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Explaining Power and Authority in International Courts

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Explaining Power and Authority in International Courts

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Abstract:

It has recently been suggested that the study of international legal life should take an 'empirical turn': a turn which has often focused on how patterns of authority emerge and operate in relation to international courts. In what follows it is argued that this empiricism fails to distinguish (for the purposes of sociological inquiry) authority from various other concepts such as power or consensus in the study of international law and courts. This is because this method focuses only on overt signs, such as observable action or statements of intention. However, one solution to this problem, which is to collapse socially significant and distinct categories such as authority and consensus into a broad category of 'power', requires the adoption of an implausible and inconsistent view of agency in explanations of legal authority. By contrast, and in line with the long-standing interpretivist tradition in sociological and legal method, we claim that in order to interpret the observable signs of compliance to international legal rules and principles as indicative of authority, consensus, or power, it is necessary to interpolate an account of the reasons which give rise the compliance we observe. This, in turn, explains why international legal doctrine, as an axiological structure, gives rise to the behaviour of its addressees, such as state officials.

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> 'Awareness of the task of tracing concepts back to their subjective origins must be present in each step of defining the object. This applies to basic ideas, such as fact, event, thing, object, nature, not less than to psychological or sociological relations.'[1]

(A) Introduction

The great German sociologists of law of the late eighteenth and nineteenth century, along with American and Scandinavian Realists of the early twentieth century, repeatedly criticized traditional

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[1] M. Horkheimer, *Eclipse of Reason* (Oxford: Oxford University Press, 1947), 92

legal scholarship for being too aloof and not sufficiently tuned to 'the reality' of legal life. Their proposed cure was to turn to more empirical methodologies. In the study of international law, the Yale School, in the hands of McDougall and Laswell, were pioneers in this regard, although their ethically rich realism was far from being a simple form of empiricism.[2] The related New Legal Realism and Empirical Legal Studies movements[3] are the most recent attempts to place the study of law, and more recently international law, on an empirical footing. The aim of these movements is, in general, to achieve a level of objectivity about the reality of international legal life which, its proponents allege, is unattainable by the traditional method of applying the canons of legal reasoning to international legal doctrine.

This 'empirical turn' was a topic considered by this journal in 2015.[4] Here, some of the contributors to this special issue explained that fundamentally the 'turn' is not just to be understood as a useful addition to traditional scholarship: what is at stake is instead the very possibility of scientific objectivity in the study of international law. A good example of this point is found in the work of Holtermann and Madsen. They, perhaps more strongly than other empiricists,[5] claim repeatedly that if legal science is to be truly objective, it must be empirical, and they invoke some of the great masters of sociology in support of their method. This is how they summarize their 'European New Legal Realism':

[2] N. Duxbury, *Patterns of American Jurisprudence* (Oxford: Oxford University Press, 2003), chapter 3; and, P. Capps, *Human Dignity and the Foundations of International Law* (Oxford: Hart Publishing, 2009) chapter 4.
[3] For a survey of the literature, see M. Suchman and E. Mertz, 'Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism' (2010) 6 *Annual Review of Law and Social Science* 555–79. For a recent discussion of empirical legal studies, see G. Davies, 'The Relationship between Empirical Legal Studies and Doctrinal Legal Research' (2020) 2 *Erasmus Law Review*.
[4] See 2015 *Leiden Journal of International Law* published two issues which focused on this 'empirical turn' in international law. See, particularly, the articles by Holtermann and Madsen, Shaffer, Alexandra Huneus and Daniel Bodansky in issue 2 and comments by Augsburg, Klabbers, Shaffer and Holtermann and Madsen in issue 3.
[5] See Suchman and Mertz (note 1, above).

> 'We have in this analysis outlined a program for New Legal Realism using the insights of a series of key European thinkers seeking a rigorous empirical science of law. This line of inquiry and the kind of scientific aspirations it entails can be dated back to the early twentieth century and notably Max Weber's *Rechtssoziologie* and his search for objectivity in terms of a value-free social science. And in the context of early to mid-twentieth century European science, the turn to empirical studies seemed in many ways a logical consequence of that commitment as evidenced in the work of Ross. We locate a similar idea in the program for a rigorous legal science put forward by Bourdieu half a century later, and one, as we argue, that can link to both Weber and Ross. Bourdieu also offers [European New Legal Realism] something which is somewhat missing in both Ross and Weber, namely a set of research tools for realizing the program of a rigorous legal science. More concretely, he suggests an integrated analysis of the fabrication of [international law] and the conditions enabling its force.'[6]

This is an example of a broader tradition of legal realism which aligns 'itself more closely with the inclusive interdisciplinarity of the law-and-society movement, [which] has embraced multimethod eclecticism, and has emphasized the importance of sensitive translation between theory and observation, as well as between law and the social sciences.'[7] Suchman and Mertz describe the related Empirical Legal Studies movement, which has also been picked up by international legal scholars, being characterized by a more straightforward 'enthusiasm for applying rigorous empirical methods to questions of legal (as opposed to primarily disciplinary) import' and adds that its 'mission, then, is the empirical study of all those phenomena that have long commanded the attention of legal scholars

[6] J. Holtermann and M Rask Madsen, 'European New Legal Realism and International Law: How to Make International Law Intelligible (2015) 28 *Leiden Journal of International Law* 211-230 at 229. For a critique of Holtermann and Madsen's empiricism and especially their reading of Weber, see H. Olsen and S Toddington, 'Legal Realism: In Search of a Science of Law' (2016) *Retfaerd* 22-37. For a response see J. Holterman and M. Madsen, 'What is Empirical in Empirical Studies of Law? A European New Legal Realist Conception' (2016) 39 *Retfærd* 3-19.

