

# Cutting off the King's Head: Rethinking Authority in International Law

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## ABSTRACT

The renewed attention to the concept of authority in the literature of international law and international relations has allowed to gain a better understanding of the phenomenon of authority in international affairs. But even recent works remain focused on ‘authority figures’ in the form of persons, offices and institutions. Building on an approach proposed by Kim Scheppele and Karol Soltan, this article frames authority as a matter of attractiveness in a choice situation, showing a way to go beyond the dominant actor-focused conception of authority. What it proposes, in particular, is to revisit the existing understanding of authority by shifting the focus from authority figures to authoritative resources. The practice of authority assertions and authority contestations in international law shows that rather than being ‘agent-centered’, claims and challenges to authority primarily turn around attributes that pass for ‘authoritative resources’ in the relevant contexts.

## INTRODUCTION

In one of his best-known interviews on power, Michel Foucault observed that ‘political theory has never ceased to be obsessed with the person of the sovereign’.<sup>1</sup> What Foucault meant to criticize was the widespread tendency to analyse power in terms of prescriptions and prohibitions, which typically leads to tracing power to the person of the power-holder. ‘What we need’, Foucault added, ‘is a political philosophy that isn’t erected around the problem of sovereignty or, therefore, around the problems of law and prohibition. We need to cut off the king’s head’.<sup>2</sup>

It is an understatement to say that the mainstream scholarship in international law has been guilty of Foucault’s charge: International law scholars have generally focused on what has been termed ‘solid authority’,<sup>3</sup> directing their attention to possible explanations of the

<sup>1</sup> Michel Foucault, *Power: Essential Works of Foucault 1954–1984* (James D Faubion ed, The New Press 2001) 122.

<sup>2</sup> *ibid.*

<sup>3</sup> Nico Krisch, ‘Liquid Authority in Global Governance’ (2017) 9 *International Theory* 237.

binding nature of international law in a world of sovereign nations.<sup>4</sup> In contrast, the neighbouring discipline of international relations traditionally paid no attention to authority in international affairs because of its narrow understanding of the phenomenon of authority and of its traditional assumption that the world of international relations was one of anarchy.<sup>5</sup>

Several scholars of international relations have, however, recently attempted to revisit the place of authority in international affairs by shifting the focus from the 'command, obedience and coercion' model of authority to various resources deployed to secure voluntary deference from others.<sup>6</sup> This strand of the literature has significantly contributed to theorizing authority beyond states, showing in particular that authority may be grounded in rationality and expert technocracy.<sup>7</sup> Similar attempts have also been made in the literature of international law. Some international lawyers have imported concepts developed in analytical jurisprudence.<sup>8</sup> Others have built on philosophy and sociology, focusing on distinctive features of authority and identifying its possible 'marks'.<sup>9</sup> For its part, a recently published edited volume dedicated to international court authority suggested valuable analytical tools to assess variations in the *de facto* authority of international courts.<sup>10</sup>

There is no doubt that this renewed attention to the concept of authority in the literature of international law and international relations has allowed to gain a better understanding of the phenomenon of authority in international affairs. However, most works developed in this context still remain vulnerable to Foucault's charge because of their focus on 'authority figures' such as persons, offices and institutions. A typical move in this new literature is indeed to clarify that authority determines behaviour not because of a threat of sanction (or a promise of a reward), or through persuasion, but because it is associated with a particular person. In other words, the new stream of literature on authority in international affairs has unanimously endorsed the traditional argument of political philosophy that 'in an authority relationship a command is obeyed, a pronouncement accepted, etc, on account of who it comes from, rather than as a result of an evaluation of its merits'.<sup>11</sup>

Building on an alternative approach proposed by Kim Scheppele and Karol Soltan,<sup>12</sup> this article frames authority as a matter of attractiveness in a choice situation. What it proposes, in particular, is to revisit the existing understanding of authority by shifting the focus from

<sup>4</sup> James L. Brierly, *The Basis of Obligation in International Law* (Clarendon Press 1958); Gerald Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement' (1956) 19 *The Modern Law Review* 1.

<sup>5</sup> Jorg Kustermans and Rikkert Horemans, 'Four Conceptions of Authority in International Relations' (2022) 76 *International Organization* 204, 204.

<sup>6</sup> Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004); Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* 405; Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press 2007); Matthias Ecker-Ehrhardt, 'But the UN Said So ...': International Organisations as Discursive Authorities' (2012) 26 *Global Society* 451; Ole Jacob Sending, *The Politics of Expertise: Competing for Authority in Global Governance* (The University of Michigan Press 2015).

<sup>7</sup> Barnett and Finnemore (n 6).

<sup>8</sup> Samantha Besson, 'The Authority of International Law-Lifting the State Veil' (2009) 31 *Sydney Law Review* 343; Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (OUP 2013); Nicole Roughan, 'Mind the Gaps: Authority and Legality in International Law' (2016) 27 *European Journal of International Law* 329; Esmé Shirlow, *Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication* (CUP 2021).

<sup>9</sup> Ingo Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law' (2013) 4 *Transnational Legal Theory* 354; Krisch (n 3); Fuad Zarbiyev, 'Saying Credibly What the Law Is: On Marks of Authority in International Law' (2018) 9 *Journal of International Dispute Settlement* 291; Ingo Venzke and Joana Mendes, 'The Idea of Relative Authority in European and International Law' (2018) 16 *International Journal of Constitutional Law* 75; Shirlow *ibid.*

<sup>10</sup> Karen J. Alter, Laurence R. Helfer and Mikael R. Madsen (eds), *International Court Authority* (OUP 2018).

<sup>11</sup> Richard B. Friedman, 'On the Concept of Authority in Political Philosophy' in Joseph Raz (ed), *Authority* (New York University Press 1990) 56, 69. See also, *ibid.* 65 ('a command carries weight not because of what is said, but because of the fact that what is said is an order given by a particular person.') and 66 ('the content of the prescription becomes irrelevant, and the person becomes the factor that endows the prescription with its distinctive appeal.'). RS Peters, 'Symposium on Authority' (1958) 32 *Proceedings of the Aristotelian Society, Supplementary Volumes* 207, 218 (stating that in an authority relation 'an order is obeyed or a decision is accepted simply because X gave it or made it.').

<sup>12</sup> Kim L. Scheppele and Karol E. Soltan, 'The Authority of Alternatives' (1987) 29 *Nomos* 169.

‘authority figures’ to authoritative ‘resources’.<sup>13</sup> Even a cursory glance at the vast literature on authority should be sufficient to realize that this is rarely done: David Enoch spoke for many when stating that ‘only persons or person-like organs can play the role of an authority’.<sup>14</sup> Going beyond the dominant ‘agent-centered’ conception of authority,<sup>15</sup> the present article addresses this important gap in the specific case of international law.

The limits of the ‘agent-centered’ approach to authority can be illustrated with the example of the Human Rights Committee’s authority in the context of individual communications under the Optional Protocol to the International Covenant on Civil and Political Rights. In its Draft General Comment No 33, the Committee asserted that the conclusion that the Committee’s ‘views’ issued with respect to the individual communications are ‘purely advisory or recommendatory’ is not ‘a justifiable conclusion to be drawn’.<sup>16</sup> One of the central arguments used by the Committee in support of this assertion was that ‘the views issued by the Committee under the Optional Protocol exhibit most of the characteristics of a judicial decision, follow a judicial method of operation, and are issued in a judicial spirit’.<sup>17</sup> The Committee’s assertion was challenged by several states in their submissions commenting on the Draft General Comment. What is telling is that most of those submissions challenged the Committee’s assertion of authority by taking issue with the premise that the Committee could be analogized to a judicial body.<sup>18</sup> Which side was right in this debate is not the point of the present article. The point rather is that the debate did not turn on the abstract question of the Human Rights Committee’s authority as an agent, but on *what* made the Committee’s interpretive determinations authoritative. If the arguments focused on whether the Committee could be compared to a judicial body, it was presumably because judicial determinations enjoy significant authority in international law. Given the decentralized nature of the international legal order, states have traditionally been seen as legally entitled to determine *uti singuli* what their legal rights and obligations are.<sup>19</sup> In such a system of ‘boundless relativism’,<sup>20</sup> independent, neutral and impartial sites such as international courts have come to be regarded as more authority-carrying than ‘interest-driven’ interpretations advanced by states.<sup>21</sup>

The premise of this article is that the example of the authority of the views issued by the Human Rights Committee is fairly representative of authority dynamics in international law. The practice of authority assertions and authority contestations in international law shows that rather than being ‘agent-centered’, claims and challenges to authority primarily turn around attributes that pass for ‘authoritative resources’ in the relevant contexts.

<sup>13</sup> *ibid* 170, 172.

