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Between Power and Persuasion: On International Institutions' Authority in Making Law

Ingo Venzke*

Abstract

Drawing on the work of Hannah Arendt, this contribution places authority between power and persuasion. It first argues that authority is a specific kind of power that claims to be legitimate because it connects to the consent of the addressee. But at the same time, authority needs to constrain even if it is not met with agreement. Otherwise it would collapse into persuasion through arguments. What sustains authority between power and persuasion is a discursive practice that builds up a social expectation and that ties actors to the command of the authority. It is with attention to the larger discursive practices that international institutions' authority in making law is best understood. The notion of semantic authority is introduced in order to capture international institutions' capacity to establish reference points for legal discourse that other actors can hardly escape.

I. INTRODUCTION

The main ways in which international institutions exercise authority is by way of rule- or law-making.¹ The question I wish to tackle in the present contribution is how to better understand the concept of authority in this context. I want to ask what it takes for international institutions to have authority. Thereby I take a step back from immediately normative questions.² But a better understanding of what it takes for institutions to have authority, I submit, ultimately also helps in pursuing normative ambitions.

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¹ Michael Zürn, Martin Binder and Matthias Ecker-Ehrhardt, 'International Authority and its Politicization' (2012) 4 *International Theory* 69; José E Alvarez, 'International Organizations: Then and Now' (2006) 100 *American Journal of International Law* 324; Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer, 2012).

² Andrei Marmor, 'An Institutional Conception of Authority' (2011) 39 *Philosophy and Public Affairs* 239.

The concept of authority has matured in domestic structures of governance and such a context is still taken for granted in large parts of theoretical scholarship.³ Given the notable institutional developments pointing beyond the state, this is surprising.⁴ In addition, authority surely is a slippery concept, no matter in which context it is discussed. It is the meeting point and melting pot of various disciplines, which further adds to complexity.⁵

I will approach authority by distinguishing it from what it is not, placing it between power and persuasion.⁶ What arguably characterises authority in contrast to power is a moment of consent, or a certain degree of voluntary recognition. At the same time, authority implies influence also in the absence of agreement by the addressee. If tested, authority needs to withstand disagreement and is thus different from persuasion. As Hannah Arendt wrote insightfully a while ago, 'if authority is to be understood at all ... it must be in contradistinction to both coercion by force and persuasion through arguments.'⁷ But how is it possible at all that authority rests on voluntary recognition and still constrains?

To clarify and contextualise the question, it is helpful to briefly revisit the conceptual terrain in which authority emerges. First of all there is a still prominent and salient view that closely links the activities of international institutions, including their role in international lawmaking, to the consent of their principals, ie their constituent members. This view testifies to the persistent orthodox narrative of classical liberalism in international law that ties all authority back to unitary sovereign states. In view of varied global governance mechanisms, this narrative surely faces considerable hurdles and surely requires at least some qualifications.⁸ But in many cases it can still plausibly be argued that international institutions at the most 'complete contracts' that member states concluded.⁹ It is impossible to foresee the future, a common and convincing argument goes, terms of contracts are invariably over- and under-inclusive, and international institutions are thus explicitly or implicitly mandated to fill in gaps down the road. That is what international actors are supposed and expected to do. In this sense, then, prior consent rules out later complaint: *volenti non fit injuria*.

3 See eg Thomas Christiano, 'Authority' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2013 edition) (without dint of hesitation discussing authority exclusively as authority of the state).

4 For an overview of responses to this phenomenon see Neil Walker, 'Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms' (2012) 3 *Transnational Legal Theory* 61.

5 Stephen Lukes, 'Perspectives on Authority' in Joseph Raz (ed), *Authority* (Blackwell, 1990) 203; Birgit Peters and Johan Karlsson Schaffer, Introduction to this issue.

6 This is a recurrent proposition, first introduced by Hannah Arendt. See Hannah Arendt, 'What is Authority?' in *Between Past and Future* (Penguin, 2006) 91, 93. See also Herbert Marcuse, *A Study on Authority* (Verso, 2008) 7.

7 Arendt, *ibid*, 93.

8 See among others Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596, 607–10.

9 Henrik Horn, Giovanni Maggi and Robert W Staiger, 'Trade Agreements as Endogenously Incomplete Contracts' (2010) 100 *American Economic Review* 394.

A contractual relationship where all action is tied back to the will of the parties thus leaves no room for authority, given that authority also implies that it persists in the absence of agreement in substance. On Max Weber's account an employee demanding to be paid the amount fixed in her contract then does not exercise authority but simply engages in a just exchange of labour for money.¹⁰ But 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 amounted to an ideal meeting of the parties' free will. In fact, authority's link to the addressee's consent is precisely what supposedly separates it from power and brute force. Influence, for instance, which stems from asymmetric (economic) power relations allowing one actor to dictate contract conditions to another, does not amount to authority at all.¹¹ The question then is not only how authority can constrain, but also: *When does a contract turn into a relationship of authority?*

I argue that international institutions' authority in making international law emerges in discursive practices that set up international institutions' statements about the law as content-laden reference points that others can only escape at a cost. With the notion of semantic authority I wish to refer to an actor's capacity to find recognition for interpretative claims and to establish its own statements about the law as new reference points for the legal discourse. Authority emerges with third actors who are in a position to shift and shape the contents of commitments, to coat them with new layers of meaning, and to sideline the original terms of any contract. I will thus revive the traditional conception of *auctoritas* as a 'piece of advice that cannot easily be disregarded'.¹² Speaking of 'advice' in this regard should not distract from the fact that the exercise of such authority is more often than not of great political sensitivity.

The contribution proceeds by discussing the relationship between authority and power (II), between authority and persuasion (III), and between authority and practice (IV). Finally, the conclusions pick up the ancillary question of when a contractual relationship turns into a relationship of authority and argues that, as societies grow more complex, the contractual paradigm should be replaced with a public law approach (V).

These steps reverberate with three institutionalisms and they roughly coincide with the classic tripartite differentiation of authority's character as rational, charismatic and traditional.¹³ First, rational institutionalism may inform the delegation of authority. Second, sociological institutionalism stresses actors' inclination to enhance their social

¹⁰ Max Weber, *Economy and Society* (University of California Press, 1978) 213.

¹¹ *Ibid.*, 216.

