

# Semantic Authority, Legal Change and the Dynamics of International Law

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## 1. Introduction

The Achilles' heel of international legal doctrine is its static view of international law. That static view is the product of a two-fold mythical imagery. First, lawmaking is pictured to be a matter of sources. The law springs from dark and hidden places into daylight in a single act of natural production. At the same time, second, depictions of interpretations of the law downstream suggest that they dig out law's meaning as it lies within that stream of legal norms, or just hidden below its surface. The finesse of doctrine further distinguishes between, on the one hand, applying the law where it is clear for everyone to see and, on the other hand, acts of interpretation where the waters are muddy. The act of interpretation looks like an act of archaeology, of recovery rather than creation.

Of course there are many exceptions to such a static view of international law, which confines the creation of law to that one time act when, at its source, the law sees the light of day. In present international legal theory the understanding is indeed rare that interpretations recover the law that is already out there, ready to be used in everyday practice. The jurisgenerative, lawmaking side of such practice is readily recognized. But that recognition is only the beginning. It continues to stir controversies that branch out into sets of normative, sociological, and doctrinal questions.

In the present contribution, I wish to further develop the concept of semantic authority in response to the recognition that a variety of actors, who typically find no place in the received doctrine of legal sources, do impact the dynamic development of international law through their practice. I build on an understanding of semantic authority as actors' capacity to find recognition for their claims about international

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law and to establish reference points for legal discourse that others can hardly escape. The concept, I submit, first has the potential of capturing sociological insights on the influence of specific actors within international legal discourse. Second, it does not immediately elevate those actors' output to the status of sources of law. It does thus not immediately convey a normative judgment or confer a blessing. Rather, it (re-)directs attention and guides normative inquiry. The understanding of authority here is one that stands in the tradition of public authority, *öffentliche Gewalt* or *puissance publique*—authority as capacity and constraint, not as a normative reason for action.<sup>1</sup> At the same time, the choice is for the concept of authority, rather than power or violence—authority as a capacity or constraint that enjoys and requires legitimacy. The present contribution's primary ambition, in other words, is thus to offer sociological reflection, not the least so as to support normative inquiry into the legitimacy of international lawmaking.

The notion of semantic authority highlights the dynamics of international law against the backdrop of an otherwise largely static picture. It adds dynamism because it is attuned to thinking of international law as a communicative and creative practice in which actors struggle for the law and thus shape the law (see already Cover 1983). Moreover, semantic authority not only sets international law into motion but is itself a product of shifting dynamics. At its core, it is sustained by a social expectation that anyone making a legal claim within a certain domain needs to refer to the statements of the actor with semantic authority. Such authority is the product of dynamics in which one actor might evoke it and another cannot get away from it. Thanks to the move from sources to communicative practice, and from rules that allocate legal competences towards shifting semantic authority, international law appears in a much more dynamic and more realistic light. All of this becomes clearer in view of a brief set of examples that explains the scenery of semantic authority and dynamic international law (2.).

In what follows, the present contribution develops and supports the thesis that international law is best understood as the product of a communicative process in which different actors with varying degrees of semantic authority struggle for the law. For that purpose, it reviews in a summary fashion the shift from sources towards communicative practices and highlights how existing approaches in this vein have understood legal change. It argues for a conception of lawmaking in communicative practice that transcends divides between actor-centred and structural approaches. It is precisely the relationship between actors and their strategic environment that contains within itself the dynamics for change (3.). Moving on from the shift towards lawmaking in communicative practice, the present contribution zooms in on the dynamic construction of authority, focusing on how it is produced in legal discourse. The argument continues to be embedded in an understanding of lawmaking in communicative practice and thus focuses from among the many factors that shape

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<sup>1</sup> See the research project on international public authority, anchored at the Max Planck Institute for Comparative Public Law and International Law: <<http://www.mpil.de/red/ipa>> (last accessed: 20 April 2015).

authority on those that connect to the language of international law itself. How does that language sustain the authority that contributes to its change? (4.) The conclusions move from these points of sociological reflection to the normative implications. They clarify how exactly the next steps are steps with a normative purport and which directions they might take (5.).