[7] Suchman and Mertz, (note 3, above) at 560.

and practitioners but that have heretofore been known only through doctrine, personal experience, conventional wisdom, and surmise.'[8] These forms of realism and empiricism share the same fundamental agenda, in that they 'are united by their shared commitment to reinserting empirical social science into the legal academy.'[9]

The drive, so to speak, to 'empiricise' the legal academy echoes a similar century old turn towards empirical method in the philosophy of science which sought to leave various metaphysical dark ages behind. This move, taken by, for example, the logical positivists, was to focus inquiry squarely on that which could be verified by sense data from the observable world. This method has, however, long been regarded with scepticism.[10] Logical positivism was shown to be incapable of providing a causal explanation of what has been observed without breaking the rules of its own strict empiricism: it imports new 'metaphysical article[s] of faith' (causality) in order to render intelligible (i.e. causally connected) that which is observed.[11] Problems such as this led social scientists and philosophers such as Weber, Horkheimer, Adorno, Gadamer and others to take an interpretative turn, which sees the inner subjective meanings and reasons of acting persons as the key to unlock an explanatory account of social action. Whether styled realist or positivist, this sort of explanation appears to be off limits to those international lawyers who take an 'empirical turn' because they seek to replace the study of legal meaning with the study of observable signs issued by those international lawyers that are the subject

[8] Ibid, at 559. It is noteworthy how the word "rigorous" is applied here as a way of distinguishing empirical approaches from other approaches, which are then implicitly branded as "not rigorous".
[9] Ibid, at 565.
[10] For an early critique, see Karl Popper, *The Logic of Scientific Discovery* (London: Hutchinson, 1959, first published in 1934 as *Logik der Forschung*). Here Popper attacks verificationism and introduces his falsificationism.
[11] A main critique is put forward by W.V.O Quine in 'Two Dogmas of Empiricism' (1951) 60 *The Philosophical Review* 20-43. Although Quine was an empiricist himself, he abandoned logical positivism and proposed instead a naturalized epistemology. In this essay, Quine points out that no statement can be verified (or falsified) in a stand-alone manner because the meaning of every term in every such statement is contingent on a vast network of knowledge and beliefs about the world. There is in other words no objectivity to be had from empirical data. Both Popper and Kuhn took their departure in natural science, but their findings are no less relevant to the social and legal sciences.

of their inquiry. This is because these inner subjective meanings, which give rise to observable signs, are hidden from view.

The quotation from Horkheimer which opens this article is one particularly clear way of expressing this turn towards the interpretation of the social phenomena in the way just described. Building on this insight, our argument is that subjectively held reasons and meanings are necessary to render intelligible the authority of international law and its courts. The limitations of empiricism in this regard are set out in the first part of our argument (B). To focus exclusively on observable acts of compliance, without paying sufficient regard to the reasons why participants comply, implies that a sociological distinction between various related concepts such as 'power', 'consensus' and 'authority' cannot be made. Thus, the methodology needed to make the 'empirical turn' is unable to isolate authority as a possible reason for observed agency, which is an intention of those who adopt an empirical approach to study of the authority of, for example, international courts. Empiricists resist this conclusion by claiming, albeit correctly, and as just mentioned, that the real reasons for compliance are hidden from empirical observation. This means, though, that the authority of international law cannot be isolated as a reason for compliance. However, there are influential sociological theories which seek to collapse authority and consensus into a broad category of power, and such arguments have been employed by empiricists as a plausible reason to disregard the problem of distinguishing analytical categories such as 'power', 'authority' or 'consensus'. In section (C) we show that authority is best conceived as the *absence* of power, and rather is an expression of freedom and choice. We then argue that attempts to avoid this distinction require the adoption of an implausible and inconsistent view of agency in sociological explanations of legal authority. We bring together these arguments in section (D). Here, we argue that the signs of compliance observed by empiricism are pre-interpretative data which can be explained only if we *interpolate* an interpretative account of the reasons which give rise the

compliance we observe. Understood this way, the consent theory of international legal authority is to be understood as an interpretative account which explains *why* the *observable fact* of state consent gives rise to *compliance*. Interpretative accounts such as this one are what makes legal normativity intelligible, and what allows the authority of international courts to be understood as a distinct phenomenon related to, but different from, others, such as power.

(B) Signs of Authority

The empiricist methods just outlined are not meant to merely describe international legal life, but are also intended to render it intelligible, or to provide an explanatory account of its features. Holtermann and Madsen, mentioned above, seek to explain the 'force' of the directives of issued by those who participate in international legal life, while for others the focus is on the authority of participants or patterns of compliance by subjects.[12] Such methods aim to explain what causes the rules, decisions or procedures of the international legal order to take one form and not another, and what effect those rules and so on have on those to whom they are addressed.[13] Some, for example, see the broader geopolitical context in which international courts issue their judgements as having an important causal influence on state compliance.[14] It is fair to assume that the successful acts of judges (which are based upon their aptitudes, maxims or personality) are also causal in some sense. As the mechanics of social explanation are employed frequently in the argument which follows, a number of general comments about them are appropriate to begin our discussion.

[12] See Holtermann and Madsen (note 3 , above) at 1007.
[13] Ibid. This is also a key point for the original American legal realists in their critique of formalism. According to this critique, doctrine is in and of itself incapable of explaining the outcome of legal decisions. Legal decisions are always part of a broader socially embedded process in which the formal law is shaped by the economic and cultural practices which the law seeks to regulate. Hence doctrine without empirical knowledge of practice is, as one proponent put it "transcendental nonsense".
[14] See below at note 27.

