Chapter 5 – The Future of Deference

I. A 'modern position'?

As described in the previous chapter, the traditional position in all three jurisdictions (and arguably in other democratic states like the United Kingdom)[1] has come under pressure. As we have seen, courts have increasingly given way to that pressure, albeit in most cases, seemingly unaware of the fundamentality of the change. It is submitted that the convergence forces, far from having only a temporary effect, have fundamentally changed the way of thinking about foreign affairs in general and judicial review in particular. From our analyses above, it can be inferred that a modern position in foreign relations law has evolved as a counterpart to the former traditional position. This modern position calls into question the claims made by traditionalists:

(1) foreign affairs are not (essentially) different from domestic matters,
(2) the executive is not the sole branch equipped to deal with foreign affairs, and
(3) judicial review in this area should not be (categorically) restricted.

To avoid misunderstandings, a few explanatory remarks are in order. I have chosen the terms 'traditionalist' and 'modern' because they best reflect the historical evolution of the two different understandings of foreign affairs.[2] We have described in Chapter 1 how the traditional position developed in political philosophy and in Chapter 4 how a modern view developed. However, there is no inevitable linear development toward the modern position.[3] As we have seen, the framers in the US had a relatively modern

1 Dominic McGoldrick, 'The Boundaries of Justiciability' (2010) 59 ICLQ 981; Ewan Smith, 'Is Foreign Policy Special?' (2021) 41 Oxford Journal of Legal Studies 1040.

2 Using the term 'modern view' in relation to diplomatic protection Thomas Kleinlein and David Rabenschlag, 'Auslandsschutz und Staatsangehörigkeit' (2007) 67 ZaöRV 1277, 1336; cf McGoldrick (n 1) 1016 ('Within this rapidly evolving constitutional context, judges' modern inclination is to find that issues are justiciable').

3 Criticizing such a position (concerning globalization) Eric A Posner, 'Liberal Internationalism and the Populist Backlash' (2017) University of Chicago Public Law & Legal Theory Paper Series No 606, 3.

understanding of foreign affairs, which gave way to a more traditional interpretation of the constitution. I understand both positions as a 'template' to think about foreign relations law. Moreover, the terms as such should be treated as descriptive, not as entailing a normative claim that 'modern' is superior to 'traditional' or vice versa.[4] Furthermore, I do not claim that both positions are mutually exclusive in a legal system. They are at two ends of a spectrum, and as we have seen, it is very well possible that a legal system in one area of foreign affairs applies a more modern approach, in others a more traditional one.[5] The traditional position has often been referred to or implicitly relied upon by courts and scholars. The modern position has barely been articulated and yet can help explain many changes in the jurisprudence of all three jurisdictions. The dynamics of deference, that is, the change between more or less judicial review, manifests itself by the oscillation between the modern and the traditional position.

This idea of a modern position relates to the phenomenon of normalization of US foreign relations law described by Sitaraman and Wuerth.[6] In their influential article, they show that cases dealing with foreign affairs in the US are treated less 'exceptionally' and more like domestic 'normal' matters. Our analysis here broadens the description of Sitaraman and Wuerth in at least three senses. First, like many debates concerning foreign relations law in the United States, their work is exclusively focused on the domestic situation. The analysis here provides a broader picture and compares the development in the US with other liberal democracies, thus putting it in a larger context. Secondly, Sitaraman and Wuerth explicitly excluded the reasons for normalization from their analysis.[7] Our examination in Chapter 4 sought to explain the changing level of deference in foreign relations law. It has been argued that this change is directly tied to the development of the international system and hence a further example of the mutual inter-

4 For a normative claim see below, this Chapter, III.

5 Which may be related to a different impact of factors pushing towards the traditional or modern position, with reference to the position within the international system cf Daniel Abebe, 'Great Power Politics and the Structure of Foreign Relations Law' (2009) 10 Chicago Journal of International Law 125, 137.

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

7 Ibid 1905.

dependence of foreign relations and international law.[8] Thirdly, Sitaraman and Wuerth connect the beginning of 'normalization' to the end of the Cold War.[9] It has been argued here that the development of the modern view is indeed a process reaching back further, at least to the end of the Second World War.[10] In general, our analysis thus builds on the works of scholars describing 'normalization' but applies the ideas to a larger setting.

II. Future dynamics: Russia's war in Ukraine

So far, the forces strengthening the modern position have gained influence since the end of the Second World War. If this dynamic continues, they will likely go on to overcome domestic particularities and push domestic foreign relations law towards a modern position. This assumption rests on the basis that the convergence factors will outweigh the divergence forces and will continue to work as they have done thus far. As alluded to above, I do not subscribe to the idea that linear development is inevitable. If one of these two basic assumptions changes, the pendulum may very well swing towards a 'traditionalist' approach.

Krieger, Nolte, and Zimmermann have examined such a swing of the pendulum concerning the structure of international law.[11] Together with others, they try to answer whether the post-Cold War developments of the international legal system have been scaled back.[12] Populism has been described as one of the factors which may induce a scale back and already been examined above.[13] Now the Russian invasion of Ukraine, next to the

8 Helmut Philipp Aust and Thomas Kleinlein, 'Introduction: Bridges under Construction and Shifting Boundaries' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021).

