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ARTICLE

Patterns of avoidance: political questions before international courts

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Abstract
International courts (ICs) have found themselves dealing with issues that are 'political' in nature. This paper discusses the techniques of avoidance ICs have developed to navigate such highly political or sensitive issues. The first part discusses some of the key rationales for avoidance. Drawing on the discussion of the political question doctrine in US constitutional law, it shows how ICs may justify avoidance on both principled and pragmatic grounds. It then discusses the different types of avoidance strategies employed by ICs, based on examples from the Court of Justice of the European Union, the International Court of Justice and the East African Court of Justice. ICs are rarely upfront about avoidance strategies. Rather, ICs tend to avoid cases in a more subtle fashion, relying on procedural rules to exclude a case, or by resolving the dispute in a way that avoids the most politically sensitive questions and controversies.

Keywords: trade policy; free-trade agreements; World Trade Organisation; succession; Global Britain; UK politics; EU law

1 Introduction

This Special Issue focuses on patterns of resistance exercised by a range of actors such as national governments, parliaments and national courts towards international courts (ICs) and regional courts. The framework paper by Madsen, Cebulak and Wiebusch emphasises how the phenomenon of resistance involves a multitude of different actors: 'the outcome of that process depends not only on the constellations of external actors, *but also on the ICs themselves* and the reactions that they adopt in the process' (Madsen *et al.*, 2018, p. 8, emphasis added). Different forms of resistance, from criticising the IC to leaving the IC altogether, are often provoked by a particular judgment or line of judgments, in which the IC is viewed as having overstepped its boundaries, straying into the world of the 'political'. This paper discusses how ICs have responded to or anticipated different forms of pushback or backlash when faced with questions and controversies described as 'political questions'. It discusses how ICs have developed a range of avoidance strategies to prevent this resistance.

Just as there are various forms of resistance towards ICs, courts have developed a number of 'resilience techniques' to avoid or mitigate the effects of resistance (Madsen *et al.*, 2018, Section 3.2). This includes, for instance, the type of legal reasoning employed by the court, the level of deference afforded to the national legal order, adjusting the standard of review in certain issue areas, right up to avoiding certain disputes altogether (Madsen *et al.*, 2018, pp. 30–31). The paper discusses examples from the International Court of Justice (ICJ), the Court of Justice of the European Union (CJEU) and the East African Court of Justice (EACJ). The examples were selected on the basis that the parties had explicitly argued that the IC should refrain from adjudicating or to adjust its standard of review on the basis that the controversy was 'political' in nature. The paper does not offer a comprehensive survey of cases where ICs are faced with political questions – a topic beyond the scope of this paper – but discusses

these selected examples to highlight some of the methods of judicial avoidance adopted by ICs. While ICs are rarely explicit about the underlying rationales for avoidance, viewing these cases in their broader context demonstrates that these ICs are also motivated by a desire to avoid wading into issues that would provoke resistance.

The first part discusses some of the rationales for judicial avoidance. There are a number of reasons why an IC might avoid dealing with issues that are highly political in nature. An IC may employ such strategies to enhance or preserve its legitimacy. An IC may avoid ruling on a highly political issue in order to prevent a negative public perception, thereby seeking to preserve its external legitimacy (Weiler, 2001; Voeten, 2013). An IC may also use such techniques to avoid going beyond the scope of authority delegated to them by states (Bodansky, 1999, p. 605). Avoiding political disputes may also enhance the IC's effectiveness and compliance in the long term, by preventing the 'patterns of resistance' discussed in this Special Issue. Yet there are also clear downsides to adopting avoidance techniques. By avoiding politically sensitive disputes, an IC may also demonstrate that it is actually quite weak. Conversely, an IC may bolster its authority by taking up cases that are politically controversial (Caserta, 2017). If an IC backs away from disputes involving political questions out of fear of potential resistance, the IC allows the most powerful – or most vocal – states to influence the IC, which may also affect its public perception. The first section discusses this dynamic in relation to the US constitutional system, where questions about the appropriate role of the courts when dealing with 'political questions' has been subject to significant legal and academic debate. It discusses how some of the rationales for avoidance – both pragmatic and principled – can also be applied to the context of ICs. It should be noted that avoidance techniques are also used in many domestic systems as well – as Delaney points out: 'Avoidance is everywhere' (Delaney, 2016, p. 3).

The second part then turns towards avoidance strategies used by ICs. Madsen, Cebulak and Wiebusch point out how ICs 'can adopt particular strategies to respond to backlash and they can be reflected in decisions about institutional management or legal reasoning' (Madsen *et al.*, 2018, p. 8). The paper does not provide an exhaustive classification or taxonomy of the different avoidance methods. Rather than testing a hypothesis about judicial avoidance, the methodology is more inductive in nature, starting with examples where ICs were faced with arguments from the parties that the dispute before them was 'political' in nature. It then identifies a number of avoidance strategies adopted by the IC. These can be loosely categorised into situations (1) where the IC avoids adjudication altogether (through interpretation of rules of jurisdiction, standing and admissibility) and (2) where the IC seeks to minimise the political impact of its decision (narrow framing of legal issues, deference doctrines).

This paper avoids normative claims about the appropriateness or otherwise of IC avoidance strategies. Rather than taking the IC's reasoning at face value, the paper demonstrates how, when looking at these disputes in their broader context, we see that ICs seek to avoid political controversy through the use of legal techniques. The paper does not find any clear link between the different forms of IC resistance and the various strategies of avoidance, although such a link may be gleaned from further empirical study.

