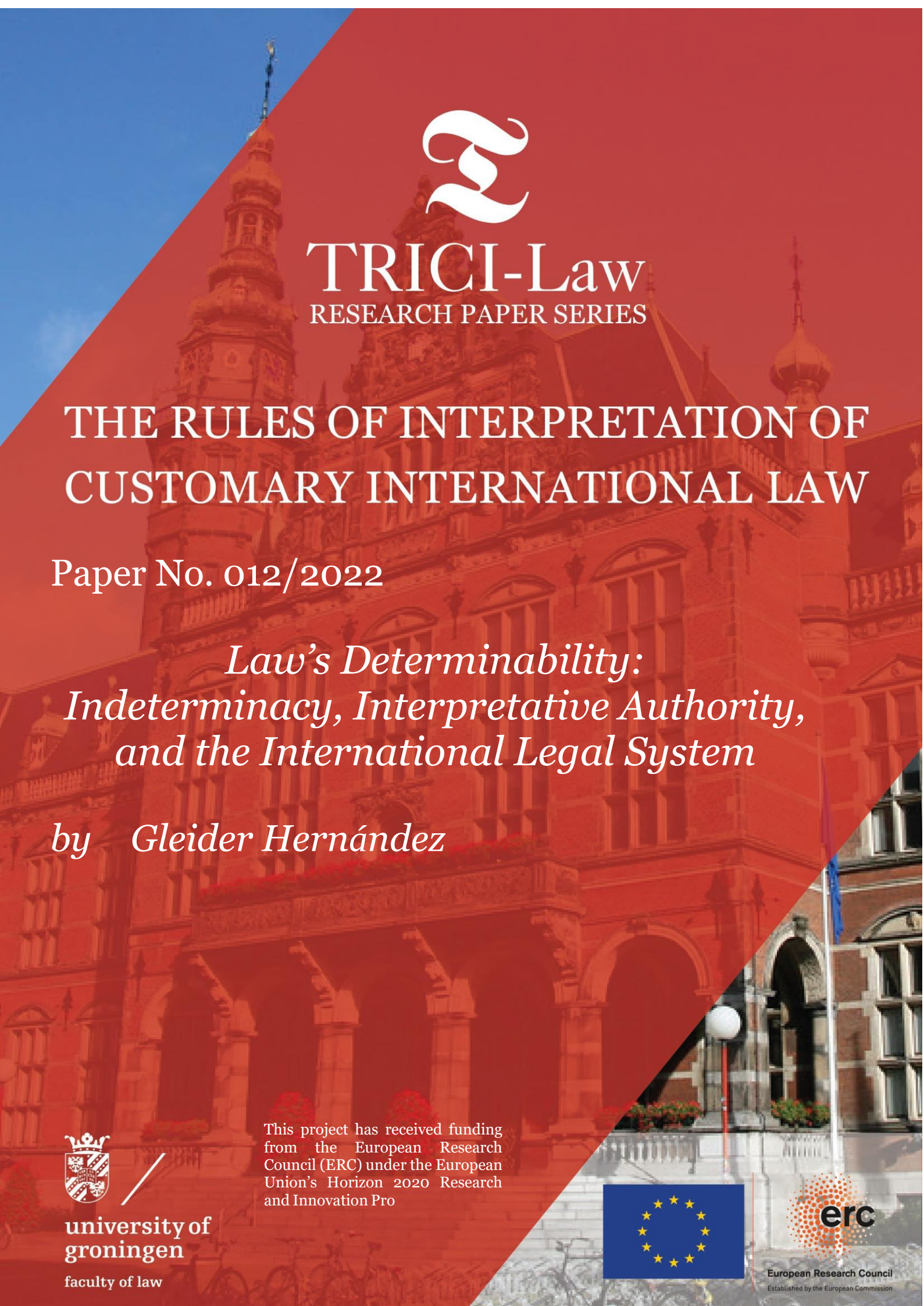

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Law's Determinability: Indeterminacy, Interpretative Authority, and the International Legal System

by Gleider Hernández

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LAW'S DETERMINABILITY:

Indeterminacy, Interpretative Authority, and the International Legal System

Gleider Hernández*

Abstract

Authority claims remain rooted in the antecedent existence of a degree of indeterminacy, in particular in the international legal system, in which a lack of systematicity characterises how international actors claim and exercise authority. The indeterminacies in international law give rise to certain practices and mechanisms designed to cure such deficiencies, and in particular these practices are observed by law-applying and law-interpreting bodies, of which international courts and tribunals tend to be the exemplars. These 'authority claims', far from being scattered and random claims for legitimation, in fact give a peek into international law's structure as a legal system with mechanisms of determinability, these mechanisms being designed to privilege coherence and order. The discretion revealed in the practices of interpretation is in fact the outcome of interpretative practices, not their cause. Accordingly, the sustainable existence of a legal system remains rooted in the existence, identification, and study of its law-applying officials, whose authority depends in part on their recognition by a wider professional or epistemic community of international lawyers. The social and communitarian foundations of authority, therefore, complement any claims to interpretative authority engendered by the legal system itself.

Keywords: *authority; interpretative communities; indeterminacy; social practices; legal system; coherence.*

1. Introduction

The international legal system remains characterized by a curious indeterminacy, both in the substance of the law itself, but also, in the difficulty of identifying with precision the forms of authority it recognizes within it. Despite the multiplicity and proliferation of international institutions with interpretative authority over law—which is no doubt law-creative, there remains a lack of systematicity in addressing how certain international actors claim and exercise authority

* Professor of Public International Law, KU Leuven & Open Universiteit. The author is grateful for the feedback and interactions with colleagues during the virtual seminar organised in June 2021 by Panos Merkouris and Sotirios Lekkas. Equally, the paper has benefited from comments and feedback from Jean d'Aspremont, Daniel Peat and Antoine de Spiegeleir, and for the editing assistance of Pauline Janssens.

within the system. But as with nature, law abhors a vacuum, and certain practices and strategies develop so as to cure the indeterminacies that might arise from time to time. Through purportedly simply applying and interpreting the law within specific factual contexts, such as its interpretation by judicial or arbitral bodies, or even an assertion as to its scope by a State or an international organ, the contours of legal rules expand, contract and evolve. In short, international legal gaps are quickly accompanied by claims by international actors to be the empowered, legitimate, or—crucially—the authoritative actor capable of filling them.