9 Sitaraman and Wuerth (n 6) 1919.

10 Cf as well the judicialization of immunity determination in sovereign immunity decision through the FSIA in the 1970s; it is however conceded, that the modern view profited from the enhanced development of the international order in the aftermath of the Cold War, especially in the US.

11 Heike Krieger and Georg Nolte, 'The International Rule of Law— Rise or Decline?— Approaching Current Foundational Challenges' in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds), *The international rule of law: rise or decline?: Foundational challenges* (OUP 2019) 3; relying on Josef L Kunz, 'Swing of the Pendulum: From Overestimation to Underestimation of International Law' (1950) 44 AJIL 135.

12 Ibid.

13 Cf above, Chapter 4, II., 4.

terrorist attacks of 9/11, constitutes the second major rift in the international legal order since the end of the Cold War.[14]

At the time of this writing, the war is still waging in Ukraine. With many developments still uncertain, it is near impossible to foresee the effects on the international order. Nevertheless, I will examine some predictions and assessments which have been made so far and try to evaluate their influence on the dynamics of deference.

It appears evident that the Russian war in Ukraine runs counter to the convergence trends analysed above. The Covid crisis already sparked a discussion about 'de-globalization,'[15] which is a stop, if not a rewind, of the ever-closer integration and interdependence of the world's economies. This, under the label of 'decoupling',[16] now equally applies to the economic effects of Russia's war in Ukraine.[17] Western countries have imposed severe economic sanctions, limiting trade between some of the world's largest economies.[18] European countries like Germany rally to achieve independence from Russian energy imports.[19] Depending on how this development is going to affect economic relations with China, it could reach an even greater dimension and divide trade along political lines.[20] Many US commentators already speak of a 'New Cold War'.[21] In the US, trade with China

14 Cf as well Ingrid (Wuerth) Brunk and Monica Hakimi, 'Russia, Ukraine, and the Future World Order' (2022) 116 AJIL 687, 688.

15 Pol Atràs, 'De-Globalisation? Global Value Chains in the Post-COVID-19 Age' (2021) ECB Forum, available at <https://scholar.harvard.edu/antras/publications/de-globalisation-global-value-chains-post-covid-19-age>.

16 Thomas J Christensen, 'Mutually Assured Disruption: Globalization, Security, and the Dangers of Decoupling' (2023) 75 World Politics 1; Anthea Roberts, 'From Risk to Resilience: How Economies Can Thrive in a World of Threats' (2023) 102 Foreign Affairs 123, 124.

17 Spencer Bokat-Lindel, 'Will the Ukraine War Spell the End of Globalization?' New York Times from 1 April 2022; Adam Tooze, 'Ukraine's War Has Already Changed the World's Economy' Foreign Policy from 5 April 2022.

18 For an updated list of the European sanctions see <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/sanctions-adopted-following-russias-military-aggression-against-ukraine_en#sanctions>.

19 Anatole Boute, 'Weaponizing Energy: Energy, Trade, and Investment Law in the New Geopolitical Reality' (2022) 116 AJIL 740, 742.

20 Bokat-Lindel (n 17).

21 Cf the Volume 55 of the Case Western Reserve Journal of International Law under the title 'International Law and the new Cold War'; Stuart Ford, 'The New Cold War with China and Russia: Same as the Old Cold War?' (2023) 55 Case Western Reserve Journal of International Law 423 and authors cited in fn 96.

had already been under pressure during the Trump administration,[22] a trend which continued under the Biden presidency[23] and may spill over to other Western countries, likely also depending on how strongly China is going to support the Russian cause and pursues its hegemonic ambitions in Southeast Asia.

The war has an equally adverse effect on the structure of the international system, especially the law governing the use of force. Some commentators argue that '[t]he post 1945 world order has collapsed into a new world disorder'[24] and that the 'new Cold War is a Hobbesian war of all against all'.[25] Already above, we have mentioned the link between a realist understanding of international relations and deference.[26] With a world that now appears to stronger resemble the realist picture, the call for deference may also increase. Likewise above, we have analysed how a country's position within the international system may affect its courts' approach towards deference.[27] With the open military conflict between Russia and Ukraine, the latter supported by the US and its allies, the trend towards a multipolar world order challenging US hegemony[28] now appears even more evident. Following Abebe's thesis set out above,[29] US courts may respond with

22 Holger Janus and Daniel Lorberg, 'Maximum Pressure, Minimum Deal: President Trump's Trade War with a Rising China' (2020) 38 Sicherheit und Frieden 94; Weijan Shan, 'The unwinnable Trade War' (2019) 98 Foreign Affairs 99.

23 Christensen (n 16) 5; Rishi Iyengar, 'Biden Turns a Few More Screws on China's Chip Industry' Foreign Policy from 19 October 2023 available at <https://foreignpolicy.com/2023/10/19/biden-china-semiconductor-chip-industry-regulations-sanctions>; recently the so-called 'TikTok-Ban' in form of the 'Protecting Americans from Foreign Adversary Controlled Applications Act' signed into law 24 April 2024.

