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International Courts' De Facto Authority and its Justification

Ingo Venzke

I. Introduction

This chapter develops six main arguments in response to Alter, Helfer, and Madsen's account of the de facto authority of international courts (ICs). The first one concerns their definition of de facto authority as a composite product of the recognition or acceptance of a legal obligation to comply, on the one hand, and meaningful action pushing toward giving full effect to judicial decisions, on the other. This understanding of authority fits the context of narrow authority over the parties to a specific case. But it is an understanding of authority that starts to shift in the authors' discussion of ICs' authority as it exists in relation to actors other than the parties to a case. This shift does not seem to feed back into any definition of authority. Especially the requirement that audiences recognize or accept an obligation to comply with a judicial decision is questionable. I will argue that such a requirement is unnecessary (section II.A).

Second, authority should, however, be distinguished from persuasion. The authors decidedly detach authority from normative legitimacy and decline to inquire into the reasons for any actors' acceptance of ICs' authority. But the fact that earlier international judicial decisions are frequently invoked in international legal discourse—in the struggle by a plethora of actors to lay claim on the law—is per se not enough to support ICs' authority. The further argument is needed that participants in legal discourse are compelled to use precedents even if they disagree with them in substance (section II.B).¹ Maintaining a distinction from persuasion is not only in line with the overwhelming tradition of thought on the concept of authority, it also clarifies the legitimacy challenge. This is a point that I illustrate, third, by highlighting ICs' semantic authority—their capacity to establish content-laden reference points that other actors can hardly escape (section II.C). With these three steps, section II invites the authors to further clarify their conception of ICs' authority. Section III turns to the justification of that authority, something that the authors wish to leave aside, for now, but that might be relevant sooner rather than later.

Fourth, I readily agree with the authors' understanding of authority as a subcategory of power. But I question that authority, in contrast to power, primarily distinguishes itself by its more limited reach across time, space, and subject matter. Authority, I rather

¹ I use the term precedent as a synonym for pertinent earlier judicial decisions in full cognizance of the fact that no field of international adjudication accepts a rule of *stare decisis*, though international trade law, human rights law, and criminal law have come especially close. See in detail Armin von Bogdandy & Ingo Venzke, *The Spell of Precedents: Lawmaking by International Courts and Tribunals*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 503–22 (Cesare P. R. Romano, Karin J. Alter & Yuval Shany eds., 2013).

submit, is a specific kind of power in that it raises demands of normative legitimacy. While similar in effect, the power of the robber is distinct from the authority of the police in that the former is typically illegitimate and the latter requires to be well-justified (section III.A). Thus, even if the authors quite plausibly and decidedly decline to engage with normative questions in order to first contribute to a better understanding of what is going on, their choice for the concept of authority might bring them closer to precisely normative questions than they wish. Fifth, also here building on earlier work together with Armin von Bogdandy, I develop the argument that international adjudication amounts to an exercise of public authority, understood as the 'capacity, based on legal acts, to impact others in the exercise of their freedom, be it legally, or only *de facto*'.² In particular, it is in this fifth and the following sixth step that I draw on the research project on international public authority anchored at the Max Planck Institute in Heidelberg (section III.B).³ The understanding of international adjudication as an exercise of public authority frames the object in a way that makes it amenable for normative inquiry and that connects to the rich thought of public-law theory.⁴ Finally, any public authority, including that of ICs needs to be justified in a way that meets the basic principle of democracy. I will briefly sketch how that principle might be set up and which pathways of legitimation it suggests for the practice of ICs (section III.C). Section IV concludes and draws attention to the allocation of public authority across levels of governance in a way that remains open as a matter of both fact and principle.

II. What Is Authority?

A. Authority across audiences

Alter, Helfer and Madsen define ICs' *de facto* authority as the product of two conjunctive components. Following their definition, an IC has *de facto* authority when 'one or more audiences recognize that IC rulings are legally binding' and they 'engage in actions that push toward giving full effect to those rulings'.⁵ A page later they repeat and phrase the components slightly differently as the 'recognition or acceptance of an obligation to comply with court rulings' and an 'engag[ement] in meaningful action pushing toward giving full effect to those rulings'.⁶ With this understanding, the authors convincingly detach their understanding of ICs' authority from questions about the normative legitimacy of such authority.⁷ It is notably a separate question whether ICs' *de facto* authority is well-justified. Furthermore, the authors draw attention to the ways in which authority varies with regard to the audiences that it reaches. The authors distinguish between *narrow* authority, which is limited to the parties to a case; *intermediate* authority, which extends to third parties who might be future litigants in similar cases or who are charged with implementing the law that the IC applies; *extensive* authority, which further includes other participants in the field of international

² ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION 112 (2014); for an earlier, slightly different framing definition 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*, 9 GERMAN L.J. 1375–400 (2008).