Authority claims thus can be situated and defined, at least in part, in the antecedent existence of indeterminacy. That said, rather than to condemn international law to incoherence, the solution in much legal theory has been to recognize or construct mechanisms of *determinability* through which indeterminacy, ambiguity or obscurity can be confined and repaired. In Section 2, I will advance the claim that whether domestic or international, a legal system will invariably endow or tolerate specific actors to exercise their discretion by taking interpretative measures which are in effect law-creative, even if such lawmaking requires a degree of recognition or acceptance of being regarded as authoritative in the legal system itself. This phenomenon demonstrates a self-empowering dimension *by a legal system itself* in filling the vacuum, to a degree illuminating a systemic function in favour of coherence and order. The discretion that is opened up for law-applying authorities is not limited by prior decisions, but is in fact 'a *result of* the multiplicity of previous [decisions]'.[1]

Of course, such a claim necessitates a workable definition of what is understood by a 'legal system', and here I will go beyond the notion that law is merely a body of rules in a formal sense. As indeed, inherent in any discussion of how to resolve situations of indeterminacy

[1] Beckett (2008), p. 65 [emphasis in original]. Though Beckett's—and Hart's—point is in relation to indeterminacy and its resolution by courts, it is relevant in relation to any institution or actor making a claim to interpretative authority.

is the identification of the actors tasked with addressing these, especially through interpretative exercises. Accordingly, Section 3 considers the multifaceted question of locating the source of authority in international law, both conceptually and in a practical sense. For the purposes of this argument, it is important to understand legal authority in two senses. First is the rather more discursive conception of 'authority' as a general discursive concept that is justified neither as coercive force nor as the ability to influence conduct or behaviour through the merits of its content.[2] Instead, authority can be understood as a self-standing description, in part through what Herbert Hart called *content-independent authority*, a normative expectation to compliance beyond power and persuasion.[3] One could argue that the very notion of law itself, and the expectation of general obedience to it by virtue of being law itself, as being in this vein. Joseph Raz points us, however, to another sense of 'authority' as that force which justifies the existence of law and the normative force of any norms produced by a legal system, with the authority of law standing simultaneously as an expression of the community it governs as well as being partly constitutive of that community itself.[4]

The specific understanding of legal authority as content-independent thus opens the space for the central discussion, the focus on certain officials as 'law-applying authorities' within the legal system (Section 4). Rather than fixate on the formal designation of an official as such, the preferred approach here is a functional account of law-applying authorities as being rooted in social practices. This is for two reasons: to identify the mechanism of 'closure' deployed by these norm-applying actors in curing any indeterminacies that arise within the system; and to advance the claim that such social practices are themselves *constitutive* of the international legal

[2] Venzke (2013).

[3] Hart (1982), p. 243.

[4] The understanding of the relationship between law and authority as laid out well by Raz (2009), in particular pp. 106-110.

system itself. In short, my argument is in broad alignment with those that seek to move our understanding of legal systems beyond systems of formal rules, but also to encompass the actors endowed or otherwise empowered by such rules who in turn, shape their development. They are mutually productive.

This partially formalistic, partially sociological claim has important limitations, which will addressed in Section 5. The first is internal: I contend that there is insufficient theorising as to how legal officials come to be identified, and the reasons why. Though broadening our understanding of authoritative legal actors might be useful in relation to the horizontal character of international law specifically, to expand the category of legal actors inadequately captures the process through which legal officials come to be identified. A second critique is more far-reaching. Such a 'co-constitutive approach' does not question the potential circularity in defining law-applying authorities—their authority and/or legitimacy being contingent on an enabling legal rule—through the practices being necessary to ensure the daily relevance of the legal system on which the rules were premised in the first place. The circularity in this approach serves, if anything, as a process of reification of legal rules, beyond social construction. It *presumes* the systemic necessity of legal officials to interpret and apply legal rules but sheds no light on either the source of these rules, nor the source of the authority of legal officials to interpret them.

It is hoped that the impasse can be met, at least in part, in Section 6, where I advance the argument that such a 'social thesis' rests, at least partially, in the technical competence or *proficiency* of law-applying authorities. Resting in part on the classic claim of Owen Fiss, such authority rests on common discourse rules that define, constrain and in fact 'discipline' the interpretative community of international lawyers. These interpretative rules go beyond the 'rules of interpretation' and are structural: they serve to establish the distinction between what is legally relevant and what is not; and they legitimate and reinforce the authority claims of those actors, officials or institutions that use them 'properly'. Moreover, I argue that such discourse rules

privilege the systemic unity of international law as a whole: they constrain the discretion of law-applying actors, channelling their arguments into a specific form acceptable to the wider community. Secondly, such interpretative practices affirm, and reaffirm, the membership of their users as part of the interpretative or epistemic community of international lawyers, but with it, a concomitant commitment to preserve the coherence and existence of the international legal system; as Martti Koskenniemi put it, 'international law's objective is always international law itself'.[5] By virtue of deploying the language and toolbox of international law to make claims to our own authority within the professional community, international lawyers therefore *ourselves* internalise the authority of international law and its continued coherence within our own arguments. The question is not whether other substantive values (moral or ethical considerations or otherwise) are submerged, but rather, whether systemic coherence becomes an overarching consideration in any interpretative exercise.

2. Indeterminacy

There have always been those who maintain that international law remains a determinate system, with rules of interpretation primarily a hermeneutic or cognitive process of objective discovery and identification of law or the intent to create obligations.[6] Such a claim is premised on a faith in the immanent rationality, or of the possibility of objectivity, within law.[7] Yet to concede both the possibility of indeterminacy within law, given its roots in linguistic constructions, and the partially constitutive character of interpretative acts and practices has been relatively uncontested for some decades. As such, the question arises: '... if law is indeterminate because its commands are

[5] Koskenniemi (2014), p. 42.

[6] The classic argument being put forward as the 'juridically natural view': see Fitzmaurice (1951), pp. 3–4; and Fitzmaurice (1957), p. 204. A modern exemplar of a similar approach is that of Orakhelashvili (2008).

[7] See e.g., generally, Weinrib (1997-1998).

conveyed through a language which is itself indeterminate, (international) lawyers invariably face the question of what they ought to do with such indeterminacy."[8]

2.1. The Determinability of the Law

As such, mainstream accounts of indeterminacy in 20th century legal scholarship have portrayed it as a problem to be addressed. Indeterminacy becomes an issue to be *resolved,* for example to the famous gap-filling general principles in Article 38, or more specifically techniques such as the principles of effectiveness[9] or systemic integration[10], that would serve to cure any gaps. One can observe this poignantly in the extended debates on Article 38(1) *(c)* in the Advisory Committee of Jurists, in which various members insisted on the completeness of international law: the ability of international law to resolve any given dispute through the application of law.[11] The so-called prohibition on judicial findings of *non liquet* ('the law is not clear') is rooted in this reasoning. Put more simply, indeterminacy is portrayed as a prima facie problem, to be resolved through mechanisms that apply rules to combat indeterminacy; it is a position that suggests that these mechanisms render ambiguities *determinable*. In short, through law, indeterminacies are cured, and vanish. What is relevant is that the completeness of a legal order is not just a matter of judicial technique, but a statement on the nature of a legal order as law.[12]

Two canonical examples neatly illustrate the point. Hans Kelsen readily conceded the 'intentional indefiniteness' of certain law-applying acts and even the unintended indefiniteness inherent in the linguistic formulation of legal norms.[13] His critique of classical legal positivism

[8] Marks (2003), p. 144.

