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A Fresh Look at the Issue of Non-justiciability of Defence and Foreign Affairs

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Abstract
For decades it has been authoritatively stressed that non-justiciability of defence and foreign affairs represents one of the major hurdles to the application of international law by domestic courts. Until now, however, international law scholarship seems to have overlooked two aspects of this issue. First, it has not been sufficiently highlighted that the international and the European community legal orders are progressively eroding the scope of application of these non-justiciability doctrines. Second, it has rarely been shown how judicial intervention in international matters can be prevented from turning into the 'judicialization' of foreign policy. Hence, ideally by moving along the path traced by those who have already dealt with this issue, the present work aims to analyse these two aspects in greater depth.

Key words
domestic application of international law; non-justiciability; political question doctrine; state responsibility

1. Introduction

National courts increasingly apply international norms to resolve disputes which have been submitted to them.[1] This trend seems to uphold the auguries of that scholarship which, since the mid-1970s, has emphasized the central role of domestic judges in ensuring the effectiveness of the international legal order and in contributing to the evolution of its norms.[2]

The administration of international law by domestic courts, however, keeps running into apparently insuperable hurdles when it comes to scrutinizing the legality of the executive conduct in the fields of defence and foreign affairs. Indeed, there remains concern that judicial intervention in such matters might affect essential interests of the state or even imperil its very existence.[3]

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1 A useful (although inevitably partial) overview of this trend is offered by the *Oxford Reports on International Law in Domestic Courts*, available online at www.oxfordlawreports.com.

2 B. Conforti, *Appunti dalle lezioni di diritto internazionale* (1976), 9; Conforti, *International Law and the Role of Domestic Legal Systems* (1993), 8. For a similar approach, albeit from a different perspective, see H. H. Koh, *Transnational Legal Process*, (1996) 75 *Nebraska Law Review* 181, at 203.

3 E. Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, (1993) 4 EJIL 159.

A typical expression of this concern is represented by the courts' proclivity to dismiss at the outset disputes relating to international matters by resorting to doctrines which prohibit ruling on 'political questions' (according to the common law wording)[4] or 'political or governmental acts' (according to that of civil law).[5] It is well known that these doctrines envisage the existence of a political power whose exercise is exempt from judicial review.[6] Although the scope of these doctrines has undergone considerable downsizing due to the gradual emergence of the rule of law; the immunity of political power is still affirmed with respect to military and foreign policy matters.

The roots and scale of this phenomenon have led some authors to argue that non-justiciability in these areas constitutes an unavoidable need, even in democratic regimes.[7] Yet this position is belied by the fact that in many countries (e.g. Germany,[8] the Netherlands,[9] Israel,[10] and Spain[11]) judges regularly discuss and decide disputes regarding the external acts of the executive. Moreover, recent judgments by US and UK courts on issues related to the so-called 'war on terror' suggest that the boundaries of non-justiciability are rather unstable and often create the conditions for deep incursions by the judiciary.[12]

Judicial abstention in foreign affairs, therefore, far from being inevitable, is the result of choices made in each legal system. Aware of this, the most influential internationalists have been leading a long battle against these doctrines.[13] In this

4 The political question doctrine is firmly rooted in the US legal system (see *Baker v. Carr*, 369 US 186 [1962]), but analogous doctrines are applied in other common law countries, e.g. in the United Kingdom (see T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2003), 161).

5 We can include in this category all the doctrines inspired by the French *acte de gouvernement* (on which see P. Duez, *Les actes de gouvernement* (1935)): The Italian *atto politico* (L. Condorelli, *Acts of the Italian Government in International Matters before Domestic Courts*, (1976) 4 *Italian Yearbook of International Law* 178), the Greek κυβερνητική πράξη (A. Tachos, 'Le contrôle interne de l'administration publique en Grèce', (1990) 42 *Revue internationale de droit comparé* 967), as well as the doctrines of the *actos politicos* adopted in several Latin American countries (F. Zuniga Urbina, 'Control Judicial de los Actos Politicos. Recurso de Proteccion ante las "Cuestiones Politicas"', (2008) 14 *Ius et Praxis* 271). According to some authors such avoidance doctrines have also been adopted by international courts (L. R. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', (1997) 107 *Yale Law Journal* 273, at 316; A. F. Perez, 'The Passive Virtues and the World Court: Pro-dialogic Abstention by the International Court of Justice', (1997) 18 *Michigan Journal of International Law* 399). This view is not universally shared (see, e.g., F. Francioni, 'International Law as a Common Language for National Courts', (2001) 36 *Texas International Law Journal* 587, at 590). Given our focus on domestic courts, however, this question is beyond the reach of the present inquiry.

6 It is worth noting that common law doctrines have a wider scope than their Continental counterparts. Unlike the latter they can also be invoked in the context of the judicial review of constitutionality, in disputes between private parties and with regard to defences raised by the respondent party. Both groups of doctrines, however, put government action in international matters beyond judicial review. Taking this aspect into consideration, therefore, a joint analysis is justified.

7 See, e.g., F. Dubois-Richard, 'La raison de droit et la raison d'état dans le régime administratif français', (1989) 2 *Revue européenne de droit public* 197; J. Nzelibe, 'The Uniqueness of Foreign Affairs', (2004) 89 *Iowa Law Review* 941.

8 D. P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997), 153.

9 C. Flinterman, 'Judicial Control of Foreign Affairs: The Political Question Doctrine', in R. Bakker, A. W. Heringa, and F. A. M. Stroink (eds.), *Judicial Control: Comparative Essays on Judicial Review* (1995), 45, at 52.

