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# International Judges as Dispute-Settlers and Law-Enforcers: From International Law Without Courts to International Courts Without Law

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# International Judges as Dispute-Settlers and Law-Enforcers: From International Law Without Courts to International Courts Without Law

*A Reply to Anna Spain*

SAMANTHA BESSON\*

## I. THE ARGUMENT

In her paper, Anna Spain discusses challenges and opportunities for international adjudication. She understands international adjudication as a means (i) to resolve (as opposed to “settle,” which would merely require agreement among parties) (ii) disputes (as opposed to “conflicts,” which imply the use of force) (iii) pertaining to international law (as opposed to “international relations,” which is used more broadly). Spain sets two goals for her paper: to identify challenges for international adjudication and to introduce new perspectives.<sup>1</sup>

For most of the paper, Spain criticizes the lack of effectiveness of international courts. She does so by identifying the three main court

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\* Professor of Public International Law and European Law, University of Fribourg (Switzerland). Many thanks to Cesare Romano and Yuval Shany for inviting me to comment on an early draft of Anna Spain’s paper *Examining the International Judicial Function: International Courts as Dispute Resolvers* and to participate in the panel, *International Judges as Dispute-Settlers and Law-Enforcers*, at the Project on International Courts and Tribunals (PICT) Conference in Amsterdam on March 18, 2011. Thanks to Anna Spain for a fascinating and innovative paper and to all participants for an interesting discussion. In considering its current style, please note that this article was drafted as a set of comments, not as a self-standing article.

1. Anna Spain, *Examining the International Judicial Function: International Courts as Dispute Resolvers*, 34 LOY. L.A. INT’L & COMP. L. REV. 5, 7, 8 (2011) [hereinafter Spain, *Examining*].

functions: peace-making, dispute-settlement, and law-enforcement.<sup>2</sup> In short, and by reference to those three functions, Spain identifies the barriers to the effective international adjudication as being: first, the peace versus justice dilemma confronting international judges; second, the limited subject, scope, and factual blindness of adjudication itself; and finally, the lack of voluntary or coerced compliance with international judgements.<sup>3</sup>

In her introduction and conclusion, Spain also stresses that the specific challenges facing international adjudication actually provide opportunities for a discourse about the role of international adjudication.<sup>4</sup> She claims that on the basis of a clear understanding of the shortcomings of international adjudication, we should be able to identify new ways to develop international adjudication.<sup>5</sup> Additionally, she claims that these new methods are essential to preserving the overarching goal of global peace and security, a primary issue for Spain.<sup>6</sup> The most prominent of her proposals for reforming international adjudication is the sequential grouping—or even the mixing or integrating of international adjudication with other international dispute-resolution (IDR) mechanisms.<sup>7</sup> This would counteract the different challenges she identified to the three functions of international adjudication.<sup>8</sup>

## II. THREE COMMENTS

I have three sets of comments on Spain's paper: the first is conceptual; the second is methodological; and the third is a general and more substantive comment on the function of international adjudication.

### *A. A Conceptual Comment*

To begin, I have two minor conceptual quibbles. Clarifying the concepts we use to refer to international adjudication is a first step

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2. *Id.* at 6–8.

3. *Id.*

4. *Id.* at 8–10, 31.

5. *Id.* at 8.

6. *Id.* at 8.

7. Spain, *Examining*, *supra* note 1, at 8–9.

8. *Id.* at 10–11.

towards the overall theoretical understanding of it. There is much to gain from keeping a close eye on our terminology and concepts.<sup>9</sup>

Spain uses the concept of *international dispute-resolution* throughout her paper and distinguishes it from *international dispute-settlement*. Her differentiation between resolution and settlement pertains to whether or not the dispute's underlying issue has been resolved. For Spain, whereas dispute-settlement can take place by mere agreement, dispute-resolution requires in-depth resolution of the issue.

I see three difficulties with Spain's distinction. First, because of the necessarily subjective nature of a *dispute*, there is an inherent consensual component to any dispute. This is also the case for legal disputes, which require a disagreement among parties not only to arise, but also to subsist and be set aside as a result. It suffices to think of the *Nuclear Tests* case<sup>10</sup> to assess the importance of contestation for an international legal dispute to arise and subsist, and hence of agreement for its resolution.

Second, I have difficulty with Spain's distinction between dispute-resolution and dispute-settlement and her idea that adjudication can objectively address and solve a legal issue. Aside from the disagreement component of any legal dispute and its previously addressed resolution, I do not think a court can ever objectively resolve a legal issue. This would not only amount to judicial law-making, which, as I discuss here, is not in itself objectionable, but it would also amount to law-making *tout court* and turn judges into full-blown law-makers. This is even more controversial in international law because it would mean replacing states and international institutions in the general and abstract law-making process with judges. Regardless of how close to law-making judicial interpretation actually comes in practice, the distinction between law-making by political institutions and judicial law-making remains central. This important distinction not only underlies the concept of judging and adjudication in general, but presumably also underlies the concept of international law.<sup>11</sup>

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9. This article presents an alternative account of international adjudication below. See *infra* Part III. It suffices to add at this stage that this article refers to international adjudication very broadly, and includes all international courts, arbitral tribunals, and institutions fulfilling a court-like function. See, e.g., *The International Judiciary in Context*, THE PROJECT ON INT'L COURTS & TRIBUNALS (Nov. 1, 2004), [http://www.pict-pecti.org/publications/synoptic\\_chart/synop\\_c4.pdf](http://www.pict-pecti.org/publications/synoptic_chart/synop_c4.pdf).