[9] Lauterpacht (1949), pp. 75-6.

[10] McLachlan (2005).

[11] Hernández (2014), pp. 257-263.

[12] *Ibid.*

[13] Kelsen (1970).

questioned the idea that the act of interpretation was nothing but an act of understanding and clarification: he situated it as an act of will or cognition: a *choice*.[14] To Kelsen, the legal system constitutes a 'frame' which serves to confine the available choice of norms in concrete cases,[15] the act of individual application by systemic actors (in the main, judicial institutions) helping further to determine and constitute a general legal rule.[16] One could do worse than to interpret the ICJ's practice in respect of maritime delimitations as the expression of choices based on the exercise of discretion within a frame of permissible options.[17]

Similarly, Hart foresaw that certain hard cases served to prove a fundamental 'incompleteness' in law, where the law could provide *no* answer.[18] His solution was to reserve a place for the exercise of discretion by legal officials (officials of the system; again, primarily courts and other law-applying authorities), for which the legal system would prescribe rules that are sufficiently determinate to supply standards of correct decision.[19] Finally, though Ronald Dworkin rejected the idea that the law could be incomplete and contain gaps, choosing instead a view that law is not incomplete and indeterminate, his solution is again premised on the view that the legal system renders the law determinable. Officials within the legal system make decisions authoritatively, exercising a 'weak' form of discretion exercised within the open texture of a legal

[14] Ibid., pp. 82-83.

[15] Ibid., p. 351.

[16] Ibid., p. 349.

[17] The modern 'three-stage test' used by the Court was first articulated in *Maritime Delimitation in the Black Sea (Romania/Ukraine), Judgment, ICJ Reports 2009*, p 61: in short, the Court literally draws a legal line taking into account facts (a line *equidistant* between both States' coastlines), but also its assessment of what might constitute 'special circumstances' (such as islands, concave shores, or access to natural resources); and thirdly, a rather notoriously subjective assessment of proportionality. The most recent assertion of the 'three-stage test' was in *Maritime Delimitation in the Indian Ocean (Somalia v Kenya), Judgment of 12 October 2021*, and it has already been picked up by ITLOS: see *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p 4.

[18] Hart (2012), p. 252.

[19] Ibid., p. 145. Hart's theory on judicial interpretation was justified by his theory of the open texture of language: ibid., pp. 120-32.

system, in line with systemic principles, which he understands as those systemic values which underlie all legal rules.[20]

Though different in their emphasis, Kelsen, Hart, and Dworkin all shared the view that legal interpretation would then become an act of cognising the possibilities available *within* the frame of the system. In so doing, all respond to the challenge of indeterminacy with hermeneutics. Although there might be an apparent ambiguity of language, the 'frame' of the legal system will provide a structural backdrop against which a stabilisation of meaning can occur. In short, these seminal 20th century legal theorists did not object to the possibility of the indeterminacy of law, emphasising instead its determinability through systemic officials. Their solution empowers law-applying authorities, such as judicial institutions, to exercise their discretion: to choose.

2.2. Koskenniemi and the Radical Indeterminacy Thesis

On the international plane, it is of course Martti Koskenniemi who, with the publication of *From Apology to Utopia,*[21] triggered a renewed debate on indeterminacy and the subjectivity of interpretation. The thrust of his well-known argument is to refute international law's claim to objectivity and the embodiment of universal values, denying the existence of both.[22] Instead, Koskenniemi's elucidation of international legal argument is that it is characterized by a constant oscillation between ascending arguments (from justice) or descending arguments (from consent), neither of which fully capture the necessary objectivity to delineate 'law' fully from other social processes.[23] That oscillation is defined by the 'generative grammar' of international law, which

[20] Dworkin (1978), pp. 31-32. He distinguished his form of 'weak' discretion from the 'strong' discretion that he purported Kelsen and Hart attributed to legal officials (judges), which allowed them to reach for principles *outside* a legal system. Dworkin's point is fair; if one examines Kelsen, *supra* n. 10, p. 352, his refusal to privilege any acceptable meaning within the frame is evident: '[f]rom the point of view of positive law, one method is exactly as good as the other'.

[21] Koskenniemi (1989).

[22] Ibid., p. 122.

[23] Ibid., p. 387.

delimits and channels the *form* in which international legal arguments are made.[24] That 'generative grammar', however, serves only to confine the form of argument, and not its substance; so long as it is made through professionally accepted legal arguments, any course of action can be justified through the language of international law, thus identifying a fundamental indeterminacy within international law.[25]

It is on that basis that Koskenniemi articulated his refutation of the determinability of law. Though his critique goes even further to raise claims as to ontological indeterminacy in international law,[26] what is relevant here is his semantic critique of the hermeneutic approach—or more simply, his linguistic analysis to refute Gadamer's 'hermeneutic circle',[27] by which I refer to the circularity of two dependent claims: that the meaning of a text as a whole can only be established by reference to its individual parts; and that the meaning of any individual part of a text is constructed only by reference to the whole. Besides its self-referentiality, Gadamer's view would seem to exclude the possibility of a neutral, external interpretative standpoint, but that that objectivity of the interpretative process may only be achieved by focussing exclusively on the object of cognition, a purely self-confirming process based on reason, and which excludes the relevance of social constructions in the process of interpretation.[28] *From Apology to Utopia* attacks the recourse to systemic values or principles that will guide international actors towards a desirable (or at least internally coherent) outcome as nothing less than the imposition of

[24] Ibid., p. 568: 'whatever else international law might be, at least it is how international lawyers argue, ... and this can be articulated in a limited number of rules that constitute the "grammar"—the system of production of good legal arguments.'

[25] Ibid., p. 591.

[26] Koskenniemi's ontological indeterminacy denies that only the meaning of a norm can be subject to dispute, and suggests that the very identity of the norm may be open to contestation. For further discussion, see Beckett (2005), p. 213.

[27] Gadamer (1975), pp. 266-67.

