

Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction

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This Article develops an understanding of authority as the ability to establish content-laden reference points that participants in legal discourse can hardly escape. Situating authority between coercion by force and persuasion through argument, it carves out recognition and constraint as constitutive elements of authority. Delegation — a conditional grant of authority from principals to agents — is typically taken to account for the authority of international courts and tribunals (ICTs). But the Article argues that delegation is at best only the starting point of ICTs' authority. The dynamics of the legal discourse stabilize authority and account for its further growth. The conception of authority that emerges from the discussion herein is less one of a command that demands blind obedience than a reference point that redistributes argumentative burdens. Communication is authority's medium. Taking a step back from immediate normative questions, the Article shows what it takes for ICTs to have authority. It presents the communicative dynamics that build up ICTs' authority and showcases the discursive resources ICTs themselves use to induce deference. The Article suggests in conclusion that a better understanding of what it takes for ICTs to have authority will also advance questions about such authority's normative legitimacy.

* Amsterdam Center for International Law, University of Amsterdam. I am indebted to the participants of the conference “International Courts and the Quest for Legitimacy,” Jerusalem-Tel Aviv, June 3-4, 2012, as well as to Anne van Mulligen, André Nollkaemper, Eljalil Tauschinsky and the journal's editors for their valuable comments on earlier drafts.

INTRODUCTION

Over the past two decades, old and new international courts and tribunals (ICTs) have produced a swelling stream of judicial decisions. That change in quantity has come with a change in quality. Today ICTs perform significant functions beyond the settlement of disputes: they stabilize normative expectations, make law, and control as well as legitimize the authority exercised by other actors.¹ While this development has left some fields of international law untouched² and some judicial institutions do indeed remain weak, many ICTs are now weighty actors in the exercise of international public authority. In Yuval Shany's words, they are "no longer a weak department of power."³

The increasing authority of international judicial institutions has stirred attention and invited reflection. But it remains unclear and unsettled how their authority may best be understood. What does their authority rest in and what does it amount to? In other words, what does it take for ICTs to have authority?⁴ Authority surely is a slippery concept. It has matured in view of domestic contexts of governance and, in spite of notable shifts of authority beyond the nation-state, such parameters are still taken for granted in large parts of the theoretical scholarship.⁵ Moreover, the concept of authority is the meeting point and melting pot of various disciplines, including political philosophy, empirically minded sociology and, not least, legal scholarship. All this adds to the concept's complexity.⁶

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- 1 Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49 (2013).
 - 2 Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order*, in CAMBRIDGE COMPANION TO INTERNATIONAL LAW 202 (James Crawford & Martti Koskeniemi eds., 2012).
 - 3 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 (2009).
 - 4 My approach to understanding the concept of authority is similar to that of Andrei Marmor, *An Institutional Conception of Authority*, 39 PHIL. & PUB. AFF. 238 (2011).
 - 5 See, e.g., Thomas Christiano, *Authority*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 2, 2004; substantive revision Jan. 11, 2012), <http://plato.stanford.edu/entries/authority/> (without a dint of hesitation discussing authority exclusively as authority of the state).
 - 6 See Richard B. Friedman, *On the Concept of Authority in Political Philosophy*, in AUTHORITY 56 (Joseph Raz ed., 1990); Stephen Lukes, *Perspectives on Authority*, in AUTHORITY, *supra*, at 203.

The present Article takes a step back from immediate normative questions and instead sets out to develop a better understanding of ICTs' authority, be it normatively legitimate or not.⁷ Once more, the driving question is what it takes for ICTs to have authority. The main argument is that the delegation of authority is certainly crucial, but only accounts for part of the story. It is yet more important to appreciate how ICTs' authority grows and is stabilized through the dynamics of discursive construction. What critically underpins the authority of ICTs is the social expectation that actors will relate to them in their arguments. This Article submits that the authority of ICTs is best understood as their ability to establish content-laden reference points that participants in legal discourse can hardly escape and that redistribute argumentative burdens.

The Article probes the received distinction, which tries to grasp authority by distinguishing it from what it is not. Hannah Arendt proposed, and others have agreed: "If authority is to be defined at all, then it must be in contradistinction to coercion by force and persuasion through arguments."⁸ On the one hand, this juxtaposition suggests that authority rests on a moment of voluntary recognition that separates it from coercion. On the other hand, authority is different from persuasion in the sense that it can prompt conforming behavior even in the absence of substantive agreement. But how can it rest on recognition and still constrain? Authority has a precarious existence, which constantly threatens to collapse into either coercion by force or persuasion through arguments.

7 I understand this to eventually complement previous and ongoing research on the exercise of international public authority, see Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, in *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS. ADVANCING INTERNATIONAL INSTITUTIONAL LAW 3* (Armin von Bogdandy et al. eds., 2010). For the ongoing research project, see *The Exercise of International Public Authority*, MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW, www.mpil.de/red/ipa (last updated Mar. 22, 2013).

8 HANNAH ARENDT, *What is Authority*, in *BETWEEN PAST AND FUTURE* 91, 93 (Penguin Books 2006) (1961); see also BRUCE LINCOLN, *AUTHORITY: CONSTRUCTION AND CORROSION* (1991); HERBERT MARCUSE, *A STUDY ON AUTHORITY* 7 (2008); Friedman, *supra* note 6, at 63. Turned differently, authority has been understood as a social relationship in which "A (a person or occupant of an office) wills B to follow A and B voluntarily complies," Miles Kahler & David A. Lake, *Governance in a Global Economy: Political Authority in Transition*, 37 *PS: POL. SCI. & POL.* 409, 409 (2004) (referring to Kim L. Schepple & Karol E. Solten, *The Authority of Alternatives*, in *AUTHORITY REVISITED* 169, 194 (J. Roland Pennock & John W. Chapman eds., 1987)).

Delegating authority, recognizing it at one point in time and promising to submit to it in the future offers a primary and conventional approach to understanding authority between coercion and persuasion. However, it not only belittles the growth of authority beyond moments of delegation, but also prompts the question of how authority persists in cases of dispute about the terms of delegation. The answer lies in the discursive context, which stabilizes authority's survival in the face of contestation and which further accounts for authority's growth beyond moments of delegation.

Both the understanding of authority as a content-laden reference point that redistributes argumentative burdens as well as the outlook on authority's dynamic construction have roots in early political thinking. Both revive a traditional conception of *auctoritas* as a "piece of advice that cannot easily be disregarded."⁹ And as Hannah Arendt reminds, *auctoritas* derives from *augere* (to augment). It augments delegated authority or, in her words, "the foundation."¹⁰ Created and set in place at one point in time, ICTs' authority takes shape and grows in the dynamics of discursive construction.

Part I continues by first drawing the contours of authority between coercion and persuasion and by introducing delegation as a "foundational" moment for ICTs' authority. Part II then explains authority's discursive construction beyond delegation. Part III turns to the discursive resources that ICTs can themselves use to further add to their authority. The last Part concludes with the suggestion that a better understanding of what it takes to have authority will also advance questions regarding the normative legitimacy of such authority.

I. CONTOURS OF AUTHORITY

A. Recognition

The distinctive element of authority in contrast to coercion by force is a minimal degree of voluntary recognition. This element also typically separates authority from power, where the latter refers to an actor's ability or chance to impose its will within a social relationship *also against resistance*.¹¹ A classic

9 3 THEODOR MOMMSEN, RÖMISCHES STAATSRICHT [ROMAN CONSTITUTIONAL LAW] 1034 (Cambridge Univ. Press 2010) (1888) ("In diesem Sinne ist *auctoritas* mehr als ein Rathschlag und weniger als ein Befehl, ein Rathschlag, dessen Befolgung man sich füglich nicht entziehen kann") (translation by the author); see also Horst Rabe, *Autorität*, in 1 GESCHICHTLICHE GRUNDBEGRIFFE [HISTORICAL CONCEPTS] 382 (Otto Brunner, Werner Conze & Reinhart Koselleck eds., 1972).