¹² Theodor Mommsen, *Römisches Staatsrecht*, vol 3 (Cambridge University Press, 2010 [1888]) 1034; Horst Rabe, 'Autorität' in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe*, vol 1 (Klett-Cotta, 1972) 382.

¹³ See Peter A Hall and Rosemary CR Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44 *Political Studies* 936; for the classic tripartite distinction of authority relating to the kind of legitimacy claim it makes, see Weber (n 10) 215.

legitimacy. It underpins the discussion of resources that might lead others to defer their judgment to them. Third and most importantly, historical institutionalism's attention paid to path dependency and incremental change ties in with the discursive construction of authority.¹⁴

II. AUTHORITY AND POWER

A. On the Surface

The distinctive element of authority in contrast to coercion by force is typically that it claims to be *legitimate*. It does so above all by claiming to rest on consent or, in other words, a minimal degree of voluntary recognition that leads an actor to *want* to act as the authority indicates. This element also characteristically separates authority from power where power is understood as an actor's ability to impose its will within a social relationship also *against resistance*.¹⁵ A classic example to illustrate and clarify this distinction pictures the constellation of an armed robbery.¹⁶ Clearly, the robber who holds his victim at gunpoint has power over him. But the robber would usually not be justified in asking the victim to hand over his wallet. And when the victim does hand over his wallet, he does not do so because he consents to the authority of the robber and acknowledges his command, but probably out of fear and out of love for his life.

It might be tried, as Max Weber did, to uphold the distinction between authority and power on a formal-descriptive basis along the lines of this example. Power visibly passes through the barrel of the gun and imposes will against resistance. Authority, by contrast, involves a minimal degree of voluntary compliance.¹⁷ But this distinction builds on a

¹⁴ There is significant potential in historical institutionalism's insight for the study of international relations and international law. See Orfeo Fioretos, 'Historical Institutionalism in International Relations' (2011) 65 *International Organization* 367.

¹⁵ Weber (n 10) 53 ("Power" (*Macht*) is the probability that one actor within a social relationship be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests').

¹⁶ The example is age old and informed St Augustine's suggestive question 'Without justice—what else is the State but a great band of robbers?' See Robert P Wolff, *In Defense of Anarchism* (University of California Press, 1970) 4; Hans Kelsen, *Pure Theory of Law* (University of California Press, 1978) 44–46.

¹⁷ Weber (n 10) 53, 214. Note that it is to some extent troubling to use Weber's elaboration on this point because his 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 poses no problems. But *Herrschaft*—a much younger term when compared to *Autorität*—makes a weaker claim about the motives of the addressee and does not imply that the addressee acknowledges that she ought to act in a certain way. Dietrich Hilger, 'Herrschaft' in Otto Brunner, Werner Conze and Reinhart Koselleck (eds) *Geschichtliche Grundbegriffe*, vol 3 (Klett-Cotta, 1982) 33. Translations of 'authority' in Weber's work thus differ. The translation in n 10 thus translates *Herrschaft* as 'domination' rather than 'authority'. See Peter M Blau, 'Critical Remarks on Weber's Theory of Authority' (1963) 57 *American Political Science Review* 305, 306.

quaint and unsustainably narrow conception of power that is confined to direct coercion by means of force.¹⁸ Neither can it distinguish between the robber and the police who direct their means of coercion in order to enforce their commands against resistance.

As concerns the conception of power, other mechanisms should be considered through which *A* can influence *B* in its actions in a way that *A* desires—namely mechanisms of exercising power via institutions and broader social relationships.¹⁹ Power not only runs through the barrel of guns but also through institutions and social structures. As Foucault highlighted, it is further embedded in the production of knowledge and identities.²⁰ Such kinds of power question on different levels what it means when we say that an actor *wants* to act in a certain manner and they each undermine the distinction between power and authority.

B. Below the Surface

On a very fundamental level, strong notions of *productive* power and, to a lesser extent, *structural* power both make a mockery out of any such thing as will and subjectivity (the kernel of related philosophical debates). They subordinate both will and subjectivity to the workings of power.²¹ Productive and structural power purport to shape who actors are, who they think they are, and what they want—*sub silencio* and subconsciously, so to speak. What actors do ‘voluntarily’ and where they resist is on these accounts, if not decided, then at least profoundly influenced by power relations. Any difference between authority and power evaporates.

Institutional power implies less far-reaching claims and roughly suggests that institutions of different generality and abstraction—eg norms of society, law, the WTO institutional framework, substantive provisions of the General Agreement on Tariffs and Trade—redistribute actors’ payoffs and thus influence action. Institutions are not (only) a long arm of *A* but (also) exert power over both *A* and *B* and can even invest an actor *C* with power to impose its will against either *A*’s or *B*’s resistance. In the international context, states set up international institutions to bind themselves and others.

Here it might be possible to uphold the distinction between power and authority by looking at how the acts of *C* link up with *A*’s and *B*’s expression of consent. A dynamic take on authority would indicate that authority does not necessarily imply voluntary recognition at the moment of its exercise, but that its exercise can link back to prior moments of recognition. While a moment of consent is needed to distinguish author-

¹⁸ Robert A Dahl, ‘The Concept of Power’ (1957) 2 *Behavioural Science* 201–15.

¹⁹ Michael Barnett and Raymond Duvall, ‘Power in Global Governance’ in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (Cambridge University Press, 2005) 1, 3 (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’).

²⁰ *Ibid.*, 21–22; Michel Foucault, ‘Two Lectures’ in Colin Gordon (ed), *Power/Knowledge* (Pantheon, 1980) 78.