[28] I have written on this circularity elsewhere: see G Hernández (2014), pp. 318-319.

coherence of law.[29] The discretion exercised by systemic officials, conceded by Kelsen and Hart, and seized upon by Dworkin in his interpretivist approach, is derided by Koskenniemi as a manifestation of structural bias masquerading as stability: '... in any institutional context, there is always ... a particular constellation of forces that relies on some shared understanding of how the rules and institutions should be applied'.[30]

Koskenniemi's coruscating critique of the determinability of law is not to suggest the impossibility of law's coherence, but rather to situate it as a political project. It is to suggest that coherence can only be achieved through the interaction of different actors who privilege certain interests, in particular coherence itself, and succeed in *imposing* them. Emmanuelle Jouannet's later critique of the act of judging, as inextricably tied to power, reflects this narrative: '... le juge international joue un rôle non négligeable, voire décisif, dans l'affirmation de ces hiérarchies normatives et [le] souci de participer au maintien du système dans lequel il s'insère s'ajoute une exigence de cohérence formelle de son propre discours judiciaire.'[31] But the salient point here remains that Koskenniemi's critique of determinability opens a space, precisely through international law's indeterminacy, for specific actors (and in particular judicial institutions) to *claim* authority for the interpretation and application of international law. By moving authority away from words and reorienting it towards observable behaviour, the question becomes not whether law is indeterminate; rather, it turns on law-applying actors who wield interpretative

[29] Koskenniemi, *supra* n. 17, pp. 584-588. The attack is especially evident in his chapters on sovereignty (Chapter 4), sources (Chapter Five 5) and custom (Chapter 6). For an excellent analysis of how the inexistence of coherence in this respect requires the *imposition* of order, perhaps through Neil MacCormick's process of 'rational reconstruction', see Beckett (2006), pp. 1054-1055.

[30] Ibid., p. 608.

[31] Jouannet (2004), p. 943: 'the international judge plays a non-negligible, in fact decisive role, in the affirmation of these normative hierarchies. To the worry about participating in the safeguarding of the system in which the judge is situated, one might add a requirement of formal coherence insofar as their own judicial discourse is concerned. Both Koskenniemi and Jouannet seem on this point to align their thoughts with those of Bourdieu (1987), p. 843, who mocks 'the magistracy's declared neutrality and its haughty independence from politics [which] by no means exclude a commitment to the established order'.

authority over legal norms with sufficient legitimacy so as to be accepted as authoritative, or law-creative, by other actors within the system.

Though intertwined concepts, before turning to the authorities that would wield such authority, it is important as a first step here to outline a clearer sense of what is meant by the term 'authority'.

3. Authority in Legal Systems

3.1. Situating Interpretative Authority

If it is true that international institutions exercise authority by rule- or law-making, then the question arises in identifying exactly what is meant by interpretative authority, and why it is relevant. Interpretative authority must be distinguished from the term of art 'authoritative interpretation', which in its most classic sense is a relevant consensual undertaking, where consent is given by the parties to delegate the authority to interpret to a named institution or actor.[32] This is the sense, for example, understood during the Vienna Conference on the Law of Treaties when proposing what would become a 'crucible' approach to the primary means of interpretation in Article 31 VCLT, which would be distinct from the supplementary means enumerated in Article 32.[33]

Interpretative authority here is to be aligned more closely with Venzke's understanding of 'semantic authority', or an actor's capacity to find recognition, in its discursive practices, for interpretative claims. In so doing, the actor or institution establishes its own statements about the

[32] Schwarzenberger (1968), p. 11; McNair (1961), pp. 531-532. This has to be distinguished from Kelsen's idea of 'authentic' interpretation (as distinguished from 'scientific' interpretation); as explained by Kammerhofer (2011), p. 115, authentic interpretation is performed by organs authorised by the law to apply it; the *result* of authentic interpretation is a norm, or a law-creating act; authentic interpretation is an act of *will*, whereas scholarly interpretation is an act of *cognition*; 'one determining what is law, the other finding the law'.

[33] United Nations Conference on the Law of Treaties: Official Records: Documents of the Conference, A/CONF.3/11/Add.2, p. 39, para. 8, and *Yearbook of the International Law Commission* (1966), vol. II, pp. 219-20, para. 8. See further Hernández (2014), pp. 326-329.

law as 'content-laden reference points' that inexorably shape future discourse on a given matter.[34] But the point is not so much about the substance of any such determinations, but on the fact that the actor or institution making such statements is exercising a degree of content-independent authority to induce a sense of compliance, at least within the legal system. The social practices that serve to legitimate the claim to interpretative authority made by an actor, therefore, is key.

But what is meant exactly by authority in this respect? Joseph Raz envisaged authority as 'basically a species of power', yet fundamentally distinct from it in that authority has the potential to induce the consent of the addressee in a different manner than traditional conceptions of coercive power. To submit to authority, therefore, is to substitute one's will for that of the actor vested with authority: '[t]o be subjected to authority ... is incompatible with reason, for reason requires that one should always act on the balance of reasons of which one is aware. It is of the nature of authority that it requires submission even when one thinks that what is required is against reason.'[35] Understood thus, authority compels obedience in the absence of agreement on substance, on the basis that the exercise of authority is accepted as legitimate. The next section will address how the legitimacy of such authority claims is justified.

3.2. The Legitimacy of Authority; the Notion of Content-Independence

To situate authority in this manner is not to ascribe it purely to a vertical system of compliance and coercion. Rather, the argument rests on an appeal to order or to hierarchy: authority is 'intended to function as a reason independently of the nature or character of the actions to be

[34] Venzke, *supra* n. 2, p. 353. Venzke relies heavily, on this point, on Bourdieu, *supra* n. 25, p. 838: '[t]hese performative utterances, substantive—as opposed to procedural—decisions publicly formulated by authorized agents acting on behalf of the collectivity, are magical acts which succeed because they have the power to make themselves universally recognized. [footnote omitted] They thus succeed in creating a situation in which no one can refuse or ignore the point of view, the vision, which they impose.'

[35] Raz (2009), p. 19.

done.'[36] In fact, the distinguishing feature of authority remains its *content-independence*, a term introduced by Hart[37] and elaborated further by Raz: 'a reason is content-independent if there is no direct connection between the reason and the action'.[38] Instead, content-independent authority flows from the identity of the person or institution making the decision, and not from an addressee's assessment of the content or merit of the command.[39] In practice, this entails that our normal decision-making and reasoning processes are definitively shaped by the authoritative directive, in that the command is determinative in any decision-making process: in short, authority trumps our own reasons.[40]

It is precisely because an actor seeks to induce obedience with its directives *irrespective* of whether the addressee accepts the underlying substantive reasons for so doing that an authority positions itself as content-independent.[41] The substantive justification is immaterial: what matters is the authority of the actor. In this sense, authority goes so far as 'to require a subject to actually do or decide something other than what she would have done or decided in the absence of the authoritative directive.'[42] 'Persuasive authority', an oft-used term in both domestic and international law,[43] is different, and makes no such content-independent demands; though a court or subject *may* rely on persuasive authorities if they find the reasoning (the content) to be

[36] See Hart, *supra* n. 3, pp. 254-255. See also Green (2010); and Shapiro (2002), p. 389. See also Sciariffa (2009).

