

The Legitimate Authority Of International Courts And Its Limits: A Challenge To Raz's Service Conception?

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Approximately as appears in
Patrick Capps and Henrik Palmer Olsen, eds,
Legal Authority beyond the State, (2018) DOI 10.1017/9781108100045
Cambridge University Press, 188-205

DOI 10.1017/9781108100045.008

Introduction: On the Relationship Between Authority and Legitimacy of International Courts

A. The Puzzle

Many international courts and treaty bodies (ICs) are criticized for several reasons. Protests against the free market ideology and Western bias of the WTO and its dispute settlement mechanism, and against the allegedly anti-African International Criminal Court are *legio*.¹ States themselves disobey: The South African government refused to arrest Sudanese President Omar al-Bashir, in public defiance of the International Criminal Court and its own High Court. Some protests and disobedience against ICs may be wholly due to governments' intransigence, which they may seek to hide. But states sometimes deliberately draw public attention to their noncompliance. Thus, politicians in the United Kingdom and Russia challenge particular judgments of the European Court of Human Rights, defying the blanket ban on prisoners' right to vote, or refusing to implement rulings that contradict their Constitution.

Such very public challenges by state governments, legislatures, domestic or international courts, corporations, investors or civil society groups are often draped in terms of 'legitimacy'. The challenges provoke several questions. Why

* This article has benefited greatly from discussions at the iCourts conference on International Jurisprudence: Rethinking the Concept of Law in the Light of Contemporary International Legality, December 19, 2014, at a PDJ workshop at Tromsø University March 5, 2014, and at a workshop in Dublin January 13, 2017. I am especially grateful for constructive comments from Oran Doyle, Margaret Martin, Oisín Suttle and the editors.

¹ Including Sarah Joseph, "Trade Law and Investment Law," in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), pp. 841-870; Kati Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Alphen aan den Rijn: Kluwer Law International, 2011); Joseph Stiglitz, *Globalization and Its Discontents* (New York: Norton, 2002), p. 214.

should such ‘compliance constituencies’² defer to ICs’ judgments at all? More precisely: when do ICs’ judgments give such constituencies reason to act differently than they would otherwise – and when do they not? Answering these questions require us to first understand what reasons there are for states and other constituencies to defer – in various ways – to ICs. What are the scope conditions for ICs’ legitimate claims to deference? How should states respond to ICs’ judgments when they venture beyond that scope? – and how should they respond when some states disobey? Indeed, such public noncompliance prompts the question of why and when other actors’ beliefs about the ICs’ legitimacy – their *social* legitimacy – and their *actual* compliance, affect the reasons other actors have to defer. These questions are especially important regarding international law as compared to domestic acts of noncompliance, due to the lack of enforcement mechanisms and the risk that parts of the international legal order unravels as a result.³

The present reflections begin to address these issues, from the vantage point of an account of the legitimate authority of ICs. The starting point is Joseph Raz’s influential ‘service conception’ concerning the legitimate political authority of the state.⁴ This account helps discern arguments that may substantiate an IC’s claims to be a legitimate authority, and arguably helps delineate the scope of such claims. One of the (in)famous features of this account is that it lays out strict requirements for when – if at all – claims to authority are legitimate. For our purposes, it is helpful because it sheds light on the complex relationships between normative and social legitimacy. It outlines the structure of arguments needed to show when and why the legitimate authority of an IC’s judgment may depend on wide spread beliefs about its legitimacy, and actual compliance by most states and other compliance constituencies - and when it does not. A state may have reason to defer even when the IC lacks legitimate authority for its judgment, due to the compliance of others.

The grounds for justified noncompliance may appear particularly challenging for an account based on Raz’s service conception. That theory explains why a legitimate authority’s command merits obedience somewhat *independent* of the substantive contents of the command. The present contribution argues that states’ disobedience may still be justified due to the substantive contents of the particular ruling by an IC.

² Xinyuan Dai, "Why Comply? The Domestic Constituency Mechanism," *International Organization* 59, no. 2 (2005)..

³ I am grateful to Oisín Suttle for underscoring this point. See also Henrik Palmer Olsen this volume xxx

⁴ Joseph Raz, "The Problem of Authority: Revisiting the Service Conception," *Minnesota Law Review* 90 (2006), http://www.philosophy.ox.ac.uk/__data/assets/pdf_file/0018/1467/Authority.pdf. For attempts to apply Raz to international law generally, cf. Samantha Besson, "Theorizing the Sources of International Law," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), p. 176.