When engaged in legal science, the empirical signs we observe (from the written judgement of an international court through to an act of compliance) are our *explanandum*: that which we wish to explain, in terms of causation. How is such an explanation – the *explanans* – possible? If we were to explain the written judgement of a court, its content is likely to be to the result of the deliberations of judges. These deliberations can (in principle, and to some extent) also be observed, although in practice they are normally conducted behind closed doors. Ultimately, (and returning to Horkheimer once again), these motivations and beliefs are the subjective origins of the observed signs that legal science aims to interpret, and they are, in this sense, *causal*. They are, though, empirically obscured from view.

But one would be mistaken to assume that the signs we observe are only the product of self-conscious, *unmediated*, acts of will. Rather, the subjective origins of the signs (i.e. the legal judgments) we wish to make sense of are presumably mediated by the norm-governed argumentative and dialogical context and process in which they arise. That is, subjective beliefs and motivations normally only have an effect if presented in a way which speaks to the 'inner juristic' (as Weber put it[15]) values, norms and beliefs that constitute the axiological framework held by participants within the legal system.

The axiological structure of social institutions has been described in a number of epistemologically diverse but in many respects similar ways in the literature following Weber: ranging from Hart's 'internal perspective' (where legal normativity mediates the relationship between the official and the legal system), through Bourdieu's 'habitus' (where 'doxa' mediates the relationship between subjective

[15] P. Ghosh, *Max Weber and* The Protestant Ethic*: Twin Histories* (Oxford: Oxford University Press, 2014) 113.

agency and institutional structure) and Gadamer's 'horizon'[16] (which describes the interaction between the meaning of a historical text and the subjective experience of a reader or interpreter). But whichever way we conceptualise it, the point is that within a legal context, those to whom the law is primarily addressed – citizens, states or other subjects – are expected employ (themselves, or through their legal counsel) this shared axiological framework when seeking support from public authorities for protection or promotion of their interests, or when seeking redress for their grievances. While taking a negative tone, G. F. Puchta (a Roman legal historian, who influenced Weber's understanding of the formality of modern law) summarizes this point well:

> '[t]he manifold quality of human nature becomes in law the colourless concept of the person; law causes the wealth of external nature to disappear within the unifying concept of property; and for the sum total of the infinite multiplicity of human commerce, the concepts of claim and obligation suffice.'[17]

Law is, in this sense, a normative language for interest negotiation in the public sphere, which claims *authority* in relation to its addressees. Formally speaking authority exists where agent *B* defers to agent *A*'s judgement, which in the context of law takes the form of a directive made by *A* in relation to *B*'s conduct For *B* to obey means that *B* acts on *A*'s directive, and not on *B*'s own reasons, insofar as those reasons lead to acts different from those specified by the directive. Where authority *exists* within a legal system one would think it is somehow the *product* of the normative value which the legal subject affords to the shared axiological framework just mentioned. This is how the authority claim of an

[16] H. Hart, *The Concept of Law* (Oxford: Clarendon Press, 2012 (3rd edition), first published in 1961); P. Bourdieu, *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, 1977, first published in 1977); and, H-G Gadamer, *Truth and Method* (London: Continuum, 1989, first published in 1960).
[17] G.F. Puchta, *Cursus der Institutionen* (Leipzig, 1881), cited by Ghosh, note 10, above, at 114.

official in a legal system becomes actualized. So, for instance, when international lawyers talk about the authority of an international court, they will claim that it arises because those states subject to the court have given their consent to abide by its directives; that the court's directives provide solutions to complex co-ordination problems each state has an interest in solving; that the decision conforms to standards of administrative justice; or, because to follow the court's directives allow states to be more likely to comply with the moral or strategic reasons that apply to them. These are all these practical reasons why a court's directives, and the axiological framework in which these directives are couched, are treated as authoritative.

By contrast, a way of thinking about power (captured by the Spinozian category of *potestas*, and discussed in detail in (C), below) is as a capacity of *A* to compel the will of *B* through various means. The mugger, for instance, can compel by significantly altering the range and appeal of the various choices open to his victim. And similarly, a state can compel in a similar way by using its criminal law and justice system to threaten or use physical force. Admittedly, international courts often employ more subtle forms of compulsion than the blunt threats of a mugger, or the coercive tools at the disposal of the state, but this notwithstanding, a state's failure to comply with the directives of an international court can lead to, or coincide with, significant economic or reputational damage, which similarly can alter the range and appeal of choices of litigants. The prestige, standing, esteem or honour of the global governance body is a resource – sometimes called symbolic capital[18] – which can be drawn on to compel addressees within the field of global governance, but which often is met by the power of others.

[18] P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805-853.

From the perspective of *practical reason* (i.e. how *I* should act *qua* moral agent), authority and power are readily distinguishable. However, sociologically, these two concepts are difficult to distinguish for the following reason. What is observable sociologically are signs that indicate a possible conjunction between the *content* of directives of an authority-claiming court and the *actions* of a state to which its directives are addressed. To give an example: the (hypothetical) North African Court of Arbitration (NACA) issues a judgement requiring that Morocco return some religious artefacts it possesses to Western Sahara, which is determined to be the rightful owners. The observable conjunction in this case is the return of the artefacts following the judgement. What we then seek is the *explanans* of this conjunction. One *explanans* is that Morocco has accepted NACA's authority. Morocco did not consider that it should return the artefacts, but once the Court gave its judgement it has a significant new reason that makes a practical difference to the balance of reasons that it possesses, and so it returns them. However, it is obscure whether the Court's authority was the *cause* of Morocco's compliance. That is, its compliance *looks* the same whether it was NACA's authority, or some other reason, which motivated Morocco to return the artefacts. Morocco could have been motivated by concerns about the shame or reputational damage which would be likely to occur if it did not comply with the judgement. Alternatively, Morocco could be worried about the likelihood that NACA could mobilise state parties to engage in countermeasures against Morocco. It may have changed its mind after hearing in pleadings about the importance of the artefacts to the culture of those who inhabit Western Sahara; or, it may be that it was going to return the artefacts anyway, but had reason to make matters difficult for the government of Western Sahara by going to court. The point is that although we see the conjunction between the directive and the act, it is difficult to disentangle authority from strategic reasons, agreement or compulsion sociologically. This difficulty arises because we do not have empirical access to Morocco's actual reason for apparent compliance to NACA's directive.