10 A. Barak, *The Judge in a Democracy* (2006), 177.

11 F. Sarasola, *La funciòn de gobierno en la Constituciòn española de 1978* (2002), 196.

12 E. Benvenisti, 'United We Stand: National Courts Reviewing Counterterrorism Measures', in A. Bianchi and A. Keller (eds.), *Counterterrorism: Democracy's Challenge* (2008), 251.

13 See, e.g., Conforti, *International Law, supra* note 2, at 13. In this regard, it has been noted that international lawyers have been more assertive than constitutionalists in criticizing these doctrines (A.-M. Slaughter Burley, 'Book Review: Are Foreign Affairs Different?', (1993) 106 *Harvard Law Review* 1980, at 1994).

regard, it is worth recalling the resolution adopted in 1993 by the Institut de droit international ('The Activities of National Judges and the International Relations of Their State') whose Article 2 reads,

> National courts, when called upon to adjudicate a question related to the exercise of executive power, should not decline competence on the basis of the political nature of the question if such exercise of power is subject to a rule of international law.[14]

This assertion is fully shareable. It is difficult to see, in fact, why the rule of law[15] must fade before the international action of the executive, especially when the latter is governed by specific rules of international law. It seems, however, that international law scholarship has overlooked two aspects of the question.

First, this subject has been dealt with mainly from the perspective of the domestic order. In particular, it has been argued – also by internationalists – that doctrines of judicial abstention lack constitutional underpinnings[16] and might be incompatible with the fundamental right of access to justice.[17] These argumentations are demonstrably correct and in the present work will be considered as given. Still, international law scholarship has not sufficiently highlighted the pressures exercised against these doctrines by the international as well as the community legal order (the latter being relevant, obviously, only for EU member states). Second, it has rarely been shown how to prevent judicial intervention in international matters from turning into 'judicialization' of foreign policy.

Hence, ideally by moving along the path traced by those who have already (of course, more authoritatively) dealt with this issue, the present work aims to analyse these two aspects in greater depth.

After a short introduction on the political act/question doctrines (section 2), I shall conduct a brief overview of the recent case law where judicial abstention resulted in a failed enforcement of international law (section 3). I shall limit this survey to cases involving the application of international norms protecting fundamental values such as peace, the environment, and human rights. Subsequently (section 4), I shall explain why and how the pressure exerted on the domestic legal system by international order may determine the abandonment of the political act/question doctrine. In section 5 I shall discuss the role which can be played, in this regard, by the EU legal order. Finally, having briefly recalled the prudential reasons which underlie judicial abstention in the field of foreign affairs (section 6), I shall try to

14 *Annuaire de l'Institut de droit international* (1994) 65, II, 318 (the text of the resolution is also available at www.idi-iil.org).

15 For the purposes of the present work, the expression 'rule of law' will be employed in its most general meaning, namely as the principle according to which state bodies must comply with the rules of law. For a fuller analysis of this concept, however, see A. Watts, 'The International Rule of Law' (1993) 2 *German Yearbook of International Law* 36.

16 It is impossible to mention all the authors who have critically dealt with this subject. Still, it suffices to recall the excellent work of Duez, *supra* note 5, for the civil law systems, and that of T. M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (1992), for those of common law.

17 See, e.g., P. Terneyre, 'Le droit constitutionnel au juge', (1991) 145 *Les Petites Affiches* 4; or, with reference to international human rights norms, P. Mertens, *Le droit de recours effectif devant les instances nationales en cas de violation d'un droit de l'homme* (1973), 118.

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illustrate how courts can settle these issues without refraining from exercising their duty of judicial review (section 7). Section 10 concludes.

2. A (BRIEF) INTRODUCTION TO THE POLITICAL ACT/QUESTION DOCTRINE

As the name itself suggests, the political act/question doctrine is grounded in the assumption that some issues belong exclusively to the political arena and consequently cannot undergo judicial scrutiny. It would be overly ambitious to embark here on a detailed comparative analysis of what this means in each national legal system. With some degree of approximation, however, it is possible to identify three rationales generally employed by domestic courts in order to justify judicial abstention.

First, it is affirmed that courts are forbidden to rule on issues which are constitutionally entrusted to the political branches of government.[18] In this regard, it is worth noting that such a prohibition does not need to be expressed but it can be interpretively drawn – as happens in most cases[19] – from constitutional norms (written or not) which allocate powers among the branches of government.

Second, it is argued that there are actions which are taken by government bodies in the exercise of a fourth function, the political one, which pertains to the state community as a whole.[20] Accordingly, these acts are not subject to jurisdictional control because courts cannot gain a position of *otherness* with respect to them.[21]

Third, it is maintained that in some matters there are no judicially manageable standards to apply and the only judgement which can be made is on the political wisdom of the choices made by the government.[22] With regard to such questions, therefore, judicial review – rather than forbidden – is simply not practicable.

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18 See, e.g., *Japan Whaling Association v. American Cetacean Society*, 478 US 221 (1986), at 230 ('The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch'); Cassazione Civile, Sezioni Unite, 5 June 2002 No. 8157, *Marković v. Presidenza del Consiglio dei Ministri e altri*, para. 2 ('[political] acts . . . constitute the manifestation of a . . . function with regard to which the Constitution requires attribution to a constitutional body', Eng. trans. available at www.oxfordreports.com).

19 For an explicit, constitutional prohibition of the exercise of judicial review over acts of foreign policy, however, see the Dutch Constitution, Art. 120 ('The constitutionality of . . . treaties shall not be reviewed by the courts', English translation available at www.minbzk.nl). One must emphasize, however, that this provision goes beyond the scope of our inquiry. In this case the judicial immunity of foreign power does not prevent the domestic application of international law but, on the contrary, strengthens it.

