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ORIGINAL ARTICLE

HAGUE INTERNATIONAL TRIBUNALS: INTERNATIONAL COURT OF JUSTICE

Allowing 'leeway to expediency, without abandoning principle'? The International Court of Justice's use of avoidance techniques

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Abstract
As the principal judicial organ of the United Nations, the International Court of Justice (ICJ) has an ambitious mandate. However, due to its institutional design, the ICJ depends in large part on whether the states allow it to play this role, and their resistance can prove particularly damaging for the ICJ in this regard. Against this background, the article argues that resort to judicial avoidance techniques may be a pragmatic way for the ICJ to adapt to this reality, and that it seems likely that the ICJ has been relying on such techniques on several occasions. With reference to the ICJ's case law, the article highlights different avoidance techniques at the ICJ's disposal, proposes a categorization based on their effects, and evaluates the potential and risks each category holds for the ICJ. Accordingly, the article distinguishes between merits-avoidance techniques, issue-avoidance techniques, and resort to deferential standards of review. It demonstrates that relying on merits-avoidance techniques and issue-avoidance techniques is counterproductive and sometimes even dangerous for the ICJ. In contrast, resort to deferential standards of review allows the ICJ to reconcile its ambitious legal mandate with the political realities, and accordingly holds the greatest potential for the ICJ.

Keywords: avoidance techniques; International Court of Justice; judicial politics; margin of appreciation; standard of review

1. Introduction

The ICJ is caught in an inherent tension between its ambitious judicial mandate and its dependency on states. While the United Nations (UN) Charter makes the ICJ the UN's principal judicial organ, the Court depends on whether states allow it to play this role. Against this background, this article focuses on one way for the Court to gain state support and help resolve this tension: by resort to judicial avoidance techniques.

After making the case for why it could be beneficial for the ICJ to practice judicial avoidance (Section 2), the article maps three different categories of judicial avoidance techniques at the Court's disposal, and proposes a categorization based on their effects. It then assesses the specific potential that each category of avoidance techniques holds for the Court. At the outset, these techniques can be divided into merits-avoidance techniques (Section 3) and issue-avoidance

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techniques (Section 4). Merits-avoidance techniques enable the Court to dismiss a case before even addressing the merits. Issue-avoidance techniques allow the Court to proceed to the merits, but then to dodge certain issues during the review that follows. While these two categories of avoidance techniques allow the Court to sidestep certain elements of a case, I argue that they are not well suited to achieving the ultimate goal of resolving the tension in which the Court finds itself. Finally, the article turns to a third category of judicial avoidance techniques, comprised of one – so far underused – technique that holds more potential in this regard: the use of deferential standards of review (Section 5). It is submitted that this technique in particular merits further attention by the Court.

2. A case for judicial avoidance

With hindsight, the last seven decades might be described as the golden age of international law. They have seen the creation of a host of international organizations, an equally marked growth of international rules addressing state conduct, and an ever-growing number of rulings from the numerous international judicial bodies set up to enforce these rules.[2] All of this activity has contributed to considerably narrowing down the space for manoeuvring by states. One of the most notable developments has been the 'judicialization of international relations', meaning the increasing involvement of judicial bodies in the realm of international politics.[3]

Lately, however, the pendulum seems to be on the cusp of swinging back. States increasingly argue for re-nationalization, especially in 'sovereignty-sensitive' areas, and recent changes in the European Convention of Human Rights[4] and ongoing debates about the role and propriety of international investment arbitration[5] illustrate that some states have already begun to act accordingly. International courts and tribunals have become the target for criticism from those who lament that state conduct is being overly constrained and that courts are overstepping the boundaries of national sovereignty.[6] Such criticism is not new for the ICJ, and it has had the opportunity to develop a fine-tuned toolkit to meet such criticism.

As the 'principal judicial organ' of the UN, the ICJ shares the organization's purposes,[7] including maintaining international peace and security (Article 1(1) UN Charter). Accordingly, the Court's primary aim is to promote the peaceful settlement of disputes among the states. Furthermore, as any court does, it strives to promote norm compliance[8] and the realization of justice.[9] As the ICJ mainly acts through its decisions, contributing to these objectives presupposes that it *issues* decisions in the first place. This underlying idea, that the Court needs to issue decisions in order to fulfil its role, is what arguably motivated the UN General Assembly to

[2]On this development see C. P. R. Romano, 'The proliferation of international judicial bodies: The pieces of the puzzle', (1999) 31 *International Law and Politics* 709, at 709.

[3]See, for instance, K. J. Alter, 'Judicialization of International Relations', in B. Badie et al. (eds.), *International Encyclopedia of Political Science* (2011), 1378, at 1378.

[4]See, for instance, I. Cram, 'Protocol 15 and articles 10 and 11 ECHR—The partial triumph of political incumbency post-Brighton?', (2018) 19 ICLQ 1, at 2, 4–7.

[5]From the wealth of literature on this subject, with further references, S. W. Schill, 'International Investment Law and Comparative Public Law—an Introduction', in S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010), 3, at 6.

[6]For an overview over the forms of state resistance see M. R. Madsen et al., 'Backlash against international courts: explaining the forms and patterns of resistance to international courts', (2018) 14(2) *International Journal of Law in Context* 197.

[7]See also S. Rosenne, *The Law and Practice of the International Court, 1920-2005: The Court and the United Nations* (2006), at 104–6.

[8]Y. Shany, *Assessing the Effectiveness of International Courts* (2014), at 164–6.

[9]Cf. the Preamble of the UN Charter. With the term 'justice', the Preamble refers to natural law, R. Wolfrum, 'Preamble', in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (2012), at para. 9.

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recommend, on several occasions, that states refer their disputes to the Court.[10] The ICJ also participates in the activities of the UN by issuing advisory opinions. Accordingly, in principle, it should not decline to do so when its opinion its requested.[11] The Court's recognition of this principle manifests itself in its pronouncement that only 'compelling reasons' may lead it to refuse to issue an advisory opinion once it has found it has jurisdiction.[12]

The Court's ability to issue decisions, however, depends on the states. Its jurisdiction for contentious proceedings is based on consent, 'even if one might regret this state of affairs'.[13] So does its ability to issue advisory opinions: it is the states that ultimately stand behind the requests made by UN organs or authorized agencies. Furthermore, absent formalized effective enforcement mechanisms,[14] the Court is dependent on states' willingness to implement its decisions.[15] Whether a state is willing to submit to the Court's jurisdiction or to comply with its decisions depends on several factors.

First, a state's perception of the Court's legitimacy is potentially important.[16] The more the state perceives the Court as a legitimate institution, the more likely it is to consent to its jurisdiction and comply with its decisions (conversely, the less so, the less likely this becomes).

Second, Goodman and Jinks have argued that acculturation may be a factor in compliance: actors adopt 'the beliefs and behavioral patterns of the surrounding culture', regardless of their normative assessment of that pattern.[17] Applied to the situation of states[18] dealing with the ICJ, this means that if there is a strong social norm among states to follow the Court's decisions, an individual state will be inclined to comply as well. This mechanism would also work in favour of widespread consent to the Court's jurisdiction, if such a norm were to exist.

A third factor is the outcome of a cost-benefit analysis. A multitude of variables may be relevant in this regard, such as whether and to what extent the state views the ICJ as a useful institution. The more that is the case, the more likely will that state support the Court in order to retain the (perceived) advantages of its activity for the future.[19] Another variable in this cost-benefit analysis is the stance taken by a state's internal actors. The higher the pressure to co-operate with the ICJ exercised for instance by domestic political actors, civil society and the judiciary, the more likely that state's co-operation becomes.[20]

[10]See, for instance, UNGA GA Res 171 (II), UN Doc. A/RES/171(II) (1947), UNGA Res 37/10, UN Doc. A/RES/37/10 (1982), UNGA Res 60/1, UN Doc. A/RES/60/1 (2005).

[11]Unless doing so would be inappropriate, Rosenne, *supra* note 7, at 107.

[12]For the most recent affirmation of this principle see, with further references, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, para. 65.

[13]*Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*, Order of 2 June 1999, [1999] ICJ Rep. 866–75, para. 26 (Judge Higgins, Separate Opinion); see also A. Coleman, 'The International Court of Justice and Highly Political Matters', (2003) 4 MJIL 29, 37. Note that the degree of dependence varies according to how its jurisdiction may be established, E. A. Posner and J. C. Yoo, 'Judicial Independence in International Tribunals', (2005) 93(1) *California Law Review*, at 36.

[14]The enforcement mechanism provided by Art. 94(2) UN Charter has yet to be used successfully.

[15]Note that jurisdiction and compliance are by far not the only means for states to influence the ICJ, see, for instance, L. R. Helfer and A.-M. Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo', (2005) 93 *California Law Review* 899, 905, 942–53, advancing a 'theory of constrained independence'.

[16]Commonly described by the term 'sociological legitimacy'. In US constitutional law, Fallon furthermore distinguishes legal and moral legitimacy, R. H. Fallon Jr., 'Legitimacy and the Constitution', (2005) 118(6) *Harvard Law Review* 1787, at 1794–801.

[17]R. Goodman and D. Jinks, 'How to Influence States: Socialization and International Human Rights Law', (2004) 54(3) *Duke Law Journal* 621, 638, 643.

[18]Goodman and Jinks explicitly advance that this dynamic also applies to states, see, with further references, ibid., 646, at footnote 87.

[19]This might apply more often for states that have lower prospects to settle their disputes successfully through diplomatic negotiations, such as weak(er) states in disputes with more powerful states.

[20]Note that the presence of strong national preferences speaking against compliance might influence the stance of domestic actors as well. On the role of domestic factors influencing state compliance with decisions of international courts and tribunals see, with further references, A. Huneeus, 'Compliance with Judgments and Decisions', in C. Romano et al. (eds.), *The Oxford Handbook of International Adjudication* (2014), 437, at 453–6.