The 'empirical turn' in the study of the authority of international law and its institutions, at least as described by in an important book on the subject edited by Alter, Helfer and Madsen, seeks to be 'agnostic as to why an audience recognizes a court's authority and to the subjective beliefs that underlie that recognition'.[19] This we think is a mistake because it leaves legal science incapable of disambiguating the various explanations for apparent compliance to legal norms or judgement, of which authority is just one. Alter, Helfer and Madsen interpret specific pre-interpretative signs (an act of compliance alongside 'either an express statement of intent to comply, or the implied acceptance that accompanies a government's decision to implement or give effect to a court's judgment.') as indicative of the *de facto* authority of the court.[20] The justification for taking this approach is that subjective motivations or reasons are hidden from view. They attribute their approach to Weber:

> 'there can be various reasons why individuals respond to authority, including habit, coercion, ethical concerns, and instrumental calculation. It can be impossible to know for sure which of these reasons underpins respect for authority, and more than one might operate at any point in time.'[21]

The consequence of this move is that it renders various reasons for compliance irrelevant for the purposes of inquiry. All reasons for action – whether the product of power, persuasion, acquiescence or habit – are subsumed under a category of *de facto* authority which focuses only on empirical signs of compliance. Authentic reasons for compliance are unknowable, they argue, and stand in the way of

[19] Alter, Helfer and Madsen, *International Court Authority* (note 2, above) at 28.
[20] Ibid, at 29. Later in this edited volume Føllesdal points out that 'recognition' seems to be very close to a study of motivations (at 414), although 'recognition' is a possible sign of internal motivations.
[21] Ibid, 369.

the broader empirical inquiry into the practices and contextual factors that relate to social actions in and around the many different international courts in operation today.

Another version of empiricism already mentioned, offered by Madsen and Holtermann, seeks to tackle this problem by incorporating a study of beliefs held by addressees about the validity of legal rules.[22] They believe that if addressees indicate that they are following a rule because they believe it to be authoritative, a distinction can be made between various reasons or explanations for decisions or compliance. But their concern is not about the axiology internally held by participants within the legal order about the rules which comprise it. Rather, they are concerned, as the empiricist agenda seems to prescribe, with the pre-interpretative signs of compliance: i.e. *observable indications* given by the addressee that they consider a particular rule, judgement or court authoritative. But these pre-interpretative signs may appear to show a coincidence between the rule and the addressee's stated reasons for compliance – after all, people generally *say* they are obeying the law – but this does not mean that the reason they comply is the result of an acceptance of authority, and not power, or agreement after they are persuaded by the reasoning of a court. The observed attitudinal signs of addressees towards rules remain fundamentally the product of a chain of causation which begins with the subjective orientation of the actor to legal rules, which remains unverifiable. Even as we get closer (through empirical investigation) to the *explanans*, our inquiry still is at the level of the *explanandum* (i.e. in this case, with the observable sign). For Holtermann and Madsen, we have now reached the limits of explanatory inquiry. But if this is the case, the causes of what we observe remain opaque, and an explanation of how fundamental categories of legal reason, such as authority, which may provide such an *explanans*, remain equally so.

[22] See Holterman and Madsen (note 3 and 4, above).

(C) Authority and Consensus as Power

Does this mean that we should completely give up on the – admittedly more philosophical – commitment to study the role of the opaque meanings and reasons embedded within this wide field of visible signs? One affirmative answer to this question stems from a view that consensus and authority can ultimately be reduced to power.

As indicated above, we tend to think about power in relational terms: the power of the employer to compel the will of the employee, or the influence of the charismatic, wealthy or well-connected over political decision-making processes. These are but complex examples of a much simpler formal relationship between persons with power and those to whom that power is addressed. Formally or analytically, power is the capacity of a person to have his ends or desires expressed in the world. Kant expresses it this way in his discussion of the relationship between agency and coercion: we choose subjective ends which we have an interest in achieving, and these form motivations for us to act. However, these particular ends may not, and need not, be shared by others.[23] A person who wills an end, also necessarily wills the means that are indispensable to achieve them (if the person does not will the means, then he must give up his ends), and only with those means can he become an 'acting cause',[24] and this is how it is possible that the world can come to reflect the contents of his will. However, when action does alter the world, it is *coercive* in the specific and technical sense that it alters the capacities of others to pursue *their* separate and distinct ends. Kant tends to illustrate this argument through the taking possession of physical objects, but his point goes beyond possession, and his discussion of property is an illustration of a more general claim about agency. That is, taking

[23] I Kant, *Groundwork on the Metaphysics of Morals* (4:447-448), *Critique of Practical Reason* (5:25) and *Perpetual Peace* (7:251).
[24] See I. Kant, *Groundwork on the Metaphysics of Morals* (4:427), *Metaphysics of Morals* (See also 6:223) and *Critique of Practical Reason* (5:11n*).

possession is only one way by which we 'actualize' the ends that we desire 'in the sensible world'.[25] This capacity to achieve ends can be said to be a rudimentary, analytical, description of power. Steven Lukes shares this conception of power, but expresses in a way that is useful for sociological inquiry. Power is, he writes,