<sup>14</sup> David Enoch, ‘Authority and Reason-Giving’ (2014) 89 *Philosophy and Phenomenological Research* 296, 312. Carl J Friedrich perceptively noted that ‘the authority of nonpersonal entities, such as dictionaries, laws, and the like’ presented ‘some very interesting special problems’, but did not go on to elaborate on such problems. Carl J Friedrich, ‘Authority, Reason, and Discretion’, in Shankar A Yelaja (ed), *Authority and Social Work: Concept and Use* (University of Toronto Press 1971) 18, 21.

<sup>15</sup> Kustermans and Horemans (n 5) 206.

<sup>16</sup> Human Rights Committee, Draft General Comment No 33 (Second Revised Version as of 18 August 2008): The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc CCPR/G/GC33/CRP.3 (25 August 2008) para 13.

<sup>17</sup> *ibid* para. 11.

<sup>18</sup> Submissions of Germany, Japan, Norway, Sweden, Poland, Romania, the UK and the United States. See the section ‘Inputs Received’ in the United Nations Office of the High Commissioner for Human Rights, ‘General Comment No. 33 on Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights’ available at <<https://www.ohchr.org/en/calls-for-input/general-comment-no-33-obligations-states-parties-under-optional-protocol>> accessed 7 June 2023.

<sup>19</sup> *Lake Lanoux Arbitration*, 12 Reports of International Arbitral Awards 281, 132; *Air Service Agreement of 27 March 1946 between the United States of America and France*, 18 Reports of International Arbitral Awards 417, 443.

<sup>20</sup> Paul Reuter, ‘Principes de Droit International Public’ (1961) 103 *Recueil Des Cours* 440.

<sup>21</sup> Bruno Simma, ‘Comment’ in Rudiger Wolfrum and Volker Roeben (eds), *Developments of International Law in Treaty Making* (Springer 2005) 581, 582.

This article is structured as follows. Section I will present Scheppele and Soltan's approach to authority in some detail. Section II will introduce the concept of choice situations and authoritative resources. Section III will attempt to illustrate how the proposed approach to authority can account for various ways in which competing claims to authority are typically adjudicated in international law. Section IV will conclude.

## I. AUTHORITY AS A MATTER OF ATTRACTIVENESS

In a study published in 1987, Scheppele and Soltan offered a new understanding of the concept of authority.<sup>22</sup> Describing the traditional theories of authority that equate the latter with 'obedience to authority figures' as political theory's failure to 'cut off the head of the king', Scheppele and Soltan argued that this actor-focused conception of authority could only account for particular authority experiences and proposed instead to conceptualize authority as a general phenomenon.<sup>23</sup> In this approach:

Authority [...] is not simply the right of actor A to get actor B to carry out A's will voluntarily. Instead, authority is found when actor B finds compelling particular properties of A, when A may be a person, a solution to a puzzle, or, more generally, any alternative in a choice situation. Authority is constituted not by person A willing a particular state of affairs which is then carried out, but rather by person B being attracted to the state of affairs offered by alternative A and voluntarily choosing that option over others.<sup>24</sup>

In this understanding, obviousness, for instance, is likely to be a powerful basis of authority, considering that an alternative that can claim the advantage of obviousness is typically attractive on several grounds: it reduces decision costs and it is easier to agree on and more likely to secure an agreement.<sup>25</sup> Likewise, alternatives that can be persuasively justified are more likely to prevail than others.<sup>26</sup> What is common to authority experiences is that the actors involved are "seduced" by the authoritative resources an alternative possesses.<sup>27</sup>

Putting attractiveness at the centre of authority experiences does not, however, mean that authority relations are simply a matter of subjective preferences. Two qualifications are necessary in this regard. First, not all choices are 'authority-revealing'.<sup>28</sup> As Scheppele and Soltan stress, we may be attracted by a particular brand of toothpaste and choose it over other brands, but this choice does not involve authority.<sup>29</sup> What makes a choice 'authority-revealing' is the fact that an alternative is privileged or dismissed through 'authority talk', a practice of communication that signals or denies the authority of that alternative.<sup>30</sup> Secondly, the preference for an alternative in an authority-revealing choice situation is not a purely personal preference. Authority relations obtain precisely when the attractiveness of an option is not simply a matter of personal choices, but have a social grounding in the form of 'a belief system' that supports it.<sup>31</sup>

<sup>22</sup> Scheppele and Soltan (n 12).

<sup>23</sup> *ibid* 170.

<sup>24</sup> *ibid* 170.

<sup>25</sup> *ibid* 187.

<sup>26</sup> *ibid* 181.

<sup>27</sup> *ibid* footnote 19.

<sup>28</sup> *ibid* 173.

<sup>29</sup> *ibid* 175.

<sup>30</sup> I borrow the concept of 'authority talk' from Ecker-Ehrhardt (n 6) 452. But it should be noted that Ecker-Ehrhardt focuses on the 'recognition of an actor or institution as an authority,' *ibid* (emphasis added).

<sup>31</sup> Peter M Blau, 'Critical Remarks on Weber's Theory of Authority' (1963) 57 *The American Political Science Review* 305, 307.

It might be thought that by shifting the focus from persons, offices and institutions to authoritative resources, Scheppele and Soltan's proposed approach does not significantly deviate from the traditional understanding of authority in political philosophy. After all, as Friedman highlights, a person can successfully claim authority only if she can be identified as someone entitled to deference on the basis of 'certain socially accepted criteria' called 'marks of authority'.<sup>32</sup> What Scheppele and Soltan describe as authoritative 'resources' or 'attributes' of an alternative may simply be another way of referring to such 'marks of authority'. Authority as theorized by Scheppele and Soltan and authority within the meaning of political philosophy discussed by Friedman are, however, different in one important respect: While the latter focuses on 'the characteristics of persons and offices', the former also includes 'the characteristics of the arrangements or outcomes' that command deference and obedience.<sup>33</sup>

In other words, a major advantage of Scheppele and Soltan's theory is that authority is not the exclusive privilege of persons or offices, but can also be associated with 'texts, rituals, types of explanation, justifications, reasons or particular real or ideal social arrangements'.<sup>34</sup> As Scheppele and Soltan point out, '[s]aying a law, a set of religious beliefs, a dictionary, a moral theory, or a particularly good argument has authority becomes less mysterious with [this] conception because one does not have to assume that these things have wills or preferences. We can say properties of these things attract us to select them, without having to assume that they are willing us to do so'.<sup>35</sup>

International law offers many examples showing that the authority of an alternative can simply be grounded in its soundness and intuitive appeal rather than its agential pedigree. Consider the remarkable example of whether a state enterprise can rely on acts of public authorities as *force majeure* circumstances excusing the non-performance of its contractual obligations towards a private party. The issue often arises in the context of international commercial transactions, but there is hardly any legal system in the world with a dedicated rule governing it. Remarkably, the issue is frequently resolved in international commercial arbitration by reference to a set of guidelines that a German professor in international business law, Karl-Heinz Böckstiegel, proposed in 1984.<sup>36</sup> Approaching the question as 'a matter of proof and presumption',<sup>37</sup> Professor Böckstiegel offered the following simple guidelines that are commonly referred to as 'the Böckstiegel Guidelines':

#### A. Acts of state in the form of administrative acts

- 1) Due to the presumption that a state will not have its executive organs act to the detriment of its own foreign trade organs, including state enterprises, administrative acts of state should in principle not be considered as *force majeure*.
- 2) This presumption is not applied, however, if it can be seen *prima facie* or can be proved by the state enterprise that the administrative act was caused by general considerations not connected with this contract or this sort of contract.

<sup>32</sup> Friedman (n 11) 68–71.

<sup>33</sup> Scheppele and Soltan (n 12) 175. As Scheppele and Soltan's definition of authority makes clear, in some circumstances, the immediate locus of authority may be a person, an office or an institution. Scheppele and Soltan (n 12) 170 ('authority is found when actor B finds compelling particular properties of A, when A may be a person, a solution to a puzzle, or, more generally, any alternative in a choice situation.'). Those circumstances can, however, be framed as specific instances falling within the broader approach proposed by Scheppele and Soltan.

<sup>34</sup> *ibid* 170.

<sup>35</sup> *ibid*.

<sup>36</sup> Karl-Heinz Böckstiegel, *Arbitration and State Enterprises: Survey on the National and International State of Law and Practice* (Kluwer/ICC 1984). For a more recent articulation, see Karl-Heinz Böckstiegel, 'Enterprise v. State: The New David and Goliath?' (2007) 23 *Arbitration International* 93.

<sup>37</sup> Böckstiegel, *Arbitration and State Enterprises* (n 36) 47.

- 3) In spite of rule 2, the presumption under 1 is applicable again, if the private party proves that in its specific case, the general considerations did not apply.