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Finally, the stance taken by the international community matters in this analysis.[21] Not co-operating despite a general expectation to do so would signal unreliability and disrespect for international law. States perceived as unreliable will likely face repercussions in the form of higher 'costs' for future transactions with other states, or even be confronted with unwillingness to conclude transactions in the first place. On the other hand, if there is a general expectation of co-operation among states, a state will reap the benefits if it lives up to this expectation. Co-operation will enhance its reputation among the international community, making advantageous transactions more likely.[22] Accordingly, the higher the peer pressure exercised by other states, the more likely a state's co-operation with the ICJ becomes.[23]

Whether the mechanism of acculturation works, and whether the cost-benefit analysis made by the states tilts in the ICJ's favour, depends on whether there is a general rule or expectation to co-operate with the Court by submitting to its jurisdiction and complying with its decisions in the first place.[24] Thus, the key for the Court is to create (and maintain) an atmosphere in which state co-operation with it becomes widespread and regular.[25] It can strengthen this co-operation expectation by working on the states' perception of its legitimacy, such as by relying on recognized methods of interpretation or by issuing 'morally right' decisions. What matters for the purposes of this article is that it may also do so by lowering the perceived cost of co-operation. In this regard, it is important for states to feel that the ICJ sufficiently takes into account their (individual and shared) preferences.[26]

Among the preferences states have, the most important one is that the Court respects their national sovereignty. Visibly taking into account this concern may set in motion a self-reinforcing process. First, it is more likely that a state will co-operate with the ICJ when the Court respects this central value. Each instance of co-operation would further strengthen the dynamics of acculturation, and tilt the cost-benefit analysis more in the Court's favour.[27] Accordingly, each individual instance of co-operation would induce more states to co-operate with the Court in the future. However, this process also works the other way.[28]

[21]H. L. Jones, 'Why Comply: An Analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua', (2012) 12 *Chicago-Kent Journal of International and Comparative Law* 57, at 60–1.

[22]See on this in detail A. T. Guzman, *How international law works: A rational choice theory* (2008), at 71–117.

[23]This is only a cursory presentation. Many factors influence whether a state will co-operate with international courts, and there is a vast body of literature on this, mostly on compliance, both with international law generally and decisions of international courts in particular. For instance, Guzman, focuses on the 'three Rs of compliance': reputation, retaliation, and reciprocity, ibid. In turn, the way in which the ICJ acquired jurisdiction seems to be less relevant for the prospects of the parties' compliance, for example, A. P. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', (2007) 18(5) EJIL 815.

[24]Dyevre also points out that 'international courts need the support of, at least, some state actors in order to secure … compliance', A. Dyevre, 'Uncertainty and international adjudication', (2019) 32(1) LJIL 131, at 132.

[25]Similarly, J. I. Charney, 'Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance', in L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads* (1987), 288, at 303.

[26]See also in this regard Posner and Yoo, who have sparked a debate about the influence of an international tribunal's independence on its effectiveness. They posit that dependent tribunals are more likely to follow state interests, and therefore states rely on them more often and comply, Posner and Yoo, *supra* note 13, at 27–8. While their hypothesis concerns a tribunal's institutional set-up, the point here concerns a tribunal's behaviour.

[27]Focusing on compliance with the ICJ's decisions, Constanze Schulte speaks of a 'self-fulfilling prophecy' in this regard, C. Schulte, *Compliance with decisions of the International Court of Justice* (2004), 438. Jones makes a similar point, Jones, *supra* note 21, at 86.

[28]Comparable considerations presumably led Janis to conclude in 1987 that the ICJ should 'contemplate a doctrine of judicial restraint' when the likelihood of compliance seems slim. To him, instances of non-compliance 'display the Court in its weakest … role' and cause a 'loss in respect', M. W. Janis, 'Somber Reflections on the Compulsory Jurisdiction of the International Court', (1987) 77 AJIL 144, at 146; see also Charney, *supra* note 25, at 305–6. Focusing on courts' strategies to improve compliance, Dothan speaks of their 'reputational capital', S. Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (2015), at 3, 7–10.

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Accordingly, it is crucial that the Court adequately acknowledges sovereignty. Defining such a concept is difficult, but it is likely to be common ground among states that core national interests as for instance national security fall within that term. One way for the ICJ to acknowledge these interests is by resorting to judicial avoidance techniques whenever they are at stake, meaning 'techniques to dispose of cases or issues within cases where a decision seems unnecessary, inappropriate, or perhaps simply too controversial'.[29] While 'avoidance [is often seen] as something that should be avoided',[30] the use of avoidance techniques enables the Court to not pass judgment on certain questions and thus to not antagonize the state(s) in question.[31]

Of course, this is a fragile equilibrium to achieve. States do not invariably expect the ICJ to pay respect to sovereignty in such a substantial way, particularly when they appear before the Court as applicant. Relying too heavily on avoidance techniques may make states that seek resolution of their disputes reluctant to initiate proceedings before the Court. In addition, it would put the ICJ at odds with its important role as enshrined in the UN Charter.[32] Accordingly, an over-use of avoidance techniques would result in a loss of relevance and credibility, also inducing states to settle their disputes elsewhere. Thus, the choice whether to resort to avoidance techniques requires strategic judicial considerations in every individual case. There is no magic formula.[33]

The following sections present some avoidance techniques available to the ICJ that may help it to achieve this equilibrium. At the outset, they can be divided into merits-avoidance techniques and issue-avoidance techniques.[34] Merits-avoidance techniques enable the Court to avoid a pronouncement on the entire substance of a case (or request) and are available in the first phase of the proceedings.[35] Issue-avoidance techniques in turn enable the Court to give a decision on the substance or merits but to avoid a pronouncement on certain issues during that examination. I will then suggest a third category, comprised of one – so far underused – technique: the use of deferential standards of review.

3. Pronouncements serving as merits-avoidance techniques

Merits-avoidance techniques concern the question of whether the Court proceeds to a review of the merits at all, and tend to follow a binary, black-or-white logic. Examples of merits-avoidance techniques include the denial of jurisdiction, the denial of standing, and the denial that there is a dispute to adjudicate upon.

[29]W. J. Davey, 'Has the WTO Dispute Settlement System Exceeded Its Authority?: A consideration of deference shown by the system to Member government decisions and its use of issue-avoidance techniques', (2001) 4(1) JIEL 79, at 96.

[30]J. Odermatt, 'Patterns of avoidance: political questions before international courts', (2018) 14(2) *International Journal of Law in Context* 221, at 224.

[31]E. F. Delaney, 'Analyzing Avoidance: Judicial Strategy in Comparative Perspective', (2016) 66(1) DLJ 1, 10; see also Odermatt, ibid., at 227. Borrowing from the 'political question' debate in US constitutional law, he refers to these considerations as 'pragmatic' reasons, at 224. For a systematization of the application of the political question doctrine by the US Supreme Court, see the leading case *Baker v. Carr*, 1962 U.S. 186, 217. See also T. Schultz and N. Ridi, 'Comity and International Courts and Tribunals', (2017) 50 *Cornell International Law Journal* 577, 596–7, 604–6.

[32]See above. '(T)he First Committee ventures to foresee a significant role for the new Court in the international relations ... The judicial process will have a central place ... for the settlement of international disputes', Draft Report of the Rapporteur of Committee IV/1, Documents of the UN Conference on International Organization, San Francisco, 1945, Volume XIII, at 315 f.

[33]Both 'principle and pragmatism' are necessary, Delaney, *supra* note 31, at 8. In certain circumstances, international courts may actually enhance their legitimacy by taking up highly politicized/controversial cases, S. Caserta, 'Regional International Courts in Search of Relevance: Adjudicating Politically Sensitive Disputes in Central America and the Caribbean', (2017) 28 DJCIL 59.

[34]See Davey, *supra* note 29, at 96; distinguishing avoidance of 'adjudication altogether' and the attempt to 'minimise the [decision's] political impact', Odermatt, *supra* note 30, at 222; Delaney in turn distinguishes three 'timeframes': *ex ante*, merits phase, and *ex post* avoidance mechanisms, Delaney, *supra* note 31, at 5.

[35]I.e., the preliminary objections phase in contentious and the examination of jurisdiction and discretion to issue an opinion in advisory proceedings. The Court may also dispose of preliminary questions in contentious proceedings within the merits, Art. 79(1) Rules of Court.

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According to Article 36(6) ICJ Statute, it is the Court that ultimately decides whether it has jurisdiction. As a result of this '*Kompetenz-Kompetenz*',[36] it enjoys a certain amount of factual latitude in this regard inasmuch as this provision puts the decision in the hands of the Court alone. This latitude creates the possibility of taking into account considerations of expediency.[37]

The two other examples of merits-avoidance techniques are available when the Court examines whether a claim is admissible. Questions of admissibility directly relate to the Court's judicial character, of which it is the sole guardian.[38] Protecting this integrity can only be done on a case-by-case basis, again resulting in some leeway for the Court. As Shany observes:

> There may be occasions ... when the exercise of jurisdiction would be undesirable from the viewpoint of an international court ... Hence, international courts may prefer to avoid to adjudicate certain cases, and the rules of admissibility provide them with a legally valid method to [do so].[39]

3.1 Denying jurisdiction

The judgment in the *Aerial Incident of 27 July 1955* case illustrates how a negative finding on jurisdiction can serve as a merits-avoidance technique.[40] Bulgarian fighter planes had shot down an Israeli civil aircraft that had intruded into Bulgarian airspace. All 58 people aboard the plane were killed, including American, British, Canadian, French, South African, and Israeli citizens. Many Western nations protested; the United States, the United Kingdom, and Israel instituted proceedings against Bulgaria. Israel sought the Court's declaration that Bulgaria was responsible for the aircraft's destruction and the resulting loss of life and all other damage.[41]

The Court, however, accepted Bulgaria's claim that it did not have jurisdiction to adjudicate. It held that Bulgaria's declaration accepting the Permanent Court of International Justice's jurisdiction from 1921 had ceased to be in force with that court's dissolution, and that accordingly Article 36(5) ICJ Statute could not confer jurisdiction on the Court when Bulgaria joined the Statute by virtue of becoming a member of the UN in 1955. Furthermore, it drew a distinction between signatory states present at the San Francisco conference in 1945, and all other states, to which Bulgaria belonged. According to the ICJ, Article 36(5) could not maintain the latter states' declarations in force and was not intended to. Consequently, the Court did not have to address Bulgaria's other preliminary objections, nor the merits of the case.[42]

However, the Court's reasoning is not entirely convincing, as a joint dissenting opinion by three judges indicated. For instance, had the Court considered the equally authentic French version of the ICJ Statute, it should have concluded that Article 36(5) indeed conferred jurisdiction upon the Court. The French version of Article 36(5) reads: 'Les déclarations faites en application de l'Article 36 du Statut de la Cour permanente de Justice internationale *pour une durée qui n'est pas encore expirée*',[43] and thus only refers to the element of time – and not to other causes

[36]C. Tomuschat, 'Article 36', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice* (2019), at para. 109.