## **2. An exemplary, scenic overview**

A number of contemporary theories approach international law with a shift in emphasis from the sources of law towards the communicative practices in which a plethora of actors use, claim and speak international law. The scenery is not that of legal sources and the state actors, which the received wisdom of sources doctrine places into the limelight. The scenery is characterized by a notable increase in forms of law, in the nature legal instrument, and in the scope of relevant actors. A brief set of examples may clarify. To first illustrate why thinking about international law has moved from sources to communicative practices, one may consider the distinction between ‘combatants’ and ‘civilians’, which lies at the core of international humanitarian law and which appears, among other places, in many different provisions of the 1949 Geneva Conventions. The plain proposition is that, in order to ‘know the law’ it is necessary to ask what it means to be a ‘combatant’ or a ‘civilian’. That answer cannot be gleaned from the text itself and cannot be found anywhere but in legal practice. Their meaning does not lie underneath the textual surface of the Geneva Conventions, but is instead the product of communicative practices that use these terms.<sup>2</sup> And these practices are not limited to state representatives who sign international treaties, but they include the opinions of military advisers, case law from domestic courts, the jurisprudence of international (criminal) courts and tribunals, statements of the International Committee of the Red Cross (ICRC), interventions by Non-Governmental Organizations (NGOs) such as Human Rights Watch, as well as the arguments of prominent legal scholars (Venzke 2009).

The extent to which any of those actors contribute to the making of international (humanitarian) law by shaping what either ‘combatant’ or ‘civilian’ means depends on their semantic authority—their capacity to establish reference points for legal discourse that other actors can hardly escape. Whether they enjoy such authority, and to which degree they enjoy it, in turn depends on factors that may still be conveniently grouped in the classic tripartite division of any authority’s legitimacy bases. Legitimacy bases connect to (legal) rationality, tradition, or personal and institutional esteem (Weber 1978, 36-8). Semantic authority, like the law that it shapes, is a product of struggle. It is clear to see how actors try their best to nourish their own authority, sustain the authority of likeminded actors and aim at destabilizing the authority of others. Not only the law shifts with communicative practice. Semantic

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<sup>2</sup> The deeper theoretical underpinnings are those of the linguistic turn, developments in hermeneutics and semantic pragmatism, most of which follows on the heels of Ludwig Wittgenstein’s resonating observation that ‘the meaning of a word is its use in language’ (Wittgenstein 1958, para 43).

authority is negotiated simultaneously. Jean Combacau and Serge Sur write lucidly in their general treatise on international law:

Les controverses relatives à l'interprétation ne seraient pas si vives si elles ne traduisaient pas une lutte pour la maîtrise du système juridique, qui fait du processus interprétatif une variante de la lutte pour le droit. (Combacau and Serge Sur 2010, 172.)<sup>3</sup>

Semantic authority rests on a belief that needs to be fought for and gained. Military advisors might thus embolden or seek to undermine the ICRC. The ICRC relies on, and lends authority to, domestic court decisions. Scholars rely on all of that and are, in turn, relied upon. Those interactions shape the law and negotiate semantic authority.

As further examples from the scenery of dynamic international law, a couple of specific cases from international trade law are illustrative. When China joined the World Trade Organization (WTO) in 2001, it made, among other things, a commitment to liberalizing trade in 'sound recording distribution services'. Does this commitment also extend to distribution by electronic means? A panel found that it did. On appeal, China argued that the scope of its commitments could not simply increase due to 'temporal variations in language'.<sup>4</sup> The Appellate Body disagreed and held that the terms—'sound recording distribution services'—were 'sufficiently generic that what they apply to may change over time'.<sup>5</sup> The Appellate Body decided a concrete case *inter partes*, but its interpretation will carry onwards and instruct future practices.<sup>6</sup>

It is next to impossible to understand international trade law were it not through the thicket of case law. Struggles over how earlier decisions are to be interpreted oftentimes gloss over the treaty language that is formalistically supposed to carry the weight of the judgement. It is in this vein, for instance, that the treaty language on justifying trade restrictions because they 'relate to' the conservation of exhaustible natural resources has largely been forgotten in the sense that the legal discourse has come to turn on whether such measures 'are primarily aimed at' that objective.<sup>7</sup> The term 'exhaustible natural resources', in turn, is shaped by the Appellate Body with reference to many international legal instruments so as to support an evolutionary interpretation.<sup>8</sup> The Appellate Body thus shaped the meaning of this treaty term and it established new reference points for legal discourse.

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3 'The controversies of interpretation would not be so lively if they did not translate into a battle for the mastery over the legal system, which turns the interpretative process into a variation of the battle for the law' (my translation).

4 Appellate Body Report, *China—Publications and Audiovisual Products*, WT/DS363/AB/R, 21 December 2009, para 47.

5 *Ibid.*, para 396.

6 According to the Appellate Body, its reports create 'legitimate expectations' among WTO members so that panels are expected to follow its precedents. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8, 10 & 11/AB/R, 4 October 1996, p. 14.

7 Appellate Body Report, *US—Shrimp*, WT/DS48/ABR, 12 Oct. 1998, para 136.

8 *Ibid.*, para 130.