B. Acts of state in the form of law

- 1) If it is not a general law but a law for an individual case, the same rules apply as under A.
- 2) A general law, due to its *per definitionem* general character, will in principle have to be recognized as *force majeure*.
- 3) Rule B2 does not apply, however, if the private enterprise supplies at least *prima facie* evidence that it was in the interest of the state not to fulfil its contractual obligations which was the motivation of the law.<sup>38</sup>

As was pointed out by a reviewer of Professor Böckstiegel's book, this analytical framework is 'more the result of his own reflections than the synthesis of numerous contributions from round the world'.<sup>39</sup> But this did not prevent the proposed framework from becoming highly influential both in the literature<sup>40</sup> and in practice.<sup>41</sup> The explanation lies not simply in the fact that the proposed framework filled an important gap but also in its intuitive appeal: it was clear and formulaic and offered a commonsensical solution to a complex problem of how to avoid opportunistic collusions between the state and state-owned enterprises without unduly interfering with the right of public authorities to take general regulatory measures.

Another telling example is the legal regime governing reservations to treaties. When the matter was submitted to the International Court of Justice (ICJ) in connection with reservations to the United Nations (UN) Genocide Convention, it was not fully clear whether a state could become a party to a treaty with a reservation if one or more contracting parties objected to that reservation. The Secretariat of the League of Nations and the UN Secretary-General followed the principle of unanimity: A reserving state could only become a party if its reservations had been accepted by all the other contracting parties. A radically different approach existed in the Organization of American States, allowing for flexibility so much so that a reserving state could become a party without any limitations having to do with the nature of the reservations or whether the reservations met with one or more objections. Faced with this uncertainty, the ICJ opted for the flexible approach with an important limitation: While a reserving state has the right to become a party in relation to those contracting parties that have accepted its reservations, both 'the attitude of a State in making the reservation on

<sup>38</sup> *ibid* 47–48.

<sup>39</sup> Jan Paulsson, 'Book Review of Arbitration and State Enterprises: Survey on the National and International State of Law and Practice' (1985) 1 *Arbitration International* 195, 200. Professor Böckstiegel himself presents the question as a 'disputed' one. Böckstiegel, *Arbitration and State Enterprises: Survey on the National and International State of Law and Practice* (n 36) 46. He also clarifies that the responses received to his questionnaires were divided on this point. *ibid* 38. The book also makes clear that only 36 countries contributed with responses. *ibid* 58.

<sup>40</sup> See eg, Ignaz Seidl-Hohenveldern, *Corporations in and Under International Law* (CUP 1987) 55; LJ Bouchez, *Prospects for International Arbitration: Disputes between States and Private Enterprises*, (1991) 81 *Journal of International Arbitration* 90; Christoph Brunner, *Force Majeure and Hardship Under General Contract Principles: Exemption for Non-Performance in International Arbitration* (Kluwer Law International 2008) 295–303.

<sup>41</sup> *Krupp-Koppers v Kopex*, Interim Award ('German FR Engineering Company v Polish Firm') (1987) 12 *ICCA Yearbook of Commercial Arbitration* 63, 67; Pierre Lalive, *Arbitration with Foreign States or State-Controlled Entities: Some Practical Questions*, in Julian DM Lev (ed), *Contemporary Problems in International Arbitration* (Springer 1987) 289, 294. See also, Böckstiegel, *Arbitration and State Enterprises* (n 36) 48 (stating that when presented in the 1983 Paris Conference for the 60th anniversary of the ICC Court of Arbitration, the guidelines 'found wide support from participants including Jimenez de Arechaga, former President of the International Court of Justice.').

accession' and 'the appraisal by a State in objecting to the reservation' are subject to the compatibility of the reservation with the object and purpose of the Genocide Convention.<sup>42</sup>

The ICJ's proposed approach was initially rejected by the International Law Commission (ILC) on the ground that 'the application of the criterion of compatibility [is] a matter of subjective discretion',<sup>43</sup> and the Commission consequently recommended the unanimity approach. But when the ICJ's opinion and the Commission's report were considered together by the General Assembly, the latter opted for the ICJ's approach regarding the Genocide Convention, and a flexible approach clearly inspired by the ICJ's opinion with respect to other multilateral treaties.<sup>44</sup> The ILC subsequently changed its view and adopted the Court's approach based on the criterion of the compatibility of the reservation with the object and purpose of the treaty.<sup>45</sup> The heart of the modern law of reservations thus comes from a rule articulated by the ICJ, which was described by the dissenting judges in the *Reservations* case as 'a new and different rule' compared to 'the existing law and practice'.<sup>46</sup>

The success of the ICJ's approach is typically explained by the Court's prestige, but it has at least partly to do with the attractiveness of that approach. As the Court convincingly explained, the unanimity approach was increasingly ill-suited to multilateral treaties adopted by the majority vote in the sense that '[t]he majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations'.<sup>47</sup> The Court's argument that the nature of some multilateral conventions makes the universal participation in them highly desirable<sup>48</sup> was also persuasive and became a serious blow to the unanimity approach as the increasing diversity of the international community made the latter 'less appropriate and less practicable'.<sup>49</sup> Finally, however subjective it might be, the Court's 'object and purpose' criterion made clear that 'the very object of [a treaty]' could not be sacrificed 'in favour of a vain desire to secure as many participants as possible'.<sup>50</sup> In sum, it is highly plausible that the success of the Court's approach had a lot to do with the fact that it struck an attractive pragmatic balance between the conflicting goals of preserving the integrity of the treaty and securing a wide participation when such a balance was badly needed.

Another advantage of the theory of authority offered by Scheppele and Soltan is that it brings to light authority's fundamentally relative character since the authority that an alternative can claim in a choice situation is not an on/off matter, but should be seen as 'a function of the strength of its resources'.<sup>51</sup> In other words, '[a]n alternative is not simply authoritative or not authoritative, but rather more or less authoritative depending on the resources which are possessed by that alternative'.<sup>52</sup>

Scheppele and Soltan's proposed approach to authority also presents the advantage of decoupling 'resources that belong to the actors who participate in the decision from resources that are attributes of alternatives among which the choice is to be made'.<sup>53</sup> For that reason, it can account for cases in which an authoritative alternative promoted by an actor with comparatively limited resources prevails. As Scheppele and Soltan point out, '[t]he rule "first

<sup>42</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951, 15, 24.

<sup>43</sup> Yearbook of the International Law Commission (1951) (Volume II) 128.

<sup>44</sup> UN General Assembly, Resolution (1952) A/RES/598(VI); UN General Assembly, Resolution (1959) A/RES/1452(XIV) A-B.

<sup>45</sup> Yearbook of the International Law Commission (1962) (Volume II) 175–80.

<sup>46</sup> Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo, ICJ Reports (n 42) 31, 43–44.

<sup>47</sup> ICJ Reports (n 42) 22.

<sup>48</sup> *ibid.* 24.

<sup>49</sup> Yearbook of the International Law Commission (1962) (n 45) 178.

<sup>50</sup> ICJ Reports (n 42) 24.

<sup>51</sup> Scheppele and Soltan (n 12) 172–73.

<sup>52</sup> *ibid.* 173.

<sup>53</sup> *ibid.* 172.

come, first served,” for example, may be adopted to solve a queuing problem even when it is suggested as a solution by a five-year-old child.<sup>54</sup> Similarly, ‘[t]he solution “split the difference” may emerge as an outcome when forwarded by one of the bargaining parties even when the other bargaining party has grown deeply angry and suspicious of the suggester’ (or, one could add, is much more powerful).<sup>55</sup>

Finally, this theory of authority is more faithful to authority experiences in law by leaving room for agency. Authority is conventionally equated with content-independent reasons for action: a directive is seen as carrying authority not because it is justified or because of an independent judgment about the soundness or plausibility of its content, but because it emanates from a particular person, office or institution.<sup>56</sup> In this traditional understanding, authority is a matter of ‘unquestioning recognition’,<sup>57</sup> of accepting opinions and prescriptions ‘on faith and without discussion’.<sup>58</sup> In contrast, in Scheppele and Soltan’s proposed approach, authority is not necessarily a matter of unquestioning adherence and may involve reasons and justifications in support of an alternative and an autonomous judgment about the ‘authoritativeness’ of that alternative. In authority experiences in international law, actors do indeed have a significant amount of agency in their relations with authority and do not refrain from questioning, contesting, challenging or destabilizing it in certain circumstances.<sup>59</sup> Importantly, the notion that authority is inconsistent with persuasion by arguments, often advanced in political philosophy<sup>60</sup> and legal theory<sup>61</sup> and uncritically reproduced in international law,<sup>62</sup> is hard to square with the rich practice in which the quality of persuasion is treated as a prominent authoritative resource in international law.<sup>63</sup>

## II. CHOICE SITUATIONS AND AUTHORITATIVE RESOURCES

The central concepts in Scheppele and Soltan’s theory of authority are choice situations and authoritative resources. Authority-revealing choice situations typically occur in areas where authority lines are not clearly delineated by traditional formal entitlements. Take the clash between the ICJ and the International Criminal Tribunal for the former Yugoslavia (ICTY)

<sup>54</sup> *ibid* 175.

