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Contemplating an Uneven Landscape

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Contemplating an Uneven Landscape: The Authority of International Law

PhD thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. C. Wijmenga
and in accordance with
the decision by the College of Deans

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Monday 21 February 2022 at 16.15 hours

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Table of Contents

Introduction	1
Jurisprudence of International Law	1
Conceptual framework of the thesis: the research question and methodology	5
The core argument	10
Limitations of the Thesis	12
<i>Authority and legitimacy</i>	12
<i>Authority and legality</i>	15
<i>Authority and effectiveness</i>	18
The Structure of the Thesis	21
Acknowledgements	30
 Chapter 1. Peaks and Valleys: The Standard Account of Authority and International Law	 33
Introduction	33
1. The Dual Meaning of Authority	36
2. The Three Theses	41
<i>The identity thesis</i>	42
<i>The agency thesis</i>	45
<i>The hierarchy thesis</i>	48
3. Peaks and Valleys: Introducing the Basic Distinction	51
4. Mediated and Unmediated Authority	63
Conclusions	74
 Chapter 2. The Authority of International Courts: Between Legitimacy and Pre-Emption	 77

Introduction	77
1. Authority: <i>de facto</i> , <i>de jure</i> , and back again	79
2. <i>De facto</i> authority, audience, and reputation	86
3. Pre-emption and ICs' <i>de facto</i> authority.....	93
Conclusions.....	104

Chapter 3. Authority and Normativity: Reapproaching Customary

International Law	105
Introduction	105
1. What Is This Thing We Interpret When We Say That We Interpret CIL?	106
2. State Practices and Normative Deeds.....	112
3. Practice as Network of Reasons.....	120
4. Asking the Right Questions: Re-approaching the Content/Container Duality	124
<i>Interpretation as identification</i>	125
<i>Interpretation as clarification</i>	128
Conclusions.....	132

Chapter 4. Authority and Pre-Emption: Solidarity as a Practical

Reason	135
Introduction	135
1. Solidarity and International Law: A Path from Fact to Principle	137
2. Solidarity as a Matter of Principle	146
3. Solidarity, Legality, and the Authority of International Law	157
Conclusions.....	164

Chapter 5. The International Rule of Law and Unmediated

Authority	167
Introduction	167

1. The International Rule of Law Between Two ‘Pocket Universes’	169
2. Attempting Reverse Engineering: The Rule of Law and Normative Authority	178
3. The International Rule of Law and Features of the Normative Authority	187
Conclusions.....	197
 Conclusions	 199
Bibliography	207
Academic summary	235
Academische samenvatting	241

Introduction

Jurisprudence of International Law

International law does not often feature in jurisprudential investigations. Nor are its peculiarities—normative, structural, institutional, etc.—typically seen as valuable for illuminating the fundamental concepts of legal philosophy, such as legality, validity, normativity, or authority. It is one of the implications of treating international law as a ‘borderline case’ of law, as H. L. A. Hart famously categorised it.¹ Yet it seems that precisely the borderline cases of a phenomenon may be most valuable for elucidating its essential features. This PhD thesis aims to do precisely this; I want to show that international law not only *may*, but *ought to* inform our jurisprudential understanding of legal concepts.

This thesis is dedicated to the concept of the authority of international law. In the five chapters that follow this introduction, I will attempt to show that legal philosophy has difficulties with explaining how international law may claim or have authority, and that these difficulties are primarily caused by some core jurisprudential commitments that typically go unchallenged or even unnoticed. One of these commitments relates to the categorisation of the instances of law I just mentioned; the domestic state-organised form of law is often taken not merely as the starting point of legal philosophical investigations, but as their alpha and omega. This, in fact, is quite understandable. The sociology and politics of legal academia in the last century have been such that domestic legal systems have come to represent the most immediate and clear example of what the law is and how we should understand it. And obviously, for most law students and law

¹ Herbert L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), 4–5.

professors domestic law is what they directly experience; courts, parliaments, governmental bodies, and police, various procedures and rules penetrate and directly fill up our social life, surrounding our social interactions in a concrete way. International law, at the same time, seems to be *somewhere out there*. It is distant, if not alien. As a result of this, international legal theory and the philosophy of international law have largely developed on their own, independently from jurisprudence, rather than in alliance with it.²

The ambition of this thesis is to try to overcome some of these deficiencies. I aim at approaching the authority of international law as a normative phenomenon that has a conceptual significance for general jurisprudence, not only for international legal theory. I thereby attempt to make a contribution both to analytical jurisprudence and to the philosophy of international law, and so I also speak to two different audiences, which is a challenging task.

From a jurisprudential perspective, I argue that there is a way in which our understanding of legal authority can and should be more inclusive and stripped of state-centric assumptions. I claim that it is possible and even desirable to reconstruct the concept of the authority of law such that it does not only apply to the well functioning, highly institutionalised domestic legal systems. I do so by showing that there is more than one way for law to perform its central function of guiding conduct, and that institutional mediation (by which I understand the creation, application, interpretation, and enforcement of law through various formal institutions such as governance bodies, courts, police, etc.³) is not a necessary component of that function—as is often assumed.

² This is not a fault of international legal scholarship only, as is sometimes assumed. As Jeremy Waldron rightly points out, analytical jurisprudence is more to blame for this divide: ‘the neglect of international law in modern analytic jurisprudence is nothing short of scandalous. Theoretically it is the issue of the hour; there is an intense debate going on in the legal academy about the nature and character of customary international law, for example. Analytic legal philosophers seem mostly to have missed this, even when it is evident that they might have a substantial contribution to make.’ Jeremy Waldron, ‘Hart and the Principles of Legality’, in *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy*, ed. Matthew H. Kramer et al. (Oxford: Oxford University Press, 2008), 69.

³ I explain the concept of institutional mediation in detail in chapter 1.

I surround this core argument by a discussion of the nature of legal normativity and the role of formal institutions in shaping it, which is generally overstated in jurisprudence.

From an international legal perspective, I argue that many conceptual problems and inconsistencies that surround international legal normativity, and in particular customary international law and principles of international law, can be bypassed by looking at them through the perspective of practical reasoning and its levels.⁴ I try to show that puzzles of formation, identification, and interpretation of customary international law, as well as those relating to principles of international law, such as solidarity, or to more complex meta-normative ideas such as the international rule of law, may have a more consistent solution if we embrace certain jurisprudential ideas about normativity and authority. International legal theory has been traditionally preoccupied with the problem of ‘sources of international law’ and their hierarchical ordering, to such an extent that it sometimes seems like this is the only jurisprudential topic that is worthy of attention. I rarely ever speak of sources of international law in this thesis, and when I do, only to highlight that they are not the focus of my attention. The role of sources in any legal order is to provide a reliable test of the legal validity of rules. Although this test is at the core of any practical application of (international) law, it does not tell us much about the authoritative capacities of the rules in question; that a rule is legally valid does not in and of itself mean that states and other actors use it as a normative guide of conduct. One of the ambitions of this thesis is, therefore, to expand the scope of conceptual analysis that international legal scholarship can engage with, beyond the issues of sources and normative hierarchies that have been dominating the field for far too long now.

This thesis is therefore a representative of what I call the jurisprudence of international law. I use the term ‘jurisprudence’ here in the analytical sense as a field of philosophical knowledge about the law, not in the normative sense in which it is often

⁴ I discuss these in detail in chapters 1, 3 and 4.

used in legal practice, that is, as a collection of judgments or established case-law. Jurisprudence, as I use the word, is a variation of philosophy of law. What I understand by ‘jurisprudence of international law’ has much to do with the Anglo-American tradition of approaching philosophical issues of law from a descriptive analytical standpoint. My interest in international law and its authority is therefore informed primarily by puzzles that are typical of the analytical tradition. What does it mean to say that the law claims authority? Whose claim is this? Is it necessary that the law’s authority flows through officials or finds its origin in their directives? These analytical inquiries are different from normative ones that seek to ground international law in moral or political realities or beliefs, or justify its content and operation according to one or another doctrine of justice or fairness. They also differ from more specialist and focused attempts to philosophically address the nature and content of particular legal practices or legal regimes, such as international humanitarian law or the *jus ad bellum*.⁵ That said, out of the many distinct ways of engaging with international law philosophically, this thesis does so with an emphasis on descriptive analytical methodology, which is at the core of what is traditionally referred to as ‘jurisprudential’.

The concept of the authority of international law is best suited for the task of building the new bridges between analytical jurisprudence and international legal theory. Not only is authority tightly linked with other key jurisprudential concepts such as normativity and legality, but it also has the flexibility and conceptual adaptability that many other concepts lack, such as, for instance, validity, sources, or legitimacy. By scrutinising the concept of the authority of international law, I therefore attempt to draw several important lines that differentiate all these aspects of legal reality, but that are often blended together. Investigating the nature and peculiarities of the authority of

⁵ Such specialist philosophical inquiries are becoming more and more common. See, e.g., David Lefkowitz, *Philosophy and International Law: A Critical Introduction* (New York: Cambridge University Press, 2020); Samantha Besson and John Tasioulas, eds., *The Philosophy of International Law* (Oxford: Oxford University Press, 2010). Both books are structured in a way that their first halves address fundamental philosophical questions of international law, and second halves deal with particular legal regimes, such as international trade law, human rights law, international humanitarian law, etc.

international law inevitably involves dealing with jurisprudential questions. And an inquiry into international law, I believe, may allow us to dispel some of the most deeply rooted assumptions about authority—that it must be personified, institutionalised, and hierarchical—that perhaps should be modified or abandoned.

Conceptual framework of the thesis: the research question and methodology

The central conceptual puzzle that I deal with in my thesis is this:

What are the nature and structure of the authority of international law, given its normative and institutional peculiarities?

As already indicated, I aim to approach this question within an analytical jurisprudential framework. By committing to this, I also accept its language and perspective. Unlike other branches of the philosophical analysis of the law, analytical jurisprudence seeks to explain the phenomenon of the law without inquiring into the content and social context of legal practices, which differentiates it from normative jurisprudence and critical approaches to law respectively. My treatment of the authority of international law, therefore, is informed primarily by the questions of what necessary and essential features of (international) law enable its claim to authority, and how this claim is translated into the normative relation that exists between the law and its addressees and/or creators, such as states. Questions such as this inform the dominant methodology of analytical jurisprudence, which is the conceptual analysis.⁶

⁶ See, e.g., Grand Lamond, 'Methodology', in *Cambridge Companion to the Philosophy of Law*, ed. John Tasioulas (Cambridge: Cambridge University Press, 2020), 18–22. Joseph Raz made one of the most compelling cases for conceptual analysis as the method of analytical jurisprudence: Joseph Raz, 'Can There Be a Theory of Law?', in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin P. Golding and William A. Edmundson (Oxford: Blackwell Publishing Ltd, 2008), 324–42. This line of thought was, of course, informed by H. L. A. Hart's take on jurisprudence as having to do with 'descriptive sociology' in Hart, *Concept of Law*, v. Hart, in his turn, was primarily influenced by J. L. Austin's views on philosophy of language which laid down many fundamentals of conceptual analysis: J. L. Austin, *How to Do Things with Words*, 2nd ed (Oxford: Clarendon Press, 1975).

Similar questions, of course, can be, and often are, asked in the normative and critical contexts. For instance, it is not unusual to investigate the authority of international law from the practical standpoint of a judge of an international court, or from a state official engaged in application or enforcement of international legal norms, or even from the point of view of a potential individual ‘user’ of international law, such as a victim of a human rights violation. Or one could adopt a critical perspective on the authority of international law by linking it to various political and historical processes that came to shape its normative role in today’s world. Even though both normative and critical takes on the authority of international law are of paramount importance, I do not include them in my conceptual framework and limit my perspective to analytical questions about the nature of authority only. It is because I believe that conceptual descriptive clarity often provides a necessary prerequisite for normative engagement and critique. By prioritising the analytical methodology, I do not mean to diminish the significance of the normative or critical perspectives, but rather to enable them in using a meaningful methodology that clarifies certain concepts and may be helpful in understanding what (authority of) law is. Analytical methodology, centred around the conceptual analysis, is not, of course, ‘a view from nowhere’, objective and neutral. The concepts we use and the way we use them are always informed by cultural, moral, and political contingencies. This is not in itself a problem, however. As Christine Korsgaard nicely put, ‘the fact that we can never escape viewing the world *from somewhere* is not a regrettable limitation, since there is *nothing* that the world is like *from nowhere*’.⁷

Within the analytical tradition, I stand by the position that the law is ultimately grounded in social facts alone and that moral facts do not play a role in determining its existence—i.e. the perspective of (exclusive) legal positivism. In the thesis (in particular, in chapter 4), I show how this framework has an advantage over alternative conceptual

⁷ Christine M. Korsgaard, *The Sources of Normativity*, ed. Onora O’Neill (Cambridge: Cambridge University Press, 1996), 245.

explanations.⁸ I build my argumentation on the assumption that the authority of (international) law is linked not to its moral grounds, but to the function it performs in practical reasoning, in particular, by allowing its subjects to engage in complex and often contentious practices without necessarily resolving moral disagreements that may be implicit within those practices. It is important to note that legal positivism as understood in analytical jurisprudence is different from what is often called ‘international legal positivism’.⁹ International legal positivism is typically committed to voluntarism and/or formalism,¹⁰ neither of which are among the conceptual tools usually employed in analytical jurisprudence, at least not in recent decades. That said, by declaring myself a legal positivist, I do not share most of the key commitments of *international* legal positivism.

The commitment to positivism is also explained by the fact that I use as the starting point for answering my research question the service conception of authority by Joseph Raz, which is one of the most comprehensive theories in political and legal philosophy.¹¹

⁸ This does not entail, however, that I subscribe to what is sometimes labelled as ‘normative positivism’, which holds that positivism is not just a proper descriptive theory of law, but a proper normative theory of law. That is, that there are moral reasons to see the law from a positivistic standpoint. I confine myself to a descriptive analysis only and do not engage in normative reasoning. For an in-depth analysis of the key premises and limitations of normative positivism in international law, see Nahuel Maisley, ‘Better to See International Law This Other Way: The Case against International Normative Positivism’, *Jurisprudence* 12, no. 2 (2021): 151–74.

⁹ An illustrative discussion on the differences between the two branches of legal positivism—jurisprudential and international—may be found here: Scott J. Shapiro, ‘Scott Shapiro on Everything’, May 28, 2021, in *Borderline Jurisprudence: A Philosophy of International Law Podcast*, produced by Kostia Gorobets and Başak Etkin, 1:07, <https://anchor.fm/borderline-jurisprudence/episodes/Episode-5-Scott-Shapiro-on-Everything-e10psto>. See also Jean d’Aspremont and Jörg Kammerhofer, ‘Introduction: The Future of International Legal Positivism’, in *International Legal Positivism in a Post-Modern World*, ed. Jörg Kammerhofer and Jean d’Aspremont (Cambridge: Cambridge University Press, 2014), 1–20.

¹⁰ See, e.g., Jean d’Aspremont, ‘International Legal Positivism’, in *Encyclopedia of the Philosophy of Law and Social Philosophy*, ed. Mortimer Sellers and Stephan Kirste (Dordrecht: Springer Netherlands, 2017), 1–7; Jörg Kammerhofer, ‘International Legal Positivism’, in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann, vol. 1 (New York: Oxford University Press, 2016), 408–26.

¹¹ Joseph Raz has been developing the service conception of authority in a series of books and articles that are now among the fundamentals of the analytical jurisprudential canon: Joseph Raz, ‘Authority, Law and Morality’, *Monist* 68, no. 3 (1985): 295–324; Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986); Joseph Raz, *Practical Reason and Norms*, 2nd ed. (New York: Oxford University Press, 1999); Joseph Raz, ‘The Problem of Authority: Revisiting the Service Conception’, *Minnesota Law Review* 90 (2006): 1003–44; Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford:

The service conception of authority is based on three key theses. First, the ultimate goal of authority is to improve the way we act for reasons (hence *service* conception), which means that the directives that authority gives to its subjects are dependent on reasons that subjects already have—the dependence thesis. Second, subjects’ submission to authority is only justified when they would do better by following authoritative directives rather than trying to act on their own—the normal justification thesis. Finally, and for my dissertation most importantly, authoritative directives may only improve subjects’ compliance with reasons if subjects accept them pre-emptively and replace their considerations on reasons with these directives. This is the pre-emption thesis.¹² Joseph Raz’s conception of authority is widely used in international legal scholarship.¹³ Most of the time, the use of the service conception of authority rotates around the normal

Oxford University Press, 2009); Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (New York: Oxford University Press, 2009).

¹² For the outline of these theses, as well as Joseph Raz’s responses to some criticism advanced against his conception, see Raz, *Morality of Freedom*, 21–69; Joseph Raz, ‘Facing Up: A Reply’, *Southern California Law Review* 62 (1989): 1153–1235; Raz, ‘The Problem of Authority’, 1003–44. I also discuss Joseph Raz’s theory of authority (as well many jurisprudential studies that build upon it) in detail in chapter 1 and reiterate some of its key elements throughout the thesis.

¹³ Chapter 1 discusses the key contributions to the international legal scholarship pertaining the concept of authority, such as Samantha Besson, ‘The Authority of International Law – Lifting the State Veil’, *Sydney Law Review* 31 (2008): 343–80; Başak Çalı, *The Authority of International Law: Obedience, Respect, and Rebuttal* (New York: Oxford University Press, 2015); Patrick Capps and Henrik Palmer Olsen, eds., *Legal Authority beyond the State* (Cambridge: Cambridge University Press, 2018); Harlan Grant Cohen et al., ‘Legitimacy and International Courts – A Framework’, in *Legitimacy and International Courts* (Cambridge: Cambridge University Press, 2018), 1–40; Richard Collins, ‘Sources and the Legitimate Authority of International Law: A Challenge to the “Standard View”’, in *The Oxford Handbook of the Sources of International Law*, ed. Samantha Besson and Jean d’Aspremont (New York: Oxford University Press, 2017), 703–23; Henrik Enroth, ‘The Concept of Authority Transnationalised’, *Transnational Legal Theory* 4, no. 3 (2013): 336–53; Devin Finn, ‘International Authority, Deliberative Legitimacy, and the Responsibilities of States’, *Global Governance* 16, no. 4 (2010): 549–58; Andreas Follesdal, ‘Power or Authority; Actions or Beliefs’, in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (Oxford: Oxford University Press, 2018), 412–21; Nienke Grossman, ‘Legitimacy and International Adjudicative Bodies’, *George Washington International Law Review* 41, no. 1 (2009): 107–80; David Lefkowitz, *Philosophy and International Law: A Critical Introduction* (New York: Cambridge University Press, 2020); Jennifer W. Primmer, ‘Beyond the Law-State: The Adequacy of Raz’s Account of Legal Systems in Explaining Intra-State and Supra-State Legality’, *Ratio Juris* 28, no. 1 (2015): 149–58; Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (New York: Oxford University Press, 2013); John Tasioulas, ‘Human Rights, Legitimacy, and International Law’, *American Journal of Jurisprudence* 58, no. 1 (2013): 1–25; John Tasioulas, ‘The Legitimacy of International Law’, in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 126–50.

justification thesis in the context of establishing the conditions of legitimacy of international institutions. In other words, international legal scholarship is by and large preoccupied with questions of the *legitimate* authority of international law. My focus is, however, on the pre-emption thesis, the importance of which in international legal theory, I believe, is generally under-appreciated. I argue that whereas the normal justification thesis is central for establishing the normative conditions of legitimate authority, the pre-emption thesis is of key importance for revealing how authority in general (legitimate or not) operates, when it succeeds and when it fails.¹⁴

At the same time, the idea of pre-emption has been at the core of analytical jurisprudence in the last decades. Joseph Raz, Jules Coleman, Scott Shapiro, and many other contemporary legal philosophers insist that for law to have authority over people it must be capable of making a practical difference,¹⁵ that is, it must have a function in practical reasoning that does not reduce to merely pointing at reasons people are already aware of. Pre-emption entails that legal norms do not merely instruct people, when they decide what to do, to act on the relevant moral, political, religious, pragmatic, prudential, etc. considerations they already have. If that was so, legal norms would hardly make any difference; they would not affect practical deliberations in any way. Pre-emption means, therefore, that legal norms do not simply *add* to, or *trigger*, the relevant considerations that actors must take into account; they *take their place*, making it

¹⁴ I give further rationale for my focus on the pre-emption thesis below, in the section dedicated to one of the limitations of the dissertation, 'Authority and Legitimacy'.

¹⁵ The meaning and significance of the practical difference thesis of course differs depending on the conceptual position, but what is important for my purposes here is that it has a direct connection with the idea of pre-emption as formulated by Joseph Raz. See generally, Jules L. Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis', in *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'*, ed. Jules L. Coleman (Oxford: Oxford University Press, 2001), 99–147. Scott Shapiro claims that the practical difference is key to law's normativity and authority: Scott J. Shapiro, 'On Hart's Way Out', *Legal Theory* 4, no. 4 (1998): 496ff; Scott J. Shapiro, 'Law, Morality, and the Guidance of Conduct', *Legal Theory* 6, no. 2 (2000): 127–70. He later reframed this idea as 'the simple logic of planning': Scott J. Shapiro, *Legality* (Cambridge, Mass: Harvard University Press, 2011), 275–77. See also, on alternative readings of the practical difference thesis, Kenneth Einar Himma, 'H. L. A. Hart and the Practical Difference Thesis', *Legal Theory* 6, no. 1 (2000): 1–43; Donald H. Regan, 'Authority and Value: Reflections on Raz's *Morality of Freedom*', *Southern California Law Review* 62 (1989): 995–1095; Wil J. Waluchow, 'Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism', *Legal Theory* 6, no. 1 (2000): 45–81.

inappropriate to invoke these considerations as a justification of actions. For example, the legal obligation to pay taxes is pre-emptive because it makes it irrelevant and inappropriate to justify our paying taxes by considerations of self-interest, solidarity, and altruism. The legal rule obligating people to pay taxes *replaces* these considerations. If we transfer this to international law, pre-emption entails that the authority of international law manifests, among other things, in its rules making it inappropriate for states and other actors to refer to background reasons and justifications, even if these reasons and justifications have a significant moral weight. The focus on the pre-emptive function of international law, therefore, is my conceptual framework that also defines the core argument I am making in this thesis.

The core argument

The idea of pre-emption, developed by Joseph Raz, as well as its conceptual siblings (such as the practical difference thesis and the simple logic of planning) have been conceptualised primarily in the context of domestic legal systems. There is nothing wrong with this as such, but it results in pre-emption being tightly linked to the institutional setting in which such legal systems operate. Thus, one of the key ideas that surround it is that the introduction of legal authority (and therefore the pre-emption) always requires a differentiation between officials and non-officials. Law can only perform its pre-emptive function if people transfer the rule-making and rule-application to some formal institutions.

The core argument that I advance in my thesis and develop in more detail in chapter 1, is that (international) law's pre-emptive capacity and authority do not require institutional mediation. Authority may be mediated and unmediated, depending on whether or not the practical deliberations in developing pre-emptive guidance are delegated to specialist formal institutions or not. Mediated and unmediated structures of authority achieve pre-emption by different means. Whereas pre-emption in the mediated context of legal systems is well-studied, pre-emption in the unmediated

context—as in the context of customary international law—is still by and large unknown.

The importance of the concept of pre-emption is explained by the fact that I disconnect the idea of authority from that of formal institutions and submit that the authority of (international) law primarily reflects the degree to which legal norms succeed in pre-empting background reasons and considerations. The more pre-emptively ‘thick’ a norm is, the more authority it has, and the other way around. The ‘thickness’ or ‘thinness’ of pre-emption is determined by how appropriate it is for actors—such as states or international courts—to ground and justify their conduct on the basis of background considerations. Authority, seen from this perspective, is not something established once and for all, or something that we ‘add’ on top of existing international law. Rather, it is being shaped, reinforced, or denied and destroyed, every time relevant actors advance justifications of their actions within or outside the framework of existing legal norms, and when these justifications are accepted or rejected by other actors.¹⁶

¹⁶ I do not intend to limit the scope of relevant actors to states only, although it is no use denying that they remain the key figures of the international legal order, acting either individually or through international organisations. Still, the authority of international law does not depend on states only, and in recent years non-state actors have been shaping the pre-emptive function of international law as well. Perhaps most prominent examples include two recent cases from the Netherlands, where non-governmental organisations Urgenda and Milieudefentie won their respective litigations in respect to governmental climate change commitments. *Stichting Urgenda v. The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)* ECLI:NL:HR:2019:2007; *Vereniging Milieudefentie v. Royal Dutch Shell PLC* ECLI:NL:RBDHA:2021:5339. Cases such as this contributed significantly to thickening the pre-emptive veil of the Paris Agreement by narrowing down the spectrum of available reasons that can be invoked within a legal domain. That said, the authority of international law gets shaped by all sorts of actors, and not only by those to whom it is directly addressed. For instance, as discussed by Tamar Megiddo, private individuals, businesses, communities, etc. may take action on their state’s international legal obligations as well, such as in the case of the ‘We Are Still In’ coalition in the US which pledged to work to reduce the US’s greenhouse gas emissions to the extent committed by the US’s nationally determined contribution after the US withdrew from the Paris Agreement. See Tamar Megiddo, ‘Methodological Individualism’, *Harvard International Law Journal* 60, no. 2 (2019): 601–48. “‘We Are Still In’ Declaration”, accessed 1 July 2021, <https://www.wearestillin.com/we-are-still-declaration>. Such examples demonstrate that the authority of international law gets shaped by a multitude of actors, not just those directly involved in the creation or enforcement of international legal norms.

Limitations of the Thesis

While introducing my thesis, I must also clearly delineate the borderlines that shape its content and ambit. Some of them have a conceptual explanation and are dictated by my choice of the framework explained above. Some of them, however, have a pragmatic explanation. Not everything that I could discuss in this thesis, or that deserves discussion in relation to my thesis, is actually discussed. I would like to point out three major limitations of my dissertation.

Authority and legitimacy

Authority is often, even typically, discussed in junction with legitimacy, and there are good reasons for this. As Joseph Raz stresses, ‘the explanation of effective authority presupposes that of legitimate authority’,¹⁷ in the sense that *de facto* authorities must always claim to be legitimate, otherwise they are not authorities at all. As I explain in more detail in chapter 2, there is indeed a deep interconnection between the *de facto* and *de jure* sides of authority, and this interconnection may take different shapes and manifestations in the contexts of domestic legal systems and of international law.

So, even though I do endorse the idea that a full conceptual explanation of authority of international law requires showing how and why international law’s authority is or can be legitimate, I do not pursue this path in my thesis. The analysis I conduct and the conclusions I reach are therefore agnostic as to whether or not international law’s claim of authority is legitimate, that is, whether or not states and other actors are morally justified in accepting and following the guidance offered by international law. This is obviously not to say that these issues are of no importance. The discourse of the legitimacy of international law has perhaps been one of the most important developments in the philosophy of international law over the last decades,¹⁸

¹⁷ Raz, *Authority of Law*, 29.

¹⁸ See, for example, Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law* (New York: Cambridge University Press, 2010); Marcel Brus, ‘Bridging the Gap between State Sovereignty and

with massive efforts being put into justifying international law's claim of authority or challenging it on various grounds. There are many good reasons to believe that international law is legitimate, and there are many good reasons to believe that it is not. Depending on which side one takes, the view of international law would of course be drastically different, and providing defences for international law's legitimacy, just like challenging it, are obviously enormously complex and important scholarly projects.

I do not take stances on this issue in my thesis, however, nor do I claim to have developed a full conceptual explanation of the authority of international law. The goal of this thesis is to investigate a conceptual puzzle that is in many ways antecedent to the problem of the legitimacy and justification of authority. I want to see what it means for the law as such to claim and to have authority, particularly in the normative and institutional context that is significantly different from the one typically explored—that of domestic legal systems. In a sense, I focus on the *de facto* side of authority, and even though I am aware that it cannot be rigidly separated from the *de jure* side, I do not inquire into the intricacies of the justification of the authority of international law, apart from the last chapter, where I link the idea of normative authority to the international rule of law. For the most part I try to find a meaningful way of speaking about the authority of international law given that the standard jurisprudential language and

International Governance: The Authority of Law', in *State, Sovereignty, and International Governance*, ed. Gerard Kreijen et al. (Oxford: Oxford University Press, 2002), 3–24; Anthony Carty, *Philosophy of International Law* (Edinburgh: Edinburgh University Press, 2007); Filipe dos Reis and Oliver Kessler, 'Legitimacy', in *Concepts for International Law: Contributions to Disciplinary Thought*, ed. Jean d'Aspremont and Sahib Singh (Cheltenham: Edward Elgar Publishing, 2019), 650–61; Ronald Dworkin, 'A New Philosophy for International Law', *Philosophy & Public Affairs* 41, no. 1 (2013): 2–30; Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 2002); Thomas M. Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', *American Journal of International Law* 100, no. 1 (2006): 88–106; Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council*, 3rd ed. (Princeton: Princeton University Press, 2008); John Rawls, *The Law of Peoples: With, The Idea of Public Reason Revisited* (Cambridge, Mass: Harvard University Press, 1999); Hélène Ruiz Fabri et al., eds., *International Judicial Legitimacy New Voices and Approaches* (Baden-Baden: Nomos Verlagsgesellschaft, 2020); Wojciech Sadurski, Michael Sevel, and Kevin Walton, eds., *Legitimacy: The State and Beyond* (New York: Oxford University Press, 2019); Fernando Tesón, *A Philosophy of International Law: New Perspectives on Law, Culture & Society* (Boulder: Westview Press, 1998); Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford: Oxford University Press, 2018).

conceptual apparatus are not exactly tailored for it. This issue, I believe, can be analytically isolated and taken for its own worth, without necessarily engaging the political and moral philosophy of legitimisation.

At the same time, nothing in my analysis and conclusions precludes a legitimacy perspective; actually, it is the other way around. Legitimacy concerns are inevitably assumed in this dissertation and always lurk in the background. Most of the steps that I take in my reasoning do assume that international law's claim of authority always exists in a broader moral and political context, and that often international law, in fact, fails to have the authority altogether or fails to be justified in its claim for it. Such failures may have different causes, and not all of them are direct consequences of legitimacy crises, as, for instance, the recent pushback against the International Criminal Court by some African states.¹⁹ However, as I try to show in chapters 2, 3, and 4, there is a similar underlying mechanism involved whenever these authority failures occur, regardless of whether they come as results of a moral deficiency of international law, its political inaptness, or poor normative or institutional design. I describe this mechanism from the perspective of the pre-emptive function of the law; we have the law because it allows us to cut off deliberative efforts and thus enables us to bypass the moral and political disagreements we may have. Law may be more or less successful in performing this function, and so the background considerations and disagreements it claims to pre-empt may still sink in and gradually erode its authority. In international law, this is especially visible, but I do not assume that it is something intrinsically bad or undesirable. I do not have the task of defending international law's authority as legitimate, nor do I assume that whenever it succeeds in performing the pre-emptive function this automatically translates into legitimacy. Strengthening the authority of international law may or may not be a good thing after all, all things considered. In many contexts and areas,

¹⁹ 'Africa Debate: Is the ICC Targeting Africa Inappropriately?', *ICC Forum*, March 2013, <https://iccforum.com/africa>.

international law has not been used as an instrument of social development and justice, as critical feminist, race, and TWAIL scholars show.²⁰

That said, by remaining agnostic about the *legitimate* authority of international law, I pursue two goals. First, I attempt to provide a conceptual scheme of the authority of international law that, on the one hand, is compatible with broader jurisprudential ideas about law's normativity and authority, and, on the other hand, accounts for international law's structural peculiarities.²¹ By severing these issues from legitimacy problems, I thereby sharpen my focus. Second, a clear and jurisprudentially consistent view of the authority of international law must precede an investigation into how this authority can be justified. As I said, I do not assume international law's legitimacy, but I believe that the account I offer may turn out to be useful for legitimacy studies.

Authority and legality

One of the puzzling implications of my analysis of the authority of international law, especially in the context of the framework I outline in chapter 1, relates to the legality of international law. Legal positivism traditionally insists that there is a necessary connection between legality and authority in the sense that it is a central aspect of the law's identity that it originates in practices of formal institutions—authorities. In other words, what we conventionally count as law, especially in domestic legal systems, must have a link to offices and public institutions, such as parliaments, courts, governmental bodies, and so on. Where there is no such connection between a purported legal norm and authorities, or when we fail to establish it, it is likely that such a norm would be discarded as non-legal. This idea is widely known as the 'institutional pedigree' and it

²⁰ For a recent and powerful critique of international law and its claim to be legitimate, see Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge: Cambridge University Press, 2020). Many relevant critics of international law's legitimacy are advanced in the context of colonial studies, e.g., in Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

²¹ I discuss these peculiarities in detail in chapter 1.

holds that an institutional origin is a necessary feature which makes the law the thing that it is.

I argue, in chapter 1 and partly in chapter 5, that the concept of authority typically employed in this line of reasoning cannot properly apply beyond highly institutionalised well-functioning domestic legal systems. I show, instead, that the authority of formal institutions is but an extension—often desirable yet not at all necessary—of the authority of legal norms. The shift from the institutional to the normative allows me to reconstruct the concept of authority in a way that makes it more flexible and applicable to international law as well as to domestic law. This, however, comes at a high conceptual price, since by severing the link between the authority of formal institutions and the legality of norms—the link that is at the very core of contemporary legal positivism—I essentially discard the idea of the institutional pedigree without offering anything in return. If the link to formal institutions is not necessary for the authority and legality of norms, then how can we know which norms *are* legal?

This conceptual puzzle is intriguing, but I do not undertake the task of addressing it here. Suffice it to say that I do believe that the institutional pedigree is not universally applicable as the standard of legality. There can also be non-institutional thresholds of legality, and there can also be no thresholds at all. Sometimes (in international law even often), we find ourselves in a situation when we do not know whether a particular norm is legal or not. And this uncertainty is not necessarily a problem to solve, or an error to fix. It may well be just a consequence of legal practices being less structured and more fluid than lawyers want them to be. I do not think it is always reasonable to try to establish exactly what the criteria of legality are in a particular situation when we are in doubt. It is an aspect of the legal profession to treat ambiguities as defects, but it is not at all necessary for jurisprudence to endorse this attitude. This is also a reason why I do not pay much attention to the conceptual and philosophical issues of the sources of international law, their function and hierarchical relations, as already mentioned

above.²² As I stress in chapters 1 and 3, authority has far more to do with normativity than with legality and validity. In this thesis, therefore, I am less interested in what it is that makes international law law, or how particular rules or pronouncements acquire legal validity, and more interested in what function they perform in practical reasoning.

This is not to say that there is no way in which my analysis of the authority of international law links to the issues of legality. As I discuss throughout this thesis, especially in chapters 1, 2, and 4, the authority of international law manifests primarily in how efficient its norms are in pre-empting background practical reasons. I believe that in many cases when the criteria of legality are ambiguous, unclear, or contested, a norm that does a better job overall in balancing and pre-empting practical reasons would probably qualify as legal by the function it performs in guiding actors' practical deliberations.

Still, given that the connection between authority and legality is deep and multifaceted, I leave most of the discussion of it outside of the scope of this thesis. I believe that conceptual clarity regarding legality is not in itself necessary for investigation of the authority of (international) law. Just as in the case of legitimacy, I believe that a

²² A perspective similar to mine but with an emphasis on sources of international law was offered by Harlan G. Cohen in a series of publications. See, Harlan Grant Cohen, 'Finding International Law: Rethinking the Doctrine of Sources', *Iowa Law Review* 93, no. 1 (2007): 65–129; Harlan Grant Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community', *International Law and Politics* 44 (2012): 1049–1107. Harlan G. Cohen argues for adoption of a doctrine of sources that would reflect their actual authoritative status and thus such a doctrine 'would focus on the processes by which rules come to be internalized by international actors. Rather than taking for granted that a treaty reflects international law, the rules laid out in a treaty would themselves be judged by the internalized norms supporting them, either in (1) the strength and legitimacy of the process that led to the adoption of those rules or (2) the customary acceptance of the rule itself.' Cohen, 'Finding International Law', 71. Despite many similarities between our approaches, I find Harlan G. Cohen's perspective somewhat problematic since it seems to overlook the role sources play in a legal system. We need them precisely so that we do not have to investigate, every time and *ad hoc*, which rules are legitimated and internalised and which are not. By discussing this problem in the context of authority, rather than in that of sources, I avoid this inconsistency. See, for a discussion of Harlan G. Cohen view of sources: Harlan G. Cohen, 'Harlan Cohen on Sources of International Law, October 1, 2021, in *Borderline Jurisprudence: A Philosophy of International Law Podcast*, produced by Kostia Gorobets and Başak Etkin, <https://anchor.fm/borderline-jurisprudence/episodes/Episode-9-Harlan-Cohen-on-Sources-of-International-Law-e17uo9a>.

discussion of authority is in many ways antecedent to attempts to explain the phenomenon of legality.

Authority and effectiveness

The quests of how to make international law more authoritative often go hand in hand with the quests of how to make it more effective. Authority is typically associated with power, ability to bend one's will, compel, or even force somebody to do something. For this reason, any conceptual investigation of the authority of international law runs into the net of associations with various compliance studies.

I believe this perspective to be quite fruitful but at the same time confusing. On the one hand, it is obvious that we need law for practical reasons, and international law is no different in this respect. We have it because it matters to us in deciding what to do and what not to. Part of this truism is that we expect that when law is violated or not complied with, such non-compliance does not go unnoticed, ignored, or unpunished. It is an intrinsic aspect of the conventional image of the law that it requires compliance and that when this does not happen, it is enforced, coercively if need be. It is reasonable, then, to associate the authority of (international) law with its overall effectiveness, with how strong a behavioural motivation it provides.²³

On the other hand, the direct association of the authority of international law with its effectiveness may obscure many important features of what authority is about. Although it is tempting to speak of crises of the authority of international law when states blatantly violate or ignore it, this is not entirely accurate, conceptually speaking. That international law is violable is an implication of its being normative; it is an inherent feature of norms that we may fail to comply with them. What one cannot violate is not a norm. So there is as such nothing unusual in international law not being complied with from time to time. But the point that I am about to make has nothing to do with Louis

²³ See, for a comprehensive study on various understandings of compliance, including those linked to the idea of authority, Markus Burgstaller, *Theories of Compliance with International Law* (Leiden: Martinus Nijhoff, 2005).

Henkin's famous observation that states do actually comply with international law most of the time.²⁴ Rather, I want to stress that there is no necessary connection between international law's claim of authority and its effectiveness, which is especially visible when states *do* violate it.

Consider the prohibition of torture, a rule of customary international law which, according to the International Law Commission and the International Court of Justice—the two most authoritative institutions when it comes to issues of international law,—is a rule of *jus cogens*.²⁵ Does it affect this rule's authority that states violate it from time to time? I argue that no, it does not. It is one of the most common errors to assume that the domain of the normative force of a rule is exhausted by the question of whether it is complied with or not. In fact, what is often far more important is how a rule in question is being used as a framework for *justifying* or *criticising* conduct. No state today would accept that it is legally, morally, and politically appropriate to justify torture, and it is rather safe to assume that the international community would normally advance a criticism of states found torturing people. The point I am making is that although it can be argued that the prohibition of torture may suffer from compliance crises, it does not in itself mean that this rule has less authority than a rule that is complied with unconditionally, e.g., some of the rules of the International Postal Union. The authority of a rule or a legal regime, therefore, is not an implication of, or a precondition for, compliance. Rather, it is a reflection of the role a rule or a regime performs in the practical reasoning of relevant subjects.²⁶

²⁴ Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2d ed (New York: Columbia University Press, 1979), 47.

²⁵ 'In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).' *Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Merits) (2012) ICJ Reports, para 99. 'The prohibition of torture constitutes a norm of *jus cogens* can be supported with reference to both practice and doctrine'. ILC, 'Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur', UN Doc A/CN.4/727, p. 35.

²⁶ Surely, a sceptic may go further than simply questioning the authority and effectiveness of a particular rule. He may argue, for instance, that the entire fabric of international law is ineffective to be meaningful in important areas of international cooperation and does not have much relevance in practice, or only to suit the interests of some actors at some time. I believe that such attacks on international law in reality address

Therefore, it is not effectiveness and degree of compliance that is a relevant marker of the authority of rules of international law, but rather the manner in which states and other actors practically engage with and use them to justify their conduct or criticise that of other states and actors. It is far more dangerous for the authority of international law when states try to penetrate behind the ‘pre-emptive veil’ of norms and thus eroding their function, than when they disregard them and are criticised. Take the general prohibition of the use of force. On the account I offer in the thesis, this rule claims authority by pre-empting considerations that states may rely on while deciding whether to use force or not. This rule’s authority, then, is undermined when states advance legal arguments based on considerations this rule was designed to pre-empt, such as those of a humanitarian nature.²⁷ The general prohibition of the use of force is a *general* prohibition, it can only perform its function when it is inappropriate for states to rely on reasons this rule is aimed at replacing. That is, states must not use force *even when* they believe that they should do so, morally speaking. What erodes the authority of this rule, then, is not that it is being violated from time to time, but that some of the justifications advanced for such violations were not rejected in a straightforward manner.²⁸

something else, not its authority or effectiveness. They seem to aim at the very possibility of international law as law, and this typically has to do with a very narrow vision of what counts as law. Although I address some of the sceptical arguments of this sort in my thesis, it is beyond the scope of this thesis to provide a comprehensive answer to such attacks. See, however, Carmen E. Pavel and David Lefkowitz, ‘Skeptical Challenges to International Law’, *Philosophy Compass* 13, no. 8 (2018): 1–14; Carmen E. Pavel, *Law beyond the State: Dynamic Coordination, State Consent, and Binding International Law* (New York: Oxford University Press, 2021), 58–85.

²⁷ Perhaps the most compelling defence of humanitarian intervention was offered by Fernando Tesón in his *Humanitarian Intervention: An Inquiry into Law and Morality*, 3rd ed. (Ardsley, NY: Transnational Publishers, 2005). It is, of course, a tricky question whether the prohibition of the use of force was originally envisaged to pre-empt humanitarian concerns. But this is beside the point. As I show in chapter 3, the pre-emptive function of norms is not so much about what their original design was (if this is known at all), but how they are being practically engaged with.

²⁸ This scheme of authority applies to other rules and regimes as well. Adil Haque, for instance, uses the practical reasoning approach to show that rules of international humanitarian law must be treated as pre-emptive practical reasons, that is, combatants may not appropriately rely on underlying considerations even when they think it would lead to a morally better outcome, all things considered. Adil Ahmad Haque, *Law and Morality at War* (Oxford: Oxford University Press, 2017).

That said, compliance and effectiveness are not in themselves relevant for assessing or conceptualising the authority of international law, which is why I do not seek to engage with this rather massive field of scholarship in international law and international relations theory.

The Structure of the Thesis

The thesis consists of five chapters, each representing a more or less standalone contribution that can be read separately. In other words, it is a papers-based dissertation. A shortened version of chapter 1 is forthcoming in *Philosophical (De)Constructions of International Law*, ed. Pauline Westerman, Kostiantyn Gorobets, and Andreas Hadjigeorgiou (Cheltenham: Edward Elgar, 2021); chapter 3 is forthcoming in *The Theory and Philosophy of Customary International Law and its Interpretation*, ed. Panos Merkouris, Jörg Kammerhofer, Noora Arajärvi, ass. ed. Nina Mileva (Cambridge: Cambridge University Press, 2021); chapter 5 is published as ‘The International Rule of Law and the Idea of Normative Authority’, *Hague Journal on the Rule of Law* 12, no. 2 (August 2020): 227–49. Chapter 2 was presented at the PluriCourts Annual Workshop ‘The Political and Legal Theory of International Courts and Tribunals’ (Oslo, 20–21 July 2020). Chapter 4 was presented at the ESIL Research Forum ‘Solidarity: The Quest for Finding Utopias of International Law’ (Catania, 20–21 April 2021). Both these latter chapters are now being prepared for submission to academic journals. Still, even though each chapter is independent in content, they are all tightly linked by the general idea that underlies this thesis.

I begin, in chapter 1, titled ‘Peaks and Valleys: The Standard Account of Authority and International Law’, by outlining the general framework of my discussion of the authority of international law. I do so by showing that the conventional jurisprudential ideas about authority are grounded in assumptions and beliefs that are meaningful primarily in the context of well-functioning highly-institutionalised domestic legal systems. There, authority is typically described along three main lines:

- first, that a link to authority is necessary for law's identity (that is, the fact that it is issued, applied, or enforced by a formal institutional authority is at least partly what makes the law the thing that it is);
- second, that authority requires agency to make claims and demands, in the sense that an authority is *somebody*, an identifiable agent with rational intentionality; and
- third, that relations of authority assume hierarchy, for in order for there to be relations of authority, there must be a form of submission of a will.

My argument is that these three ideas are largely justified when it comes to the authority of law as manifesting in state-organised legal systems. We do indeed link the authoritative claims that the law makes on us with the activities and claims of legal institutions such as parliaments, courts, governmental agencies, police, and so on. Such identification also involves hierarchical considerations, since there is always an element of an intrinsic normative inequality in relations between subjects of law and officials.

The active institutionalisation of international law in recent decades (most notably, after the World War II) made this standard account of authority applicable to all sorts of intergovernmental agencies, international courts, and various international organisations. For this reason, most contemporary studies regarding the authority of international law focus on these institutionalised areas of international law, since their authoritative nature is not much different from that of domestic institutional authorities.

At the same time, a significant, if not dominant, part of international law comprises treaties, which do not establish any sort of formal institution, and customary international law. These two forms of international law hardly fit the general jurisprudential ideas of authority, yet there seem to be no convincing arguments that we should avoid speaking of 'authority' when discussing normative claims advanced within the framework of treaties and customary international law. My argument is that there are many international legal norms whose authority is not institutionally mediated in any direct way. The core idea here is that both mediated and unmediated forms of authority—that is, those that feature formal institutional arrangements and those that

do not—perform a similar task. The authority of law is primarily about pre-empting practical reasons. I try to challenge the conventional view that pre-emption requires institutional mediation, and the following chapters are aimed at developing this idea from several different angles. I claim that in order to have a jurisprudential explanation of the authority of international law, we need to account for both formal institutions and customary international law and treaties.

Chapter 2 ‘The Authority of International Courts: Between Legitimacy and Pre-Emption’ takes on a more traditional institutional dimension of authority; that is, it focuses on formal institutions. International courts are the most common examples of institutional authorities in international law, and a lot of attention is being paid to the interplay between their *de jure* and *de facto* authority. I argue that there is a disparity in how we treat this interplay when it comes to domestic courts and international courts. In the domestic context, the authority of courts is part and parcel of the authority of the legal system to which they belong. Their *de facto* authority, then, is directly linked to the general performance of that legal system. For this reason, it is not the *de facto* side of authority that typically comes into question, but rather the *de jure* one; we want to know if and when domestic courts are justified in exercising the authority that they have. We want to know if courts are justified, for instance, in delivering judgments that modify or progressively develop the law, or whether that would go beyond their *de jure* authority.

In the case of international courts, I suggest, the situation is often reversed. Because all international courts have their authority grounded in consent, this makes its *de jure* side somewhat less problematic. Since states consent and thus explicitly recognise the authority of international courts, it is typically safe to assume (not without reservations) that states are also justified in following their judgments and other rulings. That does not mean that the *de jure* authority of international courts is never a problem. It often is, and there are strong reasons to believe that international courts are not always justified in exercising their authority. At the same time, what is more conceptually and practically problematic when it comes to the authority of international courts is its *de facto* side,

which is especially visible against the background of the highly unequal success of international courts in securing lasting and compelling effect of their judgments.

In the chapter, I discuss one of the popular solutions to the puzzle of the *de facto* authority of international courts, the one that links it to their effective audiences. The core of this solution is that whenever we wish to see how much *de facto* authority an international court has, we must measure it against the background of the public response it receives and how active actors are in complying with its judgements. The idea here is that *de facto* authority can and should be analysed with no regard to the normative dimension of the relations of authority. The most we can do is to investigate how many actors, and what kind of actors, engage with an international court and its judgments.

I claim that although this perspective is promising in its own right, it nevertheless discusses something else, not authority. Authority, even taken from the *de facto* perspective exclusively, is still a normative phenomenon, and ignoring this means missing something very important about what we have authorities for. I submit that the effective audience may be a measure of an international court's *reputation*, but not so much of its (*de facto*) *authority*. What we should focus on instead is the success with which international courts manage to generate pre-emptive practical reasons. International courts operate as institutions of authority in the sense that they claim to generate practical reasons that replace background considerations actors may have. At the same time, it is not always the case that after international courts deliver judgments (or advisory opinions) they manage to achieve such an effect; often states and other actors keep relying on background considerations that were meant to be pre-empted.

In the next chapter, 'Authority and Normativity: Reapproaching Customary International Law', I shift focus from institutional authorities to the authority of norms. I dedicate more attention as to how the pre-emptive function of norms comes about and how it affects actors' engagement with them, including rule-following and interpretation. I do so by investigating the structure of the normativity and authority of customary

international law (CIL), which, as I will argue in chapter 1, is the most conceptually challenging case for standard jurisprudential theories.

I analyse CIL from the perspective of its interpretation, which links the discussion to the previous chapter. International courts, as the primary actors engaged in interpretation of CIL, typically ‘scoop’ their authority from CIL, so it is critically important to see how CIL’s normativity and authority come about and what it means to interpret it. I start by suggesting that one of the main conundrums of CIL is that both the identification and interpretation of customary rules rotate around state practices. This makes them appear as having a dual nature; they represent both the *container* and the *content* of rules of CIL. At the same time, I show that the conventional image of state practices found in international legal scholarship and the practice of the ICJ is very much distorted and tends to misrepresent their normative nature.

Practices are never reducible to mere regularities or patterns of conduct or ‘raw material’ that has no normative significance without the *opinio juris*, as it is typically claimed in international legal scholarship, because what marks the difference here is that practices are *normative phenomena*. A regularity of conduct in itself is not an adequate criterion for determining whether there is or is not a practice. Instead, practices must be ascertained from the internal point of view of the participants, whether or not they are expected to share reasons for their actions or not. It is only appropriate to speak of practices, when the deeds that comprise them have a meaning, and are performed, out of certain expectations. For those participating in a practice, the mere fact that they so do, is an independent reason to act in a way that meets the expectations of the other participants. That is, either practices are normative, or they are not practices at all.

But normativity in itself is a complex phenomenon. It combines first- and second-order reasons. First-order reasons are those considerations that count for or against performing a certain action. Second-order reasons are reasons to act or abstain from acting on some first-order reasons. That is, norms that sustain practices render certain reasons inappropriate to act for. The interplay between first- and second-order reasons not only reveals the complexity of the normativity of practices, but also shows why they

have authority. CIL has authority not because it is communicated or generated by an institutional authority such as an international court, but because the state practices that sustain it are capable of pre-empting reasons and thus make a practical difference in actors' deliberations. From the perspective of legal interpretation, this entails that clarification of the content of the rules of CIL is essentially the process of inquiring into how reasons incorporated into a practice are weighed and balanced, as well as how new reasons are accommodated.

Chapter 4 'Authority and Pre-Emption: Solidarity as a Practical Reason' takes a closer look at the phenomenon and normative significance of pre-emption in grounding the authority of international law and is in many ways an attempt to show how the conceptual scheme described in the earlier chapters applies to actual values and norms. I investigate what it takes for international law to embody and promote such values and principles as, for instance, solidarity. I chose solidarity for this analysis for two reasons. First, because it has become increasingly popular to regard it as a principle of international law, that is, as an idea that is not just promoted by international law, but in some way defines its normative content and structure. Second, because solidarity, unlike, for instance, democracy, or sustainable development, can be conceived as a stand-alone practical reason, rather than a complex of reasons. People and states often claim to do things 'out of solidarity', and this is meant to provide a satisfactory justification and explanation of their actions (while we can hardly use 'democracy' or 'sustainable development' in our practical deliberations in the same way).

