

May 10, 2016

Volume 5, Issue 5



Image by [Edward Musiak](#) (cc)

The Disciplinary Account of the Authority of International Law: Does It Stand Firm against Its External Critics?

[Başak Çali](#)
Koç University

The form of authority that international law enjoys over states, and for what reasons, has long been an important topic of debate in international law and in the neighboring disciplines of constitutional law, legal and political philosophy and political science. Although the debate is old, it continues to be a heterogeneous one in which disciplinary approaches to the very definition of authority play a central role.

Notwithstanding disagreements on the definition of authority from various disciplinary perspectives, there are two points of agreement in this debate.

First, most mainstream international lawyers take the authority of international law to be obvious. According to the textbook approach, the authority of international law is closely associated to its binding qualities. Binding international law, international lawyers assert, makes a legal claim to authority, which, in turn, creates content-independent reasons for states to respect its authority. I dub this the ‘standard view’ of the authority of international law.

Second, some do not share the understanding that the authority of international law is obvious. These commentators are, for the most part, legal and political philosophers and political scientists, domestic constitutional lawyers. These external critical accounts query the ability of international law to generate content-independent reasons for action at all times and, instead, insist that international law must be viewed as a content-dependent enterprise. External critics and how we address them matter for the everyday practice of international law. These critics are able to mobilize resistance to the authority claims of international law amongst domestic parliaments, judges and executives across a wide spectrum of states.

In this reflection, I ask, what makes the authority claim of binding international law so obvious to *most* international lawyers, but suspect to an ever-increasing chorus of

external skeptics? Do we have to simply agree to disagree with the ardent external skeptics of the content-independent authority claims of international law?

In what follows I have three aims. First I sketch out the 'standard view' of the authority of international law held by most mainstream international lawyers, and distinguish it from thicker alternative theoretical accounts of the authority of international law that have been put forward within the discipline of international law. Second, I identify and discuss three groups of external critics: the critique of effectiveness often associated by political scientists, the democratic legitimacy critique, and the domination critique, often associated with legal and political philosophers, and explore the core objections they have to the standard view. Third, I propose that, despite the external critics, the standard view need not be abandoned. 'Bindingness as authority' is admittedly a thin account, but is able to attract support from what is still a disparate collection of states officials. This is not a self-congratulatory position. I also propose that the standard view needs to do a better job to defend itself against external critics. I propose two fruitful avenues for this: a better explanation of why we hold on to 'bindingness as authority' and a more nuanced exposition of the types of authority claims made by international law.¹

I. The Standard View of the Authority of International Law

The standard view of the authority of international law is characterized by its confidence that international law does have a claim to authority over states, including over their political and judicial authorities. The standard view is lean and simple and relies on three building blocks:

- a) a very relaxed notion of consent as the basis of the authority of binding international law;
- b) a commitment to formal neutrality;
- c) an either/or account of authority.

Let me briefly expand on these in turn.

The binding authority of international law in the standard account is grounded in the acceptance of that authority by states. Once it can be shown that a state has consented to international law, international law enjoys a legal claim to authority over states. Over the years, consent-based theories of international law have proved to be adaptable to the changing nature of the international legal order. Consent, we are told, can be explicit or tacit, individual or general.² Even the thorny questions of the authority claims of customary international law and *ius cogens* norms are addressed through doctrines of consent in general or tacit variants. So, whilst the authority of some norms may depend on individual and explicit consent (the authority of an intricate bilateral trade agreement,

¹ A more developed version of this argument can be found in Başak Çalı, *Authority of International Law: Obedience, Respect and Rebuttal* (OUP 2015).

² For an expose of this, Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours* 217.

for example), the authority of other norms may depend on general and tacit forms of consent (such as the authority of the customary norm on the prohibition of genocide).

