediate release. In particular, he urged the government to apply to the United Nations for an instruction from the General Assembly to the Allied powers demanding his release.[821]

The Constitutional Court held 'that the organs of the Federal Republic, and in particular the Federal Government, have a constitutional duty to provide for German nationals and their interests in relation to foreign States'.[822] It went on to explain that the federal government 'enjoys wide discretion in deciding the question of whether and in what manner to grant protection against foreign States'[823] and 'that the role of the administrative courts was consequently confined to the review of actions and omissions of the Federal Government for abuses of discretion'.[824] Consequently, it found that there is no duty for the government to take precisely the measures requested by Hess and held that the decision of the government not to approach the UN was covered by its broad discretion.[825] The 'civil servant liability law,' which was still in force at the time of the judgment, was not mentioned by the court. The Constitutional Court also remained silent about the basis of the right to diplomatic protection in the absence of a written clause in the constitution. Scholars still do not agree if this basis can be found in the claimant's status as a citizen, fundamental rights or both.[826]

818 Ibid.
819 *Hess Case* (n 186).
820 Cf this Chapter, I., 1., b), bb), (3).
821 *Hess Case* (n 186) 356; *Hess Case* ILR English Translation (n 186) 388.
822 *Hess Case* (n 186) 364; *Hess Case* ILR English Translation (n 186) 395.
823 *Hess Case* (n 186) 364 f; *Hess Case* ILR English Translation (n 186) 395.
824 *Hess Case* (n 186) 365; *Hess Case* ILR English Translation (n 186) 395.
825 *Hess Case* (n 186) 365 ff; *Hess Case* ILR English Translation (n 186) 396 ff.
826 Ulrich Fastenrath, 'Verfassungsrecht: Ermessen der Bundesregierung bei der Gewährung diplomatischen Schutzes' (1981) 3 JA 510, 510; Eckart Klein, 'Anspruch auf diplomatischen Schutz' in Georg Ress and Torsten Stein (eds), *Der diplomatische Schutz im Völker und Europarecht* (Nomos 1996) 128 and discussion 137 ff.

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Nevertheless, German courts subsequently accepted the approach.[827] In Germany, every citizen thus has a subjective right[828] to the legally unflawed exercise of discretion if and how diplomatic protection should be granted.[829]

c) South Africa

The older South African constitutions entailed no explicit right to diplomatic protection, and again English law had a significant influence on the South African approach. In England, as early as *Calvin's Case*[830] had the reciprocal duty between the king and his subjects been recognized 'as the subject oweth to the king his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects'.[831] Blackstone established that this duty persists 'at all times and in all countries'.[832] Although a duty to protect 'subjects' and now citizens abroad was thus acknowledged, the courts, until recently, never enforced it. This 'hands off approach' was established at the beginning of the 20th century in *China Navigation*.[833] It concerned an overseas trading company that tried to oblige the crown to protect its vessels against pirates.[834] The court held that the king's duty

827 *Judgment from 26 May 1982* I R 16/78 (Federal Fiscal Court); *Judgment from 24 February 1981 (Hess Case)* BVerwGE 62, 11 (Federal Administrative Court); *Decision from 4 September 2008 (Schloss Bensberg)* BVerfGK 14, 192 (German Federal Constitutional Court) 200; *Decision from 7 July 2009* (*Hansa Stavanger)* NVwZ 2009, 1120 (Administrative Court Berlin); *Decision from 24 January 1989* 7 B 102/88 (Federal Administrative Court); *Decision from 5 February 1981* 7 B 13/80 (Federal Administrative Court); *Judgment from 14 June 1996* 21 A 753/95 (Higher Administrative Court North-Rhine Westphalia).

828 For the notion of a subjective right cf above, Chapter 2, I., 2.; differentiating between a fundamental right and a right based on fundamental rights reasoning Rainer Hofmann, *Grundrechte und Grenzüberschreitende Sachverhalte* (Springer 1994) 108.

829 Fastenrath (n 826) 510; Klein (n 826) 127 f.

830 *Calvin's Case* (1608) 7 Co Rep 1a (Court of the Queen's Bench).

831 Ibid 4b; cf McLachlan (n 250) 354, McLachlan also sees a connection between Locke's philosophy and diplomatic protection (n 250) 40.

832 William Blackstone, *Commentaries on the Law of England: Book the First* (digitized version, Clarendon Press 1769) 370; cf McLachlan (n 250) 354.

833 *China Navigation* [1932] 2 KB 197 (Court of Appeal).

834 McLachlan (n 250) 356.

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is 'entirely in his discretion'[835] and only an 'imperfect obligation'[836] and went on that there are 'no legal means […] by which the Crown could be forced to perform that duty'.[837] Other cases recited these statements,[838] and traditionally the Crown's duty to protect its citizens was perceived as non-justiciable.[839] South African authors like Booysen, even in 1989, were of the opinion that there is no legal obligation to diplomatic protection in South Africa and relied on English precedent.[840]

This position came under attack with the beginning of the constitutional change. In 2000, Dugard (who in this year also became the ILC Special Rapporteur on diplomatic protection) argued that the question should be considered 'open' in South African law[841] and found academic support.[842] The traditional position also fell under pressure in the UK. In its 2002 *Abbasi* decision, the Court of Appeal held that British citizens had a legitimate expectation of having their request for diplomatic protection considered by the executive and that this decision could be reviewed for rationality.[843] These developments paved the way for the development of the law of diplomatic protection in South Africa, where a whole line of cases revolves around the topic.[844]

The first case in that line is *Kaunda v President of the Republic of South Africa*.[845] A group of South African citizens had been arrested in Zimbabwe

835 *China Navigation* (n 833) 222.
836 Ibid.
837 Ibid 223.
838 *Mutasa v Attorney-General* [1980] 1 QB 114 (Queen's Bench Division).
839 Tran (n 816) 305; McLachlan tries to rebut that as a false reading of the traditional case law. In my view, it correctly reflects the traditional position in English law, which however now appears to be changing McLachlan (n 250) 353 ff, 373.
840 Hercules Booysen, *Volkereg en sy verhouding tot die Suid-Afrikaanse reg* (2nd edn, Juta 1989) 389; John Dugard, *International law: A South African perspective* (2nd edn, Juta 1994) 214 fn 42; Gerhard Erasmus and Lyle Davidson, 'Do South Africans have a right to Diplomatic Protection' (2000) 25 SAYIL 113, 116.
841 Dugard, *International Law* (2nd edn) (n 840) 214 fn 42; Erasmus and Davidson (n 840) 166 fn 9.
842 Erasmus and Davidson (n 840).
843 *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 (Court of Appeal) para 106.
844 Annemarieke Vermeer-Künzli, 'Restricting Discretion: Judicial Review of Diplomatic Protection' (2006) 75 Nordic Journal of International Law 279, 297 ff; Tran (n 816) 307 ff; for analysis of the case law cf McLachlan (n 250) 948; Dugard and others, *International Law* (5th edn) (n 2) 417 ff; Eksteen (n 294) 290 ff.
845 *Kaunda and Others v President of the RSA and Others* 2005 (4) SA 235 (CC) (Constitutional Court).

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for arms trafficking and allegedly being involved in an attempt coup d'état in Equatorial Guinea.[846] The detained applied for a court order to direct the South African government to take the necessary steps for their release to South Africa and ensure that they would not be extradited from Zimbabwe to Equatorial Guinea, where they may be subject to torture or capital punishment.[847] The court found that South African citizens were entitled to ask for protection[848] and that the government had a 'corresponding obligation to consider the request and deal with it consistently with the Constitution'.[849] In determining how far the judiciary can review the fulfilment of this obligation, the court directly referred to the judgment in *Abbasi*[850] and the German *Hess* case.[851] It finally stated that if the 'government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly'[852] but also '[t]his does not mean that courts would substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection'.[853] In general, the 'government has a broad discretion in such matters which must be respected by our courts'.[854] Consequently, the court found the steps taken by the government as covered by the latter's discretion.[855]

Diplomatic protection came up again in the *Van Zyl*[856] case. The government of Lesotho had cancelled and revoked mineral leases of a South African national who approached the South African government for diplomatic protection. The Supreme Court endorsed the ruling in *Kaunda*[857] but

846 Ibid 243 ff.
847 Ibid.
848 Ibid 258.
849 Ibid 259.
850 Ibid 261.
851 Ibid 260.
852 Ibid 262.
853 Ibid [my adjustment].
854 Ibid.
855 For a critical assessment of Kaunda cf Stephen Peteé and Max Du Plessis, 'South African Nationals Abroad and Their Right to Diplomatic Protection — Lessons from the 'Mercenaries Case" (2006) 22 South African Journal on Human Rights 439.
856 *Van Zyl and others v Government of the Republic of South Africa and Others* (2008) (3) SA 294 (SCA) (Supreme Court of Appeal).
857 Ibid 309 ff.