2 Rationales for avoidance

The question about how ICs should deal with 'political questions' is not a new one, and is arguably as old as international dispute settlement. For instance, in *The Function of Law in the International Community*, Hersch Lauterpacht argued against the prevailing view among many international lawyers that some international disputes, by their very nature, were incapable of resolution by international adjudication (Lauterpacht, 1933). Lauterpacht described political disputes as those that affect 'the vital interests of States' (1933, p. 115). He noted how international law scholars tended to use the term 'political' to mean 'involving important issues', giving the term a different meaning from that used in social sciences and other branches of law. Disputes between states are, by their very nature, 'political', he argued, since they have the potential to affect entire societies. And, even where

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adjudication affects the rights of an individual, these cases can be viewed as 'political', since they affect the rights and prerogatives of the state.

Yet there are a number of reasons why the issue of 'political questions' should be given renewed attention. First, it is often noted that one of the most significant developments in international law over the past decades has been the proliferation of international and regional courts (Hirschl, 2008; Alter, 2014). States have entrusted ICs and other forms of international dispute settlement to deal with a far greater array of issues. Second, it is not only the number of courts and international judgments that is significant, but also the types of disputes in which these courts find themselves involved. The judicialisation of politics, described as 'the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies' (Hirschl, 2008, p. 253) is not confined to the domestic sphere, but affects international adjudication as well. One of the consequences of greater judicialisation of international politics is the *politicisation* of international dispute settlement (Ferejohn, 2002).

ICs increasingly find themselves faced with questions of 'high politics'. While there is some disagreement about what issues fall into this category, they generally touch upon questions about the core sovereign prerogatives of the state, and may include the decision to go to war, the decision to recognise states and governments, laws relating to elections and issues related to migration and asylum policies. This gives rise to questions about the appropriate role of ICs in adjudicating upon disputes involving such questions. One might well argue that such disputes are best left to be resolved in the political, rather than judicial, domain. Another argument might be that such disputes are not appropriate for judicial settlement because they are essentially 'non-legal' in nature, since they would require an IC to make political rather than legal assessments.

It is important to highlight a distinction between 'political questions' and 'politically sensitive' disputes. The former is about the nature of the questions faced by the court, and is premised on the assumption that there is a distinction between 'legal' and 'political' disputes. Legal disputes are viewed as those that can be resolved through the application of legal standards, leaving other, non-legal disputes to be categorised as 'political questions'. 'Politically sensitive' disputes, on the other hand, are those that, due to their subject matter or the potential for resistance by other actors (governments, national courts, political parties, etc.), are conceived as highly controversial, for the IC or other actors. A 'political question' is thus one that is 'non-legal' in nature, since it cannot be resolved through the application of legal standards, whereas a 'politically sensitive' dispute is one that will have political repercussions for the actors involved. A dispute may thus involve a legal question but still involve politically sensitive issues. For example, European human rights cases involving religious symbols can be resolved through the application of legal principles (legal question), but they touch upon issues that remain highly controversial in the West, so they are also 'politically sensitive'.

This distinction between 'political questions' and 'politically sensitive' is admittedly blurred in practice. The very question of whether a dispute can be resolved through legal techniques can be highly contested. Moreover, the determination of whether a question is 'politically sensitive' will depend on a range of factors including the political context of the states and societies involved – issues surrounding same-sex marriage may be highly politically controversial in some contexts (see e.g. Inter-American Court of Human Rights (IACtHR), Opinión Consultiva OC-24, 2017) and not in others. Yet the distinction is still an important one to make, since it separates those issues that are 'political' due to the non-legal nature of the dispute and those that are 'political' due to their subject matter or possible political consequences. This distinction allows us to avoid labelling every dispute as 'political' because it involves political actors or may have political ramifications.

The idea that courts should avoid certain disputes due to their political character appears to run against the common assumption that an IC should, in principle, deal with any legal dispute before it, as long as it satisfies the criteria of admissibility and jurisdiction. For a court to decline jurisdiction on the grounds that it involves an essentially political question would, at first sight at least, appear to be an abdication of its judicial function: resolving disputes, maintaining the international rule of law, providing access to justice to the parties and ensuring equality before the law. Moreover, the phenomenon of international dispute settlement in itself remains highly political (Ginsburg, 2014). It would

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also be practically difficult to allow ICs to avoid disputes due to their political nature, since even the most technical legal question may involve political issues or have political implications. There is a tendency to see avoidance as something that should be avoided, and that the international rule of law is best served by active and courageous ICs that are willing to risk potential resistance in order to ensure the law is observed.

This view should be challenged. There are many reasons why ICs may seek to engage in avoidance techniques. These can be distinguished as principled and pragmatic reasons. This distinction is borrowed from the discussion of the 'political question doctrine' in US constitutional law, discussed below. 'Principled' grounds stem from legal reasons about the appropriate role of the court, and seek to preserve its judicial function. Since ICs only have authority to deal with legal questions, this argument goes, ICs cannot delve into issues that are non-legal in nature, since to do so would undermine their independence and judicial character. ICs would thus refrain from disputes involving high politics, not out of fears of recoil, but because to do so would exceed their mandate by touching upon those core sovereign prerogatives. Pragmatic, or prudential, concerns, on the other hand, relate more to the IC's interest in promoting and enhancing its own external legitimacy by avoiding issues that are likely to provoke resistance from states or that might hurt the IC's reputation. This distinction is also blurred in reality. ICs may justify avoidance based on principled reasons, even where the underlying reason to do so rests on prudential considerations. A related question, then, is how open and upfront an IC will be about its use of avoidance strategies.

ICs employ avoidance strategies to respond to, or anticipate, resistance. While ICs are tasked to exercise their judicial role and to resolve disputes before them, they must also be sensitive to the broader political context in which they operate. There is quite some literature on the way ICs navigate political constraints, often focusing on a particular court, such as the CJEU (Carrubba *et al.*, 2008; Dawson *et al.*, 2013; Wasserfallen, 2010) or the ICJ (Thirlway, 2002). Much of the literature on the politics of ICs, moreover, focuses on the issue of 'judicial activism' (Zarbiyev, 2012) and has focused on the law-making powers of ICs (Staton and Moore, 2011). There is far less discussion of avoidance techniques employed by ICs generally, and the circumstances under which they are likely to employ these methods. The next section turns to US constitutional law as a starting point to address issues of avoidance. This scholarship openly addresses the dynamic facing courts when dealing with political questions (Clayton, 1999; Scharpf, 1966). While the international and domestic contexts are clearly different in many respects, there are parallels in the rationales for adopting avoidance strategies.