The standard view strives to offer a normatively formal and neutral understanding of the authority claims of international law. This formal neutrality has three dimensions. First, authority claims of international law are not dependent on the moral importance of the norms that are legalized through it. Moral authority and legal authority are taken as two separate domains. Second, the account is neutral in relation to the competing visions of the relationship between the international legal system and the domestic legal systems. The standard view of the authority of international law is not some form of a defense of the unity of international law and domestic law. The claim to authority of binding international law, from the perspective of international law, is identical for monist or dualist domestic legal systems. What is more, that a domestic legal system does not give effect to the authority demands made by international law does not affect the validity of the authority claim made by international law in and of itself. When an international legal norm ceases to make an authority claim is governed by secondary rules of international law, for example on custom change, rules of treaty amendment and the rules of interpretation of treaties based on subsequent practice.

The standard view constructs the authority of international law as an either/or view. If international law can be shown to be formally binding, it has a claim to authority. International laws cannot have too little or too much authority. States cannot pick and choose which international laws to respect and which to ignore.

The standard view of the authority of international law must be distinguished from thicker normative accounts of the authority of international law developed by legal theorists of international law. In these accounts, the focus is on identifying how the authority of international law can be decoupled from its thin consensual and/or neutral mainstream conception. They investigate whether we can identify deeper and/or alternative theoretical foundations beyond the thin 'bindingness as authority' feature of the standard account.³ These normatively rich projects, may overtime can offer an alternative disciplinary conception in the future. In the meantime, I take a pragmatic stance. I see the current battle in the everyday practice of international law to be between the standard 'bindingness as authority' view and its ardent external skeptics.

II. The External Criticisms of the Standard View

Why are those (mostly, but not always) outside the discipline of international law not fully convinced about the standard view of the authority of international law and its claim to general content-independent reasons for action? I group these under three headings: a) concerns about the standard view on the effectiveness of international law; b) the lack of democratic legitimacy of international law; c) systemic coercion exercised through international law. Despite different starting points, all of these critics reach a

³ For accounts that identify constitutional foundations of the authority of international law, for example, see, Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20(2) *Indiana Journal of Global Legal Studies* 605.

similar conclusion about the authority of international law: that the authority claim of binding international laws must give way to domestic laws, and/or executive or judicial decisions due to reasons provided by the critiques.

The first of these focuses on whether insisting on the authority of international law is realistic, given the constantly changing circumstances of international politics.⁴ Echoing international relations realism, this view insists that the observance of international law is really about a co-incidence of interests and dictates of international law. International law simply does not enjoy independent authoritative qualities. When underlying political circumstances change, so must state behavior through domestic action that best matches those circumstances.⁵ Specific international laws, if they represent old and sleepy texts, cannot and should not constrain decision-makers.

The second criticism is a concern about the authority of undemocratic international laws. Unlike the first criticism, the critiques that focus on the lack of democratic legitimacy of international law take issue with the dynamism of international law, namely, through the evolutionary (or revolutionary?) interpretations of international laws by international courts and tribunals.⁶ They demand that, for international law to enjoy authority, it should not be interpreted and applied in expansive ways that move away from the democratic endorsement international law receives at the time of its making. A domestic decision-maker, respectful of democratic values, must adhere to what its domestic legislation instructs, and not the subsequent interpretations of international law, in particular by interpreters that lack the matching democratic mandate. An undemocratic evolution of customary international law, too, must not be treated as dictating content-independent reasons for action by democratic states.

The third line of critique is concerned with the decoupling of justice-based concerns and the authority claims of international law. It queries the fiction of the consent of the weak and the disadvantaged to international laws as well as the authority claims of 'bad' international laws.⁷ It asks why some international laws, which may have emerged without any meaningful consent, for example, under conditions of economic systemic coercion, should have a legitimate claim to authority. What is more, in a world of deep inequalities, international laws may operate to mask such inequalities, and therefore, should not be viewed as content-independent reasons for action by domestic courts or parliaments. Domestic institutions must retain the right to rail against coercive international laws.

⁴ Jack Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005).

⁵ For a classical statement of this, see Leo Gross, *States as Organs of International Law and the Problem of Auto-Interpretation* (University of California Press 1953).