Section 1 provides a brief sketch of Raz's 'Service account' of legitimacy, and addresses some criticisms relevant to our concerns. Section 2 brings this account to bear on ICs, and lays out some of its distinguishing features by comparing it to the influential accounts of Daniel Bodansky and Yuval Shany.⁵ Section 3 turns to consider how this account accommodates and even justifies cases of disobedience against ICs.

1. Legitimacy - The Service Conception of Authority

How can someone who commands us to do something thereby give us a reason to act differently, even imposing on us a moral duty to do so? This is the topic of Raz's account of legitimate authority.⁶ On this account, an authority is a body which claims to have the power to impose moral duties on others, that they obey.

A claim to authority is most striking when that body issues a directive or command that appears stupid, mistaken, or unjust to those subject to it:

It is of the nature of authority that it requires submission even when one thinks that what is required is against reason. Therefore, submission to authority is irrational.⁷

Even then there is an assumption that the command of the authority imposes a moral duty on the subjects to act differently than they otherwise would have reason to.

This understanding of what it means to claim authority seems appropriate for our topic – the legitimacy of ICs. An IC is similar to other bodies that claim *authority* and not only naked power over others such as might the Mafia. The IC claims that it has a *right* to rule, i.e. to issue such a judgment, a judgment which others are *under a duty* to heed.⁸

⁵ D. Bodansky, 'The Concept of Legitimacy in International Law', in R. Wolfrum and V. Roben (eds.), *Legitimacy in International Law* (Heidelberg: Springer, 2008), pp. 309-317; D. Bodansky, 'Legitimacy in International Law and International Relations', in J. L. Dunoff and M. A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013), pp. 321-342; Yuval Shany, "Assessing the Effectiveness of International Courts: A Goal-Based Approach," *American Journal of International Law* 106, no. 2 (2012), <http://dx.doi.org/10.5305/amerjintelaw.106.2.0225>; Yuval Shany, *Assessing the Effectiveness of International Courts* (New York: Oxford University Press, 2013).

⁶ Raz. 1005.

⁷ Joseph Raz, "Legitimate Authority," in *The Authority of Law: Essays on Law and Morality*, ed. Joseph Raz (Oxford: Oxford University Press, 2009), p. 3.

⁸ Raz, "The Problem of Authority: Revisiting the Service Conception.", p. 1005.

A. Justifying Legitimate Authority: The Service Conception

What reasons do potential subjects have to defer to an IC as a legitimate authority? Raz's general argument is 'the normal justification thesis':

The subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not.⁹

Note that Raz holds that the directive of the authority must *replace* some of the reasons for action of the subjects – this is what creates the apparent puzzle:

Because the arbitrator is meant to decide on the basis of certain reasons, the disputants are excluded from later relying on them. They handed over to him the task of evaluating those reasons. If they do not then deny them as possible bases for their own action they defeat the very point and purpose of the arbitration. The only proper way to acknowledge the arbitrator's authority is to take it to be a reason for action which replaces the reasons on the basis of which he was meant to decide.¹⁰

This requirement – that the actors original reasons are *replaced* by the judgment of the authority – appears to challenge our concern with whether disobedience might ever be justified on this account; we turn to that in section 4.

Raz sketches a non-exhaustive list of five kinds of reasons which legitimate authorities may promote. These are five kinds of *service* the authority can provide to actors – hence the name 'the service conception of authority'. Note that each of these provide a necessary, but not a sufficient, condition for legitimate authority. And it remains an open, partly empirical, question whether a body which claims authority indeed does provide any such service.

1. The authority is wiser and therefore better able to establish how the individual should act.
2. It has a steadier will less likely to be tainted by bias, weakness or impetuosity, less likely to be diverted from right reason by temptations or pressures.
3. Direct individual action in an attempt to follow right reason is likely to be self-defeating. Individuals should follow an indirect strategy, guiding their

⁹ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986). Raz, "The Problem of Authority: Revisiting the Service Conception.", p. 1014.

¹⁰ Raz, *The Morality of Freedom*, p. 42. And cf. for a similar view, Bodansky, 'Legitimacy in International Law and International Relations', p. 325.

action by one standard in order better to conform to another. And the best indirect strategy is to be guided by authority.

4. Deciding for oneself what to do causes anxiety, exhaustion, or involves costs in time or resources the avoidance of which by following authority does not have significant drawbacks, and is therefore justified.[...]

5. The authority is in a better position to achieve (if its legitimacy is acknowledged) what the individual has reason to but is in no position to achieve.¹¹

2. The Service Conception Brought to Bear on ICs

Two main modifications are significant for the service conception to help bring together several of the legitimacy concerns regarding ICs, and explain how they fit together.