### 3. Lawmaking in communicative practice

In what follows, I will proceed by briefly discussing two prominent angles from which the communicative practice of international lawmaking has been approached.<sup>9</sup> The first is actor-centred and includes the legacies of legal realism, the New Haven School and its progeny (A.). The second one is centred on structures and comes in the form of systems theory (B.). In their outlooks, the static image of international law has certainly been set into motion. But they have one-sidedly emphasized either the choice and impact of the actor to the detriment of legal structures or, conversely, lost all sight of any specific actor in communicative lawmaking. Their summary discussion paves the way towards developing an understanding of semantic authority that purports to transcend that divide (C.).

#### 3.1. The impetus of actors

Early American realists already articulated a view of law not as rules but as process, not as 'law in the books' but as 'law in action' (Pound 1910). Holmes' emphasis on prophecies about what courts do already goes a long way towards understanding lawmaking in a communicative perspective where some actors—courts, in the context of Holmes' argument—are more powerful than others (Holmes 1897). The agenda was precisely to shift attention from sources and rules to practice and process.

Taking their cues from early realists, the founding fathers of the New Haven School of international law were, first of all, most outspoken about its disdain for thinking of international law in terms of formal sources. They foreshadowed theoretical developments that are attuned to how law changes through practice. International law, Myres McDougal already found, should be 'regarded not as mere rules but as a whole *process* of authoritative decisions in the world arena' (McDougal 1960, 169). He and his colleagues spelled out a view on international law with a substantive overarching morality towards which all efforts should be directed, the protection of human dignity (McDougal 1954). The view was decidedly functionalist. International law should be practiced so as to serve that end.

Michael Reisman takes the view further in his seminal article 'International Lawmaking: A Process of Communication'. He argues that scholarly teachings and judgments had setup a myth—the myth that international law could be found by looking at what Art. 38 ICJ Statute claims to be the sources of all law (Reisman 1981). The model of positivism, he contends, is distorting precisely because it holds that law is made by the legislator. He maintains instead that international law emerges from the myriad of legal communications that a plethora of actors utter every day. Given that the international legal process is no longer dominated by governments alone, Reisman further finds that newly generated legal norms can conflict with norms that others might find with a formalist look at traditional sources of the law. His process-oriented view of international law transcends formalism and claims to be

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<sup>9</sup> Here I draw on I. Venzke, *How Interpretation Makes International Law* (OUP 2012) 29-37.

in a position of granting humanitarian concerns, voiced by a wide range of actors in international political discourse, a legal status even if they conflict with norms that have a formal pedigree in the sources of law (see Bernstorff and Venzke 2010). Humanitarianism is construed as a social fact. It amounts to a point of reference for normative judgment and for legal argument with a certain distance to positive legal provisions that might be spelled out in the UN Charter, for instance (Reisman 2000). It is clear to see in this approach the recognition of communicative lawmaking that unfolds under the spell of a plethora of different actors.

The theory of transnational legal process (TLP), a spin-off from New Haven, borrows the concept of jurisgenesis from the work of Robert Cover to look at the law-generating interactions among a multitude of actors (Koh 1996). Yet it does not share the earlier New Haven School's conviction in an overarching end of human dignity that can offer guidance. Paul Schiff Berman's approach sands in this tradition, focusing on the contestation among interpretative communities that 'do create law and do give meaning to law through their narratives and precepts' (Berman 2007; quoting Cover 1983, 40). This opens the door towards sketching law in numerous co-existing, competing, and overlapping normative universes. Cover did not himself engage in debates of legal pluralism but his work certainly lends itself in support of pluralist conceptions of law when he writes that 'all collective behavior entailing systematic understandings of our commitments to future worlds [can lay] equal claim to the word "law"' (Cover 1985, 181). Law is not tied to recognized sources but emerges from social interaction among a variety of actors, including multinational corporations, non-governmental organizations, international organizations, terrorist networks, media and, in special circumstances, individuals. There is no centralized process of lawmaking or a single unified body of international law. Instead there are multiple normative communities, which generate their own legal norms. The grand picture is one of global legal pluralism (Berman 2014).

### **3.2. Logics of legal argument**

The theoretical framework of systems theory paints a quite similar picture of law-making in communicative processes. It takes many of its cues from Eugen Ehrlich, one of the founding figures in sociological jurisprudence who inspired the free law movement on which also American legal realism relied. Ehrlich already opined in 1903 that '[t]he modern dogmatic legal science, which is inclined to first investigate the intention of the legislature with regard to any legal norm, has never considered sufficiently that the meaning that the law actually gains in life depends much more on its interpretation and on the persons who are called upon to deal with it' (Ehrlich 1903, my translation). Systems theory then sets itself apart from policy-oriented jurisprudence à la New Haven by remaining bound to understanding legal practice as a distinct enterprise that cannot be reduced to the exercise of power, to the pursuit of values, to the expression of culture. It recognizes that speaking the language of the law compels actors to use a certain code of legality. It critiques external perspectives on legal practice for reducing that practice to the logics of other systems such as the

political, economic, or cultural systems. Legal practice, in its view, then becomes indistinguishable—for instance, politics by other means (Fischer-Lescano and Liste 2005).