²¹ See Chantal Mouffe, *On the Political* (Routledge, 2005); Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (Penguin, 2006).

ity from other forms of power, an addressee of authority might later disagree with its exercise and could thus be constrained.²² This is in fact the core of political or public authority and, from a normative perspective, the core of private and public autonomy: the ability of individuals and collectivities to set up institutions that are binding also against themselves.²³

C. Dynamics of Delegation

Such a dynamic view on the phenomenon of authority reverberates in the simple distinction between delegating competences and the exercise of such competences.²⁴ In domestic contexts, even the compulsory power of the police might be distinguished in this way from the acts of the robber. But in complex societies the ties to the addressees' one time consent are stretched to breaking point. Classic critiques of social contract theory run in this vein. In political theory, consent then oftentimes takes the role of a regulative idea and is reworked as popular sovereignty in more nuanced theories of democracy.²⁵

Once the understanding of power is deepened below the surface it becomes more difficult to distinguish it from authority. In fact, authority and power turn out not to be different species at all. Authority rather is a specific kind of power; a kind, namely, that can plausibly connect to the consent of the addressee in a way that other kinds of power such as coercion by force cannot.²⁶ Authority grows out of moments of consent when contracting parties make commitments and when discursive practices then shape and shift the content of those commitments. A first step in understanding authority in international lawmaking plainly embraces a dynamic understanding of authority that distinguishes between the delegation of authority and its exercise.

Delegation may well be understood as a 'conditional grant of authority from a principal to an agent'.²⁷ Rational choice institutionalism highlights a number of plausible

22 Zürn, Binder and Ecker-Ehrhardt (n 1) 83. The authors draw a similar and accurate distinction between different layers of authority. They suggest that a first layer speaks on whether an institution is considered functionally necessary in order to achieve common goods and on the competence of such institution to take certain measures. A second layer speaks on the rightful exercise of such authority.

23 Robert Brandom, *Making it Explicit: Reasoning, Representing, and Discursive Commitment* (Harvard University Press, 1998) 50; Jürgen Habermas, *Between Facts and Norms* (MIT Press, 1996) 122.

24 One might distinguish between actors being *an* authority and being *in* authority (by virtue of their office and institutions that *confer* authority): see Richard E Flathman, *The Practice of Political Authority: Authority and the Authoritative* (Chicago University Press, 1980).

25 Consider Jürgen Habermas, 'Popular Sovereignty as Procedure' in Habermas (n 23) 463–90.

26 See Joseph Raz, 'Legitimate Authority' in *The Authority of Law* (Oxford University Press, 2009) 3, 19 ('we should regard authority basically as a species of power').

27 Darren G Hawkins *et al*, 'Delegation under Anarchy: States, International Organizations, and Principal-Agent Theory' in Darren G Hawkins *et al* (eds), *Delegation and Agency in International Organizations* (Cambridge University Press, 2006) 3, 7; Curtis A Bradley and Judith G Kelley, 'The Concept of International Delegation' (2008) 71 *Law and Contemporary Problems* 1, 3 (defining international delegation as 'a grant of authority by two or more states to an international body to make decisions or take actions').

reasons why actors would create and submit themselves to actors exercising authority over them, which I do not wish to rehash here.²⁸ Just four observations are most pertinent for what it takes for international institutions to exercise authority by way of making law. First, delegation may well be implicit, for instance when state representatives conclude an agreement with rather generic language and grant international institutions—especially international courts and tribunals—the competence to interpret the agreement, knowing that this will develop the vague terms and thus shape the content of their commitments.²⁹ Second, amendment procedures of international treaties (including those treaties that set up a regime with strong international actors) usually erect high hurdles for any reaction to ‘agency slack’. They create an asymmetry between agents such as courts and bureaucracies and politico-legislative mechanisms.³⁰ Third, while the authority of agents builds on the consent of principals, later disharmony among the principals may even turn out to increase international agents’ authority as the likelihood of being held in check by way of recontracting in fact decreases.³¹ Fourth, even such dynamic can be expected and thus factored into accounts of rational choice institutionalism on why actors might delegate authority to an agent, constraining themselves and others.³²

In turn, in the exercise of public authority, international actors refer back to explicitly delegated authority as a legitimacy basis for their actions. They will portray their practice as giving effect to the terms agreed to by the parties. Legal doctrine and the standard rules of interpretation help them to do so by presenting interpretation as an archaeological activity of uncovering what parties really wanted.³³ But this view faces a number of theoretical and practical problems. One of them pertains to the underlying theory of meaning: terms agreed to by the parties do not come with a true meaning attached to them; rather, such meaning is the product of continuously using those terms. In this sense, interpretation makes international law.³⁴ In addition, digging out origi-

28 See the works cited at n 27; Barbara Koremenos, ‘When, What and Why Do States Choose to Delegate?’ (2008) 71 *Law and Contemporary Problems* 151.

29 Tom Ginsburg, ‘Bounded Discretion in International Judicial Lawmaking’ (2005) 45 *Virginia Journal of International Law* 631, 641–4; Bogdandy and Venzke (n 1).

30 Armin von Bogdandy and Ingo Venzke, ‘In Whose Name? International Courts’ Public Authority and its Democratic Justification’ (2012) 23 *European Journal of International Law* 7, 19–21; Karen J Alter, ‘Delegation to International Courts and the Limits of Re-Contracting Political Power’ in Hawkins *et al* (n 27) 312; Ginsburg (n 29) 659–70.

31 Eyal Benvenisti and George W Downs, ‘Prospects for the Increased Independence of International Tribunals’ in Bogdandy and Venzke (n 1) 99.

32 Clifford J Carrubba, ‘A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems’ (2009) 71 *Journal of Politics* 55, 67.

33 I have argued this in detail and with numerous examples in Ingo Venzke, ‘The Role of International Courts as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation’ (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 99. See also Pierre Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’ (1987) 38 *Hastings Law Journal* 814, 828.

34 For further detail, see Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012) 29–64.

nal meaning becomes an increasingly implausible view of the practice of interpretation when parties set up complex institutional structures where the content of their commitments is bound to shift over time through the interplay between different actors who argue about what the terms of delegated authority really mean. A difference between authority and power then has to be derived from a more demanding and nuanced basis of legitimacy than 'simple' consent.

