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978-1-316-64036-4 — Legal Authority beyond the State
Edited by Patrick Capps , Henrik Palmer Olsen
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Introduction

PATRICK CAPPS AND HENRIK PALMER OLSEN

It is now an uncontentious observation about the very fabric of global society that international law can no longer be reduced to a conjunction of treaty law and diplomatic relations. This situation raises new and significant questions for those considering the authority of international, transnational and global law.[1] The authors of the chapters of this book aim to articulate and respond to these questions.

1 The Field of Contemporary Global Governance

The observation just made can be developed in at least two ways. In this section, we first set out some examples of how the validity of international law, and the authority of international courts, has extended beyond being merely a product of state will, and how this extension of authority has met resistance. Second, we then explain how this extension can be described as a form of autonomous *living international law*.

A Growth and Resistance

The first example arises from the ongoing negotiations from 2017 between the United Kingdom (UK) and the European Union (EU) concerning the withdrawal of the UK from the EU. While the political and legal fallout from these negotiations will undoubtedly have significant legal, political and social implications for years, if not generations, one important early stumbling block in attempts to advance negotiations on a new association agreement between these parties is the question

[1] The literature surrounding the transformation of law beyond the state is considerable. See, for example, J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009); M. Koskiennemi, *The Politics of International Law* (Oxford: Hart, 2011); J. L. Dunoff and J. P. Trachtmann, eds., *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009).

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of what legal obligations the UK has accumulated towards the EU, and other EU member states, over the years and how those obligations can be withdrawn and replaced by new ones.[2] The complexity of these issues is immense because simple answers cannot be gleaned from the treaties alone; they are just as much concerned with practices, which are the product of decades of close economic, political and social cooperation and negotiation.

The second example is the rapid and recent growth and influence of international courts. Ninety per cent of the entire output of decisions from these institutions have been issued in the past two decades.[3] It is also now clear that international courts are becoming less arbitral and more genuinely judicial. These courts often have compulsory jurisdiction; allow litigants other than states to participate in, or even initiate, actions; and claim judicial authority to review state compliance with international rules.[4] There is, we observe, a general development of a form of judicial autonomy, by which we mean the willingness and ability of international courts to require states and other actors to comply with their judgments.[5]

There is resistance to the developments just outlined. One example is the Brighton Declaration (2012), which seeks to narrow the criteria of admissibility of the European Court of Human Rights with a view to return competences to states parties.[6] Further evidence of judicial retrenchment against international courts is to be found in the recent *Ajos* judgment of the Danish Supreme Court, which refused openly to follow a preliminary ruling from the Court of Justice of the European Union (CJEU).[7] This resistance reaches its current apotheosis with the UK's attempt to withdraw from the Union insofar as it is driven by discontent amongst British citizens that judges in the CJEU exert too much influence over the

[2] See 'Position Papers Transmitted to the EU27 on Article 50 Negotiations', European Commission, 29 May 2017, https://ec.europa.eu/commission/publications/draft-eu-position-papers-article-50-negotiations_en.

[3] Karen Alter, 'The New International Courts: A Bird's Eye View', Buffett Center for International and Comparative Studies Working Paper Series No. 09-001, 2009; and Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2014).

[4] See Alter, *New Terrain*; and, for an example, see *HM Treasury v. Ahmed* [2010] UKSC 2.

[5] Alter, *New Terrain*.

[6] See European Court of Human Rights, 'Brighton Declaration', High Level Conference on the Future of the European Court of Human Rights, Brighton, England, 19–20 April 2012, www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

[7] See Judgment of 6 December 2016, DI som mandatar for Ajos A/S mod Boet efter A (sag nr. 15/2014).

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interpretation of the content of EU law, and hence what obligations befall the UK. The same pattern also seems to be occurring outside Europe, as evidenced by the sustained critique by (often African) states and others of the International Criminal Court (ICC) who see it as being politically biased in its prosecution policy, or even being instrumental in exacerbating international crimes.[8] Proposals for the United States (US) to withdraw from the Paris Climate Agreement in June 2017 is further evidence of this retrenchment.