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already denied that the prerequisites for diplomatic protection, especially a wrongful act committed by Lesotho,[858] were given in the case at hand.[859]

The topic found a more thorough discussion in *Von Abo*. Von Abo, a South African citizen, had owned several agricultural facilities in Zimbabwe, which the Zimbabwean government confiscated during its land reform in the early 2000s. He asked the South African government to intervene on his behalf, which, in contrast to German and other governments, remained comparatively passive, although it alleged that it was engaged in diplomatic talks with the Zimbabwean government.[860] Prinsloo J referred to the *Kaunda* judgment and, based on the correspondence between Von Abo and the South African authorities, held that, although the government answered the request, it 'failed to respond appropriately and dealt with the matter in bad faith and irrationally'.[861] He ordered that within 60 days, the government had to take the necessary steps to protect Von Abo's rights and inform the court of the measures taken.[862] The government subsequently engaged in talks with the Zimbabwean government on a junior official level.[863] In contrast to other states, the South African interference was rather reluctant.[864] In the follow-up proceedings, the court held that the steps taken were ineffective and weak and thus could not pass the *Kaunda* test.[865] It awarded constitutional damages for the failure to provide diplomatic protection to Von Abo.[866] The case finally reached the Supreme Court of Appeal, which quashed the lower court's finding that Von Abo was entitled to diplomatic protection for the violation of his rights in Zimbabwe.[867] The court relied on the *Van Zyl* case and endorsed the finding that *Kaunda* only awards the right to have a request *considered* and does not entitle one to a specific type of diplomatic protection.[868] It consequently found the

858 Ibid 315 ff.
859 Critical of the judgment Vermeer-Künzli, 'Restricting Discretion' (n 844) 305.
860 *Von Abo v Government of the Republic of South Africa and Others* 2009 (2) SA 526 (T) (Transvaal Provincial Division) 550 ff.
861 Ibid 562.
862 Ibid 567.
863 *Von Abo v Government of the Republic of South Africa and Others* 2010 (3) SA 269 (GNP) (North Gauteng High Court) 278 ff.
864 Ibid 281.
865 Ibid 286 ff.
866 Ibid 289 ff.
867 *Government of the Republic of South Africa and Others v Von Abo* 2011 (5) SA 262 (SCA) (Supreme Court of Appeal) 272.
868 Ibid.

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order directing the government to take necessary steps within 60 days to be unlawful[869] and rescinded the damages awarded in the judgment.[870] The Supreme Court of Appeal only upheld the ruling that the government did not consider the initial request for diplomatic protection rationally and in good faith but stressed that this only had 'theoretical value'.[871]

In *Kaunda,* strong minority opinions argued for a broader right to diplomatic protection.[872] The first two *Von Abo* judgments partially relied on these minority opinions and thus arrived at their high level of protection.[873] The Supreme Court of Appeal's ruling in *Von Abo* can be seen as a clarification and narrow interpretation of the *Kaunda* judgment. The position in South African law thus largely mirrors German law, which served as a model in developing the review standards in *Kaunda*.[874] In both countries, individuals are only entitled to have their request for diplomatic protection considered, subject to the standard of 'abuse of discretion' (Germany) or 'rationally and in good faith' (South Africa).

d) Conclusion on diplomatic protection

In the United States, by the beginning of the 20th century, there was a debate concerning the legal nature and enforceability of diplomatic protection. However, the courts early on held attempts of individuals to oblige the executive to intervene in their favour to be non-reviewable. In a similar manner, the provisions of the Hostage Act providing a statutory angle to induce executive action were interpreted extremely narrowly. In the wake of the Sutherland Revolution, the courts explicitly connected their earlier case law to the 'political question doctrine'. In the United States, cases of diplomatic protection are non-reviewable.

869 Ibid 272 ff.
870 Ibid 275 f.
871 Ibid 278.
872 Especially Ngcobo and O' Reagan *Kaunda and Others v President of the RSA and Others* (n 845) 278 ff, 295 ff.
873 *Von Abo v Government of the Republic of South Africa and Others* (n 860) 652 ff; Dire Tladi, 'The Right to Diplomatic Protection, The Von Abo Decision, and One Big Can of Worms: Eroding the Clarity of Kaunda' (2009) 20 Stellenbosch Law Review 14, 22; Sandhiya Singh, 'Constitutional and international law at a crossroads: diplomatic protection in the light of the Von Abo judgment' (2011) 36 SAYIL 298, 306.
874 *Kaunda and Others v President of the RSA and Others* (n 845) 260.

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In Germany, the Bismarck and Weimar period constitutions included explicit provisions concerning diplomatic protection. Their legal nature was subject to academic debate. However, no procedures were available to induce the courts to decide on the issue. The discussion continued under the Basic Law. The Constitutional Court finally explicitly rejected non-reviewability in favour of a margin of discretion approach.

South Africa first relied on the British approach and treated diplomatic protection as non-reviewable. This changed under the new constitution, where the Constitutional Court, based on new British and German case law, opted for a margin of discretion approach. Case law suggesting an even stricter review of diplomatic protection has been overturned. South Africa applies a discretionary approach comparable to Germany in cases of diplomatic protection.

6. Conclusion on the tracing of deference

The review of the application of different deference doctrines in our three reference countries shows three results.

First, across all three jurisdictions, a general trend appears to be the application of weaker forms of deference. In *treaty interpretation,* all three countries now apply a margin of discretion approach or even decide independently and, in general, have lowered the influence of the executive.

Concerning the *recognition of states and governments,* the situation in the United States remained unchanged, and the executive can still conclusively decide on the issue. In Germany, the courts always enjoyed considerable independence within this area and only sporadically attached weight to the executive's opinion. South Africa had historically allowed the executive to conclusively determine recognition questions but now only applies a margin of discretion approach.

In *state immunity* decisions, the United States first applied a margin of discretion approach, which gradually developed into a conclusiveness approach. This was replaced by introducing a statutory framework that now allows the judiciary to decide independently on questions of state immunity. Within German law, over time, the conclusiveness approach in questions of state immunity was replaced by the judiciary's independent assessment. South African law had always called for an independent assessment of the courts in this area and eliminated remaining executive influence when it rejected applying a conclusiveness doctrine in recognition questions.

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With regards to *foreign official immunity*, in parallel with the law of state immunity, the US approach first developed from a margin of discretion towards a conclusiveness doctrine. As the statutory framework covering state immunity was found not applicable to foreign official immunity, uncertainty exists concerning the correct approach. Some courts only grant the executive a margin of discretion in determining certain forms of foreign official immunity, while others continue to allow the executive to conclusively settle the issue. In Germany, executive influence in foreign official immunity cases was gradually pushed back, and today, discretion is only sporadically awarded as to the facts which may entitle an individual to immunity. The same holds for South Africa. Historically statutory law allowed for a conclusive determination of foreign official immunity, which was eventually watered down to a margin of discretion approach.

Finally, concerning *diplomatic protection*, the US law remained essentially unchanged, and the area is still treated as non-reviewable. In contrast, in Germany, a previous non-reviewability was substituted for a margin of discretion doctrine. A similar development took place in South Africa: here the formerly unreviewable area is also now governed by a margin of discretion approach.

Secondly, our analyses show that the United States appears less strongly affected by the general trend toward more judicial review than Germany and South Africa. The latter two countries, throughout all groups of cases, either preserved the strong role for the judiciary in the (few) areas where it already existed or now apply less intense forms of deference. In contrast, in the US, in two fields (recognition and diplomatic protection), the strong influence of the executive has remained untouched. In two others (treaty interpretation and foreign official immunity), the trend towards more judicial review is much weaker than in Germany and South Africa.