10 ARENDT, *supra* note 8, at 121.

11 MAX WEBER, *ECONOMY AND SOCIETY* 53 (1978) ("Power" (*Macht*) is the probability

example to illustrate and clarify this distinction pictures the constellation of an armed robbery.¹² Clearly, the robber who holds his victim at gunpoint has power over him. But when the victim does hand over his wallet, he does not do so because he voluntarily recognizes the command of the robber, but out of fear and love for his life.

On a first reading, an attempt might be made to uphold the distinction between authority and power on a formal-descriptive basis. Max Weber chose this approach in line with his sociological ambitions when he distinguished authority from the — in his view — more amorphous concept of power on a purely formal basis. Whereas power refers to the chance of imposing will against resistance (and any kind of human qualities or any accidental constellation could actually place somebody in a position to enjoy such a chance, Weber notes), authority (*Herrschaft*) refers to the chance of eliciting obedience to commands.¹³ The former passes through the barrel of a gun, the latter through communications. This approach notably requires a very narrow understanding of power that is confined to physical means of coercion. From this perspective, the power of the judicial branch of government would be, as Montesquieu put it, “somehow nil” (*en quelque façon nulle*).¹⁴

It is helpful to see that Weber’s concept of choice in German is *Herrschaft*, which flows together with *Autorität* into the English *authority*. Most of the time, he uses *Herrschaft* and *Autorität* synonymously and translating them both as authority then poses no problems.¹⁵ But *Herrschaft* — a younger term when compared to *Autorität*, which came to prominence only with the emergence of territorial rulers¹⁶ — also exists where actors act out of self-interest in the face of threats or incentives rather than out of a feeling that they ought to act

that one actor within a social relationship be in a position to carry out his own will despite resistance, regardless on the basis on which this probability rests”).

- 12 The example is age-old and already informed St. Augustine’s suggestive question: “Without justice — what else is the State but a great *band of robbers*?” It has been used recurrently since, see HANS KELSEN, *PURE THEORY OF LAW* 44-46 (1978); ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* 4 (1970).
- 13 WEBER, *supra* note 11 (“‘Domination’ (*Herrschaft*) is the probability that a command with a given specific content be obeyed by a given group of persons”).
- 14 C. DE MONTESQUIEU, *DE L’ESPRIT DES LOIS*, BOOK XI ch. VI (1875). On the context of this commonly decontextualized statement, see CHRISTOPH MÖLLERS, *DIE DREI GEWALTEN [THE THREE POWERS]* 21 (2008).
- 15 See, e.g., MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT [ECONOMY AND SOCIETY]* 214 (2006).
- 16 Dietrich Hilger, *Herrschaft*, in 3 *GESCHICHTLICHE GRUNDBEGRIFFE [HISTORICAL CONCEPTS]* 33 (Otto Brunner, Werner Conze & Reinhart Koselleck eds., 1982). Translations of “authority” in Weber’s work thus differ. The translation in WEBER,

in a certain way.¹⁷ Weber opines, for example, that authority (*Herrschaft*) can in concrete cases rest on many different motives for obedience, ranging from dull habit all the way to rational calculation.¹⁸

On many other accounts, the concept of authority would exclude rational calculation as a possible ground for obedience where, in fact, conforming behavior could not at all be called *obedience* because it is not motivated by the command, but by the threats and incentives that lie behind the command and give it force. Weber, however, does not exclude rational calculation as a ground for obeying an authority, and yet he upholds the idea that authority requires a minimal degree of *wanting* to obey (voluntary recognition).¹⁹ On this account, only the clearest forms of physical coercion amount to an exercise of power, rather than authority: the gun defines the robber's authority.²⁰ But other kinds of incentives — created, for example, by institutions that impact the distribution of payoffs — would not necessarily spell the absence of authority. Weber's account thus largely abstracts from specific reasons or motives and rests on a formal-descriptive basis.

Such an attempt at distinguishing authority from power builds on a quaint conception of power as coercion by force that should be abandoned in order to consider other forms in which A can produce effects that condition B in its actions in a way that A desires — namely forms of exercising power via institutions and broader social relationships.²¹ Power not only runs through the barrel of a gun. This surely holds true for *judicial* power, which would be an outright misnomer following the idea that power involves coercion by force similar to that of the robber in relation to his victim.²²

supra note 11, thus in fact translates *Herrschaft* as “domination” rather than “authority.”

17 See Peter Blau, *Critical Remarks on Weber's Theory of Authority*, 57 AM. POL. SCI. REV. 305, 306 (1963).

18 WEBER, *supra* note 11, at 212.

19 *Id.* at 212-13.

20 See also Robert Dahl, *The Concept of Power*, 2 BEHAV. SCI. 201 (1957) (embracing a similarly narrow conception of power).

21 Michael Barnett & Raymond Duvall, *Power in Global Governance*, in POWER IN GLOBAL GOVERNANCE 1, 3 (Michael Barnett & Raymond Duvall eds., 2005) (defining power as “the production, in and through social relations, of effects that shape the capacities of actors to determine their own circumstances and fate”).

22 It is truly unlikely and so far purely a hypothetical scenario that the U.N. Security Council might authorize the use of force to enforce an international judgment, see United Nations Charter, art. 94(2), Oct. 24, 1945, 1 U.N.T.S. 16. On the concept of judicial power, see in particular ALEC STONE SWEET, GOVERNING WITH

But if the concept of power is broadened to include institutional power and even structural or productive power, how is it any different from authority?²³ The formal-descriptive basis can no longer do the job. Authority is then indeed not different in kind when compared to power, but it is akin to certain kinds of power, though not others.²⁴ The robber has power but still no authority. Voluntary recognition continues to be the distinctive criterion that identifies authority as a specific species of power.

B. Constraint

There remains a looming question: Is there much of a constraint or even command when a minimal degree of voluntary recognition is constitutive of authority? Weber grapples with this question in his treatment of an authority relationship (*Herrschaftsverhältnis*).²⁵ Not any claim to obedience amounts to authority if it is complied with, he clarifies. The example he offers is that of an employee demanding to be paid the amount fixed in her contract. When the employee demands her due payment she does not exercise authority, but simply engages in a just exchange of labor for money. At the same time, Weber continues, it is certainly not excluded from the purview of a relationship of authority that it was created by way of a contract, even where such a contract was an ideal expression of free will between its parties. But it remains unclear and, in any event, a matter of degree, when exactly a contract turns into an authority relationship. What only is clear is that such a relationship demands a moment of voluntary recognition. Influence that stems from asymmetric (economic) power relations, for example, which allow one actor to dictate contract conditions to another, does not amount to authority but, well, to an exercise of power.²⁶

This discussion points towards a *dynamic* explanation of how authority grows out of voluntary recognition. While a moment of recognition is needed to distinguish authority from other forms of power, an addressee of authority

JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 12-20 (2000); KAREN ALTER, *The European Court's Political Power Across Time and Space*, in *THE EUROPEAN COURT'S POLITICAL POWER* 3 (2009).

23 On these types of power (institutional, structural, and productive), see Barnett & Duvall, *supra* note 21.

24 See JOSEPH RAZ, *Legitimate Authority*, in *THE AUTHORITY OF LAW* 3, 19 (2d ed. 2009) (“[W]e should regard authority basically as a species of power”).

25 WEBER, *supra* note 11, at 213.

26 *Id.* at 216.

might later disagree with its exercise and could thus be constrained.²⁷ This is in fact the core of political or public authority and, from a normative perspective, the kernel of private and public autonomy: the ability of individuals and collectivities to set up laws that are binding upon themselves.²⁸ Such a dynamic perspective of the phenomenon of authority must seem simple and plausible to any lawyer who would distinguish between a competence and the exercise of such competence. Conventions of language would also distinguish between actors being *an* authority, on the one hand, and actors being *in* authority (by virtue of their office and institutions that *confer* authority), on the other.²⁹ Having identified voluntary recognition and constraint as constitutive elements of authority, the following section expands on the reasons actors may have for creating institutions that confer authority; that is, on the reasons for delegating authority.