<sup>55</sup> *ibid* 175–76.

<sup>56</sup> In political philosophy, this is often referred to as ‘surrender of private judgment’. Friedman (n 11) 64.

<sup>57</sup> Hannah Arendt, *On Violence* (Harcourt Books 1970) 45.

<sup>58</sup> Alexis de Tocqueville, *Democracy in America* (Arthur Goldhammer tr, The Library of America 2004) 489. See also Peters (n 11) 218; Friedman (n 11) 65.

<sup>59</sup> For such an understanding of authority in international affairs, see Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (OUP 2018).

<sup>60</sup> In the famous words of Hannah Arendt, ‘A father can lose his authority by beating his child or by starting to argue with him.’ Arendt (n 57) 45. See also, RF Khan, ‘A Note on the Concept of Authority’ in Gehan Wijeyewardene (ed), *Leadership and Authority. A Symposium* (University of Malaya Press 1968) 12, 14; Peters (n 11) 218; Bruce Lincoln, *Authority. Construction and Corrosion* (The University of Chicago Press 1994) 5; Frank Furedi, *Authority. A Sociological History* (CUP 2013) 8; Alexandre Kojève, *The Notion of Authority (A Brief Presentation)* (Verso 2014) 10.

<sup>61</sup> Frederick Schauer, ‘Authority and Authorities’ (2008) 94 *Virginia Law Review* 1931, 1943 (‘[B]eing persuaded is fundamentally different from doing, believing, or deciding something because of the prescriptions or conclusions of an authority. But if this is so, then the very idea of a persuasive authority is self-contradictory, for persuasion and authority are inherently opposed notions . . . . [T]he fundamental contrast between persuasion and authority renders the term “persuasive authority” self-contradictory. The use of a source can be one or the other – it can be persuasive or it can be authoritative – but it cannot be both at the same time.’).

<sup>62</sup> For two recent examples, see Gleider Hernandez, ‘Law’s Determinability: Indeterminacy, Interpretive Authority, and the International Legal System’ (2022) 69 *Netherlands International Law Review* 191, 200; Marco Milanovic and Sandesh Sivakumaran, ‘Assessing the Authority of the ICRC Customary IHL Study’ (2022) 104 *International Review of the Red Cross* 1856, 1862.

<sup>63</sup> Yearbook of the International Law Commission (2018) (Volume 2, Part Two) 109 (stating that the value of decisions of courts and tribunals on customary international law depends, among other things, ‘on the quality of the reasoning (including primarily the extent to which it results from a thorough examination of evidence of an alleged general practice accepted as law)’). See also, annulment decisions in the context of ICSID where the impossibility ‘to follow how the tribunal proceeded from Point A. to Point B.’ is seen as a ground for annulment. *MINE v Republic of Guinea* (Decision of Annulment, 22 December 1989), ICSID Case No ARB/84/4, para 5.09.



regarding the test of attribution applicable to acts committed by paramilitary units that do not form part of the official state machinery. The position of the ICJ is that the threshold under customary international law is quite high, requiring ‘complete dependence’ of the group on the state or ‘effective control [by the state] of the operations in the course of which’ violations of international law were committed.<sup>64</sup> The ICTY Appeals Chamber rejected this test in *Tadić* and ruled that while a specific instruction is needed in the case of a private individual or ‘an unorganized group of individuals’, in the case of ‘an organized and hierarchically structured group’, an ‘overall control’ exercised by the state is sufficient for the purposes of engaging the responsibility of that state.<sup>65</sup> In *Bosnian Genocide*, the ICJ dismissed the arguments advanced by the ICTY Appeals Chamber in favour of the ‘overall control’ test as ‘unpersuasive’,<sup>66</sup> rejected the test as ‘unsuitable’ for the law of state responsibility, and ruled that the applicable test was the one based on ‘its [own] settled jurisprudence’.<sup>67</sup> Which international court should have the final say with respect to conditions under which state responsibility can be engaged is not determined by any text.

Choice situations can also exist in matters with respect to which formal entitlements are in tension with competing legitimate considerations. For instance, international courts or tribunals may be formally entitled to interpret national laws when issues of national law are part of a matter falling within their jurisdiction.<sup>68</sup> Yet, while international courts or tribunals are deemed to know the applicable international law (*jura novit curia*), they are normally not in a position to claim as much expertise as domestic authorities (especially domestic courts) when it comes to ascertaining the content of domestic laws.

How sustainable an authority configuration in a choice situation can be is a function of how constantly a particular alternative prevails in relevant choice situations.<sup>69</sup> A consistent selection of a particular alternative in similar situations can stabilize the relevant expectations and give rise to a durable authority configuration. An illustrative example is the authority of the ICJ with respect to public international law matters. Given the relatively long history of the Court (which is commonly considered as including the history of its predecessor—the Permanent Court of International Justice) and its role in shaping numerous central concepts of public international law, the ICJ is often treated as ‘the supreme public international law tribunal’<sup>70</sup> even though there is no hierarchically structured international judicial system.<sup>71</sup>

What makes an alternative authority-revealingly attractive in Scheppele and Soltan’s theory is ‘the authoritative resources possessed’ by that alternative.<sup>72</sup> Authoritative resources are resources that are regarded as ‘deference-entitling properties—the qualities which are conventionally accepted as the ground on which deference is elicited or granted’.<sup>73</sup> Since social recognition plays a foundational role in authority relations,<sup>74</sup> analysing what resources are

<sup>64</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986, paras 109–110, 115.

<sup>65</sup> *Prosecutor v Duško Tadić*, International Criminal Tribunal for the former Yugoslavia (ICTY), Appeals Chamber, Judgment, 15 July 1999, Case No IT-94-1-A, para 120.

<sup>66</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, para 404.

<sup>67</sup> *ibid* para 407.

<sup>68</sup> When property rights are at issue, the existence and scope of such rights are matters of national law with respect to which international courts and tribunals may have to make determinations.

<sup>69</sup> Scheppele and Soltan (n 12) 196 (‘The authority of an alternative may be formalized as a function of the probability of its being selected. The most authoritative alternative is the alternative with the greatest probability of being chosen.’).

<sup>70</sup> Maurice Mendelson, ‘The International Court of Justice and the Sources of International Law’ in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (CUP 1996) 83.

<sup>71</sup> See Fuad Zarbiyev, ‘The International Court of Justice and Specialised International Adjudicative Bodies: From Indifference to Authority Trading’ (2022) 65 *German Yearbook of International Law* (forthcoming).

<sup>72</sup> Scheppele and Soltan (n 12) 175.

<sup>73</sup> Edward Shils, *Center and Periphery: Essay in Macrosociology* (University of Chicago Press 1975) 278.

<sup>74</sup> Kojève (n 60) 34; Ole Jacob Sending, ‘Recognition and Liquid Authority’ (2017) 9 *International Law Theory* 311, 328.

considered as authoritative and are discursively mobilized in support of authority claims in the international legal order is crucial for a proper understanding of authority relations in international law. Some of those resources—such as epistemically grounded or reputation-based resources—are socially prominent and operationally relevant beyond the narrow confines of legal discourse. Others—such as process-based properties—may be more specific to legal settings. Some authoritative resources are only present in certain types of institutions. For instance, independence and impartiality are often associated with international courts and international organizations. An alternative may prevail in an authority contest on the basis of more than one authoritative resource. A human rights treaty body's claim to authority is, for instance, normally supported by its formal mandate entrusting it with monitoring and interpreting a distinct instrument and its specialized expertise.<sup>75</sup>

Authoritative resources are social constructs. As such, the central question with respect to those resources is not whether they objectively exist, but rather whether they are consecrated through mechanisms of social 'investiture'.<sup>76</sup> For instance, domestic courts' expertise with respect to customary international law will generally be assumed to be inferior to that of international courts no matter how much expertise a particular domestic court can possess *de facto*.<sup>77</sup> Conversely, the authority of the pronouncements of a specialized human rights treaty body does not rest on the fact that all of its members are necessarily eminent experts in human rights. Once the authority of an institution is socially recognized, it can resist 'practical refutations'.<sup>78</sup>

Why an alternative is seen as deference-entitling is not a question that can receive a general response in the abstract. An alternative may look unattractive because it is perceived to be unfair. The proposition that the Internet should be governed by a small group of people based in the United States because 'they were in the right place at the right time' would strike many observers as unfair.<sup>79</sup> Sometimes, an alternative's formal features may contribute to its authority. The authority of the outputs of the ILC may have something to do with the fact that they 'look and feel' like a treaty<sup>80</sup> or simply with their written character.<sup>81</sup> The authority of an alternative may also be grounded in institutional features associated with the actor putting it forward. For instance, in the organic structure of the UN, the General Assembly's authority is often linked to its inclusiveness, while within the European Union, the authority of the European Commission is associated with its independence and technocratic expertise. Likewise, as explained in the introduction, given the decentralized nature of the international legal order, independent, neutral and impartial sites such as international courts and international organizations are typically regarded as particularly authority-carrying.