Thirdly, our examination has revealed that each country appears to be occupied with more general problems in the application of deference, which are displayed throughout the analysed groups of cases. This ties back to the different country-specific adoption of the notion of deference analysed in Chapter 1.[875] In South Africa, historically, the reliance on English law was strong. With the unclear fate of the prerogatives and the act of state doctrine under the new constitution, the current status of non-reviewability and conclusiveness doctrines is also disputed, leading to uncertainty and evasive judgments. In Germany, the Constitutional Court under the Basic

875 Cf above, Chapter 1, II.

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Law soon decided in favour of full reviewability of executive acts. However, now the circumstances under which the executive's assessments deserve special weight appear unclear. In the United States, the Sutherland Revolution granted the executive strong influence, especially by allowing the use of conclusive determinations for questions of law. This strong executive role now causes problems, particularly in areas where the courts have (re)gained the competence to decide independently on related issues.

The first two findings, on the reasons for the trend towards less deference and the unequal receptiveness towards this trend, especially concerning Germany and South Africa on the one hand and the United States, on the other hand, will be dealt with in Chapter 4. The third result, the country-specific general problems in applying deference and possible solutions, will be the subject of our following subchapter.

II. General Problems in the application of deference

1. Non-reviewability and conclusiveness doctrines in contemporary South African law

As the case law analysed above shows, courts in contemporary South Africa show a certain insecurity concerning the correct application of doctrines of conclusiveness and doctrines of non-reviewability. This is exemplified by the *Harksen* case, where the court appeared hesitant to recognize the executive certificate concerning the existence of a treaty as binding but evaded ruling directly on the issue.[876] A similar strategy was applied in *Kolbatschenko*, where the judges acknowledged that there might be areas where the state should speak 'with one voice' but determined that the case did not fall into that category.[877] In the same vein, the court in the *Grace Mugabe* case went out of its way to avoid addressing the question of how far executive conferrals of foreign official immunity are reviewable.[878]

The uncertainty of the courts' ties back to the unsettled status of the act of state doctrine, which provides the basis for non-reviewability and conclusiveness doctrines and which was analysed in Chapters 1 and 2.[879] Some

876 Cf above, this Chapter, I., 1., c), bb).
877 Cf above, this Chapter, I., 2., c).
878 Cf above, this Chapter, I., 4., c), bb), (2).
879 Cf Chapter 1, II., 1., b) and Chapter 2, II., 3.

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authors argue that the act of state doctrine has survived the constitutional transitions of 1993 and 1996,[880] while others argue it has not.[881] Moreover, some scholars favour a doctrine of non-reviewability in South Africa,[882] while others reject it.[883] The text of the constitution does not conclusively settle the issue. Opponents of the doctrine often refer to Section 34 of the South African Constitution, which states that 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court'. Nevertheless, as mentioned,[884] the provision could easily be reconciled with a concept of non-reviewability

880 Booysen argues that at act of states still are not reviewable with regards to the Bill of rights Hercules Booysen, 'Has the act of state doctrine survived?' (1995) 20 SAYIL 189, 196; Gretchen Carpenter, 'Prerogative Powers gone at last?' (1997) 22 SAYIL 104, 111; Cheryl Loots, 'Standing, Ripeness and Mootness' in Stuart Woolman and Michael Bishop (eds), *Constitutional law of South Africa* (2nd edn – January 2013 – Revision Service 5, Juta 2002) 7 – 1; Ignatius M Rautenbach, *Rautenbach-Malherbe Constitutional Law* (6th edn, LexisNexis 2012) 35, 146.

881 George N Barrie, 'Judicial review of the royal prerogative' (1994) 111 South African Law Journal 788, 791; Sebastian Seedorf and Sanele Sibanda, 'Separation of Powers' in Stuart Woolman and Michael Bishop (eds), *Constitutional law of South Africa* (2nd edn – January 2013 – Revision Service 5, Juta 2002) 12 – 26; Hugh Corder, 'Reviewing "Executive Action"' in Jonathan Klaaren (ed), *A delicate balance: The place of the judiciary in a constitutional democracy: proceedings of the symposium to mark the retirement of Arthur Chaskalson, former chief justice of the Republic of South Africa* (Siber Ink 2006) 73, 75.

882 Loots (n 880) 7 – 1; Mtendeweka Owen Mhango, 'Is It Time for a Coherent Political Question Doctrine in South Africa? Lessons from the United States' (2014) 7 African Journal of Legal Studies 457, 493; Mtendeweka Owen Mhango and Ntombizozuko Dyani-Mhango, 'Deputy Chief Justice Moseneke's approach to the separation of powers in South Africa' (2017) Acta Juridica 75.

883 Karin Lehmann, 'The Act of State Doctrine in South African Law: Poised for reintroduction in a different guise?' (2000) 15 SA Public Law 337, 355 f; Seedorf and Sibanda (n 881) 12 – 26, 12 – 52; Lourens Wepener Hugo Ackermann, 'Opening Remarks on the Conference Theme' in Jonathan Klaaren (ed), *A delicate balance: The place of the judiciary in a constitutional democracy: proceedings of the symposium to mark the retirement of Arthur Chaskalson, former chief justice of the Republic of South Africa* (Siber Ink 2006) 8, 10; Dire Tladi and Polina Dlagnekova, 'The act of state doctrine in South Africa: has Kaunda settled a vexing question?' (2007) 22 SA Public Law 444, 444; Dikgang Moseneke, 'A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa' (2013) 101 Georgetown Law Journal 749, 767 f; Moses R Phooko and Mkhululi Nyathi, 'The revival of the SADC Tribunal by South African courts: A contextual analysis of the decision of the Constitutional Court of South Africa' (2019) 52 De Jure 415, 426.

884 Cf above, Chapter 2, II., 3.

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by assuming that political questions are simply questions that cannot be resolved by 'the application of law'.[885] In addition, Section 2 of the South African Constitution, stipulating that the constitution is supreme and conduct inconsistent with it invalid,[886] does not provide an answer.[887] If the constitution were to sanction non-reviewability, the Constitutional Court would not act unconstitutionally when it exercises judicial restraint, and likewise, the executive would act constitutional if it used its unreviewable powers.

Thus, the answer cannot simply be deduced from the constitutional text but must be found by the courts through careful constitutional interpretation. Considering the case law in the previous subchapters, have the South African courts under the new legal system endorsed or rejected a doctrine of non-reviewability in foreign affairs? To answer this question, we will first analyse cases that have been put forward as supporting a doctrine of non-reviewability (or conclusiveness)[888] before engaging in a general review of the cases analysed in this chapter and commenting on the development.

a) Cases cited as a basis for non-reviewability in South Africa

Proponents of a non-reviewability doctrine in South Africa have relied on some of the abovementioned cases. One such case is *Kolbatschenko v King*, dealing with the recognition of governments.[889] Mhango contends that in the case, the court established a political question doctrine but found it inapplicable from the facts of the case.[890] According to Mhango, *Kolbatschenko* 'can be credited with founding the basis for a potential

885 Respondents in *Kolbatschenko v King NO and Another* (n 420) 353; arguing in this direction as well Chuks Okpaluba, 'Justiciability, constitutional adjudication and the political question in a nascent democracy: South Africa (part 1)' (2003) 18 SA Public Law 331, 333.

886 Ignatius M Rautenbach, 'Policy and Judicial Review – Political Questions, Margins of Appreciation and the South African Constitution' (2012) Journal of South African Law 20, 28.

887 On this point I tend to agree with Mtendeweka Owen Mhango (n 882) 488.

888 As shown in Chapter 2, conclusiveness doctrines share a common trait with non-reviewability doctrines as ousting judicial review, but only concerning a particular aspect of the case – cf above, Chapter 2, III.

889 Okpaluba (n 885) 343 seems to argue in the same direction; Mhango (n 882) 479.

890 Mhango (n 882) 479.

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application of the political question doctrine in a future case'.[891] This conclusion is rather questionable. As mentioned above, the court's reasoning was fairly opaque[892] and obviously aimed at avoiding the question. The judges indeed accepted that there were areas of 'high executive nature' and that the case was not one of them.[893] However, all statements concerning these 'high executive nature areas' were made obiter and thus should be handled with care. The closest the court came to recognizing a political question doctrine is that it mentioned that in 'highly exceptional cases'[894] it 'will adopt a "hands-off" approach'[895] albeit without further elaborating if 'hands-off' would mean non-reviewability. On the other hand, the court clearly stated, 'even if one were to accept that the Executive retains certain discretionary non-statutory powers to enable it to conduct foreign relations [...] it would appear that such powers are no longer per se beyond the scrutiny of the South African Courts'.[896] Even in the classical area of recognition of governments, where older English law provided for the certification doctrine,[897] the court only held that '*the latitude* extended by the Judiciary to the Executive in such matters will be correspondingly large,'[898] not that the decision is unreviewable. The language (although obiter) is one of a doctrine of discretion, not a doctrine of non-reviewability. Thus, *Kolbatschenko* cannot serve as evidence for political question doctrine.