[37]Here defined as considerations of aspects going beyond what is part of the strictly legal realm. As Bedjaoui notes: 'A decision dictated by expediency is ... one which, while remaining legal, is inspired by feelings of appropriateness, wisdom or prudence', M. Bedjaoui, 'Expediency in the Decisions of the International Court of Justice', (2001) 71(1) BYIL 1, at 3.

[38]*Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections*, Judgment of 2 December 1963, [1963] ICJ Rep. 15, at 29.

[39]Y. Shany, *Questions of Jurisdiction and Admissibility before International Courts* (2016), 52 (see also 155 and 158).

[40]Note that the finding on jurisdiction can also be used as an issue-avoidance technique: Excluding only one of several jurisdictional bases enables the Court to avoid certain issues. For an example, see below.

[41]*Case concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria), Preliminary Objections, Judgment*, Judgment of 26 May 1959, [1959] ICJ Rep. 127, at 130.

[42]Ibid., at 145–6.

[43]Emphasis added.

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of termination, as the majority held.[44] Furthermore, the dissenting judges objected to the majority's position that the provision contained a distinction between the original signatory states and those that later acceded to the Statute.[45] During a time of tension and strained relations between the Western and the Eastern Bloc, however, proceeding the way it did enabled the Court to avoid adjudicating upon the merits of a politically sensitive case.[46]

3.2 Denying standing

The Court also can turn the negative finding on standing into a merits-avoidance technique, as the *South West Africa* case[47] and the *NATO* cases show. In the *NATO* cases, Serbia and Montenegro[48] had asked the Court to find that several NATO member states had violated *inter alia* the

[44]*Case concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria), Preliminary Objections*, Judgment of 26 May 1959, [1959] ICJ Rep. 156, 161–5. (Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender, Joint Dissenting Opinion). See also A. M. Weisburd, *Failings of the International Court of Justice* (2016), at 113–15.; C. Shachor-Landau, 'The Judgment of the International Court of Justice in the Aerial Incident Case between Israel and Bulgaria', (1960) 8(3) *Archiv des Völkerrechts* 277. It is also worth noting that in the *Nicaragua* case, the ICJ did recognize its jurisdiction based on Art. 36(5) ICJ Statute, despite the fact that Nicaragua's declaration accepting the Permanent Court's jurisdiction never entered into force. It seems that the Court deliberately chose not to rely on a negative finding on jurisdiction as a means of avoidance, *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Jurisdiction and Admissibility of* 26 November 1984, [1984] ICJ Rep. 392, paras. 11–47.

[45]*Supra* note 44, at 175–86.

[46]See, with a further reference, Weisburd, *supra* note 44, at 325 f; Shany, *supra* note 39, at 123–4. On the potential of the finding of jurisdiction as an avoidance technique for the ECtHR see S. Dothan, 'Judicial Deference Allows European Consensus to Emerge', (2018) 18(2) *Chicago Journal of International Law* 393, 407–8. In the pending *Equatorial Guinea v. France* case, the Court has found it does not have jurisdiction, thereby discarding a (substantial) part of the application. In consequence, it will not have to address in the merits whether France violated international law by initiating criminal proceedings against the then Vice-President of Equatorial Guinea on charges of money laundering. While the United Nations Convention against Transnational Organized Crime does not expressly refer to the customary rules on diplomatic immunity from criminal jurisdiction, Equatorial Guinea had argued that its Art. 4(1), which imposes on states parties a duty to 'carry out their obligations under this Convention in a manner consistent with the (principle) of sovereign equality', thereby incorporated these rules. The Court, however, rejected this argument, arguing that 'Article 4 (1) does not impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general', *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections*, Judgment of 6 June 2018, [2018] ICJ Rep. 292, para. 93, see also paras. 94–102. In a Joint Dissenting Opinion, Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka asserted that the Court did have jurisdiction also for this part of the claims, *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections*, Judgment of 6 June 2018, [2018] ICJ Rep. 340, see especially paras. 13–14, 18–49 (Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka, Joint Dissenting Opinion). Significantly perhaps, they assert that 'the majority have failed to identify or have avoided identifying the relevant criteria for determining whether the dispute falls within the provisions of the Palermo Convention' (para. 9), thereby alluding to a possible desire of avoidance that might have motivated the majority's approach. Note that in this case, denying jurisdiction had the effect of excluding certain issues only. More properly, in this context, it might therefore be categorized as an issue-avoidance technique.

[47]In the *South West Africa* case, despite the fact that the Court had dismissed all of South Africa's preliminary objections in 1962, *inter alia* that Ethiopia and Liberia lacked *locus standi*, it held in 1966 that the applicants did not possess standing 'regarding the subject-matter of their claim' and rejected all claims without further enquiry, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections*, Judgment of 21 December 1962, [1962] ICJ Rep. 319, 327; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase*, Judgment of 18 July 1966, [1966] ICJ Rep. 6, paras. 4, 74–6, 99. Many commentators believed that this approach had been motivated by the majority's desire to avoid pronouncing upon the highly politicized issues of the case, see, for instance, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase*, Judgment of 18 July 1966, [1966] ICJ Rep. 325, at 325 (Judge Jessup, Dissenting Opinion); remarkably frank Bedjaoui, *supra* note 37, at 17; R. Higgins, 'The International Court and South West Africa: The Implications of the Judgment', (1966) 42(4) *International Affairs* 573, at 589–90.

[48]During the proceedings, the applicant changed its name to 'Serbia and Montenegro'. For the sake of simplicity, following the approach taken by the ICJ, the applicant will be referred to by that name in this discussion.

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prohibition of the use of force by bombing several targets in its territory.[49] In addition, it had requested the indication of provisional measures. To found the jurisdiction of the ICJ, Serbia and Montenegro had invoked both Article 36(2) ICJ Statute and Article IX Genocide Convention.[50] The Court, however, rejected to issue provisional measures, observing the lack of *prima facie* jurisdiction *ratione temporae* under Article 36(2) ICJ Statute and the lack of prima facie jurisdiction *ratione materiae* under Article IX Genocide Convention.[51]

However, when the Court went on to decide on the preliminary objections, it chose to rely on another finding to dismiss the cases: it held that Serbia and Montenegro did not possess standing under Article 35(1) ICJ Statute. The ICJ found that at the time of the filing of the applications, Serbia and Montengro had not been a member of the UN and accordingly had not been a party to the ICJ Statute by virtue of Article 93(1) UN Charter.[52] Furthermore, it held that the Genocide Convention could not give Serbia and Montenegro access to the Court by virtue of Article 35(2) ICJ Statute.[53] Consequently, the Court held that Serbia and Montenegro did not have access to the Court at the time of its applications, and dismissed the applications.

While the result, i.e., that the cases were discarded at this stage, did not come as a surprise, what is conspicuous is the justification employed by the Court in order to reach this result. Presumably, these cases would have not reached the merits stage in any case – the jurisdictional basis (both *ratione temporae* and *ratione materiae*) was too weak. However, while the decisions were issued unanimously, seven of the 15 judges criticized the majority for relying on this particular ground for dismissing the cases, *inter alia* because of its implications for other proceedings pending before the Court at the time, namely the *Bosnian* and the *Croatian Genocide* cases.[54] These cases had been brought by Bosnia and Herzegovina and by Croatia against Serbia and Montenegro in 1993 and 1999, respectively. The necessary implication of the finding in the *NATO* cases that Serbia and Montenegro did not have access to the Court between 1992 and 2000 normally would have been that the Court could not have reviewed the merits in those two proceedings as well.[55]

Thus, while the negative finding on standing in the *NATO* cases was not used as a merits-avoidance technique in this instance, it seems that the ICJ relied on this finding as a forward-looking avoidance technique – an avoidance technique that it could resort to in the *Bosnian*

[49]*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections*, Judgment of 15 December 2004, [2004] ICJ Rep. 279; *Legality of Use of Force (Serbia and Montenegro v. Canada), Preliminary Objections*, Judgment of 15 December 2004, [2004] ICJ Rep. 429; *Legality of Use of Force (Serbia and Montenegro v. France), Preliminary Objections*, Judgment of 15 December 2004, [2004] ICJ Rep. 575; *Legality of Use of Force (Serbia and Montenegro v. Germany), Preliminary Objections*, Judgment of 15 December 2004, [2004] ICJ Rep. 720; *Legality of Use of Force (Serbia and Montenegro v. Italy), Preliminary Objections*, Judgment of 15 December 2004, [2004] ICJ Rep. 865; *Legality of Use of Force (Serbia and Montenegro v. Netherlands), Preliminary Objections*, Judgment of 15 December 2004, [2004] ICJ Rep. 1011; *Legality of Use of Force (Serbia and Montenegro v. Portugal), Preliminary Objections*, Judgment of 15 December 2004, [2004] ICJ Rep. 1160; *Legality of Use of Force (Serbia and Montenegro v. United Kingdom), Preliminary Objections*, Judgment of 15 December 2004, [2004] ICJ Rep. 1307. Serbia and Montenegro had also filed applications against Spain and the United States. The Court, however, removed these two cases from the List due to a manifest lack of jurisdiction. As the Court's reasoning regarding the aspects at issue here is essentially the same in all the remaining decisions, for sake of simplicity, I will only refer to the proceedings in the case against the Netherlands in the analysis that follows.