Firstly, our concern is not with ‘commands,’ but rather the judgment, view or opinion (hereafter, judgment) that an ICs issues. Of particular concern are cases where compliance constituencies - domestic courts or parliaments, judges of other ICs, or civil society groups - regard this judgment as poor, unjust or the like.

Secondly, note that an IC’s correct claim to authority does not entail that others have a moral duty to *comply*. A more appropriate term may be ‘deference’: ICs’ judgments, views, comments or interpretations should influence a wide range of actions. Other courts or legislatures may be required to *take account* of the judgments: take them seriously or give some weight to them, even if in the end the subject still fails to comply. For instance, a state may be expected to present counter arguments if it fails to comply with the views of a treaty body.¹² Thus, such judgments do not always provide *exclusionary* reasons to the subjects.¹³

One straightforward application of the service conception is that a necessary condition for an IC to be a normatively legitimate authority is that it enables states or other compliance constituencies to better act on the reasons they have. Candidate reasons are the objectives of the states which prompted the treaty establishing the IC. Arguably, ICs *might* provide several of the five services Raz delineates. Again, whether they in fact do so for various compliance constituencies remains an open question. There is thus no presumption in favour of the view that ICs exercise legitimate authority: that must be argued.¹⁴

¹¹ Ibid., p. 75.

¹² Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2008), p. 220.

¹³ I am grateful to Oran Doyle and Alan Brudner who prompted this clarification.

¹⁴ I am grateful to Oran Doyle for noting the need to make this clear.

Some ICs may provide a “less biased will.” States have established them to provide assurance of their commitment to let their treaty obligations override their domestic short term interests, ranging from human rights and international criminal law to investment conditions. Other ICs can reduce the burdens of making decisions. Thus, states often agree to treaties whose central terms are left vague, leaving it to the IC as a sufficiently independent third party to interpret the legal text. Such agreements save time and help states bypass disagreements.¹⁵ ICs may also reduce or resolve various collective action problems among states, for instance removing free rider problems from international trade agreements by monitoring violations or trigger sanctions.

Such broad brush applications of ‘service arguments’ may indicate some reasons why IC’s judgments should *exclude* some of the reasons states otherwise have for acting: that is the point of the steadier will and the collective action arguments. Note that these indications of how the service conception *may* apply do not yet show that any IC in fact ever exercises legitimate authority. The service conception only indicates the sort of arguments which must be provided. Which particular judgments, by which ICs, that actually create duties that which compliance constituencies should defer, require detailed specification and arguments.

To spell out some implications of this account, it is useful to consider how it avoids some criticisms often levelled against various accounts of legitimate authority.

Apparently, some accounts hold that legitimate authorities make ‘absolute’ demands which must always be complied with. Hurd criticizes those:

Legitimacy is widely defined in relation to rule compliance ...These approaches leave no room to understand a case where rules appear to be widely accepted as legitimate and are also subject to non-compliance by those who believe in their legitimacy. In other words, these approaches deny agents the capacity to think, act, and choose in the presence of a legitimate rule or norm.¹⁶

¹⁵ Joost Pauwelyn and Manfred Elsig, "The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (2012).; Alec Stone Sweet and Thomas L. Brunell, "Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization," *Journal of law and courts* 1, no. 1 (2013).

¹⁶ Ian Hurd, "The International Rule of Law: Law and the Limits of Politics," *Ethics and International Affairs* 28, no. 1 (2014)., 166-167.

Raz's account sketched above differs in several ways: it allows that legitimacy may be a matter of degree: an authority may *increase* its legitimacy insofar as it provides a greater service to the subjects by helping them comply even more with the reasons and objectives they have. The moral duty an IC creates by its judgment may also be 'prima facie' – possibly to be 'balanced' or set aside by other reasons such as commands from other authorities. And finally, even though the judgments of a legitimate authority have a moral claim to be obeyed, there is no moral claim that these subjects must change their beliefs – e.g. that the judgment is counterproductive, flawed etc.¹⁷

Some critics of legitimacy talk dismiss such terms as mere tools of manipulation, to prompt subjects into unthinking compliance: "the very notion of legitimacy is ideological inasmuch as [it].. lets power redescribe itself as authority on its own terms."¹⁸ In contrast, Raz's this account holds that there may be no moral duty to obey all laws or other claimed authorities. Rather, it lays out the requisite sort of arguments necessary for self-proclaimed authorities to be *correct* in their claims to be legitimate for particular subjects. This account may thus arguably help *resist* manipulation and unthinking compliance. Raz holds famously that there appears to be no

legal system in which the normal justification thesis can be shown to hold for every person and for every law which the system has in fact generated.¹⁹