10. See *Nuclear Tests Case* (Austl. v. Fr.), Judgment, 1974 I.C.J. 253 (Dec. 20).

11. See Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 GERMAN L.J. 979, 993 (2011) [hereinafter von Bogdandy &

The final problem I see in Spain's notion of dispute-resolution is her inclusion of non-judicial dispute-settlement mechanisms into IDR. Spain asserts that resolution amounts to more than agreement.<sup>12</sup> However, it is difficult to understand how mediation can lead to the resolution of the underlying issue in an international dispute. Reducing IDR mechanisms to adjudication may be a way to escape this problem. But, this strategy is not appropriate in light of Spain's mixed or integrated IDR proposal.<sup>13</sup>

With respect to Spain's integrative proposal itself, I do not think integrating other IDR mechanisms into international adjudication is feasible if one is to retain the specificities of adjudicative functions. First of all, a court cannot ever include all stakeholders, as proposed by Spain, to fully resolve the issues at hand; a judicial dispute is by definition limited to the parties to a dispute. The same applies to international judicial disputes. Even if one takes into account third party interventions and indispensable third parties,<sup>14</sup> a court cannot include all subjects or state interests potentially affected by its decisions. Nor could a court, domestic or international, ever address non-legal issues (whether raised by the parties or not) even though addressing them may help resolve the dispute more globally.

Of course, I share Spain's aspiration for a holistic treatment of disputes, the inclusion of non-legal considerations (when possible), complete factual clarity, and the inclusion of all stakeholders.<sup>15</sup> I also support her extremely insightful critique of the current "pigeon-hole" approach to IDR mechanisms.<sup>16</sup> And she is right to warn against the dangers of their rigid association with distinct institutions.<sup>17</sup> However,

Venzke, *Beyond Dispute*]; Emmanuelle Jouannet, *La jurisprudence internationale en question*, in LA JURIDICTIONNALISATION DU DROIT INTERNATIONAL 343, 386–87 (2003).

12. Spain, *Examining*, *supra* note 1, at 10–11.

13. *Id.* at 25–27 (employing multiple methods of conflict resolution in international conflicts, such as mediation, arbitration, and negotiation).

14. For a discussion of the inclusion of affected third parties in international judicial proceedings, including European Court of Human Rights proceedings, specifically as a way towards justifying the interpretive authority of their decisions, see for example Samantha Besson, *The Erga Omnes Effect of the European Court of Human Rights' Judgments*, in LA COUR EUROPÉENNE DES DROITS DE L'HOMME APRÈS LE PROTOCOLE 14—PREMIER BILAN ET PERSPECTIVES [THE EUROPEAN COURT OF HUMAN RIGHTS AFTER PROTOCOL 14—FIRST ASSESSMENT AND PERSPECTIVES] (Samantha Besson ed., 2011) [hereinafter Besson, *Erga Omnes*].

15. Spain, *Examining*, *supra* note 1, at 13–14.

16. *Id.* at 23 (explaining that dispute resolution has purposes beyond just peacemaking).

17. *Id.* at 25. For a more complete and very interesting argument, see Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PA.

we already have competition between different IDR mechanisms and even between international courts. Parties also experiment sometimes with potential synchronic or even diachronic aggregation of IDR mechanisms. This kind of competition and/or aggregation can do a lot of the work Spain suggests and can help provide parties (who want it) with the kind of holistic approach the author highlights. Spain actually exposes these existing synergies very well in her paper, particularly by referencing recent International Court of Justice (ICJ) and arbitral case law.<sup>18</sup>

True, more work could be done to enhance publicity about the different options, referrals, and coherence of international mechanisms and decisions.<sup>19</sup> However, I cannot agree with Spain when she proposes integration of IDR mechanisms and the inclusion of adjudication.<sup>20</sup> I do not think that adjudication can cope with the integration of otherwise political features into the judicial process. As I will argue in Part III, IDR mechanisms have different functions and various features corresponding to those functions. One should therefore not expect any one IDR mechanism to fulfill all of those functions at the same time. This is why assessing those mechanisms' effectiveness by reference to how they promote all those functions together would only be disappointing. Moreover, integration would paradoxically enhance the risk of pigeon-holing of different functions by forcing the delineation of functions within each institution or the further distinction of institutions. Hence, integration may deepen some of the problems Spain rightly identified earlier in her paper.

A second conceptual difficulty I have encountered in Spain's argument pertains to the notion of *law-enforcement*. In the early version of her paper, Spain referred to law-enforcement as compliance with judicial decisions, and discussed the limitations of both coercive and voluntary compliance with international judicial decisions.

The problem lies, I think, in the use of the term "enforcement" in international law scholarship generally and its built-in reference to force and coercion. In the context of the functions of international courts, we should be careful to understand law-enforcement to mean legal implementation exclusively or even legal development, and leave aside

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J. INT'L ECON. L. 1, 13–30 (2010) (explaining the deficiencies in the international dispute-resolution system).

18. *Id.* at 25–27.

19. *See id.* at 25.

20. *Id.* at 25–27.

two issues: the question of the enforcement of law, on the one hand; and the question of the enforcement of judgements, on the other. Even in domestic circumstances, courts do not, strictly speaking, use coercive means to implement the law, but leave that task to the executive. Instead, they apply the law to a set of concrete facts and interpret it further in light of those facts. Moreover, courts are not necessarily involved in the enforcement of their judgements either—that, too, is a task devolved to the executive.

Once it is understood as law-application and development, however, international law-enforcement clearly is a necessary feature of judicial dispute-resolution. After all, what distinguishes adjudication from other IDR mechanisms is precisely that the resolution it offers is based on law and, as a result, contributes to implementing the law. In this sense, while IDR does not necessarily imply law-enforcement, judicial dispute-settlement or adjudication does. As a result, separating the dispute-resolution function of international courts from that of law-enforcement may be counterproductive. I will come back to this point and discuss these two functions of international adjudication and their relationship in my last set of comments.

