***Fouchard, Felix*: The Standard of Review Before the International Court of Justice: Between Principle and Pragmatism.** Oxford: Bloomsbury 2024. ISBN 978-1-50997-130-5. xvi, 248. €85.- eISBN 978-1-50997-131-2. €76.50

By some measure, the essence of a commitment to international law is the willingness to relinquish the right to judge one's own conduct. Scholars and judges have long taken a dim view of so-called 'self-judging' clauses that reflect a distrust of international adjudication and risk abuse.[1] At the same time, states value rules that allow for discretion 'to opt out of their international legal commitments when political or economic pressures become too high'.[2] Otherwise put, they value those rules that contain an expectation of deference from courts and tribunals. But when adjudicators should accept the state's own assessment of what constitutes compliance with a norm remains sharply contested. It is also the subject of an ever-growing literature, especially as scholars have sought to compare practice across international courts and tribunals.[3]

'The Standard of Review before the International Court of Justice: Between Principle and Pragmatism' sets out to examine that practice at the principal judicial organ of the United Nations. Focused on the case law of the International Court of Justice (ICJ), *Felix Fouchard* defines 'standard of review' to mean the degree to which 'the ICJ scrutinises the first-hand assessments and determinations of a state in proceedings in which the latter's compliance with obligations under international law is at issue' (p. 7). He finds that the ICJ resorts regularly to deferential standards of review. He further argues that deference is a technique of 'judicial avoidance' that the Court can deploy strategically to dispose of difficult issues without undermining its mandate or compromising the judicial function (p. 12).

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1 See Fabian Eichberger, 'Self-Judgment in International Law: Between Judicialization and Pushback', LJIL 37 (2024), 915-938 (916). Consider *Judge Lauterpacht*'s hostility to reservations to optional clause declarations that purport to give states the exclusive power to decide whether an issue is a matter of national jurisdiction. Separate Opinion of Judge Lauterpacht, ICJ, *Certain Norwegian Loans* (France v. Norway), judgment of 6 July 1957, ICJ Reports 1957, 34.

2 Eichberger (n. 1) at 916. By one account, self-judging clauses may 'further international cooperation more than they impede it' by providing 'exit-valves in areas where important national interests are at stake, interests of such importance that states might prefer not to cooperate at all rather than to concede permanent restrictions on their sovereignty in such domains'. Stephan Schill and Robyn Briese, '"If the State Considers": Self-Judging Clauses in International Investment Agreements', Max Planck UNYB 61 (2009), 61-140 (138).

3 Recent contributions include Johannes H. Fahner, *Judicial Deference in International Adjudication: A Comparative Analysis* (Bloomsbury 2020) and Esme Shirlow, *Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication* (Cambridge University Press 2021). For an enlightening assessment of both, see Joshua Paine, 'Deference and Other Standards of Review in International Adjudication', The Law & Practice of International Courts and Tribunals 21 (2022), 431-441.

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The book proceeds as follows. Chapter 2 ('Old Wine in New Skins?') provides an overview of the doctrine of non-justiciability. The author summarises the long-held idea that states are 'better-placed' than international courts and tribunals to make some types of determinations (p. 25) and that certain issues are simply incapable of 'judicial appreciation' (p. 29). The doctrine of non-justiciability has fallen into disfavour, but states tend to ask courts and tribunals to adopt deferential standards of review in disputes concerning the same types of situations that were once framed as non-justiciable – namely, cases that involve 'essential interests, domestic measures, "political" determinations, and scientific determinations' (p. 41). The invocation of deferential standards of review is therefore a 'newly wrapped, less offensive way' for states to advance the same ideas encapsulated by non-justiciability (p. 47).