An alternative's authority in international law is often a function of its justification, as authority, unlike power, is not consistent with pure discretion. Actors engaged in international legal discourse are expected to justify their choices in terms that are not simply reducible to their opportunistic interests.<sup>82</sup> The fact that justifications can be self-serving does not negate this premise. As Chaim Perelman observed, '[t]he process of argumentation must be of interest and value in many cases if some people decide to pretend to argue. It is because a

<sup>75</sup> Ahmadou Sadio Diallo, ICJ Reports 2010, 639, paras 66–67.

<sup>76</sup> Pierre Bourdieu, *Language and Symbolic Power* (Harvard University Press 1991) 119.

<sup>77</sup> Yearbook of the International Law Commission (2018) (n 63) 110.

<sup>78</sup> Bourdieu (n 76) 124.

<sup>79</sup> Kal Raustiala, 'Governing the Internet' (2016) 110 American Journal of International Law 491.

<sup>80</sup> David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 American Journal of International Law 862.

<sup>81</sup> Hans Georg Gadamer, *Truth and Method* (Continuum Publishing 1989) 274 (stating that 'the sheer fact that something is written down gives it special authority').

<sup>82</sup> Justifications must be plausibly connectable to 'common superior principles'. Luc Boltanski and Laurent Thévenot, *On Justification: Economies of Worth* (Princeton University Press 2006) 43.

currency is in circulation and has a value that we take the trouble of making counterfeit money'.<sup>83</sup>

The authority of an alternative may also depend on how 'obvious' that alternative is. The proposition that domestic authorities are better positioned than international authorities to make societal or policy choices<sup>84</sup> or in matters of fact-finding<sup>85</sup> appears to be intuitively appealing. Similarly, some precedents are obvious focal points in international legal discourse. Most international lawyers, for instance, automatically associate the issue of the legal personality of international organizations with the advisory opinion of the ICJ in the *Reparations* case.<sup>86</sup> Likewise, a practitioner observed that the *Island of Palmas* award<sup>87</sup> 'taught us all we need to know, or at least all that we do know, about sovereignty'.<sup>88</sup>

Sometimes, an alternative can elicit deference because of a lack of plausible alternatives. Consider the traditional authority of joint interpretations of treaties by their parties.<sup>89</sup> The interpretive authority of the parties to a treaty long appeared 'attractive' because the parties-originated treaty interpretation was the only game in town. Traditionally, international law was a matter of intercourse among chancelleries, involving no third-party adjudicators, non-governmental organizations or third-party beneficiaries. The very format of treaties—typically bilateral instruments setting forth specific rights and obligations for the parties—was inimical to the rise of plausible alternatives.

The landscape of the international legal order has, however, progressively changed to give rise to a new social ecology in which the interpretation of treaties by the parties themselves is no longer seen as 'naturally' dispositive.<sup>90</sup> To start with, gone are the days when international law could safely be described as an exclusively state-centric enterprise: international law today is made and implemented by a variety of actors some of which are competing authority claimants in the international legal order. From the standpoint of treaty interpretation, third-party adjudicators, which, broadly defined, include any third party formally empowered to interpret treaties, are particularly prominent competitors for interpretive authority. In some areas of international law, non-governmental organizations have also arisen as highly credible alternative interpreters, with human rights and humanitarian law being prominent examples. Lastly, the rise of treaties with third-party beneficiaries has also likely weakened state authority in treaty interpretation. How such treaties should be interpreted is indeed a matter of concern beyond the circle of the parties to those treaties.<sup>91</sup>

Similarly, the authority of the 2005 International Committee of the Red Cross Study on customary international humanitarian law has been explained not only by 'the epistemic authority' of the Committee and 'the perceived rigor of the Study', but also because there is no 'better alternative' and '[i]t is much easier to assert the existence of a customary rule and to support this assertion with a citation to the Study than it would be to conduct an independent, labour-intensive analysis that could never replicate the amount of work invested in the Study, particularly bearing in mind the scarcity of time, expertise, linguistic ability, access to

<sup>83</sup> Chaim Perelman, 'Les Cadres Sociaux de l'Argumentation (Discussion)' (1959) 26 *Cahiers Internationaux de Sociologie* 123, 130.

<sup>84</sup> *James and others v United Kingdom* App no 8793/79 (ECtHR, 26 February 1986) para 46; *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010) para 233.

<sup>85</sup> See eg, *Khamidov v Russia* App no 72118/01 (ECtHR, 13 November 2007) para 170.

<sup>86</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, 174.

<sup>87</sup> *Island of Palmas case (The Netherlands/USA)* (Award of 14 April 1928) R.I.A.A. vol 2, 829.

<sup>88</sup> Michael Wood, 'Choosing Between Arbitration and a Permanent Court: Lessons from Inter-State Cases' (2017) 32 *ICSID Review* 9.

<sup>89</sup> See Fuad Zarbiyev, 'A Quiet Revolution in the Making? The Changing State Authority in Treaty Interpretation' in Nico Krisch and Ezgi Yildiz (eds), *Many Paths of Change in International Law* (OUP 2023).

<sup>90</sup> So much so that the International Law Commission reached the conclusion that joint interpretive agreements 'are not necessarily legally binding'. Yearbook of the International Law Commission (2018) (n 63) 31.

<sup>91</sup> The recent practice of human rights treaty bodies to open up their draft general comments for submissions from all interested parties is presumably premised on this assumption.

materials, and so forth.<sup>92</sup> Other examples illustrating the ‘lack of plausible alternative’ scenario include the authority of Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations<sup>93</sup> and of the reports of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.<sup>94</sup>

Some general patterns can be identified regarding the quantum of authority as well. The degree of authority that an alternative can secure is often a function of how discriminating the authoritative resources the alternative possesses are. The more widely a resource is distributed in the international legal order, the less authoritative it is likely to be. For instance, while investment arbitration tribunals often rely on writings dealing with the calculation of compensation and damages,<sup>95</sup> which tends to be technical, they rarely refer to scholarly writings on the substance of international investment law. More generally, the diminished role of scholarly writings in ascertaining the content of international law can be accounted for in similar terms. While ‘in the nineteenth century, judicial decisions and the literature were littered with references to the founding fathers’,<sup>96</sup> the situation is different today, arguably because of a wider distribution of the scholarly capital.

When the authority of an alternative diminishes because the authoritative resource it possesses is relatively widely distributed, but that alternative still remains authority-relevant, new authority-related discriminations may arise with respect to that alternative. For instance, we can expect that the increasing availability of impartial statements of law by adjudicatory bodies is likely to lead to a decreased importance of such statements. This is already the case in investment treaty arbitration where the abundance of case law has diminished the authority of the latter. In response, the community of international investment arbitration increasingly relies on the reputation of the specific members sitting on tribunals or annulment committees to justify the deference-entitlement of their decisions.<sup>97</sup> A similar phenomenon seems to be at play at the WTO where the assessments of science-based justifications increasingly refer to ‘reputable’ and ‘respectable’ scientific studies instead of scientific studies in general.<sup>98</sup>

Authority is audience-sensitive. Depending on how much weight it carries with each particular audience, the authority of an alternative may vary across audiences. For instance, the evidentiary value of Amnesty International’s or Human Rights Watch’s reports is greater before the European Court of Human Rights,<sup>99</sup> than before the ICJ.<sup>100</sup> The doctrine of the

<sup>92</sup> Milanovic and Sivakumaran (n 62) 1896–97.

<sup>93</sup> Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, CUP 2017).

<sup>94</sup> See in particular the 2018 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/38/35. Dedicated to content moderation issues, the report has significantly influenced the work of Facebook’s Oversight Board. See Stefania Di Stefano, ‘International Human Rights Law in Content Moderation: A New Avenue for Inclusiveness?’ (on file with author).

<sup>95</sup> *Sistem Mühendislik İnşaat Sanayi ve Ticaret A v Kyrgyz Republic* (Award, 9 September 2009), ICSID Case No ARB(AF)/06/1, para 189; *AWG Group Ltd v The Argentine Republic* (Award, 9 April 2015) para 89; *Bernhard von Pezold and Others v Republic of Zimbabwe* (Award, 28 July 2015), ICSID Case No ARB/10/15, paras 681, 693, 698; *Flemingo DutyFree Shop Private Limited v Republic of Poland* (Award, 12 August 2016) para 899.

<sup>96</sup> Sandesh Sivakumaran, ‘The Influence of Teachings of Publicists on the Development of International Law’ (2017) 66 *International & Comparative Law Quarterly* 1.