I will make one short passing comment on Spain's discussion of the enforcement of judgements, however. Some authors conflate the objective effect of international court judgements (i.e., the duty to comply with judgements) with effective subjective compliance with those judgements. There are many reasons to comply or not to comply with a judgement, and those reasons can sometimes be completely independent from the judicial decision and function, as well as from the duty to comply itself. Moreover, contrary to what Spain argued in an earlier draft, the lack of compliance with a court's judgement does not make that court and its judgements illegitimate. Understood objectively, legitimacy or legitimate authority is not a consequence of obedience but a condition to obedience. Objective legitimacy should not be conflated with acceptance or subjective legitimacy, in other words. Although there may well be a connection between objective and subjective legitimacy in the long run,<sup>21</sup> they are two distinct forms of legitimacy,<sup>22</sup>

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21. For an argument on their relationship, see Allen Buchanan, *Reciprocal Legitimacy: Reframing the Problem of International Legitimacy*, 10 POL., PHIL. & ECON. 5, 14 (2009).

22. On the distinction, see Allen Buchanan, *The Legitimacy of International Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 79 (Samantha Besson & John Tasioulas eds., 2010); Samantha Besson, *The Authority of International Law—Lifting the State Veil*, 31 SYDNEY L. REV. 343 (2009) [hereinafter Besson, *Authority*].

and it is useful to distinguish them in discussions of international adjudication.

### B. A Methodological Comment

My second set of comments is methodological. Again, although this comment pertains to Spain's paper in particular, it may also apply more generally to other arguments about the effectiveness of international adjudication.

There has been a growing tendency among international law scholars to approach international adjudication as a fact or reality that may be assessed practically, as opposed to a normative practice that may be criticized normatively.<sup>23</sup> This approach is also shared by Spain in her paper: She wants to assess international courts by reference to their effectiveness in the three functions she identifies.<sup>24</sup> She does not justify those functions, but instead takes them for granted. I will return to this point in my third set of comments.

There are two general difficulties I see with the effectiveness approach to international courts or adjudication.

The first problem poses a question: Why should the lack of effectiveness of international adjudication affect its functions and the way in which it is able to fulfil those functions? In each individual case, international courts indeed adjudicate to the best of their abilities.<sup>25</sup> As such, and from an individual and prospective angle, an assessment of international courts' functions need not take their effectiveness into account.<sup>26</sup> Certainly, if international adjudication was only rarely compulsory, or its judgments rarely complied with, this would affect its

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23. See, e.g., Yuval Shany, *Assessing the Effectiveness of International Courts: Can the Unquantifiable Be Quantified?*, HEBREW UNIVERSITY INTERNATIONAL LAW RESEARCH PAPER NO. 03-10, at 6 (2010) [hereinafter Shany, *Assessing*]. For a critique of the turn towards compliance in international law scholarship, see generally Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL'Y 127 (2010) (arguing that the focus on compliance leads to inadequate scrutiny and understanding of the diverse and complex field of international legality).

24. Spain, *Examining*, *supra* note 1, at 7–8.

25. For the same critique, see Donald Regan, *International Adjudication: A Response to Paulus—Courts, Custom, Treaties, Regimes and the WTO*, in THE PHILOSOPHY OF INTERNATIONAL LAW 225, 227 (Samantha Besson & John Tasioulas eds., 2010).

26. This article is not arguing that assessing the effectiveness of international adjudication is unimportant or uninteresting, but that it is not necessary to an assessment and critique of the functions of international adjudication and cannot actually take place prior to the normative identification of those functions. See, e.g., Shany, *Assessing*, *supra* note 23, at 9 (identifying distinct goals for international adjudication before testing its performance in reaching them).



attractiveness to potential parties.<sup>27</sup> Even independent of state consent to jurisdiction, a totally ineffective institution in the international legal system may in the long run be questioned, just as it would in a domestic legal system.<sup>28</sup> Those objections rely, however, on the possibility of assessing effectiveness in the first place, a possibility that may be illusive due to its profound indeterminacy.

The second problem with the effectiveness approach is precisely its indeterminacy. The multiplicity of internal and external factors influencing the effectiveness of an institution can make it difficult to assess them all. Moreover, it is difficult to measure their combined and respective importance. To take just one example, the reasons for the lack of compliance with international judicial decisions can be extremely diverse. While the overall lack of compliance may deter some states from opting for international adjudication, the same or other reasons could encourage others to opt for international adjudication. Finally, in assessing the effectiveness of international adjudication, it is difficult to know exactly what dimension is being assessed within the complex normative practice of adjudication. For example, are the court and its members at stake? Its process? Its reasoning? Its interpretations? Its decisions? Its authority? One may imagine an international court being very effective in producing interpretations of international law, even though in practice the parties in the dispute only rarely comply with the court's decisions.

There is a third difficulty in Spain's analysis of the effectiveness of adjudication as a tool for dispute-resolution, one that arises from her understanding of the functions of international adjudication. Adjudication has specific functions and features that distinguish it from other mechanisms of dispute-resolution. Its effectiveness cannot therefore be assessed in the same ways as those of other dispute-resolution mechanisms. Nor can its lack of effectiveness in the dispute-resolution function be mentioned together with its lack of effectiveness in law-enforcement without considering the proper relationship between those two functions—particularly where the lack of effectiveness in one may be the source of greater effectiveness in the other. The time has

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27. See R. P. ANAND, *STUDIES IN INTERNATIONAL ADJUDICATION* 24 (1969) (discussing the "optional clause" of the Statute of the International Court and the reluctance of the United States and the Soviet Union to accept compulsory jurisdiction thereof).