³ See <http://www.mpil.de/de/pub/forschung/nach-rechtsgebieten/voelkerrecht/ipa.cfm>.

⁴ This is in line with A. Marmor, *An Institutional Conception of Authority*, 31 PHIL. & PUB. AFF. 238 (2011).

⁵ Alter, Helfer & Madsen, Ch. 2 of this book, at 28.

⁶ *Id.* at 29.

⁷ *Id.* at 28–29.

law such as non-governmental organizations (NGOs) and scholars; and, finally, *public* authority, which has the general public as its audience.

My first main point is that the definition of authority—as the composite product of accepting an obligation and pushing toward compliance—is well-suited for understanding ICs' narrow authority, but invites questions when it comes to the authority of ICs in relation to other audiences. The authors notably speak of different *types* of authority, depending on the audience. Yet, they offer but one single definition. When they present and discuss the indicators to be used in order to measure ICs' de facto authority in relation to different audiences it becomes apparent that, indeed, not one but several types of authority are at issue. It is not entirely clear whether those different types of authority can easily be squared with the initial definition. For example, when it comes to the extensive authority that ICs enjoy within the field of international law, is it really that members of this audience 'recognize that IC rulings are legally binding' or that they 'recogni[ze] or accept[] an obligation to comply with court rulings'? I take it that the authors do not submit that members of this audience are themselves bound or that they accept judicial decisions as creating obligations for them. But what, then, is required for ICs to have authority in relation to members of this larger audience?

The second component of authority states that members of the audience 'engage in meaningful action pushing toward giving full effect to those rulings'. This element, too, seems to be directed at others. I appreciate that the authors do not tie issues of authority all too closely to questions of compliance.⁸ Thereby they do open up towards considering judicial functions other than the effective settlement of disputes—in particular ICs' role in the stabilization and development of international legal normativity or, in other words, lawmaking.⁹ But the question remains: what exactly constitutes and defines ICs' authority in relation to actors such as NGOs or scholars? It cannot be those actors' purely voluntary recognition or acceptance of the way in which an IC has decided a certain issue or has given meaning to the law. They need to be somehow constrained, limited in their freedom, for ICs to have authority.

What a study of ICs' de facto authority thus demands is a distinction of authority from persuasion. Authority needs to persist in the absence of voluntary or discretionary recognition or acceptance. There needs to be an element of constraint (section II.B). How should this constraint be understood in relation to audiences other than the parties, especially in relation to actors such as NGOs or scholars (section II.C)?

B. Authority and persuasion

In order to find that ICs enjoy de facto authority among an extensive audience it may not be enough to note, as the authors do, that actors who lay claim to international law use international legal decisions to do so. Of course, they use decisions in support of their argument if it so suits them. That does not seem to be constitutive or indicative

⁸ Towards the end of their framework they bring in the notion of effectiveness, 'defined as the ability to move governments and private actors in the direction indicated by the law', presumably as defined by an IC where pertinent case law is available. Alter et al., Ch. 2 of this book, at 52, with reference to Laurence Helfer, *The Effectiveness of International Adjudicators*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 464–482, *supra* note 1.

⁹ 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.* 49–72 (2013). See also Andreas Føllesdal, *LJIL Symposium: Explaining and Justifying International Courts as Agents and Actors*, <http://opiniojuris.org/2013/04/09/ljil-symposium-explaining-and-justifying-international-courts-as-agents-and-actors-comments-on-von-bogdandy-and-venzkes-on-the-functions-of-international-courts/>, 9 Apr. 2013.

of ICs' authority per se. It might be suggested that this practice only makes sense if those decisions are presumed to be authoritative. If they are nothing other than fancy ornaments, then participants in the international legal discourse might just as well do without them. They do not. However, to conclude from this fact that ICs enjoy de facto authority requires an additional argumentative step, namely that participants are compelled to use those international judicial decisions even if they do not agree with them in substance and if they do not readily support their position. In other words, their use of ICs' decisions cannot be purely voluntary.