20 On the 'political function' see, in general, G. Jellinek, *L'État moderne et son droit* (1911), 330.

21 See, e.g., *R. v. Jones and others*, [2006] UKHL 16, at 65, *per* Lord Hoffmann ('there is the theoretical difficulty of the courts, as the judicial branch of government, holding not merely that some officer of the state has acted unlawfully . . . but, as a sine qua non condition, that the state itself, of which the courts form part, has acted unlawfully'). See also the stance taken by the Italian state attorney in the *Marković* case, *supra* note 18, para. 4 (the Facts): 'The State is subject to the jurisdiction of its courts only if it appears as "State administration", since in that case the judicial power may be applied to it both as an independent and as a third party. This position of independence and third parties on the part of the court does not apply if the State is summoned before the court as unitary entity of "State Community" and that is the position if claims are made against it that relate to conduct pursued as a sovereign in the field of international relations. In that case, its actions may be judged only by International Courts to whose jurisdictional competence the State is subject in connection with specific matters.'

22 E. Zoller, *Droit des relations extérieures* (1992), 311. See, e.g., *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1204–05 (5d cir. 1978): 'In their external relations, sovereigns are bound by no law; they are like our ancestors before the recognition or imposition of the social contract. A prerequisite of law

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As I have indicated in the introduction, each of these arguments has already been dealt with and confuted by other (more authoritative) authors.[23] Accordingly, I shall not linger on them.

3. The non-justiciablity of defence and foreign affairs in the recent case law

Nowadays the effects of judicial abstention on the domestic enforcement of international law have reached a scale which was unforeseeable in the past. This evolution stems from the considerable increase in legal suits where individuals invoke international norms against the executive bodies. This trend, in turn, originates from the convergence of two factors.

First, contemporary international law, while largely retaining its feature of law between states, is designed primarily to satisfy individual needs.[24] Second, civil society has increasingly been boosting the application of international law before domestic courts. Non-governmental organizations (NGOs), indeed, often sue government bodies – and sometimes non-state actors as well – alleging that they have breached international norms protecting fundamental values such as peace, the environment, and human rights.[25]

To give an account here of all the circumstances where the use of these doctrines has led courts not to apply international law would be impossible. I shall limit myself, therefore, to references to the most significant decisions from 2000 to today.

The largest group of cases concerns what is regarded by many authors as the political act par excellence: the declaration of war. The question concerning its lawfulness has arisen with particular reference to the second war in Iraq. Its outbreak, in fact, has been followed by several legal proceedings where its international (and/or constitutional) legality was challenged.

In some circumstances, the matter came up directly. It is worth recalling at this point the judgments handed down by the Queen's Bench Division in the *CND* case,[26] by the District Court for the District of Nebraska in *Callan* v. *Bush*[27] and by the South Korean Constitutional Court in *O-Hoon Lee* v. *President of the Republic*.[28] In each of these cases the plaintiffs sought to obtain a judicial declaration that the war in Iraq was (or would have been) contrary to international law. The courts, however, refused to be involved in this affair and considered the question non-justiciable.

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is a recognized superior authority whether delegated from below or imposed from above [:] where there is no recognized authority, there is no law. Because no law exists binding these sovereigns and allocating rights and liabilities, no method exists to judicially resolve their disagreements.'

23 See *supra* note 16.

24 M. Iovane, 'La participation de la société civile à l'élaboration et à l'application du droit international de l'environnement', (2008) 112 *Revue générale de droit international public* 465, at 469.

25 Ibid., at 498.

26 [2002] EWHC 2777.

27 *Callan v. Bush*, District Court for the District of Nebraska, 30 April 2003, Civil Action No. 4:03CV3060 (unreported), aff'd 103 Fed. Appx. 68 (8th Cir. 2004), cert. denied 125 US 932 (2005), rehrg. denied 125 S. Ct. 1730 (2005).

28 *O-Hoon Lee v. President of the Republic*, 16–1 KCCR 601 (available in English at http://english.ccourt.go.kr).

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In others, the international illegality or otherwise of the war in Iraq was only indirectly relevant. In the *Watada* trial, for instance, a US official who refused to take part in 'Operation Iraqi Freedom' attempted to defend himself from the charge of desertion by affirming that this military operation amounted to a crime of aggression, forbidden by a peremptory norm of international law.[29] Another example is provided by the *Comité contre la guerre en Irak* case, discussed before the French Conseil d'Etat, where some pacifist organizations sought the annulment of the decision of the minister of defence to grant the use of French airspace to the Anglo-US aircraft deployed in the Second Gulf War.[30] Although the plaintiffs did not directly attack the declaration of war, the courts nonetheless preferred to abstain.

The non-justiciability of defence and foreign policy was affirmed in many other circumstances.

Very similar to the first group of cases are, for instance, those relating to the international legality of the nuclear military policy fostered by the government. Just as happened with regard to the war in Iraq, this question was raised either directly (*R.* v. *Environment Agency ex parte Marchiori*[31]) or indirectly (*In re Nuclear Weapons*[32]) and in both cases it was considered non-justiciable.

Moreover, judicial review was denied in relation to the choice of the method of warfare whose unlawfulness – with particular regard to the bombing of civilian targets – has been invoked either in an action for annulment[33] or in a suit for damages.[34]

Furthermore, it is worth recalling the US case law relating to the Alien Tort Statute. As is known, since the *Filàrtiga* case[35] plaintiffs from all around the world have been invoking the Alien Tort Statute in order to obtain damages for human rights violations perpetrated by state and non-state actors (so-called 'international human rights litigations'[36]). Yet, when claims for compensation have been made against former US ministers and military officers, they have been rejected at the outset through recourse to the political question doctrine. This happened, for example, in *Schneider et al.* v. *Kissinger et al.*,[37] *Gonzalez-Vera et al.* v. *Kissinger et al.*,[38] and *Bancoult et al.* v. *Macnamara et al.*[39]

29 *United States v. Lt. E. Watada*, Ruling on the Defense Request for Hearing on Nuremberg Defense, 16 January 2007 (unreported, available at http://peacelaw.wdfiles.com).

