CHAPTER 19

LEGAL PHILOSOPHICAL ISSUES OF INTERNATIONAL ADJUDICATION

GETTING OVER THE *AMOUR IMPOSSIBLE* BETWEEN INTERNATIONAL LAW AND ADJUDICATION

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1 INTRODUCTION

ADJUDICATION, i.e., the function, role, or task of courts to state and apply the law in the specific disputes brought before them, is among the most classical topics in jurisprudence or legal philosophy. The existence of a system of courts with general and compulsory jurisdiction is often regarded as a key feature of a legal system.[1] As a result, even though the theory of adjudication does not exhaust the field of legal theory, to the extent that it cannot tell us what the law is and that one needs a theory of law to identify the law before it can guide judges,[2] a theory of adjudication is part and parcel of any good theory of law. More specifically, a theory of adjudication does two things: first, it explains the role of courts and how judges decide, or should decide, cases brought to them about the content of the law and, second, it guides and justifies their activities.[3]

The question raised in this chapter is whether the same applies to international adjudication and theorizing international adjudication. Like other facets of international law, international adjudication is now beginning to catch the eye of legal philosophers, and particularly philosophers of international law.[4] Although

[1] See e.g., R Dworkin, *Law's Empire* (London: Fontana Press 1986); J Raz, *The Authority of Law* (Oxford University Press 1979); J Raz, "On the Nature of Law" (1996) 82 ARSP 1; HLA Hart, *The Concept of Law* (2nd edn, Oxford: Clarendon Press 1994) 213–16.

[2] See e.g., J Dickson, "Interpretation and Coherence in Legal Reasoning" [2010] The Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/archives/spr2010/entries/legal-reas-interpret/> accessed September 3, 2012; Raz, *Authority*, note 1; Raz, *Nature of Law*, note 1; Hart, note 1; *contra*: Dworkin, note 1.

[3] See e.g., Dickson, note 2.

[4] See e.g., E Jouannet, "La notion de jurisprudence internationale en question" in SFDI (ed.), *La juridictionnalisation du droit international* (Paris: Pedone 2003); H Ascensio, "La notion de juridiction internationale en question" in SFDI (ed.), *La juridictionnalisation du droit international* (Paris: Pedone 2003); J Allard and A Garapon, *Les juges dans la mondialisation* (Paris: Le Seuil 2005); A Paulus, "International Adjudication" in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010); DH Regan, "International Adjudication: A Response to Paulus—Courts, Custom, Treaties, Regimes and the WTO" in Besson and Tasioulas (eds), *The Philosophy of International Law*; B Kingsbury, "International Courts: Uneven Judicialization in Global Order" in

international adjudication was long absent from international law, since 1945, and most definitely since the 1990s, it has become a largely accepted and central feature in the practice of contemporary international law—though it has turned out to be quite an uneven process and is not necessarily states' first choice among international dispute settlement mechanisms.[5] As a result, current international law can no longer be understood without its judicial dimension. It does not come as a surprise, therefore, that important research has been conducted in recent years on the various institutional and legal dimensions of international adjudication.[6] Curiously, the philosophical and especially the normative questions international adjudication generates have only started to be raised, as if the concepts of "judge," "court," "jurisdiction," "adjudication," "judicial reasoning," "jurisprudence," "judgement," "case-law" and "precedent" were self-evident in international law. We know very well, however, that, even domestically, those notions are fraught with complexity and have been debated at great length.

A first explanation for the neglect of the topic may be found in the close connection recognized by most international lawyers between international adjudication and the questionable legality of international law. In Benedict Kingsbury's words, the general approach to international judicialization among scholars is one of accomplishment, and no longer one of program and even less of critique. This is a way, he claims, of assuaging "Diceyan doubts about the law in international law" and may be traced back to the connection made since the nineteenth century between the existence of law or a legal system, on the one hand, and a system of courts with general and compulsory jurisdiction, on the other.[7] Placating concerns about the applicability of the rule of law to international law may constitute yet another explanation for the philosophical neglect of international adjudication. After all, given the importance of the judicial review function of courts for the respect of the rule of law in domestic jurisprudence, questioning the existence and legitimacy of international adjudication may threaten the credentials of one of the few dimensions of the rule of law that scholars have been able to identify in international legal practice and hence arguably a key feature of its legality.[8]

J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012).

[5] See, e.g., in this handbook, Romano, Ch. 5; Kingsbury, note 4; A Pellet, "Judicial Settlement of International Disputes" in R Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012).

[6] See e.g., A Boyle and C Chinkin, "Law-Making by International Courts and Tribunals" in A Boyle and C Chinkin (eds), *The Making of International Law* (Oxford University Press 2007) 263–312; C Brown, *A Common Law of International Adjudication* (Oxford University Press 2007).

[7] See Kingsbury, note 4, Conclusion; see also Jouannet, note 4, at 344–5.

[8] See A Nollkaemper, "The Internationalized Rule of Law" (2009) 1 HJRL 74; see also J Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?" (2011) 22:2 EJIL 315; and a response by S Besson, "Sovereignty, International Law and Democracy" (2011) 22:2 EJIL 373.