Distinguishing authority from persuasion is in line with a strong tradition on that leading concept. The core idea is that, in contrast to persuasion, authority persists even in cases of disagreement in substance. It is in this tradition that Hannah Arendt suggested that 'if authority is to be understood at all ... it must be in contradistinction to both coercion by force and persuasion through arguments'.¹⁰ 'Where arguments are used, authority is left in abeyance', she further wrote.¹¹ This is unduly drastic. ICs deliver reasoned judgments and support their decisions with arguments, without their authority therefore being left in abeyance. And yet, the distinction between authority and persuasion captures the idea that an actor does not enjoy authority if its directions are only followed because addressees deem them convincing—if they can freely choose to accept and recognize them. Authority implies that those directions would prevail even if addressees disagree with them, or if they suspend their own judgment and instead defer to the authority.¹²

An ideal form of authority, already according to Max Weber, would include an addressee who acts as if she took directions as a maxim for her action because of the relationship of authority. Her own assessment of the merit of the directions is not relevant.¹³ Authority, in other words, implies deferred judgment.¹⁴ It is this core of authority that H. L. A. Hart translated into legal scholarship with the notion of 'content-independent reasons'—reasons, namely, which derive from the intention of the person or institution having authority and not from an assessment of the contents of the directions.¹⁵ In short, there would be no authority if it did not also persist in the absence of agreement.¹⁶

Alter, Helfer, and Madsen, to be sure, do not tie their original definition of authority to the addressee's assessment and agreement. Neither of the component elements of ICs' de facto authority—a product of accepting that judicial decisions are legally binding and of action that pushes towards giving full effect—hinges on an assessment of the contents of the international judicial decision. The authors go further and deliberately decline to inquire into the reasons that members of particular audiences may have for either accepting ICs' decisions as legally binding or for pushing towards giving full

¹⁰ Hannah Arendt, *What Is Authority*, in BETWEEN PAST AND FUTURE 91–141, at 93 (2006).

¹¹ *Id.* at 92. See already T. HOBBS, DE CIVI 115 (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').

¹² Ingo Venzke, *Between Power and Persuasion: On International Institutions' Authority in Making Law*, 4 TRANSN'L LEGAL THEORY 354–73 (2013).

¹³ MAX WEBER, ECONOMY AND SOCIETY at 217 (1978).

¹⁴ R. B. Friedman, *On the Concept of Authority in Political Philosophy*, in AUTHORITY 56, 63 (J. Raz ed., 1990).

¹⁵ H. L. A. HART, ESSAYS ON BENTHAM 254–55 (1983); S. Sciaraffa, *On Content-Independent Reasons: It's Not in the Name*, 28 L. & PHIL. 233 (2009).

¹⁶ S. J. Shapiro, *Authority*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 382, 383 (J. L. Coleman, K. Einar Himma & S. J. Shapiro eds., 2004) (authority is either pernicious or otiose).

effect. This is part of their choice to disassociate authority from normative legitimacy. While this choice is conducive to their ambition, it seems to come with the downside of cutting off any possibility of distinguishing authority from persuasion. Why do actors recognize or accept ICs' decisions as legally binding and what makes them push towards giving full effect? Would they have done that had they not agreed with the substance of those decisions? Doing that in the absence of agreement in substance is, I submit, a constitutive element of any type of authority, also of the *narrow* kind.

The distinction between authority and persuasion, it is worth noting, renders questionable any reference to earlier judicial decisions as having persuasive authority. That notion has its strongest tradition in comparative law with regard to the role of foreign judgments.¹⁷ When it comes to international law, many international courts and tribunals rely on that notion when referring to the role of precedents.¹⁸ Especially in the decentralized system of international investment arbitration, tribunals have justified their references to earlier awards by pointing to those awards' persuasive authority.¹⁹ This practice is indicative of the difficulties that international adjudicators face when trying to come to terms with the ubiquitous use of legal instruments, such as international judicial decisions, which are formally not binding on them and which they cannot ignore either.²⁰

The notion of persuasive authority superficially updates the orthodox distinction between the sources of law (*Rechtsquelle*) and sources for recognizing the law (*Rechtserkenntnisquelle*) that legal doctrine finds reflected in Article 38 of the International Court of Justice Statute. It is in this vein that the Permanent Court of International Justice already justified its turning to an earlier judgment by arguing in a much-repeated *dictum* that '[t]he 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'.²¹ The suggestion here as elsewhere seems to be that, if the court did not regard such a decision as sound, it might simply disregard it. There would then be no authority in the earlier decision. The notion of persuasive authority might point to a repository of good reasons for a decision, but it does not take part in explaining how international adjudication amounts to an exercise of authority.

