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UNIVERSITY OF AMSTERDAM

# SEMANTIC AUTHORITY

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### **Semantic Authority**

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## Semantic Authority

*Ingo Venzke\**

### Abstract:

*This Chapter introduces the concept of semantic authority, defined as an actor's capacity to find acceptance for its interpretative claims or to establish its own statements about the law as content-laden reference points for legal discourse that others can hardly escape. In order to both clarify its heritage and its novelty, The Chapter first provides an account of the theoretical context in which the concept of semantic authority is embedded—the lines of thinking in whose wake the concept starts making sense (II.). The concept is above all indebted to understandings of (international) law as a product of its communicative practice. In contrast to similar past and present voices, however, it purports to highlight the powerful actors in legal discourse so as to anchor critique and normative inquiry. Second, the Chapter clarifies the nature of semantic authority and the dynamics that sustain it (III.). While persuasiveness can increase an actor's semantic authority, it is a constitutive feature of such authority that it must persist in the absence of agreement in substance. What is more, while semantic authority thrives on sociological legitimacy, it is a separate question of whether it is indeed well justified. Among the factors that sustain it, it is the capacity to link up with tradition that stands out. Third and finally, the chapter summarizes the concept's trajectory—what has been done with it and how it might still develop further (IV.).*

### I. Introduction: Purpose

A concept may well be introduced in view of its purpose. The purpose of semantic authority is to elucidate whose voice is particularly influential in international legal discourse. Semantic authority refers to an actor's capacity to find acceptance for its interpretative claims or to establish its own statements about the law as content-laden reference points for legal discourse that others can hardly escape.<sup>1</sup> The concept aims at those actors who have a significant impact on the making of international law within the everyday practice of its discourse. In the field of international economic law, for instance, one may think of the authority that arbitral tribunals hold in the making of investment law, or of the strong spell of the reports of the World Trade Organization (WTO) Appellate Body (AB) in the making of trade law. Many international courts and tribunals enjoy semantic authority in the sense that their decisions permeate and shape the legal discourse. Their decisions give meaning to treaty provisions and to customary international law. They gloss over and sometimes even push aside the law that, formally speaking, provides the basis for claims to (il)legality. The concept of semantic authority

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<sup>1</sup> See Ingo Venzke, 'Semantic Authority, Legal Change and the Dynamics of International Law' (2015) 12 *No Foundations* 1–21; Ingo Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law' (2013) 4 *Transnational Legal Theory* 354–373.

highlights the dominant actors within a given field. Those actors may be international courts and tribunals, just as well as international bureaucracies, executive organs of international organizations, Non-Governmental Organizations (NGOs), domestic courts, and prolific international lawyers—be it in their individual capacity or as members of professional networks such as the International Law Association or the *Institut de Droit International*.

The concept of semantic authority follows on the heels of the sober recognition that international lawmaking is not a matter of the recognized sources of international law alone, but that it unfolds in the communicative practice of its everyday operation. As such, it takes up lines of thinking that took root above all in the free law movement (*Freirechtsschule*) in Germany and in US-American legal realism. The main heritage of those traditions of thought is to look at (international) law as a product of its practice. If international law is understood in that vein, then which actors are influential in that practice that makes international law?

The concept of semantic authority has the critical ambition of elucidating exercises of power. It complements thinking about international lawmaking in terms of sources with an approach that zooms in on those actors who are particularly influential in the international legal discourse and who exercise power by way of their claims. The ambition links up with the typical critical project of working against the alienation of power. Second, the concept is part of an alternative normative inquiry. Relocating part of international legal normativity from international law's sources into its communicative practice poses yet another challenge to the orthodox narrative of legitimacy according to which international law rests on the consent of those whom it governs. If that does not hold, then the concept of semantic authority steps in to offer an alternative focus for normative inquiry. Who are the actors who hold a particular sway over the discourse and is their authority well justified? Notably, the notion of authority—referring to an actors' capacity—is different from thinking of authority as giving good reasons for action. It raises questions about normative justification. It does not answer them. But, third, the concept of semantic authority supports answers by contributing to a better grasp of practice. It purports to contribute to a clearer view of where international law comes from.