III. AUTHORITY AND PERSUASION

Sticking to the point that international institutions are typically set up by treaties that testify to the consent of their parties, the question of how they can possibly constrain persists. A first response has employed a dynamic perspective and suggested simply that an actor confers competences (delegates authority), makes credible commitments and binds itself and others now and in the future. But what if an actor, having delegated a certain degree of authority, later disagrees with the exercise of such authority, arguing that it goes beyond the scope of delegation and amounts to an *ultra vires* act? Authority needs to withstand its contestation and must also find obedience in the absence of persuasion through arguments. Arendt wrote sweepingly: 'Where arguments are used, authority is left in abeyance.'³⁵ Such a view surely smells strongly of authoritarianism and is truly drastic. It is also implausible. Public (international) actors frequently back up their decisions and legal instruments with supporting reasons—they may even be under a legal obligation to do so—and they still exercise authority.³⁶

And yet it is compelling to distinguish authority from persuasion. Further, reasoned decisions, if they are to qualify as an exercise of authority, surely demand obedience in the absence of agreement in substance. In an ideal type formulation, authority implies that the addressee acts as if she takes the content of the command as a maxim for action due to the relationship of authority and not because of her own assessment of the command as such.³⁷ Authority implies, in other words, *deferred judgment*.³⁸ HLA Hart translated this aspect of authority into legal scholarship with the notion of content-independent reasons—reasons which derive from the intention of the person or institution having authority and not from an assessment of the content of the command.³⁹ Constraint in

³⁵ Arendt (n 4) 92. See Thomas Hobbes, *De Cive* (Kessinger, 2004 [1651]) 115 (noting no less drastically that 'command is a precept in which the cause of the obedience depends on the will of the commander ... the will stand[s] for a reason').

³⁶ See eg Art 56(1) ICJ Statute.

³⁷ Weber (n 10) 217.

³⁸ Richard B Friedman, 'On the Concept of Authority in Political Philosophy' in Raz (n 5) 56, 63; Michael Barnett and Martha Finnemore, 'The Power of Liberal International Organizations' in Barnett and Duvall (n 19) 161, 169–70.

³⁹ Herbert LA Hart, *Essays on Bentham* (Oxford University Press, 1983) 254–5; Stefan Sciaraffa, 'On Content-Independent Reasons: It's Not in the Name' (2009) 28 *Law and Philosophy* 233.

the absence of consent spells power instead of authority. At the same time, authority needs to persist in the absence of agreement in substance. Otherwise it would amount not to authority but to persuasion.⁴⁰

A. Persuasive Authority?

The sensible juxtaposition of authority with both power and persuasion exposes as questionable many uses of the pervasive notion of *persuasive authority*.⁴¹ When discussing the role of judicial precedents, for example, it seems paradoxical to say—as quite a number of international courts and tribunals are happy to do—that earlier decisions have persuasive authority.⁴² Legal instruments of the United Nations High Commissioner for Refugees (UNHCR), such as its Guidelines of Refugee Protection, would not amount to an exercise of authority if they were merely persuasive, as a number of domestic court decisions suggest.⁴³ Authority implies at least relative content-independence; that is, its demand for obedience cannot turn only on the persuasiveness of its content in the eyes of the addressee.

Ideas of persuasive authority seem to be at their strongest in comparative law and with regard to the use of foreign judicial decisions arguably providing a repository of good reasons.⁴⁴ But the notion fails to offer an answer as to what authority might mean if arguments were simply persuasive. The notion of persuasive authority seems theoretically weak. More generally, it reflects the struggle of legal doctrine to come to terms with the use of ubiquitous ‘authorities’, which enjoy normative force even if they are non-binding. Alas, the concept of persuasive authority does not offer the easy way out of this quandary that some authors wish it did.⁴⁵

B. Dynamics of Deference

It might, however, be the case that actors do not contest the claims of others but *defer* their judgment to authorities. Such authority rests on the capacity of actors to make oth-

⁴⁰ Scott J Shapiro, ‘Authority’ in Jules L Coleman, Kenneth Einar Himma and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2004) 382, 383 (authority is either pernicious or otiose).

⁴¹ See also Frederick Schauer, ‘Authority and Authorities’ (2008) 94 *Virginia Law Review* 1931, 1940–52; Nils Jansen, *The Making of Legal Authority* (Oxford University Press, 2010).

⁴² See eg *ADC Affiliate Limited and ADC and ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, para 293. See also August Reinisch, ‘The Role of Precedent in ICSID Arbitration’ [2008] *Austrian Arbitration Yearbook* 495, 498.

⁴³ See with further references Venzke (n 34) 117–32.

⁴⁴ H Patrick Glenn, ‘Persuasive Authority’ (1986–7) 32 *McGill Law Journal* 261; Chad Flanders, ‘Toward a Theory of Persuasive Authority’ (2009) 62 *Oklahoma Law Review* 55.

⁴⁵ Michael Torrance, ‘Persuasive Authority Beyond the State: A Theoretical Analysis of Transnational Corporate Social Responsibility Norms as Legal Reasons Within Positive Legal Systems’ (2011) 12 *German Law Journal* 1573.

ers believe—through a variety of channels—that they would simply be better off if they deferred their judgment and submitted themselves to an authority.⁴⁶ Michael Barnett and Martha Finnemore understand authority precisely in this way—as ‘the ability of one actor to use institutional and discursive resources to induce deference from others.’⁴⁷ Such resources are various and well researched from perspectives of sociological institutionalism, which draw attention to practices that institutions adopt in order to enhance their legitimacy.⁴⁸ Attributes of the actor, the process of exercising authority, and its substantive outcome matter beyond moments of consent as a basis of legitimacy.

First, the classic tripartite differentiation of authority on the basis of an authority's claims to legitimacy would speak of charismatic authority, which is based on the attributes of the *actor*. It would focus on their qualities such as their decency, honour, esteem or even heroism.⁴⁹ Leaving aside some of the more archaic overtones, it is possible to see how attributes of the actor such as expertise, independence and integrity matter.⁵⁰ It is further helpful to distinguish between attributes of specific persons, groups of persons, and particular positions, titles or offices that bestow authority.⁵¹ How international actors may offer and use resources that induce others to defer their judgment certainly varies among the institutions and fields of law. Generally, international bureaucracies can draw authority from knowledge and secrecy.⁵² As Weber observed: ‘bureaucratic administration means fundamentally domination through knowledge.’⁵³

Second, when looking at attributes of the *process* of exercising authority, the focus shifts towards the larger organisational and normative structure supporting international actors' authority. To different degrees the process is connected to the consent of the addressee and thus linked to consensual ‘foundations’ of authority. But it also offers a genuine source of authority to the extent that it features qualities such as respect for human rights, inclusiveness and coherence. Thomas Franck has notably stressed the

⁴⁶ Frederick Schauer, ‘Precedent’ (1987) 39 *Stanford Law Review* 571, noting the similarity of this argument to Raz's service conception of legal authority (see Raz (n 26)). Cf Patrick Taylor Smith, this issue.