28. One may not exclude, of course, that new functions may be devised for international adjudication on the grounds of its effectiveness (or lack thereof) in practice.

come therefore to look more closely at the actual functions of international adjudication.

### C. A Substantive Comment

The following comments are substantive, and pertain to the actual functions of international adjudication.<sup>29</sup> Spain identifies three main functions of international adjudication: peace-making, dispute-resolution and law-enforcement.<sup>30</sup> Since her paper is directed to assessing their effectiveness, she does not justify these functions, instead stating that she will simply take them for granted as a starting point for her argument.<sup>31</sup> Nor does the paper explain how these three functions relate to one another. Parts III and IV of this article will complement Spain's argument with a brief discussion of the functions of international adjudication and their relationship with each other.

### III. INTERNATIONAL ADJUDICATION IN NEED OF LEGAL THEORY

Before turning to the functions of international courts, this article will define more closely what is meant by international adjudication. Based on the use of the concept in practice, a common concept of adjudication can be assumed. This common concept is not only shared among various international courts, but also shared between international and domestic courts.<sup>32</sup> In a nutshell, one may take adjudication to be a dispute-resolution mechanism that issues binding

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29. See generally CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION (2007) (addressing whether international courts and tribunals are adopting common approaches to issues of procedure and remedies); JOHN G. COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW, INSTITUTIONS AND PROCEDURES (2000) (providing an overview of institutions involved in dispute settlement processes and of the arbitral procedure); J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT (5th ed. 2011) (describing the various institutions and methods involved with international dispute resolution); RUTH MACKENZIE ET AL., MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS (Philippe Sands, ed., 2d ed. 2010) (providing information on the structure, organization, and procedural and adjudicative processes of international courts and tribunals).

30. Spain, *Examining, supra* note 1, at 6–8 (describing how courts can function as dispute settlers, peacemakers, and dispute resolvers).

31. *Id.* at 10–11 (setting out the definitional understandings of the various court functions).

32. Interestingly, adjudication is a complex normative concept that covers a normative practice and process, as well as an institution and its decisions. As such, its correct application requires evaluation, not only description, and the concept of adjudication has inbuilt normative constraints. See Hervé Ascensio, *La notion de juridiction internationale en question*, in LA JURIDICTIONNALISATION DU DROIT INTERNATIONAL 163, 167–68 (Colloque de Lille de la SDFI 2003) (addressing the descriptive and prescriptive nature of adjudication). Another interesting question is whether the concept of international courts is a threshold concept.

decisions based on law rendered by permanent and independent judges and according to due process.<sup>33</sup> Adjudication may in turn be deemed international when the court and its procedure are created and regulated by international law.<sup>34</sup>

Although international adjudication can presumably share these features and a common nature with domestic adjudication, it is important to draw some distinctions between international and domestic courts, on the one hand, and between different international courts, on the other. Those distinctions will indeed play out when fine-tuning the functions of international adjudication later in this article.

First of all, international courts share the same functions as *domestic courts* to the extent that they apply law to a specific case, albeit a different kind of law.<sup>35</sup> As a result, international courts are confronted with the same problems.

There are two famous difficulties to emphasize in this respect: First, the question of judicial law-making and the opposition between law and politics; and second, the related question of judicial discretion and the opposition between democracy and morality.<sup>36</sup> Obviously, these two difficulties are even greater in international adjudication where there is less determinative law, less democracy in the absence of a centralized international legislator, and less common morality in the absence of a political community with common values.

Clearly, if international judges function as judges, their judicial reasoning and decision-making imply law-making, albeit of a judicial kind.<sup>37</sup> Strictly speaking, they are not lawmakers<sup>38</sup> and their decisions

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33. See generally Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order*, in CAMBRIDGE COMPANION TO INTERNATIONAL LAW (J. Crawford & M. Koskeniemi eds., forthcoming 2012) (describing the history and providing an overview of different international courts); Georges Abi-Saab, *The Normalization of International Adjudication Convergence and Divergencies*, 43 N.Y.U. J. INT'L L. & POL. 1, 7 (2010); Regan, *supra* note 25, at 226–30 (describing international courts and custom).

34. See Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 LOY. L.A. INT'L & COMP. L. REV. 133, 136–37 (providing alternative accounts of the international nature of international adjudication).

35. Domestic courts generally apply domestic law. On the important role of domestic courts applying international law, however, see Eyal Benvenisti, *Reclaiming Democracy: The Strategic Use of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241 (2008). See also Tzanakopoulos, *supra* note 34, at 136–37.

36. Regan, *supra* note 25, at 226.

37. See von Bogdandy & Venzke, *Beyond Dispute*, *supra* note 11, at 987–89; Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, 12 GERMAN L.J. 1005, 1005–32 (2011).

cannot be counted among the formal sources of international law (Art. 38 ICJ Statute).<sup>39</sup> However, they cannot avoid interpreting the law when applying it because their interpretation has consequences for their own future application of the law (so-called precedent) and the general understanding of the law outside their specific court (so-called *erga omnes* effect of international judicial decisions).<sup>40</sup> Some see an exclusion of the interpretive authority (*res interpretata*) of international decisions and especially ICJ decisions in the ICJ Statute (Art. 59)<sup>41</sup> and the UN Charter (Art. 94(1)).<sup>42</sup> Others understand those provisions as a mere reminder of the relative scope of those decisions' decisional authority (*res judicata*) and not as an exclusion of their interpretive authority.<sup>43</sup> As a matter of fact, the jurisgenerative function of judges is more important in international courts than in domestic ones, given the limited number of sources of international law. Moreover, by virtue of the application of the *non-liquet* in international law, international judges already use general principles to fill legal gaps. This is

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38. See, e.g., South West Africa Cases (Eth. v. S. Afr., Liber. v. S. Afr.), Judgment, 1966 I.C.J. 6, 34 (July 18).

Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. *It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline.* (Emphasis added).

39. Statute of the International Court of Justice, art. 38 para.1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. Of course, this does not exclude the contribution of judicial decisions to other international law-making processes and sources, such as customary international law in particular. See Karin Oellers-Frahm, *Lawmaking Through Advisory Opinions?*, 12 GERMAN L.J. 1033, 1052–54 (2011); Milan Kuhli & Klaus Günther, *Judicial Lawmaking, Discourse and the ICTY on Belligerent Reprisals*, 12 GERMAN L.J. 1261, 1276, 1278 (2011). Judicial decisions may also contribute to general principles of international law. See Samantha Besson, *General Principles in International Law—Whose Principles?*, in LES PRINCIPES EN DROIT EUROPÉEN—PRINCIPLES IN EUROPEAN LAW 21, 30 (S. Besson & P. Pichonnaz eds., 2012) [hereinafter Besson, *General Principles*].

40. For a more detailed discussion of those notions and distinctions, see Besson, *Erga Omnes*, *supra* note 14, at 359, 388–89.

41. Statute of the International Court of Justice, art. 59, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

42. U.N. Charter art. 94, ¶ 1.

43. See Jouannet, *supra* note 11, at 359, 388–89 on the distinction between judicial law-making and law-making *tout court*, on the one hand, and between interpretive and decisional authority, on the other. See also Besson, *Erga Omnes*, *supra* note 14, at 129–37 (discussing Article 46, paragraph 1 of the ECHR and the difference between the relative decisional authority of the ECtHR's judgments and their general interpretive authority).

particularly true in relatively new fields of international law, such as international criminal law or international environmental law.

Besides sharing the same, albeit magnified, difficulties as domestic adjudication, international adjudication has unique difficulties of its own.<sup>44</sup> Primarily, these have to do with the sources of applicable international law.

First of all, international judges are called to do much more than interpret and apply the law, which is already quite challenging depending on how one understands judicial interpretation. They also have to identify international law and general international law from non-written sources, such as customary international law or general principles. That identification and validation of international law goes beyond the scope of ordinary judicial law-making in the domestic context, and comes very close to law-making *tout court*.<sup>45</sup> The ICJ Statute (Art. 38(1)(d)) confirms this ambivalence by referring to judicial decisions as a “subsidiary means for the determination of rules of law,” but nonetheless includes them in a list of formal sources of international law.

Second, the fragmentation or plurality of sources, regimes, and norms in international law makes judicial interpretation even more pivotal than in the domestic context. The effects of this legal fragmentation are heightened by the fragmentation of international adjudication itself. Although legal and judicial fragmentations do not necessarily reinforce each other, they may do so, thus giving judicial interpretation of the law greater import.<sup>46</sup>

Legal interpretation is not the only area of concern for international courts. Legal identification itself also creates difficulties. International courts do not only face the usual critiques pertaining to judicial law-making, but also newer and arguably graver critiques pertaining to international legality *tout court*. This is why some authors have rightly argued that we need a theory of international adjudication

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44. Regan, *supra* note 25, at 227–29.

45. I am using identification (in a strong sense) as a contribution to legal validation in the absence of an international legislator (*see also* Regan, *supra* note 25, at 228) and not as mere descriptive recognition of valid norms to be applied (*see, e.g.*, Kuhli & Günther, *supra* note 40, at 1266). International judicial decisions are sometimes referred to as material sources of international law; although they may function as material sources, however, this does not quite capture their other specific (judicial) law-making function.

46. Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791, 805 (1999).

that draws on the numerous existing theories of domestic adjudication, but that also expressly addresses international adjudication's own theoretical difficulties.<sup>47</sup> Whereas important research has been conducted on the empirical and judicial dimensions of international adjudication in recent years, the essential questions it generates for the theory of adjudication are only beginning to be raised.<sup>48</sup>

The second distinction announced before pertains to the distinction *between* international courts themselves. International courts have proliferated since the 1990s and there are many different types of international courts today.<sup>49</sup> Some are generalist, while others are specialized; some are universal, while others are regional; some have

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47. See, e.g., Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GERMAN L.J. 1341, 1368–70 (2011) [hereinafter von Bogdandy & Venzke, *Democratic Legitimation*].

48. See, e.g., Andreas Paulus, *International Adjudication*, in THE PHILOSOPHY OF INTERNATIONAL LAW 207–24 (Samantha Besson & John Tasioulas eds., 2010); see generally Regan, *supra* note 25 (discussing international adjudication as seen in courts and tribunals); Kingsbury, *supra* note 33 (discussing the role of international judicialization in current times); Samantha Besson, *European Human Rights, Supranational Judicial Review and Democracy—Thinking Outside the Judicial Box*, in HUMAN RIGHTS PROTECTION IN THE EUROPEAN LEGAL ORDER: INTERACTION BETWEEN EUROPEAN COURTS AND NATIONAL COURTS 97–145 (P. Popelier et al. eds., 2011) [hereinafter Besson, *European Human Rights*]; Andreas Follesdal, *Why International Human Rights Judicial Review Might Be Democratically Legitimate*, 52 SCANDINAVIAN STUD. IN L. 103 (arguing that international tribunals need not be problematically undemocratic) (2007); Jouannet, *supra* note 11, at 343–91; Ascensio, *supra* note 32, 163–202; JULIE ALLARD & ANTOINE GARAPON, LES JUGES DANS LA MONDIALISATION: LA NOUVELLE RÉVOLUTION DU DROIT (2005); Martti Koskeniemi, *The Ideology of International Adjudication and the 1907 Hague Conference*, in TOPICALITY OF THE 1907 HAGUE CONFERENCE, THE SECOND PEACE CONFERENCE 127 (Yves Daudet ed., 2008) (discussing the proliferation of international tribunals and substantive fragmentation of international law as affected by the increase of new institutions using international law to further different interests); von Bogdandy & Venzke, *Beyond Dispute*, *supra* note 11, at 980–84 (exploring the role of international courts in international judicial lawmaking); von Bogdandy & Venzke, *Democratic Legitimation*, *supra* note 47 (discussing the democratic legitimation of international judicial law making); Jacob, *supra* note 37 (arguing that judicial precedent both enables and constrains judicial decision-making in international adjudication).