<sup>97</sup> *El Paso Energy International Company v The Argentine Republic*, (Decision on Jurisdiction, 27 April 2006) ICSID Case No ARB/03/15 para 82; *Eureko BV v Republic of Poland*, Ad-Hoc Arbitration, Partial Award (19 August 2005) para 257. See also, Campbell McLachlan, ‘Investment Treaties and General International Law’ (2008) 57 *International & Comparative Law Quarterly* 361; Jan Paulsson, ‘The Role of Precedent in Investment Arbitration’ in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) 711.

<sup>98</sup> *US – Continued Suspension of Obligations*, Report of the Appellate Body, WT/DS320/AB/R (16 October 2008) para 590.

<sup>99</sup> *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008) para 143 (treating such reports as highly reliable given ‘the authority and reputation of the authors of these reports [and] the seriousness of the investigations by means of which they were compiled’).

<sup>100</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 2015, 3, paras 459, 483 (refusing to treat such reports as ‘conclusive proof’).

margin of appreciation widely applied by the European Court of Human Rights has proved unattractive to the UN Human Rights Committee,<sup>101</sup> arguably because of the latter's universal audience.<sup>102</sup> More generally, the concept of reference groups in sociology<sup>103</sup> implies that the alternative offered by an actor is likely to be selected by others when the latter are disposed to treat that actor as a frame of reference in the sense of an actor 'whose perspective is assumed' by them.<sup>104</sup> In investment arbitration, for instance, the authority of statements of law issued by the ICJ varies depending on the composition of arbitral tribunals. While arbitrators with a public international law background tend to rely on the case law of the ICJ relatively heavily, arbitrators with a commercial arbitration background rarely do so.<sup>105</sup> Some international law scholars see the ICJ's restrictive conception of self-defence as governing the international law of self-defence,<sup>106</sup> while others find it out of tune with the practical operation of international law.<sup>107</sup> The very authority-relevance of a resource may be a matter of contention across various audiences. For instance, the practice of the ILC to submit its draft texts to the governments and seek their comments is seen as a source of authority for the Commission's output by those who tend to have a state-centric view of international law, while it is seen with suspicion by others for whom international law should not be the exclusive province of states.<sup>108</sup>

Given the relational nature of authority, an alternative's authority in the international legal order is also a function of the extent to which it is in fact resisted or contested. Silence in the face of an authority claim can be seen as acquiescence<sup>109</sup> and open up significant space for influence. The lack of engagement of most states with the outputs of the ILC and expert monitoring bodies is, for instance, regarded as one possible explanation behind the *de facto* authority enjoyed by those outputs.<sup>110</sup>

### III. COMPETING CLAIMS TO AUTHORITY: A CONTEST OF ATTRACTIVENESS

Situations in which claims to authority clash with each other abound in international law. The adversarial confrontation of arguments in litigation is a good illustration. Hersch Lauterpacht famously characterized the judicial process as consisting in 'giving effect to a better right against a right of less compelling legal merit'.<sup>111</sup> Likewise, Judge Weeramantry

<sup>101</sup> UN Human Rights Committee, General Comment No 34 on art 19, Freedoms of opinion and expression, CCPR/C/GC/34 (2011) para 16.

<sup>102</sup> Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee' (2016) 56 *International & Comparative Law Quarterly* 21, 52.

<sup>103</sup> See for a helpful presentation, Tamotsu Shibutani, 'Reference Groups as Perspectives' (1955) 60(6) *American Journal of Sociology* 562, 562.

<sup>104</sup> *ibid* 563.

<sup>105</sup> Niccolò Ridi, 'Approaches to External Precedent: The Invocation of International Jurisprudence in Investment Arbitration and WTO Dispute Settlement' in Szilárd Gáspár-Szilágyi, Daniel Behn and Malcolm Langford (eds), *Adjudicating Trade and Investment Disputes Convergence or Divergence?* (CUP 2020) 121, 133.

<sup>106</sup> Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2012).

<sup>107</sup> Monica Hakimi, 'The Jus Ad Bellum's Regulatory Form' (2018) 112 *American Journal of International Law* 151.

<sup>108</sup> Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harvard International Law Journal* 1.

<sup>109</sup> See eg, *Jurisdictional Immunities of the State*, ICJ Reports 2012, 99, para 77 (treating 'the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity case on jurisdictional immunities' as evidence of the requisite *opinio juris*). See also, *In the Matter of El Sayed Prosecutor v El Sayed (Jamil Mohamad Amin)*, (Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing) Special Tribunal for Lebanon, CH/AC/2010/02 (2010) 1055, para 47 (characterizing 'the lack of objection by States' to international judicial decisions as a form of 'implicit acceptance' of, or 'acquiescence' to such decisions).

<sup>110</sup> Sandesh Sivakumaran, 'Beyond States and Non-state Actors: The Role of State-empowered Entities in the Making and Shaping of International Law' (2016) 55 *Columbia Journal of Transnational Law* 343. See also, for the specific case of rules governing covert operations, Marie Aronsson-Storrier, *Publicity in International Lawmaking: Covert Operations and the Use of Force* (CUP 2020).

<sup>111</sup> Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 396–97.

described the judicial function as involving ‘a choice among competing principles all of which in one way or another have relevance to the matter in hand’.<sup>112</sup> But the phenomenon of competing claims to authority is not limited to litigation. Other relevant examples include conflicting jurisdictional claims among states, competition for authority among international adjudicative bodies and the disputed allocation of powers among international and domestic authorities in various issue areas. What is common to all these situations is that each claim to authority is typically supported by some formal or informal basis for eliciting deference. For instance, a formally grounded authority claim of one institution (eg, the official mandate) might clash with a substantively grounded claim to deference of another (eg, specialized expertise), or a territorial claim to the jurisdiction of one state might confront a protection-based assertion of the jurisdiction of another. The practice shows that claims to authority are not positioned equally, some exerting greater attraction than others.

There have been some attempts in the literature to conceptualize competing assertions of authority. For instance, in what has been termed ‘service’ and ‘leader’ conceptions of authority, deference is assumed to be based on a recognition that one actor has the best claim as a matter of competence or legitimacy to decide a question.<sup>113</sup> Similarly, in an article dedicated to the concept of relative authority, Ingo Venzke and Joana Mendes emphasized the relational nature of authority and made the normative claim that the comparative positioning of each actor relative to others should inform the allocation of authority in European and international law.<sup>114</sup> These attempts have, however, rarely led to an empirically grounded account of authority dynamics in law, still less in international law.

Because it frames authority as a relative phenomenon, Scheppele and Soltan’s approach to authority can plausibly account for adjudication of most competing claims to authority that one can observe in the international legal order. The practice shows that many competing claims to authority in international law are indeed adjudicated on the basis of the relative deference pull of each alternative at play, with the alternative that ‘beckons us to choose it over less compelling alternatives on the basis of the resources it possesses’<sup>115</sup> prevailing.

Consider the way in which the ICJ deals with the case law of specialized adjudicative bodies. As the Court clarified in *Diallo* with respect to the interpretation of the Covenant on Civil and Political Rights by the Human Rights Committee, it is ‘in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee’.<sup>116</sup> But the Court added that ‘it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty’.<sup>117</sup> The Court’s claim to authority in *Diallo* was supported by its formal mandate: having a broad jurisdiction based on the optional declarations made by the parties under Article 36, paragraph 2 of its Statute, the Court was entitled to interpret the relevant provisions of the Covenant autonomously. The alternative, namely, the interpretations of those provisions by the Human Rights Committee possessed, however, more compelling authoritative resources: they were issued by an expert body specialized in human rights specifically put in charge of supervising the application of the Covenant.

Another relevant example can be found in the way in which international courts and tribunals deal with competing claims to authority by national courts or other national government

<sup>112</sup> Separate Opinion of Judge Weeramantry in *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen*, ICJ Reports 1993, 38, 250. See also, Rosalyn Higgins, ‘Cleveringa Lecture 2009: Ethics and International Law’ (2010) 23 *Leiden Journal of International Law* 277, 287 (‘Legal submissions to a judge are rarely simply “right” or “wrong”. The judge is often deciding which of two perfectly decent alternatives is to prevail.’).

<sup>113</sup> Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 126–65.

<sup>114</sup> Venzke and Mendes (n 9).

<sup>115</sup> Scheppele and Soltan (n 12) 176.

<sup>116</sup> *Ahmadou Sadio Diallo* (n 75) 664, para 66.