According to systems theory, law is an autopoietic subsystem of society that encompasses all communications containing claims about (il)legality (Luhmann 2004). Autopoiesis roughly means self-reproduction and Niklas Luhmann introduced the concept in order to grasp the features of social systems as well as to suggest that communications within any single system can only operate by reference to communications of that same system—legal claims have to refer to legal claims in order to be valid legal claims. The test for knowing what amounts to a valid claim in (international) law cannot be based on an idea of sources or on pedigree. It must refer to legal practice itself (Luhmann 2004, 128).

### **3.3. Dynamic developments**

#### **3.3.1. Actors in the law**

Critiques of policy-oriented jurisprudence à la New Haven have centred, among other things, on its difficulty, or unwillingness, to account for law as a genuine field of practice—as a field of practice that is structured by demands of action unlike that of politics, economics, or morality, for instance. The critique is that making a legal claim, even vesting policy preferences in the mantle of the law, faces constraints that come with the choice for the language of law. That language has argumentative traditions, standards of validity, demands of practice that render some claims more likely of being accepted than others. Some claims might be impossible to be made at all or, if made, sound ridiculous or plainly wrong. Systems theory takes that critique on board and abstracts from any specific actor and interest that might be expressed in legal interpretations. Instead it looks at communicative operations whose writers or speakers remain in the dark.

When it comes to the dynamics of international law, views in the tradition of legal realism and the New Haven school bring in the dynamism through an emphasis on the actors in processes of continuous decision-making. Systems theory, on the other hand, sees dynamism through the lens of evolution. The law adapts in an evolutionary fashion to changes in its environment. Actors and policies cannot bear on the law in any direct fashion. But the process is one of natural selection according to the logic of the law. Luhmann thus goes to great lengths to formulate a theory of legal evolution. He thus replaces the mystique of sources with yet another metaphor that is no less opaque and that no less distances the law from human action.<sup>10</sup>

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<sup>10</sup> Luhmann duly notes that thinking of legal change in terms of evolution only makes good sense if the legal system is operationally closed; that is, political operations do not have an immediate impact on legal communications (Luhmann 2004, 230).

### 3.3.2. Evolutionary change

Other approaches to international law and practice support an understanding of legal dynamics in evolutionary terms. Even Hans Kelsen opted for this imagery and developed an evolutionary theory of international law, which was based on his idea of a ‘biogenetic law’ (Kelsen 1942, 148-9). Scholarly literature generally offers many spirited uses of the concept of evolution just as well.<sup>11</sup> In judicial practice, it is above all the European Court of Human Rights that has embraced the notion of ‘evolutive interpretation’ as a common *topos* in its judgments (Bjorge 2014). The ICJ has likewise, though with less frequency or enthusiasm, spoken about the evolution of international law.<sup>12</sup> And the WTO Appellate Body has found, it may be reminded, that the expression ‘exhaustibly natural resources’ is ‘by definition, evolutionary’.<sup>13</sup> In short, it is rather common to understand developments in law and language as evolution.

Linguistic theory also seems to support such an understanding of legal change. Language change, according to linguist Rudi Keller, is the unintended by-product of a myriad of intentional actions (Keller 2003, 93). But for an evolutionary explanation to be adequate, he notes, three conditions have to be met: the process must not be analysed in light of a given goal (this precludes any talk of evolution towards something), it must be a cumulative process involving numerous individuals and knowing no single author, and the dynamics of the process must be based on a combination of variation and selection. This fits well with central tenets of systems theory. However, Keller is enormously cautious and notes with reference to his colleague Eugeniu Coșeriu that human sciences will eventually have to find their own concept to replace the concept of evolution in order to explain legal dynamics (Coșeriu 1974, 154). Coșeriu notably warned that nothing could impact language that does not pass through the speakers’ freedom and intelligence (Ibid., 169). He thus brings intention and will back into the equation.

### 3.3.3. Change through practice

Competition between agency-centred and structural explanations flares up again in the discussion of the concept of evolution. Sure enough, no single interpretation can by and for itself be transformative—claims to the law need to find acceptance within a community of interpreters. The concept of evolution highlights environmental (structural) conditions that drive selection processes and impact particular

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11 From among the many examples see: Bates 2010, Schrijver 2008, Kolb 2007; Anghie 2006; Benvenuti 2005.

12 *Aegean Sea Continental Shelf (Greece v. Turkey)*, 19 December 1978, (1978) ICJ Reports 3, para 77); *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 13 July 2009, para 65. Also compare the *dictum* in *Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, (1971) ICJ Reports 16, para 53.