[50]Note that Serbia and Montenegro had invoked additional grounds for jurisdiction in the proceedings against Belgium and the Netherlands based on bilateral treaties.

[51]*Legality of Use of Force (Yugoslavia v. Netherlands), Provisional Measures*, Order of 2 June 1999, [1999] ICJ Rep. 542, paras. 22–30, 34–41.

[52]*Supra* note 49, paras. 44–78, 90.

[53]Ibid., paras. 91–113.

[54]*Legality of Use of Force (Serbia and Montenegro v. Netherlands), Preliminary Objections of* 15 December 2004, [2004] ICJ Rep. 1061, para. 13 (Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al Khasawneh, Buergenthal and Elaraby, Joint Declaration); see also *Legality of Use of Force (Serbia and Montenegro v. Netherlands), Preliminary Objections of* 15 December 2004, [2004] ICJ Rep. 1067, para. 18 (Judge Higgins, Separate Opinion).

[55]See also S. Olleson, '"Killing Three Birds with One Stone"? The Preliminary Objections Judgments of the International Court of Justice in the Legality of Use of Force Cases', (2005) 18(2) LJIL 237, at 243.

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and the *Croatian Genocide* cases.[56] It needs to be mentioned, however, that when the Court eventually addressed the question of Serbia and Montenegro's access to the Court in the *Bosnian* and *Croatian Genocide* cases in 2007 and 2008, it refused to resort to this avoidance technique – it even went to considerable lengths to overcome this hurdle.[57]

3.3 Denying that there is a dispute

The finding that there is no dispute between the parties to adjudicate upon constitutes a third merits-avoidance technique available to the Court. One example for this can be found in the *Marshall Islands* cases. Other examples for dispute-related avoidance techniques can be found in the *Nuclear Tests* cases[58] and the *Georgia* v. *Russia* case.[59]

In the *Marshall Islands* cases, the Marshall Islands brought forward claims against India, Pakistan and the UK, alleging that they were in violation of customary international law (in the case of the UK, also of Article VI of the Treaty on Non-Proliferation of Nuclear

[56]For Olleson, 'the adoption of that particular chain of reasoning ... has ... to be seen as the exercise of a conscious choice by the majority ... fully aware of the potential implications for other pending cases', ibid., at 254.

[57]In the *Bosnian Genocide* case, it did so in its merits judgment by basing itself on the principle of *res judicata*, having already concluded in its 1996 judgment on preliminary objections that it had jurisdiction, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep. 43, paras. 80–141. In the *Croatian Genocide* case, the Court overcame this hurdle by invoking that it had in the past shown 'realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction' (para. 81), and argued that it was appropriate to apply this principle here because in 2000, Serbia and Montenegro had become a member of the UN and accordingly of the ICJ Statute, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections,* Judgment of 18 November 2008, [2008] ICJ Rep. 412, paras. 73–91.

The justification for proceeding to the merits in the *Croatian Genocide* case is especially unconvincing: the Court justified its application of the flexibility principle with the concern that '[w]hat matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew – or to initiate fresh proceedings – and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled'., ibid., para. 85. However, because Serbia and Montenegro had deposited a reservation to Art. IX Genocide Convention when acceding to the Convention in 2001, Croatia could not have brought fresh proceedings against Serbia and Montenegro by the time when the Court decided on the preliminary objections. Accordingly, the two *Genocide* cases are a further illustration of the fact that the ICJ has on several occasions also practiced deliberate 'non-avoidance'.

[58]The *Nuclear Tests* cases revolved around French atmospheric nuclear weapon testing in the South Pacific region. The Court had already ordered France to refrain from any further tests. However, it did not reach a decision on the merits. Adopting a very narrow understanding of the dispute, the ICJ held that a dispute between the parties no longer existed and that the case was moot, *Nuclear Tests Case (Australia v. France)* of 20 December 1974, [1974] ICJ Rep. 254, paras. 55–6, 59, 62; *Nuclear Tests Case (New Zealand v. France)* of 20 December 1974, [1974] ICJ Rep. 457, paras. 58–9, 62, 65. Thereby, it avoided deciding whether or not nuclear atmospheric tests were in accordance with international law, Weisburd, *supra* note 44, at 326. For a discussion of the narrow definition of the dispute by the Court, see below at Section 4.1.

[59]*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections,* Judgment of 1 April 2011, [2011] ICJ Rep. 70. This case can also be understood as an example for a dispute-related avoidance technique, if only indirectly. Properly speaking, the Court found it did not have jurisdiction because it found that the prerequisite to have fruitless negotiations before being able to submit a dispute to the Court (Art. 22 CERD) was not fulfilled. It held that it is only possible to have those negotiations once a dispute has arisen. Ultimately, however, the ICJ reached its negative decision on jurisdiction because of its narrow way to construe the existence of a dispute. It held that no dispute relating to the CERD had existed from the period of 1990 to July 2008, but that such a dispute only arose in August 2008, immediately before Georgia filed its application. Therefore, negotiations could have only taken place in a very short period, which the Court did not find to be the case. Several individual judges were highly critical of this approach, pointing out that despite the 'thorny questions' on the merits raised by the application, the Court should have found that a dispute had existed much earlier and accordingly not have rejected the objection based on Art. 22 CERD, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections*, Judgment of 1 April 2011, [2011] ICJ Rep. 142, para. 4 (President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja, Joint Dissenting Opinion).

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Weapons) because they had 'not pursued in good faith negotiations to cease the nuclear arms race' and 'negotiations leading to nuclear disarmament in all its aspects'.[60] Thus, over 40 years after the *Nuclear Tests* cases and 20 years after the *Legality of the threat or use of nuclear weapons* Opinion, the Court was again asked to pronounce on the thorny topic of nuclear arms.

However, as in previous proceedings, the ICJ 'decided not to decide'.[61] It held that a dispute between the parties did not exist, and accordingly dismissed the Marshall Islands' applications. Two points in the Court's reasoning were crucial for this finding. First, it introduced an additional criterion for a dispute to exist: the Marshall Islands needed to show that 'the respondent *was aware, or could not have been unaware*, that its views were "positively opposed" by the applicant'.[62] Second, while the ICJ initially referred to its traditional flexibility by holding that '*[i]n principle*, the date for determining the existence of a dispute is the date on which the application is submitted', it then factually contradicted this position.[63] A desire of avoidance might have been the underlying cause for both those findings.

Contrary to the Court's position that the 'awareness' criterion was already 'reflected in previous decisions', it amounts to the creation of an entirely new jurisdictional precondition not based in previous case law.[64] Furthermore, the *Marshall Islands* cases mark a departure from the Court's 'tradition of flexibility'[65] in jurisdictional aspects.[66] The Court had found in the past on several occasions that a dispute did exist, even if that dispute only 'clearly manifest[ed] itself during the proceedings', as long as there was a 'start or … onset of [the] dispute prior to the filing of [the] application'.[67] On this occasion, it instead chose to 'artificially stop the time of law and analysis at the date of submission of the request'.[68] Thereby, the ICJ refused to apply the established principle that it should overlook preliminary defects in an application if a new one would not be vitiated by the same defect, so as to avoid a circularity of procedure.[69]

[60]*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility*, Judgment of 5 October 2016, [2016] ICJ Rep. 255, para. 1; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Jurisdiction and Admissibility*, Judgment of 5 October 2016, [2016] ICJ Rep. 552, para. 1; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections*, Judgment of 5 October 2016, [2016] ICJ Rep. 833, para. 1.

[61]T. M. Franck, 'Word made Law: The Decision of the ICJ in the Nuclear Test Cases', (1975) AJIL 612, 613.

[62]*Supra* note 60, para. 38; *supra* note 60, para. 38; *supra* note 60, para. 41 (emphasis added).

[63]*Supra* note 60, paras. 39f; *supra* note 60, paras. 39f; *supra* note 60, paras. 42f (emphasis added).

[64]Representative in this regard: *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections*, Judgment of 5 October 2016, [2016] ICJ Rep. 861, paras. 20–3 (Judge Yusuf, Dissenting Opinion); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility*, Judgment of 5 October 2016, [2016] ICJ Rep. 1063, paras. 23–40 (Judge Robinson, Dissenting Opinion).

[65]*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections*, Judgment of 5 October 2016, [2016] ICJ Rep. 833, para. 10 (Judge Crawford, Dissenting Opinion).

[66]Judge Cançado Trindade observed that the ICJ '[made] *tabula rasa* of the requirement that "in principle" the date for determining the existence of the dispute is the date of filing of the application', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility*, Judgment of 5 October 2016, [2016] ICJ Rep. 321, para. 29 (Judge Cançado Trindade, Dissenting Opinion).

[67]*Supra* note 64, paras. 34–40; see also, with further references to the Court's case law and the literature, *supra* note 65, paras. 11–19.

[68]*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility*, Judgment of 5 October 2016, [2016] ICJ Rep. 314, at 315 (Judge Bennouna, Dissenting Opinion).

[69]*Supra* note 57, para. 85; cf. Judge Crawford, who calls this the 'Mavrommatis principle', *supra* note 65, paras. 8–9; with further references *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections*, Judgment of 5 October 2016, [2016] ICJ Rep. 885, paras. 17–28 (Judge Tomka, Separate Opinion). Tellingly, the Court did not refer to the *Croatian Genocide* case in the *Marshall Islands* decisions.