30 *Comité contre la guerre en Irak et autres*, CE, 10 December 2003, req. n°255904 (available at www.legifrance.gouv.fr).

31 [2002] EWCA Civ. 03.

32 [2001] JC 143, HCJ.

33 *R. v. Secretary of State ex parte Thring*, Court of Appeal (Civil Division), 20 July 2000 (unreported, available at www.cicr.org/ihl-nat.nsf). In this regard, it is worth mentioning also the judgment rendered by the UK High Court of Justice (Divisional Court) in *R. v. Secretary of State for Foreign and Commonwealth Affairs ex parte Al-Haq* ([2009] EWHC 1910). In that case the court regarded as non-justiciable the UK government's choice not to take measures with regard to the grave breaches of international humanitarian law committed by Israel during 'Operation Cast Lead'.

34 *Marković*, *supra* note 18.

35 *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

36 B. Stephens et al., *International Human Rights Litigation in US Courts* (2008).

37 412 F.3d 190 (DC Cir. 2005).

38 449 F.3d 1260 (DC Cir. 2006).

39 445 F.3d 427 (DC Cir. 2006).

Finally, in some cases, US courts resorted to the political question doctrine in order to shirk ruling on the liability of transnational corporations for international crimes perpetrated along with foreign governments.[40] In particular, this doctrine has been called on successfully by multinational enterprises accused of having co-operated during the Second World War with the Nazi regime and its allies (see e.g. *Iwanowa* v. *Ford Motor Co.*,[41] *Burger Fischer* v. *Degussa AG*,[42] *In re Nazi War Cases against German Defendants Litigation*[43]) and by a government contractor (*Corrie et al.* v. *Caterpillar Inc.*[44]).

4. The pressure exerted by the international legal order

In the aforementioned decisions judicial abstention meant that courts did not apply international norms which were binding on the forum state. In this way the very rationale of the application of international law by national tribunals – that is, the need to avoid the forum state's international responsibility – was thwarted.[45]

Awareness of this might lead judges to put aside the political act/question doctrine. In this respect, it is necessary to distinguish the case where a court is confronted with an international obligation owed to a single state or to a plurality of states individually considered, from the case where it is called on to honour an obligation due to the international community as a whole (*erga omnes* obligations) or to a group of states for the protection of a common interest (*erga omnes partes* obligations).

Paradoxically, courts will be more likely to set apart judicial abstention in the first case than in the second one. When one or more states have a specific interest in the fulfilment of the obligation at issue, in fact, domestic courts may be discouraged from abstaining by concern over exposing their own state to strong reactions by the injured state(s), such as the resort to countermeasures.[46] This situation is exemplified by the French Conseil d'Etat's ruling in *Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et Gouverneur de la colonie royale de Hong Kong* v. *Saniman*.[47] On that occasion, the United Kingdom had challenged the French government's decision to refuse to extradite Saniman, claiming breach of the 1957 European Convention on Extradition and the 1876 Franco-British Extradition Treaty. While until then French courts had regarded the refusal of the extradition as non-justiciable,[48] the Conseil d'Etat ruled in favour of the applicants. As is clearly shown by the conclusions submitted by the

40 Judicial abstention in these disputes was strongly advocated by the Bush administration. In most cases, however, courts have refused to accede to this request (B. Stephens, 'Judicial Deference and the Unreasonable Views of the Bush Administration', (2008) 33 *Brooklyn Journal of International Law* 773).

41 67 F. Supp. 2d 424, 453 (DNJ 1999).

42 65 F. Supp. 2d 248 (DNJ 1999).

43 196 F. App'x 93, (3d Cir. 2006).

44 503 F.3d 974, (9d Cir. 2007).

45 See, also for further bibliographical references and for the case law mentioned therein, A. Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts', (2008) 101 AJIL 760, at 767.

46 ILC Draft Articles on State Responsibility, (2001) II (Part Two) *Yearbook of the International Law Commission*, Arts. 42 and 49. In this sense, M. Khdir, 'La théorie de l'acte de gouvernement dans la jurisprudence du Conseil d'Etat relative aux relations internationales de la France à l'epreuve du droit international', (2003) 130 *Journal du Droit International* 1059, at 1059, but see also Duez, *supra* note 5, at 172.

47 CE, Ass., 15 October 1993, *Royaume-Uni de Grande-Bretagne et d'Irlande du Nord*, Rec. 267.

48 CE, 26 July 1985, *Solis Estarita*, Rec. 230.

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Commissaire du gouvernement, Christian Vigoroux,[49] this judicial turnaround was determined by the need to ensure compliance with international duties in the field of judicial co-operation in criminal matters.[50]

Since a strong reaction is all but a foregone conclusion when it comes to *erga omnes* or *erga omnes partes* obligations,[51] in these cases courts will be more prone to refrain from ruling. Nevertheless, even when there is no state entitled to act in self-help, the need to avoid the condemnation of the international community might cause judges to prevent the commission of an international wrong by the forum state. In this regard, it is worth mentioning the judgments rendered by the US Supreme Court in the so-called Guantánamo cases.[52] As is well known, in fact, despite the heavy political overtones of these cases, the Supreme Court regarded them as justiciable and upheld the enemy combatants' procedural rights.[53] It is safe to assume that this outcome had been in some way influenced by the international blame surrounding the Bush administration's policies in the war on terrorism and the war in Iraq.[54] The most meaningful decision, in this regard, is that handed down in the *Hamdan* case.[55] Unlike the other rulings, in fact, in *Hamdan* the Supreme Court did not limit itself to assessing the lawfulness of the government action in the light of domestic law (i.e. the Uniform Code of Military Justice[56]) but considered the question also under the lens of the international law (i.e. Geneva Conventions and customary international law[57]). In so doing, US judges intended to send a clear message to the rest of the world, indicating that there are no 'legal black holes'[58] in US jurisdiction and that international standards apply in Guantánamo Bay as well.