It has also been brought forward that *Kaunda*[899] is based on 'political question doctrine sentiments'.[900] This also appears implausible. Of course, *Kaunda* accepted a special role for the executive in conducting foreign affairs.[901] However, the court rejected non-reviewable areas and held that '[t]he exercise of all public power is subject to constitutional control'.[902] It decided to give leeway to the executive not by abdicating its judicial

891 Ibid.
892 Cf this Chapter, II., 1., a).
893 *Kolbatschenko v King NO and Another* (n 420) 357.
894 Ibid 356.
895 Ibid.
896 Ibid 355.
897 Cf above, Chapter 2, III., 3.
898 *Kolbatschenko v King NO and Another* (n 420) 356 [my emphasis].
899 Cf this Chapter, I., 5., c).
900 Mhango (n 882) 476.
901 *Kaunda and Others v President of the RSA and Others* (n 845) 261.
902 Ibid.

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function but by awarding 'broad discretion'.[903] Kaunda is proof of a clear and distinctive decision for a doctrine of discretion approach.[904]

Lastly, the ICC withdrawal case *Democratic Alliance v Minister of International Relations and Cooperation and Others*[905] has been cited as evidence for the political question doctrine.[906] We have mentioned the case above and will again discuss it below.[907] It dealt with the question of whether the South African Constitution demands parliamentary approval before the executive can withdraw from an international treaty. The court found that as the ratification of a treaty explicitly warrants prior parliamentary approval, a withdrawal has first to be decided upon by parliament. It held the given notice of withdrawal by the executive unconstitutional.[908] This finding of the court underlines that, in contrast to the US courts, it does not leave such questions to the political power plays of the elected branches. It is clearly willing to decide the correct constitutional interpretation on its own. Nevertheless, the court only decided on the 'procedural irrationality' of the executive's withdrawal. It found it unnecessary to review 'substantive irrationality,' that is to say, to review if the executive decision to withdraw would violate further material provisions of the South African Constitution.[909] In this choice not to substantially review the executive decision, Mhango and Dyani-Mhango find support for a political question doctrine.[910] However, this appears to be a misreading of the judgment. The court indeed stated that the decision to withdraw is 'in the heartland of the national executive in the exercise of foreign policy, international relations and treaty making […]'[911] but continued the sentence '[…] subject, of course, to the Constitution'.[912] Both authors also quoted the court stating 'there is nothing patently unconstitutional about the national executive's policy decision to withdraw from the Rome Statute, because it is within

903 Ibid 262 [my adjustment].
904 In the same vein Tladi and Dlagnekova (n 883).
905 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279).
906 Mhango and Dyani-Mhango (n 882).
907 Cf below Chapter 4, I., 3., b), bb).
908 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279) 229 ff.
909 Ibid 273 ff.
910 Mhango and Dyani-Mhango (n 882) 79 ff.
911 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279) 240.
912 Ibid.

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its powers and competence to make such a decision'.[913] The quote omits a substantial part; in full, the court stated 'There is nothing patently unconstitutional, *at least at this stage*, about the national executive's policy decision to withdraw from the Rome Statute, because it is within its powers and competence to make such a decision'.[914] The real reason why the court did not decide on substantial irrationality is not due to a political question doctrine but due to procedural economy. As explicitly stated, it found it unnecessary to decide on the issue at the particular stage of proceedings. It further explained that when parliament would decide upon the withdrawal and repeal of the domestic legislation implementing the Rome Statute, this legislation could be reviewed for compatibility with the Bill of Rights.[915] This goes hand in hand with the court's finding '[i]t is now axiomatic that the exercise of all public power, including the conducting of international relations, must accord with the Constitution'.[916] *Democratic Alliance* can thus not serve as an indicator for a South African political question doctrine. On the contrary, it has shown the court's readiness to solve constitutional disputes between the elected branches of government, even when foreign affairs are involved.

b) Evaluating contemporary case law

The analysis thus far has shown that cases like *Kolbatschenko*, *Kaunda*, and *Democratic Alliance* do not support a doctrine of non-reviewability. On the contrary, they indicate that the courts have decided against it. This is in line with the other early and recent case law of the new democratic South Africa analysed above. As early as in *Harksen,*[917] the court (although hesitantly) refused to treat an executive certificate concerning the termination of a treaty as binding. The *Mohamed* case,[918] not included in the examination above, likewise shows the willingness of the courts to engage in foreign

913 Mhango and Dyani-Mhango (n 882) 80.
914 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279) 241 [my emphasis].
915 Ibid 239.
916 Ibid 229 [my adjustment].
917 *Harksen v President of the Republic of South Africa* (n 267).
918 *Mohamed v President of the Republic of SA* 2001 (3) SA 893 (CC) (Constitutional Court).

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affairs cases.[919] It concerned the illegal extradition of a terror suspect to the US, where the detainees faced the death penalty. The South African government had urged the court not to decide on the issue as it would allegedly infringe the separation of powers.[920] The court outright rejected the argument and ordered the government to inform the US courts of the illegality of the extradition under South African law.[921]

Recent case law shows an even stronger trend towards judicial review. The courts appear to have shaken off the more cautious remarks in older cases like *Harksen* and *Kolbatschenko*. In the *Fick* case, the Constitutional Court denied immunity for Zimbabwe despite the clear opposition of the Zuma government.[922] In the *Al-Bashir* case,[923] which triggered the attempt to withdraw from the ICC, the Supreme Court of Appeal explicitly rejected the executive interpretation of an international agreement. Moreover, it denied giving force to an executive proclamation granting immunity for Bashir. Likewise, in the *Mugabe* case,[924] the court ignored the executive conferral of immunity, clearly distinguishing the South African approach from that of the US.[925] In the *Earthlife*[926] decision, the judges explicitly rejected contentions that they would be incompetent to review whether the implementing statute met constitutional demands. The *SADC tribunal* case[927] is the pinnacle of this recent line of case law. The court found the president's participation in the attempt to bar individuals from accessing the tribunal unconstitutional.[928]

In none of these cases involving highly political matters in foreign affairs did the courts renounce their competence to review the executive action. They did not even hint at special deference towards the executive branch

919 For the reviewability of extradition decisions cf as well *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC) (Constitutional Court).
920 *Mohamed v President of the Republic of SA* (n 918) 896, 921.
921 Ibid 897, 922.
922 *Government of the Republic of Zimbabwe v Fick and others* (n 291).
923 *Minister of Justice and Constitutional Development and Others v South Africa Litigation Centre and Others (Bashir Case)* (n 274).
924 *Democratic Alliance v Minister of International Relations and Co-operation and Others (Mugabe Case)* (n 744).
925 Cf above, this Chapter, I., 4., c), bb), (2).
926 *Earthlife Africa v Minister of Energy* (n 282).
927 *Law Society of South Africa and others v President of the Republic of South Africa and others (Southern Africa Litigation Centre and another as amici curiae) (SADC Case)* (n 294).
928 Sharing this analysis Eksteen (n 294) 311.

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in most cases. In the *Earthlife*[929] and *Democratic Alliance*[930] cases, the *Kaunda case* was explicitly cited to establish the reviewability of executive action. It appears that the decision in *Kaunda* marks the new baseline in South African foreign relations law: every public action appears to be at least reviewable as against the principle of legality.[931] Other cases not related to foreign affairs like *Pharmaceutical Manufacturers*,[932] *Hugo*,[933] and *SARFU*,[934] in which the courts have rejected unreviewable areas, support this finding.[935]

In an often-quoted remark, Justice Ackerman stated

> *I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.*[936]

From the case law analysed, it appears South African courts have lived up to Justice Ackerman's request and decided that the new South African legal system is better assisted without act of state or political question doctrines.[937]

South African courts should continue down this road and unmistakeably state the break with the past. The crown prerogatives or the act of state doctrine have not survived the transition to democracy and should not

929 *Earthlife Africa v Minister of Energy* (n 282) 260.
930 *Democratic Alliance v Minister of International Relations and Cooperation and Others (ICC withdrawal case)* (n 279).
931 Dire Tladi and Polina Dlagnekova (n 883); Dugard and others, *International Law* (5th edn) (n 2) 106.
932 *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).
933 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (Constitutional Court).
934 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (Constitutional Court).
935 Cf Corder (n 881) 75.
936 *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC) (Constitutional Court) 804.
937 Cf as well Dugard and others, *International Law* (5th edn) (n 2) 106; sharing this conclusion Eksteen (n 294) 313.