⁶ See, for example, Kristen Hessler, 'Resolving Interpretive Conflicts in International Human Rights Law' (2005) 13(1) *Journal of Political Philosophy* 29; Steven Wheatley, 'A Democratic Rule of International Law' (2011) 22(2) *EJIL* 425.

⁷ Laura Valentini, 'Coercion and (Global) Justice' (2011) 105(1) *American Political Science Review* 205.

III. A Revisionist Defense of the Standard View: Why We Hold on to Bindingness

When faced with these critics, the standard view of international law, holding on to the paradigm of bindingness through consent, neutrality and an either/or conceptual structure of the authority of international law at first seems an unresponsive and archaic account. Is this really the case?

My view is that the standard view still serves an important purpose for the practical application of international laws by state officials, in particular judges, but it is also in need of revision. In particular, I submit that the relaxed view of consent as well as a commitment to neutrality embedded in the standard view are able to respond to most external critiques. It is on the either/or characteristic of the standard account that we may want to revise our position. Let me expand on these issues in turn.

Because the legal authority of international legal norms is obvious to most mainstream international lawyers, it is true that we have not explained well why we hold this view. Where does this confidence come from? The background assumption behind this confidence is a view shared within the discipline of international law that there ought to be a general presumption of deference to international law given that states collectively engage in international law making over long periods of time and they do not make international law in all fields of regulation. International law making is a distinct type of political activity. If there is international law, it must be taken seriously.⁸ The alternative that states engage in international law making with no future presumption of deference to the international laws they make is absurd.⁹ It reduces international lawyers and diplomats into performing some kind of roleplaying just for the sake of it.

The presumption of deference is foremost an attitude that makes best sense of the collective engagement of states making international law in ever increasing institutionalized contexts. It also explains why international lawyers insist on the authority claims made by binding international laws. Seen from this perspective, the skepticism vis-à-vis the authority of international law because of the lack of effectiveness of international law is a radical anti-authority view.¹⁰ Against this view, international law must simply defend its corner with the underlying reasons for assigning authority to international legal norms. No reconciliation between this view and our reasons for holding on to the authority of international law seems possible.

Democratic legitimacy concerns do not take issue with static laws and their presumptive authority, but their wide (or wild?) interpretation by international courts and tribunals. Such critiques, however, often underplay the fact that the masters of the treaties give international courts powers to interpret international laws and to deliver binding

⁸ Aileen Kavanagh refers to minimal deference in these terms when discussing the duty of deference of judges to the legislature. She further distinguishes minimal deference from substantive deference. See, Aileen Kavanagh, *Constitutional Review under the Human Rights Act* (CUP 2009) 181.

⁹ Morgenthau was in agreement with this. Hans J Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (2nd edn, Knopf 1954), 249-52.

¹⁰ Cf. Anne van Aaken, 'To Do Away with International Law?' (2005) 17 EJIL 289.

decisions. What is more, states indicate preferences for creating either courts or quasi-judicial international bodies or retaining binding interpretation authority, as is the case with some bilateral investment treaties. They therefore show an understanding of these differences in delegating to a court compared to other types of institutions. The interpretations by international courts take place within the context of the rules of treaty interpretation espoused by the Vienna Convention on the Law of Treaties, which does not limit rules of such interpretation to textual interpretation, but also to the context and object and purpose of treaties. Whilst disagreements over the interpretation of treaties by international courts are commonplace, it is also well known that most interpreters have developed judge-made doctrines of deference to democratic decision makers. In this broader context an unsharpened democratic legitimacy critique is unable to surpass the relaxed consent view grounding the authority of international law as defended by international lawyers.