Even if authority is distinguished from persuasion, the question still remains how exactly to understand ICs' intermediate and extensive authority. In what way do ICs hold authority over non-disputing parties or, more critical, over actors such as NGOs or scholars?

C. Semantic authority

It is clear that actors such as NGOs or scholars are not legally bound and that the authority of ICs is not coextensive with their capacity to create legal obligations. Authority need not only be distinguished from persuasion, it also needs to be decoupled from the question of legal bindingness. By pointing to intermediate, extensive, and even public

¹⁷ H. Patrick Glenn, *Persuasive Authority*, 1 MCGILL L.J. 261–98 (1987).

¹⁸ MARC JACOB, PRECEDENTS AND CASE-BASED REASONING IN THE EUROPEAN COURT OF JUSTICE: UNFINISHED BUSINESS (2014).

¹⁹ E.g. ADC Affiliate Ltd. and ADC and ADMC Management Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, 2 Oct. 2006, para. 293.

²⁰ See also Frederick Schauer, *Authority and Authorities*, 94 VIRG. L. REV. 1931–961 (2008).

²¹ Case of the Readaptation of the Mavrommatis Jerusalem Concessions (Jurisdiction), Greece v. Britain, Judgment, 10 Oct. 1927, para. 43.

authority, Alter, Helfer, and Madsen do precisely that.²² They further pay tribute to the effect of international judicial decisions beyond the concrete dispute. When deciding a case through reasoned judgments, international courts exercise a series of functions that may be summarized, apart from the settling of disputes, as the stabilization of normative expectations, making law, and legitimizing as well as controlling the authority exercised by other actors.²³ In relation to intermediate and extensive audiences, the stabilization and development of normative expectations—or the clarification and making of international law—is of particular importance. International judicial decisions are central reference points for arguments about the law.

ICs' authority in such broader contexts, I submit, presents itself as their capacity to establish contentful reference points for legal discourse that other actors can hardly escape.²⁴ It presents itself as semantic authority.²⁵ That participants in the field of international law make use of international judicial decisions is well documented in the specific contributions to this book and elsewhere.²⁶ The discourses of international trade law and of human rights law in Europe probably offer the starkest examples.²⁷ A thick body of case law glosses over the naked treaty texts in both cases. In neither case is it possible to understand the law or to formulate a legal argument without reference to earlier decisions. Judicial decisions often form the key reference point for legal argument rather than the underlying treaty text that formally is supposed to carry the weight of the judicial decisions. In the trade law context, for example, the treaty language on justifying trade restrictions because they 'relate to' the conservation of exhaustible natural resources has been taken over by the question of whether measures 'are primarily aimed at' that objective—a standard introduced and shaped by a steady stream of judicial decisions.²⁸

The critical point to note, however, is that litigants and participants in the broader legal discourse are compelled to refer to the pertinent parts of earlier judicial decisions regardless of whether they agree with them in substance. They cannot escape them. If they are litigants, earlier decisions are forced upon them by the dynamic interaction with the respective opponent. If one side invokes a precedent that might go against the position of the other, the response is hardly ever that it is formally not binding and seldom that it does not apply. The typical answer is that the decision is pertinent but should be read differently. It is this dynamic that pushes earlier decisions onto the bench, too. International judges—including the members of World Trade Organization (WTO) panels and the Appellate Body—are bound to reply to the submissions of the parties and will need a lot of persuading to simply ignore an earlier decision on which the litigants have relied. Judges readily embrace earlier decisions and invoke them in their reasoning so as to cater to their image of giving effect to the law. Invoking precedents sustains the view that as judges they do not make choices but put themselves into the service of the law, as clarified in a tradition of earlier cases.²⁹

²² Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 GERMAN L.J. 979–1003 (2011).