Chapter 3 ('Something New under the Sun: Standards of Review as a Judicial Avoidance Technique') develops the claim that deferential standards of review provide a means for the ICJ to communicate to states that it will respect their 'prerogatives in certain, especially sensitive areas' (p 74).[4] This can lower 'the perceived cost of cooperation' and encourage states to consent to jurisdiction in the first place (p. 54). Whether or not the Court actually defers to state action, the reasoning inherent to engaging with arguments about discretionary standards (e. g., necessity, proportionality, capacity, due diligence) can enhance the legitimacy and predictability of the Court's decisions.[5] While states 'do not invariably expect' deference from the ICJ (indeed, they may staunchly oppose deference 'when they appear before the Court as applicants') (p. 56), the author suggests that a posture of deference can be part of a 'strategy of incrementalism' that generates trust over time (p. 76). This is an idea often associated with the European Court of Human Rights, but one that is difficult to extend to the ICJ given its smaller and more diverse case load.[6] Nonetheless *Fouchard* sees resolving a dispute by showing deference to the state accused of non-compliance as preferable to 'all-or-nothing' avoidance techniques that foreclose any consideration of the merits and conceal the Court's motives behind 'legalistic pretexts' (for example, the

4 This chapter draws on Felix Fouchard, 'Allowing "Leeway to Expediency, Without Abandoning Principle"? The International Court of Justice's Use of Avoidance Techniques', LJIL 33 (2020), 767-787.

5 This is a recurring idea in the literature. See, e. g., Vladyslav Lanovoy, 'Standards of Review in the Practice of International Courts and Tribunals' in: Gábor Kajtár, Başak Çali and Marko Milanovic (eds), *Secondary Rules of Primary Importance in International Law* (Oxford University Press 2022), 42-64 (43).

6 See Mikael Rask Madsen, 'The European Court of Human Rights and the Politics of International Law' in: Wayne Sandholtz and Christopher A. Whytock, *Research Handbook on the Politics of International Law* (Edward Elgar 2017), 227-268.

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Court's rejection of the applicants' standing in *South West Africa* or its finding that the 'dispute requirement' was unmet in the *Nuclear Disarmament* cases) (p. 75).[7] The author is careful to note, however, that recourse to avoidance techniques has costs and benefits in every case; if the Court is too cautious, it also puts its 'relevance and credibility' at risk. As he puts it: 'There is no magic formula' (p. 56).

The remainder of the book is divided into chapters on non-reviewability, good faith, reasonableness, and *de novo* review. The author draws upon 31 judgments and advisory opinions in which a participating state or a member of the Court 'advocated for a deferential standard of review' (p. 13).[8] Notably, he finds that the Court hardly ever accepts the argument that state action is entirely non-reviewable, despite a dozen cases (ranging from *Corfu Channel* to more recent cases such as *Diallo* and *Whaling*) in which states urged complete deference. This reinforces the general point that non-justiciability is a losing argument.[9]

A more significant challenge is presented by the effort to define and delineate the other standards of review that structure the analysis. The author describes good faith review to mean 'whether at the time that the state had taken the decision now under scrutiny, it could believe in good faith that the reasons for it were valid or that the conditions for the legality of the measure were indeed present' (p. 17). In turn, reasonableness review asks whether 'a rational actor could have arrived at the same assessment as [the] state' (p. 18). The author concedes that the line between good faith and reasonableness is 'blurred' but offers that reasonableness requires 'convincing' or 'serious' justifications, not simply '*any* rational basis' (pp. 18, 21). In contrast to both standards, *de novo* review means the ICJ 'will simply state in objective terms

7 ICJ, *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), judgment of 18 July 1966, ICJ Reports 1966, 6; ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Arce and to Nuclear Disarmament* (Marshall Islands v. United Kingdom), preliminary objections, judgment of 5 October 2016, ICJ Reports 2016, 833.

8 This suggests that potentially relevant cases, where a deferential standard of review was possible, are left unconsidered. For example, interpretation disputes under Article 60 of the *ICJ Statute* may amount to a state asking the Court to defer to its interpretation of what compliance requires. See, e. g., ICJ, *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (Mexico v. United States), judgment of 19 January 2009, ICJ Reports 2009, 3 (25); ICJ, *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning Temple of Preah Vihear* (Cambodia v. Thailand), judgment of 11 November 2013, ICJ Reports 2013, 281 (41, 49, 84).

9 The author finds that the Court considered issues non-reviewable in only three proceedings: *Certain Norwegian Loans*, *South-West Africa*, and *Legality of Nuclear Weapons*. The inclusion of the latter two cases is curious because the author also presents them as illustrations of other types of avoidance techniques.