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be reintroduced. Clear language in this regard would diminish the last uncertainties and help to clarify the law. To balance the executive-judicial relationship with the help of a doctrine of discretion instead of non-reviewability also fits South African constitutional history. As we will analyse in the next chapter, the new South African system, like the German Basic Law, after painful experiences of the past, strongly focuses on fundamental rights[938] and is sceptical towards unchecked executive power. Thus, the South African constitution is much closer to the German than the American ideal of a separation of powers between the executive and judiciary and German law (which abolished non-reviewability) seems a more suitable source of inspiration in further developing the South African approach. Moreover, as we will argue in our last chapter, weaker forms of deference in general offer more flexibility for the executive and judiciary alike to deal with the challenges of the 21st century.[939]

2. The role of the executive assessments in the absence of a doctrine of non-reviewability in contemporary German law

In Germany, the cases analysed above underline the findings of Chapter 2. In the absence of a doctrine of non-reviewability and a doctrine of conclusiveness, the only possibility to grant leeway to the executive in foreign affairs is doctrines of discretion. However, under the influence of the general paradigm of full reviewability, the courts appear to be insecure about if and how much weight should be given to executive assessments.

This is exemplified by the recent *Ramstein* case analysed above.[940] The Higher Administrative Court denied an area for discretion concerning the question of whether the conducted drone strikes complied with international law, a position which the Federal Administrative Court reversed. Other cases examined in this chapter show a similar uncertainty as to how much leeway should be granted to executive assessments. In the *Rhodesian Bill* case, the court almost recklessly ignored the executive decision not to

938 Cf second constitutional principle which informed the development of the South African constitution: 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution'; cf below Chapter 4, II., 3., b) and c).

939 Cf below Chapter 5, III., 2.

940 Cf above, Introduction and this Chapter, I., 1., b), bb), (5).

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recognize the oppressive minority regime in Salisbury and seriously undermined Germany's effort to reintegrate into the international community.[941] Likewise, the *Tabatabai* litigation has shown that the courts appear to be insecure in how far a margin of discretion for factual or legal questions should be awarded to the executive.[942]

As we have seen above, in various cases, the Constitutional Court acknowledged an area of discretion for the executive concerning factual determinations. It has been much more careful concerning whether an area of discretion exists to determine legal questions, especially concerning the interpretation of treaties or customary international law. Only in the *Hess* case and the *Teso decision*[943] did the Constitutional Court explicitly mention such leeway for the executive,[944] remarkably without elaborating on its foundations. The law in this area is largely under-theorized,[945] and the courts have issued conflicting judgments.[946] In the latest *Ramstein* judgment, the Federal Administrative Court explicitly relied on the *Hess* case, and the Constitutional Court can now hardly evade the question. The academic literature is divided as well. Some authors dispute lower review standards in foreign affairs in general[947] and others are particularly critical as far as legal questions are concerned.[948] On the other hand, several

941 Cf above, this Chapter, I., 2., b).
942 Cf above, this Chapter, I., 4., b), bb), (2).
943 Cf above, this Chapter, I., 1., b), bb), (3).
944 Claims that this case law 'has not been expressly overruled but tacitly abandoned or at least restricted' Giegerich (n 223) 613.
945 With regards to lower review standards in foreign affairs in general see already the critique by Juliane Kokott, 'Kontrolle der Auswärtigen Gewalt' (1996) 111 DVBl 937, 949; lining out the conflicting case law Nettesheim (n 173) 576 ff.
946 Awarding an area of discretion *Judgment from 27 May 2015 (Ramstein Drone Case)* 3 K 5625/14 (Administrative Court Cologne) mn 78; awarding discretion as well *Judgment from 14 June 1996* (n 827) mn 11 and *Judgment from 25 November 2020 (Ramstein Drone Case)* (Federal Administrative Court) (n 224); awarding no discretion, albeit basing this on the fact the executive itself did not took a clear position *Judgment from 19 March 2019 (Ramstein Drone Case)* (Higher Administrative Court Münster) (n 225) mn 564.
947 Kokott (n 945) 947 ff; Ingolf Pernice, 'Art. 59' in Horst Dreier (ed), *Grundgesetz Kommentar* (2nd edn, Mohr Siebeck 2006) mn 52 ff; acknowledging the scepticism within the scholarly debate Schorkopf (n 185) 346.
948 Beinlich appears to argue in this direction Leander Beinlich, 'Drones, Discretion, and the Duty to Protect the Right to Life: Germany and its Role in the US Drone Programme before the Higher Administrative Court of Münster' (2019) 62 German Yearbook of International Law 557, 566 f; differentiating Aust, who is critical of the Administrative Court Cologne's low review standard but likewise criticises

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authors acknowledge areas of discretion for factual determinations[949] while others also endorse them for legal questions.[950]

In my view, there are compelling reasons linked to the functioning of the international system for allowing executive discretion not only for factual assessments but also for the interpretation of treaties and the existence and interpretation of rules of customary international law. Regardless of whether the 'foreign affairs power' is almost exclusively vested within the executive or distributed between the executive and the legislative branches,[951] it is undisputed that in Germany, the executive represents the state on the international plane.[952] International law assigns special powers to the representative state organs concerning the formation of customary international law and the conclusion and subsequent development of treaties.[953] In the horizontal order of the international system, the executive takes over

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the simplification of the status of international law by the Higher Administrative Court, in the end, Aust as well appears to acknowledge a certain leeway for the executive, albeit applying a higher review standard than the Higher Administrative Court, Aust, 'US-Drohneneinsätze' (n 225) 303, 308, 309; in a similar direction Max Erdmann, 'Grundrechtliche Schutzpflichten nach Maßgabe des Völkerrechts' (2022) 75 DÖV 325, 333.

949 Stern (n 168) 249; Hailbronner (n 183) 19, 23; Calliess, 'Auswärtige Gewalt' (n 183) 608.

950 Given the weight as special expert evidence Bolewski (n 128) 161; Thomas Giegerich, 'Verfassungsrechtliche Kontrolle der Auswärtigen Gewalt' (1997) 57 ZaöRV 409, 446 ff, 459 ff; for the question whether a non-international armed conflict exists Daniel Thym, 'Zwischen "Krieg" und "Frieden": Rechtmaßstäbe für operatives Handeln der Bundeswehr im Ausland' (2010) 63 DÖV 621, 627; Patrick Heinemann, 'US-Drohneneinsätze vor deutschen Verwaltungsgerichten' (2019) 38 NVwZ 1580, 1581.

951 Cf already Grewe – Menzel dispute above Chapter 1, II., 3., e) with further references; Stefan Kadelbach and Ute Guntermann, 'Vertragsgewalt und Parlamentsvorbehalt' (2001) 126 AöR 563, 567.

952 Hailbronner (n 183) 10; Calliess, 'Auswärtige Gewalt' (n 183) 601.

953 The Constitutional Court itself recognizes the special role of the 'representative state organs' and thus especially the executive in its decisions on the existence of a rule of customary international law Helmut Philipp Aust, 'Art. 25' in Jörn Axel Kämmerer and Markus Kotzur (eds), *von Münch / Kunig Grundgesetz Kommentar* (7th edn, CH Beck 2021) mn 30; cf as well *Decision from 5 November 2003* BVerfGE 109, 13 (German Federal Constitutional Court) 28; also international law takes into account all organs of state, particular weight is placed on the assertions of the executive Tullio Treves, 'Customary International Law' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 32.