The difficulty, however, is that the concept of international adjudication, like that of adjudication itself, is neither self-evident nor understandable, except by reference to the specificities of international legality, which in turn requires discussing international adjudication. In fact, international adjudication raises even more complex philosophical difficulties than its domestic counterpart. It is time, therefore, to disambiguate the notion of international adjudication and to look more closely into what Hervé Ascensio has referred to as the "*amour impossible*" between international adjudication and international law.[9] The risk otherwise is not only a serious loss of perspective on what international judges ought to be doing, but also turning a blind eye on the crisis of legitimacy looming large in international adjudication.[10]

Of course, this is not to say that international adjudication has been completely neglected by legal philosophers. Yet, on the rare occasions in which the philosophical issues pertaining to international adjudication have been discussed, it has mostly been done either in the context of critical legal theory and outside analytical legal theory,[11] or in the context of a natural law paradigm and outside legal positivism.[12] Another difficulty looming large in recent theoretical accounts of international adjudication is the tendency to reinvent the wheel; classical issues raised by (domestic) adjudication and their perennial discussions in (domestic) jurisprudence are often ignored or at most eluded to. While it is true that international adjudication raises many of the same questions as domestic adjudication, the largely indeterminate role of international adjudication and the specificities of the international legal order itself magnify some of them, while also giving rise to new questions of their own.[13] This chapter will discuss and refer to the former as issues in the general jurisprudence or legal philosophy of adjudication, and to the latter as issues in the special jurisprudence of international adjudication. My argument will be three-pronged. It will first clarify what adjudication is and whether international adjudication in one or all of its various forms may actually be regarded as adjudication; second, re-examine classical questions of general jurisprudence of adjudication in the context of international law; and, finally, broach the new questions that constitute the core of the special jurisprudence of international adjudication.

[9] See Ascensio, note 4, at 202.

[10] See Paulus, note 4, at 223; Kingsbury, note 4, Conclusion.

[11] See e.g., M Koskenniemi, "The Ideology of International Adjudication and the 1907 Hague Conference" in Y Daudet (ed.), *Topicality of the 1907 Hague Conference, The Second Peace Conference* (Leiden: Brill Academic Publishers 2008).

[12] See e.g., G Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" (2010) 21 EJIL 1.

[13] On this diagnosis, see Regan, note 4, at 226 ff.

2 The Concept of International Adjudication

Adjudication may be defined as (i) the function, role, or task (ii) belonging to permanent and independent judges (as a court) (iii) to state and apply the law (iv) in order to settle the specific disputes brought before them (v) by issuing legally binding decisions (vi) according to a pre-determined set of rules of procedure.[14] Of course, adjudication also refers sometimes to a *process* that has that function, i.e., the process of adjudicating. Adjudication *qua* function or *qua* process is intricately tied (i) to an institution, i.e., a court; (ii) to a competence or power, i.e., jurisdiction; and (iii) to an outcome, i.e., judicial decisions and judgments. When courts exercise their jurisdiction and issue judgments, they adjudicate and the process is referred to as adjudication.

Interestingly, adjudication is best regarded as a normative concept, like the concept of law, to the extent that it encapsulates a value, i.e., applying the law to a given dispute, and its correct application implies some evaluative assessment. As such, it cannot merely be described and reduced to criteria whose existence could then simply be verified or not in practice. It cannot, however, because it is also an institution-related concept, be applied correctly, and in particular help criticize and guide judicial practice, independently from a reference to its institutional reality. The relationship between the ideal-type of adjudication and its institutional practice is therefore one of mutuality.[15]

International adjudication differs from domestic adjudication to the extent that (i) international courts are not centralized and not in a hierarchical relationship to one another; (ii) their jurisdiction is not necessarily compulsory (e.g., Art. 36.2 of the ICJ Statute), although there are exceptions among specialist and regional courts;[16] and (iii) their judicial decisions are legally binding, albeit not necessarily institutionally enforceable internationally (so-called *imperium*),[17] although there are exceptions among specialist and regional courts.

In this respect, a ready objection to international adjudication is whether it is "adjudication" in the sense developed in domestic jurisprudence. This objection resembles another one that takes issue with the legality of international law *qua* law in the domestic jurisprudential sense, and hence with the applicability of traditional

[14] See also Kingsbury, note 4; Regan, note 4, at 227; C Tomuschat, "International Courts and Tribunals" in R Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012).

[15] See Kingsbury, note 4; Ascensio, note 4.

[16] See Pellet, note 5, para. 11 ff.

[17] See also Ascensio, note 4, at 177 ff.

legal philosophy to international law. Looking at adjudication in practice, whether domestically or internationally, it is apparent that international adjudication now comes very close to domestic adjudication, at least in its minimal law-enforcement function in a given dispute.[18] Of course, international jurisdiction may not always be compulsory, general, and centralized, but this only affects the other functions vested on international adjudication in the international legal order as a whole. Hence, perhaps the legality of international law or its systemic quality may be affected, but not the adjudicative function itself. Furthermore, the institutional embedding of international law in domestic legal orders means that domestic adjudication can no longer be conceived of independently from international adjudication. As a result, the concept of adjudication has to be shared by both domestic and international law alike, and thus discussed by domestic and international jurisprudence together.

The next question actually pertains to the exact contours of the internationality of international adjudication, and, conversely, the domesticity of domestic adjudication. Indeed, domestic courts may be applying international law and therefore contributing to the enforcement of international law. In certain cases, they may also participate in the review function of international courts, especially when exercising judicial control over international executive activity. As a result, some authors regard them as practicing international adjudication.[19] In a nutshell, and by reference to the three elements identified before, adjudication may be deemed *international* when the court, its jurisdiction, and its procedure are created and regulated by international law.[20] Strictly speaking, then, domestic courts *qua* institutions are not international courts in terms of their constitutive law, jurisdiction, and procedures. They cannot, as a result, be said to contribute to international judicial law-making[21] —except perhaps through the indirect consolidation of transnational interpretations and then of general principles of international law recognized by international judges (see e.g., Art. 38.1.c and d of the ICJ Statute), as is the case in the human rights context.[22]

Of course, a recurrent issue in this volume pertains to the sheer diversity of international courts, and hence of the institutional entities exercising international adjudication in practice. The question is then how that diversity should be reflected in the various doctrinal and theoretical efforts at analyzing and systematizing the

[18] See also Regan, note 4, at 227; Tomuschat, note 14, at 35.