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The Marshall Islands' applications had posed a momentous challenge to the Court, a challenge to enter dangerous waters. Had the Court pronounced on the merits, it would have had to review the policy of nuclear deterrence, a cornerstone of the global security system. Furthermore, the application against the UK had involved the only Permanent Member of the UN Security Council that still accepts the Court's jurisdiction under Article 36(2) of the ICJ Statute. By dismissing the cases at the jurisdictional stage, the ICJ avoided dealing with these sensitive issues, and avoided antagonizing powerful states. In the eyes of several commentators, the Court made 'a deliberate choice not to entertain the case,[70] 'and [hid] its evasion behind a façade of formalist legal reasoning'.[71] The decisions are regarded as an expression of the 'ICJ's trepidation to take jurisdiction over the "big cases"'.[72]

3.4 Conclusion on merits-avoidance techniques

In the *Nicaragua* case, while dealing with contentions that the dispute was inadmissible, the ICJ observed that '[i]t must ... be remembered that, as the *Corfu Channel* case ... shows, the Court has never shied away from a case ... merely because it had political implications'.[73] This statement implies that the ICJ has steadily rejected all claims for restraint that were based on the political nature of the matter. However, the cases discussed above represent instances in which it seems plausible that considerations of expediency and the desire to avoid hostile state reactions indeed motivated the Court to practice avoidance.[74] Shany argues that such behaviour is not illegitimate per se, pointing out that 'case selection' serves as an 'important tool' for international courts: it enables them to secure support from the relevant stakeholders.[75] In the same vein, Prott observes that:

> [i]t would be rash to claim that ... factual considerations play no part at all in the judges' processes of reasoning. Of course they do, and any organization which completely disregards the views of persons on which its continued existence as a functioning institution depends, is likely to destroy the social acceptance and support which alone confer authority and power on it.[76]

On the other hand, these cases also highlight the inherent limitations of this set of avoidance techniques. Resorting to these techniques merely permits the Court to avoid a matter entirely,

[70]A. Bianchi, 'Choice and (the Awareness of) its Consequences: The ICJ's "Structural Bias" Strikes Again in the Marshall Islands Case', (2017) 111 *AJIL Unbound* 81, at 82.

[71]N. Krisch, 'Capitulation in The Hague: The Marshall Islands Cases', 10 October 2016, *EJIL:Talk!*, available at www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases; Alberto Alvarez-Jimenez infers that formalist reasoning 'was utilized as a dispute-avoidance technique', A. Alvarez-Jimenez, 'The ICJ's Marshall Islands (Mis)judgments on Nuclear Disarmament', (2017) 45(1) *Syracuse Journal of International Law and Commerce* 1, at 7.

[72]V.-J. Proulx, 'The Marshall Islands Judgments and Multilateral Disputes at the World Court: Whither Access to International Justice?', (2017) 111 *AJIL Unbound* 96, at 101.

[73]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility*, Judgment of 26 November 1984, [1984] ICJ Rep. 558, 435 (Judge Schwebel, Dissenting Opinion).

[74]That being said, there are many instances where the Court would probably have preferred to 'shy away', and nonetheless issued a decision on the merits, or acceded to the request for an advisory opinion. Besides the above-mentioned *Nicaragua* case and the *Croatian* and *Bosnian Genocide* cases, one can, for instance, point to the *Wall in the OPT* and the *Chagos* Advisory Opinions as an illustration of this, or the judgment in the *Oil Platforms* case (for a discussion of this case, see below), *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, [2003] ICJ Rep. 161; *supra* note 12; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136.

[75]Shany, *supra* note 39, at 125.

[76]L. V. Prott, 'Avoiding a decision on the merits in the International Court of Justice', (1976) *Sydney Law Review* 433, 444.

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therefore forcing it to operate in a binary, black-or-white logic. Relying on them implicates the Court's institutional credibility to a significant extent and displeases the applicant side, which might be less inclined to resort to the ICJ in the future. In turn, not relying on merits-avoidance techniques might be interpreted by the respondent as the Court's outright rejection of its (more or less) legitimate sovereignty concerns, and trigger adverse reactions on that state's part. Thus, the use of merits-avoidance techniques not only seems less suitable to help the Court garner support and strength, but rather risks leading in the opposite outcome.

4. Pronouncements serving as issue-avoidance techniques

Even when proceeding to the substantial review of a case,[77] the ICJ may still exclude certain issues from its review. Avoidance techniques in that stage include the restriction of the scope of review, practising economy of argument, and the finding of *non liquet*.

4.1 Restricting the scope of review

The *Kosovo* Advisory Opinion shows how the ICJ can use the restriction of the scope of review as an issue-avoidance technique. The deeply divided UN General Assembly had asked the ICJ whether 'the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law'.[78] This embroiled the Court in highly controversial questions of self-determination, remedial secession, territorial integrity, and statehood. With an aim to assert its judicial authority, the ICJ held that possible political implications did not constitute a reason for it to refuse to respond.[79] However, one may speculate whether such concerns did not in fact influence the Court majority – the opinion remained silent on self-determination and secession.

First, the ICJ did not expand the scope of the already narrow question (despite several suggestions to that end).[80] It is noteworthy that in the past, the Court had already affirmed its freedom to go beyond the strict terms of the question. In the *Certain Expenses* opinion (which the ICJ cited, albeit in a different context), in a very similar situation,[81] it had asserted that it 'must have full liberty to consider all relevant data ... in forming an opinion'.[82] Self-determination and secession were highly relevant aspects of the *Kosovo* request. Second, the Court read the question in an even more constrained way, understanding 'in accordance with' as 'not in violation of'.[83]

[77]In contentious proceedings, this corresponds to the merits, in advisory proceedings, to giving an answer to the request.

[78]*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 403, para. 1.

[79]Ibid., para. 35. It is noteworthy in this connection that the ICJ has so far never declined to respond to a request for an advisory opinion, P. D'Argent, 'Article 65', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice* (2019), at para. 35. In the recent *Chagos Islands* opinion, the ICJ also confidently rejected arguments that it should decline to issue the opinion requested by the UN General Assembly. Among others, the UK had argued that issuing the opinion would be improper because advisory proceedings were unsuitable to resolve complex factual questions and because the request circumvented the principle of state consent. The Court also resisted calls to restrict the scope of review to provide a more limited response, *supra* note 12, paras. 63–91, 133–7.

[80]*Supra* note 78, paras. 49–56.

[81]In both instances, a majority of states had rejected attempts by individual states to enlarge the question submitted (France in *Certain Expenses*, Serbia in *Kosovo*).

[82]*Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion of 20 July 1962, [1962] ICJ Rep. 151, at 157; see in this regard also *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep. 63, paras. 13–15 (Judges Higgins, Kooijmans and Buergenthal, Joint Separate Opinion).

[83]*Supra* note 78, paras. 56, 83.

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This made it possible to focus exclusively on the violation of negative prohibitions and to dodge the more salient issues, most notably the self-determination entitlement.[84]

The reactions to this silence have been varied. For several commentators, the narrow answer given by the Court was the only legitimate answer it could give. For instance, Pellet, analysing the Serbian choice to submit what was at face value a very narrow question, observes that '[t]he risk of playing a game is that you may be taken at your own word. This is exactly what happened in this case. The Court strictly kept to the question asked – and rightly so'.[85] Others have taken issue with the decision, criticizing that the Court 'answer[ed] the question asked in the most direct manner, and via the shortest available route'.[86] Several judges also criticized the Court for not dealing with the underlying issues of the request.[87] One commentator called the opinion 'a masterpiece of avoidance', achieved by 'stupefying formalism'.[88] Several commentators explain the ICJ's approach with its general reluctance to delve into unsolved issues of 'high politics', where the ICJ faces a dilemma: it has to assert its authority without deciding in a way that might not find the states' acceptance.[89] Answering the question but sidestepping the major issues might just have been the way out for the Court.[90] Whether the opinion issued by the Court was appropriate or not, it is clear that a more assertive answer would not have been legally precluded. The ICJ had a choice, and it made a choice.[91]

4.2 Economy of argument

Another way to engage in issue-avoiding is through resort to 'economy of argument': the ICJ draws upon one specific issue or argument to decide the case, and leaves aside other issues raised in the proceedings. Apart from the question of whether the Court may or should delve into these

[84]R. Wilde, 'Kosovo (Advisory Opinion)', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), at para. 14; T. Burri, 'The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links', (2010) 11(8) GLJ 881, at 885.

[85]A. Pellet, 'Kosovo–The Questions Not Asked', in M. Milanovic and M. Wood (eds.), *The Law and Politics of the Kosovo Advisory Opinion* (2015), 268, at 269; for Hannum, the Court's answer was 'certainly a plausible (if not inevitable) response to the question actually posed', H. Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?', (2011) 24(1) LJIL 155, at 155–6.

[86]M. Weller, 'Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?', (2011) 24(1) LJIL 127, at 130.

[87]*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 479, paras. 1, 4–6, 10 (Judge Simma, Declaration); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 491, paras. 33–5 (Judge Sepúlveda-Amor, Separate Opinion); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 618, paras. 4–5 (Judge Yusuf, Separate Opinion).

[88]T. W. Waters, 'Misplaced Boldness: The Avoidance of Substance in the International Court of Justice's *Kosovo* Opinion', (2013) 23 DJCIL 267, at 270.

[89]Weller, *supra* note 86, at 131, 133–4; with a similar explanation Waters, *supra* note 88, at 327–8; see also A. Nollkaemper, 'The Court and its Multiple Constituencies', in Milanovic and Wood, *supra* note 85, at 219.

[90]A further example for this avoidance technique can be found in the *Nuclear Tests* cases. Australia and New Zealand had asked the Court to 'adjudge and declare that … the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with … international law' and to order 'that the French Republic shall not carry out any further such tests', respectively to 'adjudge and declare … [t]hat the conduct by the French Government of nuclear tests in the South Pacific region … constitutes a violation of New Zealand's rights … and that these rights will be violated by any further such tests'. The ICJ, however, observed with respect to Australia that 'although the Applicant has … used the traditional formula of asking the Court "to adjudge and declare" … the original and ultimate objective of the Applicant was and has remained to obtain a termination of those tests; thus its claim cannot be regarded as being a claim for a declaratory judgment.' (similarly for New Zealand). Thus, the ICJ construed the true subject of the dispute as merely relating to the termination of the nuclear tests, *supra* note 58, paras. 11, 30; *supra* note 58, paras. 11, 31. Ultimately, it thereby avoided deciding whether or not nuclear atmospheric tests were in accordance with international law, Weisburd, *supra* note 44, at 326. Concerning the mootness finding, see above at Section 3.3.