It merits emphasis that the concept of semantic authority adds dynamism to international law. Apart from moving international law from its sources into its communicative practice, semantic authority is a capacity that is certainly not a given. Just like international law itself, it is a product of the struggle between participants in the legal discourse. Authority, like law, is the object of desire that is distributed in that same struggle. There are two layers of dynamism: the semantic struggle for the law shapes the law and it constantly distributes the relative authority that particular actors enjoy in that struggle. The field of international humanitarian law, for example, not only shows how the law is a product of the semantic struggle between actors such as the ICRC, international courts and tribunals, governmental representatives, military lawyers, domestic courts, NGOs and domestic courts. It also vividly shows how these actors redistribute semantic authority in the field. They use and support the authority of others who seek to pull the law into a similar direction. The ICRC typically relies on a rich number of domestic court decisions to support its claims. Conversely, some

governments have been highly critical of the ICRC, trying to diminish its influence on that which is international law.

In order to both clarify its heritage and its novelty, the present chapter continues by first providing an account of the theoretical context in which the concept of semantic authority is embedded—the lines of thinking in whose wake the concept starts making sense (II.). The concept is above all indebted to understandings of (international) law as a product of its communicative practice. In contrast to similar past and present voices, however, it purports to highlight the powerful actors in legal discourse so as to anchor critique and normative inquiry. Second, the chapter clarifies the nature of semantic authority and the dynamics that sustain it (III.). While persuasiveness can increase an actor's semantic authority, it is a constitutive feature of such authority that it must persist in the absence of agreement in substance. What is more, while semantic authority thrives on sociological legitimacy, it is a separate question of whether it is indeed well justified. Among the factors that sustain it, it is the capacity to link up with tradition that stands out. Third and finally, the chapter summarizes the concept's trajectory—what has been done with it and how it might still develop further (IV.).

## II. Theoretical Roots

The concept of semantic authority is situated in a stream of thinking that sees international law as a product of communicative practice. In that practice, a variety of actors seek to pull the law onto their side. They make claims within the language of international law that are aligned with their interests or convictions. The present section traces that line of thinking back to the impetus of the 19<sup>th</sup> century free law movement (*Freirechtsschule*) in Germany and to the programmatic work of US-American legal realists. It then presents its more recent manifestations and thereby provides an account of both the heritage embedded in the concept of semantic authority as well as the background against which it gains a contrasting shape.

The free law movement's core characteristic is its critique of formalism and of allegedly wrong beliefs that underpin doctrinal legal reasoning. Its starting point is a variation of rule-scepticism that is focused on the gap—as it was then put—between any legal rule and the case of its concrete application. The target of critique was the mainstream *Pandektenwissenschaft* or *Begriffsjurisprudenz* (conceptual jurisprudence) that presented legal reasoning, including the decision of judges, as a logical syllogism. According to that mainstream, there was no room for discretion and no room for the impact of the interpreter. The judge or any other able legal scholar could arrive at the right conclusion in a deductive-logical fashion. Interpreters in (international) law would cognize the law, but not contribute to its creation. Interpreters could be authorities because they were typically right. They could be referred—as international legal doctrine still has it—as subsidiary sources that help recognizing what the law is. Against that view, the scholars of the free law movement emphasized the role of will, subjective values and feelings in the interpretative process.

One early push in that direction come from the work of Rudolf von Jhering and his short treatise *The Struggle for Law*. For Jhering, law was a product of struggle rather

than of natural evolution—a struggle backed by interests. This puts the law into constant flux: ‘law is uninterrupted labour ... it is eternal becoming’<sup>2</sup>. Jhering wanted to understand the making of law from within legal practice, and he set out a programme for a jurisprudence with decidedly sociological ambitions.