13 Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Like Products*, WT/DS58/AB/R, 6 November 1998, paras 127-131.

interpretations' chances of success. Yet, with this focus, it blends out any bearing of particular actors on those same conditions. In legal interpretation, actors engage in struggle for the law with the decided interest of finding acceptance for their claims. They seek to influence what is considered (il)legal. Some actors possess immense resources that they are willing to put to use in those semantic struggles. Like any language, the language of international law is a social, not a natural product (Bourdieu 1999). While the concept of evolution recalls that no single act of interpretation generates meaning, it unduly abstracts from the capacities of specific actors and from the politics that are at work within processes of change (see already Jhering 1915, 65-70).

With regard to understanding legal dynamics in terms of evolution, Max Weber's astute insight continues to be pertinent. Writing about legal change by way of changes in consensual meaning, he observed that 'the mere *change of external conditions* is neither sufficient nor necessary to explain the changes in "consensual understandings". The really decisive element has always been *a new line of conduct* which then results either in a change of the meaning of existing rules of law or in the creation of new rules of law' (Weber 1978, 755). It continues to be a lasting task for international legal theory to develop an account of legal change and lawmaking that captures legal interpretation as a distinct enterprise that is not reduced to politics, morality, or culture, on the one hand, and that maintains a grasp on those actual lines of conduct, on the other. I suggest that a renewed conception of practice helps to meet that challenge.

Whereas the concept of practice used to be closely linked to strong structuralist positions, Maurice Merleau-Ponty brought life and agency into it (Merleau-Ponty 1973). He conceived practice as historically situated speaking, thinking, and acting. Practice was not the embodiment of (material) structures but the acting of *living* persons. Pierre Bourdieu was then still more blunt in his critique of structuralist abstractions from agency: they blunder into the trap of equating what they see as objective observation (unburdened with dealings of living persons) with the view that actors themselves have of their practice. Social actors tend to be ignored where they should rather be included as a constitutive element of the social world (Bourdieu 1987a; in further detail Dezalay and Madsen 2012). On the contrary, however, only taking account of actors' practice without any critical detachment and understanding for structural predispositions would fall for an unbroken subjectivism. Sociological insight would be impossible. In other words, factors that explain a person's behaviour (her claims about international law) should not be equated with the reasons for action that actors themselves see or make explicit (Bourdieu 1977).

Understanding international law as a practice has its eyes on the actors who struggle for the law to pull it onto their side (Koskeniemi 1999, 523). And it keeps in mind the fact that the struggle is one that takes place within a structured context—a strategic environment that is international law. It is a commonplace that such structural conditions for the semantic struggle can amount to a constraint while being a product of that same struggle. What is the product of a collective

process that stretches over time does not bow to the whim of any single actor or to the input of any single instance. And yet, gradual change still depends on ‘new lines of conduct’, on the actors that carry it along.

It is noteworthy that few approaches to international law take this step towards articulating how the law relates to its lawyers, how the strategic environment relates to the people who live in it. Few approaches take seriously the idea that at least in sociology is a well-received suggestion: Actors and structures are co-constitutive, one cannot do without the other. Structures live through actors and actors are shaped by structures (Giddens 1979). When it comes to international law, that co-constitution contains within itself the forces of dynamism. If that is so, then the received terminology of co-constitution might turn out to stand in the way. It suggests the ordered settlement of a constitution. It suggests closure. But the relationship between the structure of the law and the people that inhabit it, who use it and shape it, that relationship is not settled. It is unstable and dynamic. Of course a constitution can and should be thought of as a living thing. But it might be better, still, to drop that terminology and to think of the relationship between international law and its lawyers as antagonistic symbiosis.

The concept of semantic authority not only builds on the idea of communicative lawmaking to stay attuned to the dynamics of international law and to capture the authority of specific actors, it also emphasizes that this authority is one that largely depends on how an actor’s claim about international law links up with that language of international law. In other words, from the myriad of factors that shape, tug, and pull on any specific actor’s authority, it focuses on those elements of authority that lie on the level of communication. Many different factors certainly sustain an actor’s capacity to find recognition for claims about international law and to establish reference points for legal discourse. They range from the appearance of rationality, via such things as the use of wise words, to having been right in the past.<sup>14</sup> They include such things as having the right pedigree of education, having practiced in the right places, or having a sufficiently prestigious university affiliation (Bourdieu 1992, 171-182). For institutional and state actors, the size of GDP or military prowess may be considered. All of that matters to varying degrees for an actor’s semantic authority. In the following I wish to focus on those elements that lie on the level of communication only: How does (the language of) international law sustain the authority that changes it?

