



Book Review: Failings of the International Court of Justice

By Otto Spijkers¹

**Mark A. Weisburd, *Failings of the International Court of Justice*, Oxford University Press 2016
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Failings of the International Court of Justice begins with a typical quote from a typical textbook, *International Law* by Lori Damrosch. Damrosch explains that *formally*, the judgments of the International Court of Justice (ICJ or Court) are binding only on the parties to the dispute, and only with respect to that particular dispute; by contrast, *informally*, the judgments of the ICJ have great influence on the development of international law.

I looked at the other textbooks and handbooks on international law in my collection and indeed found many similar remarks. Take, for example, *Brownlie's principles of public international law* by James Crawford:

"In theory the Court applies the law and does not make it [...] Yet a decision, especially if unanimous or almost unanimous, may play a catalytic role in the development of the law" (p. 40).

Or *International law* by Malcolm Shaw: "The decisions and advisory opinions of the ICJ [...] have played a vital part in the evolution of international law" (p. 808). Or *Public international law* by Alina Kaczorowska-Ireland:

"The Court has greatly contributed to the development and clarification of international law. In its judgments the Court has always paid attention to the evolving nature of international law and has itself contributed to the evolution of that law." (p. 674)

International law by Jan Klabbers is more explicit:

"It has long been a matter of debate whether the ICJ can be expected to be more than a settler of disputes. Many observers feel that the ICJ should not limit itself to settling disputes, but also has a certain responsibility when it comes to developing international law. After all, its judgments can be highly authoritative and in the absence of an international legislature, what better organ to help develop the law than the world's leading court? Others may point out, though, that this would give the Court a political task, for which it is perhaps not particularly well equipped." (p.164)

In Weisburd's opinion, these textbooks give the student the impression that, despite the fact that the ICJ's Statute explicitly states that "the decision of the Court has no binding force except between the parties and in respect of that particular case" (Article 59), the Court in fact "plays a crucial role in creating international law, to the point that its decisions ought to be taken extremely seriously" (p.2). The main message of Weisburd's *Failings* is that the ICJ should take its Statute more seriously. In his view, the Court "lacks the formal authority to determine the content of international law". And the Court "has not performed well enough to have earned that type of authority [*de facto*]" (p. 4). Weisburd asserts that the main clients of the Court – the states – appear to agree with him, as they have been very reluctant to bring before the Court disputes that involve general issues of international law that are in need of further development. In other words, Weisburd believes it is time to re-evaluate the Court's track-record and its future role in the development and clarification of international law.

In arguing his case, Weisburd first looks at the *travaux préparatoires* of the ICJ Statute, to show that the founding fathers never intended the Court to play a law-making role (Chapter 1). Chapter 2 explains where the Court looks and ought to

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look to determine the law. Chapters 3 and 4 list a long series of errors made by the Court, both of a procedural (Chapter 3) and substantive nature (Chapter 4). Chapter 5 adds some statistics, and then Weisburd concludes. Of course, we already know what the conclusions will be, as they already have been set-out in the introduction: the Court is not doing a good job. Because the book argues towards a pre-set conclusion, the book reads more like a memorial than an objective academic work.

Chapter 1 is about the *travaux*. The ICJ Statute is very similar to that of its predecessor, the Permanent Court of International Justice (PCIJ), and thus Weisburd focuses his analysis of the *travaux préparatoires* on the PCIJ's Statute. This makes much sense, but Weisburd does seem to have overlooked certain very interesting debates on the role of the Court, which took place at the San Francisco Conference of 1945, at which the UN Charter and ICJ Statute were drafted. In his view, "the functioning of the Court was not given much attention in San Francisco" (p.23), but one might conclude differently.