2.1 The political question doctrine and avoidance in US constitutional law

This section provides a brief overview of the way in which the 'political question doctrine' has been developed and applied in US constitutional law. The political question doctrine is a technique of judicial avoidance used particularly in regard to questions related to foreign affairs and international law. Eyal Benvenisti discusses how

> '[c]ertain judge-made doctrines relieve the national courts of the duty to enforce norms of international law in some politically sensitive situations. In most cases these doctrines remove from judicial review issues that might adversely affect the executive's interests in the realm of international politics.' (Benvenisti, 1993, p. 169)

James Crawford notes how 'the political question doctrine seeks to remove from judicial scrutiny politically sensitive questions thought inappropriate for judicial resolution' (Crawford, 2012, pp. 83–84). According to these international law scholars, the doctrine is about 'politically sensitive' cases. Under the political question doctrine, the court will decline jurisdiction where it involves a dispute that the Constitution assigns to the other branches of government (*Marbury v. Madison* 5 U.S. 137 (1803)). According to the Supreme Court, the question is not one of political sensitivity, but essentially one of justiciability. The political question doctrine does not mean that the court should not deal with questions that

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are politically sensitive in nature, or will have political repercussions – such a rule would potentially strike many cases from the Court's docket (cases on abortion, same-sex marriage and pornography might fall into such category). Rather, the doctrine is derived from the principle of the separation of powers, and relates to whether a particular controversy should be properly decided by the other branches of government, rather than by the courts. The US Supreme Court stated in *Baker v. Carr* that '[t]he non justiciability of a political question is primarily a function of the separation of powers' (p. 368).

Defining the circumstances where a decision is best left to the other branches of government has proven extremely difficult, and the 'precise contours of the doctrine are murky and unsettled' (*Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 n. 8). Academic discussion has found it difficult to identify a common thread among the case-law, with some even arguing that the doctrine does not in effect exist (Henkin, 1976). The doctrine once applied to a broad range of fields of governance, but has slowly been whittled down to apply almost exclusively to the fields of foreign affairs and national security. For example, the doctrine has been applied to find that a challenge to the operation of the US 'kill list' involved a question that was to be left to the political branches, since 'courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff's claims' (*Al-Aulaqi v. Obama*, 727 F.Supp.2d 1, 52 (D.D.C. 2010), 80). The range of political questions thus expanded since it was first developed in *Madbury v. Madison* to include a greater array of disputes, but then later narrowed to deal mainly with foreign affairs issues. In *Baker v. Carr* (369 U.S. 186, 222–23 (1962)), the Supreme Court set out to clarify the situations where the doctrine would apply:

> '[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.'

The list above hints at some of the competing rationales behind the political question doctrine. It appears that the doctrine is concerned with not only the separation of powers, but also the appropriateness or inability of a judicial body to deal with certain types of questions and controversies. A court cannot resolve a dispute, for instance, when there are no judicially discoverable standards to resolve it. The Supreme Court also introduces more prudential considerations into the equation, such as the need to avoid 'embarrassment' caused by various departments pronouncing on one question. While the Court in *Baker* does not make this explicit, the list of reasons for applying the political question doctrine here are likely to be in descending order of importance. Moreover, it is not clear how the different elements of the doctrine relate to one another. One criticism has been that '[w]ithout that guiding principle, lawyers wield the Baker factors like awkward vessels and argue back and forth about meaningless facets and interpretations of the factors' (Pettinato, 2006, p. 63).

Courts and scholars have sought to find some common thread that applies to these different parts of the doctrine. According to one view, the doctrine is derived from the text of the Constitution itself, since it applies where the Constitution commits the resolution of a question to another branch of government (Cole, 2014). According to this structural theory, there is no discretion on the part of the court, which has a constitutional duty to state what the law is (Scharpf, 1966). According to this view, the rationale of the political question doctrine is 'to demarcate the political from the judicial domain and judicial responsibility from that of Congress or the Executive' (Henkin, 1976, p. 598).

This structural approach can be contrasted with the view that the doctrine finds its rationale in more prudential considerations. According to this rationale, the political question doctrine is essentially a pragmatic doctrine that allows the court to exercise some discretion when deciding which disputes to adjudicate. By allowing courts to decline becoming involved in certain cases, the doctrine serves the purpose of preserving the court's public image. This argument that the US Supreme Court should

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take into account such prudential considerations was developed by Alexander Bickel, most notably in *The Least Dangerous Branch* (Bickel, 1962). Since it is not an elected branch of government, it is argued, the Court could lose legitimacy if it were to become involved in essentially non-legal questions and political disputes. According to this theory, there are times when the Court should exercise this discretion to give space to political actors – other branches of government such as the executive and legislature – to resolve a particular controversy. Bickel argued that the Court should find some questions to be non-justiciable based on pragmatic grounds, such as the issue being too big for the Court do deal with or that the dispute would lead to the Court losing its legitimacy in the eyes of the public. There thus appear to be to competing rationales for the doctrine: it is seen as a constitutionally mandated principle related to the separation of powers or as a broader doctrine that allows instances of judicial discretion based on prudential concerns (Wechsler, 1959; Bickel, 1961).