[91]See also Nollkaemper, *supra* note 89, at 221.

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'other' issues at all,[92] it is clear that one effect of this approach is that the ICJ avoids dealing with these – potentially sensitive – questions. One example for this is the *Arrest Warrant* case.

The case was brought by the Democratic Republic of the Congo (DRC) against Belgium. Asserting universal jurisdiction, Belgium had issued an arrest warrant for the then incumbent Congolese Minister for Foreign Affairs. This prompted the DRC to turn to the ICJ, asking it to declare that Belgium should annul said warrant. Initially, the DRC had based its submissions on two different arguments – first, that the exercise of universal jurisdiction violated international law, and second, that the arrest warrant violated the accused's diplomatic immunity. Its final submissions, however, only included the second strand, on which the Court exclusively based its judgment.[93]

Concerning the legality of universal jurisdiction, the ICJ held that the *non ultra petita* rule barred it from addressing this point in the operative part of the judgment. However, the Court noted that it could have addressed this issue in its reasoning if 'necessary or desirable', and that it was logically prior to the question of immunity[94] – a point also stressed by several judges in separate opinions. In a plea to the Court to take up its role and provide guidance to the international community, three judges argued that, indeed, addressing this issue would have been 'necessary'.[95] At the very least, the ICJ was not barred from addressing universal jurisdiction, and indeed did not think it was.

However, a pronouncement on this question could have produced unwanted consequences from the Court's perspective. Indicating that universal jurisdiction could be lawfully exercised could have destabilized the conduct of international relations and antagonized states with leaders under threat by this principle. In turn, the opposite would have dealt a serious blow to the enforcement of human rights and disappointed others. Perhaps fittingly, Cot finds the Court's decision to be an expression of 'judicial politics'.[96]

[92]As Zarbiyev points out, the answer to this question depends on whether one sees the ICJ as a mere 'dispute-settler' or rather as a 'guardian of legality for the international community as a whole', to borrow an expression from Judge Lachs, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, Order of 14 April 1992, [1992] ICJ Rep. 1992, 3, at 26 (Judge Lachs, Separate Opinion); F. Zarbiyev, 'Judicial Activism in International Law - A Conceptual Framework for Analysis', (2012) 3(2) JIDS 1, at 11–13.

[93]*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep. 3, paras. 45, 51–5, 78(2). It is worth mentioning that political pressure exercised by further states whose officials had been the subject of criminal complaints has since then prompted Belgium to revise its universal jurisdiction legislation. It has thereby significantly limited the possibility to lodge further such complaints before its courts, see, for instance, S. R. Ratner, 'Belgium's War Crimes Statute: A Postmortem', (2003) 97(3) AJIL 888, at 889–92.

[94]*Supra* note 93, para. 46; Zarbiyev, *supra* note 92, at 12.

[95]*Supra* note 82, paras. 3–5. The judges furthermore emphasized that 'the Court should not, *because one or more of the parties finds it more comfortable for its position*, forfeit necessary steps on the way to the finding it does make in the *dispositif*', para. 13 (emphasis added); *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep. 35, para. 1 (President Guillaume, Separate Opinion). It is worth noting that the Court has, on several occasions, quite openly chosen not to follow this restrictive approach. The *Oil Platforms* case is an illustrative example (see below).

[96]J.-P. Cot, 'Eloge de l'Indécision; La Cour et la Compétence Universelle', (2002) 35(1-2) *Revue belge de droit international* 546, at 550 (own translation). Wouters in turn speculates that '[t]he real reason may be that the judges were very much divided on this controversial issue', J. Wouters, 'The Judgement of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks', (2003) 16(2) LJIL 253, 263. The Court explicitly reserved itself the freedom to rely on this economy of argument in the *Guardianship of Infants* case, where it held that '[i]t retains its freedom to select the ground upon which it will base its judgment, and is under no obligation to examine all the considerations advanced by the Parties if other considerations appear to it to be sufficient for its purpose', *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment of 28 November 1958, [1958] ICJ Rep. 55, at 62. The Court thereby justified not dealing with a question relating to the existence of an *ordre public* exception in the 1902 Convention and the question whether the relevant Swedish law qualified as such. Several judges criticized the majority's silence on these questions, see, for instance, *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment of 28 November 1958, [1958] ICJ Rep. 102, at 102 (Judge Moreno Quintana, Separate Opinion).

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4.3 Non liquet

A holding of *non liquet* can also serve as an issue-avoidance technique, as illustrated by the *Legality of the threat or use of nuclear weapons* Advisory Opinion. The UN General Assembly had asked whether 'the threat or use of nuclear weapons [is] in any circumstances permitted under international law'.[97] The Court did not decline to deal with this request (as it was urged to do),[98] and thus did not rely on a merits-avoidance technique to avoid a review entirely.

Core security concerns were at stake for virtually all states. For several states, nuclear weapons were the cornerstone of their defence strategy, and they would have most likely ignored a Court decision finding that the use of these weapons was unlawful. Many other states in turn regarded nuclear weapons as their ultimate menace. Discarding the request was not a feasible option for the Court, with the *South West Africa* judgment still looming in the background.[99] There seemed no good way out. In short, this 'momentous'[100] question had the ICJ 'caught between a rock and a hard place'.[101]

It finally resolved the issue with its first ever finding of *non liquet*. The Court held that:

> the threat or use of nuclear weapons would *generally* be contrary to the rules of international law ... however, the Court cannot conclude *definitively* whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.[102]

This pronouncement made it possible for both sides to claim their victory. As Chesterman has pointed out, the decision might best be explained with judicial prudence exercised by a Court struggling to preserve its legitimacy vis-à-vis the states.[103] Koskenniemi observes in the same vein that '[t]he Court felt both the law *and its own authority* to be insufficient' for reaching a definite conclusion.[104] The opinion showcases another tool the ICJ can use to avoid dealing with an issue in order to preserve its authority as a 'political institution in a world of sovereign states'.[105]

4.4 Conclusion on issue-avoidance techniques

While these three decisions can all be endorsed from a strictly legal point of view, the introduction of a certain measure of expediency in each of them seems palpable. They also illustrate the specific potential of issue-avoidance techniques: they enable the ICJ to take on the case or request, while at the same time avoiding certain isolated issues (which may, however, lie at the very heart of the matter). Thus, rather than functioning in the binary, black-or-white logic of merits-avoidance techniques, they allow the Court to proceed with a more subtle distinction between those questions to be treated and those to be discarded from its scrutiny.

[97] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, para. 1.

[98] Ibid., paras. 14–19. None of the nuclear weapons states supported the request, P. W. Kahn, 'Nuclear Weapons and the Rule of Law', (1999) 31 *NYU Journal of International Law and Politics* 349, 372–3.

[99] S. Chesterman, 'The International Court of Justice, Nuclear Weapons and the Law', (1997) 44(2) NLR 149, at 161.

[100] R. Falk, 'Nuclear Weapons, International Law, and the World Court: An Historic Encounter', (1996) 71(3) *Die Friedens-Warte* 235, at 248.

[101] D. Akande, 'Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court', (1998) 68(1) BYIL 165, at 217.

[102] *Supra* note 97, para. 2E of the dispositif (emphasis added).

[103] Chesterman, *supra* note 99, at 161, 167.

[104] M. Koskenniemi, 'The silence of law/the voice of justice', in L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice, and Nuclear Weapons* (1999), 488, at 508 (emphasis added).

[105] Kahn, *supra* note 98, at 372–3.

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5. A pronouncement serving as 'issue within issue'-avoidance technique

There is one further stage in the merits review where the Court can resort to a particular avoidance technique: in the determination of the applicable standard of review. 'Standard of review' denotes the degree of intrusiveness of a judicial body's review into the respondent's behaviour, i.e., to what degree that body second-guesses the respondent's determinations as to whether the conditions of a given norm are (not) met.[106] Determining the standard of review thus permits the ICJ to adjust the division of decisional power among the states and itself ('who decides?') on a continuum, ranging from an objective *de novo* review to complete acceptance of the respondent state's assertions.

Scholars have extensively addressed standards of review, both in the national and international context.[107] Concerning the latter, they have in particular addressed the operation of standards of review in the international human rights regime,[108] trade law,[109] and investment arbitration.[110] Many of these scholars take a normative stance on whether or not deferential standards of review should be adopted. Several for instance base their claim for embracing this notion on considerations of expertise and/or democratic accountability. They submit that in certain situations, judicial bodies are lacking in this regard and should therefore defer to the primary-decision makers, the states.[111]

The focus of this article is a slightly different one. Instead of advancing systemic legal justifications for adopting deferential standards of review, it focuses on the possible institutional advantages for the Court itself if it does. When the Court adopts a deferential standard of review, it defers to the respondent state's assertions to some degree, thereby escaping the need to follow through to the last detail of an issue itself. Resort to this notion thus enables the ICJ to make pronouncements on a certain aspect, while still acknowledging the respondent state's assertions and concerns. This makes it possible to use deferential standards of review as an avoidance technique: a technique that enables the Court not to avoid entire issues, but rather *issues within issues*.

Several characteristics render norms amenable to the application of deferential standards of review. Shany, addressing specifically the ICJ, holds this to be the case whenever the Court is called to apply 'inherently uncertain' or 'flexible' norms – more specifically, standard-type, discretionary, and result-oriented norms.[112] The ICJ is often tasked with the application of this type of norms. In addition, on several occasions, respondent states have (indirectly) asked the Court to apply

[106]See, e.g., M. Oesch, 'Standards of Review in WTO Dispute Resolution', (2003) 6(3) JIEL 635, at 637; E. Shirlow, 'Deference and Indirect Expropriation Analysis in International Investment Law: Observations on Current Approaches and Frameworks for Future Analysis', (2014) 29(3) *ICSID Review* 595, at 600; C. Ragni, 'Standard of Review and the Margin of Appreciation before the International Court of Justice', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014), 319, at 319.