24 Philip Allott, 'Anarchy and Anachronism: An Existential Challenge for International Law' EJIL: Talk! from 1 April 2022 available at <https://www.ejiltalk.org/anarchy-and-anachronism-an-existential-challenge-for-international-law/> [my adjustment].

25 Allott (n 24), similar pessimistic view David Brooks, 'The Dark Century' International New York Times from 22 February 2022; in the same vein German historian Herfried Münkler, Margit Hufnagel, 'Interview: Historiker Münkler: "Wir erleben eine Rückkehr zur klassischen Machtpolitik"' Augsburger Allgemeine from 04 June 2022, available at <https://www.augsburger-allgemeine.de/politik/interview-historiker-muenkler-wir-erleben-eine-rueckkehr-zur-klassischen-machtpolitik-id62899276.html>.

26 Cf above, Chapter 4, I., 1., b).

27 Cf above, Chapter 4, II., 1.

28 Cf Nico Krisch, 'After Hegemony: The Law on the Use of Force and the Ukraine Crisis' EJIL: Talk! from 2 March 2022 available at <https://www.ejiltalk.org/after-hegemony-the-law-on-the-use-of-force-and-the-ukraine-crisis/>.

29 Cf above, Chapter 4, II., 1.

stronger deference. In addition, Germany's position within the international system may change. Its role as a 'middle power' emphasizing its pacifist stance came under intense pressure. In the wake of the Russian aggression, the German chancellor declared that a watershed moment in history (*Zeitenwende*) occurred and not only decided to deliver weapons to Ukraine[30] but also to build up the underfinanced German military.[31] Hence, German courts could be inclined to act more deferential.[32]

Moreover, the trend towards parliamentary involvement, especially concerning the deployment of military forces, may be stopped if not reversed. The changing international environment may call for a strong executive role in commanding the use of military force. In Germany, under the influence of the Russian aggression, the leader of the opposition argued not only for a joint European Military Force but also for a reform of the German constitutional framework governing the deployment of the armed forces.[33] He stated that, 'In the long run, we will not be able to speak of an army of parliament. Parliament does not have an army. The federal government is accountable for the armed forces'.[34] Finally, also the influence of international human rights may be decreasing. Russia declared that it is leaving the Council of Europe in March 2022 and was subsequently expelled, thus limiting the jurisdiction of the European Court of Human Rights.[35]

30 Germany is currently (June 2024) the second largest supplier of military aid in absolute terms behind the United States, for an updated list of the German supplies see <https://www.bundesregierung.de/breg-en/service/military-support-ukraine-2054992>.

31 Olaf Scholz, 'Speech delivered in front of the Bundestag (Zeitenwende)' from 27 February 2022 available at <https://dserver.bundestag.de/btp/20/20019.pdf#P.1349>; English translation available at <https://www.bundesregierung.de/breg-en/news/policy-statement-by-olaf-scholz-chancellor-of-the-federal-republic-of-germany-and-member-of-the-german-bundestag-27-february-2022-in-berlin-2008378>.

32 On the connection between a state's position within the international system and deference cf above, Chapter 4, II., 1.

33 Friedrich Merz, cited in Thomas Vitzthum, 'Merz nennt drei Bedingungen für Zustimmung zu Sondervermögen der Bundeswehr' Welt from 15 March 2022 available at <https://www.welt.de/politik/article237542513/Friedrich-Merz-Drei-Bedingungen-fuer-Zustimmung-zu-Sondervermoegen-der-Bundeswehr.html>.

34 Merz (n 33) 'Wir werden nicht dauerhaft von einer Parlamentsarmee sprechen können. Das Parlament hat keine Armee. Eine Bundesregierung ist für die Streitkräfte verantwortlich' [my translation].

35 COE, 'The Russian Federation is excluded from the Council of Europe' from 16 March 2022 available at <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe>.

On the other hand, the picture painted above may be too pessimistic. It is very unlikely that globalization will be unwound completely and that we will see a return to isolated national economies. Until now, war-related sanctions are addressed at Russia alone. Developing countries like India and South Africa have completely stayed out of the economic sanctions.[36] Moreover Europe's attempts to gain economic independence are mainly targeted against Russia. If there will be a 'New Cold War' will very much depend on the degree economic relations with China come under pressure, a development which is hard to foresee.[37] In their Leaders' Communiqué following the G7-Summit in Hiroshima in 2023 the G7 leaders, including President Biden, stated the aim towards China is not 'decoupling or turning inwards' but 'de-risking and diversifying'.[38] Thus, economic disentanglement may not be directed at complete independence but instead at curbing asymmetric interdependence like Europe's dependence on Russian energy, which can be abused.[39] 'De-risking' appears to have replaced 'decoupling' as softer alternative.[40] Even scholars who speak of a 'New Cold War' in the context of US-China relations note the main differences to the original Cold War, namely the strong economic links to China and the multipolar world order, which limit the effect of the confrontation. Finally, even if a new 'cold war'-like situation between the West and Russia (and possibly China) ensues, economic integration within the West will likely continue.[41]

In addition, the prophecies concerning the end of the post-Second World War order may go too far.[42] Even if tensions between Russia (and possibly

36 Eusebius McKaiser, 'South Africa's Self-Defeating Silence on Ukraine' Foreign Policy from 18 March 2022.

37 Bokat-Lindel (n 17).

38 G7, 'Hiroshima Leaders' Communiqué', Point 51, from 20 May 2023 available at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/20/g7-hiroshima-leaders-communique/>.