It was for Eugen Ehrlich to pursue that task further.<sup>3</sup> Ehrlich keenly recognized ‘that the meaning that the law actually gains in life depends much more on its interpretation and on the persons who are called upon to deal with it.’<sup>4</sup> The task for legal science, according to Ehrlich, was then again a sociological one, namely to understand the law as a living force—as ‘living law’.<sup>5</sup> He argued for the study of how the law was made in social interactions. He wished to understand how such living law evolved and what the forces were that shaped its development.<sup>6</sup> This agenda provided an important push towards seeing (international) law as a product of communicative practices and further towards asking who is influential in that practice.

The free law movement deeply influenced many early American realists.<sup>7</sup> The further twists that this stream of thinking receives in North America starts placing emphasis on specific actors who matter in shaping the law through their interpretations. That is apparent in Oliver W. Holmes’ famous quote that ‘[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.’<sup>8</sup> Why the courts? Because, as a matter of fact, they enjoy what may well be understood as semantic authority. Different assessments as to whose voice matters in the legal discourse then permeate legal realist thinking. Karl Llewelyn thus writes in his introduction to the study of law that ‘what officials do about disputes is, to my mind, the law itself’.<sup>9</sup> It unites different scholars in this line of thinking that they place emphasis on the ‘law in action’ rather than the ‘law in the books’, as Rosco Pound, a third leading figure in early realist legal thinking next to Holmes and Llewelyn, put it so aptly.<sup>10</sup> Their advice was that scholarship ought to turn away from the study of dusty rules that are incapable of determining decisions. It ought to develop a better understanding of the actual factors that inform legal decisions and of those actors who take them.

What concerns international law specifically, the New Haven School carried this thought forward. Taking its cues from early American legal realists, its protagonists advocated that international law should be ‘regarded not as mere rules but as a whole

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<sup>2</sup> Rudolph von Jhering, *The Struggle for Law* (2nd edn, Callaghan 1915 [first published in German 1872]).

<sup>3</sup> Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (Duncker & Humblot 1913).

<sup>4</sup> Eugen Ehrlich, *Freie Rechtsfindung und freie Rechtswissenschaft* (C. L. Hirschfeld 1903) (my translation).

<sup>5</sup> Ehrlich (n 3).

<sup>6</sup> *Ibid.*

<sup>7</sup> James E. Herget and Stephen Wallace, ‘The German Free Law Movement as the Source of American Realism’ (1987) 73 *Virginia Law Review* 399–455.

<sup>8</sup> Oliver Wendell Holmes, ‘The Path of Law’ (1897) 10 *Harvard Law Review* 457–478, 460-1.

<sup>9</sup> Karl N Llewellyn, *Bramble Bush: On Our Law and Its Study*, (Quid Pro 2012 [1930]), 3.

<sup>10</sup> Roscoe Pound, ‘Law in Books and Law in Action’ (1910) 44 *American Law Review* 12–36.

*process* of authoritative decisions in the world arena'.<sup>11</sup> From the perspective of the New Haven School, international law emerges from the myriad of legal communications that a plethora of actors utter every day.<sup>12</sup> In that process, actors ought to be guided by principles of substantive morality. Their actions should ultimately be aimed at human dignity. The aim was thus to guide actors by means of a policy-oriented jurisprudence. Understanding which actors are particularly powerful in the making of international law was part of that aim. But the ambition of highlighting and ultimately questioning that power was not a primary concern, not the least because—as Richard Falk already observed—the New Haven School's policy preferences tended to coincide with those of the most powerful actor on the international scene, the US government.<sup>13</sup>

More recently, theories of transnational legal process and theories of global legal pluralism have taken up this line of thinking. In their different manifestations, they connect prominently to both the impetus of the free law movement as well as the thought of legal realism. In particular systems theory, taking its cues from the early sociological jurisprudence of Ehrlich, has painted a picture of global legal pluralism that is marked by three core features: the multiplicity of overlapping normative orders, the cacophony of actors, and functional differentiation.<sup>14</sup> The emphasis, in short, rests on the differentiation of specific regimes and discourses that each embraces a particular rationality. Those particular rationalities, more so than any specific set of actors, account for the shape of international law and its development.<sup>15</sup> For example, investment law is shaped by the emphasis on investor protection or, more deeply, by a neo-liberal economic outlook. The emphasis rests less on investment tribunals as powerful actors and more so on their awards as expressions of that underlying rationality.