[37] As was convincingly demonstrated by Hart, *supra* n. 3, pp. 261-266; and Raz (1983), p. 234.

[38] Raz (1986), p. 35.

[39] Schauer (2008), p. 1935.

[40] This allows for authority to persist even when it is defied: see Venzke (2013), p. 399, referring to Max Weber's idea that authority exists as the *potential* to command obedience, and not merely as the command itself.

[41] Schauer, *supra* n. 32, pp. 1935-1936.

[42] Ibid., p. 1939. See also Raz, *supra* no. 30, pp. 22-25: Raz's conception of authority does not depend on its impact on the balance of reasons, but demands that the addressee of a command substitute her own will for that of the authority.

[43] For a fuller treatment of the principle, see Lamond (2010); Glenn (1987).

compelling, there is no obligation to do so .[44] The fundamental contrast between (content-dependent) persuasion and (content-independent) authority is such that the very term 'persuasive authority' is self-contradictory for the purposes of the argument put forward here.[45] Venzke has made a similar argument, to the effect that authority rests on a delicate balance between power and persuasion, drawing heavily from Hannah Arendt: 'if authority is to be understood at all ... it must be in contradistinction to both coercion by force and persuasion through arguments'.[46]

If taken as such, authority refers to the capacity of an actor to deploy institutional and discursive resources at its disposal to induce, and not to compel, obedience from other actors.[47] Such a claim to authority is contingent on the system itself: it reflects the law-applying authority's duty to apply the law as it is; or in other words, regardless of its views on the content or merit of the law.[48] As such, the legitimacy of the acts of a law-applying actor is derived, no more and no less, from the authority of the legal order it inhabits, and the authority of the law that the said actor applies. It is in this respect that Thomas Franck's definition of legitimacy is salient: 'a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule *or institution* has come into being and operates in accordance with generally accepted principles of right process.'[49] To give a

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[44] Schauer, *supra* n. 32, p. 1941; Venzke, *supra* n. 2, p. 359. John Gardner's term 'permissive' might be preferable to 'persuasive': see Gardner (1988), p. 458.

[45] Ibid., p. 1944, who adds that the use of a source can be persuasive or authoritative, but it cannot be both simultaneously.

[46] Arendt (2006), p. 93, cited in Venzke, *supra* n. 2, p. 353.

[47] Barnett and Finnemore (2004), p. 5.

[48] See Raz, *supra* n. 30, p. 113; see also Schauer, *supra* n. 32, p. 1956: 'to recognize something as authority, even optional and non-conclusive authority, is to take it seriously as a source and thus to treat its guidance and information as worthy of respect. That a legal system premised to its core on the very notion of authority would worry about what it is treating as authoritative should come as little surprise.'

[49] Franck (1990), p. 24 [emphasis added]. A similar point has been made by Venzke, 'Between Power and Persuasion', *supra* n. 2, p. 363, though he relies more on Luhmann's systems theory to conclude that 'what sustains authority is the social belief in its legitimacy, the expectation to follow what the authority says'.

somewhat more prosaic example, I have argued that the International Court of Justice's consistent adherence to its earlier case law has, over many decades, led to a rather strict de facto doctrine of precedent, which has both elevated judicial decisions to a significant (albeit informal) source of international law, as well as a deliberate strategy to preserve its influence within the international legal system.[50]

The question thus arises as to the source of authority in international law, especially with respect to international institutions that put forward a claim to interpretative authority. Do their constitutive instruments embody a delegation of authority from States, who formally hold plenary law-applying capacity, as their principals? If so, does the agent, or law-applying authority, in fact hold the tools at its disposal so as to exercise its authority meaningfully?[51] To fixate on this line of reasoning, however, might be to elevate unduly a 'myth' of authority delegated in prior moments of recognition.[52] If taken to its logical conclusion law-applying authorities are permitted to portray their work merely as giving effect to intentions and decisions made elsewhere: '[l]egal doctrine and the standard rules of interpretation help them to do so by presenting interpretation as an archaeological activity of uncovering what parties really wanted',[53] turning attention away from how their authority is constructed in reality. The reality is elsewhere: to assert legal authority is to situate oneself within the ordered frame that is law, a frame which allows us to cognise and apprehend international social interaction as something distinct[54] from either power or

[50] Hernández (2014), ch. VI.

[51] For a functionalist viewpoint, see generally Alter (2006).

[52] Venzke, *supra* n. 33, pp. 392-394; see also Bourdieu, *supra* n. 25, p. 828.

[53] Venzke, *supra* n. 2, p. 357. The point is also developed in Venzke (2012), *passim*, and Venzke, *supra* n. 33, p. 389.

[54] Beckett, *supra* n. 23, p. 1061.

persuasion. As such, the question of how the system designates given actors as *empowered* or *authorized* to exercise such legitimacy becomes apposite.

4. On Law-Applying Authorities

4.1. The Centrality of Legal Officials to the Concept of a Legal System

When theorising about legal systems, a key element remains the question of whether the presence of so-called 'law-applying officials' is a necessary condition for a legal system. To take an example, Hart's second 'necessary and sufficient' condition for the existence of the legal system[55] was that its rules of recognition be effectively accepted as common public standards of official behaviour by legal officials: their presence is presumed, and it is the acceptance *by* legal officials which is 'taken to be *system-constituting*, constantly reaffirming and creating the edges of their legal system.'[56] Joseph Raz takes the argument further, claiming that 'norm-applying institutions' are a necessary component for law to be understood as a legal system:

> Many, if not all, legal philosophers have been agreed that one of the defining features of law is that it is *an institutionalized normative system*. ... the existence of norm-creating institutions though characteristic of modern legal systems, is not a necessary feature of all legal systems, but [...] the existence of certain types of norm-applying institutions is.[57]

Within international law, of course, the official or systemic character of judges has generally been neglected, though recognition of their potential law-making role has been an enduring question since the foundation of the PCIJ in the 1920s, and a conscious decision was taken to ensure substantive continuity with the PCIJ when the ICJ was founded in 1945. The question re-

[55] Hart, *supra* n. 14, p. 117.

[56] Culver and Giudice (2010), p. 4.