5. The non-justiciabilty of foreign affairs power and the EU legal order

The EU legal order may play a fundamental role in the progressive erosion of the political act/question doctrine.

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49 It is important to note that the Commissaire du gouvernement, despite what the name suggests, performs a function similar to that of the Judge Rapporteur. Its conclusions – much more articulate than the Conseil d'Etat judgments – often offer useful insights about the reasons which underlie the Court's decisions. The conclusions submitted by Vigouroux in the aforementioned case are published in (1993) 9 *Revue française de droit administratif* 1179.

50 In this sense, see O. Cayla, 'Le contrôle des mesures d'exécution des traités: réduction ou négation de la théorie des actes de gouvernement', (1994) 10 *Revue française de droit administratif* 1, at 6; Khdir, *supra* note 46, at 1077.

51 Articles on State Responsibility, *supra* note 46, Arts. 48 and 54.

52 *Rasul v. Bush*, 542 US 466 (2004); *Hamdan v. Rumsfeld*, 548 US 557 (2006); *Boumediene v. Bush*, 553 US 723 (2008).

53 For a brief, but very useful, overview of this case law see E. Chemerinsky, 'The Constitution and National Security', (2009) 25 *Touro Law Review* 577.

54 Similarly, H. Grant Cohen, 'Supremacy and Diplomacy: The International Law of the US Supreme Court', (2006) 24 *Berkeley Journal of International Law* 273, at 279.

55 *Hamdan* case, *supra* note 52.

56 Ibid., Part VI (A–C).

57 Ibid., Part VI (D).

58 This expression was famously used by Steyn, LJ, 'Guantánamo Bay: The Legal Black Hole', (2004) 53 ICLQ 1.

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The European Court of Justice has never endorsed the theories of non-justiciability applied in some member states.[59] While it has rarely lingered on the reasons for this refusal, this aspect has been thoroughly dealt with by Advocates General. Particularly helpful, in this regard, are the opinions submitted by Advocates General Darmon and Poiares Maduro, in *Maclaine Watson*[60] and *Kadi*[61] respectively.

In the first case, an agency brokerage sought damages from the European Community, claiming that it was injured by the latter's conduct in regard to the negotiation, entry into force, and implementation of the Sixth International Tin Agreement. The defendants asked the Court to hold the suit inadmissible because it concerned the international activity of Community institutions. According to them, this ground of inadmissibility was envisaged by a principle common to the laws of the member states. In its conclusions, Darmon tackled this issue with great precision, carrying out a detailed comparative analysis on the justiciability of foreign policy acts in each member state.[62] In the light of this discussion, the Advocate General concluded that the defendants' argument was a 'manifest overstatement'[63] and urged the Court not to adopt a concept analogous to that of 'acts of government'.[64] Unfortunately, the Court did not have the opportunity to rule on this case because the action was later given up by the plaintiff.

In the historic *Kadi* case, applicants pleaded for the annulment of EC regulations implementing the UN Security Council targeted sanctions. The Council, the Commission, and the United Kingdom invoked the political question doctrine and argued that the Court should have refrained from ruling on the case.[65] Advocate General Poiares Maduro bluntly rejected these arguments:

> The implication that the present case concerns a 'political question', in respect of which even the most humble degree of judicial interference would be inappropriate, is, in my view, untenable. The claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights.[66]

This approach, as is well known, has been faithfully followed – although with less emphatic overtones – by the European Court of Justice (ECJ).[67]

It can be affirmed, therefore, that in the EU legal order the principle of the rule of law is guaranteed without exception. This could have considerable backlashes on the scope of the political act/question doctrine. On the one hand, in fact, according

59 See the case law mentioned in X. Dupré de Boulois, 'La théorie des actes de gouvernement à l'épreuve du droit communautaire', (2000) 116 *Revue de Droit Public* 1791, at 1795.

60 *Maclaine Watson & Company Limited v. Council and Commission of the European Communities*, Opinion of Mr Advocate General Darmon delivered on 1 June 1989, Case C-241/87, [1990] ECR I-01797.

61 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Opinion of Mr Advocate General Poiares Maduro delivered on 23 January 2008, Joined cases C-402/05 P and C-415/05 P, [2008] ECR I-06351.

62 *Maclaine Watson* case, Opinion of Mr Advocate General, *supra* note 60, paras. 66–93.

63 Ibid., para. 95.

64 Ibid., para. 97.

65 *Kadi* case, Opinion of Mr Advocate General, *supra* note 61, para. 33.

66 Ibid., para. 34.

67 [2008] ECR I-06351. On this judgment see P. De Sena and M. C. Vitucci, 'The European Courts and the Security Council: Between *Dédoublement Fonctionnel* and Balancing of Values', (2009) 20 EJIL 193.

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to the ECJ's case law, individuals who have suffered the infringement by a national authority of a right guaranteed by Community law are entitled to a judicial remedy;[68] hence, when it comes to the breach of an EU norm, national courts are obliged to put aside domestic doctrines of abstention and to rule on the merits. On the other hand, the ECJ might directly pronounce itself on the legality of a political act if called upon to decide on a preliminary ruling concerning its conformity to the EU law.