49. On international judicial proliferation, see, for example, Ruti Teitel & Robert House, *Cross-Judging: Tribunalization in a Fragmented But Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 959, 959, 990 (2009); Cesare Romano, *A Taxonomy of International Rule of Law Institutions*, 2 J. INT'L DISPUTE 241, 241–77 (2011); Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 723–28 (1999); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT'L L. 73, 73–91 (2009); José E. Alvarez, *Three Responses to “Proliferating” Tribunals*, 41 N.Y.U. J. INT'L L. & POL. 991, 992–1012 (2009) [hereinafter Alvarez, *Three Responses*]; José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 405–06 (2010) [hereinafter Alvarez, *New Dispute*]; Abi-Saab, *supra* note 33, at 2–6.

compulsory jurisdiction, while others do not; some have exclusive jurisdiction, while others do not; some can monitor the enforcement of their judgements, while others cannot; some resolve interstate disputes, while others are also open to individuals or international organizations; some assess facts and law anew, while others only monitor the application of international law by domestic institutions; some belong to an international organization's institutional structure, while others do not; and so on.

Those variables necessarily impact the functions of international adjudication, which will be discussed below. Although they do not change international courts' basic functions, those variables contribute to fine-tuning and adapting courts' functions to the institutional circumstances of each court.<sup>50</sup>

#### IV. INTERNATIONAL ADJUDICATION IN NEED OF INTERNATIONAL LAW

With these caveats in place, it is time to turn to a theoretical discussion of the actual functions of international adjudication and the difficulties it faces. The definition I gave earlier refers to both functions of dispute-resolution and application of law: (i) Judges resolve legal disputes by applying the law; and (ii) when they apply the law, they contribute to its interpretation and development, while also allegedly to its overall normative coherence, and presumably its legitimacy.<sup>51</sup>

Interestingly, those two functions of dispute-settlement and law-enforcement cohabit without difficulties in the domestic context. They are usually considered an aggregate and their relationship is not

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50. Interestingly, the only international court that currently fits the idea of non-compulsory and non-exclusive international adjudication is the ICJ and, despite its unique features, it is the one usually referred to in discussions of international adjudication—as it is in this reply. It is difficult to explain the grip the ICJ still has on international scholars' imagination (unless they clearly specify that they will focus on more advanced forms of international adjudication). See, e.g., von Bogdandy & Venzke, *Beyond Dispute*, *supra* note 11, at 979–80. One may venture only a few reasons here: the sheer diversity of the other international courts and lack of common ground between them; the general jurisdiction of the ICJ and especially its jurisdiction over general and objective international law; and, its universal jurisdiction and the fact that it can hear cases from states that are not bound to the jurisdiction of any other courts to date (on BRICS and other states of that kind, see generally Kingsbury, *supra* note 33 (discussing the varied types of international courts, their functions, and the implications of such courts in politics, law, and justice)).

51. Scholars, including Professor Spain, often suggest a third function of international courts: peace-making. As Spain notes, while, there is a historical nexus between “pacific” dispute-settlement and adjudication in international law, that historical nexus does not in itself justify considering peace-making a necessary general function of current international courts. Spain, *Examining*, *supra* note 1, at 13; see also Abi-Saab, *supra* note 33, at 2.

questioned. Those two functions, however, are clearly separated within international legal practice, as they have been in international legal scholarship for a long time.<sup>52</sup> Interestingly, the view within the academy is beginning to change.<sup>53</sup>

Let us see why they are usually separated, before discussing ways of reconciling them. First of all, there are clear, practical reasons to distinguish between the two functions of dispute-resolution and law-enforcement. These reasons are the non-compulsory nature of international adjudication, on the one hand, and its non-exclusive nature, on the other. In these circumstances, the judge is not necessarily called to interpret the law, and if she is, it is not necessarily in an exclusive and authoritative fashion. As long as international adjudication remains one of many IDR mechanisms and a non-compulsory one, it cannot fulfil its usual function of law-enforcement the way it would in the domestic legal order. Contrary to what the case would be domestically, currently different courts may interpret international law differently and there can be as many judicial interpretations as there are courts. Furthermore, judicial interpretation of international law is not even necessary to resolve legal issues that may be resolved through other IDR mechanisms. This explains why international courts themselves may sometimes resort to other IDR mechanisms to settle a dispute without fully enforcing the law.<sup>54</sup> Finally, even when they apply and interpret international law to resolve a dispute, international courts do not have a sufficiently important and regular flow of cases that would suffice to interpret it authoritatively. International courts can therefore be said to have *jurisdictio* but without the *imperium*, its usual correlative in domestic courts.<sup>55</sup>

Second, the relationship between the two judicial functions remains complex in practice, which makes reconciliation difficult. The

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52. See Eric A. Posner & John C. Yoo, *A Theory of International Adjudication*, 93 CALIF. L. REV. 1, 63 (2005).