A. On Social Legitimacy and Normative Legitimacy

This account distinguishes the normative legitimacy of an IC from *social* legitimacy understood as the *belief* that an IC is normatively legitimate. This understanding of social legitimacy, harking back to Weber, is "parasitic on the conceptually prior idea of normative legitimacy"²⁰ A body that claims authority thus typically claims that the social legitimacy they enjoy in the eyes of some compliance constituencies, is based on true beliefs. Bodansky, Shany and many other scholars concerned with the legitimacy of ICs use 'legitimacy' and 'authority' in roughly similar ways as this account. They are not concerned with all bodies who yield any sort of power, but rather bodies which claim the right

¹⁷ I am grateful to Henrik Palmer Olsen for urging elaboration of this point.

¹⁸ Martti Koskenniemi, "Legitimacy, Rights and Ideology, Notes Towards a Critique of the New Moral Internationalism," *Associations: Journal for Legal and Social Theory* 7, no. 2 (2003), 367.

¹⁹ Stephen Perry, "Law and Obligation," *The American Journal of Jurisprudence* (2005), 276; cf Raz 2006, 1008.

²⁰ M. Weber, 'Politics as a Vocation', in M. Weber (author), H. H. Gerth and C. W. Mills (trans. and eds.) *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1973), pp. 77-128.

to rule. Both Bodansky and Shany distinguish between normative and social legitimacy in a similar way.²¹

Social legitimacy is often thought to have motivating force, because actors believe that the IC's judgment gives them reason to act. Thus, insofar as some such subjects regard an IC as a *legitimate* authority, they are often thought to be somewhat more likely to defer in such ways. However, Bodansky notes that this assumption has seldom been tested rigorously.²²

A focus on the subjective beliefs of subjects is sometimes called the 'subjective' tradition.²³ The alternative 'objective' tradition is illustrated by Allen Buchanan's claim that a government should only be considered legitimate if it meets certain standards in the way it treats its citizens. This in turn is separate from whether the population *believes* that the government is legitimate.²⁴ Even though normative legitimacy plays no direct causal role, it clearly must be included also in accounts about contestations about the legitimacy of ICs. Such disagreements are usually about normative legitimacy – which reasons actors actually have. The parties seldom disagree about social legitimacy – whether certain parties believe that they have reasons to act stemming from the IC's judgment. Rather, the parties disagree about which of these beliefs about ICs being legitimate are correct or well grounded – i.e. matters of normative legitimacy.

On this account at least three conditions need to be met for an IC to not only claim to be an authority, but to actually be a legitimate authority for various compliance constituencies. Firstly, the provision of a service is not sufficient. In particular, more must be said about when the authority puts others under an obligation to defer. Subjects may have several reasons to act which they nevertheless have no *obligation* to act on, and this may reduce the authority's claim on the agent. And several competing bodies may be able to bolster a subject's ability to act according to reasons the subject has, raising the question of how to determine which of them should be authoritative for the subject. As regards ICs, some of these issues are settled – imperfectly - by requiring states' consent. The remaining two issues concern the kinds of reasons required, and the significance of compliance.

B. Reasons Versus States' Objectives

The reasons ICs must help subjects act on are not subjective but objective, in the sense that legitimacy requires that an IC is of service regarding "whatever

²¹ Bodansky, 'The Concept of Legitimacy in International Law'. Daniel Bodansky, "The Concept of Legitimacy in International Law," in *Legitimacy in International Law*, ed. Rudiger Wolfrum and Volker Roben (Heidelberg: Springer, 2008).

²² Bodansky, 'Legitimacy in International Law and International Relations', p. 323.

²³ Hurd, 'The International Rule of Law'.

²⁴ Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004)..

reasons correctly *apply* to the case, not reasons of which the agent is aware, or which serve his self-interest narrowly understood.²⁵ Thus such reasons may be other-regarding, and they may be unknown to the subject. A state might be subject to a legitimate IC because that IC's judgments better promote the reasons the state actually has to act – even though the state rejects those reasons.