39 Nicole Deitelhoff, 'Arming for Peace' Verfassungsblog from 11 April 2022 available at <https://verfassungsblog.de/arming-for-peace/>; in this direction Christensen (n 16).

40 Roberts (n 16) 124.

41 On this point, it seems worth noting that Friedmann did develop his ideas concerning a law of cooperation during the height of the Cold War, cf above, Chapter 4, I., 1., b).

42 More optimistic outlook Oona Hathaway, 'International Law Goes to War in Ukraine' Foreign Affairs from 15 March 2022; Oona Hathaway and Scott Shapiro, 'Putin Can't Destroy the International Order by Himself' Just Security from 24 February 2022 available at <https://www.justsecurity.org/80351/putin-cant-destroy-the-international-order-by-himself/>; Fleur Johns and Anastasiya Kotova, 'Ukraine: Don't write off the international order – read and rewrite it' from 4 March 2022 available at <https:/

China) and the West are rising, they will not replace the current system with anarchy. The Russian invasion certainly puts a heavy strain on the international order, especially the rules governing the use of force. On the other hand, as widely known, Article 2 (4) of the UN charter has already been declared dead numerous times[43] and still remains the centrepiece of the *ius ad bellum*. Russia's veto, of course, blocked the condemnation of the war in the UN Security Council, but it likewise revived the long-forgotten instrument of Uniting for Peace.[44] A large majority in the General Assembly condemned the Russian aggression, with only five notorious states voting against it (Belarus, Eritrea, North Korea, Syria, and Russia itself).[45] The resolution vehemently reaffirms the prohibition of the use of force as the cornerstone of the international order[46] and '[d]eplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter'.[47] Also, the International Court of Justice, in a swift and by then unprecedented ruling based on the Genocide Convention, ordered Russia to stop its military activities in Ukraine.[48] Of course, these condemnations did not stop the hostilities, but the interna-

/www.lowyinstitute.org/the-interpreter/ukraine-don-t-write-international-order-read-rewrite-it>; Barrie Sander and Immi Tallgren, 'On Critique and Renewal in Times of Crisis: Reflections on International Law(yers) and Putin's War on Ukraine' Völkerrechtsblog from 16 March 2022 available at <https://voelkerrechtsblog.org/de/on-critique-and-renewal-in-times-of-crisis/>; on the role of international law after the Russian War in Ukraine as well Heike Krieger, 'Von den völkerrechtlichen Fesseln befreit? – Zur Ordnungsfunktion des Völkerrechts in einer Welt im Umbruch' (2023) 62 Der Staat 579.

43 Thomas M Franck, 'Who killed Article 2(4)? or: Changing Norms Governing the Use of Force by States' (1970) 64 AJIL 809; Thilo Marauhn, 'How many Deaths can Article 2(4) die?' in Lothar Brock and Hendrick Simon (eds), *The Justification of War and International Order: From Past to Present* (OUP 2021); in the wake of the Russian War in Ukraine now again cited by Tom Ginsburg, 'Article 2(4) and Authoritarian International Law' (2022) 116 AJIL Unbound 130.

44 Michael P Scharf, 'Power Shift: The Return of the Uniting for Peace Resolution' (2023) 55 Case Western Reserve Journal of International Law 217.

45 UNGA, 'Aggression against Ukraine' A/RES/ES-11/1 from 2 March 2022.

46 On the importance on reaffirmation Hathaway and Shapiro (n 42).

47 UNGA, 'Aggression against Ukraine' (n 45) [my adjustment].

48 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation) Provisional Measures, Order of 16 March 2022* ICJ Rep 2022, 211 (ICJ); now mimicked to a certain degree by *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) Provisional Measures, Order of 26 January 2024* (ICJ).

tional system is increasing the pressure on Russia. As Benvenisti, Cohen,[49] Hathaway,[50] and Shapiro[51] have pointed out, international law on its own cannot prevent the use of force but render military solutions less attractive and 'outcast'[52] the aggressor. The reactions of the international community show that the normative core of Art. 2 (4) of the UN Charter remained untouched.[53] Likewise, the Russian war is not simply setting aside the international order that developed since 1945 but is also shaped by its features. According to Johns and Kotova, pluralism is one such factor.[54] The war is not only fought by the two (or more) Leviathans but also by private actors like hacktivists,[55] international law associations,[56] social media companies, and tech giants, which even delivered vital equipment especially in the early stages of the war.[57]

The effect of the war on the trend toward parliament participation in foreign affairs is also hard to predict at the moment. At least in Germany, the call for shifting competence to the executive has not been taken up. In

49 Eyal Benvenisti and Amichai Cohen, 'Bargaining About War in the Shadow of International Law' Just Security from 28 March 2022 available at <https://www.justsecurity.org/80853/bargaining-about-war-in-the-shadow-of-international-law/>.