In the lineage of American legal realism and the New Haven School, though with avowed distance, more recent voices have looked at how international law may be given effect through its domestic reception.<sup>16</sup> Or, not unlike systems theory, they have revealed conditions of global legal pluralism. Their theories, too, gain traction in light of the cacophony of actors that have entered the stage of international law. In fact, in the perspective of those theories, the sheer multitude of actors eases any legitimacy concerns that there may be: No single voice commands.<sup>17</sup>

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<sup>11</sup> M S McDougal, *Studies in World Public Order* (Yale University Press 1960), 169.

<sup>12</sup> Michael Reisman, 'International Lawmaking: A Process of Communication: The Harold D. Lasswell Memorial Lecture' (1981) 75 *American Society of International Law Proceedings* 101–120.

<sup>13</sup> Richard A Falk, 'Casting the Spell: The New Haven School of International Law' (1995) 104 *Yale Law Journal* 1991–2008.

<sup>14</sup> Niklas Luhmann, *Law as a Social System* (Oxford University Press 2004); Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993); Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

<sup>15</sup> Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999–1045.

<sup>16</sup> Hongju Harold Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181–207.

<sup>17</sup> Paul Schiff Berman, *Global Legal Pluralism A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2014).



These streams of thinking provide the background against which the concept of semantic authority is placed in contrast. The concept takes up understandings of international lawmaking as a matter of its everyday practice. It also embraces the conception of this practice as essentially communicative. Furthermore, it credits the fact that many more actors are involved in this process than any state-based conceptions of lawmaking would have us believe. But the concept of semantic authority decidedly complements more recent voices with its focus on powerful specific actors within the international legal discourse. It does not take confidence in the fact that a multiplicity of actors alone eases legitimacy concerns. A picture of diffused power tends to hide real power. Moreover, against the emphasis on the dominant rationality of a functionally specialized regime and discourse, it again emphasizes the actor.

What is more, present views on communicative lawmaking—especially in their form of global legal pluralism—tend to present lawmaking and legal change in the naturalist category of evolution. That has purchase, but is limited, if not distorting, when it comes to those fields of international law that are shaped by a limited amount of particularly powerful actors whose voice weighs much more heavily in the international legal discourse. Semantic authority brings the individual actor back in. It builds on an understanding of international law not as a natural offshoot of social interaction but as the product of a veritable struggle for the law. Actors wish to pull the law onto their side and craft interpretations that are aligned with their interests or convictions. International law is the object of desire.

The concept of semantic authority is placed within that struggle for international law. It recognizes that this struggle is a communicative one—one that unfolds through the exchange of arguments. It credits the fact that actors need to present their claims within the language of international law.<sup>18</sup> Having clarified the concept's theoretical roots, the chapter continues by drawing out the nature of semantic authority and the dynamics that sustain it.

### III. On the Nature of Semantic Authority and the Dynamics that Sustain it

Given the communicative, argumentative nature of the struggle for international law, it is first of all necessary to clarify semantic authority's relationship to persuasion. While being persuasive can certainly contribute to an actors' authority, it is a constitutive feature of authority—including semantic authority—that it persists even in the absence of agreement in substance (A.). Second, semantic authority notably refers to an actors' capacity. Like any authority, it thrives on sociological legitimacy. But saying that an actor enjoys semantic authority does not suggest that its claims are justified (B.). Third, what sustains semantic authority, more than anything else, is the fact of being able to link up

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<sup>18</sup> In this way it links up with, but remains its distance from, practice theory and the notion of competent performances, see Emanuel Adler and Vincent Pouliot, 'International Practices' (2011) 3 *International Theory*, 1-36, 4-5.

to past practices—to be in tune with tradition. Tradition, and not the truth of a claim, is a core basis for semantic authority (C.).