53. There are important changes, indeed, as exemplified by most of the recent scholarship about international adjudication (see, e.g., von Bogdandy & Venzke, *Beyond Dispute*, *supra* note 11, at 979–80), but those accounts usually refer expressly to international courts with compulsory and exclusive jurisdiction, i.e., international courts whose dispute-settlement and law-enforcement functions are closely related, and exclude the ICJ from their ambit.

54. On the dispute-settlement dimension of international adjudication by the ICJ, see generally Pierre d'Argent, *Les principes généraux à la Cour internationale de Justice*, in LES PRINCIPES EN DROIT EUROPÉEN—PRINCIPLES IN EUROPEAN LAW (S. Besson & P. Pichonnaz eds., 2012).

55. See Allard and Garapon, *supra* note 48, at 57; see also Ascensio, *supra* note 32, at 167–86.



idea that individual judges called upon to settle a dispute between states can also contribute to interpreting international law and hence substitute themselves for its authors and primary law-makers (i.e., states) is in conflict with a certain consensualist approach to international law. This, in turn, explains why the relationship between dispute-settlement and law-enforcement is particularly problematic in areas where non-consent-based, objective, and general international law has developed but adjudication is still consent-based and non-exclusive. One may think, for instance, of cases in which the ICJ *qua* non-compulsory and non-exclusive jurisdiction applies international human rights law. As long as the legitimate authority of international law was deemed equivalent to that of a contract between private parties, consent-based adjudication fit very well: the scope of judges' legitimate authority matched that of the applicable law. That is no longer the case, however. This hiatus, or tension, has become a problem with the development of objective international law more generally because, unlike adjudication mechanisms, that law is not based on state consent.<sup>56</sup>

International law has long developed as a "law without courts," to coin the famous dictum,<sup>57</sup> but this is no longer the case. International law itself has caught up with the reality that it is not only applied by a multitude of international courts but often needs the kind of interpretation and implementation that only international courts can provide.

The current contrast between objective international law and subjective international adjudication is not only a problem for the international legal order, however. It is also a concern for judges themselves who are uneasy about their functions. And this explains why the dispute-resolution function is regularly highlighted as a primary function of international courts and the ICJ in particular. To some, it serves mainly a refuge function.<sup>58</sup> This may explain how the idea of judicial law-making has been banned officially from judicial

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56. This is why Ascensio is right when he refers to the "amour impossible entre la juridiction et le droit international classique." Ascensio, *supra* note 32, at 202; *see also* Besson, Authority, *supra* note 22, at 345.

57. *See generally* Kingsbury, *supra* note 33 (referring to Grotius and discussing the varied types of international courts, their functions, and the implications of such courts in politics, law, and justice).

58. *See* Alvarez, *New Dispute*, *supra* note 49, at 417–18; Alvarez, *Three Responses*, *supra* note 49, at 993 (both on the role of international courts in protecting human rights).

discourse,<sup>59</sup> whereas it has long been accepted in domestic jurisprudential circles. International judges' denial of their judicial law-making powers is not so much based on their being blind or resistant to progress in semantics and in legal theory, as it is on their perception of their law-enforcement and law-development functions sitting uneasily with those of their dispute-resolution function. What one may refer to as the schizophrenia of the contemporary international judge stems from her being called to function as a judge in circumstances that prevent her from using half of her functions.

One wonders about the reasons for the resistance of the international legal order to proper adjudication and for the untenable disconnect between the two pieces in the puzzle of adjudication. Arguably, one important reason is the lack of institutional and democratic maturity of international law. In the absence of other institutions and especially of a legislature with which to interact, and, more generally, of a political community to represent, the judiciary cannot play its interpretive and judicial law-making role. Such a judiciary is neither checked by nor accountable to any institution or community. Judicial law-making as a reasoning and discursive exercise requires law *tout court* and judges cannot be asked to interpret and develop international law without that law being clearly identified for them.<sup>60</sup> In general international law, not only are legal rules not clearly identified for courts, but rather courts are asked to identify these rules themselves.

As a result, not only is international law often left to function without proper courts in current circumstances, but the courts themselves are requested to function without international law and a distinct law-maker that can turn them into judges and let them be. The reasons for the former arguably lie in the reasons for the latter. Classic international law and law-making have changed, of course, but not completely. International courts have also changed, as alluded to before, but not completely either.

Of course, this disconnect between international law and international adjudication is not present everywhere in the international legal order, further elevating the uneasiness of judges and legal

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59. It suffices to look at the circumvolutions in the field of the identification of general principles of international law in the ICJ case law. See generally Besson, *General Principles*, *supra* note 39, at 34–59 (discussing the nature of international legal standards and norms); d'Argent, *supra* note 54.

60. See Jouannet, *supra* note 11, at 390.

scholars. For example, certain regional and specialized courts, such as the European Court of Human Rights (ECtHR) or the Court of Justice of the European Union (CJEU),<sup>61</sup> both have compulsory and exclusive jurisdiction and have long combined dispute-settlement and law-enforcement functions. The reason for this lies in the institutional framework in which those courts are located or in the institutions to which they are accountable: domestic and European Union (EU) institutions for the CJEU and domestic institutions and human rights courts for the ECtHR.<sup>62</sup>

Therefore, there is only one way out of the puzzle of international adjudication and that is to develop the international, or at least transnational, institutional order itself alongside the courts. Specifically, one should work on ways to enhance the institutional nature of international decision-making to provide judges with an institutional correspondent with legitimate authority to which judges may in turn respond with the corresponding legitimate authority.<sup>63</sup> In the absence of a separation of powers within international institutions (whose law is to be interpreted by international judges) and of an international legislature representing the international community, it is impossible to envisage any democratic constraints on judicial discretion or methods of ensuring that international judges feel responsible.<sup>64</sup> This, however, actually implies more than democratic reforms in the judicial process only, and

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61. See, e.g., ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 5 (2nd ed. 2006) (tracing the origins of the CJEU); Joseph H.H. Weiler, *THE EUROPEAN COURT OF JUSTICE* 181 (Gráinne de Búrca & J. H. H. Weiler eds., 2001) (on the jurisdictional competence of the CJEU); ANNE-MARIE SLAUGHTER, ALEC STONE SWEET & J.H.H. WEILER, *THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT* vii (Anne-Marie Slaughter et al. eds., 1998) (on the exclusive and ultimate competence of the CJEU); ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* 48 (2004) (on the supranational aspects of the CJEU).