50 Hathaway (n 42).

51 Hathaway and Shapiro (n 42).

52 Oona Hathaway and Scott Shapiro, *The Internationalists: How A Radical Plan to Outlaw War Remade The World* (Simon and Schuster 2017) 371 ff.

53 Sharing this view Ginsburg (n 43); Michael J Kelly, 'The Role of International Law in the Russia-Ukraine War' (2023) 55 Case Western Reserve Journal of International Law 85; Felix Lange, *Der russische Angriffskrieg gegen die Ukraine und das Völkerrecht* (De Gruyter 2023) 8.

54 Johns and Kotova (n 42); Sander and Tallgren (n 42).

55 Laurens Cerulus, 'Hacktivists come to Ukraine's defense' Politico from 25 February 2022 available at <https://www.politico.eu/article/hacktivists-come-to-ukraines-defense/>.

56 Vivek Bhatt, 'A Visible College: Public Engagement with International Law(yers) During the Ukraine Invasion' Opinio Juris from 8 March 2022 available at <http://opiniojuris.org/2022/03/08/a-visible-college-public-engagement-with-international-lawyers-during-the-ukraine-invasion/>.

57 Rachel Lerman and Cat Zakrzewski, 'Elon Musk's Starlink is keeping Ukrainians online when traditional Internet fails' Washington Post from 19 March 2022 available at <https://www.washingtonpost.com/technology/2022/03/19/elon-musk-ukraine-starlink/>; Alexander Freud, 'Ukraine is using Elon Musk's Starlink for drone strikes' DW from 27 March 2022 available at <https://www.dw.com/en/ukraine-is-using-elon-musks-starlink-for-drone-strikes/a-61270528>; also part of this category are companies which 'voluntarily' leave Russia withouth being targeted by sanctions in order to preserve reputation; Kristen E Eichensehr, 'Ukraine, Cyberattacks, and the Lessons for International Law' (2022) 116 AJIL Unbound 145, 147.

the wake of the necessary constitutional amendment to enlarge the security budget for the armed forces, some scholars called for a reform of the Basic Law's provisions governing military deployment.[58] However, none of these suggestions included a stronger role for the executive. Conversely, many authors have demanded a stronger connection between the Basic Law and international law,[59] and some even argue for a stronger involvement of the judiciary.[60]

Also in the area of human rights, there is pushback against the Russian aggression. Just days into the war, the ICC prosecutor decided to open an investigation.[61] Although the structure of the Rome Statute bars investigations concerning the crime of aggression, investigations concerning war crimes, crimes against humanity, and genocide can be conducted.[62] The investigation led to an ICC warrant against Vladimir Putin in connection with the alleged unlawful deportation of Ukrainian children.[63] Far from having only symbolic value, reminiscent of the *Al-Bashir* case, it effectively barred Putin's personal attendance of the BRICS summit 2023 in South

58 Daniel Hinze, 'Die Bundeswehr braucht klare Rechtsgrundlagen' Verfassungsblog from 7 March 2022 available at <https://verfassungsblog.de/die-bundeswehr-braucht-klare-rechtsgrundlagen>; Felix Lange, 'A Constitutional Framework for Bundeswehr Operations Abroad Based on International Law' Verfassungsblog from 5 April 2022 available at <https://verfassungsblog.de/a-constitutional-framework-for-bundeswehr-operations-abroad-based-on-international-law/>.

59 Already Helmut Philipp Aust and Claus Kreß 'Evakuierungen ohne Rechtsgrundlage?' from 7 September 2021 <https://www.faz.net/einspruch/exklusiv/afghanistan-evakuierungen-ohne-rechtsgrundlage-17526259.html>; Hinze (n 58); Lange (n 58).

60 Christian Marxsen, '"Juridified" Control' Verfassungsblog from 13 April 2022 available at <https://verfassungsblog.de/juridified-control/>.

61 ICC, 'Statement of ICC Prosecutor, Karim A A Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation."' from 28 February 2022 available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>; Milena Sterio, 'The Ukraine Crisis and the Future of International Court and Tribunals' (2023) 55 Case Western Reserve Journal of International Law 479, 490.

62 The investigation of the crime of aggression with regards to a non-state party hinges on a referral by the UNSC, cf Jennifer Trahan, 'Revisiting the History of the Crime of Aggression in Light of Russia's Invasion of Ukraine' ASIL Insights from 19 April 2022 available at <https://www.asil.org/insights/volume/26/issue/2>.