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a legislative function that requires corresponding room to manoeuvre.[954] That is not to say that the judiciary has no role to play on the international plane.[955] Domestic courts are vital in upholding the international rule of law.[956] However, their primary role is related to norm application not norm creation.[957] As we will explore in the next chapter, the structure of international law has arguably changed from pure state (and executive) centrism. Nevertheless, executive control of foreign relations is still the 'default position' of international law.[958] Moreover, it is questionable whether a completely independent role for the judiciary concerning customary international law and the subsequent development of treaties would be normatively desirable.[959] The closer the courts shift to norm creation, the more the question of comparatively less democratic legitimacy vis-à-vis the executive branch becomes relevant.[960]

954 Julian Arato, 'Deference to the Executive: The US Debate in Global Perspective' in Helmut Philipp Aust and Georg Nolte (eds), *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (OUP 2016) 213.

955 André Nollkaemper, *National courts and the international rule of law* (OUP 2011) 10.

956 George Scelle, 'Le phénmène du dédoublement fonctionnel' in Walter Schätzel and Hans-Jürgen Schlochauer (eds), *Festschrift Wehberg – Rechtsfragen der Internationalen Organisation* (Klostermann 1956) 324; Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 454; Nollkaemper (n 955); mentioning the 'Courts' Proactive Role in a Globalized World' Heike Krieger, 'Between Evolution and Stagnation – Immunities in a Globalized World' (2014) 6 Goettingen Journal of International Law 177, 194; Helmut Philipp Aust, 'Between Universal Aspiration and Local Application' in Helmut Philipp Aust and Georg Nolte (eds), *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (OUP 2016) 333, 342; Arato (n 954) 210.

957 Stressing the role of the executive Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 453; critical of the view that constitutional law may not constrain the application of international law by domestic courts Campbell McLachlan, 'Five conceptions of the function of foreign relations law' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 30; also international law takes into account all organs of state, particular weight is placed in the assertions of the executive Treves (n 953) mn 32.

958 Curtis A Bradley, 'The Dynamic and Sometimes Uneasy Relationship Between Foreign Relations Law and International Law' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 343, 350; for parliamentary involvement cf below Chapter 4, I., 3., b).

959 Appear to argue for independent judicial review Payandeh and Sauer (n 224) 1573.

960 This problem is often neglected by German authors, cf Payandeh and Sauer (n 224) 1574 who argue for a strong role of the courts in interpreting international law without mentioning the question of democratic legitimacy; acknowledging the problem Felix Lange, *Treaties in Parliaments and Courts: The Two Other Voices*

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One argument brought forward against executive discretion in foreign affairs, in general, is Article 1 (3) of the Basic Law. The provision obliges all three branches to observe the fundamental rights enshrined in the constitution.[961] Pernice argued that, as the article does not differentiate between public authorities acting internally and externally, it stood in the way of lower review standards in foreign affairs.[962] This argument is too broad: as we have seen,[963] areas of discretion and lower levels of scrutiny are well established within German administrative law. If Article 1 (3) of the Basic Law prohibited varying degrees of review, it would also do so in administrative law.[964] Article 1 (3) certainly strongly argues for applying German fundamental rights to foreign affairs cases,[965] but is silent on the concrete level of review.[966]

Another and stronger argument against executive influence in interpreting treaty and customary law is based on Article 25 and Article 100 (2) of the Basic Law.[967] Article 25 of the Basic Law provides that customary international law is an integral part of federal law, which implies a role for the courts in its identification and application.[968] Article 100 (2) of the Basic Law provides a special procedure concerning the recognition of a rule of customary international law. In contentious cases, courts must obtain a

(Edward Elgar 2024) 296; for contrast cf the remarks by Ewan Smith, 'Is Foreign Policy Special?' (2021) 41 Oxford Journal of Legal Studies 1040, 1055.

961 'The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law'.

962 Pernice (n 947) 52 ff; in this direction as well Winfried Kluth, 'Die verfassungsrechtlichen Bindungen im Bereich der auswärtigen Gewalt nach dem Grundgesetz' in Rudolf Wendt and others (eds), *Staat Wirtschaft Steuern – Festschrift für Karl Heinrich Friauf* (CF Müller 1996) 197.

963 Cf above, Chapter 2, IV., 2.

964 Refuting the argument as well Calliess, 'Auswärtige Gewalt' (n 183) 608; Calliess, *Staatsrecht III* (n 208) 81; in the same vein Thomas M Pfeiffer, *Verfassungsgerichtliche Rechtsprechung zu Fragen der Außenpolitik: Ein Rechtsvergleich Deutschland – Frankreich* (Lang 2007) 145.

965 More on German fundamental rights and their applicability in foreign affairs cases Chapter 4, I., 4., b) and Chapter 4, II., 3., b) and c); for the different opinions concerning the applicability cf Carl-Wendelin Neubert, *Der Einsatz tödlicher Waffengewalt durch die deutsche auswärtige Gewalt* (Duncker & Humblot 2016) 135 ff.

966 Cf already Meinhard Schröder, 'Zur Wirkkraft der Grundrechte bei Sachverhalten mit grenzüberschreitenden Elementen' in Ingo von Münch (ed), *Staatsrecht – Völkerrecht – Europarecht (Festschrift Schlochauer)* (De Gruyter 1981) 137, 138.

967 In this direction Payandeh and Sauer (n 224) 1573.

968 For the method applied by the Constitutional Court for the identification of customary international law cf Aust, 'Art. 25' (n 953) mn 30.

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decision from the Constitutional Court to ascertain whether a rule of international law is part of German law. Both provisions thus assign a vital role to the courts concerning the interpretation and application of customary international law in general and particularly to the Constitutional Court in contentious cases. However, correctly construed, Article 100 (2) of the Basic Law does not stand in the way of awarding an area of discretion to the executive in cases of customary international law. The provision's primary purpose is to regulate the relationship between ordinary courts and the Constitutional Court and to avoid different judgments in contentious cases that may trigger Germany's state responsibility.[969] It does not award the sole competence for interpreting customary law, let alone treaty law, to the Constitutional Court.[970] The position of the executive can be given special weight in the procedure in front of the Constitutional Court.[971]

Better arguments speak for recognizing executive discretion in interpreting customary and treaty law, especially in cases of doubt.[972] The Basic Law, with its general principles of 'friendliness towards international law' and 'openness towards international law,' respects the unique attributes of the international order.[973] If the judiciary (on a global scale) were to fix the executive on a particular understanding of customary international law, this could lead to a petrification of international law.[974] Within the German context, it would deny, qua domestic law, a power granted to the executive qua international law and ignore its basic functioning mechanism.[975] This would, in essence, amount to the exclusion of the German executive from

969 'Es ist der primäre Zweck des Verifikationsverfahrens, Verletzungen des Völkerrechts, die in der fehlerhaften Anwendung oder Nichtbeachtung völkerrechtlicher Normen durch deutsche Gerichte liegen und eine völkerrechtliche Verantwortlichkeit Deutschlands begründen können, nach Möglichkeit zu verhindern und zu beseitigen' *Decision from 5 November 2003* (n 953) mn 36; Hans-Georg Dederer, 'Art. 100' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 275; Joachim Wieland, 'Art. 100' in Horst Dreier and Hartmut Bauer (eds), *Grundgesetz: Kommentar* (3rd edn, Mohr Siebeck 2018) mn 38.

970 Contrary view Payandeh and Sauer (n 224) 1573.

971 Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 463.

972 Bleckmann (n 374) 257; Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 459 ff.

973 Cf Nettesheim (n 173) 579 f.

974 Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 460; Aust, 'Drohneneinsätze' (n 948) 309 warning of the danger of completely limiting the executive ability to develop international law.

975 In this direction Frowein (n 374) 136.

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the development of customary international law.[976] As we have seen, concerning the subsequent development of treaties, the Constitutional Court has refrained from applying a strict approach and granted leeway to the executive with its 'integration framework' doctrine. There is no reason why such a discretionary approach should not generally be adopted concerning the interpretation of treaties and customary law.

However, the general decision for an executive role in these cases has to be further refined. The level of weight granted cannot be the same in every case but has to vary according to the circumstances. In particular, the more fundamental and human rights are directly involved, the lower the leeway for the executive.[977] This is based on the very nature of human rights, which aim to protect the individual from (especially executive) infringements. In the case of international human rights, the states implicitly or even expressly accepted independent judicial oversight.[978] Thus, if international human rights law becomes relevant in a direct vertical application,[979] the control of the executive assessment must be strict. On the other hand, if human rights are only indirectly affected, the executive leeway will be higher. This will give rise to a sliding scale approach,[980] and it is upon the courts to openly define and explain the indicators which argue for more or less weight of the executive assessment.