⁴⁷ Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press, 2004) 5.

⁴⁸ Hall and Taylor (n 13) 949; Martha Finnemore, ‘Norms, Culture and World Politics: Insights from Sociology's Institutionalism’ (1996) 50 *International Organization* 325; James G March and Johan P Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (Free Press, 1989) 22.

⁴⁹ Weber (n 10) 218, 243–55.

⁵⁰ Andrea Liese and Silke Weinlich, ‘Die Rolle von Verwaltungsstäben internationaler Organisationen. Lücken, Tücken und Konturen eines (neuen) Forschungsgebiets’ [2006] *Politik und Verwaltung* special issue, ed Jörg Bogumil, Werner Jann and Frank Nullmeier, 491.

⁵¹ Jos CN Raadschelders and Richard J Stillman II, ‘Towards a New Conceptual Framework for Studying Administrative Authority’ (2007) 29 *Administrative Theory and Praxis* 4.

⁵² Deirdre Curtin, ‘The Role of Judge-Made Law and EU Supranational Government: A Bumpy Road from Secrecy to Translucence’ in Michael Dougan *et al* (eds), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing, 2012) 101–27; Ingo Venzke, ‘International Bureaucracies in a Political Science Perspective: Agency, Authority and International Institutional Law’ (2008) 9 *German Law Journal* 1401.

⁵³ Weber (n 10) 225.

process of lawmaking as the main feature that nourishes legitimacy, which then exerts a ‘compliance pull’, as he puts it. ‘Legitimacy’, Franck writes, ‘is a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.’⁵⁴ Where such a belief breaks down, authority is denied. The argument here notably pertains to beliefs as reasons for deference. This is not the same as suggesting that authority is also normatively legitimate—a distinction that Frank does not make.

Third, international actors can further thrive on the appeal of the *outcome* of their decisions, either because it is legally convincing or because it resonates with what is right and just, for instance.⁵⁵ Barnett and Finnemore biting suggest in this regard that sometimes international civil servants are seen as ‘the missionaries of our time.’⁵⁶ For instance, the UNHCR has repeatedly invoked the unmistakable plight of forcefully displaced persons to contribute to the making of international refugee law. Further, international judicial institutions lean on functional necessities in support of their reasoning, sometimes even brushing aside rather clear limitations set by the terms of delegation and thus shaking consent as a basis of legitimacy.⁵⁷

C. Authority, Not Agreement

Authority that rests on the appeal of the outcome of decisions threatens to collapse into persuasion. To repeat, authority needs to persist even if it is not met with agreement in substance. Generally, authority has a precarious existence if it is thought of in dyadic settings involving only an actor demanding obedience and another actor submitting to the command in the absence of both coercion by force and persuasion through arguments. In addition to consent and delegation, reasons and resources that lead actors to defer their judgment help explain how authority may arise and persist. But overall such deference is rare in settings where the stakes are high. Governments do spend significant amounts of time and money on legal counsel, and they are pressured to explain their actions to other domestic actors and audiences, which pushes them to formulate their own assessment of international public authority.

Authority’s existence thus remains susceptible to collapse, at least as long as relationships of authority are thought of as pair relationships involving only an actor exercising

⁵⁴ Thomas M Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990) 24.

⁵⁵ See RB Hall, ‘Moral Authority as a Power Resource’ (1997) 51 *International Organization* 591; Jochen von Bernstorff and Ingo Venzke, ‘Ethos, Ethics and Morality in International Relations’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012).

⁵⁶ Barnett and Finnemore (n 48) 33.

⁵⁷ Consider, for example, *Abaclat v Argentina* ICSID Case No ARB/07/5, para 583. See also Milan Kuhli and Klaus Günther, ‘Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals’ in von Bogdandy and Venzke (n 1) 365.

authority (*A*) and an addressee (*B*).⁵⁸ In fact, public authority hardly arises in such a way that *A* wills *B* to do *x* and *B* voluntarily complies. Typically other actors might hold *B* to act as *A* indicated. Persuasiveness can thus well sustain authority in a broader discursive setting in which other actors are convinced that *B* should do as *A* says. But for there to be authority, yet again, *B*'s own assessment of the content of *A*'s command cannot be decisive.

The conception of authority that I am offering thus turns on the broader discourse, and it is to this discourse that I will now turn. Because the discourse plays such an important role in the construction of authority it may be helpful to briefly contrast what I here propose with discourse theory that follows on the heels of Jürgen Habermas. Habermas, too, draws on Arendt in his discussion of the constitutive relationship between law and politics.⁵⁹ He highlights a different strand of her work in which she coins a notion of politics as acting together in public rather than as a struggle to pursue self-interests alone.⁶⁰ In this public sphere, according to Habermas's reading of Arendt, politics manifests itself precisely as an 'authorizing force expressed in "jurisgenesis"—the creation of legitimate law—and in the founding of institutions.'⁶¹ This resonates well with the discursive understanding of authority that I wish to convey. There are two points of particular interest in Habermas's more detailed theory that make the contrast.

First, Habermas takes political action in the public sphere to generate communicative power. Such power is legitimate, and it can authorise. It can create administrative power. In Habermas's discourse theory of law and democracy, the law takes the role of a medium in which communicative power is translated into administrative power. This link, together with a system of rights and democratic institutions, provides the key ingredient of legitimate authority.⁶² Ideas that are embedded in this argument stem from both a rich conception of the public sphere where opinion- and will-formation can unfold largely unburdened by power structures and from a theory of communicative action where the better arguments carry weight.⁶³ In short, the argument draws together a number of theoretical strands of Habermas's rich oeuvre to which I can hardly do justice here. I do not follow this lead when it comes to the authority of international institutions in making law because I do not want to overburden a public discourse with normative aspiration.⁶⁴ As concerns the projection of discourse theory from the context

⁵⁸ Blau (n 17) 313.

⁵⁹ Habermas (n 23) 148–9.

⁶⁰ *Ibid.*, 148, with reference to Hannah Arendt, *On Violence* (Harcourt, 1970) 41–44. Such a conception is also nicely conveyed in Hannah Arendt, 'Introduction into Politics' in *The Promise of Politics* (Schocken, 2007) 93, 95. See also Venzke (n 52) 1422 (on this conception of politics of the understanding of international institutional law).