> '…a dispositional concept, comprising a conjunction of condition or hypothetical statements specifying what would occur under a range of circumstances if and when the power is exercised. Thus, power refers to an ability or capacity of an agent or agents, which they may or may not exercise.'[26]

For Lukes then, power can only be apprehended sociologically when we can state the outcome of its exercise. But there is more to a sociological concept of power than this. For *A* to have power, it would have to be the case that the observer can establish a causal connection between *A*'s will that *X* happens and the actual occurrence of *X*. This however brings us into territory so complex that even Lukes is uncertain:

> 'The question of whether rational persuasion is a form of power and influence cannot be adequately treated here. For what it is worth, my inclination is to say both yes and no. Yes, because it is a form of significant affecting: A gets (causes) B to do or think what he would not otherwise do or think. No, because B autonomously accepts A's reasons, so that one is inclined to say that it is not A but A's reasons, or B's acceptance of them, that is responsible for B's change of course. I suspect that we are here in the presence of a fundamental (Kantian)

[25] See I Kant, *Critique of Practical Reason* (5:177). See also P. Capps and J. Rivers, 'Kant's Concept of Law' (2018) 63(2) *American Journal of Jurisprudence* 259-294.
[26] S. Lukes, *Power: A Radical View* (Basingstoke: Palgrave MacMillan, 2002, 2nd edition), 63.

> antinomy between causality, on the one hand, and autonomy and reason, on the other. I see no way of resolving this antinomy: there are simply contradictory conceptual pressures at work.'[27]

This is precisely where the difficult conceptual distinction between power and authority resides. Our point is that its residence is not accessible to empirical inquiry. What are the consequences of this antinomy for sociological analysis of international court authority?

To begin to answer this question, let us return to consider the operation of Kant's concept of power. One familiar sub-category of the Kant's concept of power is the capacity of *A* to *compel* addressee *B* to undertake actions so that the world reflects *X* (which is *A*'s will) and not *Y* (which is *B*'s will). This is domination of the will, which is achieved by (actually or potentially) limiting, or altering the costs of, the choices of the addressee. To return to our example, NACA can dominate the will of Morocco by, for example, threatening to exercise its capacity to shame, or cause reputational damage to, Morocco. In a real example, the European Court of Justice (or ECJ, as it was then known) became a powerful institution partly because obeying its rulings has become '…part of the package of the European Integration'. Being seen as closely linked to a larger political project that enjoyed broader support meant that '…states and other actors that wished to reap the benefits of regional integration had to accept the court and its authority [actually, power] as part of that overall package.'[28]

[27] Ibid, at 35-36

[28] R. Daniel Keleman, 'The Court of Justice of the European Union in the Twenty-First Century' (2006) 79 Law and Contemporary Problems 117. Kelemen writes: 'The establishment of the ECJs authority is inseparable from Europe's push for integration. The ECJ formed an integral part of the institutional architecture of the European Communities and, later, the EU. In short, the Court was part of the package of the European integration, and states and other actors that wished to reap the benefits regional integration had to accept the court and its authority as part of that overall package. They might have resisted implementing particular rulings and occasionally called for reforms to rein in the Court, but, so long as they wanted to be part of the EU, they could not unilaterally reject the court's growing authority.' (at 120). This has been thrown into question recently both politically (by Brexit) and legally (by the Decision of The German Constitution Court on 5 May 2020 which declared that the CJEU's application of the principle of proportionality was *ultra vires*. See

This concept of power appears consistent with part of Alter, Helfer and Madsen's empirical work on the authority of international courts. Power, for them, is 'defined as the ability to move governments and private actors in the direction indicated by the law':[29] so NACA *moves* Morocco and the ECJ *moves* Member States, so to speak, so that in both cases the latter acts in accordance with the judgement of the former. But they also see *de facto* authority[30] as a form of power: authority is a *capacity* to dominate the will of those subject to it. So, '[w]hen a court's authority endures over time, when deference is extended across issues, cases, and time, the court's power increases'.[31] Authority, then, is a *capacity* of NACA or the ECJ to dominate the choices of Morocco or Member States, which *causes* the latter to act differently to the way they would have otherwise acted.

This is an important strategy by which it is possible to avoid the problem of motivations discussed in section (B). But there is something counter-intuitive about it. If Morocco recognises the judgement of NACA to return the artefacts, agrees that it is under a moral duty to return them (which takes the form of agreement or consensus with the judgement of the Court), or was going to return them anyway, it appears irrelevant that the Court has the power to compel it. Now, it is the case when political philosophers consider authority, it tends to be in terms of an attempt to justify the exercise of forms of power, such as state coercion. However, where the concept of authority is considered in relation to the sociological observation of compliance, power and authority come apart as distinctive explanations (*explanans*) for the signs of compliance we observe (*explanandum*). If our aim is to explain Morocco's compliance with NACA's judgement, where there is authority or consensus, there is no

Decision on the Public Sector Purchase Programme (BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15)).

[29] Alter, Helfer and Madsen, *International Court Authority*, at 52.

[30] See, 10-11 above.

[31] Alter, Helfer and Madsen, *International Court Authority*, at 371.

need for power to be exercised, and Morocco's acknowledgement of a duty or obligation to comply with the Court's judgment appears to be evidence of the *absence*, rather than *existence*, of power. By the same token, where Morocco does not accept the authority of, or agree with, NACA, it needs power to compel Morocco to do that which it refuses to do. Morocco's compliance can only be explained as a result of NACA's exercise of power when Morocco's will, *ex ante* and *ex post* the Court's judgement, is to *not* comply with its judgement, but does so anyway. If this can be shown, we have *prima facie* evidence of power, but not evidence of authority. On the basis of this example, evidence of the motivations of addressees of the Court *towards its directives* seems to be necessary to identify the existence of power.