I focus the discussion in the chapter around the ubiquitous idea that solidarity constitutes a 'principle of international law'. As I point out, however, there is no one single use of the concept of 'legal principle' or 'principle of international law'. Often, we label as 'principles' ordinary legal rules. At other times, we speak of principles as normative standards that have a more abstract role in guiding the conduct of states, as compared to ordinary legal rules and are therefore used both for guidance and for interpretation. Yet on other occasions, the language of principles is used in relation to the political and moral ideals that legitimise international law. Finally, many

international legal scholars label as ‘principles’ moral values that international law is meant to serve and promote.²⁹

It is not difficult to notice that these various conceptions of ‘principle’ presuppose quite distinct normative functions. I suggest that in order to see what normative role solidarity performs in, or for, international law, we should take a step back to investigate what is special about legal normativity.

In the development of the ideas outlined in chapter 1, I suggest, based primarily on Joseph Raz and Scott Shapiro, that the special function of legal normativity lies in its bridging moral disagreements. Moral normativity (in its broadest meaning) is typically contentious in the sense that moral disagreements are pervasive and can hardly be resolved by argument or persuasion. The idea of solidarity is a good demonstration of this: while some people find it morally commendable or even obligatory to share resources in order to contribute to the common welfare, other people may find it more morally appropriate to maximise one’s individual wealth and security. Or, in the context of international law, some states may advance the agenda that accommodating refugees and helping them to assimilate is a morally right thing to do, while other states may claim that no such moral obligation exists and that there are more pressing priorities (such as preventing social volatility). It is not always or necessarily that some people are right and some are wrong, or that some states have morally apt policies while others do not.³⁰ In other words, at the level of morality, solidarity is not immune to contestations and often becomes a cause of genuine moral disagreements. The advancement which we introduce by creating legal rules on a matter, is that those moral disagreements no longer preclude us from having a general guidance. This is why instead of arguing that

²⁹ I give examples of each use of the concept of ‘principles of international law’ in the chapter.

³⁰ Of course, this would depend on the particular meta-ethical theory one adopts. For a moral realist, for instance, it *would* actually mean that some people are wrong in their moral beliefs or that some states have more morally apt policies than others. It would be less obvious for all sorts of moral anti-realists, especially for moral relativists. Neither here, nor in the respective chapter, however, do I endorse one or another meta-ethical theory.

solidarity is a principle of international law, we must push for a more robust normative pre-emption that makes appeals to it redundant.

The final chapter ‘The International Rule of Law and Unmediated Authority’ invites the reader to revisit the concept of the international rule of law from the perspective of the unmediated authority of international law analysed in the previous chapters. I argue that the unmediated authority of many legal norms in international law—in particular those of CIL and treaties—significantly affects how we should construct the ideal of the international rule of law.

I begin the chapter by showing that all the main theories of the rule of law developed by moral, political, and legal philosophy in the domestic context, rotate around similar concerns. How to ensure that a government’s use of coercion is justified and foreseeable? What are the safeguards against the abuse of power? How to make sure that officials do not use law as a tool of domination and oppression? All these questions are typically answered within the framework of opposition between so-called ‘formal’ and ‘substantive’ conceptions of the rule of law.

The discourse of the rule of law, either in its ‘formal’ or ‘substantive’ image, however, assumes the sort of legal authority that is necessarily hierarchical and institutional. The central concerns of the rule of law I have just outlined are only meaningful when there is a power discrepancy between officials and non-officials, which generates risks of abuses and oppression. For this reason, the direct transposition of the requirements of the rule of law into the international domain is typically unconvincing.

In the chapter I suggest that in order to grasp the meaning of the rule of law—both domestic and international—we have to ‘reverse engineer’ it. Stripped down of conceptual implications, the rule of law is reduced to the truistic idea that rules must be obeyed. But at the same time, it is not enough to just say that; for rules to be obeyed they must be capable of being obeyed. That is, they must be capable of securing that normative authority which enables their guiding function. Apart from straightforward conditions that contribute to rules’ normative authority—as that rules must be prospective, clear, and do not require the impossible—there are much more subtle

requirements that reflect the political context and societal structure of a given community. This, therefore, is the bottom line of the reverse engineering: the rule of law is a set of conditions that enable law's normative authority. But I suggest, however, that these conditions are not settled and fixed once and for all, or that they are the same for all possible instances of the law.

In the international context, it is often more important to ensure that as many states as possible commit to a legal rule or a legal regime, even when it comes as a matter of trade-offs. Formal and substantive requirements become blended together in an attempt to secure this commitment and the authority of a legal instrument or regime. That is, the logic of the international rule of law does not necessarily look like that of the domestic rule of law, where we move from 'thin' to 'thick', gradually expanding the list of requirements towards legal rules. In international law, the formal qualities of rules may often be sacrificed in favour of substantive values and principles that have a greater chance to secure international law's authority.

These five different, but interrelated perspectives on the authority of international law aim at discovering and discussing the peculiarities of international law that do not receive as much jurisprudential attention as they deserve. International law may happen to exhibit something about the legal philosophical concept of authority that domestic legal systems cannot. My thesis is about honing in on these exhibitions.

The ambition of this dissertation is to explore an important terrain in the conceptual analysis of international law, which occupies a peculiar position between various conversations about international law's legitimacy, validity, or legality. I try to show that in many ways our perception of these dimensions of international law are dependent on, and shaped by, how we think of its authority. In most cases, the philosophising about international law takes a normative perspective of when and how international legal rules and regimes promote particular values and principles, or how their content is legitimised, or how to ensure that they have an appropriate source-based

pedigree. I argue, however, that even before we commit to such inquiries we must have a descriptive account of how international law's authority manifests, and why it appears the way it does. That said, in this thesis, I am not trying to address some specific normative problems that international law has, such as its legitimacy crisis, or ineffectiveness, or slow adaption to the pressing needs generated by the dynamics of global cooperation. Rather, I try to explore various facets of the conceptual language through which we may meaningfully engage in conversation about the reasons and norms international law claims to generate.

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Chapter 1

Peaks and Valleys: The Standard Account of Authority and International Law¹

Introduction

‘The disintegration of the legal order is conducive to jeopardizing the authority of international law. Doubts could be raised as to whether international law will be able to achieve one of its primary objectives, dispute avoidance and the stabilization of international relations and, thus, achieve its genuine function of law.’² ‘The question of State responsibility for internationally wrongful acts [is] really a question of the authority of international law.’³ ‘The authority of international law and the obligations of duty bearers [...] cannot be replaced by more amorphous notions of protection, or by less obligatory notions of charitable action.’⁴ ‘These practices [...] undermine the authority

¹ This chapter is a significantly extended version of the following contribution: Kostiantyn Gorobets, ‘On Peaks and Valleys: Contemplating Authority of International Law’, in *Philosophical (De)Constructions of International Law*, ed. Pauline Westerman, Kostiantyn Gorobets, and Andreas Hadjigeorgiou (Cheltenham: Edward Elgar Publishing, forthcoming). I thank Ronald Pierik, Matthias Kumm, and Ingo Venzke for their feedback on the earlier drafts of this paper. I also thank all the participants of the Special Workshop ‘Philosophical Perspectives on International Law’, which was a part of the programme of the XXIX IVR World Congress (Lucerne, 7–12 July 2019), where a preliminary version of this paper was first presented. Alejandro Chehtman, Evan Fox-Decent, Matthias Brinkman, Theresa Squartio, Oisin Suttle, Monica Hakimi, Carmen Pavel, and Scott Shapiro helped me to sharpen many of the arguments I make here.

² ILC, ‘Report of the Working Group on Long-Term Programme of Work’ (25 July 2000) UN Doc ILC(LII)/WG/LT/L.1/Add.1, 35.

³ Statement by Mr. Butel (France), UNGA Sixth Committee (62nd Session) ‘Responsibility of States for internationally wrongful acts (*continued*)’ (23 October 2007) UN Doc A/C.6/62/SR.13, 3.

⁴ Statement by Ms. Kyung-wha Kang, UNSC, ‘Protection of civilians in armed conflict’ Verbatim Record (11 November 2009) UN Doc S/PV.6216, 8.

of international law and the rules of peaceful relations between States. They also create precedents that bring the international community back to the law of the jungle and the rule of “might is right”.⁵ ‘The authority of international law required that its abstract principles should be embodied in rules of such certainty, clarity and uniformity as was practicable.’⁶

These are just a handful from an endless list of examples in which states, UN bodies, international courts and tribunals, and also NGOs, human rights groups, etc., invoke the concept of the ‘authority of international law’. The importance of the ‘authority of international law’ gets stressed in the broadest variety of contexts, from peaceful settlement of disputes and illegality of the use of force to the effects of codification of international law, from securing human rights protection to ensuring compliance with judgments of international courts. There is little doubt that the idea that international law has or must have authority, or that it should be strengthened, is deeply rooted in the everyday vocabulary of international legal and political practice.

Yet jurisprudentially speaking, it is not all that clear what this ‘authority of international law’ refers to. Whose authority is it? Where does it come from, from which body or institution? Could it be that given its fragmented and non-hierarchical nature international law cannot be said to have authority at all, and so all this talk of the ‘authority of international law’ is just an example of a misnomer and a conceptual confusion?

In this chapter, I attempt to address these questions. They are not of merely conceptual significance. The way we think and speak about the authority of (international) law ultimately defines how we perceive the nature of the guidance it provides and how we engage with its rules. As was discussed at one of the ILC meetings,

⁵ Statement by Mr. Hamdoun (Iraq), UNGA Fifth Committee (51st Session) ‘General debate on all disarmament and international security agenda items (*continued*)’ (24 October 1996) UN Doc A/C.1/51/PV.13, 2.

⁶ Statement by Mr. Davin (New Zealand), UNGA Sixth Committee (13th Session) ‘Report of the International Law Commission on the work of its tenth session (A/3859) (*continued*)’ (5 November 1958) UN Doc A/C.6/SR.575, 122.

‘one of the main tasks of international lawyers and international society as a whole [is] to adapt international normativity to the changing reality in international relations [...]. It [is] important to [...] to enhance the authority of international law by reaching a more diversified, but at the same time harmonious, conception of international law.’⁷

The aim of this chapter is to approach the concept of the authority of international law from an analytical jurisprudential point of view. I wish to explore the degree to which standard philosophical conceptions of the authority of law can (or cannot) account for international law. I begin, in section 1, by laying down the groundworks and by discussing the duality of the concept of authority, which is often used to refer both to the functions of legal rules (what the law does for its subjects) and to formal institutions (where the law comes from). These two meanings of authority, which I call functional and institutional, are tightly intertwined and typically go hand in hand. In section 2, I break down the standard jurisprudential view of the nature of authority and show why it is that authority gets to refer to these two different phenomena at the same time. Section 3 brings in international law again, where I submit that its normative structure is such that the standard account of authority cannot coherently account for it. However, instead of casting international law’s authority aside as ‘a special case’, I propose to take it seriously and change the way we construct the concept of authority at the jurisprudential level. I suggest a way of doing so in the final section, where I advance a view that the authority of law may exist in a mediated or an unmediated form, and that if we acknowledge this, the authority of international law may no longer be as conceptually problematic.

This chapter is not about ‘fixing’ something about the way we think about international law. Rather, it is the other way around; I use international law to ‘fix’ something in our general ideas about the law and its authority. International law may

⁷ Statement by Mr. Lee, ILC, ‘Provisional summary record of the 3424th meeting’ (6 July 2018) UN Doc A/CN.4/SR.3424, 8.

provide us with insights that put us in the position of genealogical luck.⁸ It may help reveal some features of the law and fundamental legal concepts that remain hidden as long as we keep our focus on domestic legal systems; features that are buried under a thick layer of practices of many formal institutions and governmental bodies. International law may happen to exhibit something about the law that domestic legal systems may not.

1. The Dual Meaning of Authority

People casually treat legal rules as standards which they must obey and use for guidance. They thereby acknowledge that the law has a say, and often far more than just that, in their deciding what to do. It is therefore generally accepted that the function of the law is to guide behaviour, or, as Lon Fuller elegantly puts this, ‘law is the enterprise of subjecting human conduct to the governance of rules’.⁹ Guidance of conduct by means of rules, rather than in a conversational manner,¹⁰ implies a strong connection to the idea of authority in the sense that people are supposed to act as the rules prescribe. Rules have a certain authority over our actions, as it were; we do as they say, and when we do not, we face criticism. These basic intuitions result in the truism that ‘it is hard to think of a more banal statement one could make about the law than to say that it necessarily claims legal authority to govern conduct.’¹¹ This idea is often referred to as ‘the authority thesis’, and it maintains that it is an essential feature of the law that it claims or has legitimate authority,¹² simply because it logically follows from what functions the law

⁸ Here, I take the liberty of adopting Amia Srinivasan’s concept of genealogical luck, which she sees as reflecting ‘a power to reveal what we tacitly presume about ourselves in so far as we believe that our genealogically contingent beliefs are in fact knowledge.’ Amia Srinivasan, ‘Genealogy, Epistemology and Worldmaking’, *Proceedings of the Aristotelian Society* CXIX, no. 2 (2019): 135.

⁹ Lon L. Fuller, *The Morality of Law*, Rev. ed. (New Haven: Yale University Press, 1978), 106.

¹⁰ See, Frederick F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (New York: Oxford University Press, 1991), 52.

¹¹ Scott J. Shapiro, ‘On Hart’s Way Out’, *Legal Theory* 4, no. 4 (1998): 469.

¹² John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), 174; Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (New York: Oxford University Press, 2009), 30.

performs in regard to human conduct. However, even though this idea is straightforward and intuitively appealing, it is surrounded by many confusions.

Thus, one of the most intriguing features of the concept of the authority of law is that its use in jurisprudence is often marked by a peculiar duality. On the one hand, the idea of authority is used to explain the practical effect that the law claims to have; that is, it reflects convictions about what it takes for the law to affect the practical reasoning of its subjects. I refer to this meaning of authority as *functional* because it pertains to certain ideas about functions that the law performs in shaping people's practical deliberations as to what they should do. People pay taxes because the law tells them to do so. States refrain from using armed force because the law prohibits them from doing so, and when they don't, they advance justifications that must fit, one way or another, into the ambit of existing rules. The functional meaning of the authority of law is therefore about the ways in which the law shapes our conduct by indicating rights and obligations, but also by providing the language of justification and explanation of our actions.

Yet on the other hand, the idea of authority is used to explain how the law comes about and, more importantly, how we identify it. Here, authority is not so much about what law *does* vis-à-vis its subjects and their practical reasoning, but rather about *who makes, applies, and enforces* it. I call this meaning of authority *institutional* because here the idea of authority has a clear personified manifestation in various *authorities*, that is, formal institutions.¹³ This institutional image of authority assumes a very different language. It is no longer about the law guiding our actions and creating a network of justifications

¹³ By formal institution, I do not mean just any social institution, that is, as John Searle defines it, 'any system of constitutive rules of the form *X counts as Y in C*', John R. Searle, 'What Is an Institution?', *Journal of Institutional Economics* 1, no. 1 (2005): 10 (See also his *Construction of Social Reality* for a more detailed discussion on the structure of social institutions, especially chapter 2). Formal institutions are no doubt a species of social institutions generally, but what defines them is a presupposed agency, which I discuss below, in section 2. In this view, a formal institution is an office or an organ of a community, which acts with a certain intentionality. Thus, a parliament or a court can be said to have intentionality, whereas money and marriages cannot. From this, a parliament is a formal institution and money is not, even though they both are social institutions generally speaking.

and explanations. It is about various organs and officials who exercise their right to rule and whom people must obey. ‘State authorities demand that everyone wears a facemask in a public space.’ ‘Local authorities allowed the construction of a building outside my window.’ ‘The Security Council authorised the use of force against ISIS.’ All these and many similar expressions relate to the image of authority as manifesting in various governing structures. The institutional meaning of the authority of law is primarily about powers and their formal localisations, as well as about those who exercise these powers.

The standard jurisprudential view of the authority of law, which I analyse in this chapter, implies a deep intertwinement between these two meanings, where one cannot exist without the other. This intertwinement is nested deeply in analytical jurisprudence and is often equally visible in the ideas and writings of authors who may otherwise defend different views of the nature of law and its normativity.

For instance, Hans Kelsen claims that ‘authority is [...] originally the characteristic of a normative order’ because ‘only a normative order can be “sovereign”, that is to say, a supreme authority.’¹⁴ At the same time, in his discussion of authority, he focuses almost entirely on its personifications, such as the state.¹⁵ Even though Kelsen views law’s authority functionally and believes that this functional meaning is logically anterior, this does not significantly affect the primary importance of institutional authorities in his theory.¹⁶ After all, ‘the whole function of this basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act,’¹⁷ which in a way exhausts the functional authority of the law and gives way to the authority of formal institutions.

¹⁴ Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, MA: Harvard University Press, 1946), 383.

¹⁵ Kelsen, 124.

¹⁶ Joseph Raz correctly criticises him on this by saying that shifting the focus from the primary legislator to the primary norm is progress as compared to John Austin’s theory of law, but it does not change much from the point of view of how legal systems come about. Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of the Legal System*, 2nd ed. (Oxford: Oxford University Press, 1980), 105–9.

¹⁷ Kelsen, *General Theory*, 116.

Similarly, Joseph Raz recognises that it is possible to talk directly of the authority of law itself, and he thereby makes use of the functional meaning of authority: ‘the law has authority if the existence of a law requiring a certain action is a protected reason for performing that action.’¹⁸ Yet at the same time, throughout his writings he is consistent in arguing that what makes the law such a protected reason and secures its authority is the fact that it is issued or communicated by formal institutions.¹⁹

The law’s claim to authority is manifested by the fact that legal institutions are officially designated as ‘authorities’, by the fact that they regard themselves as having the right to impose obligations on their subjects, by their claim that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed.²⁰

This shift from the functional understanding of authority to its institutional understanding is typically subtle and seldom articulated. Often they are blended together and become almost inseparable. For instance, Scott Shapiro observes that ‘legal rules guide conduct [...] by serving as intermediaries between officials and nonofficials,’ and therefore ‘are able to inform people which actions have been designated as obligatory *in virtue of their bearing the mark of authority*.’²¹ The idea here is primarily that the reason why legal rules have authority over people’s conduct is because they originate from authorities. In such a way, the two meanings of authority can hardly be detached from one another. We use the law for guidance and as a justificatory device because it has authority, but this authority derives from the authority of those institutions and officials who make, apply, and enforce it.²² The circle is closed.

¹⁸ Raz, *Authority of Law*, 29.

¹⁹ Joseph Raz, ‘The Problem of Authority: Revisiting the Service Conception’, *Minnesota Law Review* 90 (2006): 1012.

²⁰ Joseph Raz, ‘Authority, Law and Morality’, *Monist* 68, no. 3 (1985): 300.

²¹ Scott J. Shapiro, ‘On Hart’s Way Out’, *Legal Theory* 4, no. 4 (1998): 491 (my italics).

²² See also Jules Coleman, for whom the existence of officials is the necessary ingredient for law making a practical difference: Jules L. Coleman, ‘Incorporationism, Conventionality, and the Practical Difference Thesis’, in *Hart’s Postscript: Essays on the Postscript to ‘The Concept of Law’*, ed. Jules L. Coleman (Oxford: Oxford University Press, 2001), 99–147.

This dual meaning of the concept of authority shapes its role in jurisprudential investigations. Authority, in the standard representation of the concept, is *both* what the law claims *and* where it comes from. This seems to be a logical mistake, since the authority of law figures as both *explanans* and *explanandum*. Seen as *explanans*, the authority of law relates to the behavioural consequences that the law produces. As *explanandum*, the authority of law is being treated from the perspective of how the law comes about, i.e., as a continuation of the will of formal institutions. The authority of law as *explanans* and as *explanandum*, however, are two different things and are not to be confused.²³ From this, the consideration of authority as *explanans*, i.e. law's ability to provide its subjects with reasons for action, cannot be equated with the consideration of authority as *explanandum*, i.e. that law comes about as a result of practical deliberations carried out by various formal institutions. Law's effect on practical reasoning is one thing. Its origin, be it linked to formal institutions or not, is another. It is a logical error, therefore, to assume, for instance, that just because international law's creation and enforcement depends on the existence of institutional authorities—that is, states—it cannot have the normative authority to guide the conduct of those very institutional authorities.²⁴

That is, we can either use the concept of authority to elaborate on how the law is being made and in whose practices we ground it, or, we can use it to provide an explanation of how the law manifests normatively, that is, how it provides people with reasons for action. The distinction between these two methodological perspectives on the authority of (international) law is critical for the inquiry I undertake here. As I show in the next section, however, there is an explanation as to why authority is typically taken as both *explanans* and *explanandum*, which also reflects the functional/institutional duality of this concept. The standard picture of authority used in the analytical tradition of

²³ Anne van Aaken, 'To Do Away with International Law? Some Limits to "The Limits of International Law"', *European Journal of International Law* 17, no. 1 (2006): 292.

²⁴ This argument has traditionally been associated with political realism and corresponding theories of international law. For an excellent overview of these theories and how they fail to explain the authority of international law, see Carmen E. Pavel, *Law beyond the State: Dynamic Coordination, State Consent, and Binding International Law* (New York: Oxford University Press, 2021), 58–85.

jurisprudence is deeply rooted in how the law functions in domestic legal systems. This links the idea of authority to normative powers exercised by the variety of formal institutions (courts, legislature, governmental agencies, etc.). Most jurisprudential representations of the concept of authority, therefore, have an explicit institutional focus, which becomes problematic when it comes to less institutionalised legal orders, such as international law. Consequently, there appears to be a discrepancy between the presumably universal epistemic validity of the authority thesis, which says that claiming authority is a necessary feature of any legal order, and the common jurisprudential explanation of authority as spotlighting primarily features of domestic legal systems.

2. The Three Theses

The duality of authority outlined in the previous section has deep roots in analytical jurisprudence. In this section, I sketch out what I call ‘the standard jurisprudential account of authority’,²⁵ in which the interplay between the institutional and functional meanings of authority is linked to the idea that there cannot be one without the other.²⁶ I suggest that this standard account can be reduced to three basic theses:

²⁵ By the standard account, I do not mean any particular conception of political and legal authority, as this might appear to look as if I am attacking a straw man. To avoid this impression, I draw mostly on Joseph Raz, as his conception is widely recognised as offering the most convincing philosophical and jurisprudential explanation of authority. The service conception of authority is a common point of reference also because it sets the most complete view of political and legal authority. Yet, it is not the service conception of authority that I wish to outline or critique here. Rather, I focus on the general mindset about authority in general and legal authority in particular, which underlies, among others, Joseph Raz’s account. This does not mean to say that I disagree with every aspect of the standard account. As I show in section 4, some of its building blocks are essential for our understanding of authority, for instance, the idea of pre-emption. What I try to achieve, however, is the decoupling of such fruitful ideas from the general framework that is hardly applicable to international law.

²⁶ My approach here may sound similar to Mark Greenberg’s ‘standard picture’ of law, which represents a conviction that ‘it is uncontroversial that law is created by people—more precisely, that the content of the law is in part the result of the actions, decisions, and utterances of people. Paradigmatically, the relevant actions include the enactment of statutes and regulations and the decision of litigated cases.’ Mark Greenberg, ‘The Standard Picture and Its Discontents’, in *Oxford Studies in Philosophy of Law*, ed. Leslie Green and Brian Leiter, vol. 1 (Oxford: Oxford University Press, 2011), 40–41. However, my ‘standard account of authority’ and its criticism do not have much to do with his ‘standard picture’ and its criticism. Although I do share some of the critique of legal positivism advanced by Mark Greenberg (especially when it comes

- the identity thesis, which says that formal institutions are essential for law's identity;
- the agency thesis, which says that authority is always *somebody* and therefore rules can be at best authoritative, but cannot have an authority of their own; and
- the hierarchy thesis, which says that the relations pertaining to authority require a functional distinction between the rulers and the ruled.

The identity thesis

It is one of cornerstones of the positivistic tradition of jurisprudence that a certain institutional source (a sovereign, 'the Queen in parliament', courts, or government at large) is essential for the identity of the law. In other words, what makes the law the thing that it is, is partly that it originates in the utterances and practices of certain institutions. As Joseph Raz says, 'the justification for treating laws as valid derives from the authority of their makers.'²⁷ This 'input-validity'²⁸ links to the idea that it is the normal way of identifying the law when we trace it back to its origin. Of course, the idea that law must have an institutional source is a part of legal positivism's stance against natural law, and hence Thomas Hobbes's famous aphorism that 'It is not Wisdom, but Authority that makes a Law'.²⁹ But it has another implication, which reaches far beyond the positivism/natural law debate. That law must have an authoritative institutional source means, naturally, that we cannot count as law those norms which do not have a link to

to customary law), I do not endorse his overall anti-positivistic stance. As noted in the introduction, I share the basic premises of legal positivism but try to modify them in order to account for certain institutional peculiarities of international law. I do think that law is created by people, but I try to broaden the scope of what 'created' means here, since it typically entails some sort of intentional act of will. It seems to me that existing responses to Mark Greenberg's critique are still very much grounded in domestic legal and political practices, and so offer little assistance to my endeavour here. See, Hasan Dindjer, 'The New Legal Anti-Positivism', *Legal Theory* 26, no. 3 (2020): 181–213; Jeffrey Goldsworthy, 'The Real Standard Picture, and How Facts Make It Law: A Response to Mark Greenberg', *American Journal of Jurisprudence* 64, no. 2 (2019): 163–211.

²⁷ Joseph Raz, 'Why Interpret?', *Ratio Juris* 9, no. 4 (1996): 359

²⁸ I owe the term to Pauline Westerman who offers an important discussion of the threefold nature of legal validity in her 'Validity: Reputation of Rules', in *Legal Validity and Soft Law*, ed. Pauline Westerman et al. (New York: Springer, 2018), 165–82.

²⁹ Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, ed. Joseph Cropsey (Chicago: University of Chicago Press, 1997), 55.

such an institutional source. The institutional source is used as the most basic test that allows to tell law from non-law. Consequently, for there to be law, there must also be authoritative institutions, such as courts. ‘It is widely agreed,’ according to Joseph Raz, ‘that a system of norms *is not a legal system unless it sets up adjudicative institutions.*’³⁰

The standard account of authority, therefore, revolves not only around a certain meaning of the concept of authority as such, but also around a particular interpretation of the nature of law. Only those rules of behaviour that either come from, or are recognised by, formal institutions, can have the authority of law. Particular laws, then, are products, or mandates of authorities,³¹ in a sense that they are being produced, communicated, enforced, etc., by formal institutions (courts being the most basic of them). In a nutshell, ‘recognition by law-applying organs [is] a necessary condition of the existence of laws.’³²

This view has always been problematic, however, when it comes to customary law—a theme that will be explored later in this chapter. If it is necessary for law to bear the mark of authority, for instance through official recognition by courts, customary rules cannot be labelled as law until courts turn them into law. Joseph Raz once again offers a concise summary of this idea when he claims that:

Even legal custom is not law until is recognized and declared to be law by the courts. Efficacy, therefore, does not affect validity and existence of laws. To claim otherwise is to confuse law with social customs and to disregard *the basic fact about the law – that it is created by institutions.*³³

An important caveat is necessary here. I am not saying that according to the standard view all law emanates historically from formal institutions and I therefore do not imply that the standard account endorses what Scott Shapiro calls ‘the chicken principle’ in

³⁰ Raz, *Authority of Law*, 43 (my italics).

³¹ Larry Alexander, ‘Law and Exclusionary Reasons’, *Philosophical Topics* 18, no. 1 (1990): 6.

³² Raz, *Authority of Law*, 87.

³³ Raz, 87 (my italics).

the opposition to ‘the egg principle’.³⁴ Rather, I suggest that within the standard account of authority, law is always assumed to have (a connection to) formal institutions. This need not be a connection in the form of an origin, but may also be recognition or enforcement. Regardless of what we put first, law or formal institutions, the argument goes, we need to have both. That is, the functional authority of the law can only be meaningful if there are authorities that allow identifying the law to begin with—the idea known as ‘the institutional pedigree’. This, according to Brian Tamanaha, is one of the key reasons why most of the standard versions of legal positivism are under-inclusive;³⁵ by putting the necessary connection that must exist between law and formal institutions in the centre of jurisprudence, modern legal positivism cuts off many forms of law that exist without such connection.³⁶

In the standard account of authority, therefore, it takes two to tango, and without institutional authorities there can be no law that could claim the functional authority to guide conduct. Scott Shapiro advances an idea that only with the introduction of offices and formal institutions does law come into being, because the whole point in having law is to overcome deficiencies of simpler non-legal forms of social planning. These deficiencies, according to him, can only be overcome with the establishment of authorities that carry out planning and decision-making activities. Institutionalisation, then, is a necessary step in the making of legal systems. Unless this step is made, we can only speak of ‘circumstances of legality’, but not yet of law. ‘The circumstances of legality obtain whenever a community has numerous and serious moral problems whose

³⁴ Scott Shapiro uses the chicken-egg paradox to demonstrate the basic structure of the jurisprudential argument about the origin of law. The chicken principle implies that certain institutions precede legal rules and therefore create them as such. The egg principle states the opposite: legal rules precede institutions and establish them. See Shapiro, ‘On Hart’s Way Out’, 469–72, Scott J. Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011), 36–42.

³⁵ Brian Z. Tamanaha, *A Realistic Theory of Law* (Cambridge: Cambridge University Press, 2017), 46–47.

³⁶ I show further in the chapter that customary (international) law generally falls within this category, but there are also other examples, like, for instance, many forms of the soft law.

solutions are complex, contentious, or arbitrary,³⁷ but this only means there is a *potential* for law, not yet *actual* law.

I call this idea about law's authority *the identity thesis*, therefore, not only because it stands for a conception that law's claim to authority requires mediation by formal institutions and because these provide the institutional pedigree of legality. It is the *identity* thesis also because it *identifies* the functional meaning of authority with its institutional meaning; that law has authority is just an implication of the fact that it comes from an authoritative source.

The agency thesis

The identity thesis has several important consequences. Most importantly, it reflects the explicit institutional focus of the standard view of authority. It assumes that authority is a *position*, a *role*, or a *status* occupied or acquired by a person or a formal institution in relation to some other persons or institutions. In other words, authority is necessarily a position of *somebody*.³⁸ Such a reading of authority is commonly exemplified by parents being practical authorities in regard to their children, a military officer being an authority for the soldiers under her command, governmental institutions claiming authority over people in a certain jurisdiction, etc. This dictates the agenda for philosophical and jurisprudential theories of authority, which, according to Joseph Raz, deal with 'the problem of the possible justification of subjecting *one's will to that of another*, and of the normative standing of demands to do so.'³⁹ I call this idea about the nature of authority *the agency thesis*, and according to this authority requires an agent, be that a natural or a legal person.

³⁷ Shapiro, *Legality*, 170.

³⁸ See, for some of the most persuasive treatments of the idea, Stephen Darwall, 'Authority and Reasons: Exclusionary and Second-Personal', *Ethics* 120, no. 2 (2010): 257–78; Scott Hershovitz, 'The Role of Authority', *Philosophers' Imprint* 11, no. 7 (2011): 1–19.

³⁹ Raz, 'Problem of Authority', 1003 (my italics).

As far as *legal* authority is concerned, it is appealing, in a combination of the identity thesis and the agency thesis, to associate law with different sorts of formal institutions. It suggests a perspective in which law exists ‘as a kind of firm whose subdivisions include legislatures, administrative agencies, courts, and police departments.’⁴⁰ We often refer to these as ‘public authorities’, which include organs that carry out certain functions in a community’s public life and particular individuals who comprise those organs and thereby have a special formal status—officials.

The idea that law claims authority, it follows from this view, is but a euphemism for what public authorities do and how they position themselves in regard to their fellow citizens. It is formal institutions and officials which constitute a legal system who claim authority on behalf and by means of the law. Expressions like ‘the law says this and that’, ‘law prescribes such and such conduct’, and so on, are therefore mere figures of speech, metaphors. From this perspective, when one says that the law claims the authority to govern conduct, what one *truly* means is that legal officials and formal institutions claim the authority to govern that conduct.⁴¹ Nicole Roughan gives this idea the most explicit formulation when she maintains that the idea that the law claims authority ‘is not some mysterious anthropomorphic suggestion, but rather shorthand for saying that legal officials, in their capacity as legal officials, make moral claims on behalf of the law.’⁴²

This view is based on the premise that the law as such cannot *claim* or *say* anything. As a normative order, law is not personified and therefore cannot ‘speak’ for itself. Kenneth Himma, for instance, argues that when we say that legal systems necessarily claim authority, we inevitably assume a certain metaphysical fiction. ‘Non-propositional

⁴⁰ Shapiro, *Legality*, 6.

⁴¹ Andrei Marmor writes: ‘According to an institutional conception of authorities, the subjects’ obligation to comply with a legitimate authority’s directive is not owed to the authority in question. If the obligation is owed to anyone, most plausibly it would be owed to the members of the practice or institution *on whose behalf the authority operates*.’ Andrei Marmor, ‘An Institutional Conception of Authority’, *Philosophy & Public Affairs* 39, no. 3 (2011): 256.

⁴² Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (New York: Oxford University Press, 2013), 152.

abstract objects like legal systems are not claim-making entities in *any* strict metaphysical sense,’ but ‘we often attribute claims to entities that are not, strictly speaking, capable of making claims.’⁴³ This metaphysical fiction entails that we attribute claims made by, for instance, corporate officials to the corporation itself, or those made by legal officials to the legal system of which they are officials. Yet it is clear, according to Kenneth Himma, that neither corporations nor legal systems have metaphysical and moral agency to make claims.

John Gardner expresses a related consideration when he observes that ‘law makes claims only insofar as law-applying officials make those very same claims at the very same time and place. The claims of law are identical to certain claims of its officials.’⁴⁴ He does not say, however, that law as such is incapable of making claims, since ‘one cannot explain the nature of the action performed by the official without ascribing agency (albeit not autonomous agency) to law itself.’⁴⁵ And yet the general idea remains the same: we can only intelligibly speak of law’s claim to authority when this claim is accompanied by, or expressed through, an identical claim by legal officials.⁴⁶

George Christie maintains, in a similar manner, that law always requires authorities to make claims: ‘expressions like “the rule of law”, especially when applied to the international legal order [,] [...] seem to suggest that law is impersonal, that it can be divorced from human agencies.’ He further stresses that such attempts to de-personify the law and to uncouple it from institutional authorities are nothing else but ‘cases of rhetorical abuse’ used as a cloak to disguise the brutality of force in international relations.⁴⁷

⁴³ Kenneth E. Himma, ‘Law’s Claim of Legitimate Authority’, in *Hart’s Postscript: Essays on the Postscript to ‘The Concept of Law’*, ed. Jules L. Coleman (New York: Oxford University Press, 2001), 279.

⁴⁴ John Gardner, ‘How Law Claims, What Law Claims’, in *Institutionalized Reason: The Jurisprudence of Robert Alexy*, ed. Matthias Klatt (Oxford: Oxford University Press, 2012), 33.

⁴⁵ Gardner, 33.

⁴⁶ See, for a similar take: Neil MacCormick, ‘Why Law Makes No Claims’, in *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, ed. George Pavlakos and Robert Alexy (Oxford: Hart Publishing, 2007), 59–68.

⁴⁷ George C. Christie, *Law, Norms, and Authority* (London: Duckworth, 1982), 139.

Such a conviction is once again based on the idea that authority is always a personified status or a role. This view, it seems, links up to the idea of accountability. Authorities must be accountable for what they say or do, and hence authority necessarily implies moral agency.⁴⁸ The link of accountability is, according to Stephen Darwall, what grounds the normativity of the relations of authority. He makes it his central idea that moral obligations are demands which agents ‘are mutually accountable for complying [with]’.⁴⁹ This mutual accountability is precisely what defines people’s competence ‘[to] have authority as equal members of the moral community.’⁵⁰ In other words, our moral agency, which enables us to demand that others comply with their obligations, is what ultimately grounds any authority to make those very demands. Where there is no moral agency, there can be no authority. From this view, the law, as a normative system, may claim authority only insofar as there is an agent empowered to express this claim. Law, therefore, cannot have authority; it can only *authorise*.

My argument is not, however, that law somehow magically exists without people. It is obvious that law is a human invention and so its existence and function depend on people using it. I merely point out that the standard account of authority assumes that the claims of law and the content of those claims are always reducible to claims of officials and formal institutions.⁵¹

The hierarchy thesis

The combination of the identity thesis and the agency thesis imply a kind of hierarchical relationship between authorities and legal subjects. The authority of the law is expressed

⁴⁸ Christin Korsgaard offers an illuminating Kantian account of this conception of moral authority we have over ourselves in her *The Sources of Normativity*, ed. Onora O’Neill (Cambridge: Cambridge University Press, 1996), 100–107.

⁴⁹ Stephen L. Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2006), 101.

⁵⁰ Stephen Darwall, ‘Authority and Second-Personal Reasons for Acting’, in *Reasons for Action*, ed. David Sobel and Steven Wall (Cambridge: Cambridge University Press, 2009), 145.

⁵¹ As I show in chapter 3, the content of legal norms cannot always be reconstructed in terms of the intentions of their authors, even when these intentions are clear and known. Law’s authority and its normative claim is not the same as claims of formal authorities, as I discuss further in this chapter.

through the claims of law's officials and thus implies a necessary manifestation in formal institutions. This means that authority in general, and legal authority in particular, is a species of normative power.⁵² To have authority means to be in a normative position to change reasons that apply to someone: 'Authority is [...] a triadic social relation among a *superior*, a *subject*, and a range of action.'⁵³ Therefore, wherever there is authority, there are always hierarchical relations.⁵⁴ As Joseph Raz points out, 'my explanation of authority is an attempt to explain authority *over* people of the kind that governments claim to have *over* their subjects, parents *over* their children, and so on.'⁵⁵ Hence the last piece in the standard account of authority: *the hierarchy thesis*.

The mere language of authority seems to suggest a hierarchy; to accept this language means to use 'words with hierarchical or mandatory connotations such as subject, superior, subordinate, preside over, govern, orders, commands, and punishment.'⁵⁶ To have authority, or to be in a position of authority, means to be hierarchically superior; to accept someone's authority means to subject oneself to that someone's judgment.⁵⁷ There seems to be no escape from this connotation of authority; whenever we speak of it we imply some degree of formal inequality embedded in different roles and functions.

⁵² Raz, *Authority of Law*, 18–19.

⁵³ Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1990), 42 (my italics).

⁵⁴ Remarkably, the hierarchical reading of authority is also characteristic of the conceptions of the law which are not hierarchical in themselves. In such cases, the image of the law is getting explicitly juxtaposed to the hierarchical image of authority. See, for instance, Hannah Arendt, 'What Is Authority?', in *Between Past and Future: Six Exercises in Political Thought* (London: Faber and Faber, 1961), 93; Lon L. Fuller, *Anatomy of the Law* (New York: Frederick A. Praeger, Pbl, 1968), 20–21; Gerald J. Postema, 'Implicit Law', *Law and Philosophy* 13, no. 3 (1994): 386.

⁵⁵ Joseph Raz, 'On Respect, Authority, and Neutrality: A Response', *Ethics* 120, no. 2 (2010): 290 (my italics).

⁵⁶ Noam Gur, *Legal Directives and Practical Reasons* (Oxford: Oxford University Press, 2018), 82–83.

⁵⁷ Walter Miller offers a remarkable overview of the ways in which the equation of authority with altitude is firmly built into the European linguistic system and manner of thinking. Starting with terms such as *superior*, *inferior*, *superordinate*, *subordinate* and so on, and ending with expressions that imply a vertical scale along which a personal position may slide (we move "to the top," but "fall in someone's eyes;" we have a "career ladder," but we also have "the bottom of society") —all these are deeply embedded in our fashion of perceiving the world. See, for more examples: Walter B. Miller, 'Two Concepts of Authority', *American Anthropologist* 57, no. 2 (1955): 271–89.

This hierarchical shadow of authority is most visible when authority is discussed in one of its most popular contexts—the right to rule. The idea that authority means the right to rule, and that this is what separates authority from sheer power or influence, is widely shared both in legal and in political philosophy.⁵⁸ The mere concept of the right to rule, however, logically implies the division between the ruler(s) and the ruled, and authority, from this perspective, is a kind of formal hierarchy which is subjected to various justificatory and legitimating techniques. Hence Joseph Raz’s idea of the ‘normal justification thesis’, that authorities are legitimate insofar as they enable their subjects to better comply with reasons that apply to them.⁵⁹

These three ideas about the nature of the authority of law—the identity thesis, the agency thesis, and the hierarchy thesis—comprise the standard jurisprudential account of authority. Law claims and has authority only inasmuch as it originates from authorities, which fits neatly into the three-theses scheme. This scheme depicts legal systems as having a self-reinforcing structure, in which formal institutions claim the authority on behalf of the law since it is according to the law that they have this authority to begin with. Therefore, the functional meaning of the authority of law as related to its capacity to guide conduct gets looped back to, or even substituted by, its institutional meaning. This is especially visible in the fact that in most writings on legal authority the concepts of ‘legal rules’ or ‘legal norms’ are treated as ‘legal directives’.⁶⁰ ‘Legal directive’

⁵⁸ Samantha Besson, ‘The Authority of International Law – Lifting the State Veil’, *Sydney Law Review* 31 (2008): 344; Alan Brundar, ‘The Evolution of Authority’, in *Legal Authority beyond the State*, ed. Patrick Capps and Henrik Palmer Olsen (Cambridge: Cambridge University Press, 2018), 20; Richard Dagger, ‘Authority, Legitimacy, and the Obligation to Obey the Law’, *Legal Theory* 24, no. 2 (2018): 77–102; Raz, ‘The Problem of Authority’, 1012; Scott J. Shapiro, ‘Authority’, in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules L. Coleman, Kenneth E. Himma, and Scott J. Shapiro (Oxford: Oxford University Press, 2004), 394; John Tasioulas, ‘The Legitimacy of International Law’, in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 126.

⁵⁹ Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 53.

⁶⁰ E.g., Raz, *Morality of Freedom*, 48–53; Gur, *Legal Directives*; Shapiro, ‘Authority’. The majority of works on authority I have so far cited use the language of directives as an umbrella notion for authoritative pronouncements. This may have to do with a broader conception of norms as species of commands that is deeply imbedded in the Judeo-Christian philosophical tradition, where the domain of the normative is intrinsically linked to the idea of commandments. This observation is investigated in Sylvie Delacroix, *Legal Norms and Normativity: An Essay in Genealogy* (Oxford: Hart, 2006), ix–xxi.

fits much better into the threefold standard scheme of authority, since directives as such do not exist without a ‘director’, and have hierarchical connotations. The functional dimension of ‘legal directives’ is contingent on their origin. As a result, even though two meanings of authority may be analytically differentiated, they are often presented as meaningful only when taken together. They get layered on one another as different coloured glasses, as it were, which produce a mixed image of authority.

This representation is, generally speaking, justified in the context of domestic legal systems, where formal institutions and officials typically mediate (in the form of creation, application, enforcement, etc.) between the entire corpus of legal rules and ordinary citizens. It makes the gap between the two meanings of authority almost insignificant, since claims of law nearly always overlap with corresponding claims of legal officials. Hence, the common jurisprudential strategy is to convert the discourse of authority of law into the discourse of legal authorities, thus shifting from the functional understanding of authority to its institutional understanding.

3. Peaks and Valleys: Introducing the Basic Distinction

The image of the authority of law assumed by the standard account is quite straightforward. Whenever we encounter legal authority, we must see some sort of hierarchical relations, in which a person or a formal institution in a position of authority exercises normative powers over other persons, and the general practice of such an exercise, together with its result, constitutes the law. There is nothing specifically wrong with this image, when it comes to domestic legal systems and how they function. Various theories of authority used in political philosophy and jurisprudence appeared exactly as attempts to contemplate the power hierarchies that form the backbone of political communities and legal systems. This is why most contemporary theories of authority focus on finding ways in which these hierarchies can be justified or critiqued.

In this section, however, I point out certain important limitations of the standard account and its tenets, specifically when it comes to international law. I show that we

cannot coherently explain the authority of international law unless we critically reassess the theses described above. One important caveat is critical here. I do not share the conviction, which is quite common in general jurisprudence, that international law is not an appropriate test case for jurisprudential theories. It is common to label international law ‘a borderline case’, and to conclude that ‘when faced with borderline cases it is best to admit their problematic credentials, to enumerate their similarities and dissimilarities to the typical cases, and leave it at that.’⁶¹ Even if we accept that international law is a borderline case (which is not at all given), it should not be dismissed on these grounds. On the contrary, I am convinced that any general jurisprudential conception, in order to be truly *general*, must account for the realities of international law.

It is a common perspective of international law that it is a ‘horizontal’ legal order. The doctrine of sovereign equality implies that states are entitled to equal rights and obligations under international law and therefore no formal hierarchy⁶² among them can be assumed.⁶³ This doctrine manifests, among other things, in the principle *par in parem non habet imperium*, which serves the basis of state immunity and implies that states cannot exercise their jurisdiction over each other.⁶⁴ The very idea of international law is that its authority over sovereign states does not assume institutional supremacy or formal

⁶¹ Raz, *Practical Reasons and Norms*, 150.

⁶² I speak only of formal hierarchy here because there can be other forms of hierarchy in international relations that are by and large irrelevant for conceptualisations of authority. That is, not every hierarchy is necessarily an instance of authority. Some authors suggest, however, that formal equality in law is but an implication and extension of political hegemonic hierarchies that manifest beyond the law, e.g., David A. Lake, ‘Escape from the State of Nature: Authority and Hierarchy in World Politics’, *International Security* 32, no. 1 (2007): 47–79. It is, of course, true, that also in domestic legal order formal equality before the law in no way precludes possible hierarchies—formal or informal—that may have an impact on the shaping of the authority of law. Therefore, this observation, although relevant, does not defeat the point I am making here.

⁶³ Jutta Brunnée and Stephen Toope make an even stronger claim and insist that the horizontal nature of international law must mean something for how we picture the concept of law generally, and therefore ‘Law does not depend on hierarchy between law-givers and subjects, but on reciprocity between all participants in the enterprise’. Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law* (New York: Cambridge University Press, 2010), 7. See, for a similar point: Terry Nardin, ‘Justice and Authority in the Global Order’, *Review of International Studies* 37, no. 5 (2011): 2059–72.

⁶⁴ See, e.g., *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits) (2012) ICJ Reports, paras 53–57.

hierarchy.⁶⁵ This essentially entails that international law possesses neither legislature nor executive, and its judiciary hardly resembles domestic court systems. Not only do international courts not have hierarchical relations between each other, when, e.g., one court can review the decisions of another,⁶⁶ but each court also has its own, often quite specific and narrow, material jurisdiction. Apart from that, international courts operate on the basis of the principle of consent, that is, one state may only bring a case against another state when both have agreed to this.⁶⁷ Moreover, the erection of international courts and tribunals is a relatively recent development, and throughout most of its history international law existed without permanent dispute settlement mechanisms at all.⁶⁸

The metaphor of horizontality, therefore, depicts international law as supposedly having a flat landscape, in contrast to domestic law, where officials and formal institutions embody the very idea of hierarchical relations. This idea is typically employed to emphasise that the lack of institutional authority is what marks relations

⁶⁵ This point was particularly stressed in relation to the authority of international law during the discussions on the principles of international law concerning friendly relations and cooperation among states: ‘To recognize the authority of principles of international law by postulating respect for the independence and sovereignty of States, for equal rights and for the principle of non-intervention in matters within the domestic jurisdiction of any State, was tantamount to recognizing that there could be no conflict between the individual interests of States and the interests of international relations as a whole. The rule of law in international life was therefore perfectly compatible with the sovereign position of States in their mutual dealings, and there was no need to resort to such concepts as the “supremacy” of international law to uphold the authority of the law.’ UNGA Sixth Committee, *Consideration of principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations: report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States*, 22nd Sess, UN Doc A/C.6/SR.999 (16 November 1967) 53.

⁶⁶ Although such findings were made in the context of debates around the fragmentation of international law. Some scholars put forward the idea that the International Court of Justice may be granted a hierarchical position and powers to ‘review’ decisions of other international courts and tribunals in order to preserve a harmonious and coherent development of international law as a system. See, e.g., Christian Leathley, ‘An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?’, *New York University Journal of Law and Politics* 40, no. 1 (2007): 259–306. This idea, however, has found little support.

⁶⁷ In chapter 2, I show how this affects the discourse about international courts’ legitimate authority.

⁶⁸ This is why up to the beginning of the 20th century war was the ultimate dispute-resolution instrument. As nicely put by Oona Hathaway and Scott Shapiro in their reflections on Hugo Grotius, ‘war is a substitute for courts [...] because courts are the original substitutes for war.’ Oona Anne Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017), 11.

between states.⁶⁹ Kenneth Waltz, for example, believed that ‘national politics is the realm of authority, of administration, and of law. International politics is the realm of power, of struggle, and of accommodation.’⁷⁰ Ian Hurd thinks that it is only now that international law has moved into the ‘after anarchy’ stage, because of the erection of international organisations. Before that, international law existed in no-authority conditions.⁷¹ But, as with many other metaphors, the idea of horizontality simplifies things just a little too much. Today, international law is no longer as flat and ‘horizontal’ as it used to be.

The active institutionalisation of international law makes the standard account of authority as represented in the previous section widely applicable in international legal scholarship. We can see it used in the contexts of the European Union institutions;⁷² international courts and tribunals;⁷³ international organisations and their bodies;⁷⁴ not to mention various informal or ‘liquid’ forms of global governance and global authority.⁷⁵ At the same time, the institutional domain of authority in international law

⁶⁹ See, e.g., David Armitage, *Foundations of Modern International Thought* (New York: Cambridge University Press, 2013), 4. Henrik Enroth writes in his overview of how the concept of authority got transnationalised: ‘When the term “authority” first occurs in the discourse on global governance in the early 1990s it signals not the presence but the *absence* of authority on a global scale, in keeping with earlier usage in international relations theory and in accordance with the differential logic of sovereignty governing that usage: insofar as authority is present in the nation-state, it is absent from the international arena defined formally as the anarchic sum total of the sovereign nation-states that compose it.’ Henrik Enroth, ‘The Concept of Authority Transnationalised’, *Transnational Legal Theory* 4, no. 3 (2013): 345.

⁷⁰ Kenneth N. Waltz, *Theory of International Politics* (Reading: Addison Wesley, 1979), 113.

⁷¹ Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council*, 3rd ed. (Princeton: Princeton University Press, 2008), 60–64.

⁷² Justin Lindeboom, ‘Why EU Law Claims Supremacy’, *Oxford Journal of Legal Studies* 38, no. 2 (2018): 328–56.

⁷³ Armin von Bogdandy and Ingo Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification’, *European Journal of International Law* 23, no. 1 (2012): 7–41; Nienke Grossman, ‘Legitimacy and International Adjudicative Bodies’, *George Washington International Law Review* 41, no. 1 (2009): 107–80; Andrei Marmor, ‘Authority of International Courts: Scope, Power, and Legitimacy’, in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (Oxford: Oxford University Press, 2018), 374–81.

⁷⁴ Armin von Bogdandy, ‘General Principles of International Public Authority: Sketching a Research Field’, *German Law Journal* 9, no. 11 (2008): 1909–39.

⁷⁵ Armin von Bogdandy, Matthias Goldmann, and Ingo Venzke, ‘From Public International to International Public Law: Translating World Public Opinion into International Public Authority’, *European Journal of International Law* 28, no. 1 (2017): 115–45; Nico Krisch, ‘Authority, Solid and Liquid, in Postnational

is not limited to frameworks in which legally binding norms are developed. As stressed by Fuad Zarbiyev, ‘authority experiences in international law are a much more complex phenomenon that cannot be reduced to the power to compel through binding decisions’ because it relates not only to the creation of norms, but also ‘to determin[ation of] the content of international law on a particular point and state where international law stands on that point.’⁷⁶ Even then, however, the standard account holds, because ‘an authoritative utterance determines behaviour not because of a threat of sanction (or a promise of a reward), or through persuasion, but because it emanates from a particular person.’⁷⁷

The standard view of the authority of law as necessarily implying a mediation by formal institutions is used at a broader conceptual level as well. For instance, John Tasioulas defends the view that even in the international domain authority implies the right to rule.⁷⁸ Samantha Besson occupies a similar position, though places a particular emphasis on the democratic underpinnings of the authority of international law.⁷⁹ By saying that the authority of international law means the right to rule, however, one inevitably shifts the focus from the functional meaning of authority to its institutional meaning and the power relations associated with it.⁸⁰ As a result, the authority of international law gets translated into the sum of international public authorities.⁸¹ All in all, as Joseph Raz recently stated, ‘while not assuming that all international bodies enjoy

Governance’, in *Authority in Transnational Legal Theory: Theorising across Disciplines*, ed. Roger Cotterrell and Maksymilian Del Mar (Cheltenham: Edward Elgar Publishing, 2016), 25–48.