62. Interestingly, and as argued in Besson, *European Human Rights*, *supra* note 48, at 140–42, the institutional framework of the ECtHR is weaker than that of the CJEU, explaining how different the European human rights adjudication is (or, more precisely, ought to be) to EU law adjudication.

63. Of course, there are other forms of legitimacy of international law and institutions than democratic legitimacy, but the various forms of legitimacy have to be combined. This is even more important as the conditions for global or transnational democracy are not yet given or, at least, are very controversial. For a discussion, see Buchanan, *The Legitimacy of International Law*, *supra* note 22, at 93–94; Besson, *Authority*, *supra* note 22, at 368–70.

64. See generally Martti Koskeniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *LEIDEN J. INT'L L.* 553 (2002) (discussing the proliferation of international tribunals and substantive fragmentation of international law as affected by the increase of new institutions using international law to further different interests).

in the election of judges themselves.<sup>65</sup> It also requires building a political community and a set of democratic institutions outside of and including courts, whether at the same level or across levels of governance.<sup>66</sup>

Of course, such an institutional project raises well-known difficulties in global or transnational democratic theory. To cite just one of them, the absence of equal and interdependent stakes among individuals beyond the regional level (e.g., at the EU level) makes the idea of a global or transnational political community implausible for now, and arguably even normatively undesirable.<sup>67</sup> Alternative transnational democratization models across governance levels can be developed,<sup>68</sup> however, and although adjudication ought to be one of their features, it should not be the only one. However, a further discussion of this democratic theory debate is beyond the scope of this article.<sup>69</sup>

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65. For a judiciary-focused approach of international democratization, see generally Bogdandy & Venzke, *Democratic Legitimation*, *supra* note 47 (examining judicial reasoning, judges, and judicial procedure in international law and their effects on democratization); see also Ingo Venzke, *The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation*, 34 *LOY. L.A. INT'L & COMP. L. REV.* 99, 129–31.

66. On efforts to develop the democratic credentials of international adjudication outside the judicial box, see Besson, *European Human Rights*, *supra* note 48, at 124–25; Follesdal, *supra* note 48, at 108–09.

67. See, e.g., Thomas Christiano, *Democratic Legitimacy and International Institutions*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 119–37, 137 (Samantha Besson & John Tasioulas eds., 2010).

68. See generally Samantha Besson, *Institutionalizing Global Democracy*, in *JUSTICE, LEGITIMACY AND PUBLIC INTERNATIONAL LAW* 58 (Lukas H. Meyer ed., 2009) [hereinafter Besson, *Institutionalizing*] (discussing the institutional dimensions of global justice theories and proposing a model of global democracy); Samantha Besson, *Ubi Ius, Ibi Civitas: A Republican Account of the International Community*, in *LEGAL REPUBLICANISM AND REPUBLICAN LAW: NATIONAL AND POST-NATIONAL PERSPECTIVES* (Samantha Besson & José Luis Martí eds., 2009) (providing a critical survey of the implications of legal republicanism); see generally Samantha Besson, *International Human Rights and Political Equality*, in *EQUALITY IN TRANSNATIONAL AND GLOBAL DEMOCRACY* (E. Erman & S. Näsström eds., forthcoming 2012); JAMES BOHMAN, *DEMOCRACY ACROSS BORDERS: FROM DEMOS TO DEMOI* 18 (MIT Press 2007); FRANCIS CHENEVAL, *THE GOVERNMENT OF THE PEOPLES: ON THE IDEA AND PRINCIPLES OF MULTILATERAL DEMOCRACY* 27–42 (2011) (discussing the transnational dimension of liberal democracy).

69. See generally Besson, *Institutionalizing*, *supra* note 68 (discussing the institutional dimensions of global justice theories and proposing a model of global democracy); Eva Erman, *Should All Political Contexts be Democratic? Contours of a Two-Faced Theory of Legitimacy in EQUALITY IN TRANSNATIONAL AND GLOBAL DEMOCRACY* (Erman, E. and Näsström, S. eds, forthcoming 2012).

## V. CONCLUSION

I have two concluding remarks for this reply to Anna Spain's rich and insightful paper about the challenges of international adjudication. They stem from observations about the state of international adjudication and the existing theory of international adjudication.

First, the international legal order is clearly impoverished without judges. Understanding international adjudication as mere dispute-resolution may have advantages, but it certainly does not contribute to the development of the international rule of law. If the latter is what we hope for, we should think carefully about the best ways to achieve it and how to make international adjudication part of the process. This leads to a second, related conclusion: focusing on the problems of adjudication only and trying to improve its functions and legitimacy from the inside will not suffice. We need to think about adjudication from outside the judicial box and from a broader institutional context—internationally, as I have here, but also transnationally. We cannot improve international adjudication without giving attention to the other institutions that make for an autonomous and legitimate legal order and that generate the laws that have to be judicially enforced and interpreted. In sum, if it is true that international “law without courts” is no longer an option, developing international courts without law is a pitfall that ought to be avoided.