There is another, perhaps now familiar, strategy which allows authority and power to be conjoined within sociological analysis, which is invoked by Holtermann and Madsen in their articulation of European New Legal Realism.[32] That is, authority could be rendered as a form of symbolic power articulated in terms of NACA's reputation, prestige and so on. It may be that when NACA issues its judgement, Morocco simply acts out of a routine assumption that to do so is something that ought to happen. In the language of Pierre Bourdieu, the judgement has the status of 'doxa', where 'the immediate agreement [is] elicited by that which is self-evident or normal'.[33] On this view authority represents NACA's power to establish and control 'doxa' within the global governance field, and thus compel those subject to its directives. On this reading, evidence for the absence of power (voluntary acceptance or awareness of a duty) now becomes evidence *for its very existence* (because acceptance is treated as having emerged from a powerful agent who elicits acceptance by controlling the content of *doxa*), and there is no meaningful distinction between social practices which are constituted by power

[32] Holterman and Madsen (note 4, above).
[33] Bourdieu, (note X, above), at 848.

relations, and those which are not. Apparent consensus, or authority, as an attribute of willing and choice, do not appear to be genuinely possible and the distinction between authority and power collapses: using Weber, rather than Bourdieu's language, *herrschaft* (or legitimate rule) becomes just one manifestation of *macht*.

Whether this is defensible is the philosophical question about the possibility of will, choice and freedom which so troubled Lukes in his analysis of the concept of power. And like Lukes, we have to accept that the answer to this question is something that goes beyond what can be considered here. However, stringency and consistency in analysis remains important, and these principles ought to be directed to the argument just set out. How is it possible for the imaginary NACA's behaviour to be the outcome of its voluntary *choices* to develop its authority and make judgements,[34] while, at the same time, Morocco's behaviour, when it is convergent with NACA's judgements, is necessarily, the *causal outcome* of the exercise of NACA's power, and not the product of its own voluntary choice?[35] If this more specific question cannot be answered, then agency seems to appear and disappear arbitrarily within sociological explanation in a manner which seems more influenced by the story the interpreter wants to tell, and less about methodological coherence. To be consistent, we must hold that if it is possible for Courts to build, strategize and decide, then it must be equally possible for addressees to choose to agree or accept the directives of that same Court, and for this reason we should not be too quick to collapse authority and consensus to power. What this means conceptually is that if agency

[34] See Alter, Helfer and Madsen, *International Court Authority*, where they write about how international judges can '…take steps – both inside and outside the courtroom – to influence the contexts in which their courts operate.' (at 49). They assume in other words that courts can deliberate and exercise agency in relation to their audiences.

[35] For example, Alter, Helfer and Madsen rely on Bourdieu to explain their notion of extensive authority. They say: '... extensive authority exists when an ICs audience expands beyond its compliance partners to encompass a broader range of actors … ICs with extensive authority consistently shape law and politics for one or more legal issues within their jurisdiction. This level of authority is largely analogous to Pierre Bourdieu's notion of a "field" – the space where diverse actors accept the force of law but may contest the meaning, legitimacy and importance of different legal interpretations. Applied to our object of inquiry, extensive IC authority is recognized in the practices of this wider audience.'

has a role in the explanation of legal practice, then we cannot dispense with voluntary choice and normative acceptance. But if this is the conclusion of a consistent analysis of agency applied to the study of international courts, then we return to the opening question: how do we distinguish the exercise of power from consensus or authority if both *look* the same empirically?

(D) Understanding Authority

One possibility is to return to legal reason. It may be that this – i.e. the normative language for interest negotiation in the public sphere – is in itself an important source of authority, and the basis for distinguishing authority from power. Some of the empirical approaches discussed here do glimpse the importance of this particular aspect of the object of inquiry. For example, Holtermann and Madsen, argue that axiological beliefs about legal rules are important to their attempt to explain the authority of international courts. However, as explained above, their concern remains with pre-interpretative signs which may tell us something about hidden axiological beliefs. But signs are not the beliefs themselves.

Here is one relatively straightforward way of thinking about the causal relationships between legal reason and observable compliance. Minimally, *ad hoc* commands could possess (content-dependent) authority so long as those commands were morally justified. Thus, observable compliance could be explained in terms of moral validity. However, it is not plausible to see judicial decision-making solely in these terms, simply because of the nature of law and its judicial function.[36] Rather, in their attempt to resolve disputes, international courts apply legal texts (i.e. *lex scripta*) in a way that is consistent with a set of legal formalities, as well as legal concepts such as sovereignty equality, state consent, or

[36] See, L. Fuller, 'Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353-98, on the judicial form.

dominium,[37] which shape that court's existence and operation. Contextual factors are also a cause of compliance. But it is the case that context causes compliance with *the law*, and this is why context is relevant to the study of *legal* authority.