The political question doctrine has been subject to heavy academic criticism. Thomas Franck argues that 'the abdicationist tendency, primarily expounded in what has become known as the "political question doctrine", is not only not required by but wholly incompatible with American constitutional theory' (Franck, 1992, pp. 4–5). Franck argues that the doctrine is founded on an incorrect premise that, when courts deal with foreign affairs issues, they are becoming involved in foreign affairs policy. However, he argues, when the courts are applying the law to the facts of the case, they are making *judicial* policy, which is a separate realm. Moreover, judges deal with all sorts of complicated and technical issues in their cases, and there is no reason that foreign affairs should be the subject of some kind of special exception. Others point to the incoherence of the doctrine. Jack Landman Goldsmith argues that the doctrine 'became a discretionary tool for courts to abstain whenever *they decide*, based on an independent analysis of U.S. foreign relations, that an adjudication would harm U.S. foreign relations or the political branches' conduct of those relations' (Goldsmith, 1999, p. 1402, emphasis in original). The criticism is that, rather than being grounded in principle, the doctrine is a convenient way for courts to avoid difficult questions, which undermines the rule of law and abdicates the court's judicial function to resolve disputes and state what the law is. Although the doctrine has generally fallen out of favour with many constitutional law scholars, some academics continue to support the doctrine (Yoo, 1996; Huq, 2014).

This debate about the political question doctrine is a useful starting point for discussing how ICs may deal with political questions. It demonstrates the tension between the different views about how courts should navigate political questions. Should ICs similarly develop principles to avoid dealing with certain political questions? If so, should this be based on structural grounds, stemming from the nature of the international legal order or on more pragmatic and prudential considerations, concerned more with protecting the court's public image and external legitimacy? The inconsistent application of the doctrine further demonstrates how difficult it is in practice to define a 'political question'. There are also clear concerns about how importing a political question doctrine, or some equivalent, to ICs may be viewed as a policy to avoid dealing with difficult questions, rather than a legal principle that could be applied in a consistent manner. The next section examines instances where ICs have been faced with the argument that they should decline jurisdiction, or apply a different standard of review, due to the political nature of the dispute. While no IC has adopted the political question doctrine, they have employed other techniques of judicial avoidance that are based on similar rationales.

2.2 Political questions at the international level

Much of the criticism of the political question doctrine is based on the premise that the courts are the only institution responsible for interpreting the Constitution (Mulhern, 1988). Yet the political question doctrine – according to both the principled and prudential rationales – is based on the understanding that the courts are only one part of the broader constitutional system alongside other actors, and that courts over-step boundaries when they delve into questions that are not predominantly judicial in character. Similarly, ICs are not the only bodies responsible for interpreting and enforcing international law, and there may be instances where a dispute is best left to other actors – states, domestic courts, international organisations or other dispute-settlement bodies – to resolve. Avoidance

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techniques by ICs are not necessarily an abdication of responsibility, but may also be justified on principles and pragmatic grounds.

The principled approach would derive its rationale from the nature of the international legal order. Unlike many domestic legal systems, there is no clear separation of powers in the international legal order. Yet, just as the political question doctrine views some questions as best dealt with outside of the courts, or best left for resolution by other actors (or not at all), ICs may similarly defer certain questions to the other actors in the international system. ICs exercise authority delegated to them by their constituent states; they are not authorised to deal with every question put before them. Even where a dispute meets the criteria for admissibility and jurisdiction, an IC may exercise its discretion to not hear a dispute, since it involves a question that, due to its inherently political character, goes beyond the IC's authority.

There are also prudential or pragmatic reasons for an IC to decline to deal with a dispute (or to modify the depth of judicial review) where it is called upon to deal with a political question. For instance, there may be times when a dispute may be better resolved through diplomatic or other means, and the IC views that it would be inappropriate to intervene while these talks are ongoing. Avoiding adjudication in such instances gives space for dialogue by political actors in a similar way that the US Supreme Court seeks to allow certain controversies to be resolved in the political realm. As discussed above, ICs have become not only more active in recent years, they are also faced with questions that are more political in character, as the judicialisation of politics enters the realm of international adjudication (Voeten, 2013). ICs may seek to avoid adjudication to prevent them from being drawn into disputes that would potentially hurt their reputation and public image by delving (or appearing to delve) into the political arena. Avoidance techniques can be seen as a necessary safety valve to allow ICs to decline jurisdiction in certain instances. Such a doctrine may also have the effect of preventing instances of resistance by states and other actors, thereby bolstering the IC's external legitimacy and compliance in the longer term. One may counter this argument by pointing out that, by anticipating the response to a judicial decision or by pre-empting resistance by states, an IC is taking into account non-legal considerations (Hellman, 1995). Moreover, if an IC is seen as abdicating its responsibilities in the face of vocal or recalcitrant states, its image as an independent judicial body may also be diminished. This is an argument in favour of a more principled approach to judicial avoidance. ICs could legitimately take into account the effects of their decisions when deciding cases, importing prudential theories of adjudication that allow such concerns in judicial decision-making (Bobbitt, 1982). According to such theories, the effects of courts' decisions should not only be acknowledged as important, but may be used in deciding cases (Hellman, 1995). This may be even more important in the case of ICs that are faced with various forms for resistance. The following section reviews some of the avoidance strategies that ICs have used. While the ICs justify their approaches in terms of legal reasoning and argumentation, they are also motivated by the desire to avoid becoming involved in political disputes that would provoke such measures of resistance.

3 Avoidance strategies

Faced with patterns of resistance, ICs have developed a range of avoidance strategies. The first is to avoid adjudication entirely. This is the case, for instance, when a court finds that it cannot rule on a dispute due to lack of standing or want of jurisdiction. A more common strategy is for a court to decide upon a case, but to do so in a manner that avoids the most politically sensitive parts of the case. This section provides a brief discussion of some of these strategies.