⁶¹ Habermas (n 23) 148.

⁶² *Ibid.*, 150.

⁶³ See respectively Jürgen Habermas, *The Structural Transformation of the Public Sphere* (MIT Press, 1991); Jürgen Habermas, *The Theory of Communicative Action* (Beacon, 1981).

⁶⁴ For detail see Venzke (n 34) 214–23.

of the democratic constitutional state onto the international level, I even count Habermas on my side when I am sceptical.⁶⁵

But second, Habermas also highlights, with reference to Arendt, that the authority of any institution depends on the state of opinion- and will-formation in the public sphere. It depends on the beliefs of others. Such beliefs are a resource for which organisations compete, he notes, but which they cannot themselves produce.⁶⁶ Notably, unlike instruments of violence, they cannot store up and keep such authority in stock when they lose support.⁶⁷ The first point indicates a theoretical path, which I do not wish to take, and the second has effectively introduced the argument of the following section.

IV. AUTHORITY AND PRACTICE

Authority is above all the product of discursive construction, which *stabilises* authority between power and persuasion. Authority emerges when a broader social belief holds that *B* should do *x* because *A* said so.⁶⁸ Other actors' discursive practices, including those of peers, institutions' constituent members, competing domestic actors and broader publics, will determine whether *A*'s authority prevails over *B*'s possible disagreement.⁶⁹ Notably, the more authoritative the actor that holds *B* to do as *A* says, the more likely it is that *A*'s authority will increase.

It is crucial to appreciate authority as a product of discursive practices in a dynamic context that exceeds dyadic relationships of authority.⁷⁰ Once authority is placed in a broader constellation, it is rather easy to resolve the tension between consent and constraint. What matters for the existence of authority is that there is an *expectation* to follow what the authority says. 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'.⁷¹ In Richard Flathman's words, 'shared values and beliefs' are constitutive of authority, and those shared underpinnings are shaped and upheld in discursive practices.⁷² In this sense, as Bruce Lincoln concurs, authority is based on 'culturally and historically conditioned expectations'.⁷³

⁶⁵ Jürgen Habermas, 'Concluding Comments on Empirical Approaches to Deliberative Politics' (2005) 40 *Acta Politica* 384.

⁶⁶ Habermas (n 23) 149.

⁶⁷ Hannah Arendt, *The Human Condition* (Chicago University Press, 1958) 200.

⁶⁸ See HLA Hart, *The Concept of Law* (Oxford University Press, 2nd edn 1994 [1964]) 254–9. See further Jean d'Aspremont, *Formalism and the Sources of International Law* (Oxford University Press, 2011) 192–4; Friedman (n 3) 71.

⁶⁹ On the role of publics in the construction of courts' authority in municipal federal as well as international settings, see Carrubba (n 32).

⁷⁰ For a well-developed argument in this vein, see Flathman (n 24).

⁷¹ Niklas Luhmann, *Legitimation durch Verfahren* (Suhrkamp, 1983) 34.

⁷² Flathman (n 24) 26.

⁷³ Bruce Lincoln, *Authority: Construction and Corrosion* (University of Chicago Press, 1991) 116.

A. Dynamics of Tradition

Expectations that actors should follow what an authority says hinge above all on past practices. The further study of the discursive construction of authority can then draw insights from historical institutionalism and its emphasis on path dependence.⁷⁴ Pragmatism is an attendant theoretical strand that may flank the analysis. Whereas thinking about delegation focuses on the actors and their rational choices and whereas thinking about deference points to the resources that lead others to defer their judgment, pragmatism ploughs a middle way and emphasises incremental processes of constructing authority.⁷⁵ More specifically, it can highlight how authority arises from the discursive practices in which actors (*C* and others), hold *B* to do as *A* says and how those practices create broader normative expectations sustaining *A*'s authority.

Robert Brandom, who spearheads theoretical pragmatism, stresses that legal concepts are content-laden (and constrain) through the tradition of past applications.⁷⁶ He builds on decades of semantic pragmatist thinking on the core proposition that 'words do not have a meaning other than that attributed to them by their use'.⁷⁷ It is past practices that show what words mean.⁷⁸ And those practices can shift incrementally. They tie any interpretation to the tradition of past uses, but any reiteration of the past is also creative as it is embedded in new contexts, in an ever-moving present.⁷⁹ How can words (any terms of delegation) constrain if their content, as pragmatism would have it, only stems from their use? Brandom offers a straightforward answer with profound insight: 'The current judge is held accountable to the tradition she inherits by the judges yet to come.'⁸⁰ It is a characteristic feature of the language of international law that it compels its speakers to connect to the past, to prior instance of speaking.

As Ian Johnstone notes: '[T]here is a limit to which any language, including the language of the law, can plausibly be stretched. The limits exist because those who use legal language are typically in a relationship of some duration, from which common meanings, values, and expectations have emerged.'⁸¹ Martti Koskeniemi likewise flirts with the 'culture of formalism' in which the language of international law 'compels a move away from one's idiosyncratic interests and preferences by insisting on their justifica-

⁷⁴ See James Mahoney, 'Path Dependence in Historical Sociology' (2000) 29 *Theory and Society* 507; Fioretos (n 14).

⁷⁵ On the promises of pragmatism for international law see Venzke (n 34) 41–45, 62–63.

⁷⁶ Robert Brandom, 'Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms' (1999) 7 *European Journal of Philosophy* 164, 179–81.

⁷⁷ Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell, 2nd edn 1958) para 43.

⁷⁸ *Ibid.*, para 481.

⁷⁹ This is what the concept of performativity captures best. For an introduction see Sabine Müller-Mall, *Performative Rechtserzeugung. Eine theoretische Annäherung* (Velbrück, 2012) 125–71.

⁸⁰ Brandom (n 76) 181.