[57] Raz (1975), p. 491 [emphasis added]. See also Shapiro (2011), p. 176: 'Legal institutions are structured by shared plans that are developed for officials so as to enable them to work together in order to plan for the community'.

emerged, of course, in relation to the proliferation of courts and tribunals in the 1990s.[58] The salient question remains why the practice of certain norm-applying institutions—to be distinguished from 'norm-enforcing' institutions such as police, prison officials, and other enforcement and administrative officials who are not necessary for the very existence of a legal system,[59] come to be regarded as authoritative.

There is certainly no systematic, official designation of 'authorities' or 'officials' within the international legal system. To claim that the ICJ, for example, is the 'principal judicial organ' of the United Nations is to situate it as a judicial organ of an international organization, under the constituent instrument of that organization. In fact, precisely because he could identify no functional distinction between the subjects of international law and its authorized officials, Hart arrived at his (in)famous conclusion that international law could not be considered as a *legal system*:

> The absence of these [law-applying, adjudicatory] institutions means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation, which, when we find it amongst societies of individuals, we are accustomed to contrast with a developed legal system.[60]

That said, one should situate this claim in its context. As Jean d'Aspremont points out, though there are no wide-ranging institutional and vertical structures that would 'systematically put an authority in a position to make a pronouncement on where the limit between law and non-law applies'; this would *limit* the utility of social practice, but does not discard it altogether.[61] What is more, it is difficult to observe the proliferation of international courts and tribunals who apply

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[58] Charney (1999), p. 704; Romano (1999), p. 751; See also the 'Cross-Fertilization' debates: Helfer and Slaughter (1997), p. 323; Koch (2004); and Jacobs (2008).

[59] Raz, *supra* n. 30, p. 107. The term 'legal official' used by Hart is essentially the same as Raz' concept of 'norm-applying institution', and the terms are used interchangeably here as broadly synonymous the concept of 'law-applying authority'.

[60] Hart, *supra* n. 14, p. 214.

[61] d'Aspremont (2012), p. 141.

and interpret international law on a regular basis, and yet deny that these courts fulfil even the modest function of ascertaining whether a legal rule has been violated, and also deny that they are regarded as authoritative in arriving at such determinations.[62] Because they command a general compliance from the system's legal subjects, in this respect they fulfil Hart's internal point of view, and one need not demand excessive centralisation, one that does not even exist in domestic legal orders.[63] Even if one is to insist on the *identification* of legal officials in a legal system, the lack of identification of norm-identifying officials or law-applying officials has not been considered an insurmountable obstacle with respect to identifying domestic jurisdictions as legal systems.[64]

A fully articulated concept of law-applying authorities and their role in the international legal system is certainly beyond the scope of this article, but some limited observations might advance our understanding of the concept. A functionalist account, for example, allows us to dispense entirely with the concern that norm-applying institutions are not identified *eo nomine:* '[n]orm-applying institutions should ... be identified by the way they fulfil their functions rather than by their functions themselves.'[65] Courts, for example, 'have power to make an *authoritative* determination of [legal subjects'] legal situation'.[66] Though they must do so through the application of existing legal norms, the fact that their decisions are binding on their addressees—even when they may be substantively wrong—suggests that they enjoy a limited power to

[62] Ibid. d'Aspremont suggests that this densification is sufficient to consider these judicial institutions as 'organs' of the international order. On the general legitimacy attributed to these various international courts and tribunals, studies abound, adopting a broad variety of perspectives. A recent general handbook was published in 2014: Romano, Alter, and Shany (eds.) (2014); Alter (2014); Shany (2014); Webb (2013); Schill (2009); Schulze (2005); and Pauwelyn (2003).

[63] Payandeh (2010), p. 986, citing the United States Supreme Court.

[64] Himma (2001), p. 293.

[65] Raz, *supra* n. 30, p. 106.

[66] Ibid., p. 108. He continues: '[t]he fact that a court may make a binding decision does not mean that it cannot err. It means that its decision is binding *even when it is mistaken*' [emphasis added.]

determine the legal situation in specific cases.[67] Instead of international law's institutional differences being considered as defects to be resolved in the domestic law paradigm,[68] they ought better to be read as illuminating the different purposes of international law as opposed to domestic law. As such, a functionalist elucidation of the concept of law-applying authority might be helpful in our international legal order, lacking as it does any formal vertical and institutional authority.[69] The relevant factors would, accordingly, be rooted in a two-step social practice: the law-applying authority must regard itself as bound to apply the law, and not as free to disregard it when it finds its application undesirable; and it must achieve recognition as a legitimate official from the wider legal community it serves. The fact emerges that actors within the legal system are *bound* to *take account of* the legal conclusions made by law-applying institutions by relating their arguments to them.[70] It is this characteristic, above all, which endows such relevant norm-applying institutions with authority, an authority which carries over into their decisions. The interesting question then turns on why such authority comes to be commanded, the context in which it is claimed, and how it is relevant.

[67] Ibid., pp. 109-110.

[68] Often the solution being one of transposing assumptions about the nature of law, from the theory and practice of municipal law, into international society: Beckett, *supra* n. 1, p. 68. On the domestic analogy, see also Koskenniemi (2005), p. 122: '[t]he domestic analogy that persuades us—contrary to all evidence—that the international world *is* like the national so that legal institutions may work there as they do in our European societies'.

[69] d'Aspremont (2014), p. 134.

[70] Venzke, *supra* n. 33, p. 402. In other work, von Bogdandy and Venzke have sought to situate this demand for acceptance as an assertion of *international public authority*, defined as the legal capacity to determine others and to influence their freedom, in shaping their legal or factual situation: see von Bogdandy and Venzke (2012), p. 18; von Bogdandy and Venzke (2012) 3, esp. pp. 15-20.

4.2. The Social Practice of Officials as an Explanatory Device

4.2.1. Hart's Social Thesis on the International Plane

If law exists 'as institutional fact',[71] existing *because* of a belief in law rather than its abstract existence as a thought object,[72] the recognition of law as such in social practice is crucial. Hart's social thesis, briefly touched upon earlier, rests squarely on the idea that the existence of any legal system depends, in the final analysis, on the social practice of 'legal officials', law-applying authorities operating within the legal system whose practice validates the system.[73] The necessary conditions for the existence of a legal system are twofold: first, that there be a sufficient number of subjects who comply with valid rules of behaviour; and secondly, that there exist a community of officials who perceive the law as having sufficient authority in setting out common standards of behaviour: these, together, constitute what Hart understood as his 'internal point of view'.[74] It is here, and not on theories of language and the potential to achieve determinacy (or even clarity) through a hermeneutical process, where Hart's solution was found: to situate the power to cure indeterminacy through the convergent behaviours and agreements of law-applying authorities.[75]

Accordingly, so goes Hart's social thesis, the social practice relevant in gauging communitarian semantics is that of law-applying authorities within a legal system; convergence in the use of sources, norms and rules by such law-applying authorities helps to ascertain the existence of a rule. D'Aspremont has seized upon this point in his resuscitation of Hart for the purpose of identifying law-ascertainment criteria, suggesting that the convergence of the practice

[71] See MacCormick (1986), p. 49.