#### **4. Semantic authority**

Semantic authority is a specific form of power. It is one that is generally carried by a social expectation—an expectation, namely, that one should at least refer to and deal with an actor’s claim in international legal discourse. To pick up the introductory example of the Appellate Body, it enjoys semantic authority international trade law because every actor who makes a claim is expected to do so in close engagement with

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<sup>14</sup> For a reconstruction of sources of authority in the International Court of Justice see Hernandez 2014.

its earlier decisions. That expectation is something that the Appellate Body itself can foster, for instance by giving its reports strong precedential force. Its authority also leans on common sentiments such as that like cases are decided alike. It is further an authority that is linked up with incentive structures such as winning a case and to thus choose a litigation strategy that is likely to be successful (i.e. vest claims in the Appellate Body's preferred hermeneutics, picking up its earlier decisions and hints, spinning them rather than suggesting that they were wrong, etc.).

This section focuses on how the language of international law feeds and possibly sustains actors' semantic authority—that authority which changes and makes that same international law. It might first be suggested that semantic authority is a specific form of persuasive authority, but that notion fails to convince, as it offers no account of what authority might mean if it needs to be persuasive. Similarly, it cannot be that an actor enjoys semantic authority because it is in some sense right, unless the assessment of rightness receives a thorough pragmatic twist (1.). Notably, the language of international law allows semantic authority to hide—as a matter of fact, it is at its strongest when it is not recognized (2.). Strategies of how actors can effectively hide and what ultimately sustains their authority are social expectations within specific communities (3.).

#### 4.1. Persuasive authority?

It might be suggested that claims to the law are authoritative because they are persuasive. When discussing the role of judicial precedents, for example, quite a number of international courts and tribunals are happy to say that earlier decisions have persuasive authority: they should be taken into consideration to the extent that they are convincing.<sup>15</sup> In the *dictum* of the Permanent Court of International Justice, earlier decisions should be taken into account if '[t]he Court sees no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound'.<sup>16</sup> When it comes to domestic courts and their treatment of claims to international law, they likewise resort to such views. Examples include the treatment of legal instruments of the United Nations High Commissioner for Refugees (UNHCR)—its Guidelines of Refugee Protection, for instance. They are taken into account, according to the reasoning of the judges, because they are persuasive (with references to domestic court practice see Venzke 2012, 117-132).

While widespread, such reasoning is ambiguous, at best. Above all, it remains utterly unclear what authority means in instances where it relies on persuasion. The notion of persuasive authority stands at odds with the strong argument that authority needs to be distinguished not only from coercion, but also from persuasion. It is in

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15 See, e.g., *ADC Affiliate Limited and ADC and ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para 293.

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

this regard that Hannah Arendt wrote sweepingly that '[w]here arguments are used, authority is left in abeyance' (Arendt 2006, 92). H.L.A. Hart translated this aspect of authority into legal scholarship with the notion of content-independent reasons—reasons, namely, which derive from the intention of the person or institution having authority and not from an assessment of their contents (Hart 1983, 254). If authorities had to persuade and convince in order to be taken into consideration, they would cease to be authorities. It is a constitutive feature of authority that it persists even in the absence of agreement.

Ideas on persuasive authority seem to be at their strongest in comparative law and with regard to the use of foreign judicial decisions arguably providing a repository of good reasons (Glenn 1987). But the notion fails to offer an answer as to what authority might mean if arguments were simply persuasive. The notion is theoretically weak (see Schauer 2008). More generally, it reflects the struggle of legal doctrine to come to terms with the use of ubiquitous 'authorities' that enjoy normative force even if they are non-binding and do not square with the orthodox ordering of sources doctrine. Alas, the concept of persuasive authority does not offer the easy way out of this quandary that some authors wish it did (Torrance 2011). Similarly, it is not helpful to think of an actor's semantic authority as leaning on the rightness of specific claims, unless the assessment of rightness receives a pragmatic twist as I will continue to argue below (subsection 4.3). All actors in the struggle for the law might claim that they are right. To present claims in international law as the right ones is simply the currency of the game (Peat and Windsor 2015; Bianchi 2015; Venzke 2015). The law provides the battleground for competing claims about what is a right interpretation but it does not itself give away the answer.

#### 4.2. Subservient authority

The language of international law allows actors to hide. It allows them to present themselves not as authorities at all, but as a handmaiden of other authorities. An actor's authority in contributing to the communicative making of international law seems most solid, in fact, if it is not recognized as such.<sup>17</sup> It is fragile if exposed. In the struggle for international law, the prevailing sentiment that distributes authority continues to be legalism flanked by formalism—the belief that rightness is a matter of following the rules of the law (seminally Shklar 1964). To be influential, the actor needs to hide. Or in the words of Kevin Spacey in *Usual Suspects*, 'The greatest trick the Devil ever pulled was convincing the world he didn't exist.'<sup>18</sup> The language of the law allows actors' to do precisely that, to hide. As Bourdieu observed:

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17 Shai Dothan offers the alternative, largely complementary account, of how a court can build up authority by visibly getting away with interpretations that are recognized as expansive, see Dothan 2015.