[107]Concerning international law see, for instance, the edited book by L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014).

[108]From the wealth of literature see Y. Arai-Takahashi, *The Margin of Appreciation and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002); A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012); J. Asche, *Die Margin of Appreciation: Entwurf einer Dogmatik monokausaler richterlicher Zurückhaltung für den europäischen Menschenrechtsschutz* (2018).

[109]From the wealth of literature see M. Oesch, *Standards of Review in WTO Dispute Resolution* (2003); D. Lovric, *Deference to the Legislature in WTO Challenges to Legislation* (2010); R. Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (2012); S. P. Croley and J. H. Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments', (1996) 90(2) AJIL 193; C.-D. Ehlermann and N. Lockhart, 'Standard of review in WTO Law', (2004) 7(3) JIEL 491.

[110]See especially C. Henckels, *Proportionality and Deference in Investor-State Arbitration* (2015); W. W. Burke-White and A. van Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations', (2010) 35 *Yale Journal of International Law* 283; S. Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review', (2012) 3(3) JIDS 577.

[111]See, for instance, Y. Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', (2005) 16(5) EJIL 907, at 918–22; A. van Staden, 'The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review', (2012) 10(4) ICON 1023; Henckels, *supra* note 110, at 34–41.

[112]Shany, ibid., at 912–17.

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deferential standards of review. This section considers three examples from the Court's case law where the latter was the case, and traces possible motives for its refusal to do so. It concludes by arguing that the potential of this particular avoidance tool merits the Court's further attention.

5.1 A deliberate 'avoidance of avoidance'

The *Oil Platforms* case furnishes the first example where the ICJ deliberately chose not to resort to deferential standards of review as an avoidance technique. Iran had instituted proceedings against the US, claiming that the US had violated the bilateral Treaty of Amity by attacking three Iranian oil platforms in the Persian Gulf. While the Court's jurisdiction was based on the Treaty of Amity – mostly dealing with economic aspects – the dispute essentially concerned reciprocal accusations of unlawful use of force.

The principal question the Court addressed was whether the US attacks on the platforms could be justified as measures 'necessary to protect ... essential security interests' under Article XX(1)(d) of the Treaty. The US argued that this provision contained notions 'not easily susceptible to judicial scrutiny' and that a 'very wide margin of appreciation' should be applied. It contended that '[o]nce the State concerned has shown that it found itself compelled to act ... the Court should allow ... [a] wide area of latitude to the State's assessment of necessity'.[113] It finally claimed that as it had acted in good faith, the ICJ should find that the attacks were justified.[114]

The Court, however, declined to follow this line of argument. In the first place, it held that the interpretation of Article XX(1)(d) had to follow the customary law on self-defence.[115] Accordingly, the US first had to prove that it had been the victim of an armed attack by Iran. The ICJ did not merely accept that the US had been justified to *believe* it had been (as the US had argued it should), but instead applied an objective test.[116] Regarding the criterion of necessity, the Court observed that under the law on self-defence, this requirement 'is strict and objective, leaving no room for any "measure of discretion"'.[117] Accordingly, it did not need to address the specific US claim for deference under Article XX(1)(d), but instead explicitly rejected the application of deferential standards of review concerning a state's exercise of self-defence under customary law.

Why did the Court not resort to deferential standards of review in this case? An answer may be found by taking into account that the entire review of Article XX(1)(d), and incidentally the customary law on self-defence, was an *obiter dictum*. The question whether the US attacks were justified would have only arisen if the Court had concluded that there had been a breach of the Treaty of Amity in the first place – which it denied later in the judgment. This suggests that the ICJ had other motives – presumably, it wanted to uphold the effectiveness of the prohibition of the use of force in the context of the then-emerging debate about expanding the notion of self-defence.[118] If the Court wanted to uphold this rule, then, necessarily, it also had to reject all claims to apply a deferential standard of review.

[113] *Oil Platforms (Islamic Republic of Iran v. United States of America), Rejoinder submitted by the United States of America*, para. 4.26–7; Judge Buergenthal shares this view, *Oil Platforms (Islamic Republic of Iran v. United States of America), Merits*, Judgment of 6 November 2003, [2003] ICJ Rep. 113, paras. 37–8 (Judge Buergenthal, Separate Opinion).

[114] *Oil Platforms* case, *supra* note 74, para. 73.

[115] Ibid., paras. 39–42.

[116] Ibid., paras. 64, 72; Judge Kooijmans would have preferred to apply the reasonableness test (and thus a deferential standard of review) in the context of the treaty provision, *Oil Platforms (Islamic Republic of Iran v. United States of America), Merits*, Judgment of 6 November 2003, [2003] ICJ Rep. 246, paras. 44–5 (Judge Kooijmans, Separate Opinion).

[117] Oil Platforms case, *supra* note 74, para. 73.

[118] Ibid., para. 38; see also S. M. Young, 'Destruction of Property (on an International Scale): The Recent Oil Platforms Case and the International Court of Justice's Inconsistent Commentary on the Use of Force by the United States', (2004) 30(2) *The North Carolina Journal of International Law and Commercial Regulation* 335, at 342, 370; for instance, Judge Simma more or less openly acknowledges this, *Oil Platforms (Islamic Republic of Iran v. United States of America), Merits*, Judgment of 6 November 2003, [2003] ICJ Rep. 324, para. 6 (Judge Simma, Separate Opinion); N. Ochoa-Ruiz and E. Salamanca-Aguado, 'Exploring the Limits of International Law Relating to the Use of Force in Self-defence', (2005) 16(3) EJIL 499, 505.

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5.2 Human rights over deference

The *Obligation to prosecute* case provides the second example of the Court's refusal to apply deferential standards of review. After previous efforts to hold the former Chadian president Habré criminally accountable for gross human rights violations (including torture) had failed, Belgium had filed a claim before the ICJ against Senegal, where Habré resided. It invoked a breach of the Convention against Torture (CAT) by Senegal, pointing to Senegal's refusal to extradite him to Belgium and an alleged lack of effort to investigate over several years. Thus, Belgium's goal to hold a former state leader accountable for some of the gravest human rights violations clashed with Senegalese concerns for its *domaine réservé*, embodied by the control over national criminal procedures.

For the ICJ, a central question was how strictly to apply the CAT provisions. By adopting a deferential standard of review, it could have signalled its respect for state autonomy in conducting criminal procedures. In fact, Senegal had argued that international law could not dictate 'precisely how [it] should fulfil its ... commitments, given that how a State fulfils an international obligation, particularly ... where [it] must take internal measures, is to a very large extent left to the discretion of that State'.[119] Accepting this, however, would have inevitably weakened the effectiveness of the CAT.

First, the ICJ addressed Senegal's obligation to conduct a preliminary enquiry against potential CAT offenders, and held that the choice of means in this regard is left to the state. However, based on an assessment of the CAT's object and purpose, the ICJ then set a minimum standard for this enquiry, and objectively assessed whether this standard had been met.[120] Judge Yusuf criticized this approach, advancing that it is 'erroneous to suggest ... that a general standard' exists for this assessment[121] – thereby implying that primarily, the state ought to decide how to carry out this obligation.

Concerning Senegal's obligation to prosecute, the ICJ first noted that the national authorities 'remain responsible for deciding on whether to initiate a prosecution', 'thus respecting the independence of States parties' judicial systems'.[122] However, pointing once more to the CAT's object and purpose, the ICJ also observed that submission of the matter to the competent national authorities should take place '*without delay*' and '*as soon as possible*'.[123] Again, individual judges did not agree. Judge Xue seemed to suggest that the applicable standard should be more closely related to reasonableness.[124] As she argued, Senegal should have been granted the necessary time to consider whether to extradite, and could not be found in violation during this process.

Accordingly, with resort to the object and purpose of the CAT, the ICJ declined to adopt a deferential standard of review. Its findings on the temporal scope of the obligation to prosecute are noteworthy: arguably, Senegal would have also failed to meet the reasonableness standard, making the establishment of a stricter standard unnecessary for the outcome of this case. It seems as if the ICJ purposefully set a strict standard to strengthen the CAT's regime, comparable to the *Oil Platforms* case. As one commentator observed, '[t]he Court demonstrated that in interpreting [obligations to prosecute human rights offences], it was important ... not to defer too strongly [to] the judgment of state governments'.[125]

[119] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Merits*, Judgment of 20 July 2012, [2012] ICJ Rep. 422, para. 73.

[120] Ibid., paras. 83–6.

[121] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Merits*, Judgment of 20 July 2012, [2012] ICJ Rep. 559, paras. 15–16 (Judge Yusuf, Separate Opinion).

[122] *Supra* note 119, para. 90.

[123] Ibid., paras. 115–17 (emphases added).

[124] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Merits*, Judgment of 20 July 2012, [2012] ICJ Rep. 571, para. 39 (Judge Xue, Dissenting Opinion).

[125] C. Gall, 'Coming to Terms with a New Role: The Approach of the International Court of Justice to the Interpretation of Human Rights Treaties', (2014) 21(1) AILJ 55, at 73.

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5.3 The margin of appreciation before the Court

The *Whaling in the Antarctic* case furnishes the third example of the ICJ's reticence to apply deferential standards of review. Australia had contended Japan had violated its obligations under the International Convention for the Regulation of Whaling (ICRW) and the related Schedule (which forms an integral part of the Convention) with its JARPA II whaling program in the Antarctic. In defence, Japan (like the US in the *Oil Platforms* case) *inter alia* invoked a 'margin of appreciation' as a specific standard of review.[126] This sparked a debate about the role and place of the 'margin' in general international law.[127] The case involved the applicant's interest to protect a global public good, whaling stocks, in a particularly vulnerable ecosystem. For Japan, the case involved a cultural matter of national prestige,[128] even more so as various international NGOs had been exercising pressure on Japan to stop whaling for decades.