C. Delegation

The most straightforward and standard mechanism that creates and sustains authority — combining both elements of recognition and constraint — is delegation, which may well be understood as a “conditional grant of authority from a principal to an agent.”³⁰ There are numerous plausible reasons why actors create institutions that confer authority and submit to such authority

27 Michael Zürn, Martin Binder & Matthias Ecker-Ehrhardt, *International Authority and Its Politicization*, 4 INT’L THEORY 69, 83 (2012) (drawing a similar and accurate distinction between different layers of authority, and suggesting that a first layer concerns whether an institution is considered functionally necessary in order to achieve common goods and the competence of such an institution to take certain measures, while a second layer concerns the rightful exercise of such authority).

28 ROBERT BRANDOM, MAKING IT EXPLICIT 50 (1998); RAINER FORST, A RIGHT TO JUSTIFICATION (2011); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 122 (William Rehg trans., 1996) (on the “co-originality” of private and public autonomy).

29 RICHARD E. FLATHMAN, THE PRACTICE OF POLITICAL AUTHORITY: AUTHORITY AND THE AUTHORITATIVE (1980).

30 Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney, *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 3, 7 (Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney eds., 2006); see also Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. 1, 3 (2008) (defining international delegation “as a grant of authority by two or more states to an international body to make decisions or take actions”).

being exercised over them.³¹ Actors are especially inclined to delegate authority and even tolerate a certain degree of unpredictability or leeway if they can expect instrumental gains, for instance, when an agent is expected to undertake specific and possibly repetitive tasks more efficiently or effectively.³²

Incentives for delegation may also arise in domestic political processes where some actors seek to enter into international commitments in order to outplay their opponents.³³ An adverse international judgment may, for example, help a state's executive in pursuing political projects that are unpopular among its constituency. Delegating authority to an international agent may further be conducive to political strategies, which would be perceived as illegitimate or even illegal if pursued unilaterally on the domestic level. It opens up possibilities, which would simply not be available to individual states.³⁴ For example, international criminal tribunals and the International Criminal Court are, when compared to foreign domestic courts, maybe not only the more legitimate venue to try alleged perpetrators, but also legally less troubled by issues of immunities. They also have a strong role in the making of international humanitarian law that is beyond the reach of any individual state.³⁵

From this perspective on delegation as a conditional grant of authority, the agent is expected to follow directions from its principal. When it acts in undesired ways, when "agency slack" persists, principals can learn from frustrated expectations and change the terms of delegation or dismantle that agent altogether.³⁶ In these constellations, the authority of agents is limited to the extent they lack independence. But some of the above strategies require

31 See Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171 (2008); Anne-Marie Slaughter & Laurence R. Helfer, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899 (2005).

32 Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 9-16 (1998); Hawkins, Lake, Nielson & Tierney, *supra* note 30, at 13-15; Barbara Koremenos, *When, What and Why Do States Choose to Delegate?*, 71 LAW & CONTEMP. PROBS. 151 (2008).

33 HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION (1997); Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 604-10 (2007); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

34 Abbott & Snidal, *supra* note 32, at 18 (calling this political strategy "laundering").

35 See Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1 (2006).

36 Hawkins, Lake, Nielson & Tierney, *supra* note 30, at 8.

at least an air of independence to work. Independence is also necessary when it comes to one of the most salient reasons for delegating authority to ICTs: overcoming collective action problems.³⁷

For such purposes, principals need to credibly signal that they will live up to their commitments in the future, and they delegate authority to international institutions to do precisely that.³⁸ ICTs are crucial in this regard as they strengthen commitments, increase the benefits of participating in an international regime, and lower the costs of participation.³⁹ The relatively strong judicial institutions in the context of the World Trade Organization (WTO) are a case in point. They form part of a packet that reassures members that they are less likely to be cheated on their commitments in the future.⁴⁰

This line of reasoning points to the fact that delegating authority may thus not only be thought of as a conditional grant to an *agent*, but also as delegation to a *trustee* that is less responsive to the input of principal(s).⁴¹ Whereas the understanding of ICTs as agents carries a long way, it suggests possibilities of renewed political input that are, however, oftentimes rare and limited. Formally changing the terms of delegation typically requires unanimity among the principals. Amendment procedures of international treaties, also of those setting up a regime with strong judicial bodies, usually erect insurmountable hurdles for principals to react to “agency slack.” The result is an asymmetry between the authority of ICTs, on the one hand, and political-legislative mechanisms, on the other.⁴² Informal control mechanisms

37 Clifford J. Carrubba, *Courts and Compliance in International Regulatory Regimes*, 67 J. POL. 669 (2005); Guzman, *supra* note 31, at 188.

38 This is the classical argument of early institutionalist literature on international relations, see ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984).

39 Carrubba, *supra* note 37.

40 Judith Goldstein, *International Institutions and Domestic Politics: GATT, WTO, and the Liberalization of International Trade*, in *THE WTO AS AN INTERNATIONAL ORGANIZATION* 133, 136 (Anne O. Krueger ed., 1998).

41 Karen Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT'L RELATIONS 33 (2008); Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POL. 103 (2001).

42 Armin von Bogdandy & Ingo Venzke, *In Whose Name? International Courts Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7, 19-21 (2012) (on the asymmetry between adjudication and parliamentary politics); see also Karen J. Alter, *Delegation to International Courts and the Limits of Re-Contracting Political Power*, in *DELEGATION AND AGENCY IN INTERNATIONAL*

may be similar in effect to formal amendment but not equally available to all principals, as they depend on relative power and influence.⁴³

It is, then, a particularly intriguing question why governments would still agree to submit to strong ICTs that escape their control at least to some extent. Continuing to uphold rationality assumptions and adding to the reasons already mentioned, one might note that unforeseen developments could still factor into the equation to moderate expected benefits. The possibility of unpredictable developments would not *eo ipso* rule out rational delegation.⁴⁴ Another response could point to the limits of rationality and foreseeability. The negotiating records of the Uruguay round leading to the institutional overhaul of the WTO trade system, for example, show that state representatives simply had wrong expectations about the consequences of establishing an Appellate Body.⁴⁵ Similarly, concerning the European Court of Human Rights (ECtHR), an internal study of the British Ministry of Foreign Affairs revealed after a first series of cases brought against Britain that the government had seriously underestimated the legal dynamics and implications of the European Human Rights Convention.⁴⁶

Finally, delegation may be thought of as tacit and implicit, for example when state representatives conclude an international agreement with rather generic language and when they grant an international court or tribunal the competence to interpret the agreement with the knowledge that it will fill in vague terms and thus shape the contents of commitments.⁴⁷ ICTs refer to this underlying logic when they argue that contracting parties consented to subsequent legal developments because they used generic terms in formulating their commitments.⁴⁸

ORGANIZATIONS, *supra* note 30, at 312; Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 659-70 (2005).

43 Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004).

44 Clifford J. Carrubba, *A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems*, 71 J. POL. 55, 67 (2009).

45 Peter van den Bossche, *From Afterthought to Centrepiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* 289 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds., 2006).

46 Lord Lester, *UK Acceptance of the Strasbourg Jurisdiction: What Really Went On in Whitehall in 1965*, 1997 PUB. L. 237.