²³ Bogdandy & Venzke, *supra* note 9.

²⁴ Ingo Venzke, *Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction*, 14 THEORETICAL INQUIRIES IN LAW 381–410 (2013).

²⁵ INGO VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW: ON SEMANTIC CHANGE AND NORMATIVE TWISTS 57–63 (2012); Ingo Venzke, *Semantic Authority, Legal Change and the Dynamics of International Law*, 12 NO FOUNDATIONS 1–21 (2015).

²⁶ For an overview see Bogdandy & Venzke, *supra* note 1.

²⁷ See Shaffer, Elsig & Puig, Ch. 13 of this book; Madsen, Ch. 11 of this book.

²⁸ Appellate Body Report, US–Shrimp, WT/DS48/ABR, 12 Oct. 1998, para. 136.

²⁹ See also Alter et al., Ch. 2 of this book, at 45 n.82, with reference to J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403–483 (1991).

Certainly, ICs do not hold authority over actors such as NGOs or scholars in the sense that they could command them. In its modern, communicative form, authority is more akin to the much older ideas of authority of which Arendt reminds us. Understanding authority as the ability to establish content-laden reference points in legal discourse that others can hardly escape resonates with Roman law and its distinction between the *auctoritas* of the Senate and 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 the great legal historian 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'.³⁰

It is the practical impossibility of disregarding pertinent earlier judicial decisions when laying claim to the law that sustains ICs' authority. This understanding, furthermore, shows the limits of thinking of ICs' authority along the lines of the authority of parents over children.³¹ Those lines of authority suggest that addressees suspend their judgment and defer to the actor in authority. In their seminal study of international bureaucracies, Michael Barnett and Martha Finnemore embrace that understanding of authority as 'the ability of one actor to use institutional and discursive resources to induce deference from others'.³² While instances of deference might exist on the international level, especially in fields of high complexity, it seems ill-suited to explain the authority of ICs. All litigants in the legal dispute spend significant resources to develop their claims. They do not defer their judgment as to what the law requires to any IC. Rather, they make up their own minds. But in pursuing their interests and convictions they can hardly ignore ICs' judgments. If they do, this comes at a price—be it that they are more likely to lose a case as litigants, that they are less convincing as NGOs, or that they sacrifice their reputation as able legal scholars because they do not show sufficient knowledge of judicial practice in a certain field.

Alter, Helfer, and Madsen stress that they are interested in whether actors actually follow what ICs say. They notably point out that governments may ostensibly disagree with a judicial decision and still follow it. I neither dispute this observation nor the importance of following through with the analysis to see whether ICs end up influencing conduct on the ground. This focus, however, might blend out ICs' semantic authority—in short, their influence over the legal discourse—as a distinct form of authority. It may indeed testify to ICs' authority if actors follow what they say even while ostensibly disagreeing with them. On occasion, the reverse may also be true, actors may ostensibly agree and either not follow at all or only superficially follow. I agree that, in the long run, the key question is indeed whether ICs' influence behaviour on the ground, but their influence over the legal discourse, in the meantime, is a significant dimension of their authority—their semantic authority.

³⁰ T. MOMMSEN, *RÖMISCHES STAATSRECHT*, VOL. 3, at 1028 (2010 [1888]). See also T. ESCHENBURG, *ÜBER AUTORITÄT* 23–24 (1969); Venzke, *supra* note 12.

³¹ On this prototypical constellation, see H. MARCUSE, *A STUDY ON AUTHORITY* (2008).

³² M. BARNETT & M. FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* 5 (2004).

III. How to Justify Authority?

The commentators in the present volume were invited to consider the normative legitimacy of ICs' de facto authority, something that Alter, Helfer, and Madsen themselves decided to not (yet) do themselves. It is in pursuit of that task in particular that I draw on the research project on international public authority, anchored at the Max Planck Institute in Heidelberg.³³ For reasons explained elsewhere, I do not consider the normative legitimacy of an institution as such, but of its practice.³⁴ Any such inquiry, I further submit, requires a more specific understanding of the practice whose normative legitimacy is being assessed and, certainly, a commitment to a normative basis for assessment.