[19] See A Tzanakopoulos, "Domestic Courts in International Law: the International Judicial Function of National Courts" (2011) 34 Loy. L.A. Int'l & Comp. L. Rev. 101.

[20] See Ascensio, note 4, at 163, 167 ff.

[21] See also Jouannet, note 4, at 391–3; A Pellet, "Article 38" in A Zimmermann, C Tomuschat and K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2006) 312.

[22] See S Besson, "General Principles in International Law—Whose Principles?" in S Besson et al. (eds), *Les principes en droit européen—Principles in European Law* (Zurich: Schulthess 2011).

phenomenon of international adjudication.[23] The present chapter, because it is normative, and not descriptive, and general in scope, and not specific, aims at identifying and discussing a basic and common concept of international adjudication underlying a diverse institutional practice. The fact that international jurisdiction may not always be compulsory, general, and centralized merely affects the various functions of international adjudication that may be attributed in the international legal order as a whole, and not the adjudicative function itself. The function of stating the law in a given dispute remains largely the same across different international courts.[24] True, adjudication is an institutional function and, as a result, there is a relationship between the single ideal-type of adjudication discussed and its polymorphous institutional practice.[25] This is why normative abstraction and generalization should not lead to minimizing the importance of international adjudication's multifaceted institutional reality. Accordingly, the chapter's main emphasis is on the International Court of Justice (ICJ) *qua* sole "international" court and "judicial organ of international law"[26] to date, due to its general and universal jurisdiction (ICJ Statute, Art. 36.1), though appropriate reference is sometimes made to other international courts with distinct jurisdiction and different issues, and especially the European Court of Human Rights (ECtHR) as an example of a specialist and regional court.

3 The General Jurisprudence of International Adjudication

There are two famous puzzles pertaining to adjudication in legal philosophy: the first is the question of judicial law-making and its contrast with mere law-enforcement,[27] and hence the opposition between (judicial) law and (democratic) politics; and

[23] See also Jouannet, note 4, at 364 ff; Regan, note 4, at 230 ff, on why judicial proliferation is a problem neither for international law nor for international jurisprudence; Pellet, note 5; Boyle and Chinkin, note 6, at 266; J Charney, "Is International Law Threatened by Multiple International Tribunals?" (1998) 271 Recueil des cours 101, at 373.

[24] Since I have defined the concept of adjudication as the function of stating the law to settle a dispute, the chapter does not address further functions attributed to adjudication (by various international actors, or by reference to their respective legal regimes). For functionalist discussions of the practice of international adjudication, see e.g., in this handbook, Alvarez, Ch. 8; A von Bogdandy and I Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers" (2011) 12 German L.J. 979.

[25] See Kingsbury, note 4; Ascensio, note 4, at 164–6.

[26] See also *Corfu Channel Case* (Merits) [1948] ICJ Rep 1949, para. 35.

[27] Law enforcement is used interchangeably with law application in this chapter. It should not, however, be conflated with the distinct question of the practical enforcement of legal or even judicial decisions and the latter's enforceability as a result. See also S Besson, "International Judges' Function(s)

the second is the related question of judicial discretion and its contrast with mere legal cognition, and hence the opposition between (judicial) law and morality. Obviously, those two difficulties are even greater in international adjudication where there is not only less determinate and less unified law and fewer politics in the absence of a centralized international legislator, but also less common morality in the absence of a single international political community or polity with shared values.

3.1 International judicial law-making

In contrast to non-judicial dispute settlement mechanisms, adjudication and judicial decisions are based on law: they settle particular legal disputes between the parties of a concrete case by applying the law to specific circumstances. To the extent that they settle a dispute between parties, their legal pronouncements specify the law in the specific context of the case and have *decisional authority* for those parties. At the same time, however, judicial decisions often reach beyond the case at hand and influence the court's future interpretation and application of the law. This is what one may refer to as the *interpretive authority* of judicial decisions. When that interpretive authority applies to the court itself, one usually also speaks of a *precedent*.[28]

Because the application or enforcement of the law implies identifying and interpreting it in a specific case, and because law-enforcing judicial decisions may have interpretive authority beyond the specific case, adjudication may also be referred to as the creation and development of legal norms through judicial practice. This is why one speaks of judicial law-identifying and judicial law-making. Of course, judicial interpretation is not necessary in all cases of law enforcement, and the law's meaning may sometimes be clear. Most of the time, however, interpretation is central to adjudication because the authority of law is communicative; it stems from a communication from those in authority to those to whom it applies and who have to be able to understand it.[29]

Judicial law-making, and especially the judicial identification of legal principles, bring up the legal philosophical question of the applicability of the "sources thesis" to international adjudication and hence to international law-making itself. The

between Dispute-Settlement and Law-Enforcement—From International Law without Courts to International Courts without Law. A Reply to Anna Spain" (2012) 34 Loy. L.A. Int'l & Comp. L. Rev. 101.

[28] See S Besson, "The Erga Omnes Effect of the European Court of Human Rights Judgments" in S Besson (ed), *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* (Zurich: Schulthess 2011); see also Boyle and Chinkin, note 6, at 293–320; R Jennings, "The Judiciary, International and National, and the Development of International Law" (1996) 45 ICLQ 1.