This focus on objective reasons prompts a concern about how to understand and address various forms of disagreements about such objective reasons.²⁶ Several issues may be distinguished for future further discussions. One philosophically salient issue is of course the challenge of mutually incompatible yet not irrational conceptions of the good, which may be thought to be an even greater problem among individuals globally than within a liberal society.²⁷ A second concern arises where there are (reasonable) disagreements also about what *justice* requires, e.g. regarding the appropriate extent of equality or liberty individuals should be accorded, or the value of democratic governance. 'Meta-coordination' among such alternatives may be one fruitful approach.²⁸ A third set of important issues arises where some important compliance constituencies hold certain objectives or values, though for clearly bad reasons – thus cases where autocratic rulers reject any international expressions of concern for ongoing mass slaughter for reasons of sovereign immunity. A fourth range of cases are those where compliance constituencies are mistaken, but for plausible reasons. To illustrate: an IC may be illegitimate even if it enables states to act better on the reasons states think they have – if those beliefs are mistaken. This is one way to understand some criticism raised against the WTO regime, that global trade liberalization is a mistaken objective of states, that is: claims that this is not an objective states have reason to pursue, given the impact on vulnerable segments of their populations.²⁹ Similar accounts may be offered in discussions about the Transatlantic Trade Investment Partnership (TTIP) between the EU and the US. Typical challenges concern the public health impact of TTIP³⁰ and the erosion of state sovereignty wrought by the Investor-State Dispute

Max Weber, "Der Sinn Der 'Wertfreiheit' Der Soziologischen Und Ökonomischen Wissenschaften," *Logos* (1917).

²⁵ M. Weber, *Der Sinn der 'Wertfreiheit' der Soziologischen und Ökonomischen Wissenschaften* (1917) 7 *Logos*, 40; Cf. L. Green, 'Legal Obligation and Authority', in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*; Raz, "The Problem of Authority: Revisiting the Service Conception.", p. 1008, fn 10.

²⁶ I am grateful to Oisín Suttle for suggesting that this point be expanded.

²⁷ J. Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971).

²⁸ A. Buchanan, *The Heart of Human Rights* (Oxford, Oxford University Press 2013), p. 179.

²⁹ Inter alia R. L. Howse, 'From Politics to Technocracy - and Back Again: The Fate of the

Multilateral Trading Regime' (2002) 96 *American Journal of International Law*, 94-117; J. Pauwelyn, *Conflicts of Norms in Public International Law* (Cambridge: Cambridge University Press, 2008), p. 33.

³⁰ Neil Bennet, "Health Concerns Raised over Eu-US Trade Deal," *The Lancet* 384, no. 9946 (2014).

Settlement (ISDS) mechanism, whether TTIP will indeed promote jobs and economic growth, and how fairly the burdens and benefits will be distributed.³¹ If critics are right, states do not have reason to agree to such a treaty, and a treaty body which faithfully adjudicates the treaty or investor-state disputes will *not* be legitimate on this account - even if the IC carries out its mandate diligently and impartially.

The upshot for the purposes of justifiable principled noncompliance with IC judgments is that some such sources of disagreements render such noncompliance hazardous, and may unravel support for international law in general. Others may remain unconvinced of the rationale offered by the protesters, or suspect that the justification is a sham. Such not unreasonable risks may constrain the acceptable grounds for noncompliance.

A separate but related set of criticisms against an IC arise when the IC prevents states from acting on the other reasons they have. For instance, if the overall effects of the set of ICs are detrimental to states' ability to promote and protect the interests of their citizens, we may question whether the IC is indeed providing services that states have reason to value. To illustrate, consider arguments that ICs which effectively promote free trade or foreign direct investment may severely restrict states' ability to respect and promote citizens' human rights or to secure their basic needs. John Ruggie has argued that such international commitments may have rendered states unable to alleviate and redistribute the social adjustment costs wrought by open markets and increased foreign investment.³²

In such cases, if the criticisms are sound, the IC is an authority which claims that its judgments create reasons for others - but it is not a *legitimate* authority regarding this matter on Raz's account. Note that this understanding of legitimacy allows critical and nuanced development of Shany's goal-based understanding of the effectiveness of international courts. Shany assumes that the effective pursuit of states' objectives in setting up ICs grants the ICs legitimacy:

mandate providers delegate to courts the powers to act as their "long arm" or as independent guardians of their collective interests... on the presumptive ability of state representatives to speak and act on behalf of nations and their citizenry—which confers a significant degree of legitimacy on international courts. By the same token, the goals established

³¹ For an overview cf. <http://www.atlantic-community.org/-/ttip-top-5-concerns-and-criticism>

³² John G. Ruggie, "International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order," *International Organization* 36 (1982); cf. Shany, 'A Goal-Based Approach', p. 237.

through this legitimacy-conferring process need to be afforded some priority over the goals identified by the courts' own judges.³³

He notes that this focus must be supplemented:

It fails to capture unintended or unexpected results, and it does not specifically take into account the costs invested in attaining the intended or expected goals.³⁴

In contrast, the present account does *not* assume that state representatives speak on behalf of the interests of their citizens. Indeed, Raz's service conception also (and originally) applies to states – denying the presumption that states are legitimate authorities. States may fail to act on the reasons they actually have, and instead establish an IC with flawed objectives – to the detriment of the normative legitimacy of both.