These examples give the impression of a fast-paced development in legal forms beyond the state, which runs simultaneously with political associations struggling to come to terms with this development. Traditional political associations – often converging on the sovereign state – are being asked to recognize that they are part of a broader global community, and from that emerges a need for the coordinated regulation of economic, political, environmental and technological developments. Often, though, this request is not being met because the forms of coordinated regulation that have emerged do not pay enough attention to, or may even alienate, the traditional political associations just mentioned. This is not simply a knee-jerk reaction to the forces of globalisation but is in part a plea by traditional political associations that when and where there is global or regional regulation, it must be responsive to the interests, needs and/or values of those it seeks to regulate.

B Living International Law

Another feature of the field of contemporary global governance is that it lacks systematically hierarchical relations,[9] which provides a stark and

[8] See Chapter 9 in this volume, M. Martin, 'The International Criminal Court: The New Leviathan?'; S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *European Journal of International Law* 21 (2011): 941–65; S. Kendall, 'Commodifying Global Justice: Economies of Accountability at the International Criminal Court', *Journal of International Criminal Justice* 13 (2015): 113–34.

[9] The wide and often uncoordinated spread of norms and institutions within international law has led some authors in the field to talk about the 'pluralistic' or 'fragmentary' character of contemporary international legality. See, for example, M. Koskenniemi, 'The Fate of International Law: Between Technique and Politics', *Modern Law Review* 70 (2007): 1–30; and N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010). These authors accept the view that there is an increasing density of international legality but also remark on the relative absence of coordinatory mechanisms in international law. As a result, international law is seen as increasingly fragmented, regionalized and functionally divided.

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immediate contrast with classical conceptions of the systematic unity of law found in many familiar philosophical accounts of international law.[10] This feature provides problems for theories of international legal authority. According to the familiar accounts just mentioned, systemic unity of the institutions that form global governance are understood to be initiated and regulated through multilateral treaties. At the heart of this reasoning reside two traditional legal principles. The first is the *ultra vires* doctrine, which states that a power that has been granted to an institution affords freedom to it to act within the boundary of that power, and not beyond it. Secondly, there is the *delegatus non potest delegare* principle, which (according to one version of it) prohibits delegation of legislative authority to another (non-legislative) branch of government. When brought together in the context of international law, it becomes clear that these principles support a static view[11] of international law; one that endorses domestic constitutionalism as fundamental to law, and which sees international law as emerging exclusively from agreements between states.

Our initial observations made in the previous sub-section suggest a *dynamic* or *evolutionary* conception of global governance. That is, a system of *living international law* seems to be emerging. This should not be confused with 'living law' in Ehrlich's sense of the term, which describes informal and private systems of rules beyond the state.[12] Living international law, instead, refers to a set of practices that have developed in and around existing treaty-based law. Part of this process is the maturation of international law – often through the work of international courts and other international bodies – who take it upon themselves to thicken the often thin content of posited treaty law. Conventions often under-specify the content of international law, and it is this under-specification that creates the normative space that is filled by the interpretative practices of international courts and bureaucracies.[13] These interpretative practices

[10] On this, see J. Kammerhofer and J. d'Aspremont, eds., *International Legal Positivism in a Postmodern World* (Cambridge: Cambridge University Press, 2014), ch. 1.

[11] What we here call the static conception of international law described in the text is the jurisprudential equivalent of what is known as the 'coexistence' or 'consent' theory in public international law.

[12] E. Ehrlich, *Fundamental Principles of the Sociology of Law* (1913; London: Transaction, 2001).