[29] See Raz, *Authority*, note 1; Raz, *Nature of Law*, note 1.

sources thesis is a key element to any legal positivist account of law. According to that view, law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument. Its applicability to adjudication has been challenged by theorists who understand judicial law as the only or main source of law or, at least, conceive of its validity as independent from being posited and identifiable as a social fact alone.[30]

Various replies to this challenge are available.[31] To start with, judicial law-making is a slow process, but it is definitely based on a rule of recognition. As a result, there is nothing worrying in the legalization of moral values or principles in adjudication. Legal principles are identified through legal and judicial interpretation and become part of law *qua* judicial law, i.e., some kind of judicial customary law. The analogy between judicial law and customary law as sources of law stems from their sharing the same accretion process: the repetition of practices for customary law and of precedents for judicial law. Another reply one may make to the challenge pertains to the existence of gaps in the law. Even if general principles were deemed moral and not legal norms once they have become part of judicial law, their legal import may be explained as a way to fill in gaps in the law. Gaps in the law need to be filled by judges by reference to extra-legal materials.

The main difficulty with judicial law-making lies further down the road, however, in the distinction between judicial law and legislative or ordinary law, and hence between judicial law and democratic politics. It would be wrong, indeed, to see judicial law-making as the epitome of law-making. Nor should judicial law-making be conflated with ordinary law-making. First of all, adjudication implies that law pre-exists judicial enforcement or else it could not be identified, applied, and interpreted in the specific case. In practice, of course, the identification of pre-existing law and its development or modification by judges is often straddled.[32] Secondly, the law-making function of judges is either relative to the parties in the case of their decisional authority, or general albeit limited and partial in nature in the case of their interpretive authority.[33] The primary law-making function remains vested in the legislative power as a result. As a matter of fact, the judicial law-making function is defined by reference to that primarily legislative function (and vice versa); the function of judicial law-making is only tenable in combination and in response to legislative or political authority. This may be verified institutionally, since judges work within the constraints of coherence with existing law and of other institutional limitations. This explains, for instance, why

[30] See Dworkin, note 1. In international law, see e.g., Letsas, note 12; Paulus, note 4.

[31] See R Guastini, "Les principes de droit en tant que source de perplexité théorique" in S Caudal (ed.), *Les principes en droit* (Paris: Economica 2008).

[32] See Dickson, note 2; Raz, *Authority*, note 1; Raz, *Nature of Law*, note 1; *contra*: Dworkin, note 1.

[33] See Dickson, note 2; Jouannet, note 4, at 386.

judges have to defer to the democratic legislature and its authoritative directives. Further evidence may be found in the fact that there are so few legal principles identified by judges in practice.[34]

Transposed to international law, the question is whether international adjudication *qua* judicial law enforcement also amounts to judicial law-making. Clearly, because the specificity of international dispute settlement through adjudication is law enforcement, and because the enforcement of international law implies identifying and interpreting international law, international adjudication cannot but include law-making, albeit of a judicial kind.[35]

True, international judges are not, strictly speaking, law-makers,[36] and their decisions cannot be counted among the formal sources of international law (see e.g., ICJ Statute, Art. 38.1.d). They cannot, however, avoid identifying and interpreting the law before applying it.[37] This is what one should understand from the reference in Art. 38.1.d of the ICJ Statute to "judicial decisions" as "subsidiary means for the determination of rules of law," themselves created by formal sources of international law. Legal interpretations made by judges have consequences for their own future legal reasoning (so-called precedents or *stare decisis*), but also the general understanding of the law beyond the specific court (so-called interpretive authority or *erga omnes* effect of international judicial decisions). While some authors see an exclusion of the interpretive authority *(res interpretata)* of international decisions and especially ICJ decisions in Art. 59 of the ICJ Statute and Art. 94.1 of the UNC,[38] those provisions are best understood as a reminder of the relative scope of those decisions' decisional authority (*res judicata*), and not as an exclusion of their interpretive authority.[39] Nor should they be understood to exclude the existence of precedents and coherence with previous decisions in the ICJ's case law itself, as confirmed in the Court's own decisions.[40]

[34] See P Brunet, "Les principes généraux du droit et la hiérarchie des normes" in D de Béchillon et al. (eds), *L'architecture du droit. Mélanges en l'honneur de Michel Troper* (Paris: Economica 2006).

[35] See also von Bogdandy and Venzke, note 24, at 984–9; M Jacob, "Precedents: Lawmaking Through International Adjudication" (2011) 12:5 German L.J. 1005; Boyle and Chinkin, note 6, at 266, 272; Besson, note 27.

[36] See e.g., *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 1996, at 226, 237, para. 18; see also *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 1996, at 592 para. 40 (dissenting opinion of Judge Higgins).

[37] See e.g., *Legality of the Threat or Use of Nuclear Weapons*, note 36, at 226, 237, para. 18; see also Boyle and Chinkin, note 6, at 272.

[38] See e.g., R. Bernhardt, "Article 59" in Zimmermann, Tomuschat, and Oellers-Frahm, note 21, at 1233, 1244.

[39] See e.g., Pellet, note 5; Jouannet, note 4, at 359.

[40] See e.g., *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) [1998] ICJ Rep 1998, pp. 275, 292, para. 28; see also Boyle and Chinkin, note 6, at 293 ff; Pellet, note 21, at 305 ff.

In fact, the law-identifying and law-making functions of international judges are even more important in international legal practice than in the domestic context.[41] This has to do, first, with the limited number of sources of international law: there are more gaps in international law than in domestic law.[42] By virtue of the application of *non-liquet* in international law,[43] international judges are called to identify and interpret applicable law to a greater extent than domestic judges. This is particularly true in relatively new fields of international law, such as international criminal law or international environmental law. Secondly, due to the indeterminate nature of certain sources of international law, and in particular of customary international law and general principles,[44] the judge plays a key law-identifying role. Unlike treaties, the latter sources require a judge for the validation of their legal norms: ascertaining the existence of a given practice and *opinio juris*, on the one hand, and of a principle in domestic traditions and its transposability to international relations, on the other.

