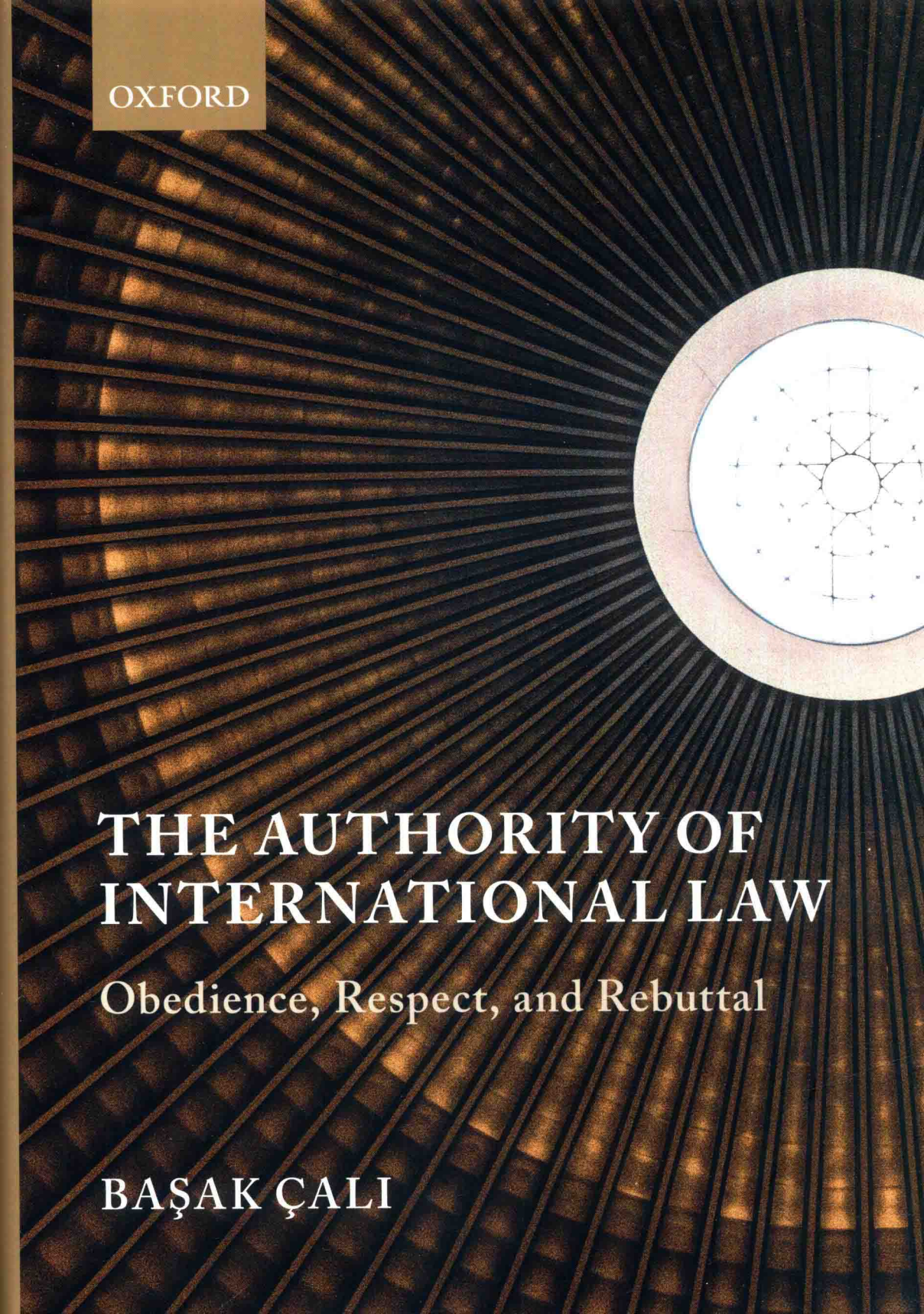
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THE AUTHORITY OF INTERNATIONAL LAW
Obedience, Respect, and Rebuttal
BAŞAK ÇALI

The Authority of International Law

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
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First Edition published in 2015

Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2015951017

ISBN 978–0–19–968509–7

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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THE AUTHORITY OF INTERNATIONAL LAW

Acknowledgements

The book has been on a journey that has transcended three jurisdictions whose relationship with international law is quite different. Writing started in London and continued in Geneva. It was completed in Istanbul. I like to think that this journey has inspired part of its creation. The other—I hope main—inspiration has been the result of thinking about, researching, and practising international law in domestic contexts for the past decade.

My interest in the authority of international law sharpened as I undertook my Economic and Social Research Council -funded research project 'The Judicial Legitimacy and Authority of Supranational Human Rights Courts: A Comparative Analysis of the Perception of the European Court of Human Rights' (Grant No: RES-061-25-0029). Whilst this research agenda aimed to reach an empirically grounded understanding of the authority of the European Court of Human Rights and its judgments in relation to parliaments and national courts, it quickly became clear that each and every actor I met in these domestic contexts was seeking to grapple with the doctrinal relationships they thought they had or did not have with law and legal institutions above and beyond the state. It was striking that most views domestic actors held, even within the same jurisdiction, were inconsistent with one another. The struggle to find a midway solution between loyalties to domestic law and to international law was what brought them together. A few took short cuts, but most of them searched for a way to reconcile what they took as multiple legal authorities demanding their attention and action. Due to promises of anonymity, I am not able to thank my judge interlocutors in London, Ankara, Karlsruhe, Dublin, Sofia, and Strasbourg openly. I am grateful to them all.