### A. *Authority, not Persuasion*

An actor enjoys semantic authority if it has the capacity to find acceptance for its statements about international law even if others do not agree in substance. This is what distinguishes exercises of authority from persuasion. As Hannah Arendt wrote insightfully already 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.’<sup>19</sup> Of course claims about international law are backed by a whole host of arguments. For many actors with semantic authority, such as international courts and tribunals, giving reasons for a decision is even a legal requirement. But also reasoned decisions, if they are to qualify as an exercise of authority, surely demand obedience even in the absence of agreements in substance. H.L.A. Hart translated this aspect of authority for legal scholarship with the notion of content-independent reasons—reasons, namely, which do not turn on an assessment of their contents.<sup>20</sup> If interpreters in the legal discourse had to persuade and to convince in order for their statements about international law to be taken into consideration, they would not exercise authority. The constitutive feature of authority is that it persists even in the absence of agreement.<sup>21</sup> At the same time, being persuasive in the eyes of an audience or community can add to an actor’s semantic authority.

The fact that earlier statements about international law—especially in the form of judicial decisions—are so frequently used in legal argument has notably been explained with reference to such statements’ persuasive authority. The notion of persuasive authority is most frequently seen in comparative law and with a view to the role of foreign judgments. Likewise, in international legal discourse it is supposed to account for the use of judicial decisions in the absence of any rule of *stare decisis* or other rules that would give earlier judgments a solid, formal legal standing.<sup>22</sup> It is in this vein, for instance that an investment tribunal found that ‘cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.’<sup>23</sup> It still remains unclear what authority amounts to if it needs to persuade. Possibly it would be in the sense of a repository of good reasons.<sup>24</sup> But if it is a constitutive feature of

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<sup>19</sup> Hannah Arendt, ‘What is Authority?’ in *Between Past and Future* (Penguin Books 2006) 91-141, 93.

<sup>20</sup> HLA Hart, *Essays on Bentham* (Oxford University Press 1983) 254-255.

<sup>21</sup> S J Shapiro, ‘Authority’ in J L Coleman, K Einar Himma and S J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004) 382, 383.

<sup>22</sup> Marc Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice. Unfinished Business* (Cambridge University Press 2014).

<sup>23</sup> *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.

<sup>24</sup> See already PCIJ, *Case of the Readaptation of the Mavrommatis Jerusalem Concessions* (Jurisdiction), Greece v. Britain, Judgment, 10 October 1927, para 43.

authority that it persists in case of disagreement in substance, then the notion of persuasive authority fails to convince. It does, however, nod to the fact that being persuasive may add to an actor's authority.

Max Weber, and many after him, suggested that authority implies that the addressee acts as if she took the contents 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.<sup>25</sup> Authority implies, in other words, that she surrenders her judgment.<sup>26</sup> That is certainly a tall order. It does not seem to be met frequently within the international legal discourse. It is not that somebody who is crafting a legal argument on Art. XX(g) GATT defers her judgment if she references Appellate Body reports on the matter. She references those reports to her advantage, knowing well with which parts she does or does not agree. The point is that the dynamics of the legal practice push her towards using even those (parts of) reports with which she disagrees. Others will most likely have picked them up, and she can hardly escape them. She, too, *presents* earlier reports as reasons for action. That is the relevant aspect of authority—it does need not persuade, nor does it require a surrender of judgment.

### B. *Legitimacy, not Justification*

Any authority remains fragile and feeble if it does not rest on sociological legitimacy. This is especially the case for an actors' semantic authority in the international legal discourse. Whereas that authority does not depend on an individual participant's agreement in substance, it leans on a general expectation that interpreters ought to refer to the statements of an actor who enjoys semantic authority. Others can hardly escape those statements. It is such an expectation that ties interpreters in trade law to earlier reports of the Appellate Body. In that field of international law, the Appellate Body has internalized the sociological argument and contributed to a self-reinforcing dynamic in support of its semantic authority. It suggested that panels should indeed rely on its earlier reports because those statements about international trade law 'create legitimate expectations among WTO Members'.<sup>27</sup> It thus signaled that earlier decisions should be and will be followed. In order to craft a successful legal argument in the field, interpreters will thus be pushed even harder towards supporting their arguments with references to earlier decisions—whether they like them or not. In that practice, the AB's statements about international (trade) law emerge as authoritative reference points.<sup>28</sup>

The sociological bases for any semantic authority may further be analyzed in light of Weber's classic tripartite division of authority's character as rational, charismatic, and

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<sup>25</sup> Max Weber, *Economy and Society* (University of California Press 1978) 217.