3.1 Deciding a dispute is 'non-legal' in nature

In some instances, a court may decide to decline ruling on a question on the grounds that it is inherently political, rather than legal, in nature. Such an approach has been taken by the ICJ in its advisory function. Under the UN Charter, the UN General Assembly or UN Security Council 'may request the International Court of Justice to give an advisory opinion on *any legal question*' (UN Charter, Article

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96(a), emphasis added) and other organs and specialised agencies may request advisory opinions 'on *legal questions* arising within the scope of their activities' (UN Charter, Article 96(b), emphasis added). The ICJ has on a number of occasions dealt with the question of whether the request for an advisory opinion dealt with a legal question. It has dealt with a number of advisory proceedings that, on their face, touch upon politically sensitive questions: the use of nuclear weapons, South West Africa, the Israeli border wall, the legality of Kosovo's declaration of independence. However, the ICJ has never declined a request for an advisory opinion on the grounds that the question was not legal in character. In fact, there is only one instance – in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* – where the ICJ found that it lacked jurisdiction to give an advisory opinion, yet this was not based on a finding that the question was not of a legal character.

The ICJ has instead held that the power to provide an advisory opinion is discretionary in character, and that it should only decide not to render an opinion where there are 'compelling reasons' (Judgments of the Administrative Tribunal of the ILO, ICJ Reports 1956, p. 86) and that a request by an organ of the UN 'in principle, should not be refused' (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), ICJ Reports 1950, p. 71). In *Certain Expenses* (*Certain Expenses of the United Nations* (Article 17, Paragraph 2 of the Charter), Advisory Opinion, [1962] ICJ Rep 151), the court responded to the argument that the question before it was not legal in nature:

> 'It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.' (*Certain Expenses*, p. 155)

The court gives no clear guidance on what it considers to be a 'legal question' (Hogg, 1962). The court appears to have a broad and understanding of what constitutes a legal question. Political disputes can be framed as legal ones. While it is true that many international disputes will involve a mix of political and legal questions, there may be instances where the question is predominantly political, and only tangentially touches upon legal issues. In *Certain Expenses*, Judge Koretsky (dissenting) argued that there were compelling reasons for the court to decline jurisdiction, arguing that:

> '[a]s the political aspect of the question posed to the Court is the prevailing one, the Court … ought to avoid giving an answer to the question on the substance and ought not to find unwillingly that its opinion may be used as an instrument of political struggle.' (Reports, 254, p. 72)

The dispute underling this advisory opinion has clear political implications. While the advisory opinion revolves around a narrow question concerning the budget of the UN and the interpretation of the UN Charter, it was part of a wider political dispute about peacekeeping missions in the Middle East and the Congo, and a clash between Western states and the Soviet Union. Yet, because the request for an advisory opinion can be answered using legal standards, the ICJ views the request as a 'legal question'. The ICJ refrains from discussing other legal issues – such as the legality or otherwise of the United Nations General Assembly (UNGA) resolution itself – deciding instead to interpret the question in a narrow fashion (Wouters and Odermatt, 2016).

The ICJ appears to have developed a form of political question doctrine under which it will refuse a request for an advisory opinion where it deals with political, rather than legal, issues. Erika De Wet discusses how '[t]he political question doctrine relates to the propriety of the ICJ to render an advisory opinion, in the light of the political context in which it was submitted' (2004, p. 43). And there has been some discussion about the extent to which the ICJ can really contribute to the resolution of 'highly political matters' (Coleman, 2003; McWhinney, 1991). However, the ICJ has to date never refused to give an opinion on these grounds, finding that most disputes involve a mix of legal and

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political questions. Of course, the question of what is 'political' in this context is a difficult one (Hirschl, 2008). What is the rationale for such an approach? The ICJ really understands a 'political question' to be a 'non-legal' question – that is, one that cannot be resolved through the application of judicial techniques. Yet, as discussed above, this distinction itself remains highly contested and difficult to settle – where the boundary lies between political and legal questions can also be a political assessment. This distinction also ties into the structural theory of the political question doctrine in US constitutional law discussed above. The court is less concerned with maintaining its legitimacy and image, and more with ensuring that it is exercising judicial, rather than political, functions.

The CJEU has also been faced with arguments that a dispute is not justiciable on the grounds that the dispute is not a legal one, but such arguments are usually given short shrift. Advocate General Maduro discussed the 'political question' issue in his Opinion in *Kadi*. The Council, Commission and the UK had argued that the CJEU should not examine the legality of EC measures implementing UN Security Council resolutions, as to do so would require the CJEU to decide on 'political questions' (Opinion of AG Maduro in *Kadi and Al Barakaat International Foundation v. Council and Commission*, Joined Cases C-402/05 P & C-415/05 P, EU:C:2008:461, para. 33). The AG did not examine in detail how a political question doctrine might apply in the EU context and noted that '[t]he precise meaning of this notion within the Community context is far from clear'. The Commission had essentially argued that the court should refrain from exercising judicial review in the case because there were no judicial criteria to apply. The AG dismissed the argument that the case involved a political question at all. Even the important interest of maintaining international peace and security, he argued, could not remove the CJEU's duty to review the legality of acts that might conflict with other interests, such as the rights of individuals. Advocate General Sharpston approved of this approach to the political question argument when it was made in Case C-27/09, *People's Mojahedin Organization of Iran (Opinion of AG Sharpston in Case C-27/09 P, French Republic v. People's Mojahedin Organization of Iran*, EU:C:2011:482, para. 253). This was in response to the argument that the power of review in the case should be of a 'light touch' given the political aspects of the case. On the contrary, in cases where the CJEU had dealt with the listing of individuals for the purposes of sanctions, it has not given a wide margin to the executive organs, but has maintained the need for effective judicial protection to be fully satisfied. It has been argued that the CJEU should develop a political question doctrine, especially in the field of EU foreign and security policy (Lonardo, 2017, p. 573). Interestingly, in a field where the CJEU prima facie does not have jurisdiction – the EU's Common Foreign and Security Policy – the court has been more assertive in finding that it can rule on these cases, primarily by interpreting the exceptions to this exclusion in a broad manner. In contrast to some domestic legal orders, including the US, the CJEU has shown little deference to states in the field of the field of foreign relations and security policy.