An important test of the EU legal order's ability to erode the scope of judicial abstention will concern the national measures implementing UN Security Council resolutions. Both in French[69] and Italian[70] case law these measures are regarded as not amenable to judicial review.

6. The prudential reasons underlying judicial abstention in foreign affairs matters

It has been authoritatively demonstrated that theories of judicial abstention are lacking constitutional foundation.[71] Furthermore, I have tried to argue that these doctrines are subject to progressive downsizing due to the pressure exerted by the international as well as the EU legal order. These arguments, however, do not exhaust the question. Judicial silence, in fact, stems less from a normative command than from prudential reasons.[72] With regard to disputes relating to international matters, in particular, it is possible to find three main concerns underlying judicial abstention.

First, there is the anxiety not to hinder government action in the international arena. In this field, it is believed, the executive must make quick and delicate choices which cannot undergo judicial review.[73]

Second, there is the need to avoid the manipulation of the judiciary by the world of politics. It is not uncommon, in fact, for political movements to conceive resorting to courts as a means to be employed along with the traditional tools of political struggle.[74] At the outbreak of the wars in the former Yugoslavia, Afghanistan, and Iraq, for instance, demonstrations for peace were accompanied by legal action aiming at a judicial declaration of their illegality. The same goes for the several cases where tribunals were called on to rule on the unlawfulness of the possession of nuclear weapons. This trend cannot be welcomed as such with favour. In democratic regimes,

68 ECJ, Case 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others*, (1987) *ECR* 04097, para. 14.
69 CE, 12 March 1999, *Société Héli-Union*, Rec., 501.
70 Tribunale di Roma, *Società Fincantieri v. Presidenza del Consiglio dei Ministri*, 10 October 1991, (1992) *Nuova Giurisprudenza Civile* 577.
71 See *supra* note 17.
72 See, e.g., A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962), 75; P. Reuter, *Le droit international et la place du juge français dans l'ordre constitutionnel national* (1970), 27; Franck, *supra* note 16, at 50.
73 See, e.g., *Korematsu v. United States*, [1944] 332 US 214, at 224 ('the military authorities considered that the need for action was great, and time was short. We cannot – by availing ourselves of the calm perspective of hindsight – now say that at that time these actions were not justified').
74 R. Hirschl, 'The Judicialization of Mega-politics and the Rise of Political Courts', (2008) 11 *Annual Review of Political Science* 93.

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the judiciary is not a means of political struggle but must limit itself to protecting individual rights by applying the law.

Third, and finally, there is the demand to ensure that in international relations the state speaks with one voice, namely that of the executive.[75] This need is particularly acute in those areas where there is the risk that the position taken by courts in the context of a domestic proceeding contrasts with the stance adopted by the executive in the international order (e.g. invalidity and termination of treaties, recognition of states, and so on).

It is hard to question, in general, these concerns. Still, it is not clear why they must necessarily lead to a complete waiver of the rule of law. A comparative analysis of judicial practice – even from countries where the abstentionist paradigm is adopted – shows that non-justiciability doctrines are not the only way to prevent institutional clashes between judiciary and executive. These clashes, indeed, could also be avoided if courts conformed to some guidelines which I shall try to illustrate in the following paragraphs.

7. How to avoid institutional clashes between judiciary and executive

7.1. Replacing non-justiciability doctrines with an articulated theory of governmental discretionary power

As underlined several years ago by French scholarship, in the case of dismissal of the non-justiciability doctrines, the freedom needed by the executive in some areas (including defence and foreign affairs) may be otherwise assured by developing a comprehensive theory of discretionary power.[76] The differences characterizing the concept of 'discretionary power' in each legal system impede a thorough discussion of the issue. However, it is possible to draw – even in the light of the existing case law – three general principles.

First, when government action is not governed by human rights norms, the courts' scrutiny must be limited to a marginal control, namely a control concerning the absence of bad faith or gross negligence in the executive's conduct. This approach has been endorsed, for instance, by the British Court of Appeals (Civil Division) with regard to the failed exercise by the British government of diplomatic protection in favour of its citizens (and long-term residents) detained in Guantánamo.[77]

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75 See House of Lords, *The Arantzazu Mendi*, [1939] AC UKHL 256, at 264, *per* Lord Atkin ('Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the Executive another'); *Baker* case, *supra* note 4, at 212.

76 See, e.g., J. Michoud, 'Étude sur le pouvoir discrétionnaire de l'administration', (1914) 37 *Revue générale d'administration* 5; Duez, *supra* note 5, at 193.

77 *R (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76; *R (Al Rawi and others) v. Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 972, *per* Lord Laws para. 148 ('The court's role is to see that the government strictly complies with all formal requirements, and rationally considers the matters it has to confront. Here, because of the subject-matter, the law accords to the executive an especially broad margin of discretion'). See also ECJ, Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, (1998) ECR I-03655, para. 53 ('because of the complexity of the rules in question and the imprecision of some of the concepts to which they refer, judicial review must necessarily . . . be limited to the question whether,

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Second, when the executive is constrained by human rights norms (including humanitarian norms), courts must verify whether the infringement of individual rights is justified in the light of the pursuit of a public interest (or of military necessity) by resorting to the proportionality rule. It is worth recalling, in this respect, the case law of the Israeli Supreme Court. The continuing occupation of the Gaza Strip and the employment of the army in the fight against terrorism determined the bringing of several lawsuits disputing the respect of human rights and humanitarian law by the Israeli Defense Force.[78] In each of its judgments the Supreme Court carefully balanced human rights and national interest in order to avoid, on the one side, the protection of the former leading to 'a national suicide'[79] and, on the other, the need to safeguard national security turning into an unlimited licence to harm the individual.[80] Similar examples may be drawn from British[81] and US[82] case law, as well as from that of the ECJ.[83]