⁷⁶ Fuad Zarbiyev, ‘Saying Credibly What the Law Is: On Marks of Authority in International Law’, *Journal of International Dispute Settlement* 9, no. 2 (2018): 293.

⁷⁷ Zarbiyev, 294–95.

⁷⁸ Tasioulas, ‘Legitimacy of International Law’.

⁷⁹ Besson, ‘Authority of International Law’, 344.

⁸⁰ As Richard Collins notes, however, and I subscribe to his view, the proliferation of formal institutions does not in itself or automatically means the relations of authority known in the domestic context: ‘The political relations between states and the institutions they create may have elements of functional hierarchy and even exhibit elements of “governance”, broadly defined, but they are still arguably different in kind and not just degree (of centralisation) to the political relations pertaining between state and citizen within the sovereign state.’ Richard Collins, ‘No Longer at the Vanishing Point? International Law and the Analytical Tradition in Jurisprudence’, *Jurisprudence* 5, no. 2 (2014): 296.

⁸¹ Roughan, *Authorities*, 28.

legitimate authority, I was assuming that international bodies can enjoy such authority. My account of authority applies to them as well.⁸² Similarly, Nicole Roughan, though not applying Raz's theory directly, shares the mindset of the standard account when she says that 'by "public" authority, I mean to capture the authority of governing bodies/institutions, including both legal and political institutions, and across state and non-/supra-/intra-/inter-state locations.'⁸³ This view quite naturally implies that we can regard all sorts of formal institutions, not just those operating domestically, as falling into the same category.

The existence of public authorities in international law equally assumes the existence of officials, whose status is a necessary consequence of formal institutions. David Lefkowitz places a particular emphasis on international legal officials as those who can possess or claim legitimate authority on behalf of international law:

International legal officials attempt to exercise authority by issuing general rules or specific decisions that are intended to guide international legal subjects. Questions regarding the legitimacy of international law, then, are questions about when and why these attempts to exercise authority succeed or fail [...].⁸⁴

Indeed, the 'horizontal' character of contemporary international law becomes less and less apparent, and the flat panorama apparently implied by the metaphor of horizontality is no longer as attractive or accurate as it used to be. The proliferation of many institutional arrangements in international law makes it look less like a flat prairie and more like a mountain range. Various formal institutions of international law stick out like 'mountain peaks' and manifest the increasingly significant hierarchical dimension of the international legal order. This explains the growing popularity of jurisprudential accounts of authority grounded in the agency, hierarchy and law's

⁸² Joseph Raz, 'Why the State?', in *In Pursuit of Pluralist Jurisprudence*, ed. Nicole Roughan and Andrew Halpin (Cambridge: Cambridge University Press, 2017), 136–62.

⁸³ Roughan, *Authorities*, 28.

⁸⁴ David Lefkowitz, 'The Legitimacy of International Law', in *Global Political Theory*, ed. David Held and Pietro Maffettone (Malden: Polity, 2016), 101.

identity theses, since they make it possible to coherently explain international public authorities' claim to legitimacy and the right to rule. Such a perspective finds support among scholars coming from general jurisprudence and international legal theory alike. Generally, it has become one of the mainstream ideas about the authority of international law that international organisations and other formal institutions such as international courts 'are the principal source of political authority [...] in the international domain.'⁸⁵

However, mountain ranges do not consist of peaks only. They are easiest to spot, but we can only see them against the background of valleys. The same applies to our imaginary legal landscape. The normative valleys of international law are vast and deep; they comprise legal norms that claim authority over conduct without originating from, or necessarily being linked to, institutional arrangements. Such norms lie low in the valleys and their authority is not personified. They possess legality even when they do not bear any mark of being issued or enforced by formal institutions. In other words, none of the three standard theses about the nature of authority applies to them.

The 'normative valleys' of international law are represented primarily (although not exclusively) by customary international law (hereinafter, CIL). CIL, as general international law, is typically seen as the glue that keeps international legal order together and allows one to consider international law as something unitary and systemic, at least in a loose sense.⁸⁶ The authority of CIL, therefore, manifests at least in its

⁸⁵ Liesbet Hooghe, Tobias Lenz, and Gary Marks, *A Theory of International Organization* (New York: Oxford University Press, 2019), 121.

⁸⁶ See, for a general treatment of this idea: Oriol Casanovas, *Unity and Pluralism in Public International Law*, trans. Francis Barret (The Hague: Martinus Nijhoff Publishers, 2001); André de Hoogh, 'Regionalism and the Unity of International Law from a Positivist Perspective', in *Select Proceedings of the European Society of International Law*, ed. M. J. Aznar and M. E. Footer (Oxford: Hart Publishing, 2016), 51–75; Pierre-Marie Dupuy, *L'Unité de l'Ordre Juridique International: Cours Général de Droit International Public*, vol. 9, Collected Courses of the Hague Academy of International Law (The Hague: Martinus Nijhoff Publishers, 2003); Robert Jennings, 'Universal International Law in a Multicultural World', in *Liber Amicorum for Lord Wilberforce*, ed. Maarten Bos and Ian Brownlie (New York: Clarendon Press, 1987), 39–51; Mario Prost, *The Concept of Unity in Public International Law* (Oxford: Hart Publishing, 2012); Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner', *European Journal of International Law* 20, no. 2

constitutive role for the international legal order. And, most importantly, this is authority in the functional meaning; CIL claims authority to guide conduct by providing states and other actors with practical reasons.⁸⁷ CIL's authority is quite obviously not institutional, for there is no formal body that represents it at the level of 'peaks'. In other words, the authority of CIL is not *someone's* authority. This, as Tiyanjana Maluwa correctly observes, is precisely the conundrum that has not really been properly addressed: 'how do authoritative customary rules emerge, and thus begin to regulate human communities as legal norms, without [...] the existence of any particular person or body of persons empowered or recognised as having the authority to make such rules?'⁸⁸

The point I am making is that both 'institutional peaks' and 'normative valleys' claim authority, but the standard account tends to only spot the former and to remain blind to the latter. Yet conceptually and practically speaking, there is nothing that precludes CIL from claiming authority as law. Rules of CIL are international law in the same way as those formed through the mediation of formal institutions, such as judgments of international courts or resolutions of the UN Security Council. They impose legal obligations on states and provide a legal framework for their relations. It seems incoherent to say that some international law claims authority, whereas some other does not. If it is ever appropriate to speak of the authority of international law, this concept simply cannot exclude CIL, at the very least because CIL is a 'default' mode of international law: in the absence of other applicable sources it is CIL that applies.⁸⁹

(2009): 265–97; Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', *European Journal of International Law* 17, no. 3 (2006): 483–529.

⁸⁷ In chapter 3, I show how the formation of rules of customary international law can be represented through the dynamics of practical reasons, and how CIL can create practical differences in how states and other actors act.

⁸⁸ Tiyanjana Maluwa, 'Custom, Authority and Law: Some Jurisprudential Perspective on the Theory of Customary International Law', *African Journal of International and Comparative Law* 6 (1994): 387.

⁸⁹ See, for an illuminating perspective of this role of CIL: Simma and Pulkowski, 'Of Planets and the Universe'.

A popular approach to CIL, however, is to try to bypass its authority by making it conditional on application or recognition by institutional authorities, such as international courts. In other words, in order for customary rules to claim authority they must have a formal link to institutions, which brings us back to the standard account. As I showed in section 1, it is often suggested that for customary rules to obtain the status of the law, they must be recognised or in some other way endorsed by formal institutions such as courts. This scheme, however, does not adequately describe how CIL works (or any customary law, in fact, as H.L.A. Hart insisted⁹⁰). As a rule, CIL does not need to operate through international legal officials or supra-national formal institutions to count as law or to claim legal authority over states; in fact, even recognition or application by an international court is but a subsidiary means for identification of the existence of a rule of CIL.⁹¹ Even though rules of CIL often get their initial linguistic formulations in the judgments of international courts and tribunals, they apply existing law, even if it happens to be for the first time. International courts do not apply customary rules to turn them into law; they apply them precisely because they *are* law. In other words, customary standards, including those of a legal character, need not be *enforced* in order to be *in force*; their authority is exhibited prior to any official enforcement.⁹² As Monica

⁹⁰ Herbert L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), 46–48.

⁹¹ According to the ILC, ‘decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.’ *Report of the International Law Commission on the Work of its 70th Session*, UNGAOR, 73rd Sess, UN Doc A/73/10 (2018) 149–150 (hereinafter, ILC Report on Identification of CIL). The ILC Report on identification of CIL is widely criticised and for good reasons. I do this myself in chapter 3, when I show the deficiencies of the traditional two-elements approach to the structure of the rules of CIL. Yet I believe the quote I just gave is a crucially important one, even though it does not attract as much attention. The ILC, by uncoupling the existence of the rules of CIL from the act of their identification by international courts, grounds the authority of CIL in their function, not in their origin.

⁹² The relationship between the legality of customary law and adjudication is a recurring theme in jurisprudence. The contemporary orthodoxy (now embraced by most legal positivists) that customary rules are not law until and unless applied by courts has been traditionally associated with Legal Realism, most prominently with Oliver Wendell Holmes and Karl Llewellyn. Oliver Wendell Holmes, ‘The Path of Law’, *Harvard Law Review* 10 (1897): 457–97; Karl Llewellyn, *The Theory of Rules* (Chicago: University of Chicago Press, 2011). However, as Andreas Hadjigeorgiou shows, it is wrong to assume that legal positivism (especially that of H. L. A. Hart’s branch) is necessarily committed to this orthodoxy. Andreas Hadjigeorgiou, ‘The Oxford Jurisprudence Circle: A Lost Legacy on Customary (International) Law’, in

Hakimi rightly observes, ‘although individual actors can easily advance claims about the law, none can alone establish the law. No one entity is entitled to assess the various claims on an issue, weed out the outliers, and finally settle CIL’s normative content.’⁹³ The authority of CIL lies beyond the legal powers of any particular actor or institution. It is a decentralised form of the law that cannot be said to originate from an institutional source.

The authority of CIL, then, is a matter of what states legally do and how they react to the doings of other states, and not a matter of ‘making-into-law’ by an international court or tribunal or other formal institution.⁹⁴ Hence, CIL claims authority as international law not by virtue of being linked to some formal institution, but by virtue of reflecting normative legal standards implicit in interactions between states.⁹⁵ I dedicate much more attention to this point in chapter 3. For the present purposes, suffice it to say that the authority of CIL is not reducible to the authority of formal institutions that invoke or apply it.

So far, I have been mainly pointing at why we should aim at encompassing CIL in the general jurisprudential scheme of authority. But what about treaties, especially those which are least visible against the shiny background of ‘institutional peaks’, such as bilateral agreements, which, according to Mario Prost, constitute 70–75% of all treaties?⁹⁶ My argument is that they are very similar to CIL in the sense that their

Philosophical (De)Constructions of International Law, ed. Pauline Westerman, Kostiantyn Gorobets, and Andreas Hadjigeorgiou (Cheltenham: Edward Elgar, forthcoming). For a more detailed argument, see Andreas Hadjigeorgiou, ‘The Oxford Jurisprudence Circle: A Lost Legacy on Customary Law’ (Doctoral dissertation, Groningen, University of Groningen, 2020).

⁹³ Monica Hakimi, ‘Making Sense of Customary International Law’, *Michigan Law Review* 118, no. 8 (June 2020): 1494.

⁹⁴ As framed by Gerald Postema, ‘the activity, rather than any articulated account of it, is the fundament – the commons from which all the participants draw and to which they all contribute (by their doings, thinkings, and sayings). All accounts or formulations are ultimately accountable to this commons.’ Gerald J. Postema, ‘Custom in International Law: A Normative Practice Account’, in *The Nature of Customary Law: Legal, Historical, and Philosophical Perspectives*, ed. Amanda Perreau-Saussine and James Bernard Murphy (Cambridge: Cambridge University Press, 2007), 289. I elaborate on this idea in more detail in chapter 3.

⁹⁵ See also ‘Statement of Principles Applicable to the Formation of General Customary International Law’ *International Law Association Report of the Sixty-Ninth Conference (London 2000)*, 1 (Final Report).

⁹⁶ Prost, *Concept of Unity*, 36.

authority rests in the normative valleys. They establish normative legal standards of conduct for the states concerned without any necessary mediation through formal institutions.

There is an important difference between CIL and treaties in how they claim authority, however. Norms of CIL cannot be said to have a determinate ‘author’. As put by Gerald Postema, ‘custom is never reducible to what each participant does or to what each says, or thinks, or believes about what each does.’⁹⁷ That is, customary norms cannot be said to be ‘authored’ in a sense that treaties can. Even if it is possible to trace the origin of customary norms to the first instance when they got normative status, customary norms do not ‘belong’ to particular members of a community.

Treaties are of course different in this respect. They bind only those states that sign up to them, and in the case of bilateral treaties they specifically bind the two states that ‘authored’ them. This idea is at the very foundation of the voluntarist variation of international legal positivism, which is the dominant paradigm when it comes to the law of treaties, as evident, in particular but not exclusively, from articles 11–17, 26, 34–37 of the VCLT.⁹⁸ Voluntarism assumes that what ultimately grounds the validity and legitimacy of treaties is the voluntary adherence to and consent of the states concerned. It seems as if treaties themselves are mere continuations of the will of states. If this is so, how can treaties claim authority and make a practical difference at all? The answer to this question should be sought beyond voluntarism, though not necessarily in contradiction to it. The authority of treaties, I suggest, is grounded in the fact that there can be a gap between what states think they have signed up to and what they find themselves as having been signed up to. The normative force of a treaty, and hence its claim to authority, is rooted neither in it being linked to formal institutions and officials, nor in the will or consent of the states concerned. The latter is what defines the *validity*

⁹⁷ Gerald J. Postema, ‘Custom, Normative Practice, and the Law’, *Duke Law Journal* 62, no. 3 (2012): 719.

⁹⁸ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

and hence *bindingness* of a treaty, but not so much its actual weight and *authority* in shaping states' conduct. Rather, the weight and normative strength of treaties is contingent on the function they perform in constructing relations between states. Regardless of whether one supports a voluntaristic reading of international treaties, or subscribes to alternative conceptions, such as, for instance, Ronald Dworkin's salience justification,⁹⁹ it is difficult to deny that the authority of treaties is almost impossible to fit into the standard account of authority, unless we turn them into mere shadows of states' will.

Another evidence that the authority of international treaties cannot be fully derived from states' consent relates to the practice of contestation. Contestation typically involves complex deliberative process that surround the adoption and application of a treaty, as well as compliance with it, when states and other actors advance arguments that challenge the content or formal status of its norms.¹⁰⁰ However, as Başak Etkin shows, 'up to a certain point contestation nourishes normativity as the norm is taken seriously enough to contest, but beyond that limit contestation becomes damaging.'¹⁰¹ This seems to reflect the idea expressed above that the authority of treaties (similarly to that of CIL) involves a certain degree of normative resistance, which entails a gap between a treaty's normative claim and states' wills.

So far, I have been trying to show that the premises of the standard account of authority do not hold when it comes to the normative valleys, which, as I see them, comprise of CIL and international treaties. *First*, their quality as law cannot be explained

⁹⁹ Ronald Dworkin, 'A New Philosophy for International Law', *Philosophy & Public Affairs* 41, no. 1 (2013): 19. Ronald Dworkin offers the principle of salience as an alternative to voluntarism and formulates it as follows: 'If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well.' Recently, there has been a revival of interest to Dworkin's take on international law, and to the salience justification in particular. See, e.g., an overview of scholarship on Dworkin's philosophy of international law in Lefkowitz, *Philosophy and International Law*, ch. 4. For a recent critique, see John Tasioulas, "'Fantasy Upon Fantasy': Some Reflections on Dworkin's Philosophy of International Law", *Jus Cogens* 3, no. 1 (2021): 33–50.

¹⁰⁰ See, generally, Antje Wiener, *Contestation and Constitution of Norms in Global International Relations* (Cambridge: Cambridge University Press, 2018).

¹⁰¹ Başak Etkin, 'The Cynic's Guide to Compliance: A Constructivist Theory of the Contestation Threshold in Human Rights', *Revue Québécoise de Droit International*, Hors-série (Juin 2021): 189–90.

by reference to institutional arrangements. *Second*, their authority is not personal; CIL and international treaties claim authority without a necessary mediation by formal institutions, and historically even in the absence of any institutions. *Third*, there is no formal hierarchy involved; customary and treaty norms guide states' conduct, but they do not necessarily erect institutions which are superior in respect of states.

What implications does this have for our understanding of the authority of law? It seems reasonable to suggest that the functional understanding of the authority of law should be considered antecedent to its institutional meaning. The authority of CIL and treaties manifests in their providing states with normative guidance, as well as in its standing as a standard of a proper way of acting. This means that jurisprudential explanations of authority must seek to explain how the functional authority of law can be possible without institutional authorities and the three theses that are used to describe them.

4. Mediated and Unmediated Authority

The puzzle of the authority of law, as I have tried to show, comprises several interconnected issues. The dual use of the concept of authority in jurisprudence makes it difficult to distinguish between its functional and institutional meanings. This results in the tendency to describe the authority of law as manifested through the claims of legal officials and institutions. Those instances of law that do not fit this description are either cast aside or still get inscribed in the institutional view of authority at the price of inevitable (and critical) distortions. The authority of international law, from this perspective, is problematic exactly because, as I tried to show in the previous section, in many instances international legal norms claim authority while not being linked to formal institutions, such as international courts. Is there a way to revisit our standard jurisprudential understanding of authority so that it accounts both for 'peaks' and 'valleys'?

It seems that the most natural way of supplementing the standard account is by acknowledging the direct functional authority of legal norms. Institutional authorities, from this point of view, if present, are not the beginning of the authority of law, and not even its necessary ingredient.¹⁰² Rather, they are supplementary devices introduced to alter the operation of the law and its claim to authority.¹⁰³ If we shift the focus from institutions to norms and if we manage to show that authority does not require, although may feature, institutional mediation, we should be able to coherently explain the authority of both peaks and valleys.

That authority has more to do with the domain of the normative, rather than with that of the institutional, is by no means a novel idea. It has been especially advanced in the context of the connection between authority and normative facts, values, and moral oughts.¹⁰⁴ Richard Flathman insisted that the values and beliefs which constitute the field of ‘the authoritative’ ‘do not take their standing as authoritative from adoption or promulgation by any agent or agency possessed of authority. Rather, the acceptance [...] of the values and beliefs as authoritative is one of the conditions of authority.’¹⁰⁵ This approach reflects the general idea that there are certain underlying aspects of the domain of normative that embody authority prior to, or without, any mediation through personal or institutional roles. In the words of Daniel Star and Candice Delmas,

¹⁰² This line of reasoning is often employed to defend the legal nature of international law, rather than its authority. See, for instance, Oona Hathaway and Scott J. Shapiro, ‘Outcasting: Enforcement in Domestic and International Law’, *Yale Law Journal* 121 (2011): 252–349; Lefkowitz, *Philosophy and International Law*, 20–39. Although these two issues are tightly intertwined, the intricacies of legality as law-ness are of limited importance for my purposes, however I must touch upon them, too.

¹⁰³ I use ‘to alter’ rather than ‘to optimise’ because as I show later, the introduction of mediatory formal institutions is not in and of itself an improvement in the functioning of law, as it is often axiomatically accepted in jurisprudence. In certain circumstances, institutionalisation may in fact be detrimental to the law and its claim to authority. See also chapter 5 of the present thesis and Kostiantyn Gorobets, ‘The International Rule of Law and the Idea of Normative Authority’, *Hague Journal on the Rule of Law* 12, no. 2 (2020): 227–49.

¹⁰⁴ Finnis, *Natural Law and Natural Rights*, 175–79; Richard E. Flathman, *The Practice of Political Authority: Authority and the Authoritative* (Chicago: University of Chicago Press, 1980), 6–7; Veronica Rodriguez-Blanco, *Law and Authority under the Guise of the Good* (Oxford: Hart Publishing, 2016); Daniel Star and Candice Delmas, ‘Three Conceptions of Practical Authority’, *Jurisprudence* 2, no. 1 (2011): 143–60.

¹⁰⁵ Flathman, *Practice of Political Authority*, 6–7.

‘normative reasons, like oughts, have a quality of *external authoritativeness* about them. This is where one should start when thinking about authority, ie with the authority of normative facts.’¹⁰⁶

There is a critical nuance here, however. It seems to be a mistake to think that authority is what moral oughts as such, being ‘normative facts’, have. This makes authority and moral normativity completely indistinguishable, and we would be compelled to conclude that anything normative is authoritative, and *vice versa*.¹⁰⁷ This does not seem to be the case. There is something odd in saying that, for instance, respect for human dignity, as a normative fact, has authority. Human dignity is by all means a self-sufficient reason for action, that is, we, as moral agents, ought to act in a way that respects and advances it. Strong moral reasons and principles are typically deontologically normative, they do not simply guide people’s actions, they *dictate* them. However, this kind of deontological normativity of moral reasons, which is at the core of Kantian ethics, for instance,¹⁰⁸ is different from legal normativity and the authority associated with it. It is widely agreed that legal norms have content-independent authority, that is, they guide actions not because they are morally correct and thus reflect a deontological ought, but because they occupy a specific position in practical reasoning.¹⁰⁹ We must be cautious, therefore, in our search for non-institutional explanation of authority, not to substitute it with the normativity of moral oughts and values. What differentiates between the moral normativity of oughts and the authority

¹⁰⁶ Star and Delmas, ‘Three Conceptions of Practical Authority’, 159.

¹⁰⁷ This line of thought is similar to Mark Greenberg’s ‘moral impact theory of law’ which holds that legal obligations are species of moral obligations, which, in turn, have a direct practical authority over our actions. Legal institutions, according to this view, change our ‘moral profile’ by affecting moral obligations that we hold towards each other. Mark Greenberg, ‘The Moral Impact Theory of Law’, *Yale Law Journal* 123, no. 5 (2014): 1306–23. See for a recent critique, to which I subscribe: Dindjer, ‘The New Legal Anti-Positivism’.

¹⁰⁸ I once again refer to Christine Korsgaard here, who offers perhaps the most compelling case for the deontological normativity of reasons in her *Sources of Normativity*.

¹⁰⁹ Nathan Adams, ‘In Defense of Content-Independence’, *Legal Theory* 23, no. 3 (2017): 143–67; Herbert L. A. Hart, ‘Commands and Authoritative Legal Reasons’, in *Essays on Bentham. Jurisprudence and Political Philosophy* (Oxford: Oxford University Press, 1982), 243–68; Raz, *Practical Reason and Norms*, ch. 2; Shapiro, *Legality*, 274–77.

of legal norms is that the latter have a capacity of guiding conduct irrespective of moral positions occupied by subjects. That is, authority is the quality of norms that enables them to bind content-independently.

Joseph Raz has famously argued that the most feasible way to treat norms is to regard them as composite practical reasons. A norm is a combination of a first-order reason to perform the norm act and exclusionary reasons not to act for certain conflicting reasons.¹¹⁰ This combination entails that norms pre-empt the first-order reasons which ground these norms; a norm replaces some practical reasons that agents independently have, and this means that norms are content-independent practical reasons.¹¹¹ There is no other way to explain how norms can bind even if they seem wrong, or even if their underlying reasons are unknown, unless we embrace the idea of pre-emption. Being bound by a norm means no longer acting on its underlying reasons or assessing its merits. This is why authority is not to be conflated with the normativity of moral reasons and values; authority, as a concept, only becomes meaningful when we introduce a gap between reasons and norms. This gap is what enables norms to guide our conduct even if the balance of reasons they reflect is suboptimal, or even when we disagree with it altogether.¹¹²

I suggest that the idea of pre-emption is the key for reimagining the concept of authority beyond its standard understanding as necessarily involving formal institutions. But in order to make full use of it, I must first debunk one of the most popular jurisprudential convictions about it. The pre-emptive character of norms generally requires justifications as to why actors must refrain from acting on their own

¹¹⁰ Raz, *Practical Reasons and Norms*, 58–59.

¹¹¹ Raz, *Morality of Freedom*, 46; Raz, ‘Problem of Authority’, 1019. See also, for an excellent elaboration on pre-emption, Donald H. Regan, ‘Authority and Value: Reflections on Raz’s *Morality of Freedom*’, *Southern California Law Review* 62 (1989): 995–1095.

¹¹² I advance this argument in more detail in chapter 4 of the present thesis, by using ‘the principle of solidarity’ as an example. There, I show that solidarity as such, though a value and an important moral reason, does not obligate us legally unless it is being normatively pre-empted, which is exactly what creates the distance I am talking about in this section.

deliberations. Joseph Raz believes that norms are typically justified as time- and labour-saving devices, as coordination-enhancing devices, as error-minimizing devices, and the like. He stresses, however, that the standard way in which *legal* norms may be justified as valid pre-emptive reasons is by reference to authorities.¹¹³ Similarly, Scott Shapiro believes that law's authority is conditioned on the fact that people transfer their judgment as to how they should act to hierarchically superior institutions.¹¹⁴ And, because of this, only those norms issued or enforced by authorities can have the authority of law—which is exactly how the standard view of authority combines its functional and institutional meanings, as shown in section 1 of this chapter.

To make things clearer, the standard jurisprudential idea is that the normal way in which we introduce the distance between the reasons that apply to agents, and the norms that represent a certain balance of these reasons, that is, the standard way in which we can introduce pre-emption and thus authority, is by surrendering judgment to someone else. Legal norms, as 'authoritative directives', are believed to have a quality of being content-independent and pre-emptive when they come about as a result of someone else's deliberations.¹¹⁵ It is commonly claimed that authoritative directives transfer decision-making from the subjects to the authorities; being subjected to an authority involves accepting what this authority orders without assessing the merits of the order¹¹⁶ and under the presumption that the authorities are better positioned for judgment.¹¹⁷ 'Authorities', then, 'demand that subjects defer, or that they surrender their will, or that they replace their private judgment with the authority's judgment.'¹¹⁸ In other words, it

¹¹³ Raz, *Practical Reasons and Norms*, 74.

¹¹⁴ Shapiro, *Legality*, 165–67.

¹¹⁵ 'Directives are intended to be "content-independent" reasons for action, meaning that they are supposed to be reasons simply because they have been issued and not because they direct subjects to perform actions that are independently justifiable.' Shapiro, 'Authority', 389.

¹¹⁶ Raz, 'Authority, Law, and Morality', 297–300; Raz *Practical Reasons and Norms*, 61; Shapiro, 'Authority', 401–404.

¹¹⁷ 'An authority, of course, is a person whose knowledge or character, or both, brings him so close to a recognized value as to call forth the respect of others and to enable him to speak and to act for them.' John Wild, 'Authority', in *Authority*, ed. Frederick J. Adelman (Chestnut Hill: Boston College, 1974), 7.

¹¹⁸ Adams, 'In Defense of Content-Independence', 161.

is in the nature of authoritative relations that once the authority is accepted, its subjects are no longer entitled to reserve to themselves the final decision as to their conduct.¹¹⁹ Having a pre-emptive reason, then, entails relinquishing the right to make one's own decisions on certain issues to someone else. According to this view, there can hardly be a way to introduce a distance between reasons and norms other than by delegating the power to make those norms to another agent.

This scheme assumes that there can be only one structure of legal authority; legal norms are pre-emptive practical reasons in virtue of their being linked to formal institutions. That is, the justification behind treating legal norms as having authority over our actions is grounded in the fact that they come into being as a result of official activity. This is precisely how institutional peaks operate; legal norms originating from institutions derive their pre-emptive capacity at least partly from the fact that their creation or application is *mediated* by formal organs. In other words, the pre-emptive function of legal norms is contingent on their being results of *delegated practical deliberations*, when officials and authorities carry out calculations as to what should be done for, and on behalf of, the corresponding community or its members. This explains why the standard jurisprudential account of authority places such an emphasis on the role of institutions. This account takes the *mediated structure of authority*, when a norm's pre-emptive function is determined by its link to delegated practical deliberations, to be the central case of the authority of law.

Certainly, because institutional peaks are no longer rare in international law, we do see mediation here, too. International courts, for instance, are mediating authorities; they produce pre-emptive reasons in the form of judgments and advisory opinions (although the degree of pre-emptiveness is different in these two cases) because states

¹¹⁹ Stefano Bertea, 'On Law's Claim to Authority', *Northern Ireland Legal Quarterly* 55 (2004): 398; Başak Çalı, 'Authority', in *Concepts for International Law: Contributions to Disciplinary Thought*, ed. Jean d'Aspremont and Sahib Singh (Cheltenham: Edward Elgar Publishing, 2019), 39–53; Richard B. Friedman, 'On the Concept of Authority in Political Philosophy', in *Concepts in Social and Political Philosophy*, ed. Richard E. Flathman (New York: Macmillan Publishing, 1973), 127–31.

delegate to them the responsibility to carry out practical deliberations.¹²⁰ Other decision-making institutions in international law also commonly operate as mediating authorities and produce pre-emptive reasons on the basis of delegation. The UN Security Council has an institutional authority precisely because it is endowed, under arts. 24(1), 25, 39, and 41–42 of the UN Charter,¹²¹ with powers to deal, primarily, with threats to international peace and security. And so its resolutions have pre-emptive qualities in part because states delegate to it the function of carrying out practical deliberations within its competence. In short, delegation of practical deliberations marks the mediated structure of the authority of law.¹²²

As we have seen, however, the very nature of normative valleys, such as those of customary international law and international treaties, is that legal norms which comprise them are *not* results of delegated practical deliberations. On the contrary, customary and conventional legal norms appear as outcomes of *direct practical deliberations*.

¹²⁰ See, for a more detailed argument in this respect, chapter 2 of the present thesis.

¹²¹ Charter of the United Nations (adopted 24 October 1945), 1 UNTS XVI.

¹²² A short detour may be necessary here. Of course, mediation may have other manifestations, too, not necessarily those involving the delegation of practical deliberations. The idea of ‘formal sources’, for instance, is another way to channel the authority of law. It gets mediated through a specific set of instruments, thus cutting off those norms that exist beyond and above what is designated as a formally settled way of determination of valid legal rules. See, e.g., Jean d’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials’, *European Journal of International Law* 19, no. 5 (2008): 1075–93; Jean d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press, 2011); Hugh Thirlway, *The Sources of International Law*, 2nd ed. (Oxford: Oxford University Press, 2019); Prosper Weil, ‘Towards Relative Normativity in International Law’, *American Journal of International Law* 77, no. 3 (1983): 413–42. Such a form of mediation looks different, of course, because instead of featuring a delegation of practical deliberations, it introduces a specific filter through which the law is or can be perceived. This filter is limiting, for it is only tuned to ‘detect’ some norms and remains blind to some others. I elaborate on this idea elsewhere, see Kostiantyn Gorobets, ‘The Unity of International Law: An Exercise in Metaphorical Thinking’, *Philosophy of Law and General Theory of Law* 2 (2019): 80–109. Although this form of mediation is peculiar in its own right, it lies beyond the scope of the present chapter and this thesis. Suffice it to say that the language of ‘formal sources’ is not always suitable for international law, since it does not have the differentiation between officials and non-officials. The concept of both real sources (such as those of water or energy) and metaphorical ‘sources’ (such as those of law) represents the idea that some content is brought *from somewhere else*. I believe this idea of distance is what makes a difference between ‘source’ and ‘origin’. An obligation, for example, may originate from ourselves, when we make a promise. It would be odd to say that ‘the source’ of this obligation would be ourselves. I think it is superfluous to speak of sources where legal normativity *originates* in the immediate interaction of agents, such as states. I develop this idea further in chapter 3, where I defend the view that customary international law is not so much a *source* of international law (even though it can be labelled as such), but rather international law *itself*.

Those subjects whose practical reasons get balanced and represented in a norm, are the same subjects who eventually generate this norm and subjected to it, and these subjects are typically, although not exclusively, states. In order to explain the authority of international law, and, more specifically, the authority of valleys-based legal norms, we must show that such unmediated authority does or can generate the pre-emptive effect just like a mediated one, something that the standard account tends to either reject or ignore.

What the unmediated form of authority implies is that the transition from first-order reasons to legal norms is often a far subtler and more complex process than in the case of a more traditional mediated authority of institutional peaks. Especially for CIL, it may be impossible to pinpoint exactly the moment when reasons and mutual expectations of states converge into a pre-emptive normative standard.¹²³ The indeterminacy about the threshold of legality of, for instance, customary rules is another consequence of the idea of pre-emption, and hence it may be a futile idea to try to square the formation of customary rules into something akin to a ‘rulebook’.¹²⁴ Pre-emption is a functional characteristic of norms, not a formal one. Therefore, it is often a steady process when one of the competing normative solutions that grows from interactions of states acquires functional dominance over other solutions. This does not mean, however,

¹²³ A recent ICJ advisory opinion on the Chagos archipelago offers a good illustration of this thesis, where the Court had difficulties with establishing the exact moment from which the separation of territories from a colonised territory was no longer permitted under customary international law: *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion), 2019 ICJ Rep, paras. 147–162. The Court has been heavily criticised on precisely this matter, namely, that it was too easily satisfied with the idea that the right to self-determination in the colonial context had become a rule of customary international law as early as 1965. See, e.g., Stephen Allen, ‘Self-Determination, the *Chagos Advisory Opinion* and the Chagossians’, *International and Comparative Law Quarterly* 69, no. 1 (2020): 203–20; James Summers, ‘Chagos, Custom and the Interpretation of UN General Assembly Resolutions’, in *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion*, ed. Thomas Burri and Jamie Trinidad (Cambridge: Cambridge University Press, 2021), 9–40. Leaving the discussions around this particular advisory opinion aside, there is generally a scholarly agreement that there is no way to indicate with precision when a rule of CIL emerges: Brunnée and Toope, *Legitimacy and Legality*, 7; Postema, ‘Custom in International Law’. See also chapter 3 of the present thesis.

¹²⁴ Here, of course, I follow Monica Hakimi’s powerful account of the deficiency of the view of CIL as implying any sort of formalism. Hakimi, ‘Making Sense of Customary International Law’.

that when such dominance is achieved, other solutions get fully cut off. As Monica Hakimi shows with the example of the *jus ad bellum*, it is wrong to assume that states may not rely on justifications for the use of force beyond those formally recognised (that is, self-defence and Security Council authorisation).¹²⁵ Whether or not such justifications succeed as parts of a normative argument for the use of force, however, would be an evidence of the pre-emptive capacity of the *jus ad bellum*.

The unmediated authority, being based on direct practical deliberations, surely provides for more flexibility and leeway in balancing reasons. Because of this, it may sometimes be the case that states penetrate the pre-emptive veil of legal norms and seem to justify their actions on the basis of underlying reasons, instead of legal norms. The typical argument used to defend humanitarian intervention, for example, is that there are strong moral reasons to use armed force to stop human rights atrocities. It seems, however, that moral reasons of this sort *are already accounted for and pre-empted* in existing norms comprising the *jus ad bellum*, so it must in principle be inappropriate to fall back on them. But in the reality of actual international legal argument, it may be difficult to draw a line between situations when states invoke a legal norm and when they invoke its underlying considerations (including normative ones). Which is why often justifications for the use of force, to continue the topic of *jus ad bellum*, though they may fall outside the formal framework of self-defence or Security Council authorisation, still exist within authority of the law.¹²⁶

Another manifestation of unmediated authority is the proliferation of various ‘soft’ forms of decision-making, which often only outline the body of relevant reasons states should act on. The whole idea of ‘soft law’ is that with it, states and other actors do not attempt to introduce a degree of pre-emption, but rather seek to channel some practices by means of principles or examples. Although the distance between reasons and ‘would-

¹²⁵ Monica Hakimi, ‘The *Jus Ad Bellum*’s Regulatory Form’, *American Journal of International Law* 112, no. 2 (2018): 151–90.

¹²⁶ This discussion is largely inspired by the draft of Monica Hakimi’s forthcoming book *Conflict Unveiled: How International Law Actually Works*. I refer to it here with the permission of the author.

be' a norm is minimal, soft law may still have some authority precisely because it performs the function of focalising practices and converging reflections upon them.

All this makes it hard to accept the idea that international law and its by and large unmediated authority is or can be successfully pre-emptive. It seems that either normative valleys are not pre-emptive at all, or, if they are, then in some weak sense at best. This, however, is a superficial perception. When the authority of law gets mediated through officials and formal institutions and practical deliberations get delegated, this may improve the overall operation of a legal order.¹²⁷ But at the same time, this also creates a distance between official deliberative practices and the practical reasoning of the subjects of a legal order. Officials and formal institutions thereby acquire what Ingo Venzke calls semantic authority, which is 'an actor's capacity to find recognition for interpretative claims and to establish its own statements about the law as new reference points for the legal discourse.'¹²⁸

In the unmediated authority, on the other hand, this distance is absent, exactly because no delegation of practical deliberations occurs. As a result, the process of formation, and the practice of application, of pre-emptive normative standards is much more dissolved in the related non-legal activities, to a point when it is difficult to differentiate between them. Although this may be seen as a defect by some, it can in fact be an advantage. As Monica Hakimi argues, 'all things being equal, we might prefer for international legal authority to be unsettled. We might want those who are subject to international law to have a meaningful—but not unfettered—say in the decisions that affect them.'¹²⁹ And, as Sylvie Delacroix rightly points out,

Law's normativity is never established once and for all, however. Emerging out of the confrontation with moral demands, prudential considerations, etc., legal

¹²⁷ Which is why, for instance, Herbert Hart believed that the introduction of officials is generally conducive for the evolution of law and that transition from simpler legal orders to legal systems is a step of improvement. Hart, *Concept of Law*, 94, 117.

¹²⁸ Ingo Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law', *Transnational Legal Theory* 4, no. 3 (2013): 356.

¹²⁹ Hakimi, *Conflict Unveiled*.

normativity is to be constantly reasserted. Each time an individual is led to assess law's normative claims in the light of morality's demands, each time a judge is led to re-articulate what we want law for: these cases contribute to shaping the 'fabric' enabling law's normativity.¹³⁰

This entails, among other things, that the pre-emptive capacity of legal norms in their unmediated authority may fluctuate and come in degrees. The degree of authority manifests in how effectively a norm manages to pre-empt the underlying reasons. To translate this into the conventional language of legal obligations, 'international laws do not impose the same strength of duties on all state officials. [...] The duties that international laws impose range from the stronger duty to obey to the duty to respect and the duty to rebut.'¹³¹ Because the norms of international law may be more or less successful in pre-empting the underlying reasons, this allows to explain why, as Başak Çalı argues, its authority 'is inherently relational and the duties of obedience that international law imposes on domestic orders come in different strengths and forms.'¹³²

The two cases of legal authority—unmediated and mediated—therefore reflect, though in different ways, the pre-emptive nature of legal norms. Despite the many differences between how mediated and unmediated legal authority manifest, the result is not very much distinct. International law claims authority by providing states and other actors with pre-emptive normative standards, just as does domestic law. It can surely be submitted that these two structures of authority have their advantages and disadvantages. It is possible that mediated authority is more efficient since the pre-emptive qualities of legal norms are better ensured when practical deliberations are delegated. At the same time, unmediated forms of authority are not 'worse' or 'less legal' (in fact, they may well be 'better'), they are merely different in how pre-emption is achieved, and how much it fluctuates. Because practical deliberations are not delegated,

¹³⁰ Sylvie Delacroix, *Legal Norms and Normativity: An Essay in Genealogy* (Oxford: Hart, 2006), 194.

¹³¹ Başak Çalı, *The Authority of International Law: Obedience, Respect, and Rebuttal* (New York: Oxford University Press, 2015), 66.

¹³² Çalı, 13.

it in principle makes it more likely that subjects will find, though perhaps over a greater span of time, a more precise balance of reasons than a formal institution designated to do so.

Conclusions

The authority of law may have many faces and manifest in a variety of ways. Its most familiar—institutional—manifestation, when law's authoritative claims are linked to the practices of formal institutions and officials, is the key focus of attention in contemporary jurisprudence. The authority of law, in this context, is described in three theses: institutional authorities provide for the identity of the law, and therefore its authority manifests in personified institutions and hierarchical relations between officials and subjects.

In this chapter, I tried to show that this understanding of authority mixes two different meanings of the concept and as a result fails to account for instances of the authority of law that do not manifest in formal institutions. International law, thanks to its still broadly customary nature, offers an excellent test-case for understanding the limitations of the standard account. International law features both 'peaks' of formal institutions and 'valleys' of customary rules and treaties, which generates the quest for finding a unified explanation of its authority.

I suggest that instead of focusing on the mediatory role of formal institutions, a jurisprudential explanation of authority should explore the variety of ways in which legal norms can acquire and effectively perform their status of pre-emptive practical reasons. From this perspective, the authority of (international) law may be mediated or unmediated, depending on whether actors delegate practical deliberations to officials or not. The mediated authority of law—which is the conventional central case of legal authority—manifests in the pre-emptive status of legal norms as linked to delegated practical deliberations carried out by judges or other officials. The unmediated authority of law manifests in direct practical deliberations by the subjects themselves. The

connection between the authority and the pre-emptive capacity of norms entails that authority may fluctuate, depending on the extent to which norms manage to pre-empt underlying reasons. Such fluctuations do not imply, however, that pre-emptive standards can be more or less 'legal', rather, they indicate that (1) not all legal norms are equally successful in performing their pre-emptive function, and (2) the pre-emptive capacities of norms may gradually build up, rather than be generated from the outset.

The idea behind connecting the authority of law to its pre-emptive capacities, rather than to its institutional manifestations, allows making several important conclusions. First, the functional meaning of authority is necessarily antecedent in respect to its institutional meaning. Law may claim and have authority even when it lacks the institutional structures typical of domestic legal systems. Second, the pre-emptive function of legal norms may not be grounded in delegated practical deliberations, which mark the mediated structure of authority. Pre-emption can be achieved, albeit by different means, in conditions of direct practical deliberations. The authority of law may be unmediated, where actors engaged in practices balance reasons that apply to them directly, without delegating it to formal institutions.

This perspective, in which the authority of law may have two different structures and yet be functionally unified, allows for a fuller jurisprudential explanation of the law's claim to authority. International law is essential in this context, as it exhibits certain deep features of legality and authority that domestic legal systems have long lost.

Chapter 2

The Authority of International Courts: Between Legitimacy and Pre-Emption¹

Introduction

‘The courts are capitals of law’s empire, and judges are its princes,’ as Ronald Dworkin’s famous metaphor goes.² It is indeed the case that in any legal order, courts play one of the most crucial roles in shaping the image and meaning of the law. International law is no exception. The boom of international adjudication that marked the post-World War II era is the best demonstration of this idea. It is a matter of widely shared consensus that international adjudication is of paramount importance for strengthening the international rule of law.

The erection of many international courts (hereinafter, ICs), however, also brought jurisprudential challenges with them. What are the grounds and manifestations of authority of ICs? Are ICs also ‘capitals of law’s empire’, that is, can we say that their authority is comparable to the authority of domestic courts, and if yes, in what respect? Most importantly, how can we account for the discrepancy in the degree of ICs’ factual authority? Why is it the case that some ICs have more weight in shaping the conduct of states and are more successful in generating lasting legal positions, whereas some other

¹ This chapter is based on the draft paper ‘International Courts’ *de facto* Authority: Between Legitimacy and Pre-Emption’, presented at the PluriCourts Annual Workshop ‘The Political and Legal Theory of International Courts and Tribunals’ (Oslo, 20–21 July 2020). I thank Andreas Føllesdal, Antoinette Scherz, and Reto Walther for their invaluable comments.

² Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Belknap Press, 1986), 407.

ICs suffer from crises of authority? It is these questions on which I focus in this chapter. The particular puzzle that I have in mind is what defines ICs as practical authorities in a *de facto* sense. In other words, how can we conceptualise and potentially ‘weigh’ the impact ICs have in respect of the practical reasoning of states and other relevant actors?

In section 1, I outline the canonic dichotomy of *de facto/de jure* authority³ in relation to ICs. I try to show that in the context of international law and international adjudication, this duality acquires a somewhat different meaning as compared to the context of domestic legal systems. In the domestic context, the key conceptual challenge is to show the moral principles that justify the submission to authorities, such as courts, whose *factual* authority seldom comes into question. In the international context, the situation is often reversed; because international adjudication is typically consent-based, the ICs’ authority is usually justified. It is the *factual* authority which is a challenge for them, since there is often a discrepancy between states and other actors being justified in following an IC’s rulings and them actually doing so. The ICs’ authority puzzle, therefore, leans more towards the *de facto*, rather than the *de jure* aspect of legitimate authority.

³ The *de facto/de jure* duality of authority relates to its sociological and normative manifestations. *De facto* authority, then, reflects the capacity of a public institute (a court, an official, or a state at large) to produce commands or directives that are generally obeyed by their addressees, regardless of the particular motives for such obedience. *De jure* (or legitimate) authority reflects the normative justification of obedience, when following the directives of authority is grounded in moral and other reasons. This duality is of course analytical; *de facto* and *de jure* authorities are not two different authorities, as it were, but rather two distinct sides or aspects of their status as authorities. See, for a general overview Thomas Christiano, ‘Authority’, in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Winter 2020 Edition), <https://plato.stanford.edu/archives/sum2020/entries/authority/>. As I show later in the chapter, however, there can hardly be a clear-cut distinction between the two sides of authority. I think it is a mistake to assume that the differentiation between *de facto* and *de jure* authority rests exclusively on the adopted perspective, when the two sides of authority merely reflect a descriptive or a normative point of view. This is wrong, I believe, because *de facto* authority is still a normative phenomenon. There is nothing new in this idea and it has been known since Thomas Hobbes, who did not recognise the duality altogether; if an authority is capable of performing its functions *de facto* it is *ipso facto* justified (Thomas Hobbes, *Leviathan, or the Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill* (London, 1651), ch. XVII). Unlike Hobbes, however, I believe that the distinction is analytically important since it allows to explain, e.g., how a government in exile can be a legitimate authority without having *de facto* authority, or how an occupying state may have *de facto* authority over a territory without being justified in exercising it. Joseph Raz points out several other cases where the distinction is vital in ‘Legitimate Authority’: Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (New York: Oxford University Press, 2009), 3–27.

Section 2 addresses one of the popular accounts on the *de facto* authority of ICs, offered by Karen J. Alter, Laurence R. Helfer, and Mikael R. Madsen.⁴ They claim that ICs' *de facto* authority can be regarded through the lenses of the size and quality of their audiences, that is, the more actors engaged with ICs rulings, the more factual authority they have. I submit that this view seems to conflate practical authority with influence or reputation and downplays the normative nature of authority. I will argue that even when taken in the *de facto* sense authority is still a normative phenomenon.

In the final section, I will show that the primary focus for inquiring into the factual authority of ICs must be neither on their justification, nor on their effective audience. Rather, it should be on what place an ICs' rulings occupy in practical reasoning. I make use of Joseph Raz's service conception of authority, but instead of focusing on its much debated 'normal justification thesis', I highlight the critical role of the pre-emptive function of ICs' rulings, which often remains ignored in international legal scholarship. My core argument is that the factual authority of ICs is primarily reflected in how successfully they pre-empt practical reasons.

1. Authority: *de facto*, *de jure*, and back again

Authority is authority, regardless of context and normative grounds. Any general explanation of authority must account for its essential features that apply to all its manifestations, whatever these may be. Therefore, if we focus on political and legal authority specifically, we must be capable of accounting for it consistently throughout various political and legal contexts. This creates a sense of a certain conceptual

⁴ Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, 'How Context Shapes the Authority of International Courts', in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (Oxford: Oxford University Press, 2018), 24–56.

continuity; we should be able to explain the political and legal authority of courts—domestic or international—within some coherent framework.⁵

And indeed, despite some institutional differences, on which I focus later, ICs and domestic courts perform the same function and share the same mission. Communities have courts because at some point of societal evolution it becomes desirable, or even necessary, to have someone who has the normative power of saying the final word in disputes. As H. L. A. Hart famously observed, disputes about whether some course of conduct does or does not violate a rule are often unresolvable ‘if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation.’⁶ From this purely functional perspective, there seems to be little discrepancy between what ICs and domestic courts do. Courts exist, both in domestic and international realms, as institutions of authority. They carry out the function of solving disputes in an authoritative way, that is, their rulings are taken to be mandatory reasons for action. Because both domestic and international courts are functional siblings, it is an attractive conceptual choice to consider the ICs’ *de facto* and *de jure* authority through the same jurisprudential lenses as the authority of domestic courts.

It is important to clarify, however, at least as a preliminary, what it means to say that courts are institutions of authority. In the contemporary liberal philosophical tradition, the concept of authority primarily relates to a specific kind of social relationship marked by formal hierarchies and hence power inequalities. Authority, in the ordinary meaning of the word, implies that someone has a superior position, which reflects a certain normative relation that exists between authorities and their subjects.⁷ Thus, we typically invoke the concept of authority when discussing the power of social

⁵ As Joseph Raz, whose conception of authority has dominated political and legal philosophy over the last decades, stresses, ‘while not assuming that all international bodies enjoy legitimate authority, I was assuming that international bodies can enjoy such authority. My account of authority applies to them as well.’ Joseph Raz, ‘Why the State?’, in *In Pursuit of Pluralist Jurisprudence*, ed. Nicole Roughan and Andrew Halpin (Cambridge: Cambridge University Press, 2017), 161.

⁶ Herbert L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), 93.

⁷ See chapter 1, where this traditional concept of authority is analysed in details.

institutions, such as governments or courts, over respective populations or parties to a dispute. Authority, in this view, is an intrinsic aspect of the political field; it reflects the governing structures that shape relations of power and subordination in a particular community.

It is obvious that the phenomenon of authority inevitably generates normative questions. After all, authority, when manifested through formal institutions, normally embodies formal hierarchy, and any hierarchy must be justified. Why is it the case that people must obey their governments? What enables courts to issue binding decisions? Such questions are central to philosophical inquiries into the nature of political and legal authority. This is why most contemporary conceptions of authority seek to show under what conditions institutions are justified—morally or otherwise—in exercising their powers. In other words, the concept of authority is commonly treated as necessarily implying, or at least being contingent on, the concept of legitimacy.

Joseph Raz offered one of the most precise formulations of what it means to look at authority through the lens of legitimacy. He writes that the central concern of a theory of legitimate authority is ‘the problem of the possible justification of subjecting one’s will to that of another, and of the normative standing of demands to do so.’⁸ To understand what authority is, then, it is not enough to point at some factual relations in which one submits one’s will to the will of another. It is also necessary to show what kind of normative considerations are involved in this submission. Submission of will, if it comes in the form of relations of authority, and not just of brute power, is not merely factual. It is always shaped by underlying normative considerations. In other words, the explanation of authority is inseparable from its justification, which also shows the relevance of the standard dichotomy *de facto/de jure* authority. A can be in a position of authority over B only if B is justified in accepting A’s directives. In addition, A can be in a position of authority, and not just exercise sheer power, only if A claims to be justified

⁸ Joseph Raz, ‘The Problem of Authority: Revisiting the Service Conception’, *Minnesota Law Review* 90 (2006): 1003.

in governing B's conduct. Therefore, according to Joseph Raz, *de facto* authority is always parasitic on *de jure* authority in the sense that even though factual authorities are not always justified in doing what they do, they always *claim* to be.⁹ This is what makes authority different from sheer power or influence; authorities necessarily claim that there are normative justifications for what they do. This claim, then, is fallible; that authorities claim to be legitimate does not mean that they are.

The concept of legitimate authority is often used to explain the normative powers that ICs have or claim to have. The central idea here is that there is an essential link between the ICs' normative position and the justification of ICs' legitimate authority. ICs do not merely claim to guide the conduct of states and other actors, they claim to do this *legitimately*. ICs function on the basis of a normative assumption that relevant actors are justified in bringing disputes for their consideration and in accepting their rulings as practical reasons. Therefore, it follows that the normative weight of an IC's rulings must be at least partly contingent on the extent to which this IC's authority is justified. ICs, as institutional authorities, necessarily claim to be justified in issuing their rulings. And this brings the normative considerations of legitimacy into play, making them essential to any account of the ICs' right to decide disputes.