[13] See also A. von Bogdandy, M. Goldmann and I. Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority', *European Journal of International Law* 28 (2017): 115–45. They observe more generally in regards to the increasing complexity of the institutional setup in international law that 'in the attempt to cater to common interests, international law has developed a

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establish what international law is taken to be, but they simultaneously raise questions of how the authority of law develops beyond the state. Officials cannot straightforwardly appeal to the texts of the treaties to claim authority; they must seek other grounds, such as an appeal to expertise; substantive justice, economic, political and social dynamics; or interpretive techniques drawn from domestic administrative law and so on.[14]

If a dynamic and evolving system of international living law is emerging, the actions or judgments produced by it cannot be explained as being authoritative according to the two principles just set out. Rather, the static conception of authority shuts down a full inquiry into the conceptual structure of the evolution and content of the actual processes of international organisations. Furthermore, it does not get close to allowing a full examination of the validity of the multifarious authority claims made by those occupying roles within newly evolving forms of global governance or, indeed, investigating their normative plausibility. One central aim of this book is to engage with the challenge of building – from various but closely related theoretical perspectives – a new jurisprudential understanding of the nature and plausibility of authority within contemporary international legality.

2 Ideas of Authority beyond the State

Without doubt, the reconciliation of forms of global governance just mentioned with democratic processes and other forms of accountability, within a dynamic and evolving system of international living law, remains an incredibly difficult problem to solve. This problem, though, is just one particularly modern expression of a more general problem of how authentic authority claims can be made by forms of global governance. We are not alone in seeing authority as a crucial entry point for understanding the complexity that surrounds contemporary international legal practices, and discussion of some related literature helps us locate the central methodological focus of this book.

sophisticated institutional structure that is hard to reconcile with ideas of horizontal relations based on (state) consent alone' (119).

[14] I. Venzke, *How Interpretation Makes International Law* (Oxford: Oxford University Press, 2012); and B. Kingsbury, 'The Concept of "Law" in Global Administrative Law', *European Journal of International Law* 20 (2009): 23–57.

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A Compliance and Authority

A special issue of *Law and Contemporary Problems* was issued in 2016 with the title 'The Variable Authority of International Courts'.[15] In their introduction to the issue, entitled 'How Context Shapes the Authority of International Courts', Karen Alter, Laurence Helfer and Mikael Rask Madsen set out their aim, which is to explain the relationship between *de jure* and *de facto* authority. *De jure* authority of international courts is understood by them to be the product of an act of delegation of competence by states to those courts, which establishes its jurisdiction. They then distinguish *de jure* authority from *de facto* authority, which is a form of compliance related agency that is studied as a matter of sociological fact. The special issue then explores and explains how various contextual factors influence the extent to which *de jure* legal mandates develop into various degrees of *de facto* authority within international courts. *De facto* authority is measured by examining the extent to which those whom the court seeks to regulate recognize (by their words, actions or both) that judgments of various international courts are legally binding.

From the perspective of legal philosophy, which is the focus of the present collection, the approach by Alter, Helfer and Madsen invites several important questions. The first question is whether what constitutes *de jure* authority can be dealt with as swiftly as Alter, Hefler and Madsen do. While the *content* of the obligations of states may be identified by state consent, does it also follow that consent establishes the *de jure* authority of the international court, where *de jure* authority is intended to establish conclusive reasons why a state should subordinate its will to the judgment of the court?

The answer to this problem advanced by Alter, Helfer and Madsen is, as has just been observed, to resort to an analysis of *de facto* authority: subjects, as a matter of sociological fact, sometimes accept the court as having normative authority.[16] However, this argument presupposes that consent is understood by subjects as a sufficient reason for them to subordinate their will to that of the official claiming *de jure* authority. This

[15] K. Alter, L. Helfer and M. Rask Madsen, eds., 'The Variable Authority of International Courts', *Law and Contemporary Problems* 79 (2016): 1–314.

[16] On this point, see H. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). Also see L. Murphy, 'Law Beyond the State: Some Philosophical Questions', *European Journal of International Law* 28 (2017) 203-272 at 218-219.