Focusing on the formal characteristics inherent in law, compliance with the *lex scripta* is only possible if it is *followable*, and *is* followed by the court. This need not imply formalism (as a legal theory), but it does imply that the court's judgement fits past practices (for Ronald Dworkin); that legal rules are applied (for Hart); or that there is congruence between the law as stated and the law as applied and that legal rules are prospective and clear action guiding directives (for Lon Fuller). This is the case whether or not addressees comply because they are compelled to do so, or because they believe it to be authoritative: in order to comply with the law, what is requires of them must be knowable. Furthermore, Dworkin, Gerald Postema and Nigel Simmonds all have observed, without some judicial sensitivity to the addressees' interests and values when interpreting the formal law it is unlikely to provide a stable system for coordinating the actions of the court's addressees.[38] These legal philosophers all defend the claim that law must have a particular substantive content, as well as form, if the possibility of compliance by addressees is to be possible. In practice, then, the interpretation and application of legal doctrine to social conflicts (embodied in the texts of judgements), can be said to be an attempt to rationalize a body of texts into a coherent and connected normative system of rules to which compliance is possible. Thus, *de facto compliance* to an international court decision cannot be severed from its judgements, which are, in turn, embedded within a broader structure of legal reason.[39]

[37] See L. Benton, *A Search for Sovereignty* (Cambridge: Cambridge University Press) at 11.
[38] G. Postema, 'Law's Autonomy and Public Practical Reason' in R. George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996); R. Dworkin, *Law's Empire* (Oxford: Hart Publishing, 2004, first published in 1986); N. Simmonds, 'Between Positivism and Idealism' (1991) 50 *Cambridge Law Journal* 308-329.
[39] See, for example, P. Capps, 'International Legal Positivism and Modern Natural Law' in J. d'Aspremont and J. Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014) chapter 8.

Pre-interpretatively, we observe *inter alia* legal norms, the judgement of a court, contextual factors and an act of compliance. The formal and substantive constraints just described become interpretative concepts used to *explain* the causal chain by which the application of legal norms gives rise to compliance. Legal normativity cannot be discarded but must be part of the explanatory framework that brings pre-interpretative observations about international courts, including the context within which they judge, into a causal relation with each other. To explain further, let us reconsider Alter, Helfer and Madsen's concept of *de jure* authority, which they disregard and consider to some extent epiphenomenal for the purposes of sociological explanation. Stated consent to be bound to an international court may be a sign of compliance, as is action consistent with an international court's judgement. Empiricists are right to see these facts as relevant to questions of authority or compliance. But *de jure* authority is not the same thing as observed consent. The latter is a pre-interpretive sign which we consider salient in our explanation of the act of compliance. The former, by contrast, is an interpretative normative concept, which is interpolated by the legal scientist to provide an explanation of why the sign of consent *gives rise* to international court authority, which, in turn, explains the act of compliance to the court's judgement. *De jure* authority, as an interpretative concept, allows us to interpret the signs we observe as indicative of the existence of international court authority: it is this concept which renders those signs normatively salient in an account of international court authority.[40] The observation of compliance in the absence of signs of consent, or the absence of signs of compliance in the presence of consent, based on this interpretative concept, requires another explanation: for example, the exercise of power in its various forms.

[40] R. Dworkin, 'A New Philosophy for International Law' (2013) 41 *Philosophy and Public Affairs* 2-30.

De jure authority is a plausible candidate for an interpretative concept which explains international court authority, not least because it is *likely* (we would suppose) to be a correct explanation of the signs of compliance that can be empirically observed (*B* stating that it has consented), even if (for the reasons set out above in sections (B) and (C)) we can never be sure that this is the actual reason for compliance by officials acting on behalf of a state. To put the same point in relation to our hypothetical example: if a judge in NACA appeals to legal rules (e.g. a treaty constituting the court ratified by Morocco and Western Sahara, case law, customary principles, etc.) and applies them in accordance with the rule of law in a way that is sensitive to the interests of Morocco, then we have a sound explanation for what we observe. That Morocco complies can be interpreted as the result of self-consciously rational, purposive, behaviour to comply with the authority of the Court. If the court fails to appeal to such rules and principles, or if Morocco refuses to comply, we may have evidence for the existence of the power of NACA to compel, or of Morocco's power to resist NACA's rulings. Thus, by interpolating *de jure* authority as an interpretative concept, we are able to distinguish between power and authority, in a way that eludes a purely empirical approach. That this is not just pure formalism can be seen by showing how our view corresponds to David Lake's analysis of authority:

> '[a]ny specific authority relationship will depend on how the governor and governed come to understand their exchange and its attendant rights and duties. How these mutual understandings arise and evolve in particular cases is undoubtedly important. Relational authority may even be enshrined in law. However, common to all such relationships – and thus the focus of exchange here – is the underlying exchange of order for compliance necessary to all social contracts.'[41]

[41] D. Lake, 'Rightful Rules: Authority, Order, and the Foundations of Global Governance' (2010) 54 *International Studies Quarterly* 587 at 596.

NACA's ruling represents order and Morocco's behavior is either compliant (and thereby supportive of the order) or not (and thereby possibly a challenge to the order). But which interpretative concept do we choose to model this relationship? One condition for choosing a viable explanatory model is that it must 'fit' (to use Dworkin's term), or be a reconstruction of, the practice we seek to interpret: the issuing of directives of international courts to addressees. In defense of *de jure* authority, it is true that international court authority invariably builds upon state consent. Consent, as is often said, is understood to be a law-creating fact, which provides the interpretative basis upon which we can interpolate an authority relationship flowing from legal norm through judicial decision to state action. However, it is well-known that today an international court will develop techniques beyond the formal text of its constitutive roots.[42] It then must rely upon other bases for its authority, especially those embodied in broader notions of public authority, such as the rule of law, values of administrative justice, proportionality or substantive human rights. For this reason, *de jure* authority, as an interpretative concept, is too narrow. Thus, as international courts develop their authority, so must the interpretative concepts of legal science adapt to distinguish authority from power.