<sup>26</sup> Richard B Friedman, 'On the Concept of Authority in Political Philosophy' in Joseph Raz (ed), *Authority* (Basil Blackwell 1990) 56-91.

<sup>27</sup> Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8, 10 & 11/AB/R, 4 October 1996, p. 14

<sup>28</sup> Citation analysis starts painting clearer pictures of nodal points, particularly crucial reference points for legal discourse Krzysztof J Pelc, 'The Politics of Precedent in International Law: A Social Network Application' (2014) 108 *American Political Science Review* 547–564.

traditional.<sup>29</sup> Notably, this is an inquiry in to sociological legitimacy bases. It does not *eo ipso* convey a judgment about semantic authority's normative justification. Authority here refers to a capacity. Whether it is justified is a separate question.

First, an actor's authority in contributing to communicative lawmaking is most solid if it is not recognized as such.<sup>30</sup> In the struggle for international law, the prevailing sentiment that distributes authority continues to be legalism flanked by formalism—the belief that rightness is a matter of impeccably following the rules of the law.<sup>31</sup> To be influential, the actor needs to hide and present itself as subservient to the law. The language of the law allows actors' to do precisely that, to hide. As Bourdieu observed:

[t]he ritual that is designed to intensify the authority of the act of interpretation . . . adds to the collective work of sublimation designed to attest that the decision expresses not the will or the world-view of the judge but the will of the law or the legislature (*voluntas legis* or *legislatoris*).<sup>32</sup>

In this sense, semantic authority presents itself as rational, as flowing from the law that rules.

Second, actors' can rely on a whole host of other resources that roughly connect to their charisma, their personal qualities. The UNHCR supports the authority of its interpretations for instance in the following manner—here in an amicus curia submission before the United States Court of Appeals for the Seventh Circuit:

‘The views of UNHCR are informed by over 55 years of experience supervising the treaty-based system of refugee protection established by the international community. . . . It has twice received the Nobel Peace Prize, in 1954 and 1981, for its work on behalf of refugees. UNHCR's interpretation of the provisions of the 1951 Convention and its 1967 Protocol are both authoritative and integral to promoting consistency in the global regime for the protection of refugees.’<sup>33</sup>

The UNHCR tends to invest significant efforts in cases that are likely to have precedential effects and that may shift argumentative burdens in the interpretative practice that is centred on the 1951 Refugee Convention. In the case at hand, it thus ‘anticipates that the decision in this case may influence the manner in which the authorities of other countries apply the refugee definition’.<sup>34</sup> The UNHCR struggles for the law, tries to increase its own semantic authority, and seeks to use the authority of

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<sup>29</sup> For the classic tripartite distinction of authority relating to the kind of legitimacy claim it makes, see Weber (n 25). 215.

<sup>30</sup> For an alternative, largely complementary account, of how a court can build up authority by visibly getting away with interpretations that are recognized as expansive, see Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* By Shai Dothan (Cambridge University Press 2015).

<sup>31</sup> Seminally, Judith N Shklar, *Legalism* (Harvard Univ. Press 1964).

<sup>32</sup> Pierre Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’ (1987) 38 *Hastings Law Journal* 814–853, 828.

<sup>33</sup> UNHCR, *Doe v Holder, Attorney General: Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner*, 13 November 2009, available at <<http://www.unhcr.org/refworld/docid/4b03eb182.html>>, at 2.

<sup>34</sup> *Ibid.*, at 3.

others in its struggle. All this adds its own capacity to influence the international legal discourse. Whether that authority is justified is a distinct matter.