The struggles I found in the course of the empirical investigation of 'their reasons' to respect or disregard international law led me naturally towards a more rigorous and systematic analysis of the authority of international law. Could we develop an account of the authority of international law that is both sound and workable? I wanted this analysis to be both practically relevant and legally defensible for those that grapple with the authority of international law as a matter of political and judicial practice. This book, therefore, is squarely located in the field of practice-oriented legal doctrine. It is concerned with how we move from the theoretical analysis of the authority of international law to a doctrinal analysis here and now. But I hope that

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the book will also be of interest to those who are occupied with questions of authority from the legal philosophy perspective.

I am one of those lucky ones to have benefited from support both institutionally and individually on the journey of this book. I owe all of them great gratitude.

University College London's Department of Political Science was my institutional home between 2003 and 2013. I was granted exceptional support during the periods I trekked across Europe from Diyarbakır to Dublin for long conversations with parliamentarians as well as constitutional and high court judges discovering the intrinsic and difficult relationships between the sociology of the authority of international law and the legal theory of it. Along this road, I benefited from the excellent research assistance of Alice Wyss, Anne Koch, and Nicola Bruch.

During this research leave from UCL, I was lucky to have been welcomed into the multidisciplinary research programme on the legitimacy of international law and institutions—first as a fellow of the Norwegian Academy of Science and Letters under its 'Should States Ratify Human Rights Conventions' Research Project at its Centre for Advanced Study and subsequently as a regular visitor to Pluricourts in Oslo. My encounters with a lively academic community of law, philosophy, and political science scholars with a sustained interest in the legitimacy and authority of international law have enabled me to better clarify my views and to interact with political scientists and political philosophers concerned with the authority of international law from the perspective of its justifiability to domestic democratic polities. For the opportunity, the welcome, and the prompt midday smørbrød, I thank, in particular, Andreas Føllesdal and Geir Ulfstein.

A number of audiences in London, Florence, Copenhagen, Nottingham, Madrid, Geneva, and Reykjavik have given me feedback that pushed me to develop and improve my work on the authority of international law. In particular, but in no particular order, I wish to extend my thanks to the late Kevin Boyle, Richard Bellamy, Dino Kritsiotis, Nigel Rodley, Françoise Hampson, and Mikael Madsen. My new home—Koç University Law School in Istanbul—was extremely supportive as I turned into the final straight and gave me space to complete the manuscript. My particular thanks go to Zeynep Elibol for helping to relieve my marking load when time was of the essence. Cem Tecimer, my student research assistant, offered nothing but outstanding help with formatting the manuscript and interpreting my occasionally haphazard footnotes. Seçil Bilgiç offered much help with organizing the bibliography. Rachael and Sam tackled this particular Turk's ability to forget definite and indefinite articles or confuse pronouns. Their

editorial suggestions have not only made the book's language better, but its arguments clearer.

My Oxford University Press editors Merel Alstein and Emma Endean were kind and patient when delays occurred—in particular when organizing my move from London to Istanbul via Geneva. I also would like to thank my two anonymous reviewers for encouraging me to write the book for the broader international law audience rather than solely for the Council of Europe space.

Finally and, most importantly, my family has supported me without question when it mattered the most. Very special thanks to Sam again, to my son, Ara, who patiently played beside me without disruption on many early mornings and post-crèche evenings, to my parents Gülseren and Erdal, my sister Göksu for always being there, and to Margaret who made the trip from Sheffield to Istanbul many a time to support me during long working hours.

I dedicate this book to Kevin Boyle, who offered me enthusiastic support during its inception, but could not see its completion.

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Introduction

'To deny that international law exists as a system of binding legal rules flies in the face of all the evidence.'[1]

Mr Hirst and Mr Davis

On 10 February 2011 an unusual motion was brought before the House of Commons—the lower house of the British Parliament. The motion, by David Davis, Member of Parliament for Haltemprice and Howden (and former shadow home secretary), proposed:

'That this House notes the ruling of the European Court of Human Rights in *Hirst v the United Kingdom* in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand.'[2]

In the subsequent vote, 234 votes were cast in favour of this motion and 22 against. They also voted against narrowing the scope of section 3 of the Representation of the People Act 1983 that states convicted prisoners do not have a right to vote. This motion had been brought forward in the midst of the political upheaval created by a culmination of cases brought before the European Court of Human Rights by convicted prisoners. The first of these, by Mr Hirst, was in 2001—ten years before Mr Davis took to the floor.[3]

[1] Hans J Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (2nd edn, New York: Knopf 1954), 249–52.

[2] HC Deb 10 February 2011, vol 523, col 493 available at: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110210/debtext/110210-0001.htm.

[3] *Hirst v UK (No 2)* (2004) 38 EHRR 40.

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