A. Power and authority

I concur with Alter, Helfer, and Madsen's conception of authority as a subcategory of power.³⁵ I further concur that authority, like power, is a question of degree. But I would ask them to articulate further how authority as one subcategory of power is different from others. They note that de facto authority only roughly corresponds to whether an IC is powerful. To understand variations in power, they suggest, we further need to look at how much sway an IC holds over its parties, constituents, and within the broader legal field.³⁶ It can have authority in a limited number of cases, involving a limited set of parties, and a limited issue area. The Andean Tribunal is an illustrative example. While it has broad competences and a wide jurisdictional scope, it only enjoys authority in the limited, though significant, area of intellectual property law.³⁷ Even if it has established itself as an actor with narrow, intermediate, and extensive authority, it would not count as a powerful actor due to this limited focus.

According to Alter, Helfer, and Madsen, power distinguishes itself from authority in its reach across time, space, and subject matter. As a subcategory of power, authority is just more limited along those three dimensions. That might not be enough of an explanation of what distinguishes authority. What does it mean to speak of authority rather than power? The specific feature of authority, I submit, is that it raises demands of normative legitimacy. It is in want of justification. With regard to its effects, power exercised through the barrel of the robber's gun does not distinguish itself from the authority of the police. What differs are the normative demands that are raised in response. By opting for the concept of authority, the authors thus pave the way for normative inquiries, even if they decidedly do not travel further down that road. If one does, this is bound to have repercussions on how to best set up the concept of authority as a subcategory of power. After all, there is a strong argument that authority is ultimately a normative concept in the sense that it is shaped by normative concerns. Alter, Helfer, and Madsen will disagree, but they are on the defensive, I submit, in providing a descriptive account of authority that distinguishes it from other forms of power. Weber did that, of course, but he could only do so at the expense of an unduly restrictive account of power which passes through the clearly visible barrels of a gun and not through institutions, through discourses and the construction of knowledge, or through the production of identities. Setting up authority as a normative concept

³³ *Supra* note 3. ³⁴ Bogdandy et al., *supra* note 2.

³⁵ Alter et al., Ch. 2 of this book, at 35. ³⁶ *Id.* at 31–33.

³⁷ Alter & Helfer, Ch. 8 of this book, at 181–84.

in this sense still does not need to suggest that authority is indeed legitimate, well justified, and that it thus gives good reasons for action.³⁸ It can still be understood as a factual capacity to do something, but the way it is set up is informed by normative concerns. Which kind of action demands a certain kind of legitimation?

B. Public authority

Alter, Helfer, and Madsen use the term public authority to refer to ICs' broadest type of authority, the one that extends even beyond the participants in the field of international law (extensive authority) to the whole public.³⁹ In line with research on international public authority, I use the term differently, namely in the tradition of public-law thinking. As for *öffentliche Gewalt* or *puissance public*, the power of the police is the prototypical example of public authority. In many ways this public authority of the police differs from that of courts on the domestic, and even more so on the international level.⁴⁰ While no IC can rely on instruments of physical coercion to give effect to its judgments, a variety of mechanisms and dynamics do however lend them power. What is more, public authority should not be limited to instances of physical coercion but be understood more broadly. The suggestion is to understand public authority as 'the capacity, based on legal acts, to impact other actors in their exercise of freedom, be it legally or simply *de facto*'.⁴¹

Several features of this definition merit emphasis. First, in line with Alter, Helfer, and Madsen's argument, public authority does not per se imply normative legitimacy; rather it raises demands and guides inquiries into normative legitimacy.⁴² Second, many different actors can impact others in the exercise of their freedom—the robber is akin to the police in this regard. What distinguishes an exercise of public authority is that its authors can claim to be mandated. For their mandate to be meaningful in a larger social context, it needs to take the form of legal acts.⁴³ Third, the definition rests on the principled consideration that every act should come into view that impacts the exercise of an individual's private and public freedom if only that act is significant enough to give rise to legitimacy concerns. The choice is for the concept of freedom, rather than liberty, is deliberate, and extends to the possibilities for the individual's full development (private freedom) and, in the most abstract level, to meaningful inclusion in the political process that determines the public interest (public freedom).⁴⁴ Freedom, in short, aims at human flourishing, both in the private realm and through participation in the public sphere. It is notably this normative concern that shapes the concept of public authority.