The domination by way of systemic coercion exercised through international law perhaps is a tougher argument as it depicts states, which may formally look like consenting to international laws, as being coerced to such acceptance. Such domination may take the form of treaty acceptance by states that may have detrimental consequences for the well being of their citizens. It may also arise when a state is asked to comply with a binding judgment or decision that undermines fundamental rights or justice-based concerns. This argument is often raised in relation to acceptance of bilateral investment treaties, the world trade regime by poor states, or the Security Council resolutions. Note, however, that the coercion argument may be relevant for all regime types, including rich democratic states. It is on this point that the standard view of the authority of international law may have to rethink its every day defense of the either/or account of authority. Is the depiction of the authority of international law as an either/or view really an accurate account of the present body of international law?¹¹

IV. Different Shades of Authority Claims Made by International Law

A closer look at international law as a collection of specific international laws rather than an abstract conception of international law as such might help in reconsidering the either/or construction of the authority of international law in the standard account. A survey of existing binding international legal norms would demonstrate that international laws, as a matter of the kind of authority claims they make, are not exclusively based on 'You must do X and only X'. Rather, when we study the kinds of authority claims made by specific international legal norms on state officials, we encounter a diversity.

Instead of insisting on a generalized claim that binding international laws have the identical claim to authority, we can organize the type of authority claims made by international laws by looking at the kinds of duties they impose on state officials. I propose that international law includes strong, weak and rebuttable duties. These

¹¹ This argument about the authority of international law echoes the view that compliance with international law is also best conceived as a spectrum, rather than an either/or view. Cf. Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1998).

duties, in turn, demand different types of content-independent reasons for action by state officials. Whilst we are familiar with the strong duties (an either/or view of the authority of international law), the other two are not explicitly conceptualized in our current legal scholarship.

Strong duties are duties that leave no space of discretion to state authorities with regard to the performance or non-performance of a conduct. An international law with a strong duty structure will ask State A to do X. State A must do X or refrain from doing what X says to the letter. The inviolability of diplomatic premises rule in the Vienna Convention on Diplomatic Relations (and corresponding customary international law) is a classic example of such a strong duty construction.

Weak duties are duties that allow state authorities room for discretion when taking action to respond to the authority claims of international law. Weak duties operate under a different logic from strong duties. They offer states broad and general direction. States, however, are free to choose a diverse range of options to respect a weak duty imposed by international law. The duty to settle disputes peacefully is one such weak duty. States may respect the authority of this duty, for example, by submitting disputes to judicial settlement, or to arbitration, or seeking diplomatic methods, such as negotiation, mediation, good offices, inquiry or conciliation. All of these actions would be compatible to respond to the authority of the international law.

The third way in which the authority of international law operates is by imposing rebuttable duties on states. Rebuttable duties are those that state authorities can set aside when they are able to show that an equally important other duty is preventing them from performing it. On first analysis, rebuttable duties may sound like an apologist's paradise. They allow states to provide reasons for not obeying or respecting the authority of international law. I suggest that this is not the case. For a duty to have a rebuttable structure there has to be a clear competition between two competing and equally important values in the specific circumstances, and state authorities have to show that the competition is tangible. Rebuttable duties, therefore, allow states to set aside the authoritative influence of a norm of international law on a case-by-case basis, only when it would be impossible to discharge another equally important duty. Qualified international human rights law duties are examples of rebuttable duties. For example, states have a duty to respect the right to privacy of individuals within their jurisdiction, but the duty to protect freedom of expression (an equally important duty) may make the duty to respect privacy rebuttable under specific circumstances.

V. Conclusion

In this reflection I took the external skeptics seriously and took them instead as an opportunity for self-reflection for our everyday defense of the authority of international law. I have argued that the standard view of authority is not an archaic insular one and can be defended soundly against external critiques without necessarily taking thicker normative approaches to the authority of international law. The background structure of international law is still imbued with deep disagreement on the thicker values that

underpin the international legal system and holding on to binding and neutral qualities of international law still offers a viable practical route for international law to make authority claims over state officials. Such qualities, however, would benefit from a more comprehensive defense of why we value binding international laws and can be more reflective about what the authority claims of international law *really* demands from state officials, in the form of strong, weak and rebuttable duties.