International legal scholarship commonly investigates the link between ICs' authority and its legitimation from the perspective of what justifies states and other actors in their acceptance of, and compliance with, ICs' rulings. For instance, Harlan G. Cohen, Andreas Føllesdal, Nienke Grossman, and Geir Ulfstein observe that there is a direct normative dependency between the scope and intensity of an IC's claim to authority and the need for its justification: 'the less authority a body claims or asserts, the less justification it needs to do so legitimately.'¹⁰ Thus, for instance, an IC claims more authority when its jurisdiction is compulsory, rather than optional, or when its

⁹ Raz, *Authority of Law*, 25–7.

¹⁰ Harlan G. Cohen et al., 'Legitimacy and International Courts – A Framework', in *Legitimacy and International Courts* (Cambridge: Cambridge University Press, 2018), 28.

rulings have qualities of precedent, or when it has a broad material jurisdiction. The more authority ICs claim, the higher the bar of its overall institutional legitimation is raised, ‘the more that is asked of participants, both in terms of substance and obligation, the more justification participants will expect and require.’¹¹

Nienke Grossman attempts to clarify what the elements of legitimacy in the case of ICs are specifically; that is, what are the key justification techniques or arguments that shape ICs’ legitimate authority? She names three such elements: (1) the fair and unbiased nature of an IC; (2) acceptance of the underlying legal regime(s) in which a given IC has been granted its jurisdiction; (3) transparency and democratic accountability of an IC.¹² The combination of these elements may differ from IC to IC, and also their weight may fluctuate over time. Nienke Grossman’s general idea is to show that in discussions about ICs’ legitimate authority we must focus on what factors may and should in principle justify the acceptance of ICs’ rulings by states and other actors.

The legitimacy framework used to account for the ICs’ authority is generally widely used.¹³ It is based on a more general idea, deriving from political and legal philosophy, that the *de facto* normative powers institutions have require justification, because otherwise the exercise of these powers will not yield valid moral, political, and legal

¹¹ Cohen, ‘Legitimacy’, 29.

¹² Nienke Grossman, ‘Legitimacy and International Adjudicative Bodies’, *George Washington International Law Review* 41, no. 1 (2009): 107–80.

¹³ Armin von Bogdandy and Ingo Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification’, *European Journal of International Law* 23, no. 1 (2012): 7–41; Margaret M. DeGuzman, ‘The Global–Local Dilemma and the ICC’s Legitimacy’, in *Legitimacy and International Courts*, ed. Nienke Grossman et al. (Cambridge: Cambridge University Press, 2018), 62–82; Nienke Grossman, ‘Solomonic Judgments and the Legitimacy of the International Court of Justice’, in *Legitimacy and International Courts*, ed. Nienke Grossman et al. (Cambridge: Cambridge University Press, 2018), 43–61; Molly K. Land, ‘Justice as Legitimacy in the European Court of Human Rights’, in *Legitimacy and International Courts*, ed. Nienke Grossman et al. (Cambridge: Cambridge University Press, 2018), 83–113; Mortimer N. S. Sellers, ‘Democracy, Justice, and Legitimacy of International Courts’, in *Legitimacy and International Courts*, ed. Nienke Grossman et al. (Cambridge: Cambridge University Press, 2018), 338–53; Ingo Venzke, ‘International Courts’ De Facto Authority and Its Justification’, in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (Oxford: Oxford University Press, 2018), 391–402; Michael Zürn, ‘International Courts: Command v. Reflexive Authority’, in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (Oxford: Oxford University Press, 2018), 382–90; Michael Zürn, Martin Binder, and Matthias Ecker-Ehrhardt, ‘International Authority and Its Politicization’, *International Theory* 4, no. 1 (2012): 69–106.

obligations. And this is where it becomes difficult to bypass dissimilarities between domestic and international courts as authoritative institutions.

Ronald Dworkin's 'capitals of law's empire' owe this prestigious status to their compulsory and mandatory jurisdiction, coupled with the fact that domestic courts are an integral part of (typically) effective legal systems. In such circumstances, one can hardly escape going to court to have one's legal dispute resolved or accepting this solution as binding; the courts' authority is backed by the general authority of the legal system to which they belong. Besides, in domestic legal orders, courts are probably the most visible legal institutions of all. They are much closer to the everyday legal life of a community than any other component of its legal system (with a possible exception of the police). This gives domestic courts enormous powers and influence in both political and legal domains. ICs clearly do not enjoy such a privilege. International adjudication is explicitly consent-based¹⁴ and for this reason it has a far more modest weight in the international legal order. In most scenarios, ICs do not represent an inescapable institution states and other actors must convince in order to defend their legal positions. Many legal disputes in international law never even reach court.

It is therefore important to realise that the idea of legitimate authority comes about as a result of the contemplation of the political and legal life of communities of people. In their context, the continuous existence of *de facto* political and legal authorities has been the reality for hundreds, if not thousands, of years. This established the agenda for finding ways in which these authorities could be limited and held accountable, and hence of understanding the conditions under which people are justified in (dis)obeying them. According to Joseph Raz, in the domestic context the relation between *de facto* and *de jure* authority is such that 'there is a strong case for holding that no political authority can be legitimate unless it is also a *de facto* authority.'¹⁵ In other words, the central task

¹⁴ Of course, I am speaking of state consent here in the context of public international law disputes. International criminal court and tribunals obviously adjudicate without the consent of natural persons subjected to their jurisdiction.

¹⁵ Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 56.

performed by the doctrine of legitimate authority is to outline certain normative grounds of relations between rulers, who exercise the authority, and ruled, who are the subjects of this authority. This is why the traditional doctrine of legitimate authority primarily concerns the hierarchical relations and functional differentiations between people and officials, as was shown in the previous chapter.

The idea of legitimate authority, therefore, is very much rooted in histories and struggles that are by and large alien to the international domain. In the domestic context, where the *de facto* authority of political and legal institutions seldom comes into question, it is their *de jure* status which is typically debated. In the international context, the situation is often reversed. Even though international law may have legitimacy problems, the typical charge goes against its factual authority, its actual normative capacity to make a difference in the practical reasoning of actors.¹⁶ With ICs, this problem is even more acute. States and other actors may have a strong moral and political justification to follow their rulings, that is, there may be no *prima facie* concerns about how legitimate such courts are. And yet international courts may fall short in having *de facto* authority, when their practice has little to no impact on the practical reasoning of the subjects. What I say here does not mean, of course, that ICs cannot suffer from legitimacy crises. They can and often do. It is not only reasonable, but also desirable to question the different way in which ICs ground their legitimacy and point at difficulties and inconsistencies that get reflected in their institutional design, representativeness, transparency, etc. In other words, by saying that the logic of *de facto/de jure* authority is often reversed in the case of ICs, I do not imply that ICs are by definition legitimate. I merely say that their factual authority is a far more difficult and often overlooked problem, as compared to their legitimacy.

¹⁶ Jack Goldsmith and Eric Posner offer probably the most recent sceptical charge of this sort against international law: Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005).

This reversed logic of authority, when one moves from *de jure* authority to *de facto*, rather than the other way around, is in itself quite remarkable, because it changes entirely the standard dynamics between these two sides of the concept of authority. Andrei Marmor believes that this is due to the crucial difference between voluntary and non-voluntary authoritative institutions. Because it is a mark of ICs that their authority rests on states' voluntary commitments, 'they tend to be formed, *de jure*, typically by way of international treaty [...] but whether they actually operate as a *de facto* practical authority is something that evolves over time.'¹⁷ Voluntary authoritative institutions, exactly because they are voluntary, experience much less pressure in showing that they are legitimate, but far more pressure in proving that they can be practically relevant.

This changes the relation between *de facto* and *de jure* authority dramatically. For ICs, the central conceptual puzzle becomes not the movement from *de facto* to *de jure*, but from *de jure* to *de facto*. International legal theory, then, becomes 'interested in when a court's formal legal authority evolves into authority in fact, or *de facto* authority'.¹⁸ This raises a substantial jurisprudential challenge. Domestic courts usually do not get questioned as to whether they have *de facto* authority. But for ICs this is what is most essential. In the next section, I investigate one of the leading approaches to understanding ICs' *de facto* authority.

2. *De facto* authority, audience, and reputation

The traditional idea that the explanation of political and legal authorities must begin with the investigation of the normative conditions under which they are legitimate, overlooks the nature of international adjudication. As I tried to show in the previous section, in the case of ICs, it is a far more acute conundrum to ensure that their authority

¹⁷ Andrei Marmor, 'Authority of International Courts: Scope, Power, and Legitimacy', in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael R. Madsen (Oxford: Oxford University Press, 2018), 374.

¹⁸ Alter, 'How Context Shapes Authority', 24.

is factual, that is, that it has a practical impact on what states and other actors do and do not do. This does not imply the rejection of the many legitimacy concerns which surround ICs. Rather, it means realising that we cannot assume, as in the context of domestic courts as parts of generally effective legal systems, that ICs factually enjoy the degree of legitimate authority they claim to have.

However, whereas the indicators of what makes political and legal authorities justified and therefore legitimate are generally well-established and widely used in international legal scholarship,¹⁹ it is far more difficult to pinpoint the indicators of factual authority. As Ian Hurd correctly observes,

Formal authority exists in the legal texts and commitments by which governments delegate some autonomy or capacity to an IC as an actor with certain responsibilities, powers, and limits. This is relatively easy to see in courts' founding treaties and other formal texts. By contrast, authority in fact is hard to see. It rests on beliefs and attitudes, is internal to the actor, or perhaps internal to the relation between the actor and the court, and mixes with other unseen social and political forces to produce effects.²⁰

The unexposed nature of factual authority is one of the main challenges for building up a picture of authoritative international adjudication. It is sometimes claimed that in order to get an intelligible account of the factual authority of ICs, we must reject aspects

¹⁹ See, for instance, Samantha Besson, 'The Authority of International Law – Lifting the State Veil', *Sydney Law Review* 31 (2008): 343–80; Allen Buchanan, 'The Legitimacy of International Law', in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 103–25; Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions', *Ethics & International Affairs* 20, no. 4 (2006): 405–37; Filipe dos Reis and Oliver Kessler, 'Legitimacy', in *Concepts for International Law: Contributions to Disciplinary Thought*, ed. Jean d'Aspremont and Sahib Singh (Cheltenham: Edward Elgar Publishing, 2019), 650–61; Andreas Follesdal, 'Survey Article: The Legitimacy of International Courts', *Journal of Political Philosophy* 28, no. 4 (2020): 476–99; Thomas M. Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', *American Journal of International Law* 100, no. 1 (2006): 88–106; David Lefkowitz, 'The Legitimacy of International Law', in *Global Political Theory*, ed. David Held and Pietro Maffettone (Malden: Polity, 2016), 98–116; John Tasioulas, 'The Legitimacy of International Law', in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 126–50.

²⁰ Ian Hurd, 'Authority and International Courts: A Comment on "Content-Independent" Social Science', in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (Oxford: Oxford University Press, 2018), 426

of the motives and beliefs that actors have, because this would require psychological inquiry, which lies outside the legal domain. This conviction was most coherently represented by Alter, Helfer, and Madsen, who insist that in order to come up with a reliable metric of ICs' factual authority, it must be 'agnostic as to why an audience recognizes a court's authority and to the subjective beliefs that underlie that recognition.'²¹ In such a way, they attempt to uncouple the issue of *de facto* authority from its legitimacy, which, as we saw in the previous section, typically go hand-to-hand both in jurisprudence and political philosophy. Alter, Helfer, and Madsen are not the first to suggest such a conceptual framework based on a strict differentiation between authority and legitimacy,²² but they are probably the most far-reaching in their inquiry.

Alter, Helfer, and Madsen suggest that if we leave the issues of legitimacy outside the analysis of ICs' authority, we must look for its objective and verifiable criterion. They offer a contextual methodology which focuses on how large the effective audience of ICs are. They argue that the effective audience is a reliable indicator of what actual weight ICs have, which directly translates into their *de facto* authority. According to Alter, Helfer, and Madsen, the build up of *de facto* authority is a steady process that proceeds in five stages:

1. *no authority*, when 'despite identified violations, litigants do not file complaints with the IC, and cases that the court does decide are generally ignored';²³
2. *narrow authority*, when parties to particular disputes 'take meaningful steps toward compliance with a court's ruling,' but the court's impact does not go beyond this specific effective audience;²⁴

²¹ Alter, 'How Context Shapes Authority', 28.

²² See, e.g., Birgit Peters and Johan Karlsson Schaffer, 'The Turn to Authority beyond States', *Transnational Legal Theory* 4, no. 3 (2013): 315–35; Zürn, 'International Authority'.

²³ Alter, 'How Context Shapes Authority', 31.

²⁴ Alter, 31.

3. *intermediate authority*, when an IC has ‘the ability to cast a larger legal shadow that affects the behavior and decisions of other similarly situated actors’;²⁵
4. *extensive authority*, ‘when an IC’s audience expands beyond its compliance partners to encompass a broader range of actors, including civil society groups, bar associations, industries, and legal academics’;²⁶
5. and *popular authority*, ‘which exists when recognition of IC rulings extends beyond the specific field to encompass the public in general’.²⁷

The most remarkable feature of such an approach is that it represents the degrees of the factual authority of ICs in purely quantitative terms. The broader the effective audience of an IC is, the more *de facto* authority it has. In other words, the factual authority of an IC becomes conditioned on, or evident in, the agents to whom the rulings of this court matter. Andrei Marmor, by endorsing this framework, takes it even further and claims that ‘it would not be unreasonable to maintain that an IC whose authority is strictly narrow *is not quite a practical authority*, at least *de facto*.’²⁸ He believes that the practical authority of an IC must be systemic in a sense that its rulings should matter in a broader context, rather than only for the parties to a dispute. Ingo Venzke, though questioning some of the aspects of relations between ICs and their audiences, maintains that it is reasonable to see factual authority as manifested in the ICs’ audience.²⁹ Ian Hurd supports Alter, Helfer, and Madsen’s framework by pointing out that it allows the development of a content-independent understanding of the ICs’ authority.³⁰

The main problem with this view, however, is exactly its agnostic position in respect to the normative implications that relations of authority generate. Even though it is intuitively appealing to assume that *de facto* authority and effective audience

²⁵ Alter, 31.

²⁶ Alter, 32.

²⁷ Alter, 31–32.

²⁸ Marmor, ‘Authority of International Courts’, 376 (emphasis added).

²⁹ Venzke, ‘International Courts’ De Facto Authority’, 393.

³⁰ Hurd, ‘Authority and International Courts’, 423–26.

correlate, this seems a contingent matter, rather than a connection of normative or ontological necessity. It is true, of course, that authority is relational and rational; that is, it is impossible to be a secret authority, or to obey an authority you do not know exists. Therefore, the audience always matters in relations of authority. The question is, however, to what extent it can be an indicator of *the factual strength* of authority.

Here, two considerations come into mind. First, as Andreas Føllesdal correctly points out, it is inconsistent with the very idea of practical authority to leave actors' reasons, motives, and beliefs outside the consideration:

Without ascription of beliefs and motives it seems difficult if not impossible to determine whether an IC exercises *de facto* authority or rather induces behavior due to actors' fears of sanctions by third parties, or is merely taken for granted by the other actors, or exercises other forms of power.³¹

This point reflects a more fundamental problem of Alter, Helfer, and Madsen's agnosticism regarding the beliefs, motivations, and practical reasons of ICs' audiences. It is certainly possible and fruitful to investigate the dynamics of ICs' audiences and to study the implications these dynamics create. This can be a reliable indicator of how well ICs do, both legally and politically speaking. But it seems reasonable to question whether '*de facto* authority' is the right term to use in this context. As Andreas Føllesdal rightly notes, if we maintain the position of motivational agnosticism, we should 'reconsider whether "de facto authority" is the best label for the kind of impact of these ICs at various levels'; rather, such agnosticism may be a valid methodological principle to be used 'to map the ICs' power more generally'.³²

Another point resonates with the doubts raised by Ingo Venzke. It may be reasonable to regard the *de facto* authority of ICs by linking it to their audience, as long as we investigate the conduct of the parties to a dispute. It is primarily for them that an

³¹ Andreas Føllesdal, 'Power or Authority; Actions or Beliefs', in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael R. Madsen (Oxford: Oxford University Press, 2018), 415.

³² Føllesdal, 412.

IC's ruling manifests as legally binding. But things become quite uncertain if we broaden the audience. It is clear that an IC cannot be a *de facto* or even *de jure* authority in regard to legal academics or just ordinary people,³³ unless they are subjects to it jurisdiction (like in human rights courts or international criminal courts and tribunals). ICs' rulings are not even presumably binding upon them; so there are no relations of authority involved.³⁴ Rather, Alter, Helfer, and Madsen's view approximates the idea of *de facto* authority to the idea of reputation. We often ascertain the weight of a court's ruling by asking questions similar to those we ask when we investigate someone's reputation.³⁵ As much as reputation reflects certain expectations we have towards a person (who has a 'good' or a 'bad' reputation), similarly, within Alter, Helfer, and Madsen's framework, *de facto* authority manifests in expectations deriving from multiple effective audiences. The size and diversity of the audience seems to serve the evidence of the reputation of people and courts alike.

But at the same time the growth of the ICs' audience and hence their reputation does not necessarily indicate the growth of their *de facto* authority. This is specifically visible if we try to reverse the logic here. States and other actors often prefer less public forms of dispute settlement, such as mediation or arbitration. In these cases, the audience of such dispute-settlement mechanisms is quite narrow, and yet the actual weight of their awards or rulings may be more significant than that of more open dispute settlement

³³ Venzke, 'International Courts' De Facto Authority', 393.

³⁴ This point can also be presented from a different angle. Stephen Darwall convincingly argues that for relations of authority to appear there must be mutual moral accountability involved. For instance, a cooking master can be a practical authority over me if I learn cooking under his tutelage, and he can give me practical reasons which he may also control that I comply with. I become morally accountable for compliance with his directives. But there is nothing remotely similar when I simply watch a cooking show and try to mimic what the cook is doing. I may listen to him, he may have certain *epistemic* powers over me, but he cannot be said to be in a position of *authority* over me. Stephen Darwall, 'Authority and Second-Personal Reasons for Acting', in *Reasons for Action*, ed. David Sobel and Steven Wall (Cambridge: Cambridge University Press, 2009), 151–52.

³⁵ Pauline Westerman employs the concept of reputation in a similar way by showing that fluctuations of legal validity depend on the input, throughput, and output qualities of rules. Pauline Westerman, 'Validity: Reputation of Rules', in *Legal Validity and Soft Law*, ed. Pauline Westerman et al. (New York: Springer, 2018), 165–82.

mechanisms. This is similar to what was above characterised as ‘narrow authority’, when an IC’s factual authority is only limited to the parties to a dispute. There is no reason to *a priori* assume that through the mere fact that the audience of an award is narrow its practical significance or bindingness is low. It is not inconceivable that an IC has not yet gained a broad reputation and public acclaim but already enjoys a high degree of factual authority for the direct addressees of its rulings. Therefore, it is reasonable to assume that the growth of the effective audience correlates with the growing reputation of a court, but it cannot be used as the main indicator of its *de facto* authority.

Collapsing *de facto* authority into reputation, it seems, distorts the nature of authority as a normative phenomenon. There is a critical difference between how an IC interacts with the direct addressees of its rulings and what impact it has beyond. A ruling of a court—domestic or international—is a reason for action for the parties in dispute and for legal officials of a given legal regime (if there are any). Even if this ruling matters, as a matter of law, to other actors, it does not mean that it matters in exactly the same way. More likely, for a broader audience not involved in a particular dispute at hand, a ruling constitutes a reason for belief that in a court’s view the law is such and such. But this reason for *belief* does not automatically translate into a reason for *action*.³⁶ In other words, members of a broader court’s audience do not obtain any obligation—legal or otherwise—to do something to respect a court’s decision.

We must therefore look for an alternative explanation of the factual authority of ICs, which, on the one hand, does not collapse it into legitimacy and justification, and, on the other hand, appreciates the normative nature of authoritative relations. In the next section I suggest that the explanation of *de facto* authority must rotate around the concept of pre-emptive practical reasons.

³⁶ See, on the difference reasons for action and reasons for belief: Joseph Raz, ‘Authority, Law and Morality’, *Monist* 68, no. 3 (1985): 295–324; Joseph Raz, *Practical Reason and Norms*, 2nd ed. (New York: Oxford University Press, 1999).

3. Pre-emption and ICs' *de facto* authority

In the previous two sections I tried to show, first, that the dichotomy *de facto/de jure* authority works differently with ICs, and, second, that the *de facto* authority of ICs cannot be substituted by its reputation and general popularity among different audiences. On the one hand, that an IC is legitimate does not mean that its rulings and opinions actually have weight in the practical reasoning of the relevant subjects, that is, *de jure* authority may have little connection to *de facto* authority, like Alter, Helfer, and Madsen show. On the other hand, despite '*de facto*' in its name, factual authority is still a normative phenomenon and therefore its analysis cannot leave out the relations of practical reasoning that exist between an IC and its subjects, which is something these scholars overlook.

If neither the legitimacy approach nor the effective audience method provide a solid ground for understanding the *de facto* authority of ICs, it may be fruitful to investigate the possible normative implications of authoritative relations. It is important to stress that the normative aspects of authority are not confined to its legitimacy. They may also reflect the normative relations between a court and its audience which manifest in a court's impact on practical reasoning. In other words, we may approach the *de facto* authority of courts by investigating whether their rulings are capable of generating pre-emptive practical reasons.

Note that this perspective differs both from the legitimacy and the effective audience approaches. On the one hand, it does not collapse *de facto* authority into a parasite upon legitimacy. I am not interested in what practical reasons a court *claims* to generate (and how much this claim is justified), but in what practical reasons it *manages* to generate. To be clear, surely, justifications of authority, which make it legitimate, play a role in what practical reasons an IC is capable of generating. Legitimacy outlines the boundaries in which *de facto* authority is likely to be achieved, even though the *de facto* authority may in principle be achieved beyond justified boundaries. Still, when these boundaries are crossed, this creates risks for *de facto* authority. When states and other

actors are not justified in accepting an IC's ruling as a practical reason, it will less likely succeed in having weight and function in their practical deliberations.³⁷ This distinction, taken from the perspective of practical reasoning, reflects a general jurisprudential idea that

whether or not the law is in fact authoritative is a question to be discussed in the context of a study of the *force* of law. By contrast, law's claim to authority has to do with the obligations that a legal practice necessary asserts to generate, not with the duties that are actually owed to the legal practice.³⁸

That is, *de facto* authority must be sought in the actual strength and qualities of reasons that a court is capable of generating, and not so much in what kind of reasons it *claims* to generate. It is, however, impossible to fully leave legitimacy out of account, as mentioned above. The *factual* authority of a court and its rulings becomes visible against the background of *legitimate* authority it claims to have. At the same time, this link does not assume any direct correlation between *de facto* authority of a court with its effective audience and, consequently, reputation. A court's impact on practical reasoning and its capacity to generate reasons may be limited only to the parties in dispute, and this is enough of an indicator of its factual authority. Whether or not practical reasons generated by a court receive further appraisal and support in other disputes, or even beyond them, is a wholly different matter.

So far I have only mentioned 'an impact on practical reasoning' and the 'capacity to generate practical reasons'. However, what is critical in this context, of course, is that ICs as institutions of authority claim to generate *pre-emptive* reasons, which have a very specific function. Joseph Raz, who is one of the strongest proponents of the pre-emptive function of authoritative directives, writes that

³⁷ For instance, Nienke Grossman offers an analysis of what authority risks are involved when the ICJ tries to solve cases in a Solomonic way, thus bypassing the legitimate expectations of parties. Grossman, 'Solomonic Judgments'. See also Cohen, 'Legitimacy and International Courts'; Sellers, 'Democracy, Justice, and Legitimacy'.

³⁸ Stefano Bertea, 'On Law's Claim to Authority', *Northern Ireland Legal Quarterly* 55 (2004): 399 (emphasis in the original).

the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, *but should exclude and take the place of some of them*.³⁹

The pre-emptive function of authoritative directions is crucial for understanding relations of authority,⁴⁰ and, I submit, it is central for explaining *de facto* authority. Remarkably, however, the idea of pre-emption is seldom mentioned during discussions on the (legitimate) authority of ICs.⁴¹ What the idea of pre-emption primarily entails is that the ICs' rulings must be capable of making a practical difference. That is, 'they must be capable of motivating agents to act differently from how they might have without their guidance,' simply because if they 'gave the same answers as deliberation on the merits, agents would never believe themselves to have reasons not to deliberate about a rule's recommendation.'⁴² In other words, ICs' rulings must make a difference to how addressees of these rulings act, *even if* the addressees have had other, independent, reasons to act in exactly the same way.

It is important to realise that authoritative directives, including the rulings of ICs, always *claim* to be pre-emptive, which must be distinguished from their factual pre-emptive force. To have a pre-emptive reason for action means to be in a position when one ought to act for this reason, instead of all the relevant reasons it was based on (including reasons against the required action). This primarily entails that a court's ruling is a reason that one has to comply with not because it is fair, just, or has other content-related characteristics. Likewise, it is a reason one has to comply with even if one believes it is unjust or unfair. All these characteristics get 'overridden' by a pre-emptive reason. Ingo Venzke uses a similar line of argumentation (without talking about pre-emption,

³⁹ Raz, *Morality of Freedom*, 46 (emphasis added).

⁴⁰ See also Joseph Raz's discussion on exclusionary reasons, which contributed significantly to his later ideas about pre-emptiveness: Raz, *Practical Reasons and Norms*, ch. 2.

⁴¹ See, e.g., Grossman, 'Legitimacy and International Adjudicative Bodies'; Marmor, 'Authority of International Courts'. In most applications of Joseph Raz's service conception of authority, the focus is on the normal justification thesis, which is a general test of legitimacy, but not to the pre-emption thesis, which is far more intricate.

⁴² Scott J. Shapiro, 'On Hart's Way Out', *Legal Theory* 4, no. 4 (1998): 493–94.

however), when stressing that the *de facto* authority of ICs implies that ‘participants are compelled to use [...] international judicial decisions even if they do not agree with them in substance and if they do not readily support their position. In other words, their use of ICs’ decisions cannot be purely voluntary.’⁴³

As already mentioned, that ICs’ rulings *claim* to be pre-emptive does not automatically imply that they are. This means we can observe fluctuations in how successful the pre-emptive function of a ruling is in the eyes of the parties to a dispute, the affected actors, or the general audience of an IC. The pre-emptive function of norms, including the rulings of ICs, is that they are supposed to take the place of the balance of reasons they are based on. However, as some authors observe, there is a degree of opacity/transparency when it comes to the actual pre-emptive capacities of norms.⁴⁴ What this means is that norms, even though it is being claimed that they pre-empt underlying reasons, may, as a matter of fact, be more or less successful in setting up the ‘pre-emptive veil’. When a norm is capable of providing for a thick and highly opaque pre-emptive standard, this makes it practically and argumentatively inappropriate for the relevant actors to invoke or rely on underlying reasons. This is what also marks highly authoritative rulings of ICs; that they manifest as pre-emptive reasons which are self-sufficient and do not require any further deliberations. Contrariwise, what marks weak rulings is that they are incapable of cutting off deliberations relating to the underlying

⁴³ Venzke, ‘International Courts’ De Facto Authority’, 394.

⁴⁴ See, e.g., Noam Gur, *Legal Directives and Practical Reasons* (Oxford: Oxford University Press, 2018), 166; Frederick F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (New York: Oxford University Press, 1991), 97, 173. Sometimes the idea of opacity/transparency is taken to mean that it is generally nonsensical to speak of the pre-emptive character of norms: Larry Alexander, ‘Law and Exclusionary Reasons’, *Philosophical Topics* 18, no. 1 (1990): 5–22; Stephen R. Perry, ‘Second-Order Reasons, Uncertainty and Legal Theory’, *Southern California Law Review* 62 (1989): 913–94. I believe, however, that there is no other way of explaining the function norms perform in practical reasoning unless we accept at least a degree of pre-emptiveness. See chapter 1 for an introductory take on this idea. I develop it further in chapter 4.

reasons; the relevant actors are not precluded, from the perspective of practical reasoning, from penetrating through a thin pre-emptive veil.⁴⁵

There are many examples of rulings of this sort, where the fluctuation of the pre-emptive capacity is quite visible, in particular in the practice of the ICJ. For instance, *North Sea Continental Shelf Cases* established the grounds for practical deliberations pertaining to identification of rules of customary international law, thus pre-empting reasoning on this matter.⁴⁶ While scholars do continue debating the feasibility and even possibility of the canonical two-element test,⁴⁷ as a matter of practical reasoning within the law, the ruling in this case has generated a powerful pre-emptive veil which makes it inappropriate to ascertain the existence of rules of CIL in adjudication in some other

⁴⁵ This perspective is similar to Ingo Venzke's idea of semantic authority as the concept which 'refers to an actor's capacity to find acceptance for its interpretative claims or to establish its own statements about the law as content-laden reference points for legal discourse that others can hardly escape'. Ingo Venzke, 'Semantic Authority', in *Concepts for International Law: Contributions to Disciplinary Thought*, ed. Jean d'Aspremont and Sahib Singh (Cheltenham: Edward Elgar Publishing, 2019), 815. However, whereas Ingo Venzke places an emphasis on interpretative and argumentative techniques, I make a broader claim that pre-emptiveness relates to the practical difference norms make for any relevant behaviour. Interpretative and argumentative claims are meaningful *within* this normative framework and the practical difference it produces.

⁴⁶ *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands)* (Merits) (1969) ICJ Reports, para 77.

⁴⁷ See, e.g., Michael Akehurst, 'Custom as a Source of International Law', *British Yearbook of International Law* 47, no. 1 (1976): 1–53; Bin Cheng, 'Opinio Juris: A Key Concept in International Law That Is Much Misunderstood', in *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, ed. Sienho Yee and Wang Tieva (London: Routledge, 2001), 56–76; Monica Hakimi, 'Making Sense of Customary International Law', *Michigan Law Review* 118, no. 8 (2020): 1487–1538; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006); David Lefkowitz, '(Dis)Solving the Chronological Paradox in Customary International Law: A Hartian Approach', *Canadian Journal of Law & Jurisprudence* 21, no. 1 (2008): 129–48; Brian D. Lepard, 'Towards a Normative Theory of Customary International Law as Law', *Proceedings of the ASIL Annual Meeting* 103 (ed 2009): 379–82; Maurice H. Mendelson, 'The Formation of Customary International Law', in *Collected Courses of the Hague Academy of International Law*, vol. 272 (Leiden: Brill, 1998), 155–410; Anthea E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', *American Journal of International Law* 95, no. 4 (2001): 757–91; Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', *European Journal of International Law* 26, no. 2 (2015): 417–43; John Tasioulas, 'Customary International Law and the Quest for Global Justice', in *The Nature of Customary Law* (Cambridge: Cambridge University Press, 2007), 279–306; Emmanuel Voyiakis, 'Customary International Law and the Place of Normative Considerations', *American Journal of Jurisprudence* 55, no. 1 (2010): 163–200. Jean d'Aspremont offers a comprehensive overview of the debate about customary international law and its normative structure in his recent monograph *The Discourse on Customary International Law* (New York: Oxford University Press, 2021).

way (at least in front of the ICJ), thus barring states from advancing some alternative identification methodologies (for good or bad).⁴⁸ This entails, among other things, that states are precluded from challenging the logic of the two-element approach, since this would entail challenging the authority of many rulings where it was employed. The fact that states and the ICJ itself have not attempted to revisit the two-element test shows how much of a pre-emptive force the *North Sea Continental Shelf* ruling managed to generate, at least in this respect.

Similarly, in the *Military and Paramilitary Activities in and against Nicaragua*, the ICJ developed the so-called ‘effective control test’ used for the purposes of attribution of conduct of non-state actors to a state.⁴⁹ This test has since then become an intrinsic part of the law on state responsibility, endorsed also by the International Law Commission in its Articles on Responsibility of States for Internationally Wrongful Acts.⁵⁰ The pre-emptive function of this test manifested in it as being inappropriate and impractical to attribute conduct of non-state actors to a state without applying the logic of the effective control, or trying to revisit it. This is exactly why the ICJ became quite defensive after the International Criminal Tribunal for Former Yugoslavia developed and applied, for the purposes of determination of the status of the armed conflict, the overall control test.⁵¹ In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ pushed back against the overall control test and restated its commitment to the effective control test as appropriate in the context of state responsibility.⁵² On my reading of *de facto* authority in this chapter, the whole tension between the ICJ and the ICTY

⁴⁸ I discuss some of the implications of the two-element approach, as well as its problems, in the next chapter.

⁴⁹ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. The United States of America*) (Merits) (1986) ICJ Reports, paras 105–115.

⁵⁰ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, 47–49.

⁵¹ *Tadić Case* (Judgment of Appeals Chamber) ICTY- 94-1-A (15 July 1999), paras 122–123. See also Antonio Cassese, ‘The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’, *European Journal of International Law* 18, no. 4 (2007): 649–68.

⁵² *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Merits) (2007) ICJ Reports, paras. 402–407.

and the juxtaposition of the two tests reveals the inner logic of pre-emption. Bosnia and Herzegovina, by requesting the ICJ to apply the broader overall control test, essentially not only confused the distinct nature of the two tests (which the ICJ pointed out),⁵³ but more importantly tried to push the ICJ to revisit its reasoning in the earlier case. In other words, the presentation of the overall test as a possible alternative to the effective control test was in effect undermining the pre-emptive capacity of the latter, which is why it was so important for the ICJ to stress its commitment to the reasoning developed in the *Nicaragua* judgment.

The degree of pre-emptiveness, therefore, reflects the factual impact of a ruling on the practical deliberations of the relevant actors. Note that this does not necessarily translate into compliance. How much states and other actors comply with rulings of ICs is a matter of their general effectiveness, rather than their *de facto* authority. What it means to say that an IC's ruling succeeded in pre-empting practical deliberations is to show that the relevant actors may no longer weigh and invoke the reasons which an IC has already accounted for in the ruling. A successfully pre-emptive ruling is such that it replaces the reasons an IC was asked to assess and therefore it shapes future practical deliberations in a way that invoking those reasons is no longer appropriate or even meaningful, as showed in the examples above.⁵⁴ It seems reasonable to ascertain,

⁵³ Some authors, however, pointed out that the effective control test set bar impractically high and argued in favour of adopting the overall control test as the standard for the purposes of attribution. See, e.g., André J. J. de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', *British Yearbook of International Law* 72, no. 1 (2002): 255–92.

⁵⁴ Things may look different for those ICs that have a practice of overruling previous judgments—something that the ICJ does not do (at least not explicitly). For instance, the European Court on Human Rights practises overruling by modifying or drastically changing its approach to particular aspects of the interpretation and application of the European Convention on Human Rights. This inevitably implies challenging the pre-emptiveness of the previous case-law. By overruling it, the ECtHR essentially diminishes the pre-emptive force of a previous ruling. The practice of overruling, then, requires some compensatory mechanisms that secure the overall pre-emptive force of an IC's jurisprudence. As Yuliia Khyzhniak shows, the ECtHR in particular is peculiar in this regard because it secures its authority by employing narrative constructions that allow it to present overruling as a natural process, in which different choices and solutions are measured against each other. Yuliia Khyzhniak, 'A Departure in the Jurisprudence of the European Court of Human Rights as Part of a Narrative Structure', *ISLL Papers: Dignifying and Undignified Narratives in and of (the) Law*, 2020, 81–104. By generating these narratives as

therefore, that to develop a methodology for measurement of ICs *de facto* authority we must primarily focus on weighing practical reasons and investigating conditions under which an IC will likely manage to pre-empt them.

Also important is the pre-emptive capacity of ICs' rulings as an indicator of their *de facto* authority also allows one to explain the connection between authority and reputation, which I touched upon in the previous section. Recall that one of the main issues with linking the *de facto* authority of an IC to its audience is that it erases the difference that exists between the practical impact its rulings are supposed to have for the parties to a dispute and other, not directly affected, audiences. Pre-emptive reasons, however, allow bypassing this issue. ICs' rulings are practical reasons primarily for the parties to a dispute, but because they are presumed to be pre-emptive, they have a broader impact on the legal regime or legal order these rulings belong to.

Ingo Venzke believes that what defines ICs' authority when it reaches beyond the parties to a dispute is that it 'presents itself as their capacity to establish contentful reference points for legal discourse that other actors can hardly escape.'⁵⁵ This seems correct, but incomplete. The critical question here must be *why* actors cannot escape a successfully pre-emptive IC ruling? What anchors such a ruling in its pre-emptive capacity? The answers to these questions must be sought in the broader context of international law being a set of pre-emptive practical reasons.⁵⁶ What makes it possible for ICs' rulings to be factually pre-emptive is that their pre-emptiveness is anchored in the general pre-emptive claim of international legal norms. ICs do not merely advance

coherent stories about the legal issues it deals with, the ECtHR manages to maintain its *de facto* authority even though it constantly tears off the pre-emptive veil of its own rulings.

⁵⁵ Venzke, 'International Courts' De Facto Authority', 396. See also, Ingo Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law', *Transnational Legal Theory* 4, no. 3 (2013): 354–73; Venzke, 'Semantic Authority'.

⁵⁶ International legal scholarship has not yet actively employed Joseph Raz's conceptual framework on exclusionary/pre-emptive reasons with his idea that 'the law presents itself as a body of authoritative standards and requires those to whom they apply to acknowledge their authority'. Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (New York: Oxford University Press, 2009), 33. This is the gap that this thesis seeks to fill in. See, in a recent discussion, Miodrag A. Jovanović, *The Nature of International Law* (Cambridge: Cambridge University Press, 2019).

their own position when they issue a judgment; rather, they claim to be acting on behalf of international law, voicing its normativity.⁵⁷ The factual pre-emptive capacity of ICs' rulings, therefore, must be assessed against the background of the factual pre-emptive capacity of international legal norms or regimes they enforce or claim to act on behalf of.

This also means that ICs may fail, or succeed to a greater or lesser degree, to appreciate the authoritativeness and hence pre-emptive status of the international law they apply. When they fail, this affects the pre-emptive capacity of their rulings. This, of course, is not unique to ICs and their authority. It applies to any practical authority, for as Peter Winch showed,

to participate in rule-governed activities *is*, in a certain way, to accept authority. For to participate in such an activity is to accept that there is *a right and wrong way of doing things*, and the decision as to what is right and wrong in a given case can never depend *completely* on one's own caprice.⁵⁸

The factual authority of ICs, therefore, is bound, amongst other things, to the factual authority of the international law they apply or enforce. In a sense, ICs cannot 'jump over their heads' in an attempt to achieve a pre-emptive impact of their rulings if the international law these rulings are based on is not in itself pre-emptive. Over and above this, the general pre-emptive capacity of international law is what makes ICs' rulings conceivable and meaningful to begin with. An example may be illustrative here. I imply that the pre-emptive capacity of a ruling is conditioned on the pre-emptive capacity of a rule that is being applied, and so an IC may fail in generating a strong pre-emptive effect of its ruling if it under- or over-states the pre-emptive force of a rule or rules it enforces. This, I believe, was exactly the problem with the Kosovo advisory opinion, in

⁵⁷ Of course, ICs are not the only actors that claim to act on behalf of international law. An argument can be made that states do that as well when advancing arguments that (perhaps later) convert into law-making. That is certainly the case, and I investigate this aspect of international law's authority in the next chapter, which focuses on the normative structure of (the formation of) customary international law.

⁵⁸ Peter Winch, 'Authority', in *Political Philosophy*, ed. Anthony Quinton (Oxford: Oxford University Press, 1967), 99 (emphasis in the original).

which the ICJ famously declared that international law contains no prohibition on unilateral declarations of independence.⁵⁹ The criticism that rained down on the ICJ seems to have pointed exactly at this; that the Court understated the pre-emptive force of the principle of territorial integrity, which implies, among other things, that self-determination of peoples must not be read ‘as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples [...] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.’⁶⁰ The ICJ has explicitly linked the principle of territorial integrity to the prohibition of the use of force only, while at the same time keeping the principle of self-determination of peoples at a certain distance. This resulted in a strange construction, in which unilateral declarations of independence seemingly have little to do with the principle of territorial integrity. As a result, the Kosovo advisory opinion is one of the least pre-emptive in the practice of the ICJ with a half of states not recognising the independence of Kosovo or endorsing the reasoning advanced by the ICJ.

Similarly, the Chagos Archipelago advisory opinion, already mentioned in the previous chapter, is another example of an apparent mismatch between the pre-emptive force of a rule of international law and the ICJ’s ruling. Unlike in the Kosovo opinion, where the ICJ *understated* the pre-emptive force of the principle of territorial integrity, the Chagos Archipelago opinion *overstated* the pre-emptive force of the principle of self-determination of peoples, reading in the Declaration on Granting Independence to Colonial Countries and Peoples⁶¹—a non-binding instrument—the ultimate evidence of

⁵⁹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect to Kosovo* (Advisory opinion) (2010) ICJ Reports, para 84.

⁶⁰ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (UNGA Res 2625 [XXV]) (24 October 1970).

⁶¹ *Declaration on the Granting of Independence to Colonial Countries and Peoples* (UNGA Res 1514 [XV]) (14 December 1960).

a formed rule of customary international law. Non-binding instruments do exercise a pre-emptive function, as discussed in chapter 1, by delineating the body of relevant reasons thus cutting off deliberations and channelling practical reasoning. But there is definitely a difference between how much of a pre-emption a non-binding declaration and a rule of customary international law can generate, and the ICJ has arguably misjudged the difference. As a consequence, the UK has refused to comply with the ruling⁶² and it does not seem likely that the advisory opinion will accumulate more of a pre-emptive force over time.⁶³

That being said, the *de facto* authority of ICs is a matter of the success with which they manage to generate pre-emptive reasons; if ICs' rulings do not provide sufficient practical grounds for cutting off deliberations on underlying reasons, their pre-emptive capacity, and hence factual authoritativeness, weakens. At the same time, if ICs manage to generate practical reasons, whose pre-emptive capacity is such that it makes it inappropriate—legally, politically, morally, etc.—to invoke underlying considerations, this signifies stronger *de facto* authority.

⁶² 'Foreign Office minister accuses UN General Assembly of 'misuse of powers' after Chagos Islands judgment' *The Independent* (26 February 2019), <https://www.independent.co.uk/news/uk/politics/foreign-office-minister-accuses-un-general-assembly-misuse-powers-after-chagos-islands-judgement-a8797631.html>

⁶³ A critique similar to mine was also advanced by John Martin Gillroy against the ICJ's advisory opinion in *Legality of Threat or Use of Nuclear Weapon*, where the Court famously ruled that 'there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.' *Legality of Threat or Use of Nuclear Weapon* (Advisory Opinion) (1996) ICJ Rep, 266. According to Gillroy, 'this judgment can be [...] understood as an example of the court's effort [...] to awkwardly juggle two dialectically engaged conceptions of practical reason, each with its own distinct claim to authority.' These two conceptions are the peremptory rules of general international law, on the one hand, and *jus dispositivum*, on the other. According to the author, the Court should have recognised the peremptory status of the prohibition of the threat or use of nuclear weapon as evident in the structure of the normative authority of international law. John Martin Gillroy, 'Practical Reason and Authority beyond the State', in *Legal Authority beyond the State*, ed. Patrick Capps and Henrik Palmer Olsen (Cambridge: Cambridge University Press, 2018), 130 ff.

Conclusions

In this chapter, I attempted to address the jurisprudential challenge of ICs' factual authority. Unlike in the case of domestic courts, ICs' *de facto* authority is not a matter of presumption, rather, it is bolstered or weakened depending on what an IC does and how it is engaged with. This alters significantly the relation between the *de facto* and the *de jure* aspects of authority and makes commonly employed jurisprudential schemes less relevant when it comes to international institutions, such as ICs.

Moreover, it raises a question of what could be possible indicators of *de facto* authority. I show that it is attractive, yet not fully consistent to link ICs' factual authority to characteristics of their audiences. This allows the uncoupling of dimensions of authority from considerations of legitimacy, but it also throws the baby out with the bathwater. Authority is a normative relation, and it cannot be expressed, therefore, in a purely factual, motives- and beliefs-independent way.

I suggest that there is a way of accounting for the *de facto* authority of ICs without, on the one hand, expressing it through legitimacy and justification, and, on the other hand, collapsing it into an audience-relative reputation. I submit that the inquiry into *de facto* authority should focus on the pre-emptive capacity of ICs' rulings. The degree to which rulings cut off deliberations related to underlying reasons and considerations reflects how successful its pre-emptive function is. This, I believe, is the central ingredient and indicator of the ICs' factual authority.

Chapter 3

Authority and Normativity: Reapproaching Customary International Law¹

Introduction

Interpretability of customary (international) law belongs to the class of jurisprudential problems that entangle and intertwine almost all thorny theoretical and practical issues. It is especially visible against the background of debates over whether customary international law (CIL) can be interpreted, and if so, how this differs from its identification; are there or should there be some rules of interpretation of CIL, and what would be the difference between such rules and those guiding interpretation of treaties?

This chapter aims at addressing some of these issues. It seeks to suggest a meaningful way of seeing the process of interpretation of CIL through the perspective of practical reasoning. By doing so, the piece proposes to disentangle one of the theoretical knots of interpretation of CIL: what is the difference between the identification and interpretation of the rules of CIL, considering that both processes concentrate mostly on state practices.² For the purposes of this contribution, by ‘state

¹ This chapter is an expanded version of the following contribution: Kostiantyn Gorobets, ‘Practical Reasoning and Interpretation of Customary International Law’, in *The Theory and Philosophy of Customary International Law and its Interpretation*, ed. Panos Merkouris, Jörg Kammerhofer, Noora Arajärvi, ass. ed. Nina Mileva (Cambridge: Cambridge University Press, forthcoming). I thank Panos Merkouris for many invaluable comments and suggestions.

² This contribution does not address the issue of *opinio juris* and touches upon the legality of customary rules only briefly. It is worth mentioning, nevertheless, that by stating that state practice is of primary interest for interpretation of CIL (and for its identification, too), I endorse the view that the normativity of rules of CIL should be separated from their legality, or legal bindingness. See, for example, Maiko Meguro, ‘Distinguishing the Legal Bindingness and Normative Content of Customary International Law’, *ESIL*

practices’ I mean a slightly different concept than the one typically used in international legal scholarship. I defend the view that any practice is normative by definition, otherwise it is not a practice at all (see section 3). This goes against the commonly accepted view that ‘mere’ state practices are but collections of actions and fail to constitute a (legal) norm. I use the concept in the plural because the growth of normativity within the practical engagements of states is typically dispersed in terms of the subject-matter. Different practical engagements converge into different normative practices, rather than constitute one continuous overarching state practice.

The first section below addresses the issue of the duality of CIL within the doctrine of the container/content distinction, which is of fundamental importance to the theory of sources of international law. Section 2 suggests a view on (state) practices as being inherently normative, which implies differentiation between tests for normativity and legality when patterns of behaviour are concerned. Section 3 provides a more detailed analysis of customary normativity. The concluding section highlights the difference in interpretation of state practices depending on their container/content perception and will therefore attempt a differentiation between interpretation for the purpose of identification and interpretation for the purpose of clarification/application of a rule of CIL.

1. What Is This Thing We Interpret When We Say That We Interpret CIL?

It is at the core of most contemporary doctrines of legal interpretation that interpretation of something is interpretation of *something*. In order to interpret a thing, this thing must already be there, and so its existence, meaning, and function are in principle independent from the act of interpretation. This primary intuition allows to differentiate

Reflections 6, no. 11 (2017): 1–11; Maurice H. Mendelson, ‘The Formation of Customary International Law’, in *Collected Courses of the Hague Academy of International Law*, vol. 272 (Leiden: Brill, 1998), 155–410.

between interpretation and creation or invention.³ But it also assumes that locating a thing and interpreting it are two distinct enterprises; identifying a rule of CIL and clarifying its meaning supposedly are not the same activity.⁴ In this regard, legal interpretation is tightly linked to the doctrine of sources of law;⁵ interpretation of law presupposes that one knows where to find it and how to identify it amongst other forms of social normativity.

The doctrine of sources is a groundwork of legal positivism. That a legal order rests on certain sources entails that a specific class of utterances or actions qualify as generating or communicating the law, as long as they match the criteria of validity that emerge from within this legal order. Thus, in domestic law we often say that, for instance, statutes or precedents are sources of law in the sense that certain activities of certain bodies (parliament, courts, etc.) within a certain procedure create legal obligations for all or some groups of persons. In international law, it is generally agreed that at least treaties and customary law perform that very same function; they generate legal obligations for states.⁶

³ On these and other philosophical and methodological problems of interpretation, see Julie Dickson, 'Interpretation and Coherence in Legal Reasoning', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Metaphysics Research Lab, Stanford University, 2016), <https://plato.stanford.edu/archives/win2016/entries/legal-reas-interpret/>

⁴ Panos Merkouris, 'Interpreting the Customary Rules on Interpretation', *International Community Law Review* 19, no. 1 (2017): 126–55. Although this has been a debatable issue in international legal literature, this contribution builds on a presumption that law in general is an intrinsically interpretable enterprise, and therefore it must be proved that CIL cannot be interpreted, rather than *vice versa*. See, on the inherently interpretative nature of law, Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 29–64; Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986), 45–86; Herbert L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), 124–36.

⁵ Jean d'Aspremont suggests a useful metaphorical way of seeing the relations between the doctrine of sources of international law and the doctrine of interpretation. He compares them to two mirrors facing each other thus creating an endless mutual reflection. Jean d'Aspremont, 'Three International Lawyers in a Hall of Mirrors', *Leiden Journal of International Law* 32, no. 3 (2019): 369–72.

⁶ E.g., Hugh Thirlway, *The Sources of International Law*, 2nd ed. (Oxford: Oxford University Press, 2019). Certainly, there may be legal obligations generated in other ways as well, such as those created within practices of international organisations or stemming from judgments and advisory opinions of international courts and tribunals. As famously maintained by the ICJ, unilateral declarations may create legal obligations as well. *Nuclear Tests Case (Australia v. France)* (Jurisdiction and Admissibility) (1974) ICJ Rep, para 43. Whether or not general principles of law are capable of directly generating legal obligations is a contentious matter, as I discuss in chapter 4 of the present thesis. See also Jean d'Aspremont, 'What Was Not Meant to Be: General Principles of Law as a Source of International Law', in *Global Justice, Human*

The qualification of some social facts as matching criteria of validity does not depend on the content of an alleged rule or source. As famously framed by H. L. A. Hart, having criteria of validity for sources of law (‘rule of recognition’) entails that ‘members [of social systems] not merely come to accept separate rules piecemeal, but are committed to the acceptance in advance of general classes of rules, marked out by general criteria of validity.’⁷ This commitment to accept *in advance* certain classes of rules presupposes that sources of law are merely *containers*, and their *content* does not typically play a role in qualifying a source of law as such.⁸ Hence the fundamental postulate of legal positivism is that identifying something as law is separated from assessing its moral merits.⁹

The container/content duality is of paramount importance for legal interpretation.¹⁰ One may only engage in legal interpretation if one knows that the normative content one wants to clarify, elucidate, or in any other way meaningfully operationalise, is *contained* in a valid source of law. In the case of statutory interpretation,

Rights and the Modernization of International Law, ed. Riccardo Pisillo Mazzeschi and Pasquale De Sena (Cham: Springer, 2018), 163–84.

⁷ Hart, *Concept of Law*, 235.

⁸ This is without prejudice to the debates around ‘inclusive’ and ‘exclusive’ forms of legal positivism. For ‘inclusive’ legal positivists, certain moral principles may play a role in identifying valid law, which means that law’s content may precede its container. See, for a general critique of such a view: Scott J. Shapiro, ‘On Hart’s Way Out’, *Legal Theory* 4, no. 4 (1998): 469–507; Scott J. Shapiro, ‘The “Hart–Dworkin” Debate: A Short Guide for the Perplexed’, in *Ronald Dworkin*, ed. Arthur Ripstein (Cambridge: Cambridge University Press, 2007), 22–55.