63 ICC, 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' from 17 March 2023 available at <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

Africa.[64] Even the creation of an ad-hoc tribunal to prosecute the crime of aggression has been discussed, although this idea is not uncontroversial.[65] In Germany, the Federal Public Prosecutor General (*Generalbundesanwalt*) opened structural investigations under the German Code of Crimes against International Law with a focus on war crimes and crimes against humanity[66] and identified first suspects.[67] Similar investigations have already been successfully conducted against members of the Syrian regime.[68] Meanwhile, the UN General Assembly voted to suspend Russia from the Human Rights Council for gross and systematic human rights violations in connection with the invasion[69] and Russia's attempts to rejoin the council failed.[70]

The effects of the Russian War in Ukraine on the dynamics of deference are thus hard to assess. It will likely restrain many of the convergence factors set out above. On the other hand, the conflict has not replaced the international order and will not only shape but also be shaped by its structure. Thus, it is rather unlikely that it will lead to a complete rewind of globalization or the international legal system. What is more, the modern view evolved as a template of thinking about foreign relations law. It will not vanish, even if the war may weaken the forces that led to its inception.

64 See already above Chapter 3, I., c), bb), (3); Zoe Jay and Matt Killingsworth, 'To Arrest or Not Arrest? South Africa, the International Criminal Court, and New Frameworks for Assessing Noncompliance' (2024) 68 International Studies Quarterly 1, 10.

65 Cautious Trahan (n 62); negatory Kevin Jon Heller, 'Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea' Opinio Juris from 7 March 2022 <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>; Kai Ambos, 'A Ukraine Special Tribunal with Legitimacy Problems?' Verfassungsblog from 6 January 2023 <https://verfassungsblog.de/a-ukraine-special-tribunal-with-legitimacy-problems/>.

66 Johannes Block, 'Committed in Ukraine, Prosecuted in Germany?' Völkerrechtsblog from 7 April 2022 <https://voelkerrechtsblog.org/de/committed-in-ukraine-prosecuted-in-germany/>.

67 LTO, 'Bundesanwaltschaft ermittelt gegen russische Soldaten' from 27 September 2023 available at <https://www.lto.de/recht/nachrichten/n/gba-kriegsverbrechen-ukraine-russland-soldaten-ermitteln-ermittlungen-verfahren-bundesanwalt-voelkermord-genozid/>.

68 Block (n 66).

69 Rosa Freedman, 'Russia and the UN Human Rights Council: A Step in the Right Direction' EJIL: Talk! from 8 April 2022 available at <https://www.ejiltalk.org/russia-and-the-un-human-rights-council-a-step-in-the-right-direction/>.

70 Phelan Chatterjee, 'Russia fails to rejoin UN's human rights council' BBC from 10 October 2023 available at <https://www.bbc.com/news/world-europe-67071697>.

Moreover, it may even provide greater flexibility to deal with the challenges of the 21st century, as we will come to claim below.

III. A normative claim

1. The 'foreign affairs fairy tale'

As we have seen, since early modern political philosophy, foreign affairs have been treated as something 'mystical'. The waves of constitutionalization, parliamentarization, separation of powers, and judicial review penetrated many areas but left the foreign affairs fairy tale largely untouched. The time has come to 'demystify' foreign affairs. Today, courts still bluntly refer to a 'traditional role of the executive' or 'executive core area'[71] without reflecting on why such a traditional role is apt or if the conditions in which it developed have changed. Given the development of the international and constitutional systems described above, it is outdated to hold that '[t]he President does […] suddenly mutate into a Leviathan once she/he enters the international relations arena'.[72] Sometimes the mystification is concealed by functionalist arguments, which are, however, not sincere endeavours to assess the institutional competence of the executive branch but rather ill-covered attempts to justify the old executive role.[73]

The international system, as well as domestic legal systems, will continue to change. Most likely, many of the developments that brought about a more 'modern' understanding of foreign affairs are here to stay. As has been shown, weaker forms of deference, especially discretionary approaches, have proven better suited to adapt to this new environment.[74] They have

71 Nettesheim, 'Art. 59' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 26.

72 Moses R Phooko and Mkhululi Nyathi, 'The revival of the SADC Tribunal by South African courts: A contextual analysis of the decision of the Constitutional Court of South Africa' (2019) 52 De Jure 415, 417 (who are opposing this view).

73 Cf below, this Chapter, III., 2., in this direction Volker Röben, *Außenverfassungsrecht: Eine Untersuchung zur auswärtigen Gewalt des offenen Staates* (Mohr Siebeck 2007) 74; Sitaraman and Wuerth (n 6) 1909; in this direction as well Smith (n 1) 26.

74 Calling for a discretionary approach as well Daniele Amoroso, 'A fresh look at the issue of non-justiciability of defence and foreign affairs' (2010) 23 Leiden Journal of International Law 933, 943; McGoldrick (n 1) 1014 ff; Daniele Amoroso, 'Judicial Abdication in Foreign Affairs and the Effectiveness of International Law' (2015) 14 Chinese Journal of International Law 99, 123 ff; arguing for a margin of discretion

been tested in domestic administrative law, where they have a similar task of allowing institutionally competent agencies to make decisions without giving them unfettered power. They can stir a 'middle ground' between independent judicial review and judicial abstention.[75] In line with that, I argued in the third chapter that all three jurisdictions should enhance the usage of discretionary doctrines and limit the usage of non-reviewability and conclusiveness doctrines.[76]

Although administrative law doctrines can serve as a role model, they cannot be taken ready-made out of context and applied to executive decisions in foreign affairs.[77] Domestic courts will have to determine factors that enlarge or narrow the room for executive discretion. It is outside the ambit of this thesis to develop such a framework, let alone a universal one. However, some guiding factors may be sketched.