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presupposition is hard to sustain: factual *compliance* can be measured, but it cannot be assumed that compliance to a directive occurs *because* the court's subjects consider it as authoritative. Furthermore, it cannot be assumed that subjects consider the court authoritative *because* those subjects have given their consent. This is, as it happens, another way of stating the classic problem of identifying *opinio juris* (that 'States concerned must … feel that they are conforming to what amounts to a legal obligation'[17]), which has preoccupied theorists of customary international law. But this issue also arises in relation to the authority of international courts that are established by treaty: a court's authority only arises to the extent that those subject to it believe it to have authority. This cannot be measured by observing individual examples of compliant behaviour in its subjects: Authority is not simply about obedience, as the fact of the latter has many different causes. Authority is a complex attitude by subjects towards an (in this case, international) institution that should involve a coherent and cohesive view of the legitimacy of obeying that institution; and such approach or attitude must be *built* and internalized over time. The theorizing of how authority is built by forms of global governance is a key theme of this book.[18]

B Authority and Legitimacy

In this volume, we have not been prescriptive about how authority is to be defined. That said, in the previous sub-section, compliance is distinguished from authority, which is understood as a subjective belief on the part of the subject that he or she has an *obligation* to subordinate his or her will to that of various officials. This subject-orientated, but still empirical, conception of authority can be distinguished from a *claim* of authority made by a legal official. Raz, as is well known, regards that an essential feature of law is that those who apply it claim authority, which for him means that they claim that legal reasons are exclusionary reasons (and thus, they claim that the subject has sufficient reason to subordinate his or her will to that of the official).[19] Furthermore, the formal nature of a claim

[17] See *North Sea Continental Shelf*, ICJ Reports, 1969, para. 77; and G. Postema, 'Custom in International Law: A Normative Practice Account', in *The Nature of Customary Law*, ed. A. Perreau-Saussine and J. B. Murphy (Cambridge: Cambridge University Press, 2007), ch. 12.

[18] See especially the chapters in this volume by Alan Brudner, Henrik Palmer Olsen and Ingo Venzke.

[19] See J. Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 29–31, ch. 2.

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of authority of a legal official can be distinguished from inquiry into the authentic *sufficient reasons* why that claim is valid. The authentic reasons have sometimes been called 'legitimate authority'.

Obviously, there are many competing views on how legitimate authority can be justified. Notably, two of the leading arguments on legal authority reject the idea that legitimate authority arises from consent by states to international law. According to Raz's normal justification thesis (or, sometimes, condition) an authority claim by an official is justified (and legitimate authority genuinely arises) when to act in accordance with that official's directives would allow a person to better conform to the reasons that apply to him or her than to do otherwise. The official may, for example, have cognitive advantages (e.g., epistemic) over the subject, or the official may solve volitional defects (e.g., cultural prejudices) that arise if a person seeks to act upon their own subjective interpretation of their reasons.[20] Tasioulas gives a good example of a way by which the normal justification thesis can be fulfilled: 'Customary international law is a distillation of the time-tested collective wisdom of states, fruitfully drawing on their divergent cultural perspectives and historical experience in the resolution of common problems, thereby making it a more reliable guide to right reason than any other alternative.'[21]

From the perspective of the normal justification thesis, it is hard to see how the fact of consent by an effective state can in and of itself establish legitimate authority in international law. Consent by states to international law, from Raz's perspective, according to Tasioulas, can only have a 'derivative bearing' on justified authority: 'It is possible for A to have legitimate authority over B even if A's rule is neither consented to nor democratic; conversely, it is possible for B to consent to A's rule, or for A to rule democratically over B, without A's rule being legitimate.'[22] That said, consent by states may be part of a system which is instrumentally effective in establishing legal norms that are consistent with the requirements of the normal justification thesis (for example, it may lead to international laws that allow better conformity to relevant reasons). While this may be the case, it is far from settled that consent is sufficient to justify the authority of international courts.

[20] See J. Tasioulas, 'The Legitimacy of International Law', in *The Philosophy of International Law*, ed. S. Besson and J. Tasioulas (Oxford: Oxford University Press, 2010), 100–103.
[21] Ibid., 101.
[22] Ibid.