De jure authority explains why the fact of consent gives the International Court of Justice (ICJ) the authority to claim jurisdiction over states which have given it. A concept of public authority explains why the Appellate Body (AB) of the World Trade Organisation is justified in applying the proportionality principle.[43] By contrast, *de jure* authority also explains why states resist the overreach by the ICJ when exercising its advisory jurisdiction,[44] and why some states (notably the United States

[42] See I. Venzke, *How Interpretation Makes International Law* (Oxford: Oxford University Press, 2012).
[43] E.g. see R. Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 *European Journal of International Law* 9-77.
[44] See, for example, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (2019) ICJ Reports.

of America) reject what it sees as AB's judicial activism based upon its concept of public authority, or as seen recently, why some domestic courts resist to follow certain rulings by the CJEU.[45].

One response to our claim could be that the question of authority is a philosophical question; the sociologist could then investigate whether there is compliance by the addressee, and inquire into the possible linguistic signs which offer putative reasons for compliance. *Doxa*, or, alternatively, *herrschaft*, then, is part of this empirical explanation, but questions of authority remain philosophical. This methodological neatness, however, is not plausible. Sociological explanation is not possible without some understanding of motivations (since agency is defined as meaningful purposive behaviour). However, because subjective motivations are empirically inaccessible, they have to be interpolated to explain their causal role in what is empirically observed. This interpolation, however, must be *both* an interpretation of the actual practice, and must be a plausible account of why a state, for example, might be justified in its acts of compliance.

We might go further along the route pointed to by Lake and assume that legal authority emerges from a dialectic in which an international court seeks to maintain an acceptable balance between the normative system which is international law, and its functioning as a mechanism for social coordination and conflict management. For example, if the court claims jurisdiction over states which have not given their consent, issues judgements using rules which are not found in underlying treaties, or if it fails to apply doctrine in a way that is relevant to its coordination and conflict management role it will risk losing authority: meaning that, those subject to it will not be motivated to treat its

[45] On the *Ajos* ruling, see M. Madsen, H. Palmer Olsen and U. Sadl, 'Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court's Decision in the *Ajos* Case and the National Limits of Judicial Cooperation' (2017) 23 *European Law Journal* 140-150 and the German *Decision on the Public Sector Purchase Programme* (BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15).

judgements as preemptive, which, in turn, may lead to a situation where they will not observably comply. *De facto* authority, then, is at the *end* of a chain of the complex interaction between doctrine, procedural and substantive fairness in application and reciprocity, which has, at its heart, the internal motivations of judges and their addressees, which in turn is modelled by the ideal-types of authority developed by legal science. In operational terms, the challenge for international courts is to provide solutions to the social conflicts that are brought before them in a way that respects this dialectic, which their judges mediate, between the normative system they apply and the motivations of the addressees to whom that system is addressed. To fully grasp the authority of international courts therefore, it is necessary to conceptualize, ideal typically, what constitutes normative justification, for without such a concept it is impossible to explain and make intelligible the agency of courts and states (as enacted by officials). Hence, to understand what is authoritative and what is not, is to be able to distinguish between acts that are rooted in a sense of obligation towards upholding an international order from those acts which are motivated by, for example, political ambition or abuse of a powerful position. This is how it is possible to interpret these different motivations as part of the balancing act that results in observed *de facto* authority, or a lack thereof.

What is more, the legal processes that unfolds when international courts manage this dialectic, then, serves as the basis for generating normative authority. The discursive processes and the political push for international coordination that gave rise to these courts in the first place is what initially drives the emergence of international court authority. Law is not only an interpretative practice, but also an argumentative practice, and in the process of legal argumentation the court will be met with a demand for justification. Thomas Risse explains:

> 'Most actors justify their preferences on the basis of general principles and norms assuming these norms are shared by participants. Thus they use arguments for instrumental purposes thereby engaging in rhetorical action. Yet, even rhetoric is subject to the triadic structure of arguing. Rhetorical reasons can be challenged by other speakers as purely instrumental as a result of which rhetorical actors need to demonstrate their sincerity in an arguing process. This constitutes what I have called "argumentative entrapment"'[46]

This is particularly true in the context of litigation and adjudication in international courts. The litigating parties and the court itself are connected in a communicative structure that is woven by their performance in legal argumentation. The 'entrapment' Risse alludes to in the context of international courts points to the way that legal argument is inextricably embedded in social practice. It is not the inevitability of participation in this structure of argumentation that presupposes and affirms the authority of international courts, but the conscious acceptance of it as a valid form of cooperation, collaboration and conflict resolution. This, then, is how the authority of international courts emerges. Our argument has come full circle: voluntary choice embedded in subjective belief lies both at the epistemic beginning and end of attempts to make legal normativity intelligible.

(E) Conclusion

What we propose is close to the interpretivist tradition of which Weber, as well as Gadamer and Habermas, are a part. The proposal is that legal science has to critically engage with the social *meaning* of international courts, including its rules and procedures. This entails a commitment to a reconstruction of the values and motivations that underlie compliance to international court

[46] T. Risse, 'Global Governance and Communicative Action' (2004) 39 *Government and Opposition* 125-391. Also see T. Risse, 'International Norms and Domestic Change: Arguing and Communicative Behavior in the Human Rights Area' (1999) 27 *Politics and Society* 529-559.

judgements. As Gadamer points out, to understand a social phenomenon is to reconstruct that phenomenon in a way that reflects the perspective of somebody who is part of that phenomenon. And similarly (or *vice versa*) active participation in a social practice, cannot be wholly separated from a theory of that practice. The theory partly lives in and through practice and therefore theory cannot be isolated from that practice, or from the self-understanding of participants to that practice, without hollowing out explanation. This entails that the motivations of participants, or the value attached to the social practice in question, must be engaged for explanation to occur. This approach is, then, a reflexive reconstruction of the interpretative concepts employed by participants and it is this which is needed to achieve a full understanding of the social phenomenon in question – here a full explanation of the authority of international courts.