2. Towards a balanced and transparent margin of discretion approach

Although foreign affairs are not fundamentally different from other areas of law, they, like every other area of law, have a unique framework in which they operate. States and their governments still have a central role within the international system, and international law attributes special powers to domestic executives, e.g., concerning the formation of customary international law.[78] Domestic frameworks have to take this into account in

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approach in treaty interpretation Julian Arato, 'Deference to the Executive: The US Debate in Global Perspective' in Helmut Philipp Aust and Georg Nolte (eds), *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (OUP 2016) 208 ff; Diego Mauri, 'The political question doctrine vis-à-vis drones' 'outsized power': Antithetical approaches in recent case-law' (2020) 68 Questions of International Law 3, 18; Elad D Gil, 'Rethinking Foreign Affairs Deference' (2022) 63 Boston College Law Review 1603.

75 Curtis A Bradley, 'Chevron Deference and Foreign Affairs' (2000) 86 Virginia Law Review 649, 674 (however, I do not subscribe to Bradley's idea of applying a *Chevron* approach).

76 Cf above, Chapter 3, II.

77 Correctly noting this in the area of treaty interpretation Joshua Weiss, 'Defining Executive Deference in Treaty Interpretation Cases' (2011) 79 George Washington Law Review 1592, 1607.

78 Cf already above, Chapter 3, II., 2.; calling it the 'Default position' of international law Curtis A Bradley, 'The Dynamic and Sometimes Uneasy Relationship Between Foreign Relations Law and International Law' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law*

order to allow the smooth functioning of international relations. There may be reasons for more or less leeway for the executive. These factors are not the same for every case in 'foreign affairs'. Courts will have to engage in a balancing exercise and develop guidelines on the appropriate degree of review for specific kinds of cases.[79] Many of the arguments used to justify a doctrine of non-reviewability may serve as an indicator towards granting more leeway to the executive. However, they should not be uncritically accepted but tested for their validity, especially in the light of the changes that brought about the modern position.

A first factor often used to argue for more executive leeway is the greater expertise vis-à-vis the courts.[80] In general, of course, this claim is very simplistic. The courts' function is to adjudicate on virtually every matter of society, but judges are not experts in every field.[81] They hear expert witnesses or request information from various agencies if they lack specific knowledge. There is no reason why this should not also be possible for foreign affairs. In fact, due to globalization, courts today already have to decide many cases with strong transnational and international components.[82] In some cases, the executive indeed enjoys special knowledge due to the foreign ministry, embassies, or intelligence agencies. Courts should give facts provided in these cases special weight or even the force of prima facia evidence.[83] As we have seen,[84] the South African DIPA has already applied this approach. However, there appears to be no reason why such a presumption may not be rebutted if contrary or conflicting evidence surfaces.[85]

A second factor is the 'lack of judicially discoverable and manageable standards,' which, at least since *Baker v Carr,* has been used to argue against judicial review in foreign affairs. Again, this argument is rather simplistic.

(CUP 2021) 343, 350; Tullio Treves, 'Customary International Law' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 32; of course, that is not to say that courts do not play a role, cf André Nollkaemper, *National courts and the international rule of law* (OUP 2011) 10.

79 In this direction as well Felix Lange, *Treaties in Parliaments and Courts: The Two Other Voices* (Edward Elgar 2024) 302.

80 Sitaraman and Wuerth (n 6) 1936.

81 Ibid 1937; Smith (n 1) 21.

82 Cf as well above Chapter 4, I., 1., a) and Robert Knowles, 'American Hegemony and the Foreign Affairs Constitution' (2009) 41 Arizona State Law Journal 87, 129.

83 Making this suggestion Amoroso, 'Judicial Abdication' (n 74) 121 f.

84 Cf above, Chapter 3, I., 4., c), bb).

85 Amoroso, 'Judicial Abdication' (n 74) 122.

In foreign affairs, as in domestic cases, where no law governs an issue, a court cannot render a judgment. However, in the vast majority of cases, foreign affairs are regulated in one way or another and either domestic law or international law[86] (or both) will apply.[87] In some cases, domestic law will contain detailed provisions regulating an area of foreign affairs (e.g., concerning immunity through statutes like the FSIA or DIPA). In other fields, domestic provisions, especially in constitutional law, will have less regulatory depth. In particular, in constitutional rights cases, the courts will have to refine how far constitutional guarantees apply to a particular case.[88] Again, this is not a speciality of foreign affairs.[89] Abstract constitutional rights also need to be interpreted in domestic cases. Aside from (genuine) domestic law, international law may also govern a case related to foreign affairs. Human rights law, international humanitarian law, and other treaty regimes or customary international law will have to be interpreted if they apply to a given case. Especially concerning international law, sometimes no rule prohibits a specific state action, and thus, according to the 'Lotus principle,' it will be permissible,[90] even though these areas will probably shrink due to the changes of the international system described above. In other cases, the interpretation of a treaty or a rule of customary international law or the existence of a rule of customary law will be contentious. The special role attributed by international law to the executive concerning the interpretation of treaties (especially by using subsequent agreements and practice) and the formation of international law again calls for a particular weight being attached to the executive's position.[91] However, this does not mean that executive statements in this regard should be treated as binding or simply trump other aspects of the case which call for a more robust judicial review.