18 Paraphrasing Charles Baudelaire, in the *The Generous Gambler*: 'My dear brethren, do not ever forget, when you hear the progress of lights praised, that the loveliest trick of the Devil is to persuade you that he does not exist!'

[t]he ritual that is designed to intensify the authority of the act of interpretation [. . .] adds to the collective work of sublimation designed to attest that the decision expresses not the will or the world-view of the judge but the will of the law or the legislature (*voluntas legis* or *legislatoris*). (Bourdieu 1987, 828.)

In the language of international law, participants in the legal discourse would typically point to treaties or customary international law as the basis for their claims. As the scenery of dynamic international law has suggested, there might be other reference points such international judicial decisions or other instruments of international institutions. Even if judicial decisions have built up a body of case law that largely glosses over the treaty texts, they took off on precisely that basis. There are notable exceptions, however. In some instances, claims were not at all supported by the will of the law or the legislature but by references to substantive justice or to community values. A noteworthy example may be one of the first decisions of ITLOS, in which it assumed jurisdiction ‘in the interest of justice’.<sup>19</sup>

In any event, actors in the communicative practice of international law present themselves as subservient to other masters or ends: the law, state governments, the world community, or justice, above all. The law rules, not the actors who are bound by it. If the law runs out in its rule, so to speak, then other resources step up, such as the parties’ intention, or justice. The variety of the masters or ends, which actors may invoke, is reflected in the way they speak and craft their claims. A sociolinguistic approach to legal reasoning is instructive in this regard. It helps to understanding how actors seek semantic authority by speaking in a way that resonates with relevant peers, how it resonates with audiences (Baum 2006). The point is to not understand claims within the international legal discourse as structured by a given language that is international law but as communicative practices in which actors gain authority by striking the right notes within their communities and, at the same time, perpetuate the underlying value and knowledge systems of those communities (Halliday 1978; Halliday and Hasan 1989).

### 4.3. Dynamics of expectations

Semantic authority is above all the product of discursive construction. It is crucial to appreciate authority as a product of discursive practices in a dynamic context that exceeds dyadic relationships picturing one actor in authority over another (Flathman 1980). What sustains the authority is not individual recognition in the specific case of its exercise, but its social recognition—a social belief in its legitimacy, which, as Luhmann already noted aptly, ‘does precisely not rest [...] on convictions for which one is personally responsible, but to the contrary on social climate’ (Luhmann 1983, 34). Shared beliefs are constitutive of authority, and those shared underpinnings are shaped and upheld in discursive practices. In this sense, authority is based on ‘culturally and historically conditioned expectations’ (Lincoln 1991, 116).

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<sup>19</sup> ITLOS, *St. Vincent and the Grenadines v. Guinea*, No 2, Judgment on the Merits 1999, para 73.

The dynamic expectations that underpin any semantic authority hinge on many factors. Above all, it seems that they hinge on past practices. Being tied to the past, semantic authority might suggest everything but dynamism. But rather, it emphasises incremental processes of constructing authority. The use of precedents vividly illustrates this part of the argument (Jacob 2012). The WTO Appellate Body's authority *and* the development of international trade law received a push when the Appellate Body found that its earlier decisions 'create legitimate expectations [...] and, therefore, should be taken into account where they are relevant to any dispute'.<sup>20</sup> The fact that actors on the market place, public officials, and participants of the legal discourse generally shape their expectations and legal arguments around earlier decisions puts the Appellate Body into a position of authority.

What is more, the Appellate Body picks up on an apparent fact; namely that its reports create legitimate expectations. Actors already do converge around them and therefore it is only proper that panels take them into consideration. The consequence of this finding is, of course, that actors take them into consideration even more so. The Appellate Body finds further support for its position, adding yet more force to its precedents. It thus stressed 'the importance of consistency and stability' in interpretation, emphasized that its findings are clarifications of the law and, as such, are not limited to the specific case. When it critiqued a panel for failing to follow its earlier reports, it stated that it was 'deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system [. . .]'.<sup>21</sup> Similar patterns can be found to varying degrees within other judicial institutions just as well.<sup>22</sup>

A claim to the law only possibly amounts to an exercise of authority, as in the example of Appellate Body reports, if not everything can be made of it. It is powerful precisely because it redistributes argumentative burdens in the future. It is in this way that the authority hinges on the past. Any act of making law by way of creative interpretation amounts to a constraint in the future. Only if statements about the law carry content and constraint, only then can they reach into the future and make law. That constraint, semantic pragmatism suggests, stems from legal practice itself: authority in lawmaking is constrained and can constrain—is tied to the past and can reach into the future—because it is tied down by the future that looks back to see how any use relates to the past (cf. Brandom 1999).