⁹ This links to the idea of content-independence as being one of the critical features of law within the positivist paradigm: H. L. A. Hart, ‘Commands and Authoritative Legal Reasons’, in *Essays on Bentham. Jurisprudence and Political Philosophy* (Oxford: Oxford University Press, 1982), 243–68; Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (New York: Oxford University Press, 2009), 37–52; Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011). According to Nathan Adams, ‘a command can be a content-independent reason only because the command itself is a container. A command is a speech act that has referential content; its content is the act that it refers to. To say that a command is a content-independent reason to obey is to say that its status as a reason to obey depends on features of the *container* (the speech act), not on features of the *content* (what the speech act refers to)’. Nathan Adams, ‘In Defense of Content-Independence’, *Legal Theory* 23, no. 3 (2017): 147 (italics added).

¹⁰ For other instances of operationalisation of this dualism, see, for example, Jean d’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials’, *European Journal of International Law* 19, no. 5 (2008): 1075–93.

a statute is a container of legal rules one wants to interpret. In the case of treaty law,¹¹ it is a treaty that is the container, and its provisions form its content. But how about CIL? What is this *thing* that *contains* customary rules? This question has no obvious answer, though it is maintained, by the International Law Commission (ILC) for example, that in case of CIL the content/container differentiation still applies.¹² What, then, is the container one is looking for in order to enquire into the content of a rule of CIL?

Apparently, interpretation of CIL is not an interpretation of some texts, since it is widely agreed that CIL is an unwritten source of international law. In other words, CIL is not *contained* in any texts. Certainly, it may have some textual *loci* in treaties, judgments, statements by state organs, to mention a few. Although true, this does not infringe on the fact that linguistic formulas, or certain articulations of customary rules, are not customary rules *themselves*. They may serve as points of reference, as useful short-hand devices used to communicate and more efficiently engage in the practice that sustains a customary rule, but it would be a mistake to say that a statement of a customary rule by an authority (institutional or academic) is the customary rule itself. In other words, linguistic formulations are but evidence of the existence of customary rules, not rules as such. This is true for any type of customary rule, not only legal ones. In the same way as, for instance, judgments of international courts and tribunals merely reflect, articulate, frame customary legal rules that are already *somewhere there* and exist independently of the fact that a court engages them, manuals of English grammar are also but snapshots of the customary rules of language. Neither of these two can be appropriately used as

¹¹ Hereinafter, when invoking treaty law as an example, I mean treaty law within the paradigm of the Vienna Convention on the Law of Treaties.

¹² The ILC, although obviously not using my content/container terminology, holds the view that the determination of ‘the “*existence and content*” of rules of customary international law reflects the fact that while often the need is to identify both the existence and the content of a rule, in some cases it is accepted that the rule *exists* but its precise *content* is disputed.’ ILC, ‘Report of the International Law Commission on the Work of its 70th Session’ (30 April – 1 June and 2 July – 10 August 2018) UN Doc a/73/10, 124 (*italics added*). The differentiation between the *existence* and the *content* of a rule of CIL inevitably implies the container/content duality since there is no other way for treating the ascertainment of the existence of a rule of CIL as an independent mental procedure except for assuming that this rule appears as a container.

the criterion for maintaining the practices, and it is actually the other way around: we often discard certain articulations of customary rules as outdated or inaccurate on the basis that *this is not how we do this (anymore)*. Therefore, it is the practice itself which is the ultimate criterion of a customary rule, not its certain pronouncement.

Also, it is difficult to see how rules of CIL can be *contained* in intentions or positions of states (regardless of whether we treat these as instances of state practice or of *opinio juris*). That is, interpretation of CIL is not an interpretation of the intention or will of a supposed author. Unlike treaties, or statutes in domestic law, customary rules cannot be said to have determinate authors. It is a distinct feature of customs that they are a matter of what *we do*, not of what one particular member of a community might intend to do on her own.¹³ As put by Gerald Postema, ‘custom is never reducible to what each participant does or to what each says, or thinks, or believes about what each does.’¹⁴ Thus, even though it may be the case for some customs that they were intentionally sparked by one action of one particular actor,¹⁵ that actor would not, nevertheless, qualify as its ‘author’. If her action ever rises to a customary rule, this means that it is *our* rule, not *hers*. This, once again, is a feature of customary rules generally, not only legal ones, since what separates them from rules being established externally is that customary rules are rules *of* a community, not rules *for* it. They are not created by someone for the community, rather, they form within the community and define it as such.¹⁶ Identification of an author of a rule only makes sense when a rule was intentionally designed to bind only particular actors (as in the case of agreements, be it a contract in

¹³ Even though it can be argued that the formation of customary rules typically involves only a limited number of states and therefore CIL suffers from a significant democratic deficit (see, for instance: Anthea Elizabeth Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’, *American Journal of International Law* 95, no. 4 (October 2001): 767), this does not contradict the point that the states which do shape the practice in question cannot be called ‘authors’ of customary rules.

¹⁴ Gerald J. Postema, ‘Custom, Normative Practice, and the Law’, *Duke Law Journal* 62, no. 3 (2012): 719.

¹⁵ The 1945 Truman Proclamation on the continental shelf is a classic example in this regard: 1945 US Presidential Proclamation No. 2667, *Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, 10 FR 12303 (1945) 13 DSB 485.

¹⁶ This also holds true for regional or even bilateral customary rules.

domestic law or a treaty in international law), or when a rule is imposed by a law-maker, since in this situation it is necessary to be able to differentiate between a 'genuine' and a 'fake' law-maker. Neither of the two situations are proper descriptions of the context of customary law creation or appearance. Thus, even though it is at times common, in international law specifically, to design a customary rule consciously, this does not suggest that the interpretation of such a rule, when it comes to its application, would be an interpretation of some intentions, or that these intentions would be the container of the rules of CIL.

It appears that interpretation of CIL is first and foremost interpretation of state practices. In the same way as we interpret other customary rules, say, rules of language, or rules of etiquette, when we interpret CIL, we enquire into what, how, in which circumstances, and so on, participants of a certain practice do and do not do. In the case of CIL, a state practice is the ultimate point of reference one has when clarifying a particular legal rule. I will further define what I mean by state practices in the next two sections. For now, it suffices to stress that unlike in the case of statutes or precedents in domestic law, or treaties in international law, state practice is not only the *container* but also the *content* of a rule one wants to interpret. From the perspective of the doctrine of sources of law, customary rules often appear difficult to deal with, for they are not only a *source* of law, they *are* law themselves.¹⁷ That state practice is both content and

¹⁷ See, for a similar point: László Blum, 'Conceptual Confusion and Methodological Deficiencies: Some Ways That Theories on Customary International Law Fail', *European Journal of International Law* 25, no. 2 (2014): 532: 'It is misleading to suggest that customary international law is one of the sources of international law. Customary international law forms part of international law. If it is part of international law, then it cannot be its source.' Of course, it can be maintained that this point holds for any law and any source of law; treaties, after all, *are* international law as well. I believe this has to do, on the one hand, with the ambiguity of the concept of 'sources of law', and, on the other hand, with the content\container distinction I discuss here. Treaties in international law, or, for instance, legislation in domestic law, are typically identifiable as containers; one does not have to resort to the analysis of their content to determine their existence (except in situations when there is uncertainty as to whether parties to an agreement expressed their consent to be bound). I think this is a critical mark of a source of law: when it is identifiable as a container regardless of its content.

container, however, engenders consequences for what the interpretation of customary rules actually entails.

The content/container dualism of state practices makes them similar to light, i.e. they manifest differently depending on how they are looked at. Light, as is well-known, behaves as a wave in one set of conditions of observation, and as particles in another, and as such is, in fact, both.¹⁸ This can also be said about state practices, for when they are interpreted for the purposes of identification of rules of CIL they appear as containers, as something legal obligations are scooped from (see section 4.1); but when they are interpreted for the purpose of clarifying the meaning of rules of CIL, practices appear as their content, as what the rules *are* in terms of content (see section 4.2). This dualism of state practices creates a confusion as to how these two instances or cases of interpretation differ. If identification and interpretation are, according to the doctrine of sources, different enterprises, how does one tell the difference between the two if both concentrate on state practices?

Before answering this question, it is necessary to take a closer look at state practices as such, since clarifying their nature is of paramount importance for further enquiry.

2. State Practices and Normative Deeds

Though it is typically asserted that the concept of *opinio juris* is far more contested than the concept of state practice,¹⁹ the latter also gives rise to many controversies with it. This is partly so given its container/content duality, but also given some conceptual assumptions regarding state practices that are deeply rooted in the doctrines of the

¹⁸ Walter Greiner, *Quantum Mechanics: An Introduction* (4th ed, Springer 2001).

¹⁹ See, for example, Bin Cheng, 'Opinio Juris: A Key Concept in International Law That Is Much Misunderstood', in *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, ed. Sienho Yee and Wang Tieva (London: Routledge, 2001), 56–76; Pauline Westerman, 'Opinio Juris: Test, Filter, Ideal, or Claim?', in *Philosophical (De)Constructions of International Law*, ed. Pauline Westerman, Kostiantyn Gorobets, and Andreas Hadjigeorgiou (Cheltenham: Edward Elgar, forthcoming).

formation and identification of CIL and are constantly replicated in international legal scholarship.

It is a widespread belief, reflected, amongst others, in the ILC reports and conclusions, and emerging from the famous *North Sea Continental Shelf* judgment, that a general practice that is accepted as law is to be distinguished from mere *usage* or *habit*.²⁰ To put it in the ILC's words, 'practice without acceptance as law [...], even if widespread and consistent, can be no more than a *non-binding usage*.'²¹ A characteristic feature of approaching state practices within the doctrine of the identification of CIL, defended also by the ILC, is an all-or-nothingness. It appears that there are only two options: either a state practice is accompanied by *opinio juris* and then may, if quantitative and qualitative requirements are met, constitute a rule of CIL, or, if it is not, then there exists no obligation for states to act in a certain manner whatsoever. This view of CIL, which Monica Hakimi labels 'the rulebook conception', assumes that without *opinio juris* state practices are *mere* usages or habits that have no binding force, and that there exist certain clear and formal criteria (i.e. secondary rules) which allow to establish the normativity and legality of these practices.²² This is also articulated by the ICJ: 'many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated *only by considerations of courtesy, convenience or tradition*, and not by any sense of legal duty.'²³ It is, therefore, of paramount importance that 'one must look at what States actually do and seek to determine whether they recognize *an obligation* or *a right* to act in that way.'²⁴ The position of the ICJ and ILC on this matter clearly opposes legal customary rules and their absence, which is reasonable from the point of

²⁰ *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands)* (Merits) (1969) ICJ Reports, para 77.

²¹ ILC, 'Identification of Customary International Law', 125 (italics added).

²² Monica Hakimi, 'Making Sense of Customary International Law', *Michigan Law Review* 118, no. 8 (2020): 1497–1504. Monica Hakimi's rejection of the rulebook conception of CIL is resonant with the view advanced here, especially in the context of practical reasoning and normativity of practices, discussed in the next two sections.

²³ *North Sea Continental Shelf Cases*, para. 77 (italics added).

²⁴ ILC, 'Identification of Customary International Law', 125 (italics added).

view of legal logic. What is disturbing, however, is how state practices are thought of when there is no *opinio juris*. The wording adopted by both institutions not only suggests the absence of any obligations within such practices, but also the non-normativity of such practices; a view widely supported in the academic literature.²⁵ *Opinio juris* appears as a magic wand that not only turns the ‘raw material’ of state practices into a norm, but simultaneously into a *legal* norm.

What seems to be the underlying principle behind this treatment of state practices rests on two interrelated ideas. First, it is clear that the identification of CIL serves the purpose of establishing the existence of a *legal* rule imposing an obligation binding upon states or granting them a right. When interpreting state practices for this purpose, one therefore asks questions of *legality*, i.e. whether there exists a norm that provides for *legal* obligations states must fulfil. What goes alongside it, however, often remains fully or partly unnoticed; namely, that legality is an attribute of a norm,²⁶ and therefore inquiring into whether there is a legal norm is asking two questions, not one: (1) is there a norm (the question of normativity); (2) if yes, is this norm a legal one (the question of legality). Importantly, these questions should be answered in this particular order. The question of *normativity*, though, bears entirely different considerations and should be approached with a distinct methodology and conceptual framework, than the question of legality.

²⁵ Michael Akehurst argues that without *opinio juris* there is no way to tell the difference between habitual actions and rule-guided behaviour: Michael Akehurst, ‘Custom as a Source of International Law’, *British Yearbook of International Law* 47, no. 1 (1976): 33. Anthea Roberts refers to state practice as the ‘raw data’, which, taken together with *opinio juris* must be further tested to see ‘if there are any eligible interpretations that adequately explain the raw data of practice,’ Roberts, ‘Traditional and Modern Approaches’, 788. As nicely put by Hugh Thirlway, *opinio juris* is similar to ‘the philosopher’s stone which transmutes the *inert mass of accumulated usage* into the gold of binding legal rules.’ Hugh W. A. Thirlway, *International Customary Law and Codification* (Leiden: Sijthoff, 1972), 47 (emphasis added). See also Blutman, ‘Conceptual Confusion’, 535.

²⁶ This does not imply that everything that can, in some legal order, qualify as law is by necessity normative. In any legal order there are laws which are not norms (e.g. declarations or recommendations). Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of the Legal System*, 2nd ed. (Oxford: Oxford University Press, 1980), 168.

The language adopted by the ILC and ICJ, however, makes it seem as if deciding on the legality of certain practices is fundamentally the same as deciding on their normativity; when a practice does not meet the threshold of legality, it is a habit or a usage that creates no obligation or a right, which is basically tantamount to the absence of a norm altogether. This brings the second assumption into play, namely, that state practices are often taken as certain collections of random individual actions of states, a collection that may or may not feature some pattern (actions that are ‘performed almost invariably’—as if their performance is a matter of (in)variability, rather than following certain normative consideration). It is thus claimed that ‘the requirement that the practice be consistent means that where the relevant acts are divergent to the extent that *no pattern of behaviour can be discerned, no general practice* (and thus no corresponding rule of customary international law) can be said to exist.’²⁷

The focus on (in)variability and patterns of behaviour that is so explicit in the reasoning of the ILC and the ICJ seems to neglect the idea that the existence of an observable pattern of conduct is not a relevant marker of there being a practice. Invariability of some actions, even when absolutely consistent, may or may not be evidence of a practice, because it is not the invariability or consistency of actions what matters, but the meaning these actions have for those engaged in them. It is a well-known example by H. L. A. Hart that, to an external observer, all more or less consistent regularities of behaviour look the same in terms of people doing certain things in certain circumstances. However, that some people go to a cinema once a week does not mean that there is a normative consideration to that effect, i.e. that it is somehow socially expected or required of from them to go to a cinema once a week.²⁸ On the other hand,

²⁷ ILC, ‘Identification of Customary International Law’, 137 (*italics added*). Surely, the point that the ILC makes here relates to the requirement of consistency as necessary for a practice to form, and I do not dispute this point. What I disagree with, however, is the general approach to identify practices with patterns of behaviour. As I show below, behavioural inconsistencies may in fact be irrelevant for the existence of a practice; that people are inconsistent in observing the prohibition of lies does not mean that no practice of criticising acts of lying can be discerned.

²⁸ Hart, *Concept of Law*, 10–11.

that all people lie from time to time (some people more often than other) does not deny the existence of a normative consideration that one must not lie. Thus, that some people go to a cinema once a week is a *regularity of behaviour*, but not a *practice*. The only way to differentiate between people engaging in a practice and people simply acting uniformly is to adopt what H. L. A. Hart calls ‘the internal point of view’; practices, unlike mere regularities or patterns of behaviour, feature a critical reflective attitude towards actions, which entails their inherently normative nature.²⁹ So, let us take a closer look at the concept of practice, for it is of crucial importance for our understanding of customary rules and their interpretation.

Practices, unlike mere regularities of behaviour (e.g., that some people happen to go to the cinema once a week), are of a normative nature. In ordinary life, it can be said that at the moment a person steps into a practice, she is expected to accept certain deeds that infiltrate and govern this practice, give it shape and make it meaningful for the participants. A simple test to be used to determine whether a regularity of behaviour is a practice is whether one may fail in performing or not performing certain actions. This is typically ascertained either through existing mutual expectations that deeds of practice are and will be followed, or through criticism when these deeds are ignored, this criticism being an aspect of the practice concerned.³⁰ For people who happen to go to the cinema once a week, it is not a failure not to go this week, but go twice the next week instead; no-one’s expectations are failing to be met, and no criticism would follow. At the same

²⁹ Hart, *Concept of Law*, 56–57. Note that these passages from Hart are sometimes understood differently. For instance, Scott Shapiro believes (wrongly, in my view), that Hart does not give us a criterion to differentiate between practices that do not give rise to social rules and practices that do (Shapiro calls the latter ‘practices*’), Shapiro, *Legality*, 102–5. I think this is a misconception, and, as I show later in this chapter, if there is ever a meaningful way of talking about practices, it must include a dimension of normativity. That is, all practices are practices*, otherwise they are not practices at all.

³⁰ Note that expectations and criticism are themselves aspects of a practice, not something to be added to a practice to make it normative, as the two-element theory of customary norms suggests. Gerald J. Postema, ‘Custom in International Law: A Normative Practice Account’, in *The Nature of Customary Law: Legal, Historical, and Philosophical Perspectives*, ed. Amanda Perreau-Saussine and James Bernard Murphy (Cambridge: Cambridge University Press, 2007), 279–306; Postema, ‘Custom, Normative Practice, and the Law’.

time, lying to people does usually constitute a failure to meet certain expectations, even when no criticism follows (not all lies get discovered, after all). This latter point also relates to other actions prohibited in the context of existing practices, e.g., torture. Such actions are sometimes colloquially referred to as ‘practices’, but even then we can only intelligibly speak of them as of ‘practices’ if there exist normative considerations that somehow make torture meaningful for those engaged in it,³¹ however wrong or ill-grounded such considerations are (e.g., various utilitarian ‘ticking-bomb scenarios’). Existence of conflicting normative expectations within the domain of the same practice is not at all uncommon, given how much these expectations may depend on underlying reasons (see next section). This is why some practices may feature uncertainty as to what constitutes a failure in performing them.³²

The difference between the two examples given above is that there is nothing to be failed in the context of going or not going to the cinema; there are no deeds flowing through the conduct of going to the cinema with a certain regularity, and therefore there is no practice, regardless of the fact that for an external observer this could be the most consistent pattern of behaviour by these people she can observe. In the latter example of lying or torturing, though, there is a certain normative standard embedded in behaviour, a standard that points at a deed and generates specific expectations that other participants of a practice would follow this deed.³³ What differentiates practices from

³¹ This is exactly why Ludwig Wittgenstein observed that “‘following a rule” is a practice. And to *think* one is following a rule is not to follow a rule. And that’s why it’s not possible to follow a rule “privately”; otherwise, thinking one was following a rule would be the same as following a rule.’ Ludwig Wittgenstein, *Philosophical Investigations*, ed. P. M. S. Hacker and Joachim Schulte, trans. G. E. M. Anscombe, P. M. S. Hacker, and Joachim Schulte, Rev. 4th ed (Chichester: Wiley-Blackwell, 2009), §202, 87e–88e.

³² It is also worth noting the problem of individuation of practices, which I do not touch upon here. Still, an argument can be made that prohibitive customary rules (such as a prohibition of lying, or prohibition of torture, mentioned in the main text) are not independent practices, meaningful in their own right, but rather parts of more complex and intricate practices that govern the ways in which we deem it appropriate or inappropriate to treat our fellow human beings. From this perspective, practices are ‘nested’ in a wider set of considerations that govern our way of living. On the problem of individuation in legal theory in general, see Joseph Raz, ‘Legal Principles and the Limits of Law’, *Yale Law Journal* 81, no. 5 (1972): 823–54; Raz, *Concept of a Legal System*, 70–92.

³³ This perspective on the normativity of practices is also informed by the idea of the performative nature of norms, most used in gender studies. Judith Butler, for instance, maintains that ‘the anticipation of an authoritative disclosure of meaning is the means by which that authority is attributed and installed: the

regularities of behaviour, therefore, is the existence of deeds as certain standards that are learned and adopted by the participants of a practice and generate expectations regarding other participants.³⁴ Practices, in such a way, are inherently normative, because the mere existence of deeds as standards constitutes an independent reason for acting in one way and not in another. As emphasised by Gerald Postema:

[Customs] are not (merely) *patterns* of behavior; rather they set *standards for* behavior, standards of correct and incorrect behavior, and thus purport to guide that behavior and provide bases for its assessment. Thus, mere regularities of behavior taken alone – the *usus* or ‘state practice’ of international law discourse – not only fail to constitute customs of international law, they fail to constitute customs of any sort, including those of ‘comity’, because they fail to constitute norms.³⁵

From this perspective, customary rules do not and cannot exist separately or detached from the practices that sustain them. Besides, that there is a practice, and not just regularity of behaviour, means that there is a norm that shapes this practice. In other words, to say that there exists a state practice on a certain matter *already* entails saying that there is a norm for this matter, and *vice versa*. For this reason, it is not entirely accurate to determine that when a certain practice fails to qualify as a rule of CIL, there is no moral or social obligation in general binding upon states that flows from the deeds and mutual expectations of participants in such a practice.

This view on state practice was particularly endorsed by the ILC in its ‘Statements of Principles Applicable to Formation of General Customary International Law’, where it claims that

anticipation conjures the object’ and thus ‘an expectation [...] ends up producing the very phenomenon that it anticipates.’ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1999), xv. In other words, the factuality of a norm cannot be comprehended in detachment from the acts that constitute it, and so a norm cannot be said to ‘exist’, rather, it is in a constant performative making.

³⁴ As famously remarked by Lon Fuller, ‘customary law arises [...] out of situations of human interaction where each participant guides himself by an anticipation of what the other will do and will expect him to do.’ Lon L. Fuller, *Anatomy of the Law* (New York: Frederick A. Praeger, Pbl, 1968), 73.

³⁵ Postema, ‘Custom in International Law’, 285.

a rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.³⁶

To recapitulate, there are two fundamental considerations flowing from the view expressed above. *First*, practices (any practices, not just state practices) are inherently normative, otherwise they are not practices whatsoever. The normativity of practices is determined by the character of the deeds framing them and by the function these practices perform, as well as by the meaning they have for participants. According to Gerald Postema, the normativity of practices is ascertainable first and foremost from the perspective of those participating in them:

Those who participate in a custom's practice undertake commitments (a) to judge certain performances as appropriate or correct and others as mistaken; (b) to act when the occasion arises in accord with these judgments; (c) to challenge conduct that falls short of these judgments; and (d) to recognize appeals to the judgments as vindications of their actions or valid criticisms of them.³⁷

Second, the content and meaning of customary rules can be (and usually is) determined without necessarily assessing the character and nature of the normative claims they exhibit (moral, legal, etc.). Hence, practices always create obligations and endow those participating in them with rights. This does not mean that these obligations and rights are of *legal* nature, but it is important to bear in mind that absence of *opinio juris* does not signify absence of *any* obligation.³⁸

³⁶ Committee on Formation of Customary (General) International Law, 'Final Report of the Committee' in *International Law Association Report of the Sixty-Ninth Conference* (London 2000) (International Law Association, London 2000), 719.

³⁷ Postema, 'Custom, Normative Practice, and the Law', 719. It is important to notice that these commitments are not steps or stages of integration into practice; all of them are intertwined and none of them can be detached from the rest (I am grateful to André de Hoogh for drawing my attention to this).

³⁸ A clarifying note: of course, legal institutions such as the ILC and the ICJ are not and frankly should not be concerned with non-legal practices and norms, since their task is to apply, interpret, codify, etc., *the law*. However, the point I have been making in this section is all about the image of normativity that these institutions generate, in particular in regard to customary norms. It follows from both the ICJ's and the ILC's positions not merely that the only normativity that matters is legal normativity, which would be

With an image of state practice as inherently normative, we may now make a further step and try to clarify how such practice can be reconstructed for the purposes of interpretation. What does the normativity of a practice look like and what are the interpretative beacons one may use in order to clarify its meaning?

3. Practice as Network of Reasons

In the previous section, I endorsed the conception that practices are of an inherently normative nature, and that getting involved in a practice means accepting and following certain normative standards that are embodied in it and are inseparable from the deeds penetrating and shaping it. This view entails, amongst other things, that practices are sustained by the mutual expectations of participants and by more or less implicit normative standards that one in principle is able to fail to meet. Importantly, this character of practices makes them normative, and this normativity may, under certain circumstances, qualify as legal. This characteristic of practices is by and large generic and applies to state practices as well.

Normativity, according to a dominant view, reflects a special ability of law and other social practices to provide those participating in them with reasons for action.³⁹ In other words, practices, such as state practices, are normative in the sense that for those who participate in them the mere fact that they do so is a reason for acting and reacting to the actions of other participants in a certain way. This reason-giving function of practices, in their normative manifestation (i.e. from the internal point of view), entails

perfectly understandable, but that there seems to be no meaningful and relevant normativity outside the law at all. This creates a seriously distorted image of the normative domain that I try to address here.

³⁹ See, generally, Stefano Bertea and George Pavlakos, eds., *New Essays on the Normativity of Law* (Portland: Hart Publishing, 2011); Sylvie Delacroix, 'Hart's and Kelsen's Concepts of Normativity Contrasted', *Ratio Juris* 17, no. 4 (2004): 501–20; Sylvie Delacroix, *Legal Norms and Normativity: An Essay in Genealogy* (Oxford: Hart Publishing, 2006); Noam Gur, *Legal Directives and Practical Reasons* (Oxford: Oxford University Press, 2018); Jeffrey Kaplan, 'Attitude and the Normativity of Law', *Law and Philosophy* 36, no. 5 (2017): 469–93; Christine M. Korsgaard, *The Sources of Normativity*, ed. Onora O'Neill (Cambridge: Cambridge University Press, 1996); Joseph Raz, *Practical Reason and Norms*, 2nd ed. (New York: Oxford University Press, 1999).

that they require a meaningful participation, and this meaningfulness comprises participants' ability to recognise and react to the actions of others in a way that is intelligible for the rest of the participants. This is precisely why, even when states do not explicate their position regarding the actions of other states, this may still contribute to the formation of a new, or sustaining an existing, practice. Even an absence of reaction may, under certain circumstances, be deciphered by other participants in a practice meaningfully either as endorsement or at least as acquiescence.

For such a meaningful participation, states must consider practice not only as a reason, but as a *network of reasons*. It is almost never the case that a practice can in one way or another be boiled down to one standalone reason that states ought to comply with, for each practice gets its function, meaning, and normative significance in a wider context of related activities.⁴⁰ In fact, especially when we look at a broader scope of social practices, even the simplest ones (such as the practice of eating with a fork and a knife) are only meaningful when taken in the context of a much wider set of considerations as to how one must behave oneself which justify the existence of these practices and shape their content. Because of this, the precise normative boundaries of practices may be difficult to define. But what is more fundamental for the purposes of interpretation and for the purposes of identification of state practices is that the reasons comprising them often vary in nature, function, and strength.

One of the most popular and influential explanations of normativity, developed by Joseph Raz, suggests that even though norms are reasons for actions, not all reasons are norms.⁴¹ A reason for action, according to his latest definition, is 'a consideration that renders its [i.e. action's] choice intelligible, and counts in its favor.'⁴² Reasons as such do not give rise to obligations, but it is nevertheless a basic moral principle that one ought

⁴⁰ See, for an in-depth elaboration on this point, Veronica Rodriguez-Blanco, *Law and Authority under the Guise of the Good* (Oxford: Hart Publishing, 2016).

⁴¹ Raz offers an in-depth discussion on the nature of reasons and norms in *Practical Reasons and Norms*, especially in chapters 1–3.

⁴² Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception', *Minnesota Law Review* 90 (2006): 1006.

to act according to the optimal balance of reasons one has, all things considered.⁴³ This equally applies to states, since it is almost never disputed that they are morally accountable agents (were they not, it would have been impossible to defend even a proposition that international law has any function or basis for existence whatsoever). In international relations, states claim reasons for their actions all the time, and some of them are norms. Michael Akehurst, in his influential article on custom as a source of international law, refers to an example of states using white paper for diplomatic correspondence to advance his argument that habits do not create rules of law.⁴⁴ And indeed, that states almost universally use white paper only shows that they do so for a widely shared reason, a reason, which, nevertheless, is not a norm. If not all reasons are norms, how is it possible to identify the class of reasons that *are* norms?

Joseph Raz's solution to the problem of norms being linguistically inseparable from the rest of the reasons⁴⁵ suggests that there must be some other criteria according to which we could differentiate between 'mere' reasons and norms. Norms are second-order pre-emptive reasons,⁴⁶ and because of this they play a drastically different role in

⁴³ Apart from the normative function, reasons also have an explanatory role. As concisely put by Bernard Williams, 'if an agent acts for certain reasons, then those reasons can figure in a subsequent explanation of how he acted.' Bernard Williams, *Truth & Truthfulness: An Essay in Genealogy* (Princeton: Princeton University Press, 2004), 237.

⁴⁴ Akehurst, 'Custom as a Source of International Law', 33–34. In fact, this argument is not particularly convincing in the light of the concept endorsed in the previous section; habits not only fail to create legal obligations, they are in principle unable to create *any* obligation. Overall, this example suggests that Akehurst advances the same conception adopted by the ILC, when absence of legal obligation gets contextually equated to an absence of any obligation at all. Thus, though making a valid claim that *opinio juris* helps to distinguish legal obligations from non-legal obligations, he seems to suggest that non-legal obligations are essentially no different from the absence of an obligation as such. This view, however practical it may be, creates a distorted image of the normativity of an international order. See also note 37, above.

⁴⁵ Both norms and ordinary reasons may be appropriately expressed in 'ought-statements', and therefore purely linguistic analysis is irrelevant for determining the features of normativity. Linguistically, there is no difference between the statement 'You ought to go outside and enjoy the sun' and the statement 'You ought to drive no faster than 60 km/h in an inhabited area'. Yet it is *prima facie* clear that the former is a statement of a 'mere' reason, whereas the latter is a statement of a norm.

⁴⁶ The concept of pre-emptive reasons is highly debated. See, for instance, Larry Alexander, 'Law and Exclusionary Reasons', *Philosophical Topics* 18, no. 1 (1990): 5–22; Stephen Darwall, 'Authority and Reasons: Exclusionary and Second-Personal', *Ethics* 120, no. 2 (2010): 257–78; Noam Gur, 'Are Legal Rules Content-Independent Reasons?', *Problema* 5 (2011): 175–210; Michael S. Moore, 'Authority, Law, and Razian Reasons', *Southern California Law Review* 62 (1989): 827–96; Donald H. Regan, 'Authority and Value:

practical reasoning as compared to ordinary first-order reasons.⁴⁷ Norms, just like other second-order reasons, are reasons to act or to refrain from acting on some first-order reasons. For example, states may share a wide set of reasons for not using armed force in international relations, and the norm of international law that prohibits the use of force is a second-order reason for acting on all those reasons. But also, and probably most importantly, the existence of a norm prohibiting the use of force is a reason for *not* acting on certain other first-order reasons. The mere fact of such a prohibition implies that states may not act for reasons that count in favour of using force against other states. In such a way, norms are second-order reasons in the sense that they *reinforce* some first-order reasons and *exclude* some other first-order reasons. What this means is that not only are norms reasons for the actions they prescribe, but they are also reasons for disregarding reasons for non-compliance.⁴⁸ For example, diplomatic immunity is a norm precisely because it is *both* a reason for states to refrain from subjecting diplomats to their jurisdiction, *and* a reason for disregarding any other reasons for acting otherwise, no matter how weighty these may be, such as in the cases when diplomats cause lethal accidents or interfere into the internal affairs of the receiving state.⁴⁹ This pre-emptive character is what differentiates norms from other reasons for action.

Practices are networks of both second-order reasons, i.e. norms, and first-order reasons. This allows for complex and often multidimensional justificatory strategies for

Reflections on Raz's *Morality of Freedom*, *Southern California Law Review* 62 (1989): 995–1095. I explore the concept of pre-emption and how it allows the clarification of the nature of the authority of international law in other parts of this thesis, especially in chapters 1 and 4. Suffice here to say that the idea of pre-emption seems promising in explaining the role norms play in practical reasoning, however it is disputable whether pre-emption is a binary or a discrete quality of norms.

⁴⁷ Promises, voluntary commitments, orders and commands, and some others are second-order reasons, but they are not norms. See, Joseph Raz, 'Promises and Obligations', in *Law, Morality, and Society: Essays in Honor of H. L. A. Hart*, ed. P. M. S. Hacker and J. Raz (Oxford: Clarendon Press, 1977), 210–28. For the sake of clarity, whenever a second-order reason is mentioned, it implies a norm.

⁴⁸ Raz, *Practical Reasons and Norms*, 58–59.

⁴⁹ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Merits) (1980) ICJ Rep 3, paras 83–87.

one or other course of behaviour.⁵⁰ Apart from this, however, this reflects a feature of norms not only being embedded in practices, but also being virtually inseparable from them. Norms, as intrinsically interwoven into practices, do not ‘hang in the air’ or exist in some metaphysical space, and their justification, therefore, is shaped by, and depends on, a wider network of reasons employed within a certain practice. Norms may be justified in a number of ways; for instance, instrumentally, as time- and labour-saving devices, as error-eliminating devices, i.e. those subjected to such norms use them as shortcuts in practical reasoning so that if a norm gets accepted it is no longer necessary to figure out each time an optimal balance of reasons to act upon. Some other norms are justified by recourse to an authority, i.e. acceptance of a norm comes as a result of acceptance of the institutional authorities issuing them. These (and many more) methods of justification of norms may overlap and supplement each other; in fact, most of the norms by which people are bound have more than simply one justification.⁵¹

In such a way, practices, such as state practice, explicate their normativity as tightly intertwined networks of first- and second-order reasons. Seen as such, their interpretation therefore relates to discovering the interconnection between these two classes of reasons, assessing their balance, and unveiling them in the justifications employed by states or implied in their actions.

4. Asking the Right Questions: Re-approaching the Content/Container Duality

Thus far this chapter has explored the features and intrinsic qualities of (state) practices as *the thing* being interpreted within the process of legal interpretation. Now it is time to

⁵⁰ From this perspective, Martti Koskenniemi’s idea of a sliding scale between apolitical and utopian line of argument, from the perspective of practical reasoning is merely an interplay between first- and second-order reasons used for the justification of a state’s behaviour. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006). Monica Hakimi also points out that CIL does not always operate as a set of rules, and may feature inconsistencies and contingencies: Hakimi, ‘Making Sense of Customary International Law’, 1516.

⁵¹ Raz, *Practical Reasons and Norms*, 74.

take this a step further and take a look at this interpretation anew. If state practices are networks of first- and second-order reasons within which states act, but also form, manifest, and explicate expectations regarding the actions of other states, how does this affect the nature of state practices for the purposes of legal interpretation? How are these networks of reasons interpreted when looked at as containers, and when looked at as contents?

The theory of normativity as a special case of practical reasoning offers an illuminating perspective on the interpretation of state practice as a network of reasons. Most importantly, it allows to clearly differentiate two instances of interpretation: interpretation of state practice for the purpose of identifying of a rule of CIL, and interpretation for the purpose of clarifying its normative content.

Interpretation as identification

The formation of a norm is a process of conversion of reasons and expectations, and it may not always be possible to draw straight lines between the stage when states act for a widely shared reason and do not explicate any expectations, the stage a practice emerges, and the stage when it has fully developed. In exceptional circumstances, articulation of reasons is enough to generate expectations that these reasons would be followed and other reasons would be excluded, which exhibits a practice being formed (e.g., the Truman proclamation on the continental shelf). Sometimes, conversion of reasons into norms does not happen because of the difficulties associated with balancing them in the most appropriate way, which causes uncertainties and disagreements as to whether a practice has emerged (e.g., uncertainties in regard of the right to unilateral declaration of independence). Yet some features of practical reasoning exploited by actors serve as beacons of whether or not there is a norm and whether it may qualify as a legal one. Thus, when states' actions are looked at with the purpose of enquiring whether a new rule of CIL has emerged, the network of reasons appears as an apparent *container*, and what states do and how they react to what other states do are assessed

within a logic of sources of law. This, first and foremost, affects the questions through which the interpretation of states' actions is carried out:

1. do states act for the first-order reasons only, and is there therefore only a semblance of a practice ('pattern' or 'regularity of behaviour')?
2. or do states act for a second-order reason (i.e. norm), and is there therefore a formed practice, where participants exhibit expectations about reasons being followed or excluded, and shape their conduct based on these expectations?
3. if the latter, then is this second-order reason acted upon and articulated as part of a wider network of legally relevant reasons, i.e. does it conform to certain conventional criteria of validity of custom as *legal* custom?⁵²

Questions (1)-(2) inquire into the existence of a second-order reason that states use as a justification for their action. There is a big difference between justification based on first-order reasons and justification based on second-order reasons, i.e. norms.⁵³ Justification based on first-order reasons does not assume any expectations from other actors and such justification may, as a matter of fact, be implicit and not designed as foreseeing, or matching, such expectations. This, however, is a much rarer situation than it may appear. In today's world, states are much more often acting within practices than they used to, even when this relates to their internal affairs, and therefore justifications, even when implied, are typically met with expectations from other actors. Hence, it is normal

⁵² *Opinio juris* is such a criterion, for it is a matter of *practice* of international law to use it as a threshold for assessing the legal validity of customary rules. Yet it is worth stressing that *opinio juris* is not an element of a customary legal rule, but rather a conventional criterion, according to which the legal relevance of a certain practice is assessed. In this sense, *opinio juris* is not something added on top of an existing practice, but rather a matter of practice itself. As Frederick Schauer puts it, 'recognition and non-recognition of law and legal sources is better understood as a practice in the Wittgensteinian sense: a practice in which lawyers, judges, commentators, and other legal actors gradually and in diffuse fashion determine what will count as a legitimate source—and thus what will count as law.' Frederick Schauer, 'Authority and Authorities', *Virginia Law Review* 94, no. 8 (2008): 1957. See, for the same line of argument, Postema, 'Custom in International Law'; Postema, 'Custom, Normative Practice, and Law'.

⁵³ See, for an interesting analysis: John Gardner, 'Justification under Authority', *Canadian Journal of Law & Jurisprudence* 23, no. 1 (2010): 71–98.

that first-order reasons-based justifications are usually addressed to states' actions in their domestic realm, though even there second-order reasons embedded into state practices play an increasingly significant role.⁵⁴

The existence of a norm manifests in a reason that has a pre-emptive function, i.e. a reason that counts for not acting on, and not using as a justification some other reasons. Not only does this mean that certain reasons cannot be legitimately acted upon, but it also entails that other states expect these reasons to be excluded and react accordingly when they are not. This, however, does not in and of itself mean that a norm embedded in a practice is a *legal* norm. There may exist mutual expectations as to what reasons may or may not be acted on, and what kind of second-order reason bridges them, even when these expectations do not have a manifestly legal character. International relations of states are by and large governed by such second-order reasons, which means that state practices (and hence also norms) are virtually omnipresent.⁵⁵

The first two questions, in this way, are asked in order to determine the reasons-made boundaries of a container of a customary rule. The third question is quite different, though. It aims at establishing whether this container meets the requirements of validity set by a legal order. It is beyond the scope of this chapter to discuss the intricacies of the

⁵⁴ Similarly, private actions by persons may not constitute any practices, if they do not assume any sort of expectations from other persons. States, too, within the doctrine of sovereignty, may organise their internal life according to considerations that do not and are not assumed to create any expectations for other states. Gradually, however, this may change, when even the internal affairs of a state create expectations for other states. For instance, as the recent developments with judiciary in Poland suggests, it may be said that there is a gradual movement towards operationalising the practices of the Rule of Law as generating political and even legal expectations.

⁵⁵ This should not come as a surprise, since practices are shadows of interactions. This obviously goes against the Lotus principle that 'rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed.*' *The Case of the S.S. Lotus (France v Turkey)* (Merits) 1927 PCIJ Rep Series A No 10, para 44 (italics added). Human interactions are almost always practice-based and, consequently, normative. It is not that easy to think of an example of human interaction that does not presuppose any mutual expectations and normative deeds. The same applies equally to states, since their interaction is but a species of human interaction; it may be almost impossible to single out states' actions in the international realm that are not *ab initio* met with deeds-based normative expectations from other states.

legality of state practices, if only because they do not, in principle, contribute to the process of interpretation of rules of CIL.⁵⁶ The dimension of the legality of customary rules, as was suggested in section 1, is typically of little relevance to the determination of their content. Let us therefore shift to a different mode of interpretation: that aimed at clarification of the content of customary rules.

Interpretation as clarification

A more specific, and more legally charged instance of interpretation of state practices is, certainly, interpretation for the purposes of clarification of the normative content of a rule of CIL. This instance of interpretation, however, tends to adopt a view of a state practice as the content of a rule, rather than its container. This, though, does not change the nature of state practices as a networks of reasons, and therefore the questions through which interpretation proceeds are again addressed to these networks, but these are very different questions:

1. what first-order reasons does a rule of CIL exclude, i.e., what reasons may states not legitimately invoke as justification for their actions within a given practice?
2. what first-order reasons does a rule of CIL reinforce, i.e. what first-order reasons does this norm account for, how does it balance them, and whether this balance corresponds to the expectations of those involved in a practice?

Let us address the first question. Since exclusion is of crucial importance for differentiating norms from other reasons, interpretation of rules of CIL is primarily concerned with what reasons are excluded by a rule that is being interpreted. For example, is it meaningful within existing state practices to ascertain whether a cyber operation as a single ‘hostile’ act employed by one state against another constitutes armed conflict within the meaning of the customary rules of international humanitarian

⁵⁶ I do address the issue of legality in chapter 1 of the present thesis.

law?⁵⁷ To translate this into the language of practical reasoning, may a state justify the reasons for its act of cyber warfare as *not* being excluded by the norms of IHL?⁵⁸ This question can only be answered by looking at how states accommodate a new reason within existing deeds; whether they discursively assess cyber warfare as an instance of armed conflict, or as something separate, probably creating an independent deed. By its very nature, exclusion is the function of a norm that renders acting on certain reasons as a violation of this norm, and therefore when a new reason emerges from within a practice (a practice of modern warfare, in this example), it is a matter of whether states accommodate this new reason within existing normative deeds, or whether they exclude it from practice and prevent from becoming its deed. This process of accommodation or rejection typically manifests in how states react to a new reason being invoked as a justification for an action within an existing practice.

Where the first question addresses the external boundaries of a practice, i.e. the issues of what kind of reasons count as aspects of a practice and what kind of reasons are excluded from it, the second question offers a different perspective. It relates to the justification of norms, briefly touched upon in the previous section. Norms, including legal norms, are typically justified as accounting for a certain balance of the first-order reasons that render a practice intelligible. From this perspective, norms always serve a purpose of simplifying or optimising participants' compliance with these first-order reasons.⁵⁹ Interpretation, therefore, may not only address the issues of the exclusion of some reasons, but also the issues of reassessing or even reshaping the balance of reasons

⁵⁷ 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (International Committee of the Red Cross 2011) 31IC/11/5.1.2 36–37.

⁵⁸ Or, to put it differently, norms of international humanitarian law are applicable when there is an armed conflict, and so the question here would also be whether a single hostile act of a cyber operation would fall within the normative meaning of an armed conflict. Therefore, it is not only a question whether norms of international humanitarian law exclude the reasons for an act, but whether such norms are applicable to this act in the first place, which loops back to the normative structure of the practice in question. After all, whether or not a norm is applicable is contingent on what reasons it does or does not account for. I thank André de Hoogh for this point.

⁵⁹ Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 40.

that are included in the practice. Thus, it is a matter of interpretation to inquire whether a rule of CIL adequately reflects and accounts for underlying reasons that shape a practice and guide state's actions.⁶⁰ If, for example, the principle of equidistance as a method of delimitation of continental shelves does not properly account for the reasons that comprise the practice of the use of a continental shelf—or when there are doubts as to whether this principle exists as a valid legal rule to begin with—there may exist a need to (re)balance these reasons according to a more fundamental principle.⁶¹ Such a rebalancing, though made within a wider normative framework of equity, does affect the balance of reasons represented by the equidistance rule; some of the reasons it accounts for are now weightier.

These two questions, though different from those discussed in the previous subsection, build on them. It is in the foundations of legal interpretation to enquire into what considerations and in what particular manner legal norms account for, since it is the core function of legal norms to improve or simplify people's compliance with reasons. And since in the case of customary rules their content and container are one and the same thing, their interpretation ultimately entails clarifying the boundaries of practices. The need in this clarification reflects that it is in the nature of practices to evolve. The normative deeds comprising the inherent normative standard of a practice are typically in flux; not only do they depend on what participants in practices do, but also on how they react to actions and incorporate new reasons. Thus, those engaged in practices constantly accommodate or reject new reasons that may or may not affect the perception of the normative standard, and this is exactly why the interpretation of customary rules is essentially an inquiry into the dynamics of practical reasoning implied within a practice. That does not entail, however, that because of this customary norms themselves fluctuate following the dynamics of practical reasoning. Exactly because they are norms

⁶⁰ This may be taken in the shape of the object-and-purpose strategy of interpretation which, though emerging in treaty law, may also be used for interpretation of CIL. See, Panos Merkouris, *Article 31(3)(C) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Leiden: Brill Nijhoff, 2015), 263–69.

⁶¹ *North Sea Continental Shelf Cases*, paras 88–99.

they have a degree of resistance which marks their essence as pre-emptive standards. This resistance, however, is not absolute in a sense that the dynamics of practices necessarily involve different modes of engagement with customary norms, and in this sense norms do not exist separately from the ways in which they are used as grounds for actions and arguments.

It is, therefore, not only *possible* that rules of CIL allow for evolutive interpretation, it is *essential*, since it follows directly from the way practices operate and develop. It should be noted, however, that evolutive interpretation in the case of treaties is not the same as in the case of CIL.⁶² For interpretation of treaties, evolutive interpretation generally relates to the phenomenon that when the text of a treaty remains the same, its meaning is altered over the course of time.⁶³ It is argued that evolutive interpretation of treaties is justified when there is evidence that the parties intended, from the outset, that their treaty would be capable of evolving over time, that it can remain effective or relevant in the face of changing conditions.⁶⁴ It is, therefore, essential that evolutive interpretation of treaties is based on the provision of art. 31(1) of the VCLT, according to which ‘a treaty shall be interpreted [...] in the light of its object and purpose’. When a rule of CIL is in question, though, it seems not entirely accurate to speak of its object and purpose as pre-given and evident in advance, since the rules of CIL cannot be always traced back to some shared intentions (as argued in section 1), their object and purpose are far less clear and determined than in the case of treaties. In the case of treaties, their object and purpose may be an *explanandum* for the purposes of interpretation, but in the case of the rules of CIL, they rather appear as *explanans*. In other words, the object and purpose of

⁶² I am grateful to Prof Adil Haque for drawing my attention to this issue.

⁶³ Christian Djeflal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge: Cambridge University Press, 2016), 19. From this perspective, evolutive interpretation relates to the establishment of a change in a treaty without its modification. Julian Arato, ‘Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences’, *The Law & Practice of International Courts and Tribunals* 9, no. 3 (2010): 456.

⁶⁴ Malgosia Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties, Part I’, *The Hague Yearbook of International Law*, no. 21 (2008): 153.

a customary rule may well be the end point of interpretation rather than its starting point. For this reason, evolutive interpretation of the rules of CIL relates more to the function a certain practice performs and to the meaning its practice has in a wider context of states' activities. Such an evolutive interpretation, then, focuses on re-evaluating the balance of reasons reflected in a norm, adjusting it to the developing patterns of the practice itself.⁶⁵ Every instance of the interpretation of a rule of CIL is therefore a snapshot of the balance of reasons currently accepted within a practice. However, since practices are dynamic entities, so are the norms which define them and are sustained by them.

To summarise, the interpretation of state practices as normative networks of reasons takes a different shape depending on how they are looked at. If a state practice is approached as a container and is thus investigated for the purposes of identification of a rule of CIL, the main strategy of interpretation will consist in assessing whether states act for a second-order reason (a norm, in this context) and whether this meets the threshold of legal validity. When a state practice is addressed as content, the interpretative strategy will primarily entail determination of those reasons a rule of CIL excludes and assessment of whether those reasons it accounts for are properly balanced.

Conclusions

It is in the core of the idea of CIL that it manifests in a peculiar duality; it is a source of international law, and at the same time it is international law as such. By blurring the line between container and content, which is essential for the conventional doctrine of sources, CIL challenges the process of its interpretation too. State practices, which appear as both containers and content of the rules of CIL, are subject to interpretation from two different positions—when a new rule is identified, and when an existing rule is

⁶⁵ See generally on the idea of rebalancing reasons: Stephen R. Perry, 'Second-Order Reasons, Uncertainty and Legal Theory', *Southern California Law Review* 62 (1989): 913–94.

clarified. This creates confusions as to how to separate these two instances of interpretation.

This contribution endorses the view on state practices as inherently normative networks of reasons. Approached as such, a state practice manifests as comprising deeds and reasons, the latter existing on two different levels. The normativity of a state practice is explained through there being second-order pre-emptive reasons, i.e. norms that bridge a variety of first-order reasons, balancing and mutually rendering them as meaningful. The interpretation of these norms embedded into state practices entails discovering connections between different groups and levels of reasons. Interpretation for the purpose of identification of a rule of CIL is primarily concerned with the question of whether there is a second-order reason that systematises the expectations and critical stances of states, and whether this second-order reason qualifies as a legal one. Interpretation for the purposes of clarification, in turn, focuses on what reasons a rule of CIL excludes, and what reasons it balances, how well this balance reflects the actual weight of the first order reasons, and how to ensure that newly formed reasons are properly assessed and accommodated within practice, or are excluded from it.

Such an approach to state practice and interpretation of CIL allows one to distinguish different interpretative stages of a lifecycle of state practice, as well as to conceptualise state practice as a normative network of reasons.

Chapter 4

Authority and Pre-Emption: Solidarity as a Practical Reason¹

Introduction

What does it imply to act on the basis of solidarity? What kind of practical considerations are involved when some actor (be that a person, a social group, or a political entity such as a state) claims that she acts in a certain way out of solidarity? More importantly, what is it to say that (international) law is grounded in, or structured by, the principle of solidarity? These questions are not only central to any attempt to justify a specific normative content of international law in the domains of environmental protection, climate change, international trade and development, etc. They may also relate to theoretical investigations into the nature of international law and its societal grounds. The issue of solidarity, then, exists at several levels of our conceptualisations of international law.

Solidarity itself may be understood very differently and its meaning often depends on the particular context of use, and for this reason it is difficult to comprehensively define it. In fact, it is much easier to explain what solidarity means by elaborating on its particular manifestations, be that an emotional sense of unity of social groups and classes (e.g., when solidarity is discussed in the context of revolutions and social movements), a

¹ This chapter is based on the draft paper ‘Solidarity as a Practical Reason: Grounding Authority of International Law’, presented at ESIL Research Forum ‘Solidarity: The Quest for Finding Utopias of International Law’ (Catania, 20–21 April 2021).

moral obligation of mutual assistance (e.g. solidarity as social co-dependence and cooperation), or a one-sided duty to help those in a need (e.g., solidarity with refugees or victims of social injustices). This makes solidarity a very nebulous concept, with risks that one instance of its use may not at all fit another instance.

Things get even trickier when solidarity is discussed as a matter of global community, in particular, as a matter of international law. In contemporary international law, solidarity occupies a peculiar position. On the one hand, it is one of the most important ideals that legitimise international law, alongside justice, peace, prosperity, sustainability, etc. Promotion of solidarity, then, is a moral duty of states and other international actors, just like the promotion of other values of universal significance. When seen as such, there is no need in international legal arguments to claim that peoples and states ought to show solidarity with other peoples and states. It is a moral duty, and moral duties, as is known, though they may be reinforced by law, do not depend on it. On the other hand, the idea of solidarity is sometimes pictured as a principle of international law. From this perspective, there is something more to solidarity than just a moral value. If it is a principle of international law, states and other subjects of international law not merely *ought to* act out of solidarity as a matter of moral duty, but they *must* do so as a matter of law.