### C. *Tradition, not Truth*

The third basis in the classic distinction of authority's legitimacy bases—tradition—merits a separate subsection. Semantic authority is above all the product of discursive construction. It is crucial to appreciate authority as a product of discursive practices in a dynamic context that exceeds dyadic relationships picturing one actor in authority over another.<sup>35</sup> What sustains the authority is not individual acceptance in the specific case of its exercise, but its social recognition — a social belief in its legitimacy.<sup>36</sup> While such beliefs hinge on many factors, it seems that they especially hinge on past practices. An actor has the capacity of finding acceptance for its statements about international law if it has been right in the past and if it can present those statements as consistent with tradition. That, and not those statements' truth, is decisive.<sup>37</sup>

Having been right in the past supports an actors' semantic authority. Rightness here is the product of the legal discourse itself. Whether a statement was deemed right can be gleaned with hindsight from its reception in that discourse. Whether a statement about international law was successfully presented as consistent with tradition, too, will be judged in that same way. Philosopher Robert Brandom wrote insightfully in that regard that '[t]he current judge is held accountable to the tradition she inherits by the judges yet to come'.<sup>38</sup> 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. Actors in the struggle for international law have to work with concepts that have histories.

It is this dynamic that explains why not everything can be made of reference points for legal discourse, why they are content-laden. To be clear, if they had no content and if everything could be made of them, then there would be no exercise of authority. The fact that reference points are content-laden, at the same time, does certainly not mean that their content could not change. It changes in the actors' struggle to align those reference points with their interests or convictions.

In sum, understanding authority as the capacity to establish content-laden reference points in legal discourse picks up an early 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 magistrate's acts if they went against the advice of the Senate or lacked the Senate's consent, such acts were without authority and politically frail. As Theodor Mommsen noted, '*auctoritas* was more

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<sup>35</sup> For a well-developed similar argument in this vein, see Richard E Flathman, *The Practice of Political Authority: Authority and the Authoritative* (Chicago University Press 1980).

<sup>36</sup> N Luhmann, *Legitimation durch Verfahren* (Suhrkamp 1983) 34.

<sup>37</sup> Note that the distinction between tradition and truth would collapse if truth was given a thoroughly pragmatist twist, such as in Patterson Dennis Patterson, *Law and Truth* (Oxford University Press 1996).

<sup>38</sup> 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, at 181.

than a piece of advice and less than a command—a piece of advice that cannot easily be disregarded.<sup>39</sup> The reasons why it cannot be disregarded connect to social expectations and to the dynamic construction of semantic authority. This dynamic process is best explained with reference to the working of precedents.<sup>40</sup> Actors are expected to refer to them even if they disagree with them. They are also well advised to do so. In practice they fight over the meaning of earlier decisions (the contents of reference points for legal discourse) just like they struggle for the meaning of treaty provisions. No participant in the international legal discourse can withdraw from the spell of precedents.

#### IV. The Concept's Trajectory

The concept of semantic authority has proved particularly helpful in understanding the authority of international courts and tribunals. It has thus been embedded in an increasing body of scholarship that reacts to the fact that international courts and tribunals have rendered more than 90% of all their decisions after 1990.<sup>41</sup> That change in quantity has gone hand in hand with a shift in quality, turning international courts and tribunals from sporadic dispute settlers into multifunctional actors who contribute to the making of international law.<sup>42</sup> The impact that they enjoy is well captured by the concept of semantic authority.<sup>43</sup> The concept further helps to explain some of their argumentative techniques. Gleider Hernandez has thus suggested that the International Court of Justice advanced its own semantic authority by declaring a relatively strict rule of precedents.<sup>44</sup> Henrik Olsen and Stuart Toddington have explored the mechanisms with which the international criminal tribunals and the International Criminal Court (ICC) have supported their authority's sociological legitimacy. They demand attention for the dynamics of how the law is shaped under the spell of adjudication and for the dynamic shifts in semantic authority.<sup>45</sup>

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<sup>39</sup> Theodor Mommsen, *Römisches Staatsrecht*, vol 3 (Cambridge University Press, 2010 [1888]) 1028; Theodor Eschenburg, *Über Autorität* (Suhrkamp 1969), 23-24.