47 Ginsburg, *supra* note 42, at 641-44.

48 See, e.g., *Aegean Sea Continental Shelf (Greece v. Turk.)*, Judgment, 1978 I.C.J. ¶ 77 (Dec. 19); Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WB/DS58/AB/R, ¶ 130 (Oct. 12, 1998);

II. THE DISCURSIVE CONSTRUCTION OF AUTHORITY

A. Consent and Contestation

Delegation is the typical starting point of ICTs' authority. But it is precisely that: a starting point and at best part of the story. The later legal discourse then adds to explaining how their authority grows out of such moments of voluntary recognition. ICTs refer to the terms of their delegated authority as the primary basis of legitimacy to back their claims to obedience. Martin Shapiro has argued that the best analytical angle from which to analyze court behavior generally is to see how it connects to manifestations of consent — as expressed in the terms of delegated authority, above all — and how ICTs try their utmost to avoid that the disfavored party perceives the judgment as an exercise of *power*.⁴⁹ In this respect, international adjudicators can cling to the parties' consent to the law to be applied, to the procedures to be used, and to some extent even to the persons applying that law. How far these three consensual elements are stretched in any specific case certainly differs and depends among other things on the judicial institutions involved, the power of the parties, and the field of law. The contrast between an arbitral tribunal applying a recent bilateral treaty and the ECtHR shaping human rights law in Europe visibly illustrates these differences.⁵⁰ But wherever ICTs are situated on this spectrum, they will summon the disputing parties' consent.

Invoking prior moments of recognition is such an obvious and ubiquitous practice that a few illustrative examples shall suffice to demonstrate how ICTs boost their authority in this way. The International Court of Justice (ICJ) has repeatedly stressed that it can only act on the solid consent of the parties and when it does act, it is of course bound by the state of the law to be applied in any specific case.⁵¹ Attempts at linking back to the consent of state parties can even go to such great lengths as suggesting that state parties to a treaty intended the contents of their commitments to develop in a certain way when they concluded a treaty some 150 years earlier.⁵² The WTO Appellate

Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, ¶ 396 (Dec. 21, 2009).

49 MARTIN SHAPIRO, *COURTS: A POLITICAL AND COMPARATIVE PERSPECTIVE* 3 (1980).

50 On those differences in further detail, see von Bogdandy & Venzke, *supra* note 1.

51 *See, e.g.*, *Fisheries Jurisdiction (Gr. Brit. & N. Ir. v. Ice.)*, Judgment, 1974 I.C.J. 3, ¶ 53 (July 25); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 18 (July 8).

52 *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, Judgment, 2009 I.C.J., ¶ 66 (July 13).

Body, shaping the law under its compulsory jurisdiction, portrays its actions as nothing but giving effect to a prior bargain: “The WTO Agreement is a treaty — the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain.”⁵³

Two persistent myths help ICTs in their endeavor to summon consent.⁵⁴ The first suggests that international lawmaking is only a matter of sources. It thereby helps to uphold the view that whatever ICTs do is rooted in the voluntary recognition of their principals.⁵⁵ The metaphor of sources is especially blind to seeing how ICTs’ practice of interpretation contributes to the making of international law and to recognizing how authority grows out of contractual relationships.⁵⁶ The related second myth concerns the semantics of interpretation and suggests that ICTs’ interpretative practice uncovers the law that is already out there, hidden in or behind the legal rules that spell out the terms of delegation.⁵⁷ Pierre Bourdieu summed up that

[t]he ritual that is designed to intensify the authority of the act of interpretation . . . adds to the collective work of sublimation designed to attest that the decision expresses not the will or the world-view of

53 Appellate Body Report, *Japan — Alcoholic Beverages (II)*, WT/DS8 10&11/AB/R, at 14 (Oct. 4, 1996).

54 Both these ideas are myths, not in the strong sense of the word that sometimes carries a subtle and possibly stingy accusation of naïveté, but in the sense of assumptions that are so deeply embedded in prevailing narratives of what happens that they are not questioned, see ROLAND BARTHES, *MYTHOLOGIES* (1972); see in further detail 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 (2011).

55 Sources doctrine became increasingly focal with the rise of legal positivism and its claim that all authority is source-based, see JEAN D’ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES* 62-66 (2011); Paul Guggenheim, *Contribution à l’histoire des sources du droit des gens [Contribution to the History of the Sources of International Law]*, 94 *RECUEIL DES COURS [COLLECTED COURSES]* 5, 20-35 (1958).

56 INGO VENZKE, *HOW INTERPRETATION MAKES INTERNATIONAL LAW: ON SEMANTIC CHANGE AND NORMATIVE TWISTS* 29-37 (2012).

57 *Id.* at 46-57; see also Andrea Bianchi, *Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning*, in *MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY* 34, 48-49 (Pieter H.F. Bekker et al. eds., 2010); Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14 *THEORETICAL INQUIRIES L.* 455 (2013).

the judge but the will of the law or the legislature (*voluntas legis or legislatoris*).⁵⁸

These are myths simply because interpretations contribute to the creation of what they find. John Langshaw Austin, a companion of H.L.A. Hart at Oxford, found that “[o]f all people, jurists should be best aware of the true sense of affairs . . . [y]et they succumb to their own timorous fiction, that a statement of ‘the law’ is a statement of fact.”⁵⁹ Austin further showed how any attempt at distinguishing something like statements of fact (*constative* speech acts) from statements that create something in the world such as law (*performative* speech acts) ultimately fails. There is no escape from the creativity of interpretations.⁶⁰

But appreciating the growth of authority through subsequent discursive practices begs a nagging question: if the actions of the agents themselves contribute to shaping the terms of delegation, how then can they maintain their claim to authority and how does this effect voluntary recognition as a distinctive feature of authority in comparison with other forms of power? In addition, if a principal disagrees with an agent’s interpretation of the terms of delegation, how could authority survive between coercion and persuasion? Would it not collapse on either side, on the side of coercion if the principal continues to disagree and on the side of persuasion if the principal does agree?

Even if the judicial review of domestic action amounts to the prime function of some ICTs, an argument could still be made about the scope and exercise of such review.⁶¹ ICTs surely enter such a discourse all the time when they rebut objections to jurisdiction, for instance. But if ICTs had to persuade, their authority would be lost. Arendt wrote sweepingly: “Where arguments are used, authority is left in abeyance.”⁶² Such a view surely smells strongly of authoritarianism and it is implausibly drastic. Many actors make reasoned

58 Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 828 (1987).

59 JOHN LANGSHAW AUSTIN, HOW TO DO THINGS WITH WORDS 4 (1979).

60 VENZKE, *supra* note 56, at 46-57.

61 Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003) (arguing that the review of domestic acts is indeed ICTs’ prime function).

62 ARENDT, *supra* note 8, at 92; *see also* THOMAS HOBBS, DE CIVI 115 (Kessinger Publishing 2004) (1651) (noting no less drastically that “command is a precept in which the cause of the obedience depends on the will of the commander” and “the will stand[s] for a reason”).

claims and still exercise authority. ICTs, like other public actors, are even under legal obligations to justify their decisions.⁶³

And yet it is indeed compelling to distinguish authority from persuasion. Also reasoned court decisions (or other acts of public authority) surely demand obedience regardless of the contents of commands, within bounds, and in the absence of substantive agreements. In an ideal type formulation, authority implies that the addressee acts as if she took the contents of the command as a maxim for action due to the authority relationship, not because of her own assessment of the command as such.⁶⁴ Authority implies, in other words, a “surrender of private judgment.”⁶⁵ H.L.A. Hart translated this aspect of authority into legal scholarship with the notion of content-independent reasons — reasons, namely, which derive from the intention of the person or institution having authority (being an authority or being in authority) regardless of the command’s contents.⁶⁶ Constraint in the absence of recognition spells power instead of authority and substantive agreement spells the absence of constraint.⁶⁷

It is fitting at this point to briefly show how the sensible juxtaposition of authority with power and persuasion exposes difficulties in many uses of the pervasive notion of *persuasive authority*.⁶⁸ When discussing the role of precedents, for example, it seems paradoxical to say — as quite a number of ICTs are happy to do — that earlier decisions have “persuasive authority.”⁶⁹ Authority implies at least relative content-independence. If earlier decisions are to qualify as an exercise of authority, then they also need to find obedience when they do not persuade.⁷⁰ Ideas on persuasive authority seem to be at their

63 See, e.g., Statute of the International Court of Justice, June 26, 1945, art. 56(1), 59 Stat. 1055 [hereinafter ICJ Statute].