As I will show, despite (or perhaps thanks to) the ambiguous normative and legal status of solidarity in international law, it is common to treat it as marking the features of the contemporary era of international law. We now live in the age of solidarity, as slogans go, and although it may sound rather too optimistic, there is certainly some truth in it. States grow more and more interdependent, which shapes the relations between them such that there is more and more value in cooperation than there used to be. This makes the idea of solidarity even somewhat more mysterious; is there something more normatively robust behind it than political and moral pathos used to legitimise international law? How is solidarity reflected in the authority structure of international law?

This chapter aims at discussing the issue of what normative status the principle of solidarity has in international law. I am not trying to unpack the meaning of solidarity in international law, nor do I focus on how this idea is manifested in different areas of international law (although these issues cannot be altogether avoided). Rather, I wish to explore what normative implications the principle of solidarity creates, especially in the context of a tendency to represent solidarity as a principle of international law. This enterprise also dictates the structure of this chapter. I start with a short overview of how solidarity has come to be viewed as a principle of international law and what debates surround this view (section 1). I then turn to exploring what kind of a ‘principle’ solidarity is, considering that we use the concept of legal principles very differently depending on the context (section 2). I try to show why it is essential to differentiate between principles which are legally normative, and those which, though essential for law, are not. In section 3, I discuss the function of legality and why moral and political principles require legal pre-emption. This allows me to discuss how solidarity grounds, together with similar moral and political concepts, the normative authority of international law. My ultimate aim is to show that solidarity is not and should not be considered a principle of international law in order to perform the normative function it has.

1. Solidarity and International Law: A Path from Fact to Principle

Without doubt, solidarity is one of the most important normative ideas driving the development of today’s international law. The spirit of solidarity pierces many regimes of international law and leaves its marks in many international legal instruments; it inspires international legal regulation and is used to argue further developments in international law. The aim of this section is to trace, in a rather sketchy manner, that intellectual history of solidarity which made it such an influential idea. By doing so, I want to investigate those conceptual foundations that underlie the popular concept that solidarity is a principle of international law.

Since the peak of its popularity in social, political, and legal philosophy in the first decades of the 20th century, solidarity has become one of the most influential of concepts. ‘There exists a social solidarity which comes from a certain number of states of conscience which are common to all the members of the same society,’² wrote Émile Durkheim, laying the groundworks of solidarism. The great sociologist believed that the more complex society becomes, ‘the more, consequently, social cohesion derives completely from this source [i.e. solidarity] and bears its mark.’³ Léon Duguit, who was probably the most renowned solidarist of his generation, shared this view, but also believed that social solidarity has a normative aspect, too. This normative side of solidarity translates into the most important social rule (which he called ‘objective law’) that ‘impl[ies] that everyone has the social obligation to fulfil a certain mission and the power to perform the acts required for the accomplishment of this mission.’⁴

Georges Scelle, another influential solidarist, supposed that the factual bounds between people form ‘a factual solidarity, constituted by an interest or a bulk of interests common to the members of the group, interests which are often vital and which can only be satisfied by the existence of the group.’⁵ That there exist common interests and interdependencies between people suggests a normative proposition that they should act out of solidarity with each other. This normative manifestation of solidarity, according to Scelle, is most apparent when it is converted into specific rules and becomes the law of a society. As a result, positive law is a mere translation of social solidarity: ‘the

² Émile Durkheim, *The Division of Labour in Society*, trans. George Simpson (New York: Macmillan Company, 1933), 109. First published in 1893, this book inspired most political and legal studies on solidarity.

³ Durkheim, *Division of Labour in Society*, 109.

⁴ ‘*droit objectif*, impliquant pour chacun l’obligation sociale de remplir une certaine mission et le pouvoir de faire les actes qu’exige l’accomplissement de cette mission’. Léon Duguit, *Le droit social, le droit individuel et la transformation de l’état* (Paris: Librairie Félix Alcan, 1908), 12. Unless indicated otherwise, translations from French are mine.

⁵ ‘[...] une solidarité de fait, constituée par un intérêt ou un faisceau d’intérêts communs aux membres du groupe, intérêts souvent vitaux et qui ne peuvent être satisfaits que par l’existence du groupement’. Georges Scelle, ‘Théorie Du Gouvernement International’, *Annuaire de l’Institut International de Droit Public*, 1935, 42.

normative aspect of the legal order is for us just a formulation of the social fact or of the phenomenon of inherent solidarity.⁶

This peculiar factual/normative dualism of solidarity has also marked its use in international legal scholarship. Solidarity acquired the status of one of the critical intellectual ‘building blocks’ of international legal theory since Alejandro Alvarez’s works in the early 20th century. International law, according to Alvarez, is nothing else but a ‘regime of solidarity’ constructed through international relations, codification of international law, and other forms of legal cooperation.⁷ Moreover, ‘this notion of solidarity’, wrote Alvarez, ‘[...] is of paramount importance for international law. It must guide its future orientation, at the same time as providing objective elements for its interpretation; well understood it will give it the prestige it deserves.’⁸ Alvarez believed that solidarity is the new factual state of international affairs which should replace the outdated factual state of complete sovereign independence,⁹ and at the same time it is the fundamental normative drive of such a replacement, a drive towards internationalism.¹⁰

This line of reasoning, that international solidarity is something coming to replace the old factual structure of international relations and thereby altering international law as well, determined the influence of this idea in international legal scholarship. For instance, Bruno Simma stresses that community interests, which caused the booming institutionalisation of international law in the post-World War II era, ‘go far beyond interests held by States as such; rather, they correspond to the needs, hopes and fears of

⁶ ‘La partie normative de l’ordre juridique n’est pour nous que la formulation du fait social ou du phénomène de solidarité originaire’. Scelle, ‘Théorie Du Gouvernement International’, 45.

⁷ Alejandro Alvarez, *La codification du droit international: ses tendances; ses bases* (Paris: Éditions internationales, 1912), 59–62.

⁸ ‘Cette notion de solidarité est [...] d’une importance capitale pour le droit international. Elle doit guider son orientation future, en même temps que fournir des éléments objectifs d’interprétation; bien comprise elle lui donnera le prestige qui lui revient’. Alvarez, *La codification du droit international*, 128.

⁹ ‘La notion de solidarité a [...] remplacé l’ancienne conception de l’indépendance et de la souveraineté absolue’. Alvarez, *La codification du droit international*, 30.

¹⁰ ‘[...] internationalisme, s’il est conduit de façon à ne pas étouffer le sentiment national patriotique, peut être une cause de rénovation du monde’. Alvarez, *La codification du droit international*, 32.

all human beings, and attempt to cope with problems the solution of which may be decisive for the survival of entire humankind.’¹¹ Community interests, Simma believes, reshape the traditional structure of international law as a thin legal order comprising primarily bilateral relations, which resonates with Alvarez’s view on solidarity as a driver of further development of international law. Karel Wellens takes this idea a step further by distinguishing three paradigms of international law, which he calls ‘the law of coexistence’, ‘the law of cooperation’, and ‘the law of solidarity’. International law, Wellens believes, has gradually moved from embodying the mere coexistence of states to providing grounds for their cooperation. The next step for international law should then be solidarity, and ‘the law of solidarity will influence the respective and combined role and impact of the two pre-existing approaches to international law.’¹²

Solidarity, then, has the feature of being both factual and normative, reflecting social interdependencies and at the same time embodying the basic social rule. Remarkably, most contemporary reflections on solidarity in (international) legal scholarship and social philosophy tend to focus more on its normative side. More importantly, when solidarity is taken normatively, it is sometimes pictured as a *legal* concept, not just generally a social or moral one. When Léon Duguit wrote that solidarity embodies the most important social rule, he also insisted that this rule is a legal one:

this social rule of conduct is not a moral rule, *but a rule of law*. It only applies to external manifestations of human will; it does not impose itself on the inner man; it is the rule of his external acts, and not that of his thoughts and his desires, which on the contrary must be any moral rule.¹³

¹¹ Bruno Simma, ‘From Bilateralism to Community Interest in International Law’, in *Recueil des Cours: Collected Courses of the Hague Academy of International Law*, vol. 250 (The Hague: Martinus Nijhoff Publishers, 1994), 244.

¹² Karel Wellens, ‘Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations’, in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, ed. Ronald St J. Macdonald and Douglas M. Johnston (Leiden: Martinus Nijhoff Publishers, 2005), 804.

¹³ ‘Cette règle social de conduite n’est point une règle de morale, *mais bien une règle de droit*. Elle ne s’applique qu’aux manifestations extérieures de la volonté humaine ; elle ne s’impose point à l’homme intérieur ; elle

That solidarity has been seen as having such a genealogy is owed to the idea that it is ‘the legal-political form for the emotionally loaded but somewhat disreputable revolutionary idea of “fraternity”.’¹⁴ Where fraternity has an explicit moral and even passionate flavour to it, solidarity has been pictured as a more rational and, very importantly, legally embedded concept.¹⁵ Solidarity is thus intellectually shaped as an intrinsically legal and political idea, as something *born within law*, rather than brought into it from the moral domain.

This has had its impact on the international legal conceptualisations of solidarity, too. Today’s international law and scholarship fully embrace the idea that solidarity is a powerful legitimising ideal lying in the foundation of modern international law. It is also almost never questioned that solidarity is amongst the most important principles generally speaking. The growing interdependence between states gives the idea of solidarity probably an even more forceful spin than the 19th century’s industrialisation, which brought it to life in the first place. This makes co-operation one of the central tasks which states ought to perform.¹⁶ But the principle of solidarity, as many scholars believe, and to whom I now turn, forms the basis for such cooperation and makes it possible for states to engage in coordinating global action to begin with. However, it is far more than

est la règle de ses actes extérieurs, et non pas celle de ses pensées et de ses désirs, ce que doit être au contraire toute règle de morale’. Duguit, *Le Droit Social*, 9 (emphasis added).

¹⁴ See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2002), 288–301. Jack Hayward writes: ‘In the late nineteenth and early twentieth century, for the abstract principles of liberty, equality and fraternity was substituted the eclectic notion of solidarity,’ which was deemed as ‘more scientific’. Jack E. S. Hayward, ‘The Official Social Philosophy of the French Third Republic: Léon Bourgeois and Solidarism’, *International Review of Social History* 6, no. 1 (1961): 20, 27.

¹⁵ Which might seem plausible, since originally, solidarity was an exclusively legal concept that related to obligations on collective debts and could be traced back to the Roman law, where ‘each member of [a family] was held responsible for the payment of the whole of the debt contracted by any member, and had the right to receive payment of debts owed to the collectivity.’ Jack E. S. Hayward, ‘Solidarity: The Social History of an Idea in Nineteenth Century France’, *International Review of Social History* 4, no. 2 (1959): 270.

¹⁶ ‘States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences’. *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UNGA Res 2625 (XXV) (24 Oct 1970).

just that; solidarity is sometimes pictured not just as any principle, but as a *principle of international law*.

To begin with, Rüdiger Wolfrum—one of the leading authorities on the issue of solidarity in international law—claims that solidarity belongs to the ‘principles having their origin directly in international *legal* relations’, and this shapes its status as a ‘structural *principle of international law*.’¹⁷ He also states that solidarity has a threefold function in international law: ‘the achievement of common objectives through common actions of States, the achievement of common objectives through differentiated obligations of States and actions to benefit particular States.’¹⁸

Ronald Macdonald shares a similar sentiment towards solidarity. In his influential article, he stresses that solidarity is a special mode of cooperation, an ideological glue that brings together efforts to achieving a common good. He emphasises that solidarity is not merely *relevant* for international law, but has an *explicit legal normative role* to play:

Solidarity is first and foremost a principle of cooperation which identifies as the goal of joint and separate state action an outcome that benefits all states or at least does not gravely interfere with the interests of other states. Solidarity, *as a principle of international law*, creates a context for meaningful cooperation that goes beyond the concept of a global welfare state; *on the legal plane it reflects and reinforces the broader idea of a world community of interdependent states*.¹⁹

Abdul Koroma writes not only that solidarity grounds international law structurally, but is also capable of generating obligations for states:

solidarity in current international law represents [...] an emerging structural principle which in many cases creates negative obligations on States not to engage

¹⁷ Rüdiger Wolfrum, ‘Solidarity Amongst States: An Emerging Structural Principle of International Law’, *Indian Journal of International Law* 49, no. 1 (2009): 9 (emphasis added).

¹⁸ Wolfrum, ‘Solidarity Amongst States’, 8.

¹⁹ Ronald St. J. Macdonald, ‘Solidarity in the Practice and Discourse of Public International Law’, *Pace International Law Review* 8, no. 2 (1996): 259–60 (emphasis added).

in certain activities, and in an increasing number of contexts establishes concrete duties on States to carry out certain measures for the common good.²⁰

Markus Kotzur shares a similar position when investigating the idea of solidarity in EU law: ‘solidarity as a *legal principle* has to be distinguished in a *negative* and a *positive* component. Negative solidarity is seen as mere response to certain dangers or events, whereas positive solidarity creates, consequent upon previous negative notion, joint rights and obligations.’²¹

Rüdiger Wolfrum, however, believes that solidarity might not have enough of a normative impact to generate positive obligations for states, but it may be said to create negative obligations: ‘states that refrain from acceding to regimes which are meant to protect the interests of the international community, are under an obligation not to undermine such efforts.’²²

The idea that solidarity is an emerging (or) structural principle of international law is often demonstrated by references to particular legal regimes. Scholars trace solidarity in international economic law and international environmental law;²³ add to this the international legal regime of collective security,²⁴ international law on climate change,²⁵ international humanitarian law and international law on human rights,²⁶ international

²⁰ Abdul G. Koroma, ‘Solidarity: Evidence of an Emerging International Legal Principle’, in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, ed. Holger P. Hestermeyer and Rüdiger Wolfrum (Leiden: Nijhoff, 2012), 103.

²¹ Markus Kotzur, ‘Solidarity as a Legal Concept’, in *Solidarity in the European Union: A Fundamental Value in Crisis*, ed. Andreas Grimm and Susanne My Giang (New York: Springer, 2017), 40 (emphasis in the original).

²² Rüdiger Wolfrum, ‘Solidarity’, in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 417.

²³ MacDonald, ‘Solidarity in the Practice’, 263–90].

²⁴ Anne-Marie Slaughter, ‘Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform’, *American Journal of International Law* 99, no. 3 (2005): 619–31.

²⁵ Angela Williams, ‘Solidarity, Justice and Climate Change Law’, *Melbourne Journal of International Law* 10, no. 2 (2009): 493–508.

²⁶ Vicente Marotta Rangel, ‘The Solidarity Principle, Francisco De Vitoria and the Protection of Indigenous Peoples’, in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, ed. Holger P. Hestermeyer and Rüdiger Wolfrum (Leiden: Nijhoff, 2012), 103–29; Carl Wellman, ‘Solidarity, the Individual and Human Rights’, *Human Rights Quarterly* 22, no. 3 (2000): 639–57; Wolfrum, ‘Solidarity’.

refugee law, international law on disaster relief, and the law of state responsibility.²⁷ Solidarity is also often discussed in the context of the doctrine of responsibility to protect,²⁸ and sometimes even in relation to international criminal law.²⁹ These different manifestations of solidarity arguably show that solidarity is not only a principle of international law, but even that it has constitutional status within the international legal order. This latter claim is most visible in Karel Wellens statement that:

The principle of solidarity *may rightfully claim constitutional status* because of the high degree of constitutionalisation it has acquired within the UN law on the maintenance of international peace and security, because it is increasingly ensuring the cohesion and consistency of international legal order across various branches and because it operates with regard to both primary and secondary rules.³⁰

Solidarity, then, is often seen as being a principle of international law, and its relevance and status are shown through a variety of manifestations in different legal regimes and branches of international law. At the same time, the principle of solidarity is conceptualised as a normative construct that has a direct or indirect impact on states' rights and obligations. Solidarity, then, 'imposes joint obligations on States to address international problems,'³¹ and in this role it also informs how states must cooperate 'for the purposes of development to increase the social welfare of the world community'.³²

There are, however, other views on solidarity in international law. Many international lawyers label solidarity merely as an aspirational concept, or as a tool for a

²⁷ Martti Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?', *British Yearbook of International Law* 72, no. 1 (2002): 337–56.

²⁸ Koroma, 'Solidarity', 119–23; Themistoklis Tzimas, 'Solidarity as a Principle of International Law: Its Application in Consensual Intervention', *Groningen Journal of International Law* 6, no. 2 (2019): 333–59; Wolfrum, 'Solidarity Amongst States', 17–19.

²⁹ Carly Nyst, 'Solidarity in a Disaggregated World. Universal Jurisdiction and the Evolution of Sovereignty', *Journal of International Law and International Relations* 8 (2012): 36–61.

³⁰ Karel Wellens, 'Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections', in *Solidarity: A Structural Principle of International Law*, ed. Rüdiger Wolfrum and Chie Kojima (Heidelberg: Springer, 2010), 36 (emphasis added).

³¹ Koroma, 'Solidarity', 109.

³² Rüdiger Wolfrum, 'International Law of Cooperation', in *Max Planck Encyclopedia of Public International Law*, April 2010, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1427?rskey=14ZFXl&result=1&prd=MPIL>.

moral legitimization of international law. It can therefore be said that there is no consensus on whether solidarity can be characterised as one of the structural principles of international law, or whether it has become a legal principle in international law.³³ Thus, Jost Delbrück insists that solidarity does not generate any *legal* obligation to cooperate,³⁴ whereas Theo van Boven expresses a similar concern in respect of the right to peace as being generated from solidarity.³⁵ Danio Campanelli even writes that

It would be hardly sustainable that solidarity is today a fully acknowledged legal principle governing international law and from which it would be possible to draw a clear set of duties and obligations for international subjects. On the other hand, the concept of solidarity [...] permeates certain legal discourses in the international law sphere, where it appears to be something more than mere cooperation or reciprocity.³⁶

Even more so, Rüdiger Wolfrum—one of the main advocates of solidarity as a principle of international law—wrote that the principle of solidarity is not a kind of legal principle from which concrete rights and obligations are deduced, but which can serve as a tool for interpreting certain regimes of international law as well as an instrument for its progressive development.³⁷ And Karel Wellens, while defending the constitutional status of solidarity in international law, at the very same time stated that he ‘did not actually say [...] that the principle of solidarity is a legally binding principle’.³⁸

³³ See, e.g., Chie Kojima and Kazimir Menzel, ‘Symposium on Solidarity as a Structural Principle of International Law, Max Planck Institute for Comparative Public Law and International Law, 29 October 2008’, *Verfassung in Recht Und Übersee* 42, no. 4 (2009): 585–88.

³⁴ Jost Delbrück, ‘The International Obligation to Cooperate—An Empty Shell or a Hard Law Principle of International Law?—A Critical Look at a Much Debated Paradigm of Modern International Law’, in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, ed. Holger P. Hestermeyer and Rüdiger Wolfrum (Leiden: Nijhoff, 2012), 15–16.

³⁵ Theo van Boven, ‘The Right to Peace as an Emerging Solidarity Right’, in *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens*, ed. Eva Rieter and Henri Waele (Boston: Martinus Nijhoff Publishers, 2011), 137–47.

³⁶ Danio Campanelli, ‘Principle of Solidarity’, in *Max Planck Encyclopedia of Public International Law*, March 2011, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2072?rkey=mUxydQ&result=1&prd=MPIL>.

³⁷ Rüdiger Wolfrum, ‘Concluding Remarks’, in *Solidarity: A Structural Principle of International Law*, ed. Rüdiger Wolfrum and Chie Kojima (Heidelberg: Springer, 2010), 225–28.

³⁸ Rüdiger Wolfrum and Chie Kojima, eds., *Solidarity: A Structural Principle of International Law* (Heidelberg: Springer, 2010), 93.

We are confronted with an intriguing question, then. Regardless of whether solidarity is legally binding or not, is it reasonable to call it a principle of international law? Is it necessary or desirable that solidarity, by having a normative role in international law, must qualify as a legal principle in order to perform this role? We have traced the evolution of the normative side of solidarity up to these questions, and what follows will be devoted to answering them.

2. Solidarity as a Matter of Principle

Is solidarity a principle of international law? Should it be or will it become one in the future? If it is a (structural) principle of international law, what kind of obligations does generate? These debates which surround the concept of solidarity in international legal scholarship reflect one of the most important jurisprudential problems. This problem, which to a significant degree shaped contemporary legal philosophy, pertains to the issue of principles and their function in law. What I mean here is not the question which is often discussed in international legal scholarship in relation to ‘the general principles of law recognized by civilized nations,’ that is, whether or not general principles belong to sources of international law,³⁹ and if so, how they can be identified. This particular theoretical puzzle is of little relevance for the inquiry undertaken here. Instead, the focus of this section is on what place principles such as solidarity have within international

³⁹ See, generally, Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 2006); Giorgio Gaja, ‘General Principles of Law’, in *Max Planck Encyclopedia of Public International Law*, May 2013, <https://opil-ouplaw-com.proxy-ub.rug.nl/view/10.1093/law:epil/9780199231690/law-9780199231690-e1410?prd=MPIL#>; Hugh Thirlway, *The Sources of International Law*, 2nd ed. (Oxford: Oxford University Press, 2019).

legal normativity. This focus is indeed very much anchored in the jurisprudential debates around principles and their role in law,⁴⁰ but goes beyond them.⁴¹

One of the main problems with the concepts ‘legal principles’, ‘principles of law’, or ‘general principles of law’ is that we use them to label very distinct phenomena, not all of which are even legal, and this often creates confusion. For this reason, not everything that looks like a *principle of international law* is, in fact, a *principle* of international law or a principle of *international law*. That is, not everything that can be labelled as a legal principle has in fact a normative function in international law or even beyond it. It is essential, therefore, to clarify what kind of ‘principle of international law’ solidarity is, considering that the use of this concept is not at all uniform. If we were to summarise all the different kinds of phenomena we call ‘legal principles’ or ‘principles of law’⁴² in international law, this is more or less what we would get:⁴³

1. ‘legal principles’ that are, in fact, ordinary legal rules, to which we attach more argumentative weight by labelling them as principles;

⁴⁰ I mean, of course, the Hart-Dworkin debate, which sparked an important discussion within analytical jurisprudence about what kind of function legal principles perform. See, generally, Ronald Dworkin, ‘Model of Rules I’, in *Taking Rights Seriously* (London: Duckworth, 1977), 29–64; Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Belknap Press, 1986); Herbert L. A. Hart, ‘Postscript’, in *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), 238–76; Joseph Raz, ‘Legal Principles and the Limits of Law’, *Yale Law Journal* 81, no. 5 (1972): 823–54; Scott J. Shapiro, ‘On Hart’s Way Out’, *Legal Theory* 4, no. 4 (1998): 469–507; Scott J. Shapiro, ‘The “Hart–Dworkin” Debate: A Short Guide for the Perplexed’, in *Ronald Dworkin*, ed. Arthur Ripstein (Cambridge: Cambridge University Press, 2007), 22–55.

⁴¹ Thus, I am not discussing one of the core issues pertaining to the conundrum of principles, that is the status of judicial discretion. This debate is of a less relevance for international law, where the judiciary has a far more limited impact on law than in domestic legal systems. I discussed these differences in chapter 2 of the present thesis.

⁴² I use quote marks here and further to differentiate between the concept of a legal principle (no quote marks) and its use in different contexts (with quote marks). I do this, as will be clear later, because not all ‘legal principles’ are in fact legal principles.

⁴³ In the discussion that follows, I am limiting myself only to the instance of a normative use of the concept of principle. That is, I am not discussing other possible connotations of the term, like, for instance, when it is used descriptively to refer to some body of rules without specifying the exact content of those rules (for instance, ‘principles of international trade law, or ‘principles of international criminal law’). As nicely put by Joseph Raz, such a use of the concept of principle is very similar to how we use acronyms, that is, as shortcuts that refer to some phenomena, but which do not have any meaning of their own. Raz, ‘Legal Principles’, 828–29.

2. ‘legal principles’ that establish legal standards of behaviour but, however, do not stipulate any specific actions to be taken by those to whom they apply;
3. ‘legal principles’ that, though relevant for law, are not, in fact, legal principles through the function they perform; rather, they represent certain political or moral norms or ideals which legitimise international law;
4. ‘legal principles’ that are not norms generally speaking, but moral values which the law is supposed to appreciate and protect.

Some caveats before I proceed. First, I do not imply that there is always a clear-cut distinction between these categories, and sometimes, depending on the context, ‘principles’ may migrate between them. This, however, as far as I can tell, does not challenge the analytical accuracy of the distinction. Second, as I will elaborate further, there are several other dividing lines here. For instance, I believe that the first two categories of ‘principles’ are legal, whereas the latter two are not and should not be. I will discuss this issue in the next section. Finally, these distinctions between various ‘types’ of legal principles have more to do with jurisprudential concerns than with those having a doctrinal nature. This is why the analysis that follows by and large does not overlap with (and so also does not challenge) the ILC’s codification efforts led by Marcelo Vázquez-Bermúdez, the Special Rapporteur of general principles of law.⁴⁴ At the same time, the categories identified above reflect the multifaceted nature of legal principle as also stressed in the First report by the Special Rapporteur:

general principles of law, in addition to serving as a direct source of rights and obligations, may serve as a means to interpret other rules of international law or as a tool to reinforce legal reasoning. A more abstract role is sometimes attributed to

⁴⁴ See ILC, ‘Report of the International Law Commission on the work of its seventy-first session’, (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, paras. 202–262.

them, such as that they inform or underlie the international legal system, or that they serve to reinforce its systemic nature.⁴⁵

Returning to the four categories of ‘principles of international law’ outlined above, to which of them may the principle of solidarity belong? Let us investigate them one by one. The *first category* is a tricky one. It is common to speak, for instance, of the principle of the prohibition of genocide,⁴⁶ or the principle of non-intervention,⁴⁷ or the principle of non-use of force in international relations.⁴⁸ What unites all of these is that they are not principles at all, but ordinary legal rules; perhaps some of the most important and vital for the international community, but still regular legal rules. This distinction is one of the critical ones, famously conceptualised by Ronald Dworkin: rules that govern behaviour act in an all-or-nothing fashion (e.g., if there is a prohibition of some action, it is either prohibited or not, no in-betweens), whereas principles have a dimension of weight and because of this do not stipulate a concrete outcome when applied.⁴⁹ As Joseph Raz phrases this distinction, ‘rules prescribe relatively specific acts; principles prescribe highly unspecific action.’⁵⁰ There is nothing unspecific or not stipulating a concrete outcome in the given examples. States are under very definite and rather

⁴⁵ ILC, First report on general principles of law of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, UN Doc A/CN.4/732, para. 26 (footnotes omitted).

⁴⁶ ‘The principles underlying the Convention [on the Prevention and Punishment of the Crime of Genocide] are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.’ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) (1951) ICJ Rep 15, p. 23. As the UN Office on Genocide Prevention and the Responsibility to Protect puts it, ‘[States] are all bound as a matter of law by the principle that genocide is a crime prohibited under international law.’ ‘Genocide’, UN Office on Genocide Prevention and the Responsibility to Protect, accessed February 20, 2020, <https://www.un.org/en/genocideprevention/genocide.shtml>

⁴⁷ ‘The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference.’ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits) (1986) ICJ Rep 14, para 202. See also Maziar Jamnejad and Michael Wood, ‘The Principle of Non-Intervention’, *Leiden Journal of International Law* 22, no. 2 (2009): 345–81.

⁴⁸ In the *Armed Activities*, the ICJ established that ‘the Republic of Uganda [...] violated the principle of non-use of force in international relations’. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Merits) (2005) ICJ Rep 168, para 345(1). See also Clause Kreß, ‘The International Court of Justice and the “Principle of Non-Use of Force”’, in *The Oxford Handbook of the Use of Force in International Law*, ed. M. Weller, Alexia Solomou, and Jake William Rylatt (Oxford: Oxford University Press, 2015), 561–96.

⁴⁹ Dworkin, ‘Model of Rules’.

⁵⁰ Raz, ‘Legal Principles’, 838.

specific obligations not to intervene in the internal affairs of other states, not to commit genocide, and not to use force in international relations. That these may be subjects of fierce debate as to what counts as genocide, or what counts as an intervention, or what counts as a use of force, does not infringe upon the fact that these are very specific acts. There is nothing in these legal obligations that indicate that they are logically different from any other customary or conventional legal obligation states have. So here the concept of ‘principle’ is used in a rhetorical manner rather than in any other.

It is not difficult to see that the principle of solidarity does not quite fit here. To begin with, solidarity does not actually prescribe any specific normative standard for states’ actions. It is exactly why scholars are having such difficulty trying to elaborate on what exactly the principle of solidarity requires states to do. From this perspective, there is very little in common between the principle of solidarity and, for instance, the principle of non-use of force, apart from both being often called ‘principles of international law’. Whereas the latter renders a specific mandatory prohibitive legal rule, the former is but an inspirational ideal, or as Robert Alexy calls it, ‘optimization command’ that ‘something be realized to the highest degree that is actually and legally possible.’⁵¹

The *second category*, which comprises ‘legal principles’ that typically prescribe highly unspecific legal standards of behaviour, but which are nevertheless legally binding, includes principles like, for instance, the principle of the freedom of the high seas,⁵² the principle of the freedom of maritime communication,⁵³ the principle of proportionality,⁵⁴ the principle of due diligence,⁵⁵ and many others. These principles do not direct states to perform any specific actions, rather, they provide for a normative

⁵¹ Robert Alexy, ‘On the Structure of Legal Principles’, *Ratio Juris* 13, no. 3 (2000): 300.

⁵² See, e.g., Leo J. Bouchez, ‘The Freedom of the High Seas: A Reappraisal’, in *The Future of the Law of the Sea*, ed. Leo J. Bouchez and L. Kaijen (Dordrecht: Springer, 1973), 21–50.

⁵³ *Corfu Channel Case (UK v Albania)* (Merits) (1949) ICJ Rep 4, p. 22.

⁵⁴ See, generally, Thomas Cottier et al., ‘The Principle of Proportionality in International Law: Foundations and Variations’, *Journal of World Investment & Trade* 18, no. 4 (2017): 628–72.

⁵⁵ See, e.g., Robert Barnidge, ‘The Due Diligence Principle Under International Law’, *International Community Law Review* 8, no. 1 (2006): 81–121.

standard from which legal obligations may be deduced in specific circumstances. In other words, even though such principles are in themselves highly unspecific in the character of the actions they prescribe, they are nevertheless legally binding. What also unites these principles is that they have other normative functions in law, apart from guiding the actions of states and other subjects. Principles such as these are often used for the purposes of interpretation of legal rules by offering the justificatory reasons or *ratio legalis* underlying legal rules; they may also provide grounds for modifying existing rules and establishing particular exceptions from legal rules, or allow to avoid *non liquet* situations by providing in such a way the ground for new rules.⁵⁶

Does solidarity fit this category? As we saw in the previous section, it is not at all obvious that solidarity is a legally binding principle. Even most dedicated advocates of solidarity as a principle of international law tend to agree that it does not directly generate legal obligations. And this makes all the difference here, for the principles in this category *are* legally binding. Not acting on the basis of solidarity in, say, disaster relief, and not acting on the basis of proportionality, for instance, in the context of applying countermeasures, may have drastically different legal qualifications and consequences. When violating the principle of proportionality may in itself lead to qualification of an act as legally wrongful,⁵⁷ there can hardly be any legal consequences for violating the principle of solidarity.

⁵⁶ As Jean d'Aspremont argues, this latter function of legal principles is the original one when it comes to international law. Moreover, that principles perform this function makes it incoherent to treat them as a source of international law. Jean d'Aspremont, 'What Was Not Meant to Be: General Principles of Law as a Source of International Law', in *Global Justice, Human Rights and the Modernization of International Law*, ed. Riccardo Pisillo Mazzeschi and Pasquale De Sena (Cham: Springer, 2018), 163–84. See also, on the function of legal principles in international law: Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law"', *Michigan Journal of International Law* 11, no. 3 (1990): 768–818.

⁵⁷ As indicated by the ILC in the commentary to art. 51 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 'Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.' ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 134. Notably, the ILC speaks of proportionality as of a rule, rather than as of a principle. This is another indication of how much uncertainty exists around this concept.

We are now left with the last two categories. As already mentioned, unlike the previous two categories, these two comprise ‘legal principles’ which are not necessarily *legal*, and this may cause many confusion as to where to draw a line between law and non-law. This was essentially the main claim by Ronald Dworkin, who brought the issue of principles into the core of jurisprudence: since we often apply moral or political principles to justify a legal position, positivists’ insistence on a clear-cut separation between law and non-law does not hold.⁵⁸ In the context of my investigation here, things are complicated by the unclear normative status of solidarity. Let us take a general look at both categories before returning to solidarity.

The *third category*—‘principles of international law’ which are in fact not *legal* principles at all—hides some pitfalls. It is common, in international law as well, to encounter principles that create no direct legal normative implications, that is, no legal duties can be deduced from them. They neither prescribe a certain line of behaviour, nor establish anything that can even weakly be called a legal obligation. Rather than *prescribing*, they are *describing* a normative order to which they belong and outline its essential features. Jeremy Waldron calls them ‘characterising principles’, for they ‘tell us what a legal system is like, not how to work within it.’⁵⁹ These are principles such as federalism, popular sovereignty, limited government, separation of powers, etc., to give examples, following Waldron, from the constitutional law of the US. In international law, there are also such characterising principles, for instance, the principle of sovereign equality, or the principle of self-determination of peoples, or the principle of good faith.

These principles are very much different from those which we analysed before. Normative principles, such as proportionality or due diligence, guide actions by establishing a legal standard of behaviour (no matter how abstractly or vaguely). Characterising principles are different in this regard. They certainly perform a normative function politically, for they guide the construction of normative orders and

⁵⁸ Dworkin, ‘Model of Rules’.

⁵⁹ Jeremy Waldron, ‘Non-Normative Principles’, *NYU School of Law, Public Law Research Paper No. 19-36*, 2019.

legitimise them by reference to political and moral considerations. The trouble begins when we try to establish whether they have any normative function *legally*, i.e. whether we can say that they have a normative impact on the legal arguments being used within an existing normative system. Jeremy Waldron argues that they do not.⁶⁰ Rather, they shape constitutional systems by reflecting certain political and philosophical designs, but they are no more normative for legal issues than the bearing walls of a building are for the choice of room decorations. To say that a constitutional system is based on the principle of the separation of powers is to describe certain aspects of this system by pointing out a particular feature of its institutional design. It is quite difficult to specify legal obligations that stem from this principle and legally bind some or all of the subjects of this legal order.⁶¹

The final *fourth category* of phenomena which we at times call ‘legal principles’ or ‘principles of law’ comprises certain moral values that law embodies or is supposed to protect. Here, many examples can be given. In *Corfu Channel*, the ICJ referred to the general principle of ‘elementary considerations of humanity’,⁶² which definitely reflects moral values international law protects. In international human rights law, it is not at all atypical to speak of the principle of (respect for) human dignity,⁶³ whereas in

⁶⁰ ‘It is only legal normativity that is the problem. That a CP [characterising principles] may be politically and philosophically normative is something we can take for granted’. Waldron, ‘Non-normative principles’, 27.

⁶¹ The same goes, for instance, for the principle of good faith, which, according to the ICJ, is ‘one of the basic principles governing the creation and performance of legal obligations, [but which] is not in itself a source of obligation where none would otherwise exist.’ *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, (Jurisdiction and Admissibility, Judgment) 69 ICJ Rep 1988, para 94. Equally, when speaking, for instance, of the principle of sovereign equality, it is not hard to see its political, rather than legal nature. Although it shapes the political underpinnings of the international legal order, it requires translation into pre-emptive legal norms that provide a basis for the specific legal rights and obligations that stem from it, such as, for instance, norms pertaining to jurisdictional immunities. That the principle of sovereign equality is not *per se* a normative legal principle may sound, to an international lawyer’s ear, a heresy. Yet it is important to keep in mind that this is by no means a unique feature of international law or for that matter any law: characterising principles such as sovereign equality do give rise to specific legal norms that outline what sovereign equality actually means, normatively, but they do not in themselves have a legal nature.

⁶² *Corfu Channel Case (UK v. Albania)* (Merits) (1949) ICJ Rep 4, 22.

⁶³ E.g., Jean-Paul Costa, ‘Human Dignity in the Jurisprudence of the European Court of Human Rights’, in *Understanding Human Dignity*, ed. Christopher McCrudden (Oxford: Oxford University Press, 2013), 393–402; Marcus Düwell, ‘Human Dignity: Concepts, Discussions, Philosophical Perspectives’, in *The Cambridge*

international humanitarian law, the principle of humanity is considered to be one of the most fundamental.⁶⁴ In international environmental law, it is common to speak about the principle of intergenerational equity,⁶⁵ while in the international law of development equity in general is treated as ‘the basic principle of international development law’ because ‘it serves to resolve the contradictions between simultaneous demands for economic independence and for organized mutual aid, for equality in preferential treatment, for common benefit and the renunciation of reciprocity on the part of developing countries.’⁶⁶ All these concepts—humanity, dignity, equity, etc.—represent moral values which international law must protect. It is common to speak of values as principles when we turn them into practical reasons: ‘the word “principle” is sometimes used to assert an ultimate value or to assert that such a value is a reason for action.’⁶⁷

If we go back to solidarity now, it might be tempting to say that solidarity is a principle because it has the same sort of intrinsic moral value as human dignity, equity, humanity, etc. Acting out of solidarity, from this point of view, is already fulfilling a moral duty which is an end in itself. As Adam Cureton puts it, ‘the social moral rules that hold us in solidarity are often valuable for their own sake [...], more precisely, they are *non-derivatively valuable in virtue of being a constitutive part of a relationship that is valuable as an*

Handbook of Human Dignity, ed. Marcus Duwell et al. (Cambridge: Cambridge University Press, 2014), 23–50; Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’, *European Journal of International Law* 19, no. 4 (2008): 655–724. See, however, a critique of ‘legal expropriation’ of human dignity in Stephen Riley, ‘Human Dignity as a *Sui Generis* Principle’, *Ratio Juris* 32, no. 4 (2019): 439–54.

⁶⁴ See, for a general overview: Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper, and Gro Nystuen, eds., *Searching for a ‘Principle of Humanity’ in International Humanitarian Law* (Cambridge: Cambridge University Press, 2012).

⁶⁵ Lynda M. Collins, ‘Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance’, *Dalhousie Law Journal* 30, no. 1 (Spring 2007): 79–140; Lothar Gundling, ‘Our Responsibility to Future Generations’, *American Journal of International Law* 84, no. 1 (1990): 207–12; Edith Brown Weiss, ‘Our Rights and Obligations to Future Generations for the Environment’, *American Journal of International Law* 84, no. 1 (1990): 198–207.

⁶⁶ Milan Bulajić, *Principles of International Development Law: Progressive Development of the Principles of International Law Relating to the New International Economic Order*, 2nd rev. ed (Dordrecht: Martinus Nijhoff, 1993), 50.

⁶⁷ Joseph Raz, *Practical Reason and Norms*, 2nd ed. (New York: Oxford University Press, 1999), 49.

end.’⁶⁸ This idea comes very close to one of the first formulations of solidarity in international law, when Emer de Vattel wrote:

The offices of humanity are those succours, those duties, to which men are reciprocally obliged as men, that is, as social beings which necessarily stand in need of a mutual assistance for their preservation, for their happiness, and for living in a manner conformable to their nature.⁶⁹

This concept, that we owe duties to each other by the mere fact that we live in a society, reflects, according to de Vattel, ‘the general principle’ and ‘the eternal and immutable law of nature’ which reads that: ‘One state owes to another state whatever it owes to itself, as far as this other stands in real need of its assistance, and the latter can grant it without neglecting the duties it owes to itself.’⁷⁰

Without a doubt, people are under a moral obligation to show solidarity, in a sense that it is a valid moral demand to require someone to do something out of solidarity, and it is therefore morally permissible to hold someone accountable for not showing solidarity.⁷¹ Without going into details pertaining to the status of solidarity as a moral reason, it suffices to say that I do not deny that solidarity may, for some people, be a strong non-instrumental moral reason to do something. Yet from how the idea of solidarity is typically constructed, especially in international legal scholarship and practice, it seems that it usually makes sense and is valuable when used as a practical

⁶⁸ Adam Cureton, ‘Solidarity and Social Moral Rules’, *Ethical Theory and Moral Practice* 15, no. 5 (November 2012): 692 (emphasis in the original).

⁶⁹ ‘Les Offices d’humanité font ces secours, ces devoirs, auxquels les hommes sont obligés les uns envers les autres en qualité d’hommes, c’est-à-dire en qualité d’êtres faits pour vivre en société, qui ont nécessairement besoin d’une assistance mutuelle, pour se conserver, pour être heureux & pour vivre d’une manière convenable à leur nature’, Emer de Vattel, *Le droit de gens, ou principes de la loi naturelle: Appliqués à la conduite et aux affaires des Nations et des Souverains*, vol 1, (Londres, 1758), p. 257. The English translation is given by: Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns*, vol. 1 (London, 1759).

⁷⁰ de Vattel, *Le droit de gens*, 258–59: ‘Une Etat doit à tout autre Etat ce qu’il se doit à soi-même, autant que cet autre a un véritable besoin de son secours, & qu’il peut le lui accorder sans négliger ses devoirs envers soi-même’.

⁷¹ I am following the structure of moral obligation and moral reason as offered by Stephen Darwall. Stephen L. Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2006).

reason in order to secure more fundamental reasons, such as humanity, human dignity, or social cohesion. This brings it closer to a moral principle, rather than to a moral value, although, as already mentioned, the line between the two can be very much blurry.⁷²

The third category of ‘legal principles’ looks most promising, then. Solidarity, it seems, is labelled as a ‘principle of international law’ in the sense that it provides for some critical moral and political normative foundations for the international legal order. This group of principles, however, is the most theoretically challenging, for it unites principles which are fundamentally important for international law in a normative way, but which, at the same time, are not normative in a *legal* sense. This ascertainment brings us back to the initial jurisprudential problem that surrounds the legal normative implications of such principles as solidarity, sustainable development, and, to a large extent more ‘traditional’ ideas of the Rule of Law, democracy, and human rights, which Anne Peters qualifies as ‘value-driven organizing principles of constitutional government’.⁷³ It is remarkable that Anne Peters uses this particular language for these principles, which resonates with Rüdiger Wolfrum’s characteristic of solidarity as a ‘structural’ principle of international law. Even though in international legal scholarship we may routinely attribute a legal status to these principles, the language used when we talk about them suggests that they perform their normative function at a different, non-legal level.

⁷² On a separate note, I do believe it is more consistent to argue that solidarity is not deontologically normative, as, for instance, human dignity. This point is convincingly elaborated by Kurt Bayertz: it is quite difficult to justify solidarity as a moral obligation because it calls for a positive action, whereas moral obligations are typically grounded in the paradigm of warding off dangers occurring in social co-existence and because of this they are generally negative or at least restrictive. As a consequence, ‘manifestations of solidarity may be morally commendable, but they cannot be made [morally] *binding*.’ Besides, whereas moral obligations are universal in a sense that they cannot contain any references to contingent characteristics, this is typically what solidarity assumes. If we try to claim that solidarity does not discriminate and we must therefore show solidarity with all the people in the world, it is unclear how it would then differ from the categorical imperative or other similar moral norm. See, Kurt Bayertz, ‘Four Uses of “Solidarity”’, in *Solidarity*, ed. Kurt Bayertz (Dordrecht: Kluwer Academic Publishers, 1999), 3–28.

⁷³ Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, *Leiden Journal of International Law* 19, no. 3 (2006): 601

In order to see what kind of relations bind solidarity and similar ‘structural’ or ‘organising’ principles of international law and international legal normativity, we must investigate what actually makes normativity legal and what functions legality performs in regard to these and other non-legal principles and values. If solidarity is such a non-legally normative principle, how can we account for its status in law?

3. Solidarity, Legality, and the Authority of International Law

In the previous section, I argued that we need to differentiate between different uses of the concept ‘legal principle’ or ‘principle of law’. I have also claimed that solidarity belongs to the kind of principles that, although relevant for international law and possibly with a normative function, are not *legally* normative. This reflects the general disposition towards solidarity in international legal scholarship, which we saw in the second section: it is a legal concept and a legally relevant principle, but one which, nevertheless, cannot be undoubtedly said to generate legal obligations, that is, it is hardly legally binding. How can we then solve this conundrum of solidarity? Is there a way to account for such principles, which are, on the one hand, critically important for law, but on the other hand are not in themselves legal, without necessarily ruining the distinction between law and non-law?

It is important to stress that when we speak about the legality of some norm or principle, this typically entails that we trace it back to some source(s) of (international) law. We may label this view ‘source-based legality’. In this view, legality is tantamount to legal validity, that is, law is something that we can identify by using formal criteria of origin.⁷⁴ What is important, however, is not everything which is legally valid is law. It is possible to have a legally valid norm, i.e. a norm which relevant actors are bound to

⁷⁴ See, generally, on the application of this conception of legality to international law: Jean d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press, 2011).

apply when solving legal cases, that does not belong to the legal order in question. In other words, what courts and other officials are bound to apply because law authorises them to do so, is not tantamount to the law of the particular legal order in general.⁷⁵ A classic example in this regard is that courts in domestic legal systems are often bound to apply the law of another country. The law of another country, in this situation, is legally valid in a sense that courts are bound to apply it, but it is not a part of the legal order in which it is applied. In the same way, for instance, the International Criminal Court, in certain circumstances, is bound to apply domestic criminal law when solving cases,⁷⁶ but this does not make it a part of international criminal law. The same goes for moral standards: courts may be obligated by the law to apply moral standards (e.g., reasonableness, fairness, etc.), which makes these moral standards legally valid, but does not make them into the law.⁷⁷

However, for many moral standards, to which we may find direct or indirect references in law, it is not at all given that they are even legally valid, let alone that they are legal. I mean of course those moral or political values and principles which inspire certain legal documents and get mentioned in preambles or figure in *travaux préparatoires*. Such moral or political principles and values, though recognised by law as relevant for, e.g., interpretation of legal provisions, are not necessarily legally valid in themselves, that is, courts and other relevant actors are not legally bound to apply them *per se*. These are precisely the third and the fourth categories of ‘principles’ mentioned in the previous section. Solidarity is one of such principles, since it is beyond doubt that it serves an inspirational ideal for many international legal regimes, but at the same time it creates

⁷⁵ See Shapiro, ‘On Hart’s Way Out’, 505–7. For the difference between legal validity and legality, see also Raz, *Practical Reasons and Norms*, 127–29; Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (New York: Oxford University Press, 2009), 146–59.

⁷⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998) 2187 UNTS 3, art 21(1)(c).

⁷⁷ E.g., when the ICJ solves cases in accordance with art. 38(2) of its Statute, that is, *ex aequo et bono*, this would not mean that the moral standards applied by the Court in such a context become legal, even though the Court is legally authorised (by its Statute) to apply them.

no direct legal obligations for states. It creates a very peculiar theoretical puzzle, for it is unclear how such principles correlate with international legal normativity.

Since, as we just saw, legal validity is not a sufficient criterion to qualify some norm or principle as legal, it is possible to suggest that legality should also be approached functionally. In this view, something is legal not necessarily (or only) because it comes from a valid source, but because it performs a specific function. We have law because it secures benefits that would not be possible without it. Most importantly, law offers a special normative technique which is not available for other normative systems such as, for instance, morality or politics. Law, by establishing general standards of conduct irrespective of individual preferences and moral beliefs, allows us *to bypass the moral and political disagreements that people have*. This is precisely why, if we accept that a moral standard is a part of law (like saying that solidarity is a legal principle) we make it impossible for law to make a practical difference in performing its function. If we have the law because it allows us to bypass moral disagreements by establishing general rules of conduct, it is detrimental for the very function of the law to apply *as legal* those moral standards which cause the disagreements we wanted to prevent by having the law in the first place.⁷⁸

Thus, we may say that solidarity is a valid moral principle which makes it morally commendable to assist those who suffer from need or require our assistance, that is, to refer back to de Vattel, when we owe to another whatever we owe to ourselves. Or, even more so, we may say that solidarity requires us to contribute to the communal interests by performing actions in favour of the community even when this goes against our individual interests. However, it is not difficult to see that even though we may recognise the validity of this moral principle, it does not necessarily mean that everyone does. That we may believe that contributing to communal interests is the morally right thing to do,

⁷⁸ This argument is very much influenced by Scott Shapiro's view on the function of legality: Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011), 214. However, I do not share his position that legality necessarily requires social hierarchy and distribution of functions between officials and ordinary subjects of law, as I argued in chapter 1 of the present thesis.

does not mean that our neighbour thinks so. He may believe, as probably many people do, that it is far more important to secure individual liberty and prosperity, which in themselves ground valid moral principles. We are, then, in disagreement. It may be practically impossible to overcome this disagreement by simply trying to convince our neighbour to act out of solidarity (he is quite stubborn and frankly has the right to have a moral position of his own). This may become even more difficult when solidarity is treated as a practical reason at the level of a society at large, or even more so the global level. Should a state assist the population of another state suffering from a civil war, or should it instead stick to a neutral position? Should a state admit a large number of refugees, or should it keep its borders closed to prevent political volatility? Should a state introduce measures that would limit atmospheric pollution, or should it strive for maximising economic growth? All these kinds of dilemma are in essence examples of complex practical deliberations, when relevant actors must adequately weigh all appropriate reasons, solidarity being one of these. And what is essential for such dilemmas is that they necessarily involve disagreement. Exactly because we have disagreements such as these, there is need for a special normative technique that allows us to create rules of conduct which enable us to achieve the aims we have without necessarily resolving this disagreement.

Law, then, makes it possible to obligate everyone to do something even if this action is not morally justified or required by our personal or collective moral beliefs, or, as Scott Shapiro phrases it:

By settling matters in favor of the directed action, law cuts down on deliberation and bargaining costs and compensates for cognitive incapacities and informational asymmetries, thereby enabling community members to achieve goals and realize values that would otherwise be beyond their grasp.⁷⁹

⁷⁹ Shapiro, *Legality*, 247.

That is, the value of having law is precisely that it enables us to simply point at a binding legal rule instead of convincing someone to act in a certain way because of the moral or political merits of such an action. This entails the pre-emptive force of law as a matter of practical deliberations:

the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.⁸⁰

This idea that law by claiming practical authority pre-empts reasons for action allows us to see that such moral and political values and principles like solidarity, sustainable development, rule of law, democracy, and so on, are relevant for law and determine its content as long as the law pre-empts them. Pre-emption means that law replaces the moral and political reasons for action on which we may disagree with a shared normative standard. This by no means entails that, once we have this standard, we no longer disagree. We do, and it is an essential part of political life to debate social issues even when, or one might say, exactly because, they are legally regulated.

The mechanism of normative pre-emption entails the introduction of legal rules which legally obligate us to perform some actions (or to abstain from performing actions), regardless of whether these actions are independently justified by moral or political considerations. As a result, it is these legal rules that become reasons for a desirable action, and not necessarily the underlying considerations, which may be shared by some people, but not shared by others. For example, it may be morally and politically desirable if members of a certain community contributed some part of their wealth to solving general problems the community may be faced with. Some members of this community may feel deontologically obligated to do so, as they believe it is the right thing to do. But it cannot be taken for granted that all members of our hypothetical community share the same high moral standard (remember our neighbour?). The

⁸⁰ Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 46.

simplest solution would be to introduce a taxation system—historically the first system of solidarity. What practical difference does it make? Because paying taxes is now a legal obligation, it no longer depends on moral deliberations, and even if one disagrees on whether an existing taxation system is fair or what activities the money collected is spent on, it does not change the fact that one must pay one's taxes. Consequently, even though the motivation of solidarity may lie in the background of tax law, it is not because of solidarity that we pay taxes, it is because law obligates us to do so. We no longer *morally ought* to financially contribute to our community, we *legally must* do so.