A version of the political question doctrine was also discussed in *Watson* (Opinion of AG Darmon, Case C-241/87, *Maclaine Watson & Company Limited v. Commission*, 1 June 1989), which related to the conduct of the European Community in relation to the negotiation, entry into force and implementation of the Sixth International Tin Agreement, which established the International Tin Council. The Commission and Council, supported by the UK, argued that the action for damages was inadmissible. The first argument in favour of admissibility was because the application 'refers to acts and transactions of the Community concerning the *conduct of international relations*' (*Watson*, para. 45, emphasis in original). Advocate General Darmon reviewed the case-law of the EU Member States in the field of judicial control over external relations, which identified quite some disparity in the treatment across EU Member States. Some have developed a rule that limits the courts' review over acts of state, whereas others have developed no such rule, although they may still apply a lower standard of review. From this, the AG found that there was no principle common to the Member States whereby actions for damages in respect of acts by the state in the field of international relations are inadmissible. Nonetheless, the AG acknowledges the 'extremely narrow confines of judicial control' that runs through the law of the Member States. Geert De Baere refers to the court's approach here as a 'political question doctrine "lite"' (2012, p. 371).

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The political question doctrine also was recently discussed in *Council v. Front Polisario*. The case involved an action for annulment of the Council Decision on the conclusion of an Agreement between the EU and Morocco. The case was brought by *Front populaire pour la libération de la saguia-el-hamra et du rio de oro* ('Front Polisario'), the National Liberation Movement for Western Sahara, alleging inter alia that the EU–Morocco Liberalisation Agreement was concluded in violation of international law, including the principle of self-determination. The Council and Commission had argued that 'political nature' of the question before the court would lead it to make 'political rather than legal assessments' (AG Opinion, para. 141). The argument was not addressed directly by the Grand Chamber, but was discussed briefly in the Opinion of Advocate General Wathelet. The Advocate General quoted the ICJ's *Wall* Advisory Opinion, in which the ICJ stressed that questions in international life will often involved a mix of political and legal questions: 'Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task' (Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep 2004, p. 136, para. 41). However, the Advocate General does not go into any more discussion on the issue beyond this brief reference, and does not address the fact that the role of the CJEU is markedly different from the advisory jurisdiction of the ICJ. The AG accepts the ICJ's view that a dispute is legal in character if it involves at least some legal standard, even if the dispute will have political consequences. The cases clearly have political consequences for EU–Morocco relations, as evidenced by the strong response by Morocco to the judgments. Rather than refraining to adjudicate on the grounds that the dispute is not legal in character, the court avoided most controversial issues through limiting the standing of the applicants (discussed below) (Odermatt, 2017).

The EACJ has also rejected arguments that it should not hear a certain matter because the dispute raises questions that are political rather than legal character. For instance, in *Democratic Party v. Secretary General of the East African Community and Others* (Reference No.2 of 2012), the Democratic Party in Uganda brought an action against the Secretary-General of the East African Community, as well as the Attorneys General of Uganda, Kenya, Rwanda and Burundi. It alleged failures to make individual country declarations accepting the competence of the African Court on Human and People's Rights in accordance with Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights. It argued that the respondents' failure to do so amounted to an infringement of the Treaty for the Establishment of the East African Community, the African Charter on Human and People's Rights and the Vienna Convention on the Law of Treaties (1969). One of the arguments raised by the respondents was that the question was not justiciable, since it raised purely political, rather than legal questions. Ruling on the dispute would therefore be an unjustified encroachment on the executive and legislative branches (para. 39). The respondents argued that the issues in the dispute were non-justiciable because it would require the Court to compel a Partner State to perform a purely executive function. In a similar fashion to the ICJ and the CJEU, the EACJ found that it had jurisdiction as long as the dispute involved questions capable of judicial determination. The EACJ found that the question put to it involved 'triable issues' capable of judicial examination (unless there was an explicit exclusion of jurisdiction). The question in the case – whether the delay in depositing declarations under Article 34(6) of the Protocol was in violation of the treaty – is clearly one that can be assessed according to legal criteria. One can understand that for the EACJ to rule that states had a duty to exercise certain sovereign prerogatives (making international declarations) would clearly antagonise Member States by going beyond its mandate. However, the Court did not have to avoid the question in its entirety, since it could dismiss the applicant's claims through legal reasoning. Having found that it had jurisdiction to decide on the issue, the EACJ went on to find that there was no violation of the treaty, since the action in question (the delay) touched upon the sole discretion of the Partner State (para. 63).

The EACJ was also faced with the argument relating to a 'political question' in relation to the 'aspirational' nature of a treaty provision. In *Mohochi*, the Court dealt with proceedings instituted

by Mr Mohochi, a Kenyan citizen, brought against the Attorney General of the Republic of Uganda. The applicant alleged that, upon his arrival at Entebbe International Airport, he was denied entry into Uganda and subsequently detained by immigration officials and then deported to Kenya. One of the grounds of action was the alleged violation of Article 6(d) of the treaty – a provision that sets out some of the goals and purposes of East African Community (EAC) integration, including adherence to the principles of democracy, the rule of law, accountability, transparency and social justice. The respondent argued that the EACJ was not in a position to answer such a question, since it involved a treaty provision that was 'futuristic and progressive in application' and required the court to resort to political rather than legal determination (para. 36). One can see why the EACJ quickly dismissed this argument – the provision of the treaty was clearly capable of being breached, and the court had the responsibility to determine whether or not it had been. The court could review a state's alleged violation of Article 6(d), since the principles enshrined therein are 'solemn and serious governance obligations of immediate, constant and consistent conduct by the Partner States' (para. 36). Again, the EACJ rejected arguments that it should avoid a dispute on the basis that it involved a 'political question'. It is clear that the human rights jurisdiction is more controversial, or politically sensitive to EACJ states. However, the court can navigate these challenges without excluding jurisdiction entirely.