<sup>117</sup> *ibid.*

agencies with respect to the interpretation of the relevant domestic laws.<sup>118</sup> Unsurprisingly, international courts are not in a position to claim as much expertise as domestic authorities (especially domestic courts) when it comes to ascertaining the content of domestic laws. While international adjudicatory bodies are deemed to know the applicable international law,<sup>119</sup> the situation is different with respect to domestic laws. The Permanent Court of International Justice described international adjudicators as follows:

Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries. All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, either by means of evidence furnished it by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken.<sup>120</sup>

This is the main reason why international courts easily grant that in principle, domestic authorities (in particular, domestic courts) are better positioned than international courts to interpret the laws of their countries. As the ICJ pointed out, 'it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts'.<sup>121</sup> Similarly, the European Court of Human Rights explained that if domestic authorities, especially domestic courts, are better positioned to interpret domestic laws, it is because they are 'particularly qualified to settle the issues arising in this connection'.<sup>122</sup> In the same vein, a WTO panel observed that 'objectively, a Member is normally well-placed to explain the meaning of its own law'.<sup>123</sup>

The authority dynamics in both examples can, however, change when the relevant authoritative resources are adversely affected. Take the ICJ's above-described practice to defer to specialized adjudicative bodies in their areas of specialization. The ICJ did not follow that practice in *Qatar v UAE* and explicitly rejected the interpretation of the Committee on the Elimination of Racial Discrimination according to which nationality-based differential treatment can, in some circumstances, constitute a prohibited racial discrimination pursuant to the Convention on the Elimination of All Forms of Racial Discrimination. After examining the ordinary meaning and the context of the terms 'national origin' included among the

<sup>118</sup> See Johannes Hendrik Fahner, *Judicial Deference in International Adjudication. A Comparative Analysis* (Hart Publishing 2022) 96–99; Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017).

<sup>119</sup> *Fisheries Jurisdiction*, ICJ Reports 1974, 9, para 17; 181, para 18 ('The Court [...], as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.').

<sup>120</sup> *Brazilian Loans*, PCIJ Series A21, 124. It is interesting to note that according to the Permanent Court, any other approach would be inconsistent with 'the principles governing the selection of its members'. *Serbian Loans*, PCIJ, Series A20, 46. This is an implicit reference to the expertise on the basis of which the members of an international court are selected: in general, international judges are selected on the basis of their expertise in international law, not in any particular national legal system. For a clearer reference to expertise, see *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* (Decision on the Application for Annulment, 23 December 2010), ICSID Case No ARB/03/25, para 236 (admitting that the tribunal 'should give particular consideration to municipal decisions' and recognising that it 'had not been chosen for its knowledge of Philippine law.').

<sup>121</sup> *Ahmadou Sadio Diallo* (n 75) para 70.

<sup>122</sup> *Winterwerp v Netherlands*, App no 6301/73 (ECtHR 24 October 1979) para 46.

<sup>123</sup> *China – Intellectual Property Rights*, Report of the Panel (26 January 2009), WTO DS362, para 7.28. See also, *Thailand – Cigarettes (Philippines)*, Report of the Appellate Body (17 June 2011), WTO DS371, footnote 253.

grounds of racial discrimination listed in the Convention, as well as the object and purpose and the *travaux préparatoires* of the latter, the Court reached the conclusion that ‘national origin’ does not cover current nationality but refers to ‘a person’s bond to a national [...] group at birth’.<sup>124</sup>

How can a generalist court such as the ICJ legitimately contradict the finding of a specialized body in its area of specialization? One plausible response is that an interpretation offered by a specialized body is authoritative to the extent that it is plausible and persuasive: an interpretation that does not seem to be consistent with accepted canons of interpretation cannot be authoritative simply because it comes from a specialized body. The approach of the Committee on the Elimination of Racial Discrimination is indeed in tension with the language of the Convention, its *travaux préparatoires* and state practice. As Geir Ulfstein aptly observed, the Committee also failed to provide an elaborate reasoning in support of its interpretation.<sup>125</sup> These are relevant considerations in the dynamic of authority relations because unlike power, authority is not consistent with discretion. As Barnes points out:

An authority on a text must know that text, and the very fact that the text is known is presumed to restrict discretion in expounding it [...]. This, at any rate, is the theory which gives the authority its credibility, its very standing as an authority. To the extent that it is thought to lack discretion an authority is credited. To the extent that it is thought to be exercising discretion an authority is distrusted.<sup>126</sup>

Similarly, the deference-entitlement of a domestic court’s interpretation of the laws of its own jurisdiction rests on the premise that domestic courts have some features that make them reliable interpreters of those laws. As an arbitral tribunal pointed out, ‘deference on the part of international tribunals requires the clear perception that domestic courts are independent, competent and above all clear of suspicion of corruption’.<sup>127</sup> This assumption acts as a presumption that can be rebutted. In *OAo Tatneft*, the tribunal reached the conclusion that ‘an unrestricted application of the standard of deference’ was not justified given that the reasons provided by domestic courts at issue in the case were unconvincing and that domestic courts did not seem independent from the Prosecutor.<sup>128</sup> Similarly, in *Pac Rim Cayman*, the tribunal observed that only interpretation given ‘in good faith’ would be entitled to deference.<sup>129</sup>

Domestic authorities’ claim to deference can be defeated for other reasons. As a matter of fundamental fairness, an interpretation put forward by a state cannot have a dispositive effect in the ongoing litigation involving it given the risk that such an interpretation is likely to be self-serving.<sup>130</sup> The United States Supreme Court’s ruling that ‘a [foreign] government’s expressed view of its own law is ordinarily entitled to substantial but not conclusive weight’ seems to be inspired by such considerations, since the relevant factors according to the Court include the ‘context and purpose’ of the interpretation as well as its ‘consistency with the foreign government’s past positions’.<sup>131</sup>

<sup>124</sup> *Application on the International Convention on the Elimination of All Forms of Racial Discrimination*, ICJ Reports 2021, 71, paras 81–97.

<sup>125</sup> Geir Ulfstein, ‘Who is the Final Interpreter in Human Rights: the ICJ v CERD?’ (*EJIL: Talk!*, 22 February 2021) <<https://www.ejiltalk.org/who-is-the-final-interpreter-in-human-rights-the-icj-v-cerd/>> accessed 7 June 2023.

<sup>126</sup> Barry Barnes, ‘On Authority and its Relationship to Power’ (1984) 32(1) *The Sociological Review* 180, 186.

<sup>127</sup> *OAo Tatneft v Ukraine* (Award on the Merits of 29 July 2014) PCA Case No 2008-8, para 476.

<sup>128</sup> *ibid* para 479.

<sup>129</sup> *Pac Rim Cayman v El Salvador* (Award of 14 October 2016) ICSID ARB/09/12, para 8.31.

<sup>130</sup> *Armed Activities on the Territory of the Congo*, ICJ Reports 2005, 168, para 61 (‘The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source.’).

<sup>131</sup> *Animal Sci Prods v Hebei Welcome Pharm Co*, No 16-1220, 558 US (2018).



In the same vein, the ICJ made clear in the *Diallo* judgment quoted above that the principle of deference to national authorities' interpretation of domestic laws is not applicable in a situation 'where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case'.<sup>132</sup> If the interpretation by a state of its own laws is challenged by the other side, the procedural equality of the parties makes it difficult to grant unconditional deference to that interpretation.<sup>133</sup> In *Pac Rim Cayman*, the tribunal articulated a general approach according to which deference should be given to national authorities' interpretation of domestic laws offered 'before the emergence of the parties' dispute'.<sup>134</sup> Understandably, domestic proceedings against the foreign investor during the pendency of international proceedings against the host state are seen with suspicion.<sup>135</sup>

A similar phenomenon seems to be present in the field of human rights.<sup>136</sup> For instance, the European Court of Human Rights typically defers to national authorities in the assessment of whether a particular restriction is necessary to protect some values such as morals that are specific to each society, acknowledging that '[b]y reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements'.<sup>137</sup> But the Court has also clarified that '[t]he extent of the State's margin of appreciation [...] depends on the quality of the decision-making process', making clear that a 'seriously deficient' procedure would not receive deference on its part.<sup>138</sup> As one commentator noted, this approach would tend to favour 'Member States that can be assumed to have strong legal and political systems'.<sup>139</sup> The same observation has been made with respect to the Inter-American system of human rights.<sup>140</sup>

These examples show that when dealing with competing claims to authority by other international adjudicative bodies or by national courts or other national government agencies, international courts are guided by the relative deference pull of various choices at play. The expertise on relevant rules and pragmatic considerations such as the functional proximity of national authorities to the issues at hand are a paramount consideration. Other parameters having to do with the plausibility and persuasiveness of the decisions at issue, the conditions of operation of relevant institutions and the circumstances surrounding their decisions are, however, also relevant and may take precedence over considerations of expertise. As the

<sup>132</sup> *Ahmadou Sadio Diallo* (n 75) para 70.

<sup>133</sup> Hence, the observation of the Appellate Body of the WTO that the fact that a member is objectively well positioned to interpret its own laws 'does not relieve [it] of its burden to adduce arguments and evidence necessary to sustain its proposed interpretation'. *Thailand–Cigarettes (Philippines)*, Report of the Appellate Body (17 June 2011), WTO DS371/R, 1, footnote 253.

<sup>134</sup> *Pac Rim Cayman v El Salvador* (n 129) para 8.31.