Third, when the executive allegedly violated human rights norms which suffer no exception (e.g. those forbidding acts of torture), the judge's role is limited to ascertaining whether this violation occurred. If it occurred, courts have no alternative but to declare the unlawfulness of the government conduct.[84] It is helpful to mention, again, Israeli case law. The Supreme Court held that the violent interrogation of a suspected terrorist is not lawful, even if doing so may save human life by preventing impending terrorist acts.[85] Dealing with the knock-on effects on national security of this ruling, Judge Barak explained,

> We are aware that this decision does not make it easier to deal with that reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back.[86]

7.2. Filtering 'political' suits through the standing requisite and a correct application of international law

Dismissing a political suit as non-justiciable is not the only way to prevent courts from being 'politicized'. An effective filter against non-genuine lawsuits can be applied by judges, first, through a rigorous assessment of the plaintiffs' standing and, second, by a correct appraisal of the substantive content of the international norm invoked.

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by adopting the suspending regulation, the Council made manifest errors of assessment concerning the conditions for applying those rules').

78 The Israeli Supreme Court case law relating to the fight against terrorism is fully collected in Judgments of the Israel Supreme Court: Fighting Terrorism within the Law, available at www.mfa.gov.il.

79 CA 2/84, *Neiman v. Chairman of Cent. Elections Comm. For Eleventh Knesset.*

80 CA 7048/97, *Anonymous v. Minister of Defense.* See Barak *supra* note 10, at 283.

81 A. Baker, *Proportionality under the UK Human Rights Act* (2010).

82 *Hamdan* case, *supra* note 52, Part V.

83 *Kadi* case, *supra* note 61, para. 361.

84 See, e.g., E. Orükü, 'The Core of Human Rights and Freedoms: The Limit of Limits', in T. Campbell et al. (eds.), *Human Rights: From Rhetoric to Reality* (1986), 37.

85 HCJ 5100/94, *The Public Committee against Torture in Israel v. The Government of Israel*, 53(4) PD 817.

86 Ibid., at 845.

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With regard to the first method, it should be noted that several norms of contemporary international law, while promoting the protection of values common to the whole of mankind, still keep a traditional inter-state structure. Accordingly, compliance with these norms may be claimed only by states (or, if it be the case, by international organizations).[87] A classic example is the norm prohibiting the use of armed force. No doubt every individual benefits, ultimately, from the maintenance of peace in international relations. This does not imply, however, that international law recognizes an individual right to peace whose infringement may be claimed before domestic courts. The only right that international law acknowledges, in fact, is the state's right 'not to be attacked'. Therefore a lawsuit aiming to obtain a ruling on the international unlawfulness of a declaration of war should be rejected, because applicants lack *locus standi* and there is no need to resort to non-justiciability.[88] This approach has been endorsed by the Dutch Supreme Court,[89] the Nagoya High Court (Japan),[90] and the Danish Supreme Court,[91] as well as by the minority of South Korea's Constitutional Court in the aforementioned *O-Hoon Lee* case.[92] Moreover, in the above-quoted *Callan* case the District Court of Nebraska identified the plaintiff's lack of standing as an alternative ground for dismissal.[93]

The question becomes different, however, when national legal systems provide the individual with the right to invoke the violation of such a norm.[94] This can occur, for instance, when domestic law acknowledges a soldier's right not to obey an unlawful order. In a judgment recently rendered by the German Federal Administrative Court (Bundesverwaltungsgericht),[95] for instance, the refusal of a German officer to contribute to the military operations in Iraq has been held to be a legitimate conscientious objection, protected by Article 4(1) Grundgesetz ('Freedom of . . . conscience . . . shall be inviolable'), since the war in Iraq raised serious doubts in terms of international law.[96]

As to the second point, it is necessary to carry out a preliminary observation. Despite the indisputable role played by legislature and judiciary, national executives still perform a pivotal function in the creation of international law, either through the negotiation and conclusion of treaties or by the formation of practice and *opinio juris* required for the development of customary international law. Contemporary international law, therefore, may still be described as the set of limits which states (and chiefly their executives) willingly accept in order to achieve certain common

87 See, e.g., Iovane, *supra* note 24, at 469.
88 In this sense see M. E. Tigar, 'Judicial Power, the "Political Question Doctrine" and Foreign Relations', (1970) 17 *UCLA Law Review* 1135, at 1171.
89 *Daniković and others v. The Netherlands*, NJ (2002) 35 (English translation available in (2004) 35 *Netherlands Yearbook of International Law* 522); *Association of Lawyers for Peace and Others v. The Netherlands*, NJ (2004) 329 (available in English at www.oxfordlawreports.com).
90 Nagoya High Court, 17 April 2008 (unreported).
91 *Constitutional Committee Association and Others v. Rasmussen*, 17 March 2010 (unreported, an English summary is available at www.domstol.dk).
92 *Supra* note 28.
93 *Supra* note 27, at 4.
94 See Nollkaemper, *supra* note 45, at 770.
95 BVerwG, 2 WS 12.04 (a partial English translation of the judgment is available at www.oxfordlawreports.com).
96 Ibid., para. 95.