64 WEBER, *supra* note 11, at 215.

65 Friedman, *supra* note 6, at 67.

66 H.L.A. HART, *ESSAYS ON BENTHAM* 254-55 (1982); see RAZ, *supra* note 24; Stefan Sciaraffa, *On Content-Independent Reasons: It’s not in the Name*, 28 *LAW & PHIL.* 233 (2009).

67 Scott J. Shapiro, *Authority*, in *OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 382, 383 (Jules Coleman & Scott J. Shapiro eds., 2004) (claiming that authority is either pernicious or otiose).

68 Frederick Schauer, *Authority and Authorities*, 94 *V.A. L. REV.* 1931, 1940-52 (2008).

69 See, e.g., *ADC v. Republic of Hung.*, ICSID Case No. ARB/03/16, Award, ¶ 293 (Oct. 2, 2006); see also August Reinisch, *The Role of Precedent in ICSID Arbitration*, 2008 *AUSTRIAN ARB. Y.B.* 495, 498 (“[A]uthoritative decisions may not be binding precedents but they enjoy a highly persuasive authority which is hard to disregard”).

70 Schauer, *supra* note 68.

strongest in comparative law and with regard to the use of foreign judgments, which may provide a repository of good reasons.⁷¹ But it fails to offer an answer as to what authority might mean in this context if its arguments were simply persuasive. The notion of persuasive authority seems theoretically weak and generally reflects the struggle of legal doctrine to come to terms with the use of “authorities,” which are non-binding, still ubiquitous in legal discourse, and sometimes come with normative force.

B. Discursive Construction

Authority’s existence is especially precarious and susceptible to collapse as long as relationships of authority are thought of as pair relationships involving only A and B.⁷² Authority hardly arises in the way that A wills B to do *X* and B voluntarily complies. In such constellations it remains difficult to distinguish authority from power when the addressee alleges that A’s actions exceed the terms of delegated authority. Conversely, if B could not be induced to comply in the absence of agreement, A would lack authority. This is precisely the case when it comes to the actions of ICTs. They are characteristically faced with deciding between competing interpretations. But they are also embedded in a larger context. This larger discursive context perpetuates a social belief that *stabilizes* ICTs’ authority.⁷³ Authority emerges when this broader context holds that B should do *X* because A said so. This context includes peers and broader publics, whose discursive practices will determine whether A’s authority prevails over B’s possible disagreement.⁷⁴ Notably, the more authoritative the actor is that holds B to do as A says, the more likely this will increase A’s authority.

Authority needs to be understood as a product of discursive practices in a dynamic context that exceeds dyadic relationships of authority.⁷⁵ Once authority is placed in such a constellation, it is possible to resolve its imminent collapse into either coercion in the absence of voluntary recognition or persuasion in

71 Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55 (2009); H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261 (1986-1987).

72 Blau, *supra* note 17, at 313.

73 Marmor, *supra* note 4; *see also* D’ASPROMONT, *supra* note 55 (reviving Hart’s social thesis for the international legal context); Friedman, *supra* note 6, at 71; *cf.* HART, *supra* note 66 (basing the rules of recognition — the rules that point out authorities — in social practice).

74 On the role of publics in the construction of a court’s authority in municipal, federal as well as international settings, *see* Carrubba, *supra* note 44.

75 For a well-developed similar argument in this vein, *see* RICHARD E. FLATHAM, *THE PRACTICE OF POLITICAL AUTHORITY* 124 (1980).

the absence of content-independent obedience. What matters for the existence of authority is that there is an *expectation* that what the authority says will be followed. Above all, this expectation feeds on past experience. This dynamic construction sustaining ICTs' authority merits further scrutiny and explanation.

What sustains the authority is not individual recognition in the specific case of its exercise, but its social recognition — a social belief in its legitimacy, which, as Niklas Luhmann notes, “does precisely not rest . . . on convictions for which one is personally responsible, but to the contrary on social climate.”⁷⁶ In Richard Flatham's words, “shared values and beliefs” are constitutive of authority, and those shared underpinnings are shaped and upheld in discursive practices.⁷⁷ In this sense, as Bruce Lincoln concurs, authority is based on “culturally and historically conditioned expectations.”⁷⁸ Turning to ICTs, it first of all matters that they have been right and successful in the past, and so does a record of actually having elicited obedience to commands previously.⁷⁹ Both boost the expectation that commands will be followed. ICTs, thus, can gain (and lose) authority in discursive practices conducted over time.

Understanding the discursive construction of authority is especially salient when it comes to the ICTs' protuberant modus of exercising authority; that is, by way of making law.⁸⁰ They shift meanings and establish new reference points for legal discourse. By positing their claims about international law as points of reference in legal argument, they contribute to lawmaking. That such authority does exist can — on a *prima facie* and exemplary account — be easily gleaned from legal arguments made in the context of trade law where participants in legal discourse cannot escape the spell of judicial precedents.

76 NIKLAS LUHMANN, *LEGITIMATION DURCH VERFAHREN* [LEGITIMACY THROUGH PROCESS] 34 (1983) (“Legitimität beruht somit gerade nicht auf ‘frei-williger’ Anerkennung, auf persönlich zu verantwortender Überzeugung, sondern im Gegenteil auf einem sozialen Klima” (translated by the author)).

77 FLATHAM, *supra* note 75, at 26.

78 BRUCE LINCOLN, *AUTHORITY: CONSTRUCTION AND CORROSION* 116 (1991).

79 See Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 *CHI. J. INT'L L.* 115 (2011) (arguing that the court increases its reputation by finding compliance); see also ANDRE NOLLKAEMPER, *NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW* 256 (2011) (“The authority of a decision of a national court cannot be presumed, but has to be earned”).

80 Much of the practice of international institutions — bureaucracies and judicial bodies alike — may in fact be best understood as lawmaking by way of interpretation, see VENZKE, *supra* note 56; Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, in *INTERNATIONAL JUDICIAL LAWMAKING: ON PUBLIC AUTHORITY AND DEMOCRATIC LEGITIMATION IN GLOBAL GOVERNANCE* 3 (Armin von Bogdandy & Ingo Venzke eds., 2012).

Anyone entering this field is forced and expected to relate their arguments to earlier judicial statements about the law. Against this background, I suggest thinking of ICTs' authority as the *ability to establish content-laden reference points that participants cannot escape*.

The authority of reference points notably works independently of their content, within bounds.⁸¹ Thus an actor who has just lost a case may well turn around and invoke the adverse judgment to support its position in another case. Generally, actors use such references in the strategic endeavor to support their positions, and in so doing they force them onto others who then have little choice but to also relate to them. Authority emanates from this dynamic and discursive practice. ICTs, in turn, can further strengthen their authority by reinforcing the use of precedents. Precedents constrain them to some extent, but, even more so, they empower them. I will sketch how they do so immediately, but beforehand wish to further refine the conception of authority that emanates from this discussion.

Authority in this discursive understanding is in fact less of a command that demands blind obedience than a reference point that is hard to escape, comes with some content, and redistributes argumentative burdens. Notably, such authority can come in degrees rather than in the modus of all or nothing. Though Weber spoke of authority as command, which suggests a binary possible response of either obedience or defiance, he also defined authority as a *chance* to find obedience, thus suggesting not only that authority can persist even if defied in a specific case, but also opening up possibilities of thinking about authority in degrees — something he does not discuss any further.⁸²

At this point it also appropriate to contrast my conception of authority with that of Joseph Raz, who has offered the most prominent account in present debates. Raz distinguishes authority as a command from other things such as recommendations or advice by saying that the former excludes countervailing reasons. Authority does not hinge on its impact on the balance of reasons at all, in his view, but requires that the addressee take the command of the authority in

81 Schauer, *supra* note 68, at 575 (noting that “if we are truly arguing from precedent, then the fact that something was decided before gives it present value despite our current belief that the previous decision was erroneous”).