<sup>135</sup> *Rapport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* (n 120) para 242 ('[T]he decisions of municipal authorities seized of cases against an alien which arise directly out of the same set of facts may need to be scrutinised very carefully by an international tribunal. The tribunal would need to satisfy itself, inter alia, as to the impartiality of the relevant decision-maker, in view of the pendency of proceedings against the state of which that decision-maker is an organ. The tribunal retains the ultimate power to judge the probative value of evidence placed before it.').

<sup>136</sup> See generally, Fahner (n 118) 143–45.

<sup>137</sup> *Handyside v United Kingdom* App no 5493/72 (ECtHR 7 December 1976) para 48.

<sup>138</sup> *Shtukaturov v Russia* App no 44009/05 (ECtHR, 27 March 2008) para 89. This approach is described as part of the 'procedural turn' in the judicial policy of the European Court of Human Rights. See Oddny Arnardottir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15 *International Journal of Constitutional Law* 9; Robert Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 *Human Rights Law Review* 473.

<sup>139</sup> Mikael R Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) 9 *Journal of International Dispute Settlement* 219.

<sup>140</sup> Diego R Pinzon, 'The "Victim" Requirement, the Fourth Instance Formula and the Notion of "Person" in the Individual Complaint Procedure of the Inter-American Human Rights System' (2001) 7 *ILSA Journal of International & Comparative Law* 369, 376; Bernard Duhaime, 'Subsidiarity in the Americas. What Room Is There for Deference in the Inter-American System?' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals. Standards of Review and Margin of Appreciation* (OUP 2014) 289, 295.

examples discussed above illustrate, a generalist international court such as the ICJ can deny the deference-entitlement of specialized adjudicative bodies if the latter's interpretations are not supported by commonly accepted canons of interpretation. International courts and tribunals can similarly refuse to defer to national authorities when there is plausible ground to think that the position of the latter is biased, is put forward for the purposes of 'gaining an advantage in a pending case' or is manifestly incorrect. Similarly, international courts usually refrain from adopting a deferential attitude in areas where national authorities are normally granted a large policy latitude (margin of appreciation in human rights, the assessment of whether the state's essential security interests are threatened) when there is evidence that domestic authorities have abused such latitude to the detriment of their international commitments.

The broader lesson to draw from this discussion is that successful destabilizations of and resistance to authority often involve the mobilization of more compelling authoritative resources. For instance, the challenges to the authority of the European Court of Justice by the German and Italian high courts were primarily grounded in the insufficient protection of fundamental rights in the European legal order.<sup>141</sup> Recognized as fundamental values of liberal democracies, human rights were successfully mobilized in those instances as a stronger authoritative resource against the formally grounded authority title of the European Court of Justice, and the latter came to accept that 'respect for fundamental rights forms an integral part of the general principles of Community protected by the Court of Justice'.<sup>142</sup>

The resistance to the UN-imposed targeted sanctions regime can be analysed similarly. The measures implementing Security Council resolutions were challenged both in the literature and before courts in many parts of the world on the ground of their incompatibility with the targeted individuals' fundamental human rights, with the Court of First Instance of the European Union contemplating the possibility of judicially reviewing Security Council resolutions with regard to *jus cogens* in *Kadi v Council and Commission*.<sup>143</sup> In 2006, arguably in reaction to such challenges, the Security Council established a Focal Point responsible for receiving de-listing requests from individual(s), groups, undertakings and/or entities on the Sanctions Committee's lists.<sup>144</sup> In 2008, the Security Council directed the Sanctions Committee 'to make accessible on the Committee's website a narrative summary of reasons for listing for the corresponding entry or entries on the Consolidated List'.<sup>145</sup> Later that same year, the European Court of Justice found that the targeted sanctions against Mr Kadi had violated his right to be heard and the right to effective judicial protection.<sup>146</sup> Similar challenges were brought before courts in Canada, Pakistan, Switzerland, Turkey, the UK, the United States as well as the European Court of Human Rights and the Human Rights Committee. In 2009, '[t]aking note of challenges, both legal and otherwise, to the measures implemented by Member States',<sup>147</sup> the Security Council created the Office of the Ombudsperson.

This framework can also help explain the inter-institutional competition for authority in the international legal order. Take the example of the investor-state dispute settlement

<sup>141</sup> Anne M Slaughter, Alec S Sweet and Joseph Weiler, *The European Court and National Courts. Doctrine & Jurisprudence: Legal Change in its Social Context* (Hart Publishing 1998); Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979* (CUP 2012).

<sup>142</sup> Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>143</sup> Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-03649, para 226.

<sup>144</sup> UN Security Council, UN Doc S/RES/1730 (2006).

<sup>145</sup> UN Security Council, UN Doc S/RES/1822 (2008).

<sup>146</sup> C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351.

<sup>147</sup> UN Security Council, UN Doc S/RES/1904 (2009).

reform processes. To many observers of the field, the selection of UNCITRAL as the forum for the reform discussions must have come as a surprise. UNCITRAL is a UN body specializing in commercial law reform worldwide. Its role in international investment law and arbitration is primarily limited to its arbitration rules whose first iteration in 1976 did not even contemplate the possibility of their being relevant to an investment case brought against a state on the basis of an investment treaty.<sup>148</sup> Contrast this with UNCTAD, an organization with substantial institutional expertise in international investment law with flagship periodical publications in the field, hosting one of the most comprehensive databases on international investment agreements and policies worldwide. How then has UNCITRAL come to host the ISDS reform discussions? It is highly plausible that the reason why UNCITRAL had the upper hand in the competition between the two organizations had something to do with its perceived ideological neutrality and its reputation for politics-free technical expertise. Indeed, while UNCITRAL depicts itself as ‘the core legal body of the UN system in the field of international trade law’ and repeatedly stresses its ‘legal’ character, UNCTAD openly claims that it was ‘created by developing countries, for developing countries’ and has the reputation of being sympathetic to the developing world. As a recent work emphasized, depoliticization, which consists in ‘minimizing, concealing, even eliminating politics’, enhances international organizations’ legitimacy.<sup>149</sup> In other words, UNCITRAL may have won the competition for authority with UNCTAD by appearing more attractive because of its actively entertained image of political neutrality.

What these examples illustrate is that authority relations in international law are much more dynamic than the ‘agent-centered’ approach to authority typically implies. If authority is not necessarily an entitlement permanently or even durably attached to a person or institution, but a feature of various alternatives that present themselves in specific choice situations, it should be actively secured in each such situation. Conscious of this dynamic, authority claimants in international law rarely take their deference entitlement for granted and often engage in strategic behaviour to cultivate their appeal in contests of attractiveness.

#### IV. CONCLUSION

The concept of authority has rightly been described as ‘a concept with a rich and complicated history’.<sup>150</sup> The fact that ‘authority’ has been used in many disciplines without an internally consistent overarching analytical framework has likely added to the complexity. What is remarkably common to these usages, however, is their constant focus on ‘authority figures’ such as persons, offices and institutions.

The premise of this article is that the actor-focused conception of authority is limited to particular authority experiences and is unable to account for the general phenomenon of authority. Building on the theory of authority offered by Kim Scheppele and Karol Soltan, this article frames authority experiences in international law as alternatives ‘in a choice situation’ and argues that the authority relations in the international legal order are driven by, among other things, ‘authority-revealing’ properties of an alternative that prove compelling relative to competing alternatives at play.

<sup>148</sup> See UNCITRAL, Rules (1976). art 1 refers to ‘the parties to a contract’, and art 19(3) refers to ‘a counter-claim arising out of the same contract.’ On this point see, Jan Paulsson and Georgios Petrochilos, Revision of the UNCITRAL Arbitration Rules 1, paras 6 and 174 <[https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arbrules\\_report.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arbrules_report.pdf)> accessed 7 June 2023.

<sup>149</sup> Marieke Louis and Lucile Maertens, *Why International Organizations Hate Politics. Depoliticizing the World* (Routledge 2021) 3.

<sup>150</sup> Roger Cotterrell and Maksymilian Del Mar (eds), ‘Introduction’ in *Authority in Transnational Legal Theory* (Edward Elgar 2016) 1.

By shifting the focus from authority figures to authoritative resources, the approach proposed in this article suggests that what is central in authority talks is not the agents as such, but what makes the alternatives represented by those agents authoritative. This means that authority experiences in international law cannot be properly appreciated without a sustained analysis of what specific attributes are authority-revealing in international law.

Once the focus is shifted from authority figures to authoritative resources, a more dynamic picture of authority relations emerges. In the absence of formally organized hierarchical power structures, informal mechanisms of authority allocation constitute a pervasive feature of international law. New competitors can claim a particular authoritative resource. What should count as an authoritative resource itself can be at stake in competition for authority. The theory of authority discussed in this article helps to provide a compelling account of challenges and resistance to authority, which remain severely undertheorized both in international law and international relations.

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