C. On Legitimacy and General Compliance

A further requirement is that the IC must actually provide the service claimed. To secure this, very often actual compliance by many subjects may be crucial. Consider an IC that is set up to prevent free riding among states, or assurance of their reliability, such as trade agreements and human rights treaties, respectively. The IC only provides such services insofar as enough relevant compliance constituencies comply or defer so as to bring about the coordination or assurance benefits. If states continue to free ride on free trade agreements, the IC does not reduce the collective action problem, and the IC is an illegitimate authority. Arguably, human rights ICs are less dependent on general compliance: they can provide helpful services to some states and their individuals by providing credible monitoring of legislation and policies even though some other states systematically ignore the judgments. However, the role of human rights ICs as a 'self binding' device may suffer. They can serve to make a state's human rights commitments more credible toward their own population, or toward other compliance constituencies only if the IC is generally complied with. If many states continue human rights violations unabated, such attempts at self binding no longer enhance states' commitment. So, actual compliance by a significant proportion of the compliance constituency may be a condition for an IC to be a legitimate authority. This account thus provides one explanation for why "[a]n institution could not be normatively legitimate if no one thought it so."³⁵

³³ Shany, 'A Goal-Based Approach', p. 241.

³⁴ *ibid*, p. 224.

³⁵ Bodansky, 'Legitimacy in International Law and International Relations', p. Daniel Bodansky, "Legitimacy in International Law and International Relations," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2013); *ibid*.327.

Note that this also limits the possible disparities between objective and subjective reasons: if an IC was to attempt to promote states' ability to act according to their objective reasons, reasons which they currently fail to accept, it is very unlikely that the states would indeed comply. Hence, the IC would not promote its objective – and would thus be illegitimate:

there are independent reasons for thinking that someone or some body can be an authority only if the fact that the two conditions are met can be known to its subjects. The point of being under an authority is that it opens a way of improving one's conformity with reason. One achieves that by conforming to the authority's directives, and (special circumstances apart) one can reliably conform only if one has reliable beliefs regarding who has legitimate authority, and what its directives are. If one cannot have trustworthy beliefs that a certain body meets the conditions for legitimacy, then one's belief in its authority is haphazard, and cannot (again special circumstances apart) be reliable. Therefore, to fulfill its function, the legitimacy of an authority must be knowable to its subjects.³⁶

Persistent free riding among state signatories thus challenge the normative legitimacy of the IC, especially if noncompliers impose excessive burdens onto compliers. Therefore, this account challenges rather than promotes unthinking general compliance. Indeed, when discussing domestic legitimate authorities, Raz notes that

[o]ne crucial condition which, in the case of political authorities governing sizeable societies, is necessary to establish their [normative] legitimacy, does not obtain. That is the ability to co-ordinate the actions of members of the society in case in which they have reason to co-ordinate their actions, and the ability to do so better than they can. That ability requires effective power over them.³⁷

This limit to legitimate authority notwithstanding, a further important role of general deference by other compliance constituencies is that such deference may independently give subjects a reason to defer. The reasons may be out of fairness to those who defer – though they defer on mistaken grounds – and to avoid being a free rider on practices that the subject benefits from.

3. Can Noncompliance Be Justified?

Arguably, a theory of legitimate authority should aid in identifying its own limits of application – and indeed how to act in such borderline cases. Can this account

³⁶ Raz, 'The Problem of Authority', p. 1025.

³⁷ Raz, *The Morality of Freedom*!, pp. 75-76.

of the legitimacy of ICs, drawn from Raz's service conception, permit a state to not defer with a judgment of a generally legitimate IC? – might it even permit a state to engage in some form of international 'civil disobedience' against judgments it finds beyond the bounds of acceptability? Such an account will also show that such legitimacy talk is not designed as a tool of manipulation to entice compliance constituencies to defer. However, the pedigree of this account from Raz's 'Service conception' would seem to render it impossible to permit willful noncompliance that is due to the *content* of the judgment. Such noncompliance would seem to contradict the whole point of having an authority: since acceptance of the IC as a legitimate authority entails that the subject no longer can rely on the reasons which the IC's judgments exclude.³⁸