Concerning German fundamental rights, the Constitutional Court acknowledged that they find extraterritorial application.[981] On the other hand,

976 The German state practice determined by the courts would always follow the current status of customary international law developed by other states, that is to say, the state practice largely set by the executive of other states.

977 Making this argument for factual determinations Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 445 ff; Hailbronner (n 183) 21 ff; Arato (n 954) 214; Giegerich, 'German Courts' (n 223) 613.

978 Nollkaemper (n 955) 59 ff.

979 E.g. concerning rights of the European Convention on Human Rights which will be applied in combination with German fundamental rights.

980 For factual determinations Giegerich, 'Verfassungsrechtliche Kontrolle' (n 950) 448.

981 Recently *Judgment from 19 May 2020 (BND Telecommunications Surveillance)* BVerfGE 154, 152 (German Federal Constitutional Court); for the decision see Helmut Philipp Aust, 'Auslandsaufklärung durch den Bundesnachrichtendienst – Rechtsstaatliche Einhegung und grundrechtliche Bindungen im Lichte des Urteils des Bundesverfassungsgerichts zum BND-Gesetz' (2020) 73 DÖV 715; already *Decision from 21 March 1957 (Washingtoner Abkommen)* (n 175) 295; for older scholarly opinions excluding the application of fundamental rights cf Pfeiffer (n 964) 115 ff; for a more recent and comprehensive review on the positions on general application in extraterritorial situations cf Neubert (n 965) 135 ff.

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their effect is weakened in many situations entailing extraterritorial components.[982] This weakened effect (*gelockerte Grundrechtsbindung*)[983] may be brought about by a combination of different legal mechanisms and vary from case to case.[984] Foreign citizens may only invoke certain fundamental rights with a weaker protection standard,[985] and international law norms like international humanitarian law may act as a justification for the infringement[986] of fundamental rights.[987] Moreover, when fundamental rights are used not as a defence against the German state but to demand positive protective action towards other sovereign states (*Schutzpflichten*), the executive is awarded an additional leeway concerning how to fulfil this duty to protect.[988] Furthermore, foreign affairs aspects will typically allow the executive to invoke arguments like the need for 'international cooperation,' which will carry weight in determining the proportionality of an infringement of fundamental rights.[989] These considerations, which are mainly discussed with reference to modified fundamental rights protection, can also inform the level of judicial review given to executive interpretations of treaty and customary law in a particular case. Instead of rather opaque

982 Often discussed under the quite unfitting term of 'Grundrechtsbindung' Nettesheim (n 173) 581 ff; *Judgment from 14 July 1999 (Telecommunication Surveillance)* BVerfGE 100, 313 (German Federal Constitutional Court) 363; *Decision from 4 May 1971 (Spanier Beschluss)* BVerfGE 31, 58 (German Federal Constitutional Court); *Judgment from 10 January 1995 (Zweitregister)* BVerfGE 92, 26 (German Federal Constitutional Court) 41; *Judgment from 19 May 2020 (BND Telecommunications Surveillance)* (n 981) 104; Horst Dreier, 'Art. 1 III' in Horst Dreier and Hartmut Bauer (eds), *Grundgesetz: Kommentar* (3rd edn, Mohr Siebeck 2013) mn 45; Hofmann (n 828); Calliess, 'Auswärtige Gewalt' (n 183) 608; Martin Nettesheim, 'Art. 59' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 214 ff; Schorkopf (n 185) 348.

983 The term is a misnomer, as fundamental rights remain binding, but their level of protection may be modified.

984 Nettesheim, 'Verfassungsbindung' (n 173) 583; Dreier (n 982) mn 45; Neubert (n 981) 169.

985 Horst Dreier, 'Vorbemerkung Grundrechte' in Horst Dreier and Hartmut Bauer (eds), *Grundgesetz: Kommentar* (3rd edn, Mohr Siebeck 2013) mn 71 ff.

986 German legal terminology would rather speak of an 'interference' (*Eingriff*).

987 Thym (n 950) 630.

988 Hailbronner (n 183) 16; Nettesheim, 'Verfassungsbindung' (n 173) 585 ff; cf the recent judgment on the German Climate Change Act *Decision from 24 March 2021 (Climate Change)* BVerfGE 157, 30 (German Federal Constitutional Court) mn 173 ff; for a recent analysis of the concept in relation to extraterritorial situations cf Erdmann (n 948).

989 For different arguments which may be used especially on the justification stage of fundamental rights review cf Neubert (n 981) 170 ff referring to them as 'topoi'.

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language and generalizing statements, the courts should openly balance these factors to determine the appropriate level of judicial scrutiny.[990]

3. The status of conclusiveness doctrines in contemporary US law

In contrast to contemporary German and (as has been argued above) South African law, the legal system of the United States clearly embraces non-reviewability in the form of the political question doctrine. Likewise, doctrines of conclusiveness have found frequent application. The extent of the latter doctrine in particular now appears to cause uncertainty concerning the application of deference. As our analysis has shown, this is especially the case with executive assessments concerning legal questions, and even more so in areas where the courts have (re)gained the competence to decide on related issues.[991] In the area of treaty interpretation, the courts have refused to develop the margin of discretion doctrine in the direction of conclusiveness and pushed back against the very deferential *Chevron* approach.[992] In cases of state immunity, the conclusive influence of the executive led to so many problems that the State Department itself argued for a stronger judicial solution of these cases.[993] Still, the conclusive effect of legal assessments is applied to questions of foreign official immunity and continues to cause great uncertainty and has even led to a circuit split.[994]

In my view, the availability of conclusiveness doctrines should be limited to factual determinations within US law. This would bring US law in line with its British roots. As we have seen, the certification doctrine developed in recognition cases and traditionally only referred to questions of 'fact'[995] not questions of law.[996] Only the Sutherland Revolution in the early 20th century manifested its (over-)extensive application to questions

990 The recent decision concerning the BND can be seen as a step towards more openly defining the review standard *Judgment from 19 May 2020 (BND Telecommunications Surveillance)* (n 981).
991 Especially concerning immunity questions, cf above, this Chapter, I., 4., a) and I., 3., a).
992 Cf above, this Chapter, I., 1., a), bb), (3), (d).
993 Cf above, this Chapter, I., 3., a).
994 Cf above, this Chapter, I., 4., a), cc).
995 Mann, *Foreign Affairs* (n 2) 23 ff.
996 Using the example of state immunity White (n 46) 27.

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of law.[997] Hence, to allow the executive to conclusively determine the legal consequence of a certified fact, e.g., in questions of state immunity, not only the status entitling immunity but immunity as such have always overstretched the historical roots of the concept.[998] In state immunity cases, this development was curtailed by legislative intervention in the form of the FSIA. The same has been done for foreign officials who are covered by the Vienna Conventions. It appears to be about time to acknowledge the general unsuitability of conclusive executive determinations in legal questions and reform the remaining areas where the doctrine is still applied.

Its principal field of application now appears to be foreign official immunity in cases not covered by the Vienna Conventions. As we have seen, the Supreme Court in *Samantar* ruled that the FSIA is not applicable in cases concerning individuals.[999] The Fourth and the Second Circuit are now in disagreement over the degree of deference that should be awarded to foreign official immunity decisions. Whereas the Fourth Circuit does not allow for conclusive determinations of conduct-based immunity (but only for status-based immunity), the Second Circuit advocates for conclusive executive determination of both questions.

It appears clear that solving the problem by simply reapplying the old pre-FSIA common law is not a viable option. It concerned cases before the restrictive theory of immunity was established and would hardly be instructive concerning a modern common law of foreign official immunity.[1000] As conclusive executive determinations of state immunity have been abolished with the enactment of the FSIA, conflicting positions are very likely if some immunity decisions are made by the courts and others by the executive.[1001] For example, based on the FSIA courts may find a state to be immune but the executive could deny immunity for a foreign official, or vice versa,[1002] e.g., because they apply a different standard in determining what constitutes

997 White (n 46) 27, 134 ff (referring to state immunity); Dodge and Keitner (n 629) 685, 712 f.

998 This appears clear from the view of English Law, cf already Moore (n 232) 38; Mann, *Foreign Affairs* (n 2) 37; McLachlan, *Foreign Relations Law* (n 250) 247.