It is essential to observe that law's pre-emptive force may come in degrees. Law may be more or less successful in replacing moral or political reasons for action, and this also applies to international law. 'Law's legitimate authority is not necessarily as general as the law claims it is,'⁸¹ which necessarily entails that when law lacks authority in some domains where it claims to have it, it is all but natural for subjects to fall back on the underlying reasons.⁸² In international law, where practical authority is typically not mediated by formal institutions, it may take time to achieve the degree of pre-emptive force which replaces underlying reasons in practical deliberations, as discussed in chapter 1.⁸³

Thus, even though international law may claim to provide for legal rules and procedures which obligate states to act in a way they would have acted anyway were they acting out of sheer solidarity, this may not necessarily be the case. It is often claimed,

⁸¹ Samantha Besson, 'The Authority of International Law – Lifting the State Veil', *Sydney Law Review* 31 (2008): 354.

⁸² But this also has another implication. It is possible that law does not claim authority in domains where it probably should, and this is precisely what enables the interpretative power of principles in avoiding *non liquet* situations. The use of principles for filling up normative gaps is essentially a reconstruction of the pre-emptive reasoning of one domain in another domain, based on the assumption that these two domains share the same moral/political reasons which are to be legally pre-empted.

⁸³ A good illustration to this claim is the slow shift of paradigm regarding the use of force in international law initiated by the Kellogg-Briand pact of 1928. It took almost 20 years for the new legal norm of prohibition of aggressive war to pre-empt the political and moral reasons existing at that time. See, on the history of the pact and its growing pre-emptive force: Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017).

for instance, that the system of collective security established after World War II is a manifestation of international solidarity.⁸⁴ And yet, the proponents of humanitarian intervention or the doctrine of the responsibility to protect, which enjoy a doubtful legal status, often justify them by considerations of solidarity.⁸⁵ This kind of debate shows that when (international) law claims to pre-empt certain reasons but fails to do so at least in some concrete circumstances, these underlying reasons become essential for practical deliberations. To put it in different terms, *in an international legal order that truly appreciates the principle of solidarity, one does not have to justify one's legal position by referring to solidarity, for one has pre-emptive legal rules to invoke.*

This is why Lorenzo Casini is correct in his statement that ‘solidarity can acquire the status of legal principle only when it loses its “altruistic” character: if [so], then States may use this principle in order to establish mutual obligations aimed at reducing risks and uncertainty.’⁸⁶ Indeed so, solidarity only makes sense legally if its moral core is pre-empted by legal rules. The only thing is that, if this happens, solidarity *does not need to be* a legal principle, for its legal representation will be boiled down to specific rules of obligation. Solidarity is only relevant for law as long as legal rules mediate its moral implications.⁸⁷

From all this follows that, paradoxically, the central argument used to qualify solidarity as a principle of international law, namely that the idea of solidarity is reflected

⁸⁴ Koroma, ‘Solidarity’, 104–05; Slaughter, ‘Security, Solidarity, and Sovereignty’, 622–27; Wolfrum, ‘Solidarity Amongst States’, 11–14.

⁸⁵ Nancy D. Arnison, ‘International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?’, *Fletcher Forum of World Affairs* 17, no. 2 (1993): 199–2012; Laurence Boisson de Chazournes, ‘Responsibility to Protect: Reflecting Solidarity?’, in *Solidarity: A Structural Principle of International Law*, ed. Rüdiger Wolfrum and Chie Kojima (Heidelberg: Springer, 2010), 93–110; Wolfrum, ‘Solidarity Amongst States’, 17–19.

⁸⁶ Lorenzo Casini, ‘Solidarity between States in the Global Legal Space’, *European Review of Public Law* 26, no. 1 (2014): 108. A very similar argument is advanced by Andrea Sangiovanni in his analysis of solidarity under EU law: Andrea Sangiovanni, ‘Solidarity in the European Union’, *Oxford Journal of Legal Studies* 33, no. 2 (2013): 213–41.

⁸⁷ Jürgen Habermas skilfully used this argument in his advocacy for a European constitution, a project that, however, never came to be. He claims that one of the central tasks of any constitution is to create, through democratic citizenship, ‘legally mediated solidarity between strangers’. Jürgen Habermas, ‘Why Europe Needs a Constitution’, *New Left Review* 11 (2001): 16.

in many different regimes of international law, is essentially the main reason why it is *not* a principle of international law. That states account for considerations of solidarity in international environmental law, international human rights law, international law on the use of force, international trade law, international law of development, and so on, shows that solidarity requires legal pre-emption in order to legally bind states. For this reason, solidarity will never (and in fact does not have to) become a legally binding principle of international law, because its role in international legal normativity is drastically different. Together with other moral and political principles, solidarity grounds the legitimacy of the international legal order, which is essential for the practical authority of international law. When law fails to account for relevant moral and political reasons and does not, in such a way, perform its function of bypassing the disagreements we may have about these reasons, its authority may vanish very quickly. The principle of solidarity, therefore, is amongst those ideas that ground international law's authority by legitimising its rules, procedures, and institutions. Hence, it is essential that international law keeps embracing the principle of solidarity by strengthening the pre-emptive veil of legal rules.

Conclusions

'Solidarity is not discovered by reflection but created,' wrote Richard Rorty.⁸⁸ It seems that contemporary international law and international legal scholarship fully embrace this view. Solidarity is something states, international organisations, and ordinary people may and should shape by their actions. This means, at the very least, that solidarity is a practical reason, not just a fact, and as a reason it exhibits some fundamental moral values which must also underlie international law. This intrinsic normativity of solidarity

⁸⁸ Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), xvi.

makes it tempting to treat it as more than just a moral principle, but as a principle of international law.

Such a perspective on solidarity, however altruistic it may be, unfortunately, misses the point about the function of (international) law and the way it connects to its moral and political underpinnings. I attempted to show that solidarity is not a principle of international law in any legal sense, but, most importantly, it does not have and should not have characteristics of legality. Solidarity, being a political and moral principle, relates to law in a way very similar to other principles of such a kind, like democracy, the rule of law, or fairness. International law is supposed to normatively pre-empt these principles by replacing them, as a matter of legal reasoning, with legal rules. In such a way, international law performs the central function of legality, which is bypassing the moral and political disagreements people may have. By establishing general rules of conduct which are binding irrespective of individual or even collective moral beliefs, international law legally obligates states to act in a way that is justified by motives of solidarity. As a result, it is the rules of international law which become reasons for actions, rather than solidarity as such.

Such a relation between solidarity, and other similar principles, and international legal normativity highlights the nature of international legal authority. On the one hand, international law's authority is legitimised as long as it accounts for such fundamental moral principles, and for this reason it is essential that considerations of solidarity keep penetrating into larger numbers of international legal regimes and branches. On the other hand, normative authority always comes in degrees, and in the case of international law it may take a long time for the underlying moral and political principles to get effectively pre-empted by legal rules. Moreover, when international law fails to account for solidarity in the areas where it is expected or needed, it is all but natural to fall back on solidarity as a practical reason if it is not (effectively) pre-empted. In such a way, in a strongly authoritative international legal order one would not need to resort to moral and political reasons such as solidarity. International law must strive for normative authority which would make the appeal to these reasons redundant.

Chapter 5

The International Rule of Law and Unmediated Authority¹

Introduction²

In recent decades, the international rule of law³ has become a topical yet conceptually challenging idea. The internationalisation of the rule of law has a wide spectrum of applications, from its promotion through a variety of international organisations⁴ to

¹ This chapter is based on the following publication: Kostiantyn Gorobets, ‘The International Rule of Law and the Idea of Normative Authority’, *Hague Journal on the Rule of Law* 12, no. 2 (2020): 227–49.

² This paper was presented at ESIL Research Forum ‘The Rule of Law in International and Domestic Contexts: Synergies and Challenges’ (Göttingen, 4–5 April 2019). I would like to thank Prof Marcel Brus, Andreas Hadjigeorgiou, Dr Till Patrik Holterhus, Dr André de Hoogh, and Prof Pauline Westerman for their invaluable feedback on the early drafts of the paper. I am also grateful to three anonymous reviewers for their thoughtful and constructive comments and suggestions, which helped me to clarify some critical ideas used in this paper.

³ In this chapter I approach the rule of law as a jurisprudential concept and specific legal ideology, and not as a legal practice. Ideologies are frameworks we use to justify or question social practices, and this is exactly the function the rule of law performs. It is a meta-normative ideal that reflects the merits of a legal order functioning in a way which enables its subjects to comply with it and use it as a guidance for actions. The international rule of law, therefore, applies to the normative authority that international law exercises in relations between states, as well as in relations between international organisations and states, in relations between states and individuals, and even in relations between international organisations and individuals. Machiko Kanetake, ‘The Interfaces Between the National and International Rule of Law: A Framework Paper’, in *The Rule of Law at the National and International Levels: Contestations and Deference*, ed. Machiko Kanetake and André Nollkaemper (Oxford: Hart Publishing, 2016), 16. This chapter, however, mostly focuses only on one—horizontal—dimension of the international rule of law. The main reason for such a limitation is that the horizontal image of the international rule of law is most theoretically challenging since it questions the very fundamental assumptions regarding the rule of law (see section 1), and it also appears to be the most generic. Therefore, I believe that the conceptual framework offered here accounts for other manifestations and contexts of the international rule of law as well.

⁴ The United Nations, Council of Europe, European Union, World Bank, and so forth often articulate the critical role of the rule of law and emphasise the need for its strengthening by national governments. What unites all these activities is that the rule of law is presented in its domestic meaning. This is also true for the often-cited definition of the rule of law by the UN Secretary-General, that ‘it refers to a principle of

attempts to implement it as a legal ideology for international law as such,⁵ for example, through its inclusion in Agenda-2030.⁶ Often the meaning and function of the international rule of law is assumed, yet what ‘the international rule of law’ means and what practical differences it entails when we add ‘international’ to ‘the rule of law’, and how and why it should be protected remains unclear. Despite many attempts at conceptualising the international rule of law,⁷ it still lacks shape and appears as a nebulous ideal.

This chapter offers a framework for conceptualising the international rule of law as a meaningful idea. It suggests that the international rule of law, its meaning and function, should not be deduced from the rule of law known domestically. Instead, the two versions of the rule of law should be deconstructed and stripped of the variety of political, moral, and other layers in order to reveal their common core. I submit that this core meaning relates to the normative authority any legal order claims and to the conditions under which this claim becomes realisable.

governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’ ‘Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies’ (12 October 2011), UN Doc S/2004/616, para. 6. As Robert McCorquodale notices, ‘it is a statement about how the rule of law should operate in national systems and it is not a definition of the rule of law at the global level.’ Robert McCorquodale, ‘Defining the International Rule of Law: Defying Gravity?’, *International and Comparative Law Quarterly* 65, no. 2 (2016): 286. Also, Rule of Law Checklist, adopted by the Venice Commission in 2016 (Venice Commission, ‘Rule of Law Checklist’ (18 March 2016) CDL-AL(2016)007) has been specifically designed as ‘a tool for a variety of actors who may decide to carry out... an assessment’ of rule of law practices (para. 26–27). The UN’s ‘Rule of Law Indicators’ focuses primarily on how the rule of law should be implemented by national governments. *The United Nations Rule of Law Indicators: Implementation Guide and Project Tools* (New York: United Nations, 2011), vi.

⁵ See ‘Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels’, UNGA Res 67/1 (24 Sep. 2012) UN Doc A/RES/67/1, para. 2: ‘the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.’

⁶ ‘Transforming our world: the 2030 Agenda for Sustainable Development’ UNGA Res 70/1 (21 Oct. 2015) UN Doc A/RES/70/1, goal 16.3.

⁷ See below, Section 1.

The chapter will proceed in three steps. I first sketch out an image of the rule of law known domestically and show why it is not appropriate to transplant its theories and underlying histories directly into international law (section 1). In section 2, I show that theories of the rule of law must be deconstructed in order to reveal their core concern which, it will be submitted, relates to normative authority. Finally, I present the international rule of law as a set of conditions under which international law's claim to authority is realisable (section 3).

1. The International Rule of Law Between Two 'Pocket Universes'

Like many other normative ideals, the conceptual shape and meaning of the rule of law, as well as critical points of disagreement over its content, are products of domestic jurisprudential and political discourse. It is, therefore, well known that the idea and the concept of the rule of law strongly relate to how state governments and other public authorities affiliated with it may or may not exercise their political and legal powers. Hence the canonical three-headed picture of the rule of law offered by Albert Venn Dicey: (1) predominance of regular laws as opposed to arbitrariness; (2) equality before the law; and (3) institutional protection of rights.⁸

The main concern grounding the rule of law may be phrased in many different ways: securing individual autonomy, guaranteeing respect for human dignity, providing for accountability of governmental agencies, limiting arbitrariness in the execution of power, etc. But overall these ideas can be reduced to the principle that there must exist certain limits for the use of law, or as framed by Joseph Raz, the rule of law defends against threats coming from the law itself.⁹ Law is one of the ways political power is

⁸ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959), 201–03.

⁹ Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (New York: Oxford University Press, 2009), 224.

exercised, and thus the rule of law is a virtue of a certain legal order. The main theoretical concern about the rule of law is how broad this virtue is in terms of the scope of its particular requirements. Though Dicey's threefold approach is a common starting point for rule of law discussions, it does not exhaust the varieties of conceptions—broad and narrow—of this idea. Therefore, the critical point of theoretical disagreements about the rule of law is whether it accounts only for what is known as formal legality or also encompasses requirements regarding the content of rules.

On the one hand, it is often claimed that the rule of law is only *a* virtue of a legal system, and there are other virtues a legal system may or may not possess, or may possess to a lesser or higher degree. Hence, in this conception the rule of law only relates to the principles which represent the idea of formal legality, i.e. a set of requirements as to how laws should function. To say that a legal system conforms to the rule of law implies, from this perspective, that its laws are clear enough, known in advance, and relatively stable; that they do not prescribe the impossible and do not apply retrospectively; that their making is guided by clear, known, and stable rules; that all these rules are equally and consistently applied; that they are general and do not select particular individuals or make irrelevant distinctions between people; that courts are accessible and allowed to review governmental directives, etc.¹⁰ This view is embodied in 'thin' or formal conceptions of the rule of law.¹¹ The main claim of these theories is that the rule of law only relates to the formal features of the laws composing a given legal system and does

¹⁰ There are many similar versions of such a list of requirements of the rule of law, e.g., Friedrich A. von Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge, 2012); Raz, *Authority of Law*, 214–19), and it is beyond the scope of this paper to discuss them in depth. For a supplementing view, see Lon L. Fuller, *The Morality of Law*, Rev. ed. (New Haven: Yale University Press, 1978), ch. 2. Unlike Raz, Fuller claims that a minimal conformity to the rule of law is required as a necessary condition of the existence of a legal system, which reflects the disagreement they have on the nature of legality. This issue cannot be discussed here.

¹¹ Here, I follow the classification of the rule of law conceptions offered by Paul Craig and Brian Tamanaha: Paul P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law*, 1997, 467–87; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), ch. 7–8. A similar conception, though critical towards classical approaches, may be found in Paul Gowder's work, where he labels them as 'weak' and 'strong' rule of law, respectively Paul Gowder, *The Rule of Law in the Real World* (New York: Cambridge University Press, 2016), ch. 1–3.

not impose requirements regarding their content.¹² In such a way, ‘thin’ theories strictly separate the rule of law as a virtue of a legal system from other virtues, such as the goodness or justness of its laws. The rule of law, in other words, does not necessarily mean the rule of *morally good* law.

On the other hand, the rule of law is often taken as a much broader ideal. It is thus framed not merely as *a* virtue of a legal system, but *the* moral and political ideal that embraces principles and values which form an image of a better society. From this perspective, it is not enough to secure a specific way or method in which law operates, and for this reason the rule of law must mean more than just formal legality. The rule of law, it is therefore submitted, must be furthered not only for the motives of legal certainty and predictability but also for the motives of higher values, such as human dignity, democracy, equality, justice, liberty, etc.¹³ Ronald Dworkin famously claimed that

the rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish [...] between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules [...] capture and enforce moral rights.¹⁴

¹² I do not suggest here that the formal rule of law does not create any substantive *implications*. This is the whole point as to why we value the rule of law: it makes a practical difference for how legal orders operate, which necessarily affects the content of their laws. It is, then, a natural assumption that there is a correlation here: the better a legal order conforms to formal requirements of the rule of law, the higher are chances that its particular laws are more just and fair. As David Luban shows, Fuller’s canons of the rule of law, though they are formal, nevertheless necessarily imply at least some substantive limitations and ‘push the law away from a certain kind of moral badness’. David Luban, ‘The Rule of Law and Human Dignity: Re-Examining Fuller’s Canons’, *Hague Journal on the Rule of Law* 2, no. 1 (2010): 39. A similar line of argument found in Paul Gowder: the formal conceptions of the rule of law must contribute to achieving certain substantive aims (e.g. keeping officials from abusing their powers), otherwise they are just hollow. Gowder, *The Rule of Law*, 48–51. Although I agree that the rule of law allows us to secure certain moral values which would otherwise be jeopardised, I believe this does not imply that such moral values must necessarily be elements of the rule of law as such.

¹³ E.g., the much-celebrated Lord Bingham’s account of the rule of law led him to a famous conclusion that the rule of law is ‘the nearest we are likely to approach to a universal secular religion’. Tom Bingham, *The Rule of Law* (London: Allen Lane, 2011), 172. He believes, amongst other things, that the rule of law must require protection of fundamental human rights, which also implies that the rule of law is hardly possible without democracy. Lord Bingham, ‘The Rule of Law’, *Cambridge Law Journal* 66, no. 1 (2007): 67–85.

¹⁴ Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 11–12.

Taken in such a broad, or ‘thick’, meaning, the rule of law is no longer just a quality of a legal system. It becomes a complex and multidimensional ideology, ‘too important to be left to lawyers’.¹⁵ In this all-inclusive manifestation the rule of law appears as an element of a theory of justice, and not just as a set of formal requirements for laws, and for this reason conceptions of the rule of law that share this perspective are often labelled as ‘thick’ or ‘substantive’.

The ‘thin’ and the ‘thick’ versions of the rule of law are sometimes seen as complementary standards,¹⁶ and sometimes as contradictory or at least conceptually incompatible.¹⁷ But what is more important is that regardless how the ‘thin’ and ‘thick’ visions of the rule of law correlate with each other, they are products of domestic legal experience and practice. The whole logic of describing the rule of law in between these two traditions results from contemplating the rule of law as a political and legal doctrine of protecting citizens against governmental abuses. The only principal difference is that the ‘thin’ theories do this through establishing safeguards as to how laws should be given a proper functionality, and the ‘thick’ theories through ensuring that laws substantively reflect the values and principles underlying individual rights. Is it possible to transplant this logic into international law, or should the international version of the rule of law be approached differently? The critical issue of the concept of the international rule of law is what it means for the rule of law to be (truly) international? Is it the same rule of law?

¹⁵ Martin Krygier, ‘Why the Rule of Law Is Too Important to Be Left to Lawyers’, *Law & Social Bounds* 2, no. 2 (2012): 30. That ‘the rule of law is too important to be left to lawyers’ is Martin Krygier’s paraphrase of David Shipler’s ‘law is too important to be left to lawyers’, which in its turn is a paraphrase of Georges Clemenceau’s ‘war is too important to be left to generals’.

¹⁶ E.g., for Gowder, the thick (or ‘strong’, in his own language) version of the rule of law applies to the enactment of law and the use of discretion in its interpretation, whereas the thin (‘weak’) version—to its execution. Gowder, *The Rule of Law*, 51.

¹⁷ Craig summarises this latter point by saying that ‘the adoption of a fully substantive conception of the rule of law has the consequence of robbing the concept of any function which is independent of the theory of justice which imbues such an account of law.’ Craig, ‘Formal and Substantive Conceptions’, 487. See also John Tasioulas who observes that deducing the rule of law from one or another normative ideal—liberty, justice, right, etc.—only obscures its meaning and makes it indistinguishable from what it means for law to be a *good* law. John Tasioulas, ‘The Rule of Law’, in *Cambridge Companion to the Philosophy of Law*, ed. John Tasioulas (Cambridge: Cambridge University Press, 2020), 117–34.

Can we appropriately attach the same meaning to it as we do to the rule of law known domestically?¹⁸

One of the leading approaches to the concept of the international rule of law suggests that one can grasp its meaning and function in the international community by applying the template designed on the basis of, and applied to, the rule of law known domestically. It is thus often assumed that applying the logic of the rule of law to international law entails matching it to one of the lists of criteria offered by Dicey, Fuller, Raz, or other scholars, and then either try to stretch them to account for the peculiarities of international law¹⁹ or reject the international rule of law altogether as unsound.²⁰ International law is in principle unable to satisfy some of these criteria, which either means the rule of law does not apply here, or that international law is simply deficient.²¹ It is therefore claimed that international law is too underdeveloped and primitive, and for this reason ‘there is presently no such thing as the international rule of law, or at least that international law has yet to achieve a certain normative or institutional threshold to justify use of the term.’²² Some authors even go further and observe that ‘talk of a rule of law for the international realm cannot target law in the usual sense of the term’.²³

¹⁸ In one form or another, these issues are central for most attempts at conceptualising the international rule of law. Stéphane Beaulac, ‘An Inquiry into the International Rule of Law’, *EUI Working Paper MWP*, no. 14 (2007): 1–35; Paul Burgess, ‘Deriving the International Rule of Law: An Unnecessary, Impractical and Unhelpful Exercise’, *Transnational Legal Theory* 10, no. 1 (2019): 65–96; Simon Chesterman, ‘An International Rule of Law?’, *American Journal of Comparative Law* 56, no. 2 (2008): 331–61; Richard Collins, ‘Two Idea(l)s of the International Rule of Law’, *Global Constitutionalism* 8, no. 2 (2019): 191–226; Ian Hurd, ‘Three Models of the International Rule of Law’, *Eidos* 23 (2015): 37–48; Terry Nardin, ‘Theorising the International Rule of Law’, *Review of International Studies* 34, no. 3 (2008): 385–401; Carmen E. Pavel, ‘The International Rule of Law’, *Critical Review of International Social and Political Philosophy* 22 (2019): 1–20.

¹⁹ Beaulac, ‘An Inquiry into the International Rule of Law’; James Crawford, ‘International Law and the Rule of Law’, *Adelaide Law Review* 24, no. 3 (2003): 3–12; Charles Sampford, ‘“Thin Theories” of Domestic and International Rule of Law’, in *International Rule of Law and Professional Ethics*, ed. Vesselin Popovski (Farnham: Ashgate, 2014), 49–76.

²⁰ Hurd, ‘Three Models’. Hurd’s rejection of the international rule of law as a normative doctrine is based on the idea that the international rule of law should be approached descriptively, i.e. the international rule of law is a toolbox of justificatory means states exploit to defend their policies. Ian Hurd, ‘The International Rule of Law: Law and the Limit of Politics’, *Ethics & International Affairs* 28, no. 1 (2014): 39–51.

²¹ Ian Hurd, ‘The International Rule of Law and the Domestic Analogy’, *Global Constitutionalism* 4, no. 3 (2015): 365–95.

²² Chesterman, ‘An International Rule of Law?’, 358.

²³ Pavel, ‘The International Rule of Law’, 3.

In such a way, the most conceptual problems related to the international rule of law are connected to theorising its meaning, content, and functions through the use of the domestic analogy. This domestic analogy, however, does not seem to be justified, if only because the rule of law—domestic or international—must be taken as a product of certain legal histories.²⁴ As nicely put by Jutta Brunnée and Stephen Toope,

the problem with the domestic law analogy is not necessarily the analogy as such, but the assumptions that commonly shape it. When we assume that the defining features of domestic law – and by extension of all law – are formal enactment by a superior authority, application by courts, and centralized enforcement, we are bound to see international law as a poor cousin. Most importantly, we risk misjudging how law operates in international society, obscuring its potential power, and misdirecting even the best intentioned efforts to improve it.²⁵

And indeed, it is essential to appreciate that domestic and international versions of the rule of law were shaped as responses to quite different challenges. The relevance of the rule of law as a legal ideology for domestic setups was forged in civil wars, revolutions, bills of rights, and oppositions to the powers of kings, princes, and nobles—something that international law has never known. It seems that the only way of taking the international rule of law seriously is by rejecting the transplantation of legal histories and

²⁴ The inappropriateness of domestic analogies regarding *inter alia* rule of law issues had already been stressed by ICTY, where the Tribunal emphasised that ‘the international community lacks any central government with the attendant separation of powers and checks and balances. In particular, international courts, including the International Tribunal, do not make up a judicial branch of a central government. The international community primarily consists of sovereign States; each jealous of its own sovereign attributes and prerogatives, each insisting on its right to equality and demanding full respect, by all other States, for its domestic jurisdiction. Any international body must therefore take into account this basic structure of the international community. It follows from these various factors that international courts do not necessarily possess, *vis-à-vis* organs of sovereign States, the same powers which accrue to national courts in respect of the administrative, legislative and political organs of the State. Hence, the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension. In addition to causing opposition amongst States, it could end up blurring the distinctive features of international courts.’ *Prosecutor v Blaškić* (Judgement in the Appeals Chamber) ICTY-IT-95-14 (29 October 1997), para 40. Cf the view of Martti Koskenniemi, who claims that ‘the “domestic analogy” [...] is necessarily entailed by the modern system of international law.’ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006), 22.

²⁵ Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law* (New York: Cambridge University Press, 2010), 6.

the political ideologies from the domestic into the international realm. Though histories of domestic law and histories of international law overlap, it does not mean that they are shared. The histories of international law comprise tales of preventing and reducing suffering in wars, guaranteeing the autonomy of states, securing their coexistence and cooperation, achieving solidarity and furthering common goals, but also of fighting for sovereign equality and liberation.²⁶ Hence though some motives in the historical narratives of domestic and international law may somehow echo one another,²⁷ their general structures and story-lines differ quite significantly. As Paul Burgess convincingly argues, even though evolutions of domestic and international rule of law seem to suggest similar solutions, this does not mean they grew from similar problems.²⁸

Domestic and international law, in such a way, exist and develop like two ‘pocket universes’. This term relates to a hypothesis shared by some astrophysicists that our reality is not continuously uniform, and that it rather looks like a ‘patchwork quilt’ with each part having somewhat different fundamental parameters.²⁹ Thus one ‘pocket universe’ may differ from another in some basic prerequisites, which results in further diversification as they develop. They still belong to the same fabric of reality, and may

²⁶ Much can be said about the transformation of historical discourses of international law, see Martti Koskenniemi, ‘Expanding Histories of International Law’, *American Journal of Legal History* 56 (2016): 104–12. This, however, is not the task of this article. My point here is that the struggle for international law (to use von Jhering’s language) differs from the struggle for law in the domestic setup.

²⁷ One could see similarities in the domestic political struggles against racial inequality (especially in the USA and South Africa) and international political struggles against colonialism, which furthered the ideology of the rule of law and gave it a refreshed meaning. Both were driven by the ideology of equality and contra suppression and domination. Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge: Cambridge University Press, 2011); Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge: Cambridge University Press, 2020).

²⁸ Burgess, ‘Deriving the International Rule of Law’, 78–79. I also share Paul Burgees ultimate analytical conclusion stemming from the historical argument: ‘Given the absence of a domestic Rule of Law concept formed in relation to the same problems as those present in the international sphere, the rationale for using a domestic idea—or a modified version of that idea—as a foundation for the creation or identification of an international Rule of Law does not subsist. As those problems do not correlate, domestic Rule of Law conceptions should not be used as the foundation from which to derive an international Rule of Law.’ Burgess, ‘Deriving the International Rule of Law’, 66.

²⁹ Alan H. Guth, *The Inflationary Universe: The Quest for a New Theory of Cosmic Origins*. (Boston: Addison-Wesley Longman, 2000).

even share many characteristics, but the way things appear in them features dissimilarities. This idea describes quite accurately the relations between domestic and international jurisprudence. They both belong to the same reality, but at the same time form two distinct ‘pocket universes’, which affects the meaning and functions of many shared concepts and ideas. This is primarily because domestic and international jurisprudence have dissimilar agendas dictated not only by well-known structural and functional differences between the two types of legal orders,³⁰ but also by divergent challenges faced by domestic and international law. The convergence of these challenges in recent decades, though, is a reason why the rule of law has been more actively articulated as applicable to international affairs.

The conceptual problem of the rule of law as a product of particular legal histories becomes visible when assessed against this idea of ‘pocket universes’. The two share many concepts and ideas, yet in most cases each jurisprudential universe has its own conventional way of using and applying them. This can be said, for instance, about concepts of ‘custom’, ‘bindingness’, ‘obligation’, ‘validity’, and many more. Though featuring in both universes, they are accompanied by somewhat dissimilar techniques of instrumentalisation; they, if we continue our astrophysics metaphor, ‘vibrate’ on different ‘frequencies’. The same can also be said about the rule of law. As stated by Arthur Watts,

for at least two reasons these national notions of the rule of law cannot be directly transposed to the international level. First, the purposes which the rule of law serves at the national level—usually involving the protection of the rights of the individual as against an otherwise all-powerful governing authority—are quite different from those which it might be called upon to serve internationally; and second, the more specific requirements of the rule of law often reflect a State’s particular historical and

³⁰ Here, I refer to the horizontal structure of international law that manifests in the absence of a universal legislature, judiciary, and executive. Even though some domestic legal systems may not feature them as separate and institutionally independent branches of government, their functions are performed by a legal system, nevertheless. I discuss these differences in chapter 1 of the present thesis.

constitutional evolution, and differ from State to State. The international rule of law cannot be identified with any one national meaning of the concept [...].³¹

And indeed, the histories of the domestic rule of law relate to the ideas that individuals must have normative and institutional safeguards that defend them against governmental abuses, which in itself assumes a hierarchical relation between the ruled and the ruler. Whom does the international rule of law defend then, and against whose abuses? Certainly, it can be said that in the case of the international rule of law, just as with its domestic sibling, its ultimate beneficiaries are individuals; that states mediate between international law and people replicating in such a way the hierarchical scheme of government.³² It is a solid perspective, which, however, only takes one of the possible dimensions of the international rule of law. Even though international law and international institutions have been increasingly addressing natural persons, which naturally creates the rule of law related concerns,³³ it seems too far-fetched to reduce all possible manifestations of the international rule of law only to these kinds of relations. It may be too early to reject the paradigm that states are the primary subjects of international law and hence beneficiaries of the international rule of law, which makes the hierarchical perception of this doctrine far less relevant. Since there is no government states require protection from, there is seemingly little point in framing the international rule of law concerns in such a way.³⁴ Yet this does not mean that these concerns are no

³¹ Arthur Watts, 'The International Rule of Law', *German Yearbook of International Law* 36 (1993): 16.

³² 'Ultimately the reasons for continuing to insist that ROL [rule of law] requirements apply to the nation-state are the same as they always are. Those requirements apply to the state for the sake of the well-being, liberty, and dignity of individuals.' Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?', *European Journal of International Law* 22, no. 2 (2011): 341. In such a way, for Waldron, the rule of law applied internationally has little difference in structure as compared to the rule of law applied domestically; in both cases it ultimately benefits human individuals by being mediated through officials of nation states Waldron, 'Are Sovereigns Entitled to the Benefits', 332.

³³ The *Kadi* case is a canonical example in this regard. Case C-402/05 P and C-415/05, P. *Kadi and Al Barakat International Foundation v. Council and Commission* [2008] ECR I-6351.

³⁴ Waldron states that if we accept this latter vision of the international rule of law, i.e. as applied primarily to states as subjects of international law, it becomes redundant. For if there is nothing states may in principle be abused by, the whole concern of the rule of law may be avoided. Waldron, 'Are Sovereigns Entitled to the Benefits', 323. See also Allen Buchanan, who believes that 'much of IL concerns the relations among states and in many cases, states do not represent the interests of some or even most of their citizens. So, it

longer relevant. As convincingly argued by Martin Krygier, the main goal of the rule of law is to limit arbitrariness in the execution of power³⁵—a concern which is as valid in international law as it is in domestic legal systems. States obviously may use their powers to abuse other states, without being formally superior to them. This makes the horizontal dimension of the international rule of law as relevant as canonical vertical ones. And yet there seems to be little understanding of how horizontal and vertical manifestations of the international rule of law can be reconciled within one conceptual paradigm.

Does this mean that the international rule of law is merely an empty political slogan, which has in fact no meaning? Or perhaps international law is far too special and therefore any attempt to conceive it through the prism of the rule of law will fall victim to unacceptable distortions? These questions are tough ones because they address the very problem of the extended applicability of a certain normative ideal beyond its native domain. The next section will address these questions by reconstructing the core meaning of the rule of law common to its domestic and international manifestations.

2. Attempting Reverse Engineering: The Rule of Law and Normative Authority

The conceptual challenge posed by the international rule of law is of a complex nature. First of all, it impeaches the underlying assumptions most classical doctrines of the rule of law rely on (such as that the rule of law is addressed to officials and thus implies a formal hierarchy, or that it entails separation of governmental functions, or that it primarily safeguards individual autonomy). Further, the international iteration of the rule of law presupposes the universal validity of this concept, yet as was shown, the direct transplantation of its domestic vision into the international law does not seem a

is not clear just how the commitment to the rule of law is to be cashed out in the international arena.’ Allen Buchanan, ‘Democracy and the Commitment to International Law’, *Georgia Journal of International and Comparative Law* 34, no. 2 (2006): 314–15.

³⁵ Martin Krygier, ‘Why the Rule of Law Matters’, *Jurisprudence* 9, no. 1 (2018): 149–52.

promising strategy. In such a way, to admit that the rule of law may apply internationally implies the abandonment of the traditional images of this idea and to try to discover its core, common to all its possible manifestations.

In order to contemplate the international rule of law we need to abstract from its domestic model and attempt its reconstruction or ‘reverse engineering’. What reverse engineering requires is a deconstruction of the conceptual layers of the rule of law that came as a consequence of the domestic contestation of this ideal. Deconstructing the core meaning of the rule of law without linking it directly or indirectly to domestic rule of law theories and practices chiefly implies abstracting it from its moral and political justifications.³⁶ Being stripped of these justifications, however, the rule of law has seemingly trivial content. Joseph Raz offers, probably, the most straightforward formulation of the truism that underlies the rule of law when he submits that “‘the rule of the law’” means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it.’³⁷ This implies that the rule of law, taken domestically or internationally, does not have any direct moral message, as is sometimes assumed.³⁸

This core formula of the rule of law may seem far too simplistic. For if the rule of law only means recognition of the normative force of the law and obedience to it, then even the formal legality requirements appear as a redundant set of principles. Yet

³⁶ The methodological approach of reverse engineering as applied to international law differs significantly from other two other common approaches, identified by Paul Burgess: (1) deployment and amendment or augmentation of pre-existing rule of law conceptions; and (2) application of the rule of law to the international rule of law by co-identification of similar or related features across the two—international and domestic—concepts. Burgess, ‘Deriving the International Rule of Law’, 90–94.

³⁷ Raz, *Authority of Law*, 212.

³⁸ For example, Terry Nardin writes that the criteria of the rule of law ‘presuppose a primary order of non-instrumental rules in which citizens are related to one another as moral equals’, and thus ‘the rule of law means that states treat *one another* justly, that is, as members of an association constituted by their recognition of the authority of its rules.’ Nardin, ‘Theorising the International Rule of Law’, 399. This interpretation explicitly presupposes a moral meaning of the (international) rule of law, which is problematic. Is the international rule of law only satisfied when states treat each other as equals or behave justly? Does this not say something about the moral merits of the states in question rather than merits of international law as such?

importantly, saying that the law ought to be obeyed and people should be guided by it is also assuming many other things which are often taken precisely as the requirements of the rule of law. For people to obey the law, it must be capable of being obeyed.³⁹ They must at least know what it is, how to identify it, and how to extract its normative meaning. No-one can obey norms he is not aware of, or norms that prescribe the impossible, or norms presented in a language its subjects cannot understand. This does not mean that such norms cannot exist or cannot be enforced upon their subjects. In this situation, this will still be law, but it would become practically indistinguishable from sheer power or violence. For subjects to comply with it, they will need first to deduce the normative meaning of the actions of officials by observing their reactions to certain events or lines of behaviour. This entails that even in such a crooked and violent society, at least officials must share a more or less common understanding of law, otherwise it will be impossible to enforce. However, a legal order consisting only of such norms would probably not last for long even if coercively imposed.⁴⁰ In other words, for a subject of law to obey norms, these norms must have qualities that create *practical opportunities for obedience*.

In this way, the rule of law is a merit of a legal order that enables its subjects to comply with it.⁴¹ This merit, however, may be implemented in more than just one way.

³⁹ A similar point has also been argued by David Dyzenhaus, who claims that the central question of the rule of law is ‘how it is possible that those subject to the de facto power of a sovereign could consider his enacted law as obligatory—as having de jure or legitimate authority over them,’ that is: ‘Why should the law be considered a source of obligations in the first place?’. David Dyzenhaus, ‘Hobbes on the International Rule of Law’, *Ethics & International Affairs* 28, no. 1 (2014): 54. Dyzenhaus then proceeds with an argument that a realist-style scepticism about the international rule of law, which is often attributed to Hobbes, does not, in fact, hold.

⁴⁰ This is, of course, a matter of degree and social context. I am not assuming that a Fullerian thesis that the minimal conformity to the rule of law (inner morality of law in his own language) is a necessary condition for the existence of law is accurate. However, some authors tend to adopt this position. Nardin, ‘Theorising the International Rule of Law’, 400–401.

⁴¹ Cf Michael Oakeshott’s idea that ‘the expression “the rule of law” [...] stands for a mode of moral association exclusively in terms of the recognition of the authority of known, non-instrumental rules (that is, laws) which impose obligations to subscribe to adverbial conditions in the performance of the self-chosen actions of all who fall within their jurisdiction.’ Michael Oakeshott, ‘The Rule of Law’, in *On History and Other Essays* (Totowa: Barnes and Nobel, 1983), 148. I do not intend to show that the rule of law imposes

Depending on how a legal order operates, what normative claim it has, to whom it is addressed, and so on, its content and structure changes. The rule of law, from this point of view, should be perceived as coalescing two perspectives: one is the perspective of the subjects (bottom-up) and the other is the perspective of the legal order as such (top-down). The function and the value of the rule of law, therefore, is that it serves as a bridge between law's claim of authority over its subjects, and actual materialisation of this claim in their conduct. Thus, if we accept that the rule of law relates to the ability of a legal order to generate an acceptable and realisable claim of authority, the theory of the rule of law becomes part and parcel of the theory of the authority of law. This entails that our attempted deconstruction of the rule of law must also include ascertainment of what this claim actually is and how it may be realised.

International law, like any other legal order, claims to have an authority in the sense that it provides its subjects with reasons for actions they ought to comply with. Yet what does that claim of authority comprise? Why is it relevant to ensure that this claim is actually convertible into compliance? I shall approach these questions by offering a reconstruction of the concept of authority following on, and reiterating, the key arguments I made earlier, in chapter 1. The reiteration is necessary here in order to see how practical reasoning is linked to the idea of the international rule of law, especially given that the authority of international law is predominantly unmediated.

Authority is a special kind of relation between the law and its addressees. What is special about this relation is that authority affects the practical reasoning of its subjects. To say that A has an authority over B means to say that A may address to B directives which B ought to obey.⁴² There are many examples of such relations: authority of

obligations on actors (although this is often the case), rather, I aim to suggest that it enables actors to accept and abide by obligations to begin with.

⁴² This scheme only applies to the relations of practical authority, not to the scheme of epistemic, or theoretical, authority, since the latter does not *per se* create any duty for those subjected to it. The difference between the two is that while theoretical authorities, such as experts or academics, can tell what should be done, practical authorities tell it to be done. Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception', *Minnesota Law Review* 90 (2006): 1032–34.

parents over their children, authority of officers over soldiers, authority of superiors over inferiors in a company, and, of course, authority of government over people. In all these instances, those in a position of authority may provide those subjected to it with special reasons for actions.

Reasons, in turn, are facts that count for performance of a certain action, or to put it in more sophisticated words, ‘a reason for an action is a consideration that renders its choice intelligible, and counts in its favor.’⁴³ Reasons may be simple (‘I am hungry, and this is a reason for me to eat’), or complex and intertwined with other considerations or conceptions (‘a low entrepreneurial activity is a reason for the government to lower the taxation burden’). Reasons reflect what ought to be done. They may have different weight; some reasons can outweigh others, and usually it is expected that an actor behaves accordingly to the optimal balance of reasons, i.e. according to what ought to be done *all things considered*.

An important feature of practical reasoning is that reasons exist on two levels, and thus there are first-order reasons and second-order reasons. Second-order reasons do not directly compete with first-order reasons, and if a conflict between a first- and a second-order reason occurs, a first-order reason must be disregarded altogether and not weighed on its merits.⁴⁴ An example of such a second-order reason is a promise. One ought to keep one’s promises, no matter what. In such a way, if I gave a promise to help my friend, I must help him even if this is not what I ought to do according to the optimal balance of reasons (I might have other urgent things to do or I do not feel like helping him anymore, etc.). Second-order reasons of this kind are exclusionary in a sense that even if I have other reasons that compete with my promise, they must be excluded from my considerations, i.e. I must not act on them.

Norms are another example of second-order reasons. Subjects ought to do as norms prescribe even if they have first-order reasons for non-compliance. Such

⁴³ Raz, ‘The Problem of Authority’, 1006.

⁴⁴ Joseph Raz, *Practical Reason and Norms*, 2nd ed. (New York: Oxford University Press, 1999), 39–45.

competing first-order reasons are excluded and must not be taken into account, no matter how weighty they are. Norms, in this way, are *protected reasons* in a sense that they are reasons for the action they prescribe, and at the same time they may not be appropriately defeated by excluded first-order reasons. For example, to say that the prohibition of the threat or use of force against territorial integrity or political independence of any state is a norm⁴⁵ is to say that states consider it both as a reason for action (a reason for not treating or using force against another state) and a reason for not acting for other competing reasons (for example, for reasons of gaining new territories or expanding political influence). First-order reasons that compete with the prohibition of the threat or use of force shall, therefore, be disregarded and must gain no weight in states' considerations as to what ought to be done. This example also clarifies another feature of norms as exclusionary reasons; they never exclude *all* the competing reasons (i.e., norms are never absolute reasons). Thus, states may use force for reasons of self-defence and authorisation by the UN Security Council. The exclusionary function of norms is a matter of social practices, and as practices evolve so do the norms; for instance, the discussions regarding the legality of humanitarian intervention can be said to rotate around the issue of whether certain moral reasons (solidarity, considerations of humanity, etc.) are altogether excluded by the general prohibition of the use of force.⁴⁶

Unlike other types of authority, the authority of law is therefore normative, because it claims to provide its subjects with a special kind of protected reasons—norms. Hence, we have come full circle. To say that the law ought to be obeyed is to say that the reasons it provides its subjects with are perceived by them as protected reasons. To put it in Raz's words, 'law is authoritative if its existence is a reason for conforming action and for

⁴⁵ Charter of the United Nations (adopted 24 October 1945), 1 UNTS XVI, art. 2(4).

⁴⁶ See chapter 3 for an in-depth discussion on the link between first-order and second-order (exclusionary) reasons and how they translate into the pre-emptive function of practices such as those grounding customary international law.

excluding conflicting considerations.⁴⁷ This reinforces my initial claim that explanation of the rule of law depends on the theory of authority being used. For if we accept that law's existence makes a practical difference for those to whom it is addressed, there is a reasonable expectation that law's claims are to be met and perceived in such a way. According to this scheme, the rule of law is what actually enables the perception of the reasons the law offers as protected reasons, i.e. as norms. The rule of law bridges the gap between law's claim of normative authority and its acceptance as such by the subjects of law. What is peculiar, however, is that different types of legal orders claim and secure normative authority in dissimilar ways. This becomes especially visible when the normative authority of domestic law is compared to the normative authority of international law. These two kinds of the normative authority need a closer look.

The manner in which the claim of normative authority is addressed to the subjects affects the conditions under which this claim is accepted, i.e. the construction and the content of the rule of law. My central hypothesis in this thesis, formulated at length in chapter 1, has been that law's claim of authority may have two main forms: mediated and unmediated, which differ in the way the claim of authority is addressed to the subjects.⁴⁸

The authority of law within the domestic context is often a euphemism for the authority of state since state government usually is the only legitimate power that has a universal claim of authority over all relations within society.⁴⁹ Therefore, a normal way

⁴⁷ Raz, *Authority of Law*, 29.

⁴⁸ It is worth repeating the point made in chapter 1 that mediated and unmediated forms of authority should not be taken as in an either/or manner. Rather, they exist on opposite sides of a scale. Some claims of authority may be more mediated whereas other more unmediated. It is always a matter of degree. Also, it may be the case that law *tends* to adopt a mediated form of authority due to features of legality. As I discuss these issues in chapter 1 of the present thesis, mediation in the normative structure of authority necessarily involves formal institutions.

⁴⁹ This must not be misapprehended. That the state and the domestic law *claim to have* authority over all relations within society does not mean that they actually *have* this authority. Different societies in different times practiced a variety of methods of limiting such a claim and securing at least some autonomous fields where the state has no power. Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1990); Joseph Raz, 'Why the State?', in *In Pursuit of Pluralist Jurisprudence*, ed. Nicole Roughan and Andrew Halpin (Cambridge: Cambridge University Press, 2017), 136–62.

of describing the authority of domestic law is by identifying it with the system of officials and corresponding system of public institutions (‘authorities’). This type of authority strongly relates to the idea of ‘authorship’ in the sense that in domestic legal systems law is typically identified through the institutions empowered with making and applying laws. Within a domestic legal system, accepting the law’s claim of normative authority means accepting the authority of officials who make, interpret, apply, and enforce the law. In such a way, law’s authority in domestic legal orders is by and large performed through institutions and officials.⁵⁰ For this reason, I have been referring to it as ‘mediated authority’.

In the international realm, however, law’s claim of authority is not typically backed by an institutional structure similar to the government in states—one of the most widespread arguments against the international rule of law.⁵¹ International law does not always embody or represent a consolidated or even articulated political power (though it can). Certainly, many parts of international law do rely on institutional structures, such as international organisations, but these do not exhaust the entirety of norms of international law. Customary international law, and also significant number of international treaties, claim the normative authority without being identified, in one way or another, with some public institutions which issue or enforce them. Even though the last couple of decades evidenced the boom of international organisations, the larger part

⁵⁰ This, again, is a matter of degree. I do share Fuller’s conviction that any legal order must have a horizontal dimension, as well, Lon L. Fuller, ‘Human Interaction and the Law’, in *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth I. Winston, Rev. ed (Portland: Hart Publishing, 2001), 231–66. The image of mediated authority, however, relates to the concept that legal systems require a division between officials and ordinary individuals. I discuss this more below.

⁵¹ The absence of a unified institutional structure is often taken as signalling the lack of authority of international law or international law’s inability to have a claim to authority. This view is analysed and criticised in: Başak Çalı, ‘Authority’, in *Concepts for International Law: Contributions to Disciplinary Thought*, ed. Jean d’Aspremont and Sahib Singh (Cheltenham: Edward Elgar Publishing, 2019), 39–53. See also conceptualisations of the international rule of law through the prism of constitutionalism, where it is taken as applied primarily to institutions: Bardo Fassbender, ‘What’s in a Name? The International Rule of Law and the United Nations Charter’, *Chinese Journal of International Law* 17, no. 3 (2018): 761–97; Mattias Kumm, ‘Global Constitutionalism and the Rule of Law’, in *Handbook on Global Constitutionalism*, ed. Anthony F. Lang and Antje Wiener (Cheltenham: Edward Elgar, 2017), 197–211.

of international law claims authority without mediation by officials or formal institutions.⁵² For this reason, I have been calling the type of authority predominantly characterising international law ‘unmediated authority’.

Both types of authority—mediated and unmediated—represent normative authority. International law’s authority, just like the authority of domestic law, is based on its claims that it accumulates and provides its subjects with protected reasons for action—norms. The difference between the two types, though, is that the authority of domestic law is *far more* mediated by officials and public institutions, whereas the authority of international law is generally not.⁵³ Hence, international law’s normativity is typically directly created by, and addressed to its subjects,⁵⁴ while domestic law’s

⁵² Besides, it is not at all given that international organisations are functionally similar to formal institutions comprising officials like those we see in domestic law. Only some international bodies (e.g., international courts, the UN Security Council, European Commission) may be said to perform functions similar to domestic formal institutions. International law, then, generally does without them. David Lefkowitz, ‘What Makes a Social Order Primitive? In Defense of Hart’s Take on International Law’, *Legal Theory* 23, no. 4 (2017): 261. See also Mario Prost’s discussion of the redundancy of the idea of officials and formal institutions as applied to international law. Prost, *Concept of Unity*, 83–105.

⁵³ This difference can be translated into the language of law/legal system duality. Herbert Hart famously claimed that international law is not a legal system, which was taken by many international lawyers as a denial of the legality of international law, or at least as a sign that international law is less of a law than domestic legal orders. Mehrdad Payandeh, ‘The Concept of International Law in the Jurisprudence of H. L. A. Hart’, *European Journal of International Law* 21, no. 4 (2010): 967–95. Lately, the same point was restated by Giovanni Bisogni who claims that ‘state law certainly falls into the core of settled meaning of the word “law” and the idea of state law is well expressed in terms of union of primary and secondary norms. On the other hand, IL slips into a (not linguistic, but substantive) penumbral area, and is theoretically coupled with the law of primitive societies, blurring its complexity and structure. Law par excellence is, then, only state law: it turns out to be the touchstone of the legality of any other rule practice, which, however, can never be on a level with it.’ Giovanni Bisogni, ‘The Question To Be Faced Is One of Fact: H.L.A. Hart’s Legal Theory Through His View of International Law’, *Canadian Journal of Law & Jurisprudence*, 2021, 12, <https://doi.org/10.1017/cjlj.2021.11>. However, what Hart seemed to mean is that a legal system is only a mode of existence of law; a mode that is the most typical one because of its prevalence. Existence of secondary rules and officials, though, ‘is not a necessity, but a luxury, found in advanced social systems whose members not merely come to accept separate rules piecemeal, but are committed to the acceptance in advance of general classes of rule, marked out by general criteria of validity.’ Herbert L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), 235. International law seldom functions through officials precisely because it is not a legal system. I fully endorse David Lefkowitz’s view on this matter, as well as his critique of Mehrdad Payandeh’s reconstruction of Hart. Lefkowitz, ‘What Makes a Social Order Primitive?’.

⁵⁴ Cf. Waldron, ‘Are Sovereigns Entitled to the Benefits?’, 332, but also his ‘Authority for Officials’ where he seems to be making a slightly different (and more general) point: Jeremy Waldron, ‘Authority for Officials’, in *Rights, Culture and the Law*, ed. Lukas H. Meyer, Stanley L. Paulson, and Thomas W. Pogge (Oxford: Oxford University Press, 2003), 45–69.

authority and normativity are mainly communicated through officials.⁵⁵ Terry Nardin also observes that to speak about the international rule of law means to accept that the authority of international law may be accounted for with no reference to officials:

we must assume [...] that law can be effective without legislation, adjudication, and centralised enforcement—that laws can be created, their meanings in particular cases authoritatively determined, and observance secured in other ways.⁵⁶

That the normative authority of international law is by and large unmediated and its claim is addressed directly to its subjects, implies that the conditions under which this claim is acceptable and realisable differs from those which are germane to the mediated structure of authority. Our attempt at reverse engineering, therefore, brought us to the image of the rule of law as a set of conditions under which reasons addressed by law to its subjects are taken as protected ones. These conditions are not universal and depend on the structure of authority the law claims to have. Now we must investigate how this influences the concept of the rule of law as applied to international law.

3. The International Rule of Law and Features of the Normative Authority

In the previous two sections, I attempted to address some concerns about the concept of the international rule of law. In doing so, I suggested that the domestic and the

⁵⁵ This view requires adopting a conception of legality which does not make law contingent on a particular source lying outside the law itself. In this regard, I generally share Jutta Brunnée's and Stephen Toope's perspective that 'both order and authority come from within law, from continuing practices that meet conditions of legality', and such "circular" understanding of legality, in which authority is internal to law, leads to a more robust account of the rule of law than a "linear" understanding', in which law's origin and authority have an external, non-legal source Brunnée and Toope, *Legitimacy and Legality*, 170–71. At the same time, I do not share their conviction that the rule of law is essentially tantamount to the conditions of legality (and *vice versa*) as I incline to adopt a functional understanding of legality, as suggested in chapters 1 and 4. According to the functional understanding of legality, legal normativity differs from general social normativity in that it allows to bypass moral disagreements by providing its subjects with protected reasons for action. Note that such a conception of legality does not necessarily imply a clear-cut threshold between law and non-law, since norms can be more or less successful in performing this function. Yet the analytical value of the distinction does not suffer from this.