A third reason for the importance of the judicial law-making function of international adjudication pertains to international legal pluralism and the absence of hierarchy among norms, regimes, and sources of international law. When their jurisdiction allows it, international judges are called to identify all the norms, regimes, and sources that bear in a given case (see e.g., the Vienna Convention on the Law of Treaties, Art. 31.2 and 3),[45] and then interpret them coherently.[46] Fourthly, the norms in certain regimes of international law, like international human rights law, are necessarily abstract, calling for the specification of the corresponding duties in context and hence for their constantly renewed identification and interpretation through judicial decisions. This explains why many understand human rights treaties as "living instruments."[47] Judicial law-making is actually even more central to international human rights law than it is to other regimes of international law in that the minimal protection of human rights requires a mutual validation by both domestic and international judges.[48]

Of course, international judicial law-making cannot exhaust international law-making and something has to prevent judicial law-making from being identified with international law-making itself. This jurisprudential objection is harder

[41] See e.g., R Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1993) 202; H Lauterpacht, *The Development of International Law by the International Court* (first published 1958, Cambridge University Press 1982) 5.

[42] See Boyle and Chinkin, note 6, at 289–90.

[43] See PCIJ, Advisory Committee of Jurists, *Procès verbaux* of the Proceedings of the Committee, 16 June–24 July, The Hague 1920, at 312.

[44] See Boyle and Chinkin, note 6, at 278–85 ff.

[45] See Boyle and Chinkin, note 6, at 273–5.

[46] Boyle and Chinkin, note 6, at 273–5; Regan, note 4, at 230 ff; Pellet, note 5.

[47] See *Tyrer v. United Kingdom* (1978) Series A no 26, paras 15–16.

[48] See S Besson, "Human Rights and Democracy in a Global Context—Decoupling and Recoupling" (2011) 4:1 EGP 19.

to fight back in international law in the absence of a centralized international legislature, however. The primary international law-making power remains vested in states, even though it is sometimes delegated to international organizations and associates other subjects of international law more directly than through their states as officials.

The question that arises, then, is how international courts may institutionally be organized so as to make their law-making function responsive to the primary law-making function of states. The latter are indeed both subjects of international law, and hence of international adjudication, and its authors. Moreover, *qua* authors of international law, states usually make international law without institutional mediation. And it is difficult, as a result, to identify that institutional respondent to judges that delineates judicial law-making from law-making. Within international organizations, the question has been solved by reference to the division of powers and their mediation among legislative, executive, and judicial institutions distinct from the states. The same may be said by reference to international treaty-making conferences. Outside international organizations, however, and in the absence of a centralized and universalized legislature, the distinctiveness of international judicial law-making from ordinary law-making remains to be established.

In any case, in practice many states resist both the idea of international judicial law-making and of internationally institutionalized law-making mechanisms themselves. The idea that individual judges called on to settle a dispute between states can also contribute to interpreting international law and hence substitute themselves for its authors and primary law-makers and law-interpreters, i.e., states, contradicts the consensualist approach to the validity of international law.[49] A subjective understanding of the validity of international law is matched therefore by a subjective notion of international adjudication: according to that approach, states remain the only validators, interpreters, and enforcers of the law to which they have consented.

Those difficulties explain the persistence of a tension and uneasy separation in practice between the dispute resolution function of international courts, and the law-enforcing, and hence law-identifying and law-making roles that come with the judicial function itself. Evidence of this resistance to international judicial law-making may be found in the kind of jurisdiction exercised by international courts. As we saw before, indeed, international jurisdiction has remained largely non-compulsory and non-exclusive. On the one hand, international adjudication remains one of many international dispute resolution (IDR) mechanisms. As a result, judicial interpretation is not even necessary to resolve legal issues that may be resolved through other IDR mechanisms that do not use the law to do so. International courts themselves may sometimes resort to other IDR mechanisms to settle a dispute without fully enforcing the law. In general, they regard themselves

[49] See E Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge University Press 1991) 23–6.

as competing with other IDR mechanisms, and often give priority to settling the dispute between the parties over developing international law. Interestingly, this may also explain the reluctance of the ICJ to use its advisory function to identify new principles of international law in indeterminate areas of international law and outside any actual dispute. 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 to interpret it authoritatively. On the other hand, the international judge is not necessarily called to interpret the law in an exclusive and authoritative fashion for all international law subjects. Contrary to domestic law, international law may currently be interpreted differently by different courts and there can be as many judicial interpretations as there are courts. As long as it remains non-compulsory and non-exclusive, international adjudication cannot fulfill its usual functions of law enforcement the way it would in the domestic legal order.

This in turn explains why the relations between the dispute settlement dimension of international adjudication and international law-making are particularly problematic in areas where non-consent-based objective and general international law has developed, but where adjudication remains mainly subjective or consent-based and non-exclusive. One may think, for instance, of cases in which the ICJ 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 fitted very well: the scope of judges' legitimate authority matched that of the applicable law. This explains, for instance, why third party interventions are allowed or even compulsory in some cases: to fill the gap between a bilateral dispute resolution mechanism and multilateral law-making consequences.[50] Of course, the disconnect between objective international law and subjective international adjudication is not present everywhere in the international legal order. Regional and specialized courts that are both compulsory and exclusive, such as the ECtHR or the Court of Justice of the European Union, have long combined dispute settlement and law-making functions. And the reason again lies in the institutional framework in which those courts are embedded, i.e., institutions that mediate international law-making for states and to which those international courts are accountable to, such as European Union institutions for the CJEU and domestic institutions and human rights courts for the ECtHR.