82 WEBER, *supra* note 11, at 214 (noting that obedience implies that the addressee of a command makes the command's content the maxim of her own action without regard to her own assessment of its contents). For an understanding that goes beyond authority as command, see also Armin von Bogdandy & Matthias Goldmann, *The Exercise of International Public Authority Through National Policy Assessment: The OECD's PISA Policy as a Paradigm for a New International Standard Instrument*, 5 INT'L ORG. L. REV. 241 (2008).

lieu of her own judgment on the balance of reasons for action.⁸³ Understanding authority, as this Article submits, as a weight that redistributes argumentative burdens seems to be straightforwardly excluded from his perspective. Its own merit largely aside, Raz's account simply does not capture — it is simply not geared towards — the authority of ICTs that works in discursive practices.⁸⁴

Understanding authority as the ability to establish content-laden reference points in legal discourse rather picks up a much earlier tradition of political thinking. It connects to how the idea of authority was already used in Roman law where the *auctoritas* of the Senate was distinguished from the *potestas* of the magistrates. While it did not impact the validity of the magistrates' acts if they went against the advice of the Senate or lacked the Senate's consent, such acts were without authority and politically frail. As Theodor Mommsen noted, "*auctoritas* was more than a piece of advice and less than a command — a piece of advice that cannot easily be disregarded."⁸⁵ This early tradition captures authority as a weight that redistributes argumentative burdens in legal discourse. Speaking of "advice" should not distract from the fact that such redistribution is more often than not of great political sensitivity.

C. The Force of the Past

The legal discourse builds on moments of delegation and dynamically increases authority. Arendt reminds us in this vein that *auctoritas* derives from *augere* (to augment). She suggests that it is the original foundation that authority (or those in authority) constantly augments.⁸⁶ In contrast to power, she notes, authority has its roots in the past that it continues to use in order to boost its claims in the present.⁸⁷ One might think of this authority as *traditional* in character, not so much in the sense of the authority of good old rules, but with reference to past practices.⁸⁸ The force of the past builds on intuitive beliefs

83 RAZ, *supra* note 24, at 22-25.

84 Raz's argument forms part of his broader ambition of providing an account of the authority of law while offering a defense of exclusive legal positivism. At the same time, he strives for "an analysis maximizing the similarities between authority for action and authority for belief," *see id.* at 8; *see also* Samantha Besson, *The Authority of International Law — Lifting the State Veil*, 31 SYDNEY L. REV. 343 (2008) (using Raz to also think of *international* authority).

85 MOMMSEN, *supra* note 9; *see also* THEODOR ESCHENBURG, ÜBER AUTORITÄT [ON AUTHORITY] 23-24 (1969).

86 ARENDT, *supra* note 8, at 121.

87 *Id.* at 122.

88 Of course traditional authority was really the prime target of Enlightenment philosophy and is now usually dismissed quickly as backward-looking, irrational

suggesting plainly that actors should act consistently and decide like cases alike.⁸⁹ The appearance of consistency adds to credibility and increases the authority of the actor.⁹⁰

The use of precedents vividly illustrates how authority hinges on the past. There is little authority in earlier decisions if authority only turned on the salience and persuasiveness of reasons along the lines of the much-repeated *dictum* of the Permanent Court of International Justice (PCIJ): “The Court sees no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound.”⁹¹ If the court did not regard such decisions as sound, it could be argued, it might simply disregard them. There would then be no authority.

Disregarding the past does not meet the demands and expectations of practice. There is an incipient authority of earlier decisions even in the statement of the PCIJ because it already invites parties to dispute and argue over the use of previous judgments. They then expect that the international court will relate its decision to those judgments as well. Authority grows yet stronger when adjudicators themselves give more force to earlier decisions and find, as the WTO Appellate Body did, for instance, that such earlier decisions “create legitimate expectations . . . and, therefore, should be taken into account where they are relevant to any dispute.”⁹² The Appellate Body gave still more force

and in any event not a good ground of normative justification, *see* Hilger, *supra* note 16.

- 89 Critiques of such an attitude are, of course, legion, *see, e.g.*, Jacques Derrida, *Force De Loi: Le Fondement Mystique De L'Autorité [The Force of Law: The Mystical Foundation of Authority]*, 11 CARDOZO L. REV. 919 (1990). But still, for the mores of practice if not moral rules, see the forthright argument by Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, in INTERNATIONAL JUDICIAL LAWMAKING, *supra* note 80, at 35; Schauer, *supra* note 68.
- 90 Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 600 (1987) (“Even more substantially, this subordination of decisional and decisionmaker variance is likely in practice to increase the power of the decisionmaking institution. If internal consistency strengthens external credibility, then minimizing internal inconsistency by standardizing decisions within a decisionmaking environment may generally strengthen that decisionmaking environment as an institution.”) (footnote omitted).
- 91 Readaptation of the Mavrommatis Jerusalem Concessions (Jurisdiction) (Greece v. U.K.), Judgment, 1927 P.C.I.J. (ser. A) No. 11, ¶ 43 (Oct. 10).
- 92 Appellate Body Report, *supra* note 53; Panel Report, *United States — Zeroing in Anti-Dumping Measures Involving Products from Korea*, WT/DS402/R, ¶ 7.6 (Jan. 18, 2010).

to precedents when it stressed “the importance of consistency and stability” in interpretation, emphasizing that its findings are clarifications of the law and, as such, not limited to the specific case; and when it critiqued a panel for failing to follow its earlier reports, stating that it was “deeply concerned about the Panel’s decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel’s approach has serious implications for the proper functioning of the WTO dispute settlement system”⁹³ Working towards normative stability constrains interpreters, to be sure, but it also reinforces their authority.

Similar patterns can be found to varying degrees within other judicial institutions as well.⁹⁴ The International Criminal Tribunal for the Former Yugoslavia (ICTY) has crafted a rich body of jurisprudence that considerably develops both procedural and material criminal law.⁹⁵ The Appeals Chamber helped by effectively endowing earlier decisions with precedential force. “[T]he need for coherence is particularly acute,” it held, “where the norms of international humanitarian law and international criminal law are developing.”⁹⁶ Similarly, the ECtHR observed that “[t]he Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.”⁹⁷ With such statements, ICTs add to the force of their past decisions in future legal discourse and considerably increase their own authority. Contestants in semantic struggles over what

93 Appellate Body Report, *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 161-162, WT/DS344/AB/R (Apr. 30, 2008); Appellate Body Report, *United States — Continued Existence and Application of Zeroing Methodology*, ¶¶ 362-365, WT/DS350/AB/R (Feb. 4, 2009).

94 See the overview in Armin von Bogdandy & Ingo Venzke, *The Spell of Precedents: Lawmaking by International Courts and Tribunals*, in OXFORD HANDBOOK ON INTERNATIONAL ADJUDICATION (Cesare Romano, Karen Alter & Yuval Shany eds., forthcoming 2013)

95 Danner, *supra* note 35; Mia Swart, *Judicial Lawmaking at the Ad Hoc Tribunals: The Creative Use of the Sources of International Law and ‘Adventurous Interpretation,’* 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG J. INT’L L.] 459 (2010).

96 Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 113 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000); Prosecutor v. Kupreckic, Case No. IT-95-16-T, Judgment, ¶ 540 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

97 Ireland v. United Kingdom, 25 Eur. Ct. H.R. (Ser. A), ¶ 154 (1978).

the law means are as a matter of fact forced to relate their arguments to the decisions of ICTs and there is a normative expectation that they should do so.