⁸¹ Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press, 2011) 25 (emphasis added).

tion in terms of the historical practices.’⁸² Wittgenstein sums up with typical eloquence: ‘Grammar is the account books of language. They must show the actual transactions of language.’⁸³ Brandom simply terms it ‘scorekeeping’.⁸⁴

B. Semantic Authority

The conception of authority that emerges from the dynamics of tradition is one that emphasises actors’ capacity to find recognition for their uses of a term and to establish new terms as reference points for legal discourse. On the face of it, the notion of communicative power might also be fitting in order to grasp the influence of actors in the struggle over what the law (terms of delegation) means. But it is so closely tied up with Habermasian discourse theory that I had better leave it aside. What I intend to capture with the concept of semantic authority is the sociological condition in which some actors’ communicative practice simply matters more than others. More precisely, I define semantic authority as an actor’s capacity to find recognition for their claims about the law and to establish content-laden reference points that participants in legal discourse can hardly escape.⁸⁵

To offer but two examples: Whoever wants to say something about what ‘taking direct part in hostilities’ means in the law of armed conflict is bound to use the work of the International Committee of the Red Cross (ICRC) on the issue.⁸⁶ Whoever wants to say something about whether preliminary measures ordered by the International Court of Justice are binding—something about which the Statue itself is ambivalent, if not skeptical—will have to refer to the judgment in *LaGrand* where the Court actually found that they are binding.⁸⁷ Participants in legal discourse can hardly escape these reference points *because* they are *expected* to relate to them. When they do not relate to them they incur costs or forgo benefits. In academia it would amount either to bad research or to falling below professional standards if one were not to make the expected reference. Before court, it impacts the chances of winning a case.

The authority of reference points notably works independent of their content, within bounds.⁸⁸ Generally, other actors may use content-laden reference points in their

⁸² Martti Koskeniemi, ‘The Place of Law in Collective Security’ (1996) 17 *Michigan Journal of International Law* 455, 478. See further Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005) 616.

⁸³ Ludwig Wittgenstein, *Philosophical Grammar*, Rush Rhees (ed) (Basil Blackwell, 1974) para 44.

⁸⁴ Brandom (n 23) 180–98.

⁸⁵ Venzke (n 34) 62–64, 169–71, 254–6.

⁸⁶ In particular Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol I, *Rules* (Cambridge University Press, 2005); Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation of in Hostilities under International Humanitarian Law* (ICRC, 2009).

⁸⁷ *LaGrand (Germany v United States of America)*, Judgment [2001] ICJ Rep 466, para 103.

⁸⁸ Schauer (n 46) 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’).

strategic endeavour to support their positions. In so doing, they reinforce the authority of such references and also force them onto others who then have little choice but to also relate to them. Authority emanates from this dynamic and discursive practice.

Authority in this discursive understanding is less of a command that demands obedience than a reference point that is hard to escape, that comes with some content, and that redistributes argumentative burdens. Such authority can come in degrees rather than in the modus of all or nothing. Though Weber spoke of 'commands', which suggests a binary response of obedience or defiance, he also defined authority as a *chance* to find obedience, thus not only suggesting 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.⁸⁹

Nor does Joseph Raz consider any such degrees of authority. He distinguishes authority as a command from 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 takes the command of the authority *in lieu* of her own judgment on the balance of reasons for action.⁹⁰ Understanding authority as a weight that redistributes argumentative burdens seems to be excluded. Its own merit largely aside, Raz's account does simply not capture—is simply not geared towards—the authority of international actors that works in discursive practices.⁹¹

Understanding authority as the ability to establish content-laden reference points in legal discourse picks up a much earlier tradition of thinking about authority. It connects to 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 notes, '*auctoritas* was more than a piece of advice and less than a command—a piece of advice that cannot easily be disregarded.'⁹²

The discursive construction of authority builds on consent and thrives on discursive resources (attributes of the actor, the process, the outcome). But it amounts to a genuine source of authority that, in view of the actual dynamics of international legal practice, cannot plausibly be reduced to other considerations. Arendt recalls in this vein

⁸⁹ For an understanding that goes beyond authority as command, see Armin von Bogdandy and 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' (2008) 5 *International Organizations Law Review* 241.

⁹⁰ Raz (n 26) 22–25.

⁹¹ Raz's argument forms part of his broader ambition of providing an account of the authority of law while offering a defence of exclusive legal positivism. At the same time, he strives for 'an analysis maximizing the similarities between authority for action and authority for belief'. Raz (n 26) 9.

⁹² Mommsen (n 12) 1028. See also Theodor Eschenburg, *Über Autorität* (Suhrkamp, 1969) 23–24.

that *auctoritas* derives from *augere* (to augment), and she suggests that it is the original foundation that authority (or those in authority) constantly augments.⁹³ In contrast with power, she notes pertinently, authority has its roots in the past.⁹⁴

International actors can exercise authority by way of lawmaking when they have the capacity to establish content-laden reference points for legal discourse. They have semantic authority. Their statements about the law amount to authority because they compel others to relate their arguments to them. Actors are well advised and expected to refer to them mainly because of the plain belief that like cases should be treated alike.⁹⁵ The appearance of coherence in turn adds to the authority of the actor.⁹⁶

C. Reference Points

The use of precedents vividly illustrates this argument. Earlier decisions do not amount to an exercise of authority if it was for the salience and persuasiveness of their reasons alone. Yet this is the thrust 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.’⁹⁷ If the court did not regard such decision as sound, it could be argued, it might simply disregard them. There would then be no authority.

But 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 leads parties to a dispute to use and argue about previous judgments. Disputing parties then expect the International Court to relate its judgment to precedents 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.’⁹⁸

The Appellate Body gave still more force to precedents when it stressed ‘the importance of consistency and stability’ in interpretation, emphasised that its findings are clarifications of the law and, as such, are not limited to the specific case, and criticised a

⁹³ Arendt (n 6) 121.

⁹⁴ *Ibid.*, 122.

⁹⁵ Critiques of such an attitude are of course legion: see eg Jacques Derrida, ‘Force de loi: le fondement mystique de l’autorité’ (1990) 11 *Cardozo Law Review* 919. Yet, for the mores of practice, see the forthright argument by Marc Jacob, ‘Precedents: Lawmaking through International Adjudication’ in Bogdandy and Venzke (n 1) 35.

⁹⁶ Schauer (n 46) 600.

⁹⁷ *Case of the Readaptation of the Mavrommatis Jerusalem Concessions* (Jurisdiction), *Greece v Britain*, Judgment, 10 October 1927, para 43.