86 To the extent that it is applicable within the domestic legal system.
87 Amoroso, 'Judicial Abdication' (n 74) 118 f (concerning international law).
88 Ibid 117.
89 Knowles (n 82) 129; Amoroso, 'Judicial Abdication' (n 74) 117.
90 Amoroso, 'Judicial Abdication' (n 74) 117; at least this appears to be the position under current international law, albeit especially the presumption of freedom of the *Lotus* case is not unchallenged, cf Armin v Bogdandy and Markus Rau, 'The Lotus' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 18.
91 Cf already above, Chapter 3, II., 2., cf as well (n 78).

Another argument for more executive influence is the necessity to 'speak with one voice'.[92] As we saw above, this assumption has never been entirely accurate,[93] and especially in the second half of the 20th century, the state constantly speaks with many voices. Additionally, as has been pointed out, the understanding (at least amongst democracies) that the courts act independently is now widely shared.[94] Still, there may be cases where the international system calls for uniformity. A state recognized by another state has a legitimate expectation under international law that its existence is not called into question by entities of the recognizing state.[95] Thus, there is a sound reason attributed to the unique context of the international system, which requires more substantial deference towards the executive.[96]

In addition, the factor of speed is often used to lobby for executive dominance.[97] It is purported that the executive has to react quickly to international situations and thus should be unhampered by courts when acting. Again, this aspect is not exclusive to foreign affairs[98] and can be easily provided for by courts. In most cases, judicial review is retrospective, and the challenged executive action already happened and thus speed is no issue at all.[99] In the small number of cases where executive actions are subject to preliminary proceedings,[100] the courts will only engage in plausibility control, as they do in general in such proceedings.[101] If the executive indeed enjoys particular expertise in the area in question, the courts in these cases will again apply a considerably lower review standard.

A factor that will strengthen the judicial review in a given case is the involvement of domestic constitutional or international human rights. Executive actions strongly linked to domestic constitutional or international human rights will likely lead to less deference by the courts.[102] The protection of constitutional rights (and human rights), like habeas corpus review,

92 Sitaraman and Wuerth (n 6) 1942 ff.
93 Knowles (n 82) 131; Sitaraman and Wuerth (n 6) 1945.
94 In this direction Knowles (n 82) 132.
95 Amoroso, 'Judicial Abdication' (n 74) 134.
96 Ibid 131, 134.
97 Knowles (n 82) 135; Sitaraman and Wuerth (n 6) 1938 ff.
98 Sitaraman and Wuerth (n 6) 1938.
99 Knowles (n 82) 136; Sitaraman and Wuerth (n 6) 1938.
100 Recognising the problem Knowles (n 82) 136.
101 For Germany, cf Chapter 3, I., 1., b), bb), (6).
102 Amoroso, 'Fresh Look' (n 74) 943; Amoroso, 'Judicial Abdication' (n 74) 124 ff.

has always been a core function of the courts and will tilt the balance towards strong judicial review.[103]

Of course, the points outlined here can only offer a general idea of how different factors will call for more or less judicial review. Domestic courts have to develop the exact approach to be applied in the various groups of cases involving foreign affairs.[104] It will vary with the demands of the respective constitutional law, especially the constitutional allocation of foreign affairs powers to the three branches and the place offered to international law within the domestic legal system.

IV. Conclusion – The emperor without clothes

In this last chapter, it has been argued that the factors that undermined the traditional position have had a fundamental effect on states' foreign relations law. They led to the gradual development of a modern position that challenged the traditional view's claims and established a new paradigm of thinking about foreign affairs and judicial review.

We have also examined the likely effect of the Russian War in Ukraine on the modern position. As assessed above, it is unlikely that the conflict will completely rewind the changes of the international system since the Second World War. The modern position evolved as a template to think about foreign relations law and will remain influential in the minds of scholars and judges, even if the forces which led to its inception are weakened.

Finally, it has been argued that a doctrine of discretion approach is best suited to balance the executive-judicial relationship in light of the changes of the international and domestic legal systems. I sketched some factors which may weaken or strengthen judicial review from case to case. Many of the abovementioned points have been subconsciously accepted and applied by the courts. In most cases, however, this adherence to a 'modern' understanding of judicial review in foreign affairs has not been made explicit. Sometimes lip service has been paid to old ideas of foreign affairs before quashing an executive action. Instead, courts should openly discard the 'foreign affairs fairy tale' and acknowledge that the emperor is without clothes. Applying an open and transparent discretionary approach

103 As argued for Germany, cf Chapter 3, II., 2.

104 Developing a margin of discretion approach for the US Gil (n 74).

will add legitimacy to courts' decisions in dealing with the challenges of the 21st century.