In fact, the role of the Court in settling international disputes was discussed extensively at the San Francisco Conference. It is worth looking briefly at this discussion. The Australian delegate at some point suggested that "in general the Security Council shall avail itself to the maximum extent of the services of the Court in the settlement of disputes of a legal character, in obtaining advice on legal questions connected with other disputes, and in the ascertainment of disputed facts" (Amendments to the Dumbarton Oaks Proposals Submitted on Behalf of Australia, published in *The United Nations conference on international organization* (UNCIO), vol. 3, p. 551). Some states believed all disputes should obligatorily be brought before the ICJ. For example, the Uruguayan delegation proposed that "any difference, opposition or conflict between nations, of any character whatever, ought obligatorily to be submitted to the International Court of Justice, if it should not first have been settled by good offices or arbitral procedure" (Uruguayan Amendments, UNCIO, vol. 3, p. 29). To make this possible, Belgium proposed that all states "should recognize the obligatory jurisdiction of the Permanent Court of International Justice as regards any question of law for which they have not made use of another method of peaceful settlement", and that "they should acknowledge themselves bound by the decisions of the Court" (Suggestions of the Belgian Government, UNCIO, vol. 3, p. 334). The role of the Council would then be to monitor compliance of the Court's judgments. This is what Venezuela suggested: "the ideal [...] would be to entrust the solution of international controversies to the International Court or an independent arbitration agency, and entrust to the Security Council the mission of executing such decisions and of imposing on any States in conflict the intervention of the agency mentioned" (Venezuelan Amendments, UNCIO, vol. 3, p. 208).

Weisburd does not refer to this discussion. He concludes that the ICJ was intended, by the founding fathers, to be "a relatively weak institution" (p. 23). In light of the many proposals put to the table – referred to above – the evidence does not appear to support his conclusion.

Chapter 2 mainly serves to set the stage: it introduces the reader to the sources of international law that the Court is authorized to apply when settling the disputes brought before it and when answering the questions put to it. The Chapter is, however, not as innocent as might appear. Especially in the section on customary law, Weisburd already shares his criticism of the Court's approach to identifying customary norms. He objects to the approach that derives custom from legally non-binding documents, such as General Assembly resolutions or treaties that are not yet in force. He believes there is no convincing theory to support this approach and that it is in any case driven too much by a belief in globally shared values (p. 77-78).

Chapters 3 and 4 take the reader through the case law of the Court. Weisburd identifies all sorts of mistakes the Court supposedly has made, and he categorizes them under various headings. If you desperately want to find errors in the work of human beings, you will always find them. And judges are, of course, human beings. At the end of Chapter 3 (on procedural errors), Weisburd claims to have shown that "the Court has, since 1945, made numerous procedural errors" (p. 244). In fact, "the Court's judgments include so many analytical errors that any recapitulation would be as long as the initial discussion" (p. 244). On issues of substance (Chapter 4), the Court does not do much better. The Court's track record is referred to by Weisburd as of "highly questionable" quality (p. 336). This is especially so for the way the Court has identified and then applied norms of customary law. In a way, this conclusion cannot come as a surprise because in Chapter 2, Weisburd already expressed his disagreement with the general method used by the Court to identify and apply custom.

At the beginning of Chapter 5, Weisburd claims that the preceding chapters have "establish[ed] that a significant fraction of the judgments produced by the ICJ [...] include seriously questionable elements" (p.340). The Chapter then builds on that "established fact"; however, if the reader is not convinced by the arguments made in previous Chapters, it will be difficult to go along with what follows. In Chapter 5, Weisburd offers all kinds of statistics, apparently in an attempt to

demonstrate the gravity of the problem. Of the 94 inter-State disputes, he claims 34 contentious cases and 3 advisory opinions contained “problematic” assessment of the facts and/or legal reasoning (p. 350).

The introduction and Chapters 1 and 2 of the book basically outline what the Court ought to have done and how exactly it ought to have done it. Chapters 3, 4 and 5 purport to show that the Court has not done what it should have done; at the least, what is has done is not good enough. The book is very much written towards a particular conclusion – the Court is not doing a good job. Some readers might not appreciate this subjective writing style very much. They might prefer to draw their own conclusions, based on an objective presentation of all arguments from both sides. If you are one of these readers, then you may find the book is at times a little difficult to get through.