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whether or not the subsumption advanced by the concerned state is correct' (p. 21).

In principle, it makes sense that the degree of deference extended by the Court operates along a continuum (p. 7). However, the book's detailed review of the cases suggests that any fine line separating one standard of review from another is drawn with disappearing ink. As others have noted, 'attempts to define standards of review often boil down to a replacement of one indeterminate concept by another', such that the 'conceptual value' of terms such as good faith and reasonableness 'seems limited to expressing some degree of deference, rather than providing a clear analytical framework of analysis'.[10] Perhaps inadvertently, the book illustrates this critique. In particular, the effort to set out when the ICJ has applied a 'good faith' standard (Chapter 5) or 'reasonableness' standard (Chapter 6) tends to suggest a distinction without a difference.[11] Another difficulty is the Court's tendency to apply different standards of review to separate aspects of a case. The author identifies this phenomenon in cases ranging from *Nicaragua* and *Gabčikovo-Nagymaros* to *Whaling* and *Certain Iranian Assets*. This complicates any attempt to systematise the Court's approach and underlines the practical difficulties with distinguishing good faith from reasonableness and even between reasonableness and *de novo* review.

Take the author's use of the *ELSI* case as an example of good faith review. The dispute in that case turned on whether Italy's requisition of an industrial facility owned by two U. S. corporations was an arbitrary measure prohibited by the relevant bilateral treaty. This meant asking whether there had been any legitimate reason for the local official to have seized the facility. However, the author does not explain why assessing whether a measure is arbitrary is necessarily a question of good faith rather than reasonableness. Moreover, it is not entirely clear that this was how the Court proceeded. The author quotes the judgment for the Court's view that the measure 'cannot be said to have been unreasonable or merely capricious' (p. 121).[12] The term 'good faith' appears nowhere in the judgment. Similarly, in *Mutual Assistance*, it is difficult to know why the ICJ's decision to credit a French judge's determination that France's 'essential interests' were at stake (such that

10 Fahner (n. 3), at 146, 148.

11 *Vladyslav Lanovoy* describes the 'standard of good faith review' as 'closely intertwined with the notion of reasonableness'. Lanovoy (n. 5), 47. Compare further the Court's view that the requirement to perform treaties in good faith obliges states to apply treaty provisions 'in a reasonable way'. ICJ, *Gabčikovo-Nagymoros Project (Hungary/Slovakia)*, judgment of 25 November 1997, ICJ Reports 1997, 79 (142).

12 ICJ, *Electtronica Sicula S. p. A.* (United States v. Italy), judgment of 20 July 1989, ICJ Reports 1989, 15 (129). The Court may have used that phrase because counsel for the United States had described the requisition as an 'unreasonable or capricious exercise of authority'.

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France was within its rights not to transmit a sensitive file to Djibouti) should be understood as resort to good faith rather than reasonableness. The problem also runs in the opposite direction when the author turns to cases that adopt a reasonableness standard. For example, it is not entirely clear that the ICJ in *Corfu Channel* found that a coastal state's right to regulate innocent passage in exceptional circumstances was subject to a standard of reasonableness rather than good faith. Similarly, while the author treats *Rights of U. S. Nationals in Morocco* as a 'reasonableness' case, the Court itself described Morocco's right to adopt a customs calculation method as 'a power which must be exercised reasonably and in good faith' (p. 141). The author's focus on the relative intensity of the Court's review does not quite manage to explain why these cases illustrate one deferential standard rather than another. It also tends to blur the distinction that the author makes between the standard of review and the standard of proof (i. e., 'the degree of judicial conviction required') (p. 8). More generally, the book's approach reinforces a view that 'the formulation of specific standards of review, independent of the applicable legal norm, does not result in a better understanding of the adjudicator's intensity of review.'[13]