[72] Beckett, *supra* n. 1, pp. 73-74.

[73] Hart, *supra* n. 14, pp. 116-117.

[74] Ibid.

[75] Hart (1983), p. 277. See also, more generally, Hart, *supra* n. 14, pp. 108-109. D'Aspremont has taken this a step further, and gone so far as to suggest that Hart's ultimate Rule of recognition is in fact derived essentially from the social practice of law-applying authorities: see d'Aspremont, *supra* n. 61, p. 133.

of law-applying authorities not only served to identify the existence of legal rules and norms, but also, the meaning of the formal criteria of law-identification.[76] In essence, his claim rests on the idea that formal law-ascertainment can provide sufficient guidance as to the distinction between what is law and what is not law. Though d'Aspremont concedes that even that 'limited determinacy' does not deprive law-applying authorities of the large margin of discretion they enjoy when determining what constitutes an international legal rule,[77] he maintains that law-applying authorities and lawyers, as officials of the system, share a meaningful normative language which in turn imbues the law with its normative character.[78] In Section 6, the common discourse rules of epistemic communities will be further explored; but for our purposes, it suffices to observe that to justify authority through social practice is merely another technique through which the determinability of the law remains an essentially internal issue, to pass through the legal system as a problem to be resolved.

4.2.2. Is Social Practice Constitutive of an 'International' Legal System?

The second feature of a social practice theory relates to whether ascertainment, interpretation and application of legal rules by certain law-applying actors in the international legal order comes to be regarded as constitutive of the law itself, especially if such actors are—formally at least—deprived of a law-creative role.[79] For d'Aspremont, the answer would be in the negative: the

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[76] D'Aspremont, *supra* n. 53, p. 197. The reliance on Wittgenstein's theory of language to describe the social practice of relevant actors—lawyers, judges, academic commentators—contribute to what comes to be regarded as *legal* was also described in Simpson (1986), pp. 18-21.

[77] Ibid., p. 141. See also Klabbers (1996), p. 12; Hart, *supra* n. 14, p. 148.

[78] Raz calls this the *semantic thesis*: Raz, *supra* n. 30, p. 37. D'Aspremont cites this approvingly, *supra* n. 53, p. 5, but his reliance on the practice of officials in Hart's social thesis as determinative is perhaps misplaced. Hart himself emphasises that there were two 'necessary and sufficient conditions' for the existence of a legal system'. First, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed by private citizens. Secondly, a legal system's rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by the legal officials of the system: Hart, *supra* n. 14, p. 116.

[79] Prosper Weil made the point in relation to customary law in his analysis of *North Sea Continental Shelf*, '...la norme coutumière n'a pas pris corps avant que le juge international n'en énonce le contenu; *elle existe uniquement*

communitarian semantics generated by international courts and tribunals through the identification of international legal rules are not constitutive of law-making: such actors only 'partake in the semantics' of the formal criteria of law-ascertainment,[80] and law-making is only generated through the subsequent validation of the decisions of international courts and tribunals by States in their practice through the emergence of a shared and sustainable '*feeling* of convergence of the practices of law-ascertainment'.[81]

However, this line of reasoning presupposes the ability for each law-applying authority to verify whether other similar authorities also use that law-ascertainment criterion in their practices: with the 'circulation of decisions of authorities called upon to apply international law and their translation into a language spoken by most of them', it is sufficient to infer that a 'mutual confirmation system' exists.[82] Such a broad-textured approach allows one to apprehend the practice of domestic courts engaging with international law, and the extent to which these also resort to a certain vocabulary which, notwithstanding its roots in the specific domestic legal system of which it formally forms a part, remains intelligible to the wider sphere of international law-applying authorities.[83] It suggests that the discursive approach may not be formally constitutive, yet materially constitutive of—if not the existence of a legal norm, but— its interpretation

grâce à cette énonciation qui lui donne vie et lui confère une existence propre' [emphasis added]: Weil (1987), p. 551.

[80] D'Aspremont, *supra* n. 53, p. 205.

[81] Ibid., p. 213.

[82] A prime example has been the 'transnational judicial dialogue' approach favoured by Slaughter (2003), p. 205, where she claims an awareness in the international judiciary that their actions are part of 'a global community of law dealing with related problems', and p. 218, concluding that a dialogue between national and international adjudicative bodies 'may be as close as it is possible to come to a formal global legal system'. Slaughter's vision of a 'global community of courts' is primarily based on horizontal dialogue between domestic courts, primarily based on the persuasive authority of the reasoning invoked in the case law they produce, and the mutual recognition courts accord each other in a self-reinforcing exercise. 'Vertical' communication between national and *supra*national courts would confirm this practice, purportedly strengthening the rule of law and promoting the interests of 'a particular subset of individuals and groups in transnational society: see Slaughter (1995), and Slaughter (1995), p. 535.

[83] D'Aspremont, *supra* n. 53, p. 202, using the term 'accessible'.

and acceptance by the wider community of international lawyers. And by entrenching such a sense of common interpretation or meaning, there is a claim to membership within that wider community—a point to be addressed in Section 6.

5. Challenges with the Social Thesis

5.1. Enlarging the Social Thesis

D'Aspremont's ambitious resuscitation of Hart's social thesis is compelling, to a point, and certainly serves to address the problem of indeterminacy and provide the theoretical foundations for the claim to authority as asserted by law-applying institutions. Yet he too falls prey to the limitation that besets Hart's social thesis on the domestic plane: there is an insufficient attempt to theorize as to how legal officials come to be identified, and why. This problem is not of d'Aspremont's making, and he has in fact taken seriously Brian Tamanaha's critique against Hart, for failing to establish in precise terms who qualifies as a legal official.[84] Yet Tamanaha's solution is not much better and serves merely to broaden the category from a functional perspective: 'whomever, as a matter of social practice, members of the group (including legal officials themselves) identify and treat as "legal officials"'.[85] Certainly, Tamanaha's definition is broader, and in this respect perhaps more suitable to international law as it allows for a wider set of legal actors (in addition to international courts, such a definition could encompass arbitral tribunals, administrative agencies like the World Health Organisation, advisory bodies such as the International Law Commission, regulatory bodies, and certain non-governmental organisations such as the Red Cross).[86] Yet the criterion for acceptance as a law-applying authority under this definition remains socially-based, and even somewhat circular: recognition by other legally

[84] Tamahana (2001), p. 139.