The case hinged on whether JARPA II fell under Article VIII ICRW, according to which each contracting party may permit whaling by its nationals '*for purposes of scientific research* subject to such restrictions ... as [it] thinks fit'.[129] Japan argued that it was in the best position to assess whether JARPA II was for purposes of scientific research. According to Japan, all the ICJ could assess was whether Japan could 'reasonably regard [the program] as scientific research' or not.[130] Both Australia and New Zealand (which had intervened) contended that Article VIII stated an 'objective requirement', leaving no margin.[131]

The Court found that whether a whaling program 'is for purposes of scientific research *cannot depend simply on that State's perception*'.[132] It then examined whether JARPA II involved 'scientific research', and whether it was 'for purposes of' scientific research. In order to answer the second question, the Court examined whether its 'design and implementation [were] *reasonable* in relation to achieving its stated objectives'. Here, the ICJ held that an 'objective' standard of review ought to be applied,[133] and concluded that JARPA II failed to meet this 'objective reasonableness' test. Accordingly, it found Japan to be in violation of its obligations under the ICRW and the Schedule.

Four judges dissented from the judgment, of which two opted for a more lenient standard of review. Judge Owada argued that since Article VIII was an exception to the sovereign right of whaling, the decision whether and how to issue whaling permits 'is primarily left to the discretionary decision' of the state. The ICJ should therefore have abstained from reviewing the 'concrete modalities' of JARPA II and only examined whether Japan had been acting in good faith.[134] Judge Abraham in turn opted for a sort of 'manifestness' standard. According to him, the Court should only have examined whether there was 'manifestly' no reasonable relationship between JARPA II's means and its scientific objectives.[135]

[126] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Merits*, Judgment of 31 March 2014, [2014] ICJ Rep. 226.

[127] See, for instance, E. Bjorge, 'Been There, Done That: The Margin of Appreciation and International Law', (2015) 4(1) CJICL 181; E. Cannizzaro, 'Proportionality and Margin of Appreciation in the Whaling Case: Reconciling Antithetical Doctrines?', (2016) 27(4) EJIL 1061; A. Garrido-Muñoz, 'Managing Uncertainty: The International Court of Justice, "Objective Reasonableness" and the Judicial Function', (2017) 30(5) LJIL 457; and the contributions in M. Fitzmaurice and D. Tamada (eds.), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (2016).

[128] Briefly Payam Akhavan, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Verbatim Record of the public sitting held on July 2, 2013, CR 2013/12*, 44, para. 18.

[129] Emphasis added.

[130] Vaugham Lowe, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Verbatim Record of the public sitting held on July 15, 2013, CR 2013/22*, 60, para. 20.

[131] *Supra* note 126, para. 59, see also para. 63.

[132] Ibid., para. 61 (emphasis added).

[133] Ibid., para. 67 (emphasis added).

[134] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Merits*, Judgment of 31 March 2014, [2014] ICJ Rep. 301, paras. 19–21 (Judge Owada, Dissenting Opinion).

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5.4 Conclusion on standards of review

Accordingly, in all three cases, the ICJ narrowed down state discretion and imposed a (rather) strict standard of review, and prioritized the effectiveness of the applicable legal regimes. Nonetheless, these three cases also highlight this particular avoidance technique's distinctive potential for the ICJ, as will be discussed next.

First, what sets this avoidance technique apart from the others is that it permits an even finer balancing on the continuum between total deference to the states and no restraint at all. Accordingly, the ICJ does not have to exclude a review of the substance of an application or request altogether or discard issues from its review. Instead, it may approach even sensitive questions while still avoiding findings that could prove damaging for its institutional well-being. It is a way for the Court to effectively and – most importantly, accurately – balance out the competing demands associated with its activity.

Concerning UK human rights law, the adoption of a generalized theory of deferential standard of review has been criticized as 'non-justiciability dressed in pastel colours'.[136] Looking beyond the criticism, this quote also serves to illustrate the significant advantage of adopting such standards in the international sphere over all other avoidance techniques. The doctrine of non-justiciability – despite a forceful rejection by Lauterpacht over 80 years ago[137] – still makes its appearances before the ICJ.[138] As noted in the introduction, the states' concerns for their sovereignty is no less, if not even more acute today than it was then. Adopting deferential standards of review represents a pragmatic way to deal with these assertions. Doing so enables the ICJ to fine-tune the weight given to state sovereignty – thus introducing gradations – while still making pronouncements that provide guidance for the international community and thus without having to cede completely to the sovereignty-based interests of the states. Thereby, the ICJ can assert its role, follow its mandate and avoid the states' outright rejection at the same time.[139] In addition, as the Court becomes stronger as an institution, nothing prevents it from gradually reducing the degree of deference accorded to defendant states when determining the applicable standard of review, thereby constantly adjusting for the cost of co-operation for the defendant and similar states. To use an expression borrowed from Alexander Bickel: Adopting deferential standards of review enables the Court to 'allow leeway to expediency without abandoning principle'.[140]

Significantly, even merely discussing whether to adopt a deferential standard of review would be beneficial for the Court. As seen above, the other avoidance-techniques tend to be rather opaque, and the Court often hides the motives for their (non-)application behind legalistic pretexts. Additionally, the way it applies these techniques is inconsistent. Both these factors make it difficult for the states to anticipate the Court's use of these techniques in future cases. In contrast, the

[135] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Merits*, Judgment of 31 March 2014, [2014] ICJ Rep. 321, para. 35 (Judge Abraham, Dissenting Opinion).

[136] T. R. S. Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"', (2006) 65(3) *Cambridge Law Journal* 671, at 689.

[137] H. Lauterpacht, *The Function of Law in the International Community* (1933).

[138] In the *Marshall Islands* case, the UK asserted in its preliminary objections inter alia that 'on the date of the filing of the Marshall Islands' Application, there was 'no justiciable dispute', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections of the United Kingdom of Great Britain and Northern Ireland*, para. 26; Judge Yusuf emphatically rejected the use of this concept, *supra* note 64, paras. 9–13.

[139] On this point, see also Shany, *supra* note 111, at 922. Note that data suggests the ECtHR is increasingly using the margin of appreciation as a strategic device to signal political restraint after increasing state criticism of overreach, M. R. Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?', (2018) 9(2) JIDS 199; on the strategic potential of the margin of appreciation doctrine Dothan, *supra* note 46, at 406–7; A. Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication', in G. Huscroft (ed.), *Expounding the constitution: Essays in constitutional theory* (2008), 184, at 203–4; on strategic considerations influencing investment tribunals when determining the standard of review, Henckels, *supra* note 110, at 185–6.

[140] A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1986), 71.

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rationales for applying deferential standards of review have already been systematized by scholars and other international courts and tribunals. The arguments for and against deferential standards of review more openly acknowledge their normative roots, their link to the principle of sovereignty and to the role of international courts. By building on this edifice of ideas, the Court can lay out more openly its perspective on sovereignty and self-perception of its role. Thereby, it can demonstrate political consciousness, rather than insisting on an artificial (and not very credible) distinction between the 'political' and the 'legal', and make its decisions more transparent.

This transparency is a key factor in making the Court's decisions more predictable for states. Better predictability in turn enables states to better assess the costs for co-operating with the ICJ. States will be somewhat more inclined to refer to the ICJ if they can reasonably predict its behaviour.[141] Openly addressing the reasons why the Court is adopting a deferential standard of review (or even why not) may therefore raise the states' willingness to submit to its jurisdiction.[142] Accordingly, the transparency associated with resorting to the standard of review notion might help the ICJ to secure crucial state support.[143]

6. Conclusion

In an 'ideal' world, resort to avoidance techniques would not be necessary for the ICJ – it would be respected and its decisions implemented simply on the basis of its status in the UN system. However, reality is different. Due to the ICJ's institutional design, states have a decisive influence on its effectiveness, and this situation is highly unlikely to change in the future. In this environment, resort to judicial avoidance techniques may be a pragmatic way for the Court to adapt to that reality. This article has outlined different judicial avoidance techniques at the ICJ's disposal, proposing a categorization based on their effects: merits-avoidance, issues-avoidance and deferential standards of review. Drawing on the Court's case law, I have analysed several cases in which it seems likely that a desire for avoidance was one factor that influenced the course of action taken by the Court. However, both merits- and issue-avoidance techniques hold significant risks for the ICJ. Resort to them has often been perceived as an abdication of its role as the principal judicial organ of the UN, and has provoked negative reactions from various states, scholars and civil society.

In contrast, resort to the third category, deferential standards of review, may function as a particularly nuanced and transparent avoidance technique. If used with strategic wisdom,[144] this avoidance technique will do little damage to the Court's standing and prove particularly useful as a power-balancing tool. Judicious resort to deferential standards of review thus seems to be one of the most promising options available for the ICJ to acknowledge states' interests in order to win their support and to be able to fulfil its mandate as envisaged in the UN Charter.

[141]On this see C. W. Jenks, *The Prospects of International Adjudication* (1964), 106; linking predictability to a court's (perceived) legitimacy, N. Grossman, 'Legitimacy and International Adjudicative Bodies', (2009) 41 *The George Washington International Law Review* 107, at 149–50.

[142]Of course, the willingness of states to submit to the Court's jurisdiction will be even greater the more often the Court applies deferential standards of review, as this lowers the risk for 'costly' adjudication against them.

[143]Some authors reject this transparency-claim, see, for instance, Shirlow, *supra* note 106, at 612.

[144]On the dangers of resorting too readily to deferential review standards see, for instance, C. E. Foster, 'Adjudication, Arbitration and the Turn to Public Law "Standards of Review": Putting the Precautionary Principle in the Crucible', (2012) 3(3) JIDS 525, at 557–8; Bjorge, *supra* note 127, at 190; see also, highly critical of avoidance, Bianchi, *supra* note 70, at 86.

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