⁵⁶ Nardin, 'Theorising the International Rule of Law', 398.

international versions of this idea should not be deduced from one another, but instead must be treated as rooted in the common core which is the law's normative authority. From this, the rule of law—domestic, international, or any other—is a meta-normative ideal that reflects the merits of a legal order as functioning in a way which enables its subjects to be effectively guided by it and use it as a justification for actions. I do not suggest that this formula is a definition of the rule of law. There can be other, probably much more accurate and precise formulations of the idea. Yet my claim is that this is the understanding of the rule of law that enables its consistent and uncontroversial application to any legal order without falling into the fallacies of domestic analogies. Also, this understanding allows to account for different manifestations of the rule of law in a variety of contexts. That is, both vertical and horizontal dimensions of the international rule of law can be reconstructed via law's claim to authority, mediated or unmediated. The merit of the rule of law may be achieved and secured in a variety of ways, which also explains the existence of distinct yet functionally overlapping concepts and doctrines.⁵⁷ I shall now illustrate how and in what respect the international rule of law differs from its domestic images regarding the ways of achieving and securing its normative authority.

A critical outcome of excluding officials and public institutions from the equation of the international rule of law, which, as was shown in the previous section, is of primary importance, is that the strict separation between its 'thin' and 'thick' versions is no longer relevant; at least, not according to these two versions of the rule of law and their interplay known domestically. The logic of the 'thin' and the 'thick' rule of law, as Pauline Westerman accurately observes, implies that in order to get thick, one must first be

⁵⁷ Here, one can mention the French *l'état de droit*, or the German *rechtsstaat*, or the Soviet *законность*, or other iterations of this idea in different cultures. Some of them are more convergent, some are not. Thus, the Venice Commission emphasised that most European doctrines that relate to this merit of legal orders are largely overlapping. See Venice Commission, 'Report on the Rule of Law' (4 April 2011) CDL-AD(2011)003rev, paras. 7–16. Yet non-European images of law and its merits may feature quite significant dissimilarities. My hypothesis suggests that the offered formulation of this merit is consistent with most cultural iterations of the rule of law and its conceptual siblings.

thin.⁵⁸ The rule of law cannot, therefore, be built from its thicker end.⁵⁹ Because domestic law is issued, interpreted, applied, enforced, etc. predominantly through a system of officials, it is of paramount importance from the rule of law perspective that their practices are known, consistent through time, and conducted within reasonable frames of discretion, etc., otherwise its addressees may be unable to comply with it and guide their behaviour by it. These requirements also enable a justification of the institutional authority of the state according to one or another moral standard. Yet the rule of law does not require democracy or a liberal political setup, and hence such practices, even when conforming to these requirements, do not necessarily serve a morally justified goal.⁶⁰ For this reason, the rule of law does not guarantee liberty, diversity, democracy, or equality. Its ideal is to enable law's claim for normative authority to be fulfilled.

Therefore, the thickening of the rule of law as a political doctrine only becomes possible when the legal accountability of officials is institutionally secured, and when their directives meet the requirements of formal legality. Such social conditions usually enable (more or less) effective mechanisms of communicating values and goals to the officials and transforming them first into policies and later into legal norms, which by implication requires a mediated form of authority. This is one of the reasons why, for instance, populism as a political platform is a threat to the rule of law,⁶¹ as it values the

⁵⁸ Pauline C. Westerman, *Outsourcing the Law: A Philosophical Perspective on Regulation* (Cheltenham: Edward Elgar Publishing, 2018), 141.

⁵⁹ Brian Tamanaha famously arranged six modifications of the rule of law theories from simpler to more complicated, where each next one broadens and supplements the previous one. This is a one-way logic, and one may not simply reverse it and start discussing the rule of law 'as a welfare state' without first accounting for the rule of law 'as rule *by* law'. Tamanaha, *On the Rule of Law*, ch. 7–8. This, however, is not only a theoretical issue, as the same also applies to implementing the rule of law in a legal system; without securing the formal legality, the use of the rule of law for pursuing noble goals risks resulting in totalitarianism.

⁶⁰ Hence an iconic, yet often taken wrongly, statement by Raz that 'a non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution, may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the most enlightened Western democracies' Raz, *Authority of Law*, 211.

⁶¹ See, for example, Andreas Zimmermann. Andreas Zimmerman, 'Times Are Changing—and What About the International Rule of Law Then?', *EJIL:Talk!* (blog), 5 March 2018, <https://www.ejiltalk.org/times->

achievement of certain goals far more than the way of achieving such goals. ‘Doing the right thing’ gets much more weight than ‘doing things right’, which may cause non-conformity with the basic formal requirements of the rule of law. In other words, the domestic logic of the thickening of the rule of law entails that furthering morally justifiable goals and values does not in itself signify the conformity to the rule of law, since such goals and values may well be furthered through a deeply wicked institutional structure. At the same time, non-furtherance of such goals and values does not mean non-conformity with the rule of law.

In international law, the situation differs, although the starting point remains the same. As stressed by Mattias Kumm, the international rule of law primarily entails

that nations, in their relationships to one another, are to be ruled by law. The addressees of international law, states in particular, should obey the law. They should treat it as authoritative and let it guide and constrain their actions.⁶²

Here again, the central message of the international rule of law is articulated through international law’s claim for authority. Kumm’s statement, however, lacks an important detail significant for reconstructing the international rule of law through authority, namely, that not only states should treat international law as authoritative or let it guide their actions, but also that international law as such *must meet conditions for such a treatment*. Authority is always a two-way relation between a legal order and its subjects. What changes during our shift from the mediated authority of domestic law to the unmediated authority of international law, however, is the perception of typical devices used to justify norms as protected reasons.

are-changing-and-what-about-the-international-rule-of-law-then/. Certainly, populism is only an example here. Many contemporary political and legal ideologies bring similar threats. Westerman, *Outsourcing the Law*, ch. 8.

⁶² Mattias Kumm, ‘International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model’, *Virginia Journal of International Law* 44 (2003): 22. For the same argument, see also André Nollkaemper, ‘The Internationalized Rule of Law’, *Hague Journal on the Rule of Law* 1, no. 1 (2009): 77–78.

As noted above, both here and in chapter 1, the authority of international law does not generally feature mediators in the form of officials. This primarily entails that norms of international law are not commonly justified by reference to institutions though this is also possible in some regimes. This also results in the ways legal obligations get generated and what conditions their acceptance. When authority is mediated, the justification of obligation pertains to the delegation of judgment, when public institutions are supposed to weigh all the relevant reasons for action and balance them in legally valid norms.⁶³ Importantly, such a delegation assumes that the end result of institutions' practical deliberations must be accepted as a content-independent reason for action, that is, 'the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.'⁶⁴ The mediated structure of legal authority necessarily implies content-independence of its directives,⁶⁵ i.e. the addressees of this directives must accept them without judging them on their merits. This is why traditional domestic doctrines of the rule of law places such an emphasis on formal legality, for it allows to secure that authorities, in their practical deliberations, account for at least *some* relevant reasons (not necessarily substantive ones). This issue relates to so called 'double-counting': accepting an authoritative directive as a reason for action *and* acting for some reasons that this directive accounts for is erring in practical reasoning. That is, one either trusts an authority that it has balanced all the reasons adequately and accepts its judgment, or one does not and acts for underlying reasons

⁶³ Raz, *practical Reasons and Norms*, 74.

⁶⁴ Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 46.

⁶⁵ Content-independence of authoritative directives is at the core of jurisprudential investigations of legal normativity. I wish merely to indicate that content-independence is to a large extent a feature of norms generated by institutional authorities, which by definition belong to the mediated kind. Whether unmediated authority generates content-independent reasons is not at all clear. My hypothesis is that legal norms may have a thinner or thicker 'pre-emptive veil', that is, they can replace underlying reasons for action with varying success. Mediated authority, because it assumes delegation of practical deliberation, tends to generate norms with a thicker pre-emptive veil than unmediated authority. See, for more discussion, chapters 1 and 4 of the present thesis.

instead. What formal legality brings, then, in the context of mediated authority, is not that relevant reasons are counted twice, but rather that it is ensured that they are at least counted once.⁶⁶

Norms of international law, especially norms of customary international law, are more often justified as devices enabling and securing coordination, as well as time- and labour-saving or error-eliminating devices, as suggested in chapter 3. An important feature of these justificatory devices is that they usually relate to norms deliberated by their subjects directly. This in itself changes the scheme of normative authority. The authority of a norm of international law does not solely depend on its source or even on the many formal qualities which are of crucial importance for the domestic setup. Since states determine the content of the norms they abide by because they directly participate in their creation (either through conventional law-making or through customary practices), the authority of these norms equally depends on their formal and substantive merits, and often the lack or deficiency of the former is often compensated for by the consensus regarding the latter. If in domestic law, individuals cannot dis-obligate themselves from compliance with laws they dislike or disagree with (apart from the special cases such as civil disobedience), nor can they cherry-pick laws to be bound by. In international law states can do this far more freely.⁶⁷ Besides, since states do not delegate practical deliberations, but instead perform them directly, it affects the ways in

⁶⁶ Scott J. Shapiro, 'Authority', in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro (Oxford: Oxford University Press, 2004), 414.

⁶⁷ This argument is certainly focused on obligations arising from international treaties. Even though the VCLT suggests a rather restrictive approach to unilateral withdrawals from treaties (Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 56), it remains unclear whether this provision reflects customary international law and thus applies to the non-parties of the VCLT. Besides, most treaties do provide for denunciation or withdrawal. Also, with respect to customary international law, states generally cannot directly dis-obligate themselves from it, unless replacing the obligations under the CIL with a treaty-based legal regime. Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', *European Journal of International Law* 17, no. 3 (2006): 483–529. Moreover, even when States adopt a treaty deviating from a rule of customary international law, they do not dis-obligate themselves in absolute terms since they remain bound by customary international law in their relations to non-parties. All this, however, does not impeach the general observation that states have far more freedom and flexibility in choosing the legal obligations to be bound by than any individual could ever dream of.

which reasons (both first- and second-order) are assessed. Unmediated authority generates legal obligations that are not necessarily or always content-independent, or at least when they are, states are entitled to penetrate through the pre-emptive veil freely, which results in a more unstable and fluctuating structure of authority than that characterising domestic legal systems.⁶⁸

Because the authority of international law is of the unmediated kind, the international rule of law does not require the logic of thickening and hence there is often a small gap between the formal and substantive requirements of the international rule of law. The value-driven requirements of the international rule of law matter as much as the requirements of formal legality. This does not in itself mean that the international rule of law requires a ‘thicker’ view on the rule of law as such. For example, William Bishop supposed that:

the concept [of the international rule of law] includes reliance on law as opposed to arbitrary power in international relations; the substitution of settlement by law for settlement by force; and the realization that law can and should be used as an instrumentality for the cooperative international furtherance of social aims, in such

⁶⁸ That unmediated authority of international law may generate content-dependent obligations is very visible in the context of *jus cogens*. Art. 53 of the Vienna Convention on the Law of Treaties, by stating that a norm of *jus cogens* is ‘a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’ does not in fact establish any *formal* threshold for peremptory norms. As the International Law Commission put it, ‘it is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may [...] give it the character of *jus cogens*’. ILC, ‘Reports of the International Law Commission on the second part of its 17th session and on its 18th session’ (3–28 January 1966) UN Doc A/6309/Rev.1. Yearbook of the International Law Commission (1966, Vol. II), 248. An argument can be made, however, following the Special Rapporteur on the peremptory norms of general international law, that acceptance and recognition plus non-derogability are the formal criteria of *jus cogens*. See ILC, ‘Report on the Work of the Seventy-First Session. Chapter V: Peremptory norms of general international law (*jus cogens*)’ (2019) UN Doc A/74/10, 157–174. Note, however, that the same report states, on page 151, that ‘The characteristic that peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community relates to the content of the norm in question.’ The authority of the peremptory norms of international law, then, is explicitly content-*dependent*, rather than content-independent. A recent discussion on this matter may be found here: Adil Haque, ‘Adil Haque on International Law and Morality’, April 30, 2021, in *Borderline Jurisprudence: A Philosophy of International Law Podcast*, produced by Kostia Gorobets and Başak Etkin, 17:12, <https://anchor.fm/borderline-jurisprudence/episodes/Episode-3-Adil-Haque-on-International-Law-and-Morality-eudscq>.

fashion as to preserve and promote the values of freedom and human dignity for individuals.⁶⁹

This, it seems, is not an attempt to advocate a broad definition of the international rule of law, but an attempt to show that substantive merits of international law cannot be appropriately excluded from the equation of the international rule of law and must be given the same weight as formal merits.

More importantly, however, since international law-making and, to a large extent, international law-enforcement are not delegated to formal institutions, the formal and the substantive merits of norms of international law converge and intertwine when it claims authority. From this perspective, what Ian Hurd considers as a vice of international law regarding the rule of law, namely that states are free to choose the legal obligations they deem it reasonable to be bound by, at least in terms of treaty law,⁷⁰ can in fact be its virtue. States are entitled to assess the norms of international law both by their formal qualities *and* by their substance when forming a view of legal obligations applied to them.

To recapitulate, that the authority of domestic law is mediated by officials makes its formal conditions more relevant, because subjects of law are committed to accept in advance specific types of official utterances as norms even if they are imperfect or even wrong on the balance of reasons. The authority of international law, however, is only in small part mediated by officials, which implies that, in principle, there is no general commitment to accept in advance any norm that meets certain formal criteria.⁷¹ Even when such a commitment is expressed through consent, however, this is seldom general and much more often *ad hoc*. As a consequence, the body of legal obligations under

⁶⁹ William W. Bishop, 'The International Rule of Law', *Michigan Law Review* 59, no. 4 (1961): 553.

⁷⁰ Hurd, 'Law and Limits of Politics', 41–42.

⁷¹ These criteria are also less sharp than in most domestic legal orders. If for international treaties things are clear, the debates around the criteria and markers of customary international law has proven to be endless. Highly careful language adopted by the International Law Commission in this regard also suggests that the criteria used for identification of the customary international law are quite vague. ILC, 'Draft conclusions on identification of customary international law' UN Doc A/73/10, para. 65.

international treaties is unique for every state, and the content of customary international law is by and large approved through practice, over which states gave a direct control through participation or rejection. What this difference between the structures of authority entails is that in international law there is a small gap between the reasons that apply to states and the norms that pre-empt these reasons and bolster coordination by providing shortcuts in practical reasoning.⁷² Norms of international law, in this way, are closer to the reasons that apply to states, and states are more flexible in articulating groups of interlocked reasons and balancing them as pre-emptive normative standards.

It is important to clarify an apparent contradiction here. Earlier in the thesis, in chapter 1, I maintained that the authority of international law manifests in its capacity to generate pre-emptive normative standards of conduct, so the more pre-emptive international law is, the more authority it has. In this chapter, however, I have been advancing the view that the international rule of law requires a combination of the formal and the substantive qualities of norms, which entails that the pre-emptive capacity of these norms is not too strong. How is it possible to make these two claims at the same time?

There is indeed an element of paradox here. The international rule of law, just like its domestic sibling, is a systemic quality of a legal order; it is a meta-normative ideal that applies to a legal order as a whole. In this sense, it is similar to normativity; as Joseph Raz pointed out, the explanation of normativity depends on the concept of a legal system, rather than on the concept of a particular law.⁷³ What this entails, for the purposes of my analysis here, is that as a systemic quality, the international rule of law relates to the pre-emptive capacity of international law as an order. And for this systemic

⁷² Since norms by definition exclude some reasons from deliberations, this means that actors no longer need to consider all of them every time this is relevant and needed. Norms already represent a certain balance of excluded reasons and remain valid protected reasons even when this balance is tipped.

⁷³ Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of the Legal System*, 2nd ed. (Oxford: Oxford University Press, 1980), 169–70.

quality to be secured, and the authority of international law as a whole to be achieved, it is sometimes necessary to sacrifice the pre-emptive capacity of particular norms and regimes, making them less pre-emptive than they would normally be.⁷⁴ To use a metaphor, this is similar to the idea of structural voids in architecture: sometimes, paradoxically, adding voids in the structure of a building makes it stronger overall. That is to say, by allowing the mix of the formal and substantive merits of norms and thus weakening their pre-emptive capacity, the international rule of law still aims at a stronger authority of international law overall, by making the legal normative framework of international cooperation more attractive for states and other actors (in part exactly thanks to a lowered pre-emptive bar of separate norms).

The described features of normative authority affect the structure and the content of the rule of law applied internationally. The formal and substantive merits of laws, which in the domestic setup are stored in different baskets, so to speak, get mixed together like pieces of Lego, and different areas or regimes of international law rely more on one piece, whereas other regimes rely more on other pieces.⁷⁵ The fundamental core of the rule of law—that the subjects of law must obey the law and be guided by it—is therefore enabled by both formal and substantive merits of particular norms of

⁷⁴ Carmen Pavel offers an interesting example from the text of the UN Charter which offered one of the first formulations of the principle of non-intervention in the domestic affairs of sovereign states. Art. 2(7) of the Charter reads, in its first clause, that ‘nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.’ It is not difficult to see that this norm is weakly pre-emptive, for it is left entirely up to states to carry out practical deliberations as to what falls within ‘matters which are essentially within the domestic jurisdiction’. This, as a matter of practical reasoning, can be almost anything. Carmen E. Pavel, *Law beyond the State: Dynamic Coordination, State Consent, and Binding International Law* (New York: Oxford University Press, 2021), 165–66. And yet it is important to see that such sacrifices of pre-emption at the level of particular norms may be crucial for securing the pre-emptive potential and capacity of the system as a whole (in this case—the system of the United Nations).

⁷⁵ Richard Collins speaks of a similar duality of the international rule of law, and he pictures these two sides of the international rule of law as ‘justified by quite distinctive logics, but their mutual antagonism makes them also inseparable in expressing urges that make little sense except in their opposition: the functional vision expressing the need to avoid an over-fetishised legal formalism that tends to mask structural inequalities, biases and global injustices; the formal vision ensuring a degree of accountability and restraint that can only be ensured through the systematic logic of the international legal form itself.’ Collins, ‘Two Idea(l)s’, 225.

international law. States as the central subjects of international law recognise its authority by subjecting themselves (and to a significant degree each other) to the body of rules of conduct that represent a certain balance of reasons that apply to them. The international rule of law allows international law to generate authority and to be complied with because its norms provide for a formally and procedurally reliable normative framework of conduct or dispute settlement, but it may as well generate it because these norms express values and principles shared by states, even when the formal qualities of such expressions are dubious.

Conclusions

In this chapter, I attempted a reconstruction of the concept of the rule of law in a way that allows one to account for its main manifestations—domestic and international. I submitted that the rule of law should be considered as part and parcel of a conception of normative authority, and that what is traditionally approached as requirements or principles of the rule of law are in fact conditions under which a claim for the authority of a certain normative order is realisable. What does this entail, and how does it change our perception of the international rule of law?

My central conclusion is that an image of the rule of law, its content and function depend on how a certain legal order generates the obligation to obey its norms and use them as guidance for action. The rule of law is therefore a collage of qualities of norms that enable or contribute to their status as authoritative. In the case of the international rule of law, this collage combines both the formal and the substantive merits of norms, securing in such a way the status of states as both agents and addressees of international law. The international rule of law should be considered independently from the domestic rule of law, since the latter depends on dissimilar tools and techniques for the justification of norms, and hence the structure of domestic law's authority differs quite significantly from the one of international law. Still, both versions of the rule of law enable furthering of certain values and principles, since they both protect subjects of law from the threats

of the law itself. If the conditions under which a legal order's claim for authority is realisable (and these conditions differ depending on the type of legal order), this allows for securing the liberty and autonomy of its subjects and for conforming to principles legitimising this legal order.

That authority of law can be justified, secured, and made realisable by different means and under different conditions allows to break the vicious circle of domestic analogy, when the international rule of law inherits conceptual features of the rule of law known domestically, which leads to distortions or limitations. Both domestic and international rule of law represent the idea that legal orders, by claiming practical authority, must meet conditions under which this claim is justified and realisable. Since authority of law may be more or less mediated by formal institutions, this also affects what these conditions are and how they can be met.

Conclusions

What does it mean to say that international law has or claims authority? What does the authority of international law entail, and how does it differ from the authority of domestic law? In this thesis, I have tried to give a jurisprudential answer to these questions.

Authority is one of the basic jurisprudential concepts. It is used to explain the grounds of law's claim to guide the actions of its subjects. As with most other jurisprudential concepts, such as validity, normativity, obligation, etc., the concept of authority is presumably of universal applicability, that is, it applies to any instance of law. Yet the standard picture of authority used in the analytical tradition of jurisprudence is deeply rooted in how the law is typically manifested in state-centric legal systems. This significantly obscures the idea of authority, which gets linked to the normative powers exercised by various formal institutions which make up legal systems (courts, legislature, governmental agencies, etc.). Consequently, there appears to be a discrepancy between, on the one hand, the presumably universal epistemic validity of the concept of authority as applicable to any law, and, on the other hand, the common jurisprudential explanation of authority as focused primarily on domestic legal systems. International law differs significantly from domestic legal systems, which makes the standard account of authority only partly relevant to how it operates. This thesis offered a more generic jurisprudential explanation of authority, which can encompass both highly institutionalized domestic legal systems and more dispersed, clustered, and heterarchical legal orders such as international law.

I began by drawing the familiar picture of authority as commonly seen in jurisprudence. This shows that it is intuitively appealing to speak of authority as of a personified status or position. Within this standard jurisprudential view, authority

implies hierarchy; authority is not just *someone*, it is *someone superior*, someone with *power*. These two basic features of authority (personification and superiority) are reflected in the conventional image of law as necessarily involving formal institutions, such as governmental bodies, courts, police departments, etc. The *leitmotiv* of authority, therefore, is essential for a greater conceptual composition, that of the law. Because the law necessarily manifests in formal institutions, the standard line of argument stipulates that its authority must be expressed in legal officials directing people's conduct. 'Authority of law' and 'legal authorities' become if not synonyms, then at least two sides of the same coin. One cannot exist without the other.

I showed, in chapter 1, that this perspective, in which the authority of law and legal authorities are glued together to an extent that it is hard to differentiate between them, generates one of the key sources of confusion about the idea of authority. Because of the intuitions of the standard account, jurisprudence uses the concept of authority in two different ways interchangeably. On the one hand, 'authority' is used to explain how the law comes about, and here 'authority' is used to mean formal institutions which create, apply, and enforce the law. On the other hand, 'authority' is used to explain law's impact on people's conduct, and here 'authority' is used to mean some function the law performs in the practical reasoning of its subjects. One of the tasks of this thesis was to disentangle these two meanings of authority. I attempted to show that even though it may be reasonable to mix the two meanings together in the context of domestic legal systems, in international law there is a significant gap between them, and that we should uncouple the latter, normative meaning of authority, from the former, institutional one.

International law is far less institutionalized than domestic legal systems; not in the sense of quantity of formal institutions—there are hundreds of these in international law—but in the sense of them not being organised as one unified legal system. Even more so, its active institutionalisation is a fairly fresh development in the long history of international law. Pre-World War I international law featured almost no permanent formal institutions at all. This upsets the most basic intuition about authority, namely that it is a personified position of superiority and normative power. This is where the

gap between the two meanings of authority—institutional and normative—becomes most visible. In domestic legal systems it is typically the case that the entirety of legal norms is linked in one way or another to formal institutions. Consequently, it is difficult to squeeze the blade between what the law authoritatively requires and what formal institutions, such as legal authorities, say and do. Hence, we have the interchangeability between ‘authority of law’ and ‘legal authorities’. But in international law, this is not always the case because a significant number of international legal norms has no direct connection to any sort of global governance institutions. And yet these rules definitely claim to have, or are presumed to have, an impact on practical reasoning. That is, in international law it is possible to imagine areas of ‘authority of law’, where no ‘legal authorities’ operate.

I made use of the metaphor of peaks and valleys to highlight the peculiarities of international law’s structure of authority. ‘Peaks’ represent formal institutions of all sorts, and ‘valleys’ represent those areas of legal normativity that generally operate without a necessary link to such institutions. The ‘normative valleys’ of international law are best explained through the example of customary international law (CIL). CIL does not come about as a result of law-making by an authoritative legal institution. Its formation, existence, and normative force do not depend on application by formal institutions like international courts. And yet there is a longstanding practice of treating CIL as the most canonical manifestation of the authority of international law. Another example of ‘normative valleys’ is international treaties, especially those that do not establish any formal institutional arrangements. What differentiates normative valleys from institutional peaks is primarily their horizontal character.

The standard philosophical explanation of authority is easily applicable to the ‘peaks’, but it has trouble with explaining the authority of the ‘valleys’. All this entails that an explanation of the authority of law must not be equated with an explanation of authoritative institutions. This does not mean, however, that institutional authorities are irrelevant. I revisited the connection between institutional and normative meanings of authority by suggesting that authority may or may not be mediated.

By ‘mediation’ of authority I mean the introduction of agents to whom participants of a legal practice delegate fully or partly practical deliberations in creating, applying, or enforcing legal norms. While the standard jurisprudential view suggests that such mediation is paramount for the emergence of the authority of law, I claim that such ‘legal authorities’ are not necessary ingredients of there being normative legal practices, but rather optimizing devices, which may or may not be introduced. This assumes that the authority of law may be unmediated, when legal norms are being shaped, interpreted, and applied without a necessary involvement of formal institutions.

That authority can be unmediated entails that there must be a way to explain it without relying on hierarchical power discrepancies, normative statuses, etc. I suggested that instead of thinking about authority in terms of institutional agencies, or normative roles, it is better to link it directly to legal normativity and the function it performs in practical reasoning. The function of norms is to optimise practical reasoning by pre-empting practical deliberations on underlying reasons. States have, and act upon, legal norms as devices that allow them to bypass or resolve the moral and political disagreements they have. This entails that legal norms are pre-emptive second-order reasons; they replace the background considerations and are therefore meant to be used as ready-made solutions, without a need for states to calculate all the pros and cons each time a situation covered by a norm appears.

The concept of unmediated/mediated authority also allows me to dispel some sources of scepticism about international law’s authority. I claim that the existence of unmediated authority proves the possibility of pre-emptive normative standards even when no delegation of practical deliberations happens. In other words, law does not have to originate from an institutional source to claim authority (that is, to perform its pre-emptive function). Unmediated authority may, of course, be weaker compared to mediated authority, simply because non-delegated practical deliberations may be more time-consuming in framing pre-emptive normative standards. Yet on the other hand, direct practical deliberations may prove more inclusive and less intrusive in terms of factual inequalities between states.

In the thesis, I paid attention to both the mediated authority of peaks and the unmediated authority of valleys. In chapter 2, I focused my analysis on international courts—perhaps the most straightforward manifestations of ‘peaks’ in international law. They claim authority as adjudicative institutions, and it has been an attractive strategy to analyse this authority in the same vein as in the case of domestic courts. I showed, however, that international courts’ authority is far less commonplace than that of domestic courts; the latter rarely have problems with securing *de facto* authority, whereas the former are known to struggle from fluctuations and deficits of factual authority. I claimed that the *de facto* authority of international courts is best understood as the degree of success with which international courts manage to generate pre-emptive practical reasons. Being examples of mediated authority, however, international courts’ authority is conditioned upon the normative qualities of the legal norms they apply when making a judgment. It means that international courts are not always able to generate a stronger pre-emption than the norms they enforce.

This conclusion entails that the authority of institutional peaks such as international courts requires the authority of some more fundamental kind, that of valleys. In chapter 3, I investigated how CIL’s normativity enables the possibility of pre-emption even when no institutional delegation takes place. I claimed that the authority of customary international law manifests in the ways in which practices (such as those explicating customary international law) shape the practical reasoning of states. I rejected the canonical two-element conception of CIL and show instead that any practice has a degree of normativity. This is so because for anyone to enter the practice she must accept the authority of the standards embedded in this practice (e.g., right and wrong ways of doing things). This shapes the very basic idea of authority; it reflects the existence of norms as special kinds of practical reasons. Acceptance of norms from the internal point of view leads to the establishment of the relations of authority between these norms and a subject. The authority of CIL, then, as that of valleys, is possible exactly because customary norms are capable of functioning as pre-emptive practical reasons.

However, the pre-emptive veil that legal norms manage to generate within normative practices may vary in its thickness. That is, it is generally the case that norms are meant to pre-empt practical reasons, but they may be more or less successful in doing so. This can be shown against the background of the values that international law is expected to embody, which I do in chapter 4. It is common to argue that international law should be an instrument to further values and principles that unite the global community. Thus, one of the widespread ideas is that international law promotes or should promote solidarity, which I take as my case study for the purposes of jurisprudential analysis. Despite its popularity, it is not always clear what normative role solidarity should perform in international law, as a value and principle. How can international law help promote and strengthen it? Normatively speaking, international law can only do so if it manages to effectively pre-empt solidarity as a practical reason and replace it with norms. In other words, in a system that truly promotes solidarity, acting out of solidarity becomes redundant, for there are norms to follow. Yet at the same time, different areas of international law may be more or less successful in embodying such values as solidarity, which makes it more or less appropriate to rely on them directly. This shows that authority is not merely about the existence of norms. Authority relates to the capacity of norms to pre-empt underlying reasons. The thicker the pre-emptive veil of international legal norms, the more authority law has, and the other way around.

My discussion of mediated and unmediated authority, degrees of pre-emptiveness, international courts, and customary international law, led me to the issue of the international rule of law. Since, as I showed in the thesis, the authority of international law combines both mediated and unmediated structures, this raises questions as to how the international rule of law is possible, and how we should understand it. I suggested that the international rule of law represents a set of conditions under which the authority of international law is achieved. This means, somewhat paradoxically, that the international rule of law requires a subtle balance between the formal and substantive qualities of particular legal rules, so that the pre-emptive capacity of international law as

a whole is likely to be successfully achieved. This understanding of the international rule of law differs significantly from the more traditional ideas that it should relate to certain normative safeguards that protect autonomy and secure human dignity. I submit that these dimensions of the international rule of law become relevant at the stage of legitimation of international law's authority, not at the stage of securing it as such.

All this allows me to conclude that the authority of international law, as a jurisprudential puzzle, has a solution if we embrace the possibility that authority, as a normative phenomenon, does not require institutional mediation. It is also not something established once and for all; it can fluctuate, grow stronger, or diminish altogether. Whether or not international legal norms succeed in securing their pre-emptive status is a matter of how states and other actors engage with them in using them for guidance. The authority of international law is not something that can be explained by seeking its origins or sources. Rather, it is something that is strengthened or weakened each time international legal norms are used to justify or criticise conduct, shape relations, or structure the complexity of the global community of humankind. It is not given but constantly reconstructed.

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Academic summary

International law claims the authority to guide the conduct of states, international organisations, and various non-state actors, including individuals. This practically unequivocal and truistic idea, when seen from an analytical jurisprudential perspective, becomes rather puzzling on closer inspection. In the context of domestic legal systems, the authority of law is tightly linked to an intricate system of public institutions, officials, and governing bodies. It is they who claim the authority on behalf of the legal system they represent, and it is through their practices that the authority of law is typically ascertained. The standard jurisprudential image of the concept of authority, therefore, revolves around three theses that describe the special role formal institutions and officials play in the operation of legal systems. *The identity thesis* states that law's identity as a concept and phenomenon requires the existence of formal legal institutions such as courts, parliaments, governments, etc., since it is normally their practices that manifest the conventional standard of legality. What counts as law in a given community, has to do with certain official practices within which rules and principles are produced, applied, enforced, interpreted, etc. From here, *the agency thesis* construes the authority as a role, position, or function occupied by *somebody*, a natural or a legal person. The normal talk of authority involves pointing at agents who are empowered to guide people's conduct, be that in the official context of political or legal systems, or the less formalised contexts of everyday social interactions. Finally, *the hierarchy thesis* establishes that authority is a hierarchical relation between people, which in law typically manifests in the official/citizen duality.

None of these theses hold true for many areas of international law, or at least their applicability is significantly limited. The identification of international law is not

normally linked to any supra-national institutions (with rare exceptions such as EU law), its authoritative claim is seldom linked to any special agents and officials, and, following the principle of sovereign equality, there are no formal hierarchies in international law. This basic incompatibility of international law's normative and institutional structure with the standard view of authority causes many to doubt whether international law has or can claim any authority at all. One of the sceptical arguments about international law assumes that the absence of an overarching institutional infrastructure results in international law having little to no practical impact on what states and other actors do.

Instead of endorsing these doubts, chapter 1 of this thesis offers an alternative way of looking at the concept and phenomenon of the authority of law in order to bypass some of the conceptual difficulties identified. It suggests that while a domestic model of legal authority typically requires some form of institutional mediation in the creation, application, and enforcement of laws, this does not mean that such a model provides an exhaustive explanation of the authority of law. Institutional mediation is a common, but not a necessary ingredient of authority. One of the key claims of the thesis, then, is that the authority of law may come in mediated or in unmediated forms, with both related to the same function the law is supposed to perform. The authority of law is a manifestation of its impact on the practical deliberations of those to whom it applies. Legal norms are pre-emptive practical reasons in the sense that they replace or exclude certain primary reasons for action, making it inappropriate to invoke or rely on them directly. The more effective the law is in pre-empting such primary background reasons, the more authority it has, and vice versa. The standard account of authority implies that the pre-emptive function of legal norms requires the delegation of practical deliberations to specialised institutions such as courts, parliaments, etc. In international law, however, such a delegation rarely occurs even in the most robust institutional contexts. The argument of the thesis, therefore, is that the delegation of practical deliberation is not necessary for legal norms to have a pre-emptive capacity, and that their authority may be unmediated.

The thesis develops this argument along several lines.

Chapter 2 is dedicated to the authority of international courts as the most visible institutional anchors of the contemporary international legal order. It argues, however, that the basic *de jure/de facto* duality of authority, when applied to international courts, produces a different picture as compared to that seen domestically. The puzzle around the *de jure/de facto* duality of authority relates to the fundamental concern of how to ensure that those claiming the authority are justified in doing so. The assumption here, which is essential to the operation of political communities such as states, is that the *de facto* authority is seldom a matter of concern (except in rare circumstances such as failed states or revolutions), and it is its justification that requires scrutiny. However, in international law things are often reversed. Because international courts adjudicate on the basis of the principle of the consent of the states involved, their *de jure* authority is less of a question, and it is their *de facto* authority that becomes the central issue. Without being backed up by an overarching enforcement mechanism, international courts often suffer from compliance crises and the factual impact of their judgments on the reasoning of international actors may fluctuate. At the same time, there are no convincing accounts that would explain these fluctuations of the *de facto* authority of international courts. The thesis argues that judgments of international courts may be more or less successful in pre-emptive practical reasons, which in turn affect their lasting effect. Besides, there are often mismatches between the authoritative claims of judgments of international courts and the pre-emptive capacity of the norm they apply, in the sense that the courts attribute more or less weight to legal rules than is generally accepted. So their judgments can easily be dismissed as political or not rigorous. The authority of international courts thus depends on the authority of the international law they apply.

The next chapter looks into the normative structure of customary international law and its role in practical reasoning. The traditional two-element approach to norms of customary international law overlooks the nature and normative significance of practices. Practices are never inert, purely factual conglomerates of actions; if there is a practice, it always has a normative dimension. From the perspective of practical reasoning, state practices are normative in the sense that they accommodate or exclude

certain reasons states and other actors may have, thus rendering some actions and their justifications inappropriate or unacceptable. The unmediated authority of customary international law, then, is the direct manifestation of legal normativity in the international domain. This chapter also discusses several important implications that the practical reasoning perspective generates for interpretation of customary international law. In particular, it argues that interpretation is primarily concerned with tracing the fluctuations in the balance of reasons that customary norms represent. This makes the interpretation of customary international law different from other instances of legal interpretation, especially those that have textual anchors (such as treaties). Customary rules cannot be said to have an object and purpose, and for that reason their interpretation requires constant normative reconstructions.

Chapter 4 takes a closer look at the phenomenon and the process of the normative pre-emption that underlies the whole structure of the authority of international law. The principle of solidarity is taken as an example to demonstrate how moral and political values and principles enter legal normativity, and in what role. It has become increasingly common to argue that solidarity is a principle of international law, or even a *constitutional* or *foundational* one (together with sustainable development, democracy, the Rule of Law, etc.). In part, this is a result of a strong intellectual tradition of solidarism in international law, but it is also a consequence of viewing international legal normativity as giving direct effect to the underlying values which international law must embody or protect. This overlooks the function that legal norms perform. By pre-empting background moral and political considerations and taking their place, they allow to bypass the disagreements over these considerations. This means that as such solidarity can be a valid moral reason for action, yet in order to have an effect at the level of law, it must be replaced by legal norms. In an international legal order that truly embodies solidarity, any claims that directly refer to it are redundant, because there are norms to rely on. For this reason, solidarity is not and should not be regarded as a principle of international law and must remain what it is: a moral reason of assistance and mutual respect that international legal norms must be designed to pre-empt.

The final chapter of the thesis addresses the conceptual puzzle of the international rule of law, which has a direct relation to the concept of the authority of international law. Some of the key confusions that surround the idea of the international rule of law stem from the tendency of deducing its content from the Rule of Law known domestically. The domestic version of the Rule of Law was formed against the background of formal hierarchies and inequalities, as a device to mitigate the risks of authorities overstepping their legitimate powers. The domestic ideal of the Rule of Law, therefore, exists in the context of the mediated form of legal authority, where the power of the law is concentrated in, or flows exclusively through, formal institutions. International law, although it exists in a notoriously unequal political setup, does not recognise formal hierarchies between subjects of law and officials, except in rare circumstances (such as the United Nations Security Council resolutions adopted under the Chapter VII powers). It is therefore unclear what ideal the international rule of law embodies, whom it protects and against whose abuses. The chapter argues that in order to have an explanation of the international rule of law, we need to make a step back and link it to the idea of the authority of the law. Following Joseph Raz's influential account of the Rule of Law, the chapter argues that at the most fundamental level, the Rule of Law is a set of normative conditions that enable the law to claim authority over its subjects, regardless of whether it is mediated or not. However, while the mediated form of authority makes it a priority to secure the formal qualities and virtues of a legal order, the unmediated form of authority does not have such a prioritisation. This is exactly why in international law there is typically a trade-off between the formal qualities of rules and the substantive values and principles they represent, for such compromises increase the chances that the authority of international law overall is achieved.

By distinguishing between the mediated and unmediated forms of authority, and by analytically scrutinising the latter, the thesis shows that the authority of legal norms does not necessarily depend on their link to formal institutions and hierarchies. The authority of international law as a whole is not something to be added on top of existing

regimes but represents its factual strength that can be strengthened or weakened depending on how states and other actors engage with its norms.

Academische samenvatting

De gezagsaanspraken van internationaal recht zijn bij nader inzien raadselachtig. In de context van binnenlandse rechtsstelsels is het gezag van recht nauw verbonden met een ingewikkeld systeem van publieke instellingen, ambtenaren, en bestuursorganen. Deze actoren claimen hun gezag op grond van het rechtssysteem dat zij vertegenwoordigen. Het gezag van dat rechtssysteem wordt vastgesteld door de praktijken waarin deze actoren fungeren. Het rechtsfilosofische standaardbeeld van begrippen als ‘gezag’ en ‘autoriteit’ berust dan ook op drie thesen aangaande de speciale rol die formele instellingen en ambtenaren spelen in rechtssystemen. *De identiteitstheze* zegt dat recht als concept en als fenomeen het bestaan van formele rechtsinstellingen vereist zoals rechtsbanken, parlement, overheid, enz., want het is in hun praktijken dat het recht zich manifesteert. Wat telt als recht in een gemeenschap heeft te maken met bepaalde officiële praktijken waarbinnen regels en beginselen worden geproduceerd, toegepast, gehandhaafd, geïnterpreteerd, enz. *De agency-these* construeert het gezag als een rol, positie, of een functie van *iemand*, een natuurlijke persoon of een rechtspersoon. Gewoonlijk spreekt men over gezag door te wijzen op actoren die bevoegd zijn om het gedrag van mensen te sturen, ofwel in de officiële context van politieke of rechtssystemen of in de minder geformaliseerde contexten van alledaagse sociale interacties. Ten slotte stelt *de hiërarchiethese* dat gezag gebaseerd is op een hiërarchische relatie tussen mensen, die in het recht tot uiting komt in de verhouding tussen ambtenaar en burger.

Geen van deze thesen gelden voor het internationaal recht. Of in ieder geval is hun toepasbaarheid aanzienlijk beperkt. De identificatie van internationaal recht wordt niet gekoppeld aan supranationale instellingen (met zeldzame uitzonderingen zoals EU-recht); zijn gezagsaanspraak wordt zelden gekoppeld aan speciale actoren en

ambtenaren; en volgens het principe van soevereine gelijkheid bestaan er geen formele hiërarchieën in internationaal recht. Deze fundamentele onverenigbaarheid van de normatieve en institutionele structuur van internationaal recht met het standaardbeeld van gezag doet velen zich afvragen of het internationaal recht überhaupt wel enig gezag heeft. Een van de sceptische argumenten aangaande internationaal recht luidt dat de afwezigheid van een overkoepelende institutionele infrastructuur ertoe leidt dat internationaal recht weinig praktische impact heeft op wat staten en andere actoren doen.

In plaats van deze twijfels te onderschrijven, biedt hoofdstuk 1 van dit proefschrift een alternatieve manier om naar het concept en fenomeen van het gezag van het recht te kijken teneinde enkele van de geïdentificeerde conceptuele problemen te omzeilen.

Het suggereert dat hoewel een nationaal model van juridisch gezag doorgaans een vorm van institutionele bemiddeling vereist bij het creëren, toepassen en handhaven van recht, dit niet betekent dat een dergelijk model een uitputtende uitleg geeft van het gezag van recht. Institutionele bemiddeling is een gebruikelijk, maar geen noodzakelijk element van gezag. Een van de belangrijkste beweringen van het proefschrift is dat het gezag van het recht in (door actoren) bemiddelde vorm tot uiting kan komen, maar dat het *tevens* goed mogelijk is dat het zich op onbemiddelde directe wijze doet gelden zonder zijn functie te verliezen. Het gezag van recht doet zich dan gelden in de manier waarop het van invloed is op de praktische beraadslagingen van degenen op wie het van toepassing is. Rechtsnormen zijn tweede orde redenen die bepaalde eerste orde redenen op zo'n manier vervangen en overbodig maken dat het ongepast is om deze eerste orde redenen rechtstreeks aan te voeren. Dit is de zogenaamde 'pre-emptieve' functie van het recht. Hoe effectiever het recht deze pre-emptieve functie vervult, hoe meer gezag het heeft, en vice versa. In de standaardopvatting van gezag wordt ervan uitgegaan dat deze (*pre-emptieve*) functie van rechtsnormen alleen kan worden vervuld als de praktische beraadslagingen aan gespecialiseerde instellingen zoals rechtbanken, parlementen, enz. worden overgelaten of gedelegeerd. In het internationaal recht komt een dergelijke delegatie echter zelden voor, zelfs niet in de meest robuuste institutionele contexten. In

dit proefschrift wordt beargumenteerd dat een dergelijke delegatie van praktische beraadslaging niet nodig is om rechtsnormen toch een pre-emptieve functie toe te kennen; hun gezag kan zich doen gelden ook als ze niet wordt bemiddeld door instituties en actoren.

Dit argument wordt langs verschillende lijnen ontwikkeld.

Hoofdstuk 2 is gewijd aan het gezag van internationale rechtbanken als de meest zichtbare institutionele ankers van de hedendaagse internationale rechtsorde. Het stelt echter dat de fundamentele *de jure/de facto* dualiteit van gezag, toegepast op internationale rechtbanken, een ander beeld oplevert dan in nationale rechtssystemen. De puzzel rond de *de jure/de facto* dualiteit van gezag heeft betrekking op de fundamentele vraag hoe ervoor kan worden gezorgd dat degenen die gezag claimen daartoe gerechtigd zijn. In nationale rechtssystemen is het feitelijke gezag zelden een punt van zorg (behalve in zeldzame omstandigheden zoals in mislukte staten of tijdens revoluties). Daarentegen vereist de *rechtvaardiging* van dat gezag wel nader nauwkeurig onderzoek. In het internationaal recht liggen de zaken echter vaak omgekeerd. Omdat internationale rechtbanken oordelen op basis van het principe van de instemming van de betrokken staten, is hun *de jure* gezag minder een vraag en is hun *de facto* gezag juist het probleem. Zonder een overkoepelend handhavingsmechanisme hebben internationale rechtbanken vaak te maken met nalevingscrises en is de feitelijke impact van hun uitspraken op de redenering van internationale actoren wisselend. Tegelijkertijd zijn er geen overtuigende verklaringen voor deze fluctuaties van het *de facto* gezag van internationale rechtbanken. In het proefschrift wordt beargumenteerd dat uitspraken van internationale rechtbanken meer of minder succesvol kunnen zijn in hun pre-emptieve functie. En dit wisselende succes heeft invloed op de duurzaamheid van de impact van de uitspraken. Bovendien zijn er vaak *mismatches* tussen de gezaghebbende claims van uitspraken van internationale rechtbanken en het pre-emptieve vermogen van de norm die zij toepassen, in die zin dat de gerechtshoven een zwaardere of juist minder zwaardere gewicht toekennen aan rechtsregels- en verdragen dan algemeen geaccepteerd is waardoor de uitspraken gemakkelijk kunnen worden afgedaan als

politiek ingestoken. Het gezag van internationale rechtbanken hangt dus af van het gezag van het door hen toegepaste internationale recht.

Het volgende hoofdstuk gaat in op de normatieve structuur van het internationaal gewoonterecht en zijn rol in praktisch redeneren. De traditionele twee-elementen benadering van normen van internationaal gewoonterecht als combinatie van ‘state-practice’ en ‘*opinio juris*’ gaat voorbij aan de aard en de normatieve betekenis van praktijken. Praktijken zijn nooit inerte, puur feitelijke conglomeraten van handelingen; als er een praktijk is, heeft die altijd een normatieve dimensie. Vanuit het perspectief van praktisch redeneren zijn staatspraktijken normatief in de zin dat ze bepaalde redenen die staten en andere actoren kunnen hebben accommoderen of uitsluiten, waardoor sommige handelingen en hun rechtvaardigingen ongepast of onaanvaardbaar worden. Het onbemiddelde gezag van het internationaal gewoonterecht is dus de directe manifestatie van juridische normativiteit in het internationale domein. Dit hoofdstuk bespreekt ook enkele belangrijke implicaties die het praktisch redeneerperspectief genereert voor de interpretatie van internationaal gewoonterecht. In het bijzonder stelt het dat interpretatie in de eerste plaats betrekking heeft op het opsporen van de fluctuaties in de uiteindelijke afweging van redenen die de normen van het gewoonterecht vertegenwoordigen. Daardoor verschilt de interpretatie van het gewoonterecht wezenlijk van andere vormen van juridische interpretatie vooral als die zich kan beroepen op teksten, zoals verdragen. Van gewoonteregels kan niet worden gezegd dat ze een object en doel hebben, en daarom vereist hun interpretatie constante normatieve reconstructie.

Hoofdstuk 4 gaat nader in op het fenomeen en het proces van normatieve *pre-emption* dat ten grondslag ligt aan de hele structuur van het gezag van internationaal recht. Het solidariteitsbeginsel wordt als voorbeeld genomen om aan te tonen hoe morele en politieke waarden en principes de juridische normativiteit binnendringen, en welke rol ze daarbij vervullen. Het is steeds gebruikelijker geworden om te beweren dat solidariteit een beginsel van internationaal recht is, of zelfs een *grondwettelijk* of *fundamenteel* beginsel (samen met duurzame ontwikkeling, democratie, *the Rule of Law*, enz.). Dit is

deels een gevolg van een sterke intellectuele traditie van solidarism in internationaal recht, maar het is ook een gevolg van de opvatting dat internationale juridische normativiteit direct effect geeft aan de onderliggende waarden die internationaal recht moet belichamen of beschermen. Hiermee wordt voorbijgegaan aan de functie die rechtsnormen vervullen. De pre-emptieve functie van rechtsnormen maakt het mogelijk om morele en politieke achtergrondoverwegingen als het ware tijdelijk tussen haken te zetten. Rechtsnormen, als tweede orde redenen, nemen hun plaats in, waardoor conflicten tussen de verschillende eerste orde overwegingen omzeild kunnen worden. Dit betekent dat solidariteit een geldige morele reden voor het handelen kan zijn, maar door rechtsnormen moet worden vervangen wil het juridisch effect hebben. In een internationale rechtsorde die solidariteit belichaamt, zijn alle claims die er direct naar verwijzen overbodig, omdat er normen zijn om op te vertrouwen. Daarom is en mag solidariteit niet worden beschouwd als een beginsel van internationaal recht en moet het blijven wat het is: een morele reden van bijstand en wederzijds respect die door internationale rechtsnormen overbodig gemaakt moet worden.

Het laatste hoofdstuk van het proefschrift behandelt de conceptuele puzzel van de internationale *Rule of Law*, die direct gerelateerd is aan een het begrip van het gezag van internationaal recht. Enkele van de belangrijkste verwarringen rond het idee van de internationale *Rule of Law* komen voort uit de neiging om de inhoud ervan af te leiden uit het begrip van de *Rule of Law* dat figureert in het nationale recht. De nationale versie van *the Rule of Law* werd gevormd tegen de achtergrond van formele hiërarchieën en ongelijkheden. De Rule of Law verschijnt dan als een middel om het risico te verkleinen dat het gezag zijn wettelijke bevoegdheden zou overschrijden. Het nationale ideaal van *the Rule of Law* bestaat daarom in de context van de door actoren bemiddelde vorm van juridische gezag, waarbij de macht van de wet is geconcentreerd in, of uitsluitend stroomt door, formele instellingen. De *Rule of Law* verschijnt hier in de eerste plaats als *rechtsstaat*. Hoewel het internationaal recht functioneert in een notoir ongelijk politiek landschap, erkent het geen formele hiërarchieën tussen rechtssubjecten en ambtenaren, behalve in zeldzame omstandigheden (zoals de resoluties van de VN-Veiligheidsraad die

zijn aangenomen onder de bevoegdheden van Hoofdstuk VII van het VN-Handvest). Het is daarom onduidelijk welk ideaal de internationale *Rule of Law* belichaamt, wie het beschermt en tegen wiens misbruik. Het hoofdstuk stelt dat om een verklaring te hebben voor de internationale *Rule of Law*, we een stap terug moeten doen en deze moeten koppelen aan het idee van het gezag van het recht. In navolging van Joseph Raz' invloedrijke uiteenzetting van *the Rule of Law*, betoogt het hoofdstuk dat de *Rule of Law* op het meest fundamentele niveau uit een reeks normatieve voorwaarden bestaat waardoor het recht in staat gesteld wordt gezag over zijn onderdanen op te eisen, ongeacht of dit gezag al dan niet wordt bemiddeld door instituties en actoren. Echter, terwijl het voor een bemiddelde vorm van gezag een prioriteit is om de formele kwaliteiten en deugden van een rechtsorde te waarborgen, kent de onbemiddelde vorm van gezag een dergelijke voorrang niet. Dit is precies de reden waarom er in het internationaal recht typisch een afweging is tussen de formele kwaliteiten van regels en de materiële waarden en principes die ze vertegenwoordigen, want dergelijke compromissen vergroten de kans dat het gezag van het internationale recht in het algemeen wordt vergroot.

Door onderscheid te maken tussen bemiddelde en onbemiddelde vormen van gezag, en door de laatste analytisch te onderzoeken, laat het proefschrift zien dat het gezag van rechtsnormen niet noodzakelijkerwijs afhankelijk is van hun verband met formele instellingen en hiërarchieën. Het gezag van het internationaal recht als geheel is niet iets dat moet worden toegevoegd aan bestaande regimes, maar vertegenwoordigt zijn feitelijke kracht die kan worden versterkt of verzwakt, afhankelijk van hoe staten en andere actoren omgaan met zijn normen.