On the face of it, Raz's account of legitimate authority might not be thought to provide such explanations or justifications of noncompliance against legitimate authorities. Deference is required even when the IC makes a mistake:

There will be other cases, for example, cases in which the directive issued by authority is mistaken or unjustified... This can be consistent with the directive being binding on us. Even legitimate authorities make mistakes. In such cases, we should conform with the directive, and the ideal case is one in which we do so because we are required to by the authority and not because of the other reasons that support the action.³⁹

Such claims may be why Arthur Applbaum argues that Raz's account cannot accommodate 'civil disobedience':

If legitimate authority entails a dispositive duty to obey, civil disobedience disappears as a poignant moral phenomenon. If the authority is legitimate, disobedience is not justified. If, by assumption, disobedience is justified, then the authority that is disobeyed cannot have been legitimate.⁴⁰

In response, consider two kinds of noncompliance. Firstly, subjects may recognize the legitimate authority of the IC, but hold that *other* reasons override the authority's decision. Such arguments may be similar to those Franck might have in mind when he described the non-authorized NATO intervention into Kosovo as a morally mandatory act of international civil disobedience.⁴¹ That description is challenged on several counts, including whether the case may be

³⁸ *ibid*, p. 42.

³⁹ Raz, "The Problem of Authority: Revisiting the Service Conception.", pp. 1022-1023, my emphasis.

⁴⁰ Arthur Applbaum, "Legitimacy without the Duty to Obey," *Philosophy and Public Affairs* 38, no. 3 (2010), <http://dx.doi.org/10.1111/j.1088-4963.2010.01186.x>, 220; cf. Bodansky, 'Legitimacy in International Law and International Relations', p. 327.

⁴¹ Thomas M. Franck, "Lessons of Kosovo," *American Journal of International Law* 93 (1999)..

accepted as *sui generis* without setting precedence, or whether this opens for a slippery slope of non-authorized exceptions by states with mixed motives. Other cases appear more uncontroversial on such grounds. Thus, the German Constitutional Court also refused to comply with an ECtHR judgment due to concern for *other* affected parties than those involved in the case.⁴² Arguably, similar and more difficult issues may arise when there is disagreement as to whether the fetus should be accorded a right to life.⁴³ This fits with Raz's insistence that:

Authoritative directives are not always conclusive reasons for the conduct they require. They can be defeated by conflicting reasons, or by conflicting directives. The reasons that can defeat them are those they do not exclude.⁴⁴ Other cases may be understood as a particular form of extreme corrective measure within a legal or political system which is not fully just. John Rawls has argued that in such legal orders some noncompliance may serve as an ultimate attempt to urge the authorities to change their directives to avoid serious injustice and to improve the system as a whole.⁴⁵ In such cases, an authority such as an IC may be generally legitimate in that it can create moral duties, but it does not do so always, namely when its judgments fail to satisfy the 'normal justification' requirements in a particular case.

One type of example was mentioned above: when general compliance is not to be expected. Another kind of case arise when the IC transgresses its domain of legitimate authority. There may be two kinds of such transgressions: the decisions may concern matters outside the proper scope where the IC performs a service. Such cases may arise if the IC makes serious mistakes in its 'dynamic interpretation' of the treaty. We might include the 'Solange' mechanism as an example of this, where a domestic apex court warns that it will not automatically comply if in its own view, the IC violates its proper domain.⁴⁶ Raz would appear to grant as much when he limits the kinds of reasons which the authority's judgment pre-empts:

The pre-emption thesis claims that the factors about which the authority was wrong, and which are not jurisdictional factors, are pre-empted by the directive.⁴⁷

⁴² *Görgülü [Gorgulu]*, 2 BvR 1481/04 - paras. (1-72), (German Federal Constitutional Court, 2004).

⁴³ I am grateful to Oran Doyle for this observation.

⁴⁴ Raz, "The Problem of Authority: Revisiting the Service Conception.", p. 1023.

⁴⁵ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971)..

⁴⁶ Bundesverfassungsgericht, "Solange I: Internationale Handelsgesellschaft V. Einfuhr Und Vorratsstelle Für Getreide Und Futtermittel," *BVerfGE* 37, 271 (1974)., Ernst-Ulrich Petersmann, "Human Rights, International Economic Law and 'Constitutional Justice'," *European Journal of International Law* 19, no. 4 (2008)..

⁴⁷ Raz, *The Morality of Freedom.*, p. 61.