The cases discussed above relate to instances where the parties explicitly argued that the dispute was political – or non-legal – in character, and that the IC should refrain from providing a judgment. In these instances, the ICs have found that, if the dispute involves at least some dispute of a judicial character, or that the dispute can be framed in a legal way, then it will not decline to hear the case. However, in doing so, the IC can then go on to use more subtle avoidance techniques (discussed below) that can retain the IC's image as a body committed to dispute settlement and the rule of law, while still carefully navigating the issues that might provoke resistance or political recoil.

3.2 Deciding that a 'dispute' does not exist

ICs have refrained from declining jurisdiction on the basis that the dispute is political in character, but they have avoided adjudicating because no 'dispute' exists. In *Georgia v. Russia*, the ICJ found that there was no 'dispute' between the parties within the meaning of the Convention on the Elimination of Racial Discrimination (CERD) and that negotiations must have first taken place before the court has jurisdiction. More recently, in *Marshall Islands* (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom) (Preliminary Objections) Judgment [2016] ICJ Rep 833), the ICJ went further, finding that it lacked jurisdiction altogether and declined a move to the merits stage on the basis that a 'dispute' did not exist. Marshall Islands brought claims against the UK, India and Pakistan for their alleged failure to fulfil their obligations to conclude negotiations that would lead to nuclear disarmament. The ICJ found that, in all three cases, there was no justiciable dispute between the parties. The respondent states essentially argued that Marshall Islands had never brought its claim to their attention, let alone engaged in negotiations or talks on the matter. Of course, the ICJ's requirement that a 'dispute' exists can prevent vexatious or unfounded cases being brought before the ICJ. Yet this requirement – and the more demanding threshold applied in the *Marshall Islands* case – can also be used to shield the Court from being drawn into politically sensitive issues, such as the use of force or legal issues relating to nuclear weapons.

The use of this form of avoidance technique received an overwhelming negative response from international law academics. Nico Krisch argues that the main reason for the court's avoidance is due to the subject matter of the dispute – nuclear weapons – and that the ICJ 'evades the problem, and hides its evasion behind a façade of formalist legal reasoning' (Krisch, 2017). He further points out that, of the eight judges who found there to be no dispute between the parties, six hailed from countries that possess nuclear weapons, while two (Japan and Italy) enjoy the protection of nuclear weapons through their alliance with the US (Krisch, 2017). Academics are openly aware that this is

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an example of the ICJ avoiding a dispute – not even proceeding to the merits – due to the possibility of antagonising P-5 and other powerful states. The ICJ is faced with its own form of state resistance – that is, the possibility of more states withdrawing from the optional-clause system. Had the ICJ proceeded to the merits in this case, this could have led some states to withdraw these declarations, as the US and France have already done. This is not to allege that the ICJ judges deliberately avoided the dispute out of fear of antagonising powerful states. Rather, as Andrea Bianchi argues, the case reveals the structural bias of the ICJ towards the interests of those powerful states:

> 'a commitment to the status quo, a certain aversion to calling into question the received world-view of a state-centred system of international law (often with a markedly Western bias), in which the role of international law is to preserve the current power structures'. (Bianchi, 2017, p. 85)

Even if the majority's approach to the issue of whether a 'dispute' exists is justified in terms of legal reasoning, it is that very legal reasoning developed through the court's jurisprudence that makes it more difficult for cases like this to proceed to the merits stage. Had the ICJ proceeded to deal with the substance of the dispute, it would have had the opportunity to clarify the obligations of these states in terms of nuclear disarmament, but also risk antagonising those P-5 members. Bianchi stresses that the ICJ's decision might be 'an indirect or even subliminal message sent to the world of politics that such issues as nuclear disarmament should be reserved to the political arena and not addressed by the Court for judicial determination' (Bianchi, 2017, p. 86). Such reasoning – that the dispute is better dealt with by the political organs, such as the UN Security Council – echoes the rationale for the political question doctrine discussed above. Antony Anghie suggests that this is part of a broader trend in which the ICJ has avoided weighing in on controversial issues: 'In each of these controversial cases, the Court seemed to flinch at the prospect of engaging in "political issues" or issues presented as best left for the political process' (Anghie, 2017, p. 64). As Surabhi Ranganathan discusses in her commentary, the court has shown a reluctance to deal head on with the legal issues related to nuclear weapons (Ranganathan, 2017). While international lawyers are highly critical of the ICJ for being 'expeditious' in these cases, they tend to overlook the potential pitfalls that the court seeks to avoid.

3.3 Standing and admissibility

Another avoidance technique or strategy employed by courts is to deny standing to the party bringing the dispute, both states and individuals. Faced with questions of standing and admissibility, ICs can decide whether to interpret requirements in a narrow or expansive fashion.

In the *Front Polisario* case discussed above, the court was clearly faced with politically sensitive questions – that is, the recognition of Morocco's territorial sovereignty regarding Western Sahara. Rather than state explicitly that the case involved political questions, the CJEU found in this case that the applicants did not have standing under EU procedural law. Since the international agreement in question did not apply to the territory of Western Sahara, the CJEU held, the issue was not of 'direct concern' to applicants. However, even in coming to this conclusion, the CJEU dealt with an issue that is not only politically controversial, and may potentially harm relations between the EU and its Member States with Morocco, but is also subject to ongoing political process between the parties. In this context, it is understandable that the CJEU did not wish to become involved in issues that were still subject to ongoing political processes. Moreover, the CJEU is not an international court in the same vein as the ICJ, and is arguably not the most appropriate venue to hear cases relating to this kind of international dispute, especially were interested parties such as the Kingdom of Morocco did not have the chance to be heard. As discussed above, the CJEU's ruling would also have the potential to embarrass and cause diplomatic tensions with Morocco – a country with whom the EU seeks to maintain good relations.