A more interesting example comes from the author's treatment of the *Bosnian Genocide* case, where the ICJ broadly set out every Contracting Party's obligation under Article I of the *Convention on the Prevention and Punishment of the Crime of Genocide* 'to employ all means reasonably available to them, so as to prevent genocide so far as possible'.[14] It further explained that responsibility would depend on whether 'the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide'.[15] Having determined that genocide took place at Srebrenica, the key question was whether Serbia and Montenegro 'had manifestly' failed to act – a standard that the author describes as a 'qualified standard of review' that corresponds to good faith (p. 126). Drawing on work by *Serena Forlati*, he considers that the Court consciously sought to establish a deferential standard of review for future cases 'to counterbalance the unlimited geographical reach' of the extraterritorial obligation to prevent genocide that it had just articulated (p. 127).[16] A pending action by Nicaragua against Germany in relation to the

13 Fahner (n. 3), 148.

14 ICJ, *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, ICJ Reports 2007, 43 (430).

15 ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro* (n. 14).

16 See Serena Forlati, 'The Legal Obligation to Prevent Genocide: *Bosnia v. Serbia* and Beyond', Polish Y. B. Int'l L. 31 (2011), 189-205 (203-204).

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situation in Gaza may test the author's claim and clarify what standard of review applies in disputes relating to the duty to prevent genocide.[17] At the provisional measures stage of that case, the Court suggested a willingness to extend significant deference to Germany and its internal risk assessment process.[18]

The author also posits an outward-looking explanation for the Court's approach in *Diallo*, albeit to establish a more demanding standard of review in future cases, not a low threshold. In this case, the Court used reasonableness to assess whether the Democratic Republic of Congo's ground for Mr. Diallo's expulsion (public order) was compatible with its obligations under the *International Covenant on Civil and Political Rights*.[19] According to the author, this was a 'stricter standard' than the Court needed to adopt 'under considerations of judicial economy' and can therefore be seen 'as a signal to the state community' about strict limits on the invocation of public order to justify police action (p. 137). This reads too much into the decision. It seems just as likely (if not more so) that the Court viewed reasonableness as the appropriate standard of review based on the relevant treaty text and core principles of international human rights law (i. e., that a restriction must be necessary and proportionate in pursuit of a legitimate aim).[20] In this light, there seems little reason to attribute the Court's decision to apply a reasonableness standard to broader considerations of community interest.

In its penultimate chapter, the book examines several cases in which the ICJ rejected calls for deference and engaged in *de novo* review. Among other examples, this includes detailed assessments of *Nicaragua*, *Oil Platforms*, and *Construction of a Road* (security interests), *Obligation to Prosecute or Extradite* (domestic measures), the *Namibia* advisory opinion (political determinations), and *Whaling* (scientific determinations). The author concludes that *de novo* review remains the Court's default posture and notes the 'near-constant, conspicuous absence of justification for its adoption of this standard', even when states have argued extensively for deference (p. 209). Again, however, the examples reveal that whether the ICJ has engaged in *de novo* review or applied a reasonableness standard may lie in the eye of the beholder. Is it

17 ICJ, *Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory* (Nicaragua v. Germany), provisional measures, order of 20 April 2024 (Nicaragua v. Germany).

18 ICJ, *Nicaragua v. Germany* (n. 17), (17). See also Separate Opinion of Judge Iwasawa, *Nicaragua v. Germany* (n. 17), (9, 11); Declaration of Judge Cleveland, *Nicaragua v. Germany* (n. 17), (11-13, 16).

19 ICJ, *Ahmadou Sadio Diallo* (Guinea v. DRC), judgment of 30 November 2010, ICJ Reports 2010, 639 (72-74).

20 Article 13 of the ICCPR provides that a lawfully present alien must have the opportunity to challenge his expulsion unless 'compelling reasons of national security otherwise require'.