Whereas international law has long developed as "law without courts" to coin the famous dictum,[51] it is now no longer the case. Not only is there a multitude of international courts applying it, but international law itself has caught up with that reality and often needs the kind of interpretation and implementation that only international courts can provide. For the time being, however, not only is international law often left to function without proper courts, but the problem is actually

[50] See Boyle and Chinkin, note 6, at 295.

[51] See Kingsbury, note 4, referring to Grotius on this.

best approached from the other side: courts themselves are requested to function without international law and a distinct law-maker that can turn them into full judges and let them be. I will come back to the question of the legitimacy of international courts in adjudicating and of those in whose name international judges are deciding in the last section of this chapter.

3.2 International judicial discretion

It follows from the previous section's considerations that the law is not completely determinate and that adjudication is not merely about legal cognition but also implies judicial discretion. Judicial discretion, however, does not only raise institutional and legitimacy questions about the procedure of law-making and the relationship between (judicial) law and politics, but also substantive concerns about the content of law-making and the relationship between (judicial) law and morality. This second challenge is that judge-made law implies incorporating morality into the law, and the question again is whether this may be explained in a legal positivist framework and without endorsing a natural law approach.

Various responses to this challenge are available.[52] Before considering them, it is important to stress that the distinction at stake here between law and morality is a conceptual one and not a factual one; no one denies any longer that there is a factual relationship between law and morality.[53] First of all, law cannot, strictly speaking, incorporate morality since law is already part of morality, and morality applies anyway to us and to our legal institutions, legal reasoning being a special kind of moral reasoning. In those circumstances, law can only modulate or exclude morality. Judicial law acts precisely as modulator of morality into the legal order: it transposes and specifies moral principles or moral values in an institutional context by making normative choices. Furthermore, and this is a second objection to the challenge, even in cases in which legal principles and other judge-made legal standards are regarded as mere reflections of moral principles, they do not turn morality into law but simply give legal effects to morality within the legal order. This is done in the same way a legal order gives foreign law legal effects without turning it into domestic law.

Transposed to international adjudication, the question of judicial discretion is even more problematic and the natural lawyers' challenge to judicial discretion greater in international law than domestically.[54] There is indeed less determinate law to be directly ascertained due to the few sources of international law, their diversity, and their fragmentation, as I explained in the previous section. Moreover, the moral

[52] See e.g., Guastini, note 31.

[53] Guastini, note 31; see e.g., J Raz, "Incorporation by Law" (2004) 10 Legal Theory 1.

[54] See e.g., Letsas, note 12; Paulus, note 4.

values and interests protected through many norms and regimes of international law are readily considered as universal and, as a result, the moral origins of those norms and the moral justification for their authority are often held as more self-evident than those of domestic law.[55] A confirmation may be found in the value-discourse that often predominates in discussions of international adjudication.[56] As a matter of fact, moral values are regarded by some international judges and scholars as a "judicial lodestar"[57] in deciding international cases.

Of course, the same objections to the challenge may be made internationally as domestically.[58] Moreover, there is, as a matter of fact, less common or shared morality available to international judges than one would think *prima facie*. This is due to the absence of an international community with clearly ascertained common values. As a result, identifying and implementing global values may not be that self-evident for international judges.[59]

There are at least two difficulties with the suggested role of morality within international adjudication. The first one has to do with the existence of a global morality beyond the state. Scope precludes providing a full argument here. Although it is feasible, it is important not to underestimate the need not only to rebut state-of-nature-type arguments about international relations, i.e., relations between states outside the boundaries of a political community, but also to explain how global justice principles and duties come close to domestic ones. A second issue has to do with the higher degree of pluralism that affects global morality. Moral conflicts make orderings of values necessarily parochial, thus raising difficult legitimacy questions about decision-making procedures that identify them and consequently about judicial orderings of those values. It suffices to say in this respect that considerations about social epistemology and institutional design may help conceive of inclusive and deliberative institutions and procedures to adjudicate those conflicts and hence to constrain international judicial discretion. Certain institutional mechanisms, like the margin of appreciation of domestic courts or the European consensus in the ECtHR's toolbox, are examples of restrictions on supranational judicial discretion in the human rights context. Another example is the domestic judicial filter and the resulting deference to the domestic judge in the ICJ's practice, especially when recognizing general principles of international law stemming from domestic judicial decisions.[60] However, all those institutional mechanisms confirm

[55] See S Besson, "The Authority of International Law—Lifting the State Veil" (2009) 31:3 Sydney L. Rev. 343, Introduction.

[56] See e.g., Paulus, note 4; A von Bogdandy and I Venzke, "On the Functions of International Courts: An Appraisal in Light of their Burgeoning Public Authority" (ACIL Research Paper October 2012) < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2084079> accessed December 19, 2012.

[57] See *Legality of the Threat or Use of Nuclear Weapons,* Dissenting Opinion of Judge Higgins, note 36, at 370, para. 41.

[58] See also *South West Africa Cases,* (Second phase) [1966] ICJ Rep 1966, at 34, paras 49–51.

[59] See Regan, note 4, at 230 ff, in response to Paulus, note 4.

[60] See Besson, note 22.

one thing: judicial law and morality are clearly distinct. I will come back to the question of the legitimacy of international courts in adjudicating on those difficult moral issues in the last section of the chapter.

4 The Special Jurisprudence of International Adjudication

Besides sharing the same difficulties, albeit magnified, as domestic adjudication, international adjudication also presents jurisprudential difficulties of its own. The first set of difficulties has to do with the sources of applicable international law and the second set with the legitimacy of international law.