³⁸ Michael Zürn, Martin Binder & Matthias Ecker-Ehrhardt, *International Authority and its Politicization*, 4 INT'L THEORY 69–106 (2012); see Armin von Bogdandy, Matthias Goldmann & Ingo Venzke, *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 EUR. J INT'L L 115–45 (2017).

³⁹ Alter et al., Ch. 2 of this book, at 32–33.

⁴⁰ At the same time, it is a deeply embedded thought, to be clear, that the judiciary does exercise public authority. This is unambiguously reflected, for instance, in constitutional provisions such as art. 20(2) of the German Basic Law, which states that '[a]ll state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies'.

⁴¹ BOGDANDY & VENZKE, *supra* note 2, at 112.

⁴² BOGDANDY & VENZKE, *supra* note 2, at 111–12.

⁴³ On the insufficiencies of a general level of (tacit) acceptance for meaningful legitimation, see *id.* at 155 and 214.

⁴⁴ Bogdandy et al., *supra* note 39.

While the exercise of public authority certainly differs across levels of governance, with means of physical coercion still held exclusively at the state level, the notion offers a shared basis for understanding the activity of national, supranational, and international institutions. When it comes to international courts, studies of their *de facto* authority, in the present volume as well as elsewhere, have shown how, through their decisions, they impact the exercise of freedom by others.⁴⁵ I do not further support that point at present and rather turn to the consequences that follow from such an understanding, namely the need that ICs' exercise of public authority be justified in a way that lives up to the basic principle of democratic legitimacy—a tall order.

C. Democratic justification

Any public authority—be it based on acts of domestic, supranational, or international law—requires democratic justification. Since public authority differs across levels of governance and across institutions, the shape and form that such justification ought to take also differs. It is clear that the public authority exercised by courts on any level of governance requires a different mode of justification from acts of parliaments or of plenary bodies. Yet, in spite of their differences, their public authority demands democratic legitimation. That can be supported in political theory, with concepts of popular sovereignty and self-determination, and, more down to earth, with positive public law demanding that all public authority—explicitly including adjudication—emanate from the people.⁴⁶ While crucial, this is but a starting point. How should the principle of democratic legitimacy be developed as a more specific basis for the justification of ICs' exercise of public authority?

One way to approach that task would be to go the way of political philosophy and to develop a standard of legitimacy within one of the traditions that it offers. Armin von Bogdandy and I have opted for a different way that stays closer to the ground and builds on already established elements of public law beyond the state.⁴⁷ Taking this path we can build on greater consensus when compared to the fragmented traditions of political philosophy. To further develop a concept of democracy for the normative legitimacy of international courts, we can learn from the achievements of European law and European integration, which have produced the so far unique instance of a supranational institution that explicitly subscribes to the demand that its activities be democratically legitimate. The Treaty on the European Union (TEU) offers the sole example of legal provisions that frame the concept of democracy beyond the state. And unlike any theory, it is the outcome of intense democratic debate.⁴⁸ Taking this route, we neither overlook that the EU is far from an exemplar of ideal democratic governance, nor do we come close to suggesting that it offers a model for other supra- or international institutions to emulate. What we take from its development and constitution is inspiration for how to think about the concept of democracy. That inspiration can travel and meet with other traditions without, once again, imposing European ideas onto the world.

In all possible brevity, we take from the TEU, first, that any account of democratic governance needs to specify the democratic subject. Article 9 TEU, which opens Title II TEU on 'democratic principles', does so by establishing Union citizenship next to

⁴⁵ INTERNATIONAL JUDICIAL LAWMAKING (Armin von Bogdandy & Ingo Venzke eds., 2012).

⁴⁶ See, e.g., art. 20(2) of the German Basic Law, *supra* note 41.

⁴⁷ BOGDANDY & VENZKE, *supra* note 2, at 135–37.

