

# Contents

|                                                                                                   |           |
|---------------------------------------------------------------------------------------------------|-----------|
| <i>Acknowledgements</i> .....                                                                     | <i>v</i>  |
| <i>List of Tables</i> .....                                                                       | <i>ix</i> |
| <i>Table of Cases</i> .....                                                                       | <i>xi</i> |
| <br>                                                                                              |           |
| 1. Introduction .....                                                                             | 1         |
| I. Significance of the Standard of Review .....                                                   | 4         |
| II. Definition of the Term ‘Standard of Review’ .....                                             | 6         |
| III. Structure of the Book .....                                                                  | 11        |
| IV. Methodology .....                                                                             | 12        |
| V. Key Empirical Insights .....                                                                   | 23        |
| <br>                                                                                              |           |
| 2. Old Wine in New Skins? .....                                                                   | 25        |
| I. The Doctrine of Non-Justiciability in the International<br>Order .....                         | 26        |
| II. State Arguments for a Differential Standard of Review .....                                   | 31        |
| III. A Common Denominator: The Better-Placed Contention .....                                     | 41        |
| IV. Standard of Review Claims as Old Wine in New Skins? .....                                     | 45        |
| <br>                                                                                              |           |
| 3. Something New under the Sun: Standards of Review as a<br>Judicial Avoidance Technique .....    | 50        |
| I. Judicial Avoidance: Dubious from an Orthodox Point<br>of View, Yet a Practical Necessity ..... | 51        |
| II. Pronouncements Serving as Merits-Avoidance Techniques .....                                   | 57        |
| III. Pronouncements Serving as Issue-Avoidance Techniques .....                                   | 66        |
| IV. Differential Standards of Review as a Judicial Avoidance<br>Technique .....                   | 73        |
| <br>                                                                                              |           |
| 4. Absence of Judicial Oversight .....                                                            | 79        |
| I. National Security Interests .....                                                              | 81        |
| II. Domestic Matters .....                                                                        | 97        |
| III. Political Determinations .....                                                               | 101       |
| IV. Scientific Determinations: Explicit Rejection in <i>Whaling</i> .....                         | 109       |
| V. Conclusion for the Absence of Judicial Oversight .....                                         | 112       |
| <br>                                                                                              |           |
| 5. Good Faith .....                                                                               | 119       |
| I. A Textual Basis for the Application of the Good Faith<br>Standard .....                        | 120       |

|      |                                                                                       |     |
|------|---------------------------------------------------------------------------------------|-----|
| II.  | Good Faith Standard as Counterbalancing: <i>Bosnian Genocide</i> .....                | 125 |
| III. | Conclusion for Good Faith .....                                                       | 127 |
| 6.   | Reasonableness .....                                                                  | 130 |
| I.   | National Security Interests .....                                                     | 131 |
| II.  | Domestic Measures .....                                                               | 140 |
| III. | Political Determinations: <i>Conditions of Admission to the UN</i> .....              | 148 |
| IV.  | Scientific Determinations .....                                                       | 150 |
| V.   | Conclusion for Reasonableness .....                                                   | 162 |
| 7.   | <i>De Novo</i> .....                                                                  | 168 |
| I.   | National Security Interests .....                                                     | 170 |
| II.  | Domestic Measures .....                                                               | 191 |
| III. | Political Determinations .....                                                        | 200 |
| IV.  | Scientific Determinations: <i>Whaling</i> .....                                       | 204 |
| V.   | Conclusion for <i>De Novo</i> .....                                                   | 209 |
| 8.   | Conclusion .....                                                                      | 213 |
| I.   | <i>De Novo</i> as the Court's Default, but Far from Constant Standard of Review ..... | 214 |
| II.  | Rarely Autonomous Adoption of a Deferential Standard of Review .....                  | 218 |
| III. | Mostly Stricter Standard of Review than Invoked by the Respondents .....              | 219 |
| IV.  | Subject-Matter as a Factor for the Adoption of a Deferential Standard of Review ..... | 221 |
| V.   | Strategic Use of Deferential Standards of Review .....                                | 227 |
|      | <i>Bibliography</i> .....                                                             | 232 |
|      | <i>Index</i> .....                                                                    | 243 |