<sup>40</sup> Armin von Bogdandy and Ingo Venzke, 'The Spell of Precedents: Lawmaking by International Courts and Tribunals' in Cesare P R Romano and others (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 503-522.

<sup>41</sup> Karen J Alter, 'The Evolving International Judiciary' (2011) 7 *Annual Review of Law and Social Science* 387-415.

<sup>42</sup> Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 *Leiden Journal of International of International Law* 49-72.

<sup>43</sup> Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press 2014) 115-19.

<sup>44</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, [2008] ICJ Rep 412, paras 53-5. See Gleider I Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014) 158.

<sup>45</sup> Henrik Palmer Olsen and Stuart Toddington, 'The End of an Era: Static and Dynamic Interpretation in International Courts' (2014) 14 *International Criminal Law Review* 1-26.

Semantic authority does not stop there but extends to many other international institutions. In his research on the exercise of international public authority, Matthias Goldmann has shown how semantic authority amounts to one form of such public authority, impacting on other actor's freedom.<sup>46</sup> He has drawn attention to the possibly subtle, but no less powerful, workings of such authority. The notion of semantic authority, in short, informs—and is informed by—research on the exercise of international public authority.<sup>47</sup> Focusing less on particular actors and more so on specific argumentative techniques, Jean d'Aspremont has explored those techniques that render claims within the language of international law particularly likely to succeed.<sup>48</sup> Andrea Bianchi, as well as Daniel Peat and Matthew Windsor, have similarly inquired into the game of interpretation in international law to ask which cards are trump—which styles, ruses, forms of argument contribute to the interpreter's capacity of finding acceptance for her claims within relative interpretative communities.<sup>49</sup>

Studies have thus either looked at the influence of international institutions through the lens of semantic authority, or they have integrated that concept as part of an account of interpretative practice in international law. The concept is of course susceptible to further development, embedded in theoretical attempts that try to make sense of international law as an argumentative practice. It might be pushed further both in its sociological and political philosophical dimensions.<sup>50</sup> It might be asked whether the fact that statements about international law need to find acceptance within a community of interpreters may contribute to their normative justification. While semantic authority is a form of power, the conceptual choice is for the more specific category of authority rather the more encompassing one of power. To speak of authority suggests that other participants' acceptance of a claim might possibly be an expression not only of power structures alone, but of something like genuine agreement.<sup>51</sup> But the question of the role, if any, that such agreement plays in the normative justification of any authority is embroiled in deep debates of political philosophy as well as argumentative theory. The concept of semantic authority links up to these debates just as well as to sociological

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<sup>46</sup> Matthias Goldmann, *Internationale öffentliche Gewalt. Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung* (Springer 2014)

<sup>47</sup> See [www.mpil.de/red/ipa](http://www.mpil.de/red/ipa).

<sup>48</sup> Jean d'Aspremont, 'Wording in International Law' (2012) 25 *Leiden Journal of International Law* 575–602.

<sup>49</sup> Daniel Peat and Matthew Windsor, 'Playing the Game of Interpretation: On Meaning and Metaphor in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds) *Interpretation in International Law* (Oxford University Press 2015) 3-33; Andrea Bianchi, 'The Game of Interpretation in International Law: the Players, the Cards and Why the Game is Worth the Candle' in *Ibid.* at 34-60.

<sup>50</sup> See in particular the suggestions by Maria Panezi, 'Of Tortoises and Hares: Exploring the Role of International Administrations and Tribunals in the Development of International Law' (2013) 4 *Transnational Legal Theory* 283–300.

<sup>51</sup> Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012) 57-64; Gleider I. Hernandez, 'Interpretation' in Jean d'Aspremont and Jörg Kammerhofer (eds), *International Legal Positivism in a Postmodern World* (Cambridge University Press 2014) 317-348, 346.

inquiries into the forces that nourish any authority. It has the potential of linking accounts of international law with these debates while, at the same time, functioning as a more practical tool for capturing those actors whose voice in the international legal discourse is particularly influential.