The compliance constituencies may thus have several other reasons to act that remain in force even when the IC's judgment preempts some reasons. Indeed, Raz may allow that when one judgment of a legitimate authority is clearly wrong, compliance constituencies may not defer to it:

Even if legitimate authority is limited by the condition that its directives are not binding if clearly wrong, and I wish to express no opinion on whether it is so limited, it can play its mediating role. Establishing that something is clearly wrong does not require going through the underlying reasoning. It is not the case that the legitimate power of authorities is generally limited by the condition that it is defeated by significant mistakes which are not clear.⁴⁸

I submit that a second form of transgression is if the IC fails profoundly in procedures: where it is deemed by a state or other compliance constituency to depart drastically from legal methods but instead draws arbitrary or highly biased conclusions.

In these two kinds of cases, if less confrontational means of protest have been unsuccessful, the state might avail itself of public, reasoned disobedience to urge the IC that it must change its mode of operation. Such disobedience must be duly constrained and presented in ways to convey credibly to other compliance constituencies and to the IC that the state generally accepts the legitimate authority of the IC, but that the state believes there is no such obligation in the present case. The challenge for the disobedient state is thus to credibly signal that it believes the IC to generally enjoy legitimate authority, but not in particular cases such as these. While noncompliance might usually be taken to express a desire to reject the IC's authority, the state here seeks not to reject the IC but to improve it. Note that this task is especially difficult when it comes to ICs and international law, where compliance is precarious and where the different compliance constituencies may have differing, often conflicting values and objectives.

Note that in such cases, the state does not deny that the judgment of an IC acting within its appropriate domain with appropriate methods, preempts a set of reasons for actions which the state otherwise had concerning the particular case in question. The noncompliance is primarily based on other reasons the state has, concerning whether the service conception applies to this particular case, and how to best improve the IC. In such cases one may want to claim that the authority is still legitimate in general, but that subjects have no duty to comply with this particular command. Thus Applbaum appears mistaken in his claims quoted above. On Rawls' account – which Applbaum appears to otherwise

⁴⁸ Raz, *The Morality of Freedom*, p. 63.

follow – civil disobedience is defined in part as actions which express such a belief that the authority is *usually* legitimate:

The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's conduct. This fidelity to law helps establish to the majority that the act is indeed politically conscientious and sincere, and that it is intended to address the public's sense of justice. To be completely open and nonviolent is to give bond of one's sincerity, for it is not easy to convince another that one's acts are conscientious, or even to be sure of this before oneself.⁴⁹

What might be judgments by ICs that could fit such an account – so that noncompliance should be regarded as and assessed as acts of civil disobedience? Such a theory might support Lord Mance, who when considering the possibility of the domestic court refusing to follow the European Court of Human Rights held that:

It would then have to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level.⁵⁰

The account sketched above may not appear to be completely consistent with the quotes from Raz's works presented above. If so, I submit that this is a plausible correction. Moreover, Raz elsewhere might seem prepared to accept such forms of noncompliance:

Human judgment errs. It falls prey to temptation and bias distorts it. This fact must affect one's considerations. But which way should it incline one? The only general answer which I find persuasive is that it depends on the circumstances. In some areas and regarding some people, caution requires submission to authority. In others, it leads to denial of authority. There are risks, moral and other, in uncritical acceptance of authority. Too often in the past, the fallibility of human judgment has led to submission to authority from a misguided sense of duty where this was a morally reprehensible attitude.⁵¹

Thus, this account of legitimate authority provides several grounds to resist deference to international courts.

⁴⁹ Rawls., 'A Theory of Justice', p. 366.

⁵⁰ Paul Mahoney, "The Relationship between the Strasbourg Court and the National Courts," *The Law Quarterly Review* 130 (2014)., at 52.

⁵¹ Raz, *The Morality of Freedom.*, p. 351.

4. Conclusion

Why and when should a judgment by an international court give others a reason to act differently than they would otherwise do - be it domestic parliaments when drafting a new law, or a domestic court interpreting such laws? Raz's famous account of legitimate authority helps frame answers to these questions. The account indicates systematic modes of argument about the ICs' claims to be legitimate authorities, and explains why actual compliance may sometimes be required for an IC to be normatively legitimate. A strength of this account is that it also helps explain why and when these authorities are mistaken about their claims to compliance. Indeed, this account of the legitimate authority of ICs even allow for cases of justifiable disobedience. Such cases may seldom be justified due to the precarious state of parts of international law and widespread divergence of values. Still, public, reasoned disobedience may be urgently needed when considering how to improve on the legitimate authority of present day international courts, within a not fully just multi-level legal and political order.

Görgülü [Gorgulu]. 2 BvR 1481/04 - paras. (1-72): German Federal Constitutional Court, 2004.

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