The Court employed a judicial avoidance technique by denying the applicants standing, and it did this by relying on principles of public international law. In particular, the CJEU found that it had to interpret an international agreement and therefore could make use of Article 31(3)(c) of the 1969

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Vienna Convention on the Law of Treaties (VCLT). This provision allows the interpreting body to take into account '[a]ny relevant rules of international law applicable in the relations between the parties'. This allowed the CJEU to 'bring in' other principles of international law in order to interpret the agreement including the *pacta tertiis* principle of the relative effect of treaties. The court applied these principles to find that it could not interpret the agreement as applying to the territory of Western Sahara. However, the legal consequence of such a finding was that the applicants did not have standing under EU law to bring the case. The CJEU thus framed the dispute in such a way so that it could criticise Morocco for its policies towards Western Sahara, but refrained from examining the EU's policy towards the territory, which also potentially violates international law and fundamental rights (Odermatt, 2017).

3.4 Deference – adjusting the depth of judicial review

The avoidance strategies discussed above – finding a dispute to be non-legal, finding that no dispute exists and denying standing – are all *ex ante* avoidance mechanisms, which prevent the IC from proceeding to the merits of the case. These avoidance techniques are relatively rare, however. One reason for this could be that to deny the IC's competence to hear a dispute in its entirely could also undermine its legitimacy, by signalling that it will refrain from disputes that might touch upon politically sensitive issues. Another strategy is to deal with the merits, but to show deference to the state, such as by modifying the depth of review. The European Court of Human Rights (ECtHR) has famously developed such a doctrine through the use of the margin of appreciation. The ECtHR's legal rationale for the doctrine is based on principles relating to subsidiarity and state consensus (Letsas, 2006), although scholarship tends to point to the incoherent application of the doctrine. The ECtHR has shown itself to be sensitive and receptive to political signals from states (Madsen, 2017). Much of the ECtHR's success could be traced to the fact that it has employed such techniques (McGoldrick, 2016).

3.5 Avoiding the political – judicial minimalism

Another form of avoidance is to find that an IC has jurisdiction to hear a case, but to adjudicate in a way that side steps the most politically sensitive issues. Such an approach allows the IC to maintain the appearance that it is not afraid to deal with any legal question, even the most controversial ones, while at the same time refraining from tackling the political question at the heart of the dispute. This is a form of judicial 'minimalism' – it recognises that the IC's role is to deal with the legal question before it, and not to resolve the underlying political dispute that led to it. There are a number of instances where an IC finds that it has jurisdiction to decide a case, but then goes on to deliver an opinion in a way that side steps the most politically sensitive issues. The ICJ's *Kosovo* Advisory Opinion, for instance, has been criticised for doing just this (Waters, 2013). While the ICJ found that it has jurisdiction to decide upon the highly sensitive question concerning Kosovo's unilateral declaration of independence, the ICJ's opinion avoided discussing the questions at the heart of the dispute, such as Kosovo's statehood or right to self-determination. While it is not surprising that the ICJ would avoid weighing in on these issues, such an avoidance strategy arguably requires the court to be much more attuned to particular sensitivities compared with the *ex ante* strategies discussed above.

4 Conclusion

ICs are facing patterns of resistance from different angles. The experience of the Southern African Development Community Tribunal, the withdrawal from the International Criminal Court, the UK's decision to leave the EU (and with it, probably, the CJEU) and the political pressure of European states to 'rebalance' human rights at the ECtHR all point to a similar phenomenon: a

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perception that these courts have overstepped their authority by deciding cases that touch upon 'political' questions.

International and regional courts employ a range of techniques to avoid politically sensitive questions. ICs are rarely upfront about this, and are reluctant to refrain from adjudicating because the dispute involves political, rather than legal, questions. Rather, ICs tend to avoid disputes in a more subtle fashion, relying on procedural rules to exclude a case (*ex ante* exclusion) or resolving the dispute in a way that avoids the most politically sensitive questions and controversies (deference, judicial minimalism). This paper has argued that ICs may choose to do so on both principled and pragmatic grounds. This has parallels with the discussions in the US legal system about the rationale for the 'political question doctrine', which is presented as both a constitutionally mandated principle derived from the separation of powers and as a practical tool to preserve the court's public image and enhance its legitimacy. ICs, however, are reluctant to openly acknowledge these prudential grounds for avoidance. ICs have an interest in minimising potential resistance and should take into account the potential ramifications of their decisions if they are to preserve their reputation, and enhance state compliance. Such an approach has been highly criticised by international lawyers, who tend to view this as an abdication of ICs' core judicial function. Yet, judicial avoidance techniques recognises that ICs are part of a wider community of actors responsible for interpreting and applying international law, and that there are occasions where an IC may refrain from adjudication, preferring sensitive questions to be dealt with outside the courtroom.

The paper has also sought to demarcate politically sensitive questions, which, due to their subject matter, may have political ramifications in a state, and political questions, which fall outside the scope of an IC's mandate because they are essentially non-judicial in character. For the former, techniques such as deference to states may placate those states by easing the ramifications of the IC's judgment. For the latter, however, the mere fact of adjudication is viewed as illegitimate, since it entails the IC going beyond its judicial function (to resolve legal disputes before it, to state what the law is) and entails making political decisions. This paper has argued that such distinctions are often blurred in practice and the decision to identify a dispute as 'politically sensitive' or even 'non-legal' can involve political judgments. Nevertheless, the distinction is important, since it requires us to articulate more clearly what the political is in a political question. It can also help us understand the rationales for IC avoidance: do they avoid certain questions on principled grounds (e.g. because it goes beyond the IC's mandate) or pragmatic grounds (it would lead to resistance from state and affect its legitimacy)? ICs are rarely candid about these avoidance techniques. This paper has illustrated some of the various approaches taken by ICs. In most cases, ICs show deference through their judgments; there are also instances where they decline to adjudicate altogether. While ICs are almost invariably criticised when doing so, such a strategy may in the long term allow the IC to bolster its own legitimacy. Just as there is growing awareness of the different patterns of resistance towards ICs, more research should focus on the patterns of avoidance developed by ICs to mitigate or prevent such resistance.

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