999 Cf above, this Chapter, I., 4., a), bb).

1000 Ryan (n 562) 1799.

1001 Mentioning many possible conflicting situations Wuerth, 'Foreign Official Immunity' (n 346) 28 ff, 37.

1002 Wuerth, 'Foreign Official Immunity' (n 346) 29.

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a 'commercial activity'.[1003] Moreover, international law and US law,[1004] in the light of growing human rights jurisprudence, have progressed and now appear to hold foreign officials accountable for grave human rights violations in some instances.[1005] The old common law does not reflect these new circumstances.

The current uncertainty should be solved by a statutory fix eradicating executive conclusiveness for questions of law in cases of foreign official immunity.[1006] Some authors advocate such a solution[1007] and correctly point out that the current state of affairs mirrors the state of the law concerning *state* immunity decisions before the enactment of the FSIA.[1008] Instead of deciding whether the state engaged in a commercial or non-commercial activity, the question is now whether an act is pursued in an official or non-official (including commercial activity) capacity.[1009] As with pre-FSIA state immunity determinations, the executive's suggestions are not always guided by this distinction, and the State Department is under constant pressure from foreign governments to intervene.

In line with my proposal to limit the availability of conclusiveness to questions of fact, this fix, contrary to some suggestions,[1010] should not be limited to conduct-based immunity but also encompass head of state immunity.[1011] Here, the executive's ability to conclusively settle questions of law will also cause problems. The mainstream position in international law

1003 Ibid 32.

1004 Especially the Alien Tort Statute (although already long in existence) and the newer Torture Victim Protection Act are invoked in Human Rights cases Wuerth, 'Foreign Official Immunity' (n 346) 35.

1005 Beth Stephens, 'The modern common law of foreign official immunity' (2011) 79 Fordham Law Review 2669, 2702; cf as well the approach taken by the Fourth Circuit *Yousuf v Samantar II* (n 609).

1006 For a statutory fix (albeit limited to conduct-based immunity) Bellinger (n 623) 835, speaking of possible future codification; acknowledging that a statute might be preferable to judicial or executive law making Wuerth, 'Foreign Official Immunity' (n 346) 4 fn 16; Ryan (n 562).

1007 Ryan (n 562).

1008 In the same vein Totten, 'Adjudication' (n 474) 542.

1009 Ryan (n 562) 1783, 1796 f.

1010 Wuerth, 'Foreign Official Immunity' (n 346) 4 fn 16 (raising doubt if status-based immunity can be regulated by statute); Ryan (n 562) 1802 wants to keep the old role of the executive concerning status-based immunity.

1011 Mallory (n 574) 187 ff; Joseph W Dellapenna, 'Case Note – Lafontant v. Aristide. 844 F.Supp. 128.' (1994) 88 AJIL 528, 532; George (n 478) 1076 ff; doubtful concerning the executive influence concerning status-based immunity as well Dodge and Keitner (n 629) 685, 713.

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holds heads of state immune from civil and criminal law.[1012] However, state practice is less settled concerning civil jurisdiction.[1013] In the past, US courts have also shown a tendency to apply the restrictive immunity doctrine to heads of state.[1014] Moreover, at least concerning former heads of state, international law has shown a tendency to allow for exemptions concerning grave human rights violations,[1015] a debate that is likely to continue.[1016] The arguments against an executive determination of head of state immunity in these cases mirror the arguments made against such an executive role in state immunity cases before the FSIA and concerning conduct-based immunity. If subjected to a suit, heads of state will request suggestions from the State Department, which will always have to consider foreign policy repercussions and thus is unlikely to offer suggestions based on a principled approach.[1017] In the absence of executive suggestions, the courts will have no clear guidance and will have develop their own standards, which may conflict with the executive's approach.[1018]

An argument often made against statutory regulation of head of state immunity is that it lies close to the presidential recognition power[1019] recently confirmed in *Zivotofsky v Kerry*.[1020] However, as the name implies, the president's exclusive power, correctly construed, only extends to decisions concerning recognition, not immunity. The presidential power is not touched when understood to be controlling only as to the status entitling immunity, not immunity as such.[1021] Such a construction is perfectly in line with the (pre-Sutherland) courts' approach from *Schooner Exchange* up

1012 This is drawn from *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v Belgium) Judgment* ICJ Rep 2002, 3 (ICJ) mn 51; Arthur Watts, 'Heads of State' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 18; Calliess, *Staatsrecht* III (n 208) 21.

1013 Watts (n 1012) mn 20.

1014 Mallory (n 574) 181 ff; citing cases George (n 478) 1077 ff; this problem appears to be overlooked by Ryan (n 562) 1788.

1015 Krieger (n 956) 185 ff; especially triggered by the arrest of Pinochet, cf Andrea Gattini, 'Pinochet Cases' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013).

1016 Especially in the light of the debate concerning conduct-based immunity, cf above, this Chapter, I., 4., a), cc).

1017 Mallory (n 574) 186; George (n 478) 1069.

1018 Mallory (n 574) 181; George (n 478) 1069.

1019 Article II (2) (3) US Constitution.

1020 *Zivotofsky v Kerry* (n 350).

1021 *Guar Trust Co of NY v United States* 304 US 126 (1938) (US Supreme Court) 138; in this vein also Wuerth, 'Foreign Official Immunity' (n 346) 17, 56; Yelin (n 478) 965.

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to *Ex parte Peru*, where executive decisions were only treated as binding regarding the status entitling immunity. As mentioned above, until today, it is also the approach taken by English courts, which served as a prototype for the development in the United States. If the presidential recognition power entailed a broader meaning and gave the executive conclusive force concerning immunity determinations, the FSIA would have been unconstitutional, which the Supreme Court held not to be the case.[1022] The role of the executive should thus be limited to whether the individual holds a government position to which immunity is accorded.[1023] Only in this regard, the courts should be bound by the executive determination, which may play an important role, e.g., when the head of state loses de facto control but is still recognized by the US government.[1024]

Such a statutory fix would eradicate the last major field of application of the conclusiveness doctrine for questions of law. It would settle the executive role, which would be confined to recognizing states and governments (including its officials). In line with the historical roots, this would limit the availability of conclusive executive assessments to questions of fact.

III. Conclusion on the Application of Deference

This chapter has analysed the application of different deference doctrines within the three reference jurisdictions. Thereby it revealed three main findings. First, throughout all examined groups of cases, a trend towards less deference is visible. Secondly, this trend is much weaker in the United States than in Germany and South Africa. Thirdly, all three reference jurisdictions struggle with country-specific problems concerning the application of deference, which are rooted in the different historical adaption of the traditional position and the notion of deference.

1022 *Verlinden BV v Central Bank of Nigeria* 461 US 480 (1983) (US Supreme Court); Wuerth, 'Foreign Official Immunity' (n 346) 17; Yelin (n 478) 980 sees the president's power to confer immunity not as a function of the reception clause but of the president's diplomatic power, nevertheless, he concedes that Congress may curtail the executive's binding suggestions; Ryan (n 562) 1795.

1023 Critical towards binding executive immunity decisions concerning heads of state Ingrid Wuerth, 'Does President Trump Control Head-of-State Immunity Determinations in US Courts' Lawfare from 22 February 2017 available at <https://www.lawfareblog.com/does-president-trump-control-head-state-immunity-determinations-us-courts>; Wuerth, 'Foreign Official Immunity' (n 346) 56.

1024 George (n 478) 1085; Stephens (n 1005) 2704 ff (in the context of common law); Totten, 'Head-of-state' (n 571) 346.

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Concerning the last finding, solutions have been proposed that generally prefer margin of discretion doctrines over more rigid forms of deference in balancing the executive-judicial relationship. In South Africa, the existence and usefulness of doctrines of non-reviewability have been contested in the aftermath of the constitutional transition. It has been argued that the courts have and should continue to renounce their revival in favour of a margin of discretion approach. In Germany, due to the constitutional decision for complete judicial reviewability of executive acts, great uncertainty exists, in which cases the executive assessment should nevertheless be awarded weight. It has been argued that German law should recognize an area of discretion for legal questions like it does for factual assessments, and indicators for the level of review have been proposed. In the United States, the broad application of doctrines of conclusiveness in questions of law has led to problems, especially in areas where courts (re)gained the competence to decide closely related issues. It has been proposed that the usage of conclusiveness doctrines in the US, in line with its historical roots, should be limited to factual questions. The first two findings, the trend toward less deference and its asymmetrical reception in Germany, the United States, and South Africa, will be the subject of our next chapter.

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