4.1 International adjudication and the sources of international law

The place of international judicial law-making among the sources of international law raises distinct questions relating to the specificity of the international legal order and its sources. International judges are called to do much more than interpret and apply the law. They also have to identify international law, especially general international law when it stems from non-written sources such as customary international law or general principles.

The international judge's role in the identification of international law goes beyond the scope of ordinary identification of any given rule of law in domestic judicial law-making; it comes very close to validating international law and hence to supplementing the formal sources of international law. This occurs either through transforming an emergent rule into an existent one by stating its crystallization, or through focusing on an emergent rule for validation at a later stage.[61] Without judicial validation of those international legal norms, there could be no legal validity through formal sources of general international law in the current state of the international legal order: there are no universal institutions available outside international courts to universally validate the practice of all states as customary international law or general principles. One possible alternative would be the UN General

[61] See Boyle and Chinkin, note 6, at 283; A Cassese and JH Weiler (eds), *Change and Stability in International Law-Making* (Berlin: W. De Gruyter 1988) 3.

Assembly, but the lack of external binding force of its recommendations and decisions is an obstacle. This is even more important as those sources of general international law constitute an important bulk of the international legal order.

The law-identifying role of international judges raises difficult jurisprudential questions that go beyond reconciling judicial law-making with the sources thesis and, as explained in the previous section, identifying some kind of rule of recognition behind judicial law itself. In the present constellation, indeed, judicial law is made instrumental to other sources of general international law. Here, the fact that all states are subjects to the legal norms stemming from those sources, but without ultimately having to consent to them as a prior condition, turns adjudication into a validating mechanism. Judicial law becomes an intermediary source of customary international law[62] and general principles as a result.[63] This intermediary role of adjudication among the sources of international law is actually confirmed by Art. 38.1.d of the ICJ Statute, which refers to judicial decisions as "subsidiary means for the determination of rules of law."

The jurisprudential difficulty is both practical and theoretical. First of all, vesting international judges with such a validating function is not only problematic from the perspective of the judicial function, but also from that of the organization of the international legal order itself. International judges are usually elected by states and their jurisdiction is mostly subjective as a result. The gap between subjective jurisdiction and objective international law-making discussed before becomes salient again; it is the way the function of the international judge is currently institutionalized that prevents judges from properly exercising the law-validating function vested on them. Secondly, the law-validating function of international judges begs the question of what the basis is for judicial law's validity in a legal positivist framework. Indeed, drawing a difference between judicial law *qua* form of customary international law, as I argued before, and judicial law *qua* subsidiary source of customary international law becomes difficult. Whatever one thinks of the analogy between judicial law and customary law made earlier in the chapter and how close they really are, the validating function of international judges threatens the possibility of applying the sources thesis to international judicial law-making itself. Alternative sources of international law listed in Art. 38 ICJ Statute cannot be used to account for the validity of judicial law-making. The implicit rule of recognition applicable to judicial law-making is to be found elsewhere in the international legal order. The problem is that international courts, and especially the ICJ, contribute to developing the theory of sources of international law and the international rule of recognition itself, by stating how international law sources work. For instance, the ICJ has clarified the constitutive elements of customary international law, the

[62] On the sources of general principles of international law and judicial law, see e.g., Besson, note 22; Boyle and Chinkin, note 6, at 285 ff.

[63] On customary international law and judicial law, see e.g., Boyle and Chinkin, note 62, at 278 ff.

relationship between international customary and conventional law, the role of soft law in international law, the value of the International Law Commission's codifications of general international law, and the conditions for the development of *jus cogens* norms. This confirms the meta-role of international adjudication in the international legal order, and the fact that that function has not been endorsed or corroborated by other subjects of international law so far.

A solution to both those practical and theoretical difficulties could lie in the institutionalization of international law-making processes, so as to provide for multilateral institutional fora for objective international law-making alongside international adjudication.[64] This would gradually emancipate the making of general international law from international adjudication, and contribute to solving the puzzle of the applicability of the sources thesis to international judicial law. An important benefit of the proposed institutionalization also lies elsewhere: it would enhance the legitimacy of international judicial law-making itself.

4.2 International adjudication and the legitimacy of international law

The role of international judicial law-making in the justification of the authority of international law raises distinct questions that have to do with the specificity of the international legal order. International judges are called to identify and interpret international law, and hence to validate and make it, thus raising difficulties pertaining to the justification of the authority of the international law they contribute to validating and making. Further, international judges are called to exercise discretion on disputed issues of global justice and morality, without being embedded in an institutional framework that makes them responsive and accountable, either directly or indirectly, to the individual subjects of those global legal norms.

In a nutshell, legitimacy is used here in an objective way to refer to justified authority, or the right to rule and to generate obligations, the latter being understood as exclusionary reasons for action. This explains why legitimacy and justification are sometimes used interchangeably. Legitimacy can be used by reference to an institution, such as a court, or to the law, such as judicial law. Both are usually related, to the extent that the legitimacy of law is tributary of the legitimacy of law-making institutions and vice versa. This objective meaning of legitimacy ought to be carefully distinguished from another understanding of legitimacy that is widespread, albeit unreflectively, in the literature: subjective legitimacy, i.e., legitimacy *qua* acceptance. In practice, however, subjective legitimacy often goes hand in hand

[64] See already *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), note 36, at 43, para. 103.

with objective legitimacy, as it is difficult to have sustainable objective legitimacy without some subjective legitimacy along the way and vice versa.[65] In what follows, the focus is on objective legitimacy only. It is important to emphasize, however, that most chapters in this volume broach various aspects of subjective legitimacy through, for instance, the impartiality and independence of courts and the fairness of judicial procedures.