⁴⁸ BOGDANDY & VENZKE, *supra* note 2, at 137.

national citizenship. Second, Article 10 TEU continues to flesh out the dual democratic legitimacy on which the Union rests, highlighting the role of the citizens of member states and their representation by their governments, on the one hand, and the role of Union citizens who are directly represented in the European Parliament, on the other. Third, Article 11 TEU demands further opportunities for including citizens in decision-making, in particular through interaction with civil society. Fourth and finally, Article 12 places emphasis on the continued key role of national parliaments as sources of democratic control. In sum, Articles 9–12 offer as central elements for democracy beyond the state: citizenship, representation, transparency, participation, deliberation, responsiveness, and relevant control mechanisms.⁴⁹ Key is the idea of political inclusion.⁵⁰

We have considered elsewhere how this concept of democracy can be developed further, how it can be attuned to the context of ICs' exercise of public authority, and what it means for ICs' law and practice. We have in particular focused on pathways of democratic legitimacy with regard to the selection of judges, the judicial process, and judicial decisions.⁵¹ While each of these pathways offers opportunities for supporting the democratic legitimacy of international adjudication, the requisite political and sociological conditions that undergird democratic legitimacy do remain fragile. While the fragility of those conditions does not categorically undermine the suggestions for adjusting the selection of judges, the judicial process, or judicial decisions in light of the principle of democracy, it does draw attention to the necessary interaction between ICs and other actors on different levels of governance. It is this last element of interaction and of how ICs are embedded within a broader normative pluriverse that I wish to emphasize in my concluding observations. It connects to the contestation of ICs' authority.

IV. Conclusions

I have argued that Alter, Helfer, and Madsen's understanding of *de facto* authority fits the relationship between ICs and the parties to a case. Questions arise when it comes to intermediate and extensive audiences. Above all, in what way do ICs impose constraints in such broadened contexts? The way in which ICs exercise authority beyond any concrete dispute, I argued, is, above all, due to the sway they hold over the legal discourse—their semantic authority. ICs have the capacity to establish content-laden reference points for legal discourse that other actors can hardly escape.

I have furthermore argued that the distinction between authority and persuasion should be maintained as a constitutive feature of both concepts. This is not only in line with a strong tradition of the authority concept, but also clarifies the legitimacy challenge. Authority needs to persist in the absence of agreement in substance—in the absence of successful persuasion. At the same time, as a distinct subcategory of power,

⁴⁹ This reading of arts. 9–12 TEU is certainly not without controversy; for further support see Armin von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations*, 23 EUR. J. INT'L L. 315–34 (2012); Joana Mendes, *Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU*, 48 COMMON MKT. L. REV. 1849 (2011).

⁵⁰ In contrast to the more demanding notion of self-government BOGDANDY & VENZKE, *supra* note 2, at 146–47.

⁵¹ *Id.* at 156–206.

I argued, authority raises specific legitimacy demands. It is truly difficult to otherwise distinguish authority from power, lest one adopts an unduly restrictive view of power.

The understanding of ICs' practice as an exercise of international public authority takes those key points on board. In their capacity, based on legal acts, to impact other actors in their exercise of freedom, be it legally or simply *de facto*, ICs' public authority is distinct from persuasion and from other kinds of power. Like any exercise of public authority, I have argued, international adjudication demands to be justified in a way that lives up to the basic principle of democratic legitimacy. I have sketched briefly what that may look like and promised to consider the practice of ICs in a broader normative pluriverse in this concluding section. A remaining task is namely to appreciate ICs' exercise of public authority in relation to other actors across different levels of governance.

The concluding argument in this regard is that the relationship between different levels of governance—domestic, supranational, international—is essentially unsettled as a matter of fact and as a matter of principle. Not only is ICs' international public authority contested on the supranational and domestic level as a matter of fact.⁵² While such contestation often uses reactionary and questionable arguments, it also has good reasons on its side. The possibilities for generating democratic legitimacy are still at their strongest in domestic settings of governance. This is recognized in many instances of legal practice, such as in applications of the principle of subsidiarity, in variations of the margin of appreciation, or in the resistance to proportionality analysis in judicial bodies such as those of the World Trade Organization. Value choices are largely left to the domestic decision-making process.

The domestic process, in its turn, has as its single most significant downside that it typically excludes outsiders that are nevertheless affected. It is this shortcoming in the absence of supranational and international cooperation to which ICs form part of the response. There is no basis in sight for categorically allocating authority across levels of governance.⁵³ That authority will rather shift in the interaction between different actors. That may be a game of power. But parts of it can also lead to a desirable accommodation of distinct claims to authority in a normative pluriverse.

⁵² Zürn et al., *supra* note 38.

⁵³ VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW, *supra* note 25, 256–65; in support of this argument *see also* the compelling account by NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (2010).