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Another leading account of legitimate authority is given by democratic theorists, and they make a similar point about the consent-based theory of international authority. Kant, most notably, thought that the law of nations emerges from a non-coercive confederation of republican states but that it cannot exist in the relations between republican and non-republican states. By implication, international legal rules established by the consent of effective, but non-republican, states cannot obviously demand compliance as a matter of law.[23] By implication, any courts, or other forms of global governance, established by such rules cannot have legitimate authority.[24] A similar conclusion concerning the authority of international legality is reached by Thomas Christiano, a leading democratic theorist.[25]

If our initial observation (from Section 1) is correct – that international legality has now gone beyond simply a reflection of treaties, diplomacy and state practice – then it follows that new forms of international legality cannot have authority on the consent-based model. This evolution of international legality, when applied to our justified uneasiness with the consent-based model of legitimate authority itself, seems to fundamentally destabilize our familiar understandings of legal authority beyond the state. This is, in essence, the philosophical problem that the chapters in this book seek to address. Ultimately, our philosophical models of legitimate authority may be used to help build legal authority beyond the state, or to throw the authority of those who claim it into doubt, as living international law emerges.

3 Outline of the Book

Naturally, the chapters in this book touch in many different ways upon the themes just discussed. This said, let us conclude this introduction by describing the trajectory or narrative arc of the book. The first five

[23] The exception to this occurs when the content of that treaty is consistent with perfect moral duties. But if this is the case, then the state is only doing what it was morally obligated to do anyway. On this point, see P. Capps, 'Legal Idealism and Global Law', in *Ethical Rationalism and the Law*, ed. P. Capps and S. D. Pattinson (Oxford: Hart, 2017), ch. 12.

[24] P. Capps and J. Rivers, 'Kant's Concept of International Law', *Legal Theory* 16 (2010): 229–57.

[25] T. Christiano, 'Democratic Legitimacy and International Institutions', in *The Philosophy of International Law*, ed. S. Besson and J. Tasioulas (Oxford: Oxford University Press, 2010), ch. 5.

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chapters by Brudner, Capps, Olsen, Venzke and Gillroy each focus on how and why authority can be built beyond the state.[26]

Alan Brudner's contribution, upon which some of the other contributions of this book rely, redeploys his 'career to authority', which he set out powerfully in *Constitutional Goods*,[27] to consider why states should treat attempts by international courts to enforce international human rights and international criminal law as authoritative. While some view the enforcement of international law as a threat to state sovereignty, Brudner regards it instead as the consummation of state sovereignty, and this explains precisely why international law should be treated as authoritative and interpretation of it by international courts as determinative. That is, international adjudicative institutions are a logical outcome of the evolution of domestic sovereignty from despotism to constitutionalism. To understand international legal authority in this way is to understand it as an aspect of the maturation of state sovereignty.

The chapters by Patrick Capps and Henrik Palmer Olsen then go on to argue that Brudner's 'career of authority' also has considerable use when considering the evolution of international legal institutions described in this introduction. That is, Brudner's claims not only relate to the reasons why states should regard international law and institutions as authoritative from the perspective of the evolution of state sovereignty; these contributors observe that the evolution of the authoritative governance structures of international institutions also seem to evolve according to Brudner's logic. Capps starts from the observation that a dense system of global administrative law has emerged over the last two decades. He then argues that the evolution of authority within global administrative law seems to match empirically the development of other primitive administrative systems, such as that in the early US, and that it is similar to Brudner's 'career of authority'. Capps's key claim is that the normative motor that drives the evolution of authority in global administration reflects what Kant called 'negative resistance' – that is, resistance *through* law – and this form of resistance is an expression of a duty of persons (whether officials, subjects or citizens) to live under legal institutions that allow them to relate to each other in a morally rightful way.

[26] We note that some of the material in this section is drawn from abstracts provided by the contributors of this book for the two conferences mentioned in Section 4.

[27] A. Brudner, *Constitutional Goods* (Oxford: Oxford University Press, 2004).

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