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entirely clear that the Court eschewed some implicit consideration of reasonableness in assessing Liechtenstein's decision to grant nationality to Mr. Nottebohm?[21] Did the Court's approach in *Belgium v. Senegal* really establish that the Court would not consider reasonableness in future cases in which a state is alleged to have violated a treaty obligation by not initiating criminal proceedings against an alleged torturer?[22]

The book's assessment of the *Whaling* case merits special comment, especially since the case is often seen as a clear example of the ICJ directly addressing the standard of review. The dispute concerned whether a programme called JARPA II was 'for purposes of scientific research' under Article VIII of the *International Convention on the Regulation of Whaling* (ICRW) and therefore exempt from the moratorium on commercial whaling. Japan initially argued that its discretion to issue special permits for scientific whaling under JARPA II was non-reviewable on the basis of the treaty's plain language. It later asserted that the Court's review should be limited to whether it had issued the permits in good faith before it eventually accepted that a reasonableness standard should apply, even while maintaining that the treaty afforded it a 'margin of appreciation'. Australia (the applicant) and New Zealand (as an intervenor) argued for *de novo* review and rejected any notion of judicial deference, especially in light of 'the need to uphold the regime effectiveness of the ICRW' (p. 160).

First, the Court determined that JARPA II 'could broadly be characterised as "scientific research"'. *Fouchard* asserts that this reflected the Court's adoption of a reasonableness standard, not merely good faith, because the Court 'analysed the programme's characteristics – even if superficially' (p. 161). The Court then considered whether JARPA II was 'for purposes of' scientific research. In the Court's view, this turned on whether the programme's design and implementation were 'reasonable in relation to its stated objectives'.[23] On this point, *Fouchard* argues that 'despite its assertions to the contrary', the Court 'silently applied the *de novo* standard' (p. 205). He asserts further that by adopting this 'concealed *de novo* standard […] the ICJ only half-heartedly recognised its institutional limitations as a court of law' (p. 209). To reach that conclusion, the author emphasises that the Court dedicated over 30 pages to evaluating the details of JARPA II – an approach 'so demanding that it resembles the *de novo* standard to the

21 ICJ, *Nottebohm Case* (Liechtenstein v. Guatemala), judgment of 6 April 1955, ICJ Reports 1955, 4.

22 ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), judgment of 20 July 2012, ICJ Reports 2012, 422.

23 ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), judgment of 31 March 2014, ICJ Reports 2014, 226 (172).

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point of becoming indistinguishable from it' (p. 207). Yet rather than revealing some kind of judicial subterfuge, this highlights how difficult it may be to distinguish *de novo* review from reasonableness review in many cases.[24] By a different reading, the ICJ's approach in *Whaling* provided ample opportunity for Japan to persuade the Court that its assessment of JARPA II as a programme for purposes of scientific research was reasonable and therefore entitled to deference. It is not clear why adopting a reasonableness standard precludes a detailed assessment of the state's basis for claiming to have acted reasonably. This is arguably a fair description of what the Court set out to do in taking a forensic and exacting approach to JARPA II – an analysis that consistently identified points of 'contradiction or irrationality' in the programme.[25] In the end, the judgment conveys that Japan failed to persuade the Court that it had acted reasonably in granting special permits on the basis of JARPA II.[26]

In sum, 'The Standard of Review before the International Court of Justice' successfully demonstrates that while certain landmark cases might suggest that the ICJ is preternaturally opposed to resorting to deferential standards of review, 'the real picture is more complex' (p. 214). At the same time, the author's empirical study reveals 'no clear pattern' with respect to most types of cases; the exception is self-defence, where the Court has typically *rejected* calls for deference (p. 214). The author's detailed treatment of the cases is commendable, especially the attention given to party arguments. For practitioners, the material provides a resource to consult when mapping out the best means to advocate for or against a given standard of review. The book might have been even more useful if organised by case type (national security, domestic measures, political determinations, scientific determinations). The

24 For an insightful analysis of how the Court implemented a reasonableness standard of review in *Whaling* (drawing on notions of 'necessity' and 'adequacy'): Asier Garrido-Muñoz, 'Managing Uncertainty: The International Court of Justice, "Objective Reasonableness" and the Judicial Function', LJIL 30 (2017), 457-474.

25 Claire Brighton, 'Unravelling Reasonableness: A Question of Treaty Interpretation', Austr. Y. B. Int'l L. 32 (2014), 125-134 (132).