Some fields of international adjudication such as investment arbitration are, however, torn in how they treat earlier decisions.⁹⁸ It surely takes away from the authority of a tribunal when others do not relate to it and maybe even contradict it *sub silencio* where cases are alike. Many investment tribunals only suggest that they can find “inspiration” in earlier decisions of other tribunals, be it within the field of investment law or beyond. Earlier decisions are but a repository of good reasons.⁹⁹ Authority only emerges once an ethos takes hold that regularly uses prior decisions and when participants cannot escape relating their arguments to earlier decisions even if they do not agree with those decisions. There is a notable trend towards such an ethos also in the field of investment arbitration.¹⁰⁰ Increasingly more tribunals do find themselves obliged to consider earlier decisions, and some even explain that this is necessary to meet the legitimate expectations of the community of states and investors regarding the certainty of the rule of law.¹⁰¹ This seems all the more salient when parties — in their written pleadings and oral arguments — heavily rely on earlier decisions, as they usually do.¹⁰² Respondents do not deny the authority of earlier decisions, even if they are on balance contrary to their positions, but rather support their authority by themselves relating to them, trying to distinguish them or to spin meanings to their advantage.

There would, of course, be no force of the past if everything could be made of it. Only if precedents carry content and constraint can they reach into the

98 In the present Article I am leaving aside a discussion of the conditions that render it more or less likely for ICTs to act as lawmakers with the help of precedents. On those conditions, see Tom Ginsburg, *Political Constraints on International Courts*, in OXFORD HANDBOOK ON INTERNATIONAL ADJUDICATION, *supra* note 94.

99 See, e.g., AES Corp. v. Arg., ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶¶ 31-32 (Apr. 26, 2005); Azurix Corp. v. Arg., ICSID Case No. ARB/01/12, Award, ¶ 391 (July 14, 2006); Romak S.A. v. Republic of Uzb., UNCITRAL Case No. AA280, Award, ¶ 170 (Nov. 26, 2009) (Perm. Ct. Arb. 2009).

100 Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, in INTERNATIONAL JUDICIAL LAWMAKING, *supra* note 80, at 133.

101 Saipem S.P.A. v. The People’s Republic of Bangl., ICSID Case No. ARB/05/07, Decision on Jurisdiction and Provisional Measures, ¶ 67 (Mar. 21, 2007); cf. Schill, *supra* note 100, at 162 (pointing out the virtually identical reiterations of this statement in Suez v. Arg., ICSID Case No. ARB/03/19, Decision on Liability, ¶ 189 (July 30, 2010); Noble Energy v. Ecuador, ICSID Case No. ARB/05/12, Decision on Jurisdiction, ¶ 50 (Mar. 5, 2008)).

102 See, e.g., El Paso Energy Int’l Co. v. Arg., ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 39 (Apr. 27, 2006).

future. Judicial decisions must not only be creative but also constrained and constraining in order to increase ICTs' authority.¹⁰³ Against the backdrop of ages of realist critique and rule-skepticism, I only offer a brief suggestion on how to think of such constraint: ICTs are limited in what they can do through terms of delegation and through past practices because they are tied to the past by the future, by yet later interpretations that look back to see how any instance "fits."¹⁰⁴ Whether ICTs have used earlier decisions correctly or not will be decided at later stages that constrain the present: "The current judge is held accountable to the tradition she inherits by the judges yet to come."¹⁰⁵

The discussion of the force of the past has so far focused on ICTs' authority in the international legal discourse. But it might further be noted that, with lesser density and force, the reception of international decisions at the domestic level may in a similar way contribute to the construction of their authority. Domestic constitutional provisions recognizing the applicability of international law might be read as express recognitions of authority. But a lot again turns on interpretative practices, even in the rather exceptional case that the domestic legal order vests international decisions with direct effect.¹⁰⁶ If domestic courts, for example, hold other actors to their international commitments as interpreted by ICTs, that would certainly bear favorably on the authority of international courts and tribunals.

103 An influential and insightful argument about the nature of such constraint arose specifically between Stanley Fish and Ronald Dworkin, *see* Ronald Dworkin, *Law as Interpretation*, 9 *CRITICAL INQUIRY* 179 (1982); Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 9 *CRITICAL INQUIRY* 201 (1982).

104 Markus Winkler, *Die Normativität des Praktischen [The Normativity of the Practical]*, 64 *JURISTENZEITUNG* 821 (2009).

105 Robert Brandom, *Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms*, 7 *EUR. J. PHIL.* 164, 181 (1999); in detail see VENZKE, *supra* note 56, at 54-57.

106 Thinking about international law's reception in terms of monism and dualism alone simply does not capture the complexity of practice, *see* Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 *INT'L J. CONST. L.* 397 (2008); Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 *MOD. L. REV.* 183 (2008); André Nollkaemper, *Rethinking the Supremacy of International Law*, 65 *ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT [J. PUB. L.]* 65 (2010).

III. JUDGES, PROCEDURES AND OUTCOMES

The Article has so far outlined the contours of authority, looked at the delegation of authority, and presented the communicative dynamics that build up and boost authority. Illustrating the discursive construction of authority has already included ICTs' summoning of consent — their showcasing of their actions as being rooted in the terms of delegation. But what remains lacking is a further examination of the features of ICTs themselves that contribute to their authority. Those features may further induce recognition on part of the addressee, but it adds clarity not to treat them as reasons for delegation. They rather induce *deference*. Michael Barnett and Martha Finnemore understand authority precisely as “the ability of one actor to use institutional and discursive resources to induce deference from others.”¹⁰⁷ In this vein, the present Part explores traits of judges, features of the judicial process, and the appeal of the outcome.¹⁰⁸

A. Judges

The classic tripartite differentiation of authority speaks of *charismatic* authority based on the attributes of the person in authority, focusing on such qualities as their integrity, reputation or even heroism.¹⁰⁹ Discounting for some of the more archaic overtones, it is possible to see how the person of the judge or arbitrator matters for ICTs' authority. It is not without effect that many statutes demand in the very first articles that “[t]he Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices.”¹¹⁰ These demands are frequently flanked by directives on the conduct of office. Among other things, they constrain judges with regard to the secondary employment

107 MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* 5 (2004).

108 It is inspired by insights of sociological institutionalism that draw attention to practices that institutions adopt in order to enhance their social legitimacy, see JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* 22 (1989) (on the “logic of appropriateness”); Martha Finnemore, *Norms, Culture and World Politics: Insights from Sociology's Institutionalism*, 50 *INT'L ORG.* 325 (1996); Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 *POL. STUD.* 936, 949 (1996).

109 WEBER, *supra* note 11, at 215, 240-52.

110 ICJ Statute, *supra* note 63, art. 2.

they may take and they set standards for judges to recuse themselves.¹¹¹ ICTs have adopted such directives on their own initiative and developed related principles in their jurisprudence.¹¹² Evidence of actual independence varies among institutions. By and large, it suggests that judges are independent and responsiveness to political pressure is an exception.¹¹³ Independence adds to authority.¹¹⁴

Concrete examples further suggest that personal traits of judges are relevant in an assessment of their authority, or the authority of the institution. The WTO Appellate Body, for example, enjoyed increased authority at its outset not least due to the prominence and reputation of its members. The decisions of specific arbitral tribunals seem to enjoy greater authority in light of their composition. The prestige of individual judges and arbitrators — or of the overall bench — matters, and the authority of the institution and its decisions can be seen to rise or wane with it.¹¹⁵

111 See Shimon Shetreet, *Standards of Conduct of International Judges: Outside Activities*, 2 LAW & PRAC. INT'L CTS. & TRIBUNALS 127 (2003).

112 This is an increasingly hot topic in investment arbitration, *see, e.g.*, *Tidewater v. The Bolivarian Republic of Venez.*, ICSID Case No. ARB/10/5, Decision on the Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator (Dec. 23, 2010).

113 See Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008) (concluding that the overall picture is positive for the possibility of impartial review of government behavior by judges on an international court); Michal Onderco, B. Holá & S. Ruiter, *Are International Criminal Judges Biased? Evidence from the ICTY* (Nov. 8, 2012) (unpublished manuscript) (on file with the author).