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interests.[97] In other words, it imposes duties that national governments are able and intend to honour. Hence it is unlikely that a proper administration of international law would be detrimental to government interests. In this regard it could be helpful to recall the outcomes of the lawsuits alleging the non-compliance with international law of the policy of nuclear deterrence adopted by some Western countries. These suits, when deemed justiciable, have always been rejected on the merits. In the famous 1983 *Pershing II* case,[98] for example, the Bundesverfassungsgericht was called on to judge whether the government's decision to authorize the installation of Pershing II and Cruise nuclear missiles on German territory was compatible with international law. According to the applicants, after the Second World War a customary norm had evolved forbidding the possession and use of nuclear weapons. The German Constitutional Court observed that the main nuclear powers of the time (the Soviet Union, the United States, and the United Kingdom) still retained their nuclear arsenal and concluded that such a rule could not have been formed, lacking both *diuturnitas* and *opinio juris*.[99]

In sum, some of the most politically loaded suits promoted by individual activists or NGOs are not grounded in international law as it really is, but on international law as the plaintiffs wish it to be. Accordingly, a judge wishing not to be lured into the political thicket must limit him- or herself to applying international norms as they really are, locking the door to the creation of new individual (or collective) rights or to an evolutive interpretation of pre-existing international standards. By so doing, courts will never be in a position to impinge on sensitive interests in the foreign affairs area.

7.3. Reconciling judicial intervention in foreign affairs with the principle of 'speak with one voice'

Courts have already worked out ways of reconciling the principle of 'speak with one voice' with the judicial duty to interpret and apply international law.

In this regard, the domestic case law relating to invalidity and termination of treaties is illuminating. A study conducted in the late 1980s[100] – but whose results can be still considered valid[101] – has revealed that, in this matter, courts act according to two principles.

First, whenever a tribunal is called on to enforce a treaty, it has the power and the duty to determine whether the latter is valid and in force, but the effects of this assessment will be limited to the specific case.[102] Second, the executive decision to terminate a treaty manifests, at international level, the state's intent 'to free itself

97 J. d'Aspremont, 'The Foundations of the International Legal Order', (2007) 18 *Finnish Yearbook of International Law* 219.

98 BVerfGE 66, 39 2 BvR 1160/83 (an English translation is available at www.utexas.edu/law/academics/centers/transnational/work_new/german).

99 Ibid., at C, para. 2(c). More recently, a similar approach was followed by the Queen's Bench Division (Divisional Court) in *Hutchinson v. Newbury Magistrates Court*, 2 October 2000 (unreported, available at www.tridentploughshares.org).

100 B. Conforti and A. Labella, 'Invalidity and Termination of Treaties: The Role of National Courts', (1990) 1 EJIL 44.

101 B. Conforti, *Diritto internazionale* (2006), at 125.

102 Conforti and Labella, *supra* note 100, at 50.

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once and for all from its contractual commitment'.[103] Accordingly, the judges of that state will no longer be able to give effect to the denounced treaty.[104]

In this way, the principle of 'speak with one voice' does not automatically translate into judicial silence but rather calls for a more equitable co-ordination of the tasks (and the powers) of the courts and those of the government.

This case law provides us with two indications of a general character. On the one hand, it suggests that judicial decisions on these issues have effects limited to the specific case and cannot determine an intrusion on the prerogatives of the government in foreign affairs. This principle is likely to find application in areas other than the invalidity and termination of treaties. Consider the case where a court needs to verify the statehood of an entity in order to apply the rules on state immunity. If the court holds this entity to be a state because it effectively and independently governs a territorial community, this does not mean that the former is recognizing the latter. The recognition of states remains the exclusive prerogative of the government while the court's ruling will affect only the dispute at issue.

On the other hand, it clarifies that when governments express the will of their states through lawful acts yielding legal effects in the international legal order (e.g. the formal denunciation of a treaty), courts of these states will be obliged to conform. Consider again the government decision to recognize a foreign state. The effect of estoppel flowing from that decision[105] constrains all the recognizing state's legal operators, including its own judges. The latter, in other words, will be bound by the recognition given by their government. The same cannot be said, however, with regard to the decision not to recognize a state, which, as is well established,[106] has no effect at the international level.

8. Conclusions

In *First National City Bank* v. *Banco Nacional de Cuba*, Justice Powell recognized that '[u]ntil international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law.'[107] The persisting inability of international tribunals to ensure a centralized enforcement of international law, on the one hand, and the increasing application of international law by domestic courts, on the other hand, prove this statement to have been somewhat prophetic.

103 Ibid. (emphasis in original).

104 Ibid. Following the entry into force of the 1969 Vienna Convention on the Law of Treaties – and in particular of the compulsory conciliation procedure under Arts. 65–68 – some clarification is needed. Even though the conciliation mechanism under the Convention could result in a paralysis of state power to terminate a treaty, this does not rule out the national courts' power and duty to ascertain whether a treaty is valid and in force before enforcing it in a domestic proceeding (ibid., at 65).

105 V.-D. Degan, 'Création et disparition de l'Etat (à la lumière du démembrement de trois Fédérations multi-ethniques en Europe)', (1999) 279 RCADI 195, at 247.

106 See, e.g., I. Brownlie, *Principles of Public International Law* (2008), 85.

107 406 US 759 [1972], at 775.

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Yet the fulfilment of this process is substantially hindered by judicial application of the non-justiciability doctrines. Authoritative (international and public law) scholarship has already shown that these doctrines lack stable constitutional foundations. In the present work I have tried to establish that when it comes to the application of international and community norms these doctrines undergo progressive erosion due to the pressure exerted by international as well as EU legal orders.

I have attempted to demonstrate, moreover, that the prudential concerns accompanying judicial intervention in international matters may be smoothed without resorting to judicial abstention but rather by assuring that judicial review does not overstep certain limits.

These considerations support a definitive abandonment of the political act/question doctrine. Such an evolution, of course, will inevitably produce different effects according to the characteristics of each legal system. In any case, it would represent a decisive step in the direction shown, some forty years ago, by Justice Powell.