⁹⁸ Appellate Body Report, *Japan: Taxes on Alcoholic Beverages*, WT/DS8 10 and 11/AB/R (4 October 1996), 14; *Zeroing in Anti-Dumping Measures Involving Products from Korea*, WT/DS402/R (18 January 18 2011), para 7.6.

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 ...'⁹⁹ Similar patterns can be found to varying degrees within other judicial institutions as well.¹⁰⁰

It is not just judicial precedents that function as reference points in legal discourse that actors are expected to use. The example of ICRC was already supposed to indicate that. When it comes to the practice of non-judicial institutions, very similar expectations and dynamics exist. The past figures prominently in the UNHCR's making of refugee law, for instance, where High Commissioners have incrementally contributed to shifts in the definition of 'refugee'.¹⁰¹

There would of course be no force of the past if everything could be made of it. Only if statements about the law carry content and constraint can they reach into the future and make law. Such statements must not only be creative but also constrained and constraining in order to increase international actors' authority in making international law. Ages of realist critique and rule-skepticism have (in part successfully) challenged ideas about the determinacy of semantic content and about origins of legal constraint. Pragmatism offers a simple answer: Nothing innate in words or legal concepts constrains, but practice does. Authority in lawmaking is constrained and can constrain—is tied to the past and can reach into the future—because it is tied down by the future that looks back to see how any use relates to the past.¹⁰²

It may finally be noted that the practical construction of international authority does not take place at the international level alone; it also occurs when international authority is received on other, supranational or domestic, levels of governance. First of all, domestic constitutional provisions recognising the applicability of international law and, by extension, the use of international decisions that interpret it, might be read as express delegations of authority to international actors. But a lot again turns on interpretive practices, even in the by and large exceptional case that the domestic legal order gives international decisions direct effect. Domestic cases relating to international decisions have precedential effects in domestic systems. If domestic courts, for example, hold other domestic actors to international commitments as interpreted by international institu-

⁹⁹ Appellate Body Report, *United States: Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (30 April 2008), paras 161–2; Appellate Body Report, *United States: Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (4 February 2009), paras 362–5.

¹⁰⁰ ICTY, *Prosecutor v Aleksovski*, para 113; cf *Prosecutor v Kuprećić*, IT-95-16-T, Judgment (14 January 2000), para 540. See also Mia Swart, 'Judicial Lawmaking at the Ad Hoc Tribunals: The Creative Use of the Sources of International Law and "Adventurous Interpretation"' (2010) 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 459. Similarly, see ECtHR, *Ireland v United Kingdom*, Judgment of 18 January 1978, Series, A, No 25, para 154.

¹⁰¹ Bhupinder S Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation' (1993) 5 *International Journal of Refugee Law* 442; Venzke (n 34) 91–103, 122–34.

¹⁰² Brandom (n 76); Markus Winkler, 'Die normativität des Praktischen' (2009) 64 *Juristenzeitung* 821.

tions, they will certainly contribute to those international institutions' authority. Overall, beyond delegation and deference authority is a product of practice.

V. CONCLUSIONS: PUBLIC AUTHORITY

The present contribution has tried to better understand international institutions' authority in making law by drawing authority's contours in relation to both power and persuasion. It has highlighted authority's precarious existence, which constantly threatens to collapse on either side. By introducing a dynamic perspective that distinguishes between moments of explicitly recognising an authority by way of consent and delegation, on the one hand, and the later exercise of authority, on the other, the contribution has taken a first step towards offering an account in which authority can both rest on consent and still constrain. But this first step begged the question how authority can grow out of moments of recognition to demand obedience. Persuasion through arguments is not an option as there is no authority where it will not also be met with obedience in the absence of agreement. At this juncture the argument has, in passing, exposed as questionable many uses of the notion of persuasive authority.

As a second step, the contribution discussed resources that might induce actors to defer to authorities. It examined characteristics and features of actors, processes and outcomes in search of such resources. Authority based on deferred judgment is rather feeble, unless the construction of authority is placed in a broader discursive context that stabilises authority between both power and persuasion. In fact, authority hardly arises in bipolar, dyadic relationships but (more) easily when an actor *C* or a broader discursive context holds that *B* should do as *A* says.

In a third step, the contribution thus argued that international institutions' authority in making law is above all the product of discursive construction in which past practices support a social expectation that *B* should do as *A* says. Appreciating the construction of authority in this way allows for authority to be less of a command that demands obedience and more a discursive reference point that is hard to escape, that comes with some content, and that redistributes argumentative burdens. One may thus think of authority as the ability to establish content-laden reference points in discourse that are difficult to avoid because participants are expected, and in turn forced, to relate to them. As Carl Friedrich noted a while ago: 'All authority is in the last analysis the authority of communications.'¹⁰³ Whose communications amount to an authority and what they mean are the subject of struggles between a myriad of actors pursuing different projects. In the end, authority, like law, 'is an eternal Becoming'.¹⁰⁴

¹⁰³ Carl J Friedrich, 'Loyalty and Authority' (1954) 3 *Confluence* 307, 312.

¹⁰⁴ Rudolf von Jhering, *The Struggle for Law* (Callaghan, 2nd edn 1915) 13.

These three steps aimed to achieve an understanding of authority between power and persuasion in order to clarify 'what it takes' for actors to have authority. They were driven by the question of how authority can be distinct from power by virtue of its connection to the consent of the addressee and how it can be distinct from persuasion by virtue of its persistence in the absence of agreement. But the first step—while resonating strongly with the classical narrative that state governments make the law and institutions that constrain them—is simplistic and difficult to maintain in the light of growing global governance mechanisms and, generally, when societies grow more complex.¹⁰⁵ Connecting authority to consent as the main basis of legitimacy separating authority from power then becomes increasingly difficult, implausible, and often highly idealised. In fact, continuing to think in terms of consensual-contractual relationships might impede a clear view of relationships of authority.

In more complex institutional settings it is more often than not necessary to let go of attempts which try to tie all action back to the consent of those addressed. Instead authority should be framed in public law terms.¹⁰⁶ (International) public authority is a specific form of power that purports to be legitimate because it is legally constituted and, at least, *claims* to speak in the name of the public.

¹⁰⁵ Franck (n 54).

¹⁰⁶ Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal* 1375; Bogdandy and Venzke (n 1).