The legitimacy of international law, and hence of international institutions like international courts and their decisions, is a complex topic; it pertains to the reasons for action given by those in authority to those subject to international law, i.e., in most cases, by states to states. A way out of that complexity, as I have argued elsewhere,[66] is to lift the state veil and to understand the reason-givers as states *qua* officials for their constituency of individuals and the reason-takers as states *qua* proxies for their constituency of individuals. When international organizations act as law-makers, they mediate the reason-giving and allow to see more clearly the difference between states as officials and states as proxy-subjects. International courts as well may be seen as officials and proxies of individuals through their constituent states. They could be seen as adjudicating in the states' and their people's name, as a result.

When one considers different justifications for the authority of international adjudication, it is important to start by putting consent aside. Consent reinforces the legitimate authority of international law by strengthening the salience of a coordinating solution, for instance, and it may explain respect for international law in practice. Alone, however, it is not a sufficient justification for legal authority.[67] Various other justifications for the legitimacy of international adjudication may be provided, however, and its legitimacy is likely to be piecemeal like that of international law as a whole and not holistic.[68]

As explained above, there is one justification of authority that matters more than others in the context of adjudication, however, and that is democratic legitimacy. If judges make law, their authority to do so has to be justified in democratic terms as well. Hence the question of those whose law is being interpreted and applied by judges, in short, those in whose name judges decide, persists.

Transposed to international law and adjudication, the democratic legitimacy of adjudication raises not only magnified issues by reference to domestic adjudication, especially when it is contrasted with universal values being considered as a lodestar of the international judge by certain authors and judges, but also issues of its own that have to do with the inherent limitations of international institutionalization and hence of its democratization.

[65] On the legitimacy of international law, see Besson, note 55; J Tasioulas, "The Legitimacy of International Law" in Besson and Tasioulas, note 4; A Buchanan, "The Legitimacy of International Law" in Besson and Tasioulas, note 4.

[66] See Besson, note 55. [67] Besson, note 55. [68] See Tasioulas, note 65.

One important reason for the reluctance of democratic states toward international judicial law-making, and especially judicial discretion on morally disputed issues, is the lack of institutional and democratic maturity of international law and hence of international adjudication. In the absence of other institutions and especially of a legislature to interact with, and, more generally, of a political community to represent, the judiciary cannot play its interpretive and judicial law-making role. It is neither checked by nor accountable to any institution or community. Nor is it really checking on any institution. Judicial law-making as a reasoning and discursive exercise requires the pre-existence of law, and judges cannot be asked to interpret and develop international law without that law being clearly identified for them. In general international law, not only are those legal rules and principles not clearly identified for courts, but courts are asked to identify them themselves.

It is important, as a result, to explore ways of developing an international institutional order besides courts. One could work, for instance, on ways of enhancing the institutional nature of international decision-making in order to provide judges with an institutional opponent with legitimate authority to which judges may in turn account and respond with the corresponding legitimate authority. It is not possible, in the absence of a separation of powers within international institutions whose law is to be interpreted by international judges, and in the absence of an international legislature representing the international community, to envisage (democratic or other) constraints on judicial discretion and ways of making sure international judges feel responsible. As explained before, this lack of institutional framework of international adjudication may explain why some international courts' jurisdiction remains optional (see e.g., ICJ), while others' is already compulsory (see e.g., ECtHR, CJEU).

This, however, implies more than democratic reforms in the judicial process and in the election of international judges.[69] It requires building a set of institutions outside courts but also around and including them, whether at the same level of governance or across levels of governance in connection with domestic courts and institutions. Of course, in the meantime, international judicial review of multilateral law-making may also acquire another democratic justification of its own, especially in circumstances in which those multilateral law-making processes still suffer from an important democratic deficit.[70] It suffices here to think of the democratizing function of the CJEU in the EU, and of the various decisions through which it reinforced the legislative power of the European Parliament.

[69] See A von Bogdandy and I Venzke, "In Whose Name? An Investigation of International Courts Public Authority and its Democratic Justification" (2012) 23:1 EJIL 7.

[70] See Boyle and Chinkin, note 6, at 310.

5 Conclusions

In his 2010 seminal piece on international adjudication, Donald H. Regan concluded rightly that "many writers move too easily from the premise that we need a lot more effective international law than we currently have [...] to the problematic conclusion that since no other institution is currently able to give it to us, judges should step in to supply our need."[71]

The idea that international adjudication can be a cure to all ills is actually quite widespread. For various reasons, many scholars think we need a stronger international community and legal order, and turn to judges to give it to us. This approach, however, puts the cart before the horse. This chapter shows that judges should not be asked to step in without previous clarification of important theoretical issues about the sources of international law itself and its legitimacy. This implies in particular making sure that processes of general international law-making are institutionalized so as to warrant the respect of the sources thesis and the democratic accountability of international judges. International adjudication scholars have moved too quickly from a programmatic take on international adjudication to one of accomplishment and contentment. It is time to revert to a more critical stance. It is only at this price that the problem that was long described as the *amour impossible* between international law and its judges can be faced openly, but also eventually overcome.

Research Questions

1. The law-making function of international courts and legal positivism: is the sources thesis applicable to international judicial law?
2. The judicial discretion of international courts: is there a way to distinguish international judicial law from morality?
3. The law-validating function of international courts: what does it mean for the legality of international law itself?
4. The legitimacy of international courts: how does it relate to that of international law and how can one enhance the democratic legitimacy of international adjudication?

[71] See Regan, note 4, at 241.

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