114 Eyal Benvenisti & George W. Downs, *Prospects for the Increased Independence of International Tribunals*, in INTERNATIONAL JUDICIAL LAWMAKING, *supra* note 80, at 99; Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 266-68 (2012). But domestic executives surely dominate selection and election processes, RUTH MACKENZIE, KATE MALLESON, PENNY MARTIN & PHILIPPE SANDS, *SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS* (2010); DANIEL TERRIS, CESARE P.R. ROMANO & LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INQUIRY INTO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* 23 (2007); Emmanuelle Jouannet, *Actualité des questions d'indépendance et d'impartialité des juridictions internationales* [*Topicality of Questions on the Independence and Impartiality of International Courts*], in INDÉPENDANCE ET IMPARTIALITÉ DES JUGES INTERNATIONAUX [INDEPENDENCE AND IMPARTIALITY OF INTERNATIONAL JUDGES] 271, 283 (Hélène Ruiz Fabri & Jean-Marc Sorel eds., 2010).

115 See Marc Jacob, *Unfinished Business: Precedent and Case-Based Reasoning in the European Court of Justice* 158 (Sept., 9, 2012) (unpublished Ph.D. dissertation,

Expertise may further play a critical role, less so in the sense of “knowing the law,” but more so in the sense of scientific expertise that comes to bear on factual questions.¹¹⁶ It is interesting to note Annex VIII of the United Nations Convention on the Law of the Sea (UNCLOS), for example, which pertains to “special arbitration” where special expertise is arguably required and arbitrators are chosen from a list of experts. Parties can request such a tribunal to “carry out an inquiry and establish the facts giving rise to the dispute.” By default, “the findings of fact of the special arbitral tribunal . . . shall be considered as conclusive as between the parties.”¹¹⁷ Some other institutions also provide for the involvement of experts, but by and large their use has been marginal.¹¹⁸

B. Processes

The judicial process adds to ICTs’ authority through features such as its routine, symbolism, and appearance of rationality. The focus here shifts from individuals to the larger organizational and normative structures.¹¹⁹ The judicial process is certainly linked to moments of delegation. But it also offers a genuine source of authority to the extent that it shows quality, fairness and opportunities for participation.¹²⁰

The aforementioned independence of the judges is one key element of ICTs’ authority, but so also are rules ensuring the equality of the parties, adequate timeframes giving sufficient time to prepare and (re)act while not delaying justice, opportunities to voice arguments and contest contravening claims, and, generally, a persuasive “administration of justice.”¹²¹ The quality of the

Univ. of Frankfurt) (on file with the author).

116 On experts in judicial proceedings, see generally Makane M. Mbengue, *International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-Finding in International Adjudication*, 34 *LOY. L.A. INT’L & COMP. L. REV.* 53 (2011).

117 United Nations Convention on the Law of the Sea, Annex VIII, art. 5., Dec. 10, 1982, 1833 U.N.T.S. 397.

118 See, e.g., Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 13(2), 27(2), app. 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401; see also Mbengue, *supra* note 116.

119 LAURENCE BAUM, *JUDGES AND THEIR AUDIENCES* (2006); LUHMANN, *supra* note 76.

120 See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990) (“[L]egitimacy has the power to pull toward compliance those who cannot be compelled”).

121 HABERMAS, *supra* note 28 at 222-37; see also Robert Kolb, *La maxime de la ‘bonne administration de la justice’ dans la jurisprudence internationale* [*The*

process further hinges on the modus of judicial reasoning and the justification of judicial decisions. The juridical language plays a crucial facilitating role in this regard. It nourishes the image of impersonality and objectivity of the process and sustains authority in that it forms “the basis of a real autonomy of thought and practice.”¹²² It legitimizes.¹²³

C. Outcome

ICTs might seek to boost their authority by offering reasons for deferring to their claims that reach beyond the arguably narrow confines of legal discourse. They may invoke hortatory concepts such as justice, for instance.¹²⁴ They may thrive on moral positions or, closer to the ground, on strongly teleological — if not functionalist — reasoning that hinges on shared or global goals that they can claim to be pursuing.¹²⁵ ICTs thus appeal to functional necessities in support of their outcome, sometimes even brushing aside rather clear manifestations of express delegation in the instruments that found their authority. This may well work to their benefit if it resonates with relevant constituencies, but it might also undermine that authority, which rests on the terms of delegation. The decision of the investment tribunal in *Abaclat* might serve as a case in point, where the goal of investment protection seems to have washed away jurisdictional hurdles. The tribunal ended up affirming jurisdiction, *inter alia* with the argument that “it would be *unfair* to deprive the investor of its right to resort to arbitration based on the mere disregard [of the exhaustion of local remedies].”¹²⁶

Another particularly intriguing example stems from the field of international criminal law, where the ICTY effectively supported its finding on the existence

Maxim of ‘Good Administration of Justice’ in International Jurisprudence], 27 L’OBSERVATEUR DES NATIONS UNIES 5 (2009).

122 Bourdieu, *supra* note 58, at 820.

123 DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* 236–63 (1997).

124 On the roles of justice in international legal discourse, see Jochen von Bernstorff & Ingo Venzke, *Ethos, Ethics and Morality in International Relations*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2010).

125 See generally Rodney Bruce Hall, *Moral Authority as a Power Resource*, 51 INT’L ORG. 591 (1997). On the (dim) prospects of pursuing public goods in international courts, see André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT’L L. 769 (2012).

126 *Abaclat v. Arg.*, ICSID Case No. ARB/07/5, ¶ 583 (Aug. 4, 2011) (emphasis added). Also consider the strong dissenting opinion of George Abi-Saab in this case.

of a customary rule prohibiting reprisals against civilians with an argument that such a rule should exist because the “killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights.”¹²⁷ The Trial Chamber at issue might have followed up on a famous earlier decision finding that “[t]he general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law.”¹²⁸

ICTs can generally scrounge authority from the effects they achieve, the goals they pursue, and the functions they perform.¹²⁹ But this kind of authority has a precarious existence, as it threatens to collapse into persuasion through arguments. Authority requires, it may be recalled, that actors “obey” even in the absence of substantive agreement. Discursive resources pertaining to the person of the judge or arbitrator, the judicial process, or the outcome may then not only induce deference from immediate parties to a judicial process, but also gain momentum in authority’s discursive construction.

CONCLUSION

This Article has tried to better understand what it takes for ICTs to have authority. Placing authority between coercion by force and persuasion through arguments, it has highlighted authority’s precarious existence, constantly threatening to collapse on either side. Beyond moments of delegation, it has argued, the discursive construction stabilizes and supplements ICTs’ authority. The dynamics of the legal discourse build up and sustain an expectation, which compels actors to relate their arguments to international judicial decisions. ICTs exercise authority by establishing content-laden reference points that participants in legal discourse can hardly escape.

The conception of authority that has emerged is less one of a command that demands blind obedience than a reference point that redistributes argumentative burdens. Communication, rather than the barrel of a gun, is authority’s medium. As Carl Friedrich noted a while ago, “All authority is in the last analysis the authority of communications.”¹³⁰ Which communications amount to an authority and what they mean is the subject of struggle between a myriad of

127 Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 529 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

128 Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 183 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

129 Shany, *supra* note 114; von Bogdandy & Venzke, *supra* note 1.

130 Carl J. Friedrich, *Loyalty and Authority*, 2 CONFLUENCE 307, 312 (1954).

actors pursuing different projects. In the end, authority, like law, is eternally in a state of becoming.¹³¹ As of late, international legal practice has vested ICTs with a hefty role in the semantic struggle for the law. Appreciating what it takes for ICTs to have authority, exploring further the details of its discursive construction, I ultimately suggest, promises to further advance questions about — if not the quest for — normative legitimacy.

131 See RUDOLPH VON JHERING, *THE STRUGGLE FOR LAW* 13 (2d ed. 1915).