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

21 Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (30 April 2008), paras 161-2; Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology* WT/DS350/AB/R (4 February 2009), paras 362-365.

22 ICTY, *Prosecutor v Aleksovski*, para 113; cf *Prosecutor v Kupreckic*, IT-95-16-T, Judgment, (14 January 2000), para 540. See Olsen and Toddington 2014. Similarly, ECtHR, *Ireland v United Kingdom*, Judgment of 18 January 1978, Series, A, No 25, para 154. For an overview see Bogdandy and Venzke 2013.

It may further be noted that the practical construction of semantic authority does not take place at the international level alone. When it comes to the claims of international institutions such as courts or tribunals, the way they are received on other, supranational or domestic levels of governance matters. First of all, domestic constitutional provisions that recognize the applicability of international law and, by extension, the use of international decisions that interpret it, might be read as express delegations of authority to international actors. But a lot again turns on interpretative practices, even in the case that the domestic legal order grants international decisions direct effect. Domestic cases relating to international decisions have precedential effects in domestic systems. If domestic courts for example hold other domestic actors to international commitments as interpreted by international institutions, they would certainly contribute to such international institutions' authority. Many domestic legal systems thus require under certain circumstances that domestic actors take international judicial decisions into account.

To offer but one prominent example from the field of human rights, the semantic authority of the European Court of Human Rights (ECtHR) received a boost when the German Federal Constitutional Court held that domestic fundamental guarantees need to be interpreted in light of its jurisprudence.<sup>23</sup> One reading of this example might suggest that the ECtHR's authority received a blow because its decisions were not given direct effect, nor were they otherwise determinative of the outcome (*in casu* whether the claimant was entitled to see and care for his son).<sup>24</sup> That is a matter of enforcement and compliance, and indirect effects can, in any event, go long ways. What concerns the development of international human rights law within the 'European public order', however, the obligation to take jurisprudence into account has far-reaching effects and notably does not only extend to cases to which Germany has been a party. The ECtHR's authority in shaping human rights law in Europe has thus increased.

In sum, semantic authority is not well understood along the traditional lines of a command that demands obedience. Rather, it connects to Roman law practices where the *auctoritas* of the Senate was distinguished from the *potestas* of the magistrates. While it did not impact the validity of the magistrate's acts if they went against the advice of the Senate or lacked the Senate's consent, such acts were without authority and politically frail. As Theodor Mommsen noted, '*auctoritas* was more than a piece of advice and less than a command—a piece of advice that cannot easily be disregarded' (Mommsen 2010, 1028; see further Eschenburg 1969).

## 5. Conclusions: towards normative implications

The present contribution has taken its start with the recognition that lawmaking unfolds in a communicative practice, which has set international lawmaking into motion. Recognizing the lawmaking side of using, speaking, and struggling for

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23 German Federal Constitutional Court, *Görgülü*, 2BvR 1481/04, 14 Oct. 2004.

24 *Ibid.*

international law, however, is only the beginning. Normative, sociological and doctrinal sets of questions follow. The present contribution has tried to understand communicative lawmaking as a practice and the view it has set out purports to transcend divergent approaches that either zoom in on policy-oriented actors and then lose a grip on the contextual constraints that come with speaking the language of international law, or that stay attuned to those constraints but blend out the actors in the process. Whereas the former would see actors and their preferences as origins of change and dynamism, the latter would abstract from those actors and understand change in terms of evolution. Conversely, understanding lawmaking and legal dynamics through the lens of communicative practice suggests that it is precisely the relationship between actors and their strategic environment that contains within itself the dynamics for change.

The concept of semantic authority attempts to capture those actors who are influential in processes of communicative lawmaking. The contribution's argument has continued to be embedded in an understanding of lawmaking in communicative practice as it draws out actors' semantic authority precisely in the way in which it connects to that international law which it shapes. It is by highlighting the dynamic construction of such authority that a second level of dynamism is introduced: the law is a product of practice, and so is the semantic authority of the actors that contribute to its making. Actors struggle for the law in the law and in interaction with other authorities, trying to undermine some and to support others.

The present contribution's ambition has primarily been one of sociological reflection to inform practice about itself. Ultimately, that serves a normative purpose. Normative considerations also clearly underpin sources doctrine: who should have what say in the making of international law? The concept of semantic authority purports to offer an anchor of normative inquiry in this sense. Who has what authority and is it well justified? It will not be enough to point out that semantic authority hinges on acceptance, that it is fragile, or that it needs to be gained and that it can be lost. Unlike instruments of violence, authority cannot be stored up and be kept in stock so as to be employed in cases of dwindling support (Arendt 1958, 200). It leans on a general social belief. But that is certainly insufficient for a normative justification of any authority (Bogdandy & Venzke 2014).

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