26 The author also suggests that the judgment reflected *de novo* review because the Court did not credit the views of 'involved experts' who considered that the annual sample sizes in JARPA II were reasonable (p. 207). This raises important questions about how expert testimony should play into the application of a deferential standard of review. In *Whaling*, one expert witness appeared for Japan, and his views on the reasonableness of sample sizes were contradicted by Australia's expert. *Whaling* (n. 23) (20, 130, 158, 190). In this context, it is not clear how the Court's failure to credit the testimony of Japan's expert defeats the proposition that the Court's standard was reasonableness. Japan's expert witness was not directly involved in the design of JARPA II. One might wonder how the Court would have dealt with testimony from a Japanese scientist who had been directly involved in JARPA II and was prepared to testify to the good faith and reasonableness of its design.

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concluding chapter contains a helpful set of tables that illustrates the material in this way.

However, the book does not go quite as far as some of the author's claims suggest. The core argument that 'the standard of review notion holds distinct advantages for the ICJ's institutional stability and credibility' compared to other techniques of judicial avoidance remains speculative (p. 213). Indeed, the study is not focused on the broader *impact* of how the Court has resolved any given case by adopting a particular standard of review or avoidance technique. Moreover, the author ultimately points to few examples in which the Court's adoption of a deferential standard seemed clearly aimed to avoid sensitive or highly political issues (in contrast to how the Court has purportedly used 'merits-avoidance' techniques in other cases).[27] For example, the author presents the adoption of a reasonableness standard to assess Nicaragua's regulation of navigation on the San Juan River in *Navigational Rights* as a means by which the ICJ avoided 'finding against Nicaragua on several of Costa Rica's claims' and gave itself leeway in future cases to defer 'to a state's power of regulation' (p. 228). But it is difficult to see why the Court would have been concerned about potential backlash from Nicaragua in the specific case or why it would have viewed this as a vehicle by which to 'set higher hurdles' to finding violations in future cases (p. 228) (especially since the Court's approach to reasonableness in *Navigational Rights* amounted to a test of 'strict necessity').[28] More convincingly, the author acknowledges that not every instance in which the Court adopts a deferential standard of review 'amounts to the use of this notion as an avoidance technique' (p. 227). Instead, the author concludes that the cases demonstrate that the Court has used the standard of review as an avoidance technique 'in far fewer proceedings than it could have' (p. 212). This speaks to the Court's broader view of its role and function.

The author has also sought to identify how decisions to adopt a posture of deference (especially when not outcome-determinative for the instant case) create options for avoidance in future cases (a 'forward-looking avoidance technique') (p. 228). However, there is also reason for scepticism here. First, there is scant evidence that the Court's decision-making process is as forward-looking as the author's claim assumes. Secondly, the author does not identify any example of a decision to adopt a deferential standard in one case that actually facilitated avoidance in a subsequent case. Thirdly, it is not clear

27 See, e. g., Manuel Casas, 'Functional Justiciability and the Existence of a Dispute: A Means of Jurisdictional Avoidance?', Journal of International Dispute Settlement 10 (2019), 599-621; Surabhi Ranganathan, 'Nuclear Weapons and the Court', AJIL Unbound 111 (2017), 88-95.

28 Garrido-Muñoz (n. 24), 469.

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why deciding that a measure of discretion is embedded into certain rules of international law – and examining whether state action falls within the limits of that discretion – should be construed as 'avoidance' at all, rather than simply reflecting the Court's best understanding of what the law requires.

As a result, some insights to be drawn from this book may differ from those emphasised by the author. These include the difficulty in distinguishing among various standards of deference or discerning a coherent approach across the Court's diverse jurisprudence.[29] Indeed, *Fouchard* concedes that his study shows that one cannot speak of a 'doctrine of deferential standards of review' at the ICJ (p. 214). For that reason, it is also difficult to conclude that resort to deferential standards of review has served to inject consistency and predictability into the Court's work. The author may be right that the ICJ sometimes makes 'rhetorical concessions' to deference that do not reflect how it actually decides an issue (p. 229). But this goes less to the idea that the ICJ treats the standard of review as a technique of judicial avoidance and more to the fact that the Court's practice remains fluid and contextual.

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29 Specialized dispute settlement regimes that adjudicate disputes arising out of a single treaty may be better positioned to 'fine-tune a uniform standard of review' than the ICJ, which hears cases relating to many different areas and instruments of international law. Lanovoy (n. 5), 49.

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