[85] Ibid., p. 142.

[86] D'Aspremont, *supra* n. 53, p. 141.

relevant actors is constitutive of their authority, whatever their institutional form. Any uncertainty over who is a legal official is resolved by looking further up a chain of officials, and the official's importance to the system follows the place they occupy.[87] The fact that norm-applying institutions are regarded as essential in order to ascertain the existence of a legal system remains unquestioned.[88]

Certainly, other social actors and not merely judicial authorities act in the production of communitarian semantics and are thus regarded, as a matter of fact, as law-applying authorities;[89] but d'Aspremont's theory neglects to provide a persuasive theory of *how* exactly the position of these authorities should be apprehended. His favoured solution, enlarging the social thesis by adopting Tamanaha's 'socio-legal positivism',[90] simply continues to presume the systemic necessity of law-applying authorities. What is more, Tamanaha's definition, whilst cognising the vacuum created by indeterminacy, stretches it to its full extent and enables claims of authority by virtually any actor whose interpretations could become regarded as legally authoritative. Examples of such authority claims in international law abound, from 'study groups' of the International Law Association to the more focussed, and self-appointed, 'expert studies' published on specialised areas such as the Tallinn Manuals on cyberspace[91] or the ongoing MILAMOS project on outer space. This is problematic for a number of reasons; as Bourdieu commented, albeit focussing specifically on judges,

> Judges, who directly participate in the administration of conflicts and who confront a ceaselessly renewed juridical exigency, preside over the adaption to reality of a system which would risk closing itself into rigid rationalism if it were left to theorists alone.

[87] Collins (2015), p. 14.

[88] Raz (1975), p. 491; and Marmor (2001), pp. 16-17: because their activities have the greatest normative consequences within their legal systems, judges are situated in the innermost circle of a legal system.

[89] D'Aspremont, *supra* n. 61, p. 134.

[90] D'Aspremont, *supra* n. 53, p. 60.

[91] Schmitt and Vihul (2017); and see Kessler and Werner (2013) for a critical comment.

> Through the more or less extensive freedom of interpretation granted to them in the application of rules, judges introduce the changes and innovations which are indispensable for the survival of the system.[92]

Applied to international law, such a broad definition of 'law-applying authority' enables the international legal order to act precisely in Luhmannian terms, perpetuating and extending the reach of the legal system into regulating an ever-expanding area.[93] It does not question the strategy through which law-applying authorities come to be identified. The problem with insisting on law as a social practice goes further than merely under-theorising the role of the legal official. It represents nothing less than the *reification*[94] of the official's role within a legal system: the institutional role is deemed essential, fixed and indispensable, even though it is very much a matter of social and legal construction.

5.2. Presumption by Reification

If the official is essential to the existence of the legal system, the very definition of law becomes conflated with its ascertainment through authoritative, official validation. Rather than a formal or binding act, the outcome of a process to test its validity, law and legal rules are reduced to nothing

[92] Bourdieu, *supra* n. 25, p. 824.

[93] For a brief overview of the process of autopoiesis in sustaining and nourishing a system, see Luhmann (1986), p. 172.

[94] The complex term 'reification' is understood here in the manner explained by Marks (2001), p. 112: as 'the process by which human products come to appear as if they were material things, and then to dominate those who produced them. Thanks to strategies of reification, men and women may cease to recognize the social world as the outcome of human endeavour, and begin to see it as fixed and unchangeable, an object of contemplation rather than a domain of action'.

more than what legal officials, and in particular judges, *pace* Alf Ross, are prepared to recognize as law.[95] As Jason Beckett has argued, using Hart's own words against him,[96]

> ... [law's] existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons and their advisers. ... for when courts reach a particular conclusion on the footing that a particular rule has been correctly identified as law, *what they say has a special authoritative status* conferred on it by other rules.[97]

By linking this, as Hart does, with his second necessary and sufficient condition for the existence of a legal system,[98] the existence of a legal system becomes a question of fact; a legal official is factually empowered by a factually extant legal system to resolve disputes thereunder. If legal theory demands the existence of law-applying authorities as a necessary condition for the existence of a legal system, the reasons why this demand is made need further to be explored. It is insufficient merely to highlight that law-applying officials accept, apply and use international law. The key point is their systemic function, discharged by virtue of the very office they hold.[99] Applied to international law, such officials would be recognized by social convention as enjoying the authority to adjudicate disputes and to resolve any indeterminacy that might arise from time to time. The issue is locating this recognition, which, rather than being carefully justified, is too often simply asserted and presumed to exist, without identifying *whom* is in fact involved.

The social thesis, further, relies extensively on the argument that legal rules and legal officials do not exist in the abstract, but that they are contingent upon one another and within a system. It is not that legal norms have some essence that endows them with a distinctively legal

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[95] A distillation, perhaps of the judge-centric account in Ross (1959), p. 34. See also Paul Ricoeur, who decries this strand of positivism as 'the complicity between the juridical rigidity attached to the idea of a univocal rule and the decisionism that ends up increasing a judge's discretionary power.' Ricoeur (2000), p. 114.

[96] Beckett (2008), p. 60.

[97] Hart, *supra* n. 14, p. 59.

[98] See *supra*, section 4.A.

[99] Marmor (2001), p. 10.

character, but rather, that they are norms belonging to a *legal system*: the question thus arises as to 'what property or set of properties all legal systems have in common that distinguish them from non-legal systems. Only when armed with that information can one identify legal norms (including laws) as legal norms. One distinguishes [these] as norms belonging to legal systems.'[100] To recall, Hart's basic critique of international law rests in its failure to meet his criteria of a legal system. For Hart, the lack of official agencies to determine authoritatively the fact of violation of the rules is 'a much more serious defect'[101] than any official monopoly on sanctions, or a centralized law-creative power. Again, the key problem here is that all of these solutions rely on the existence of a certain hierarchy; the acceptance of authority for the existence of a legal system is presumed, rather than explained or justified.

Finally, perhaps the most wide-ranging observation to be made about the social thesis was developed by Pierre Bourdieu, in his famous article 'The Force of Law', where he focussed on the competition that characterizes the juridical field with respect to the purported monopoly on the right to determine the law. In terms redolent of Hart, and yet for completely different reasons, Bourdieu situates that competition with respect to the claim to a 'socially recognized capacity to *interpret* a corpus of texts sanctifying a correct or legitimized vision of the social world.'[102] If this is the case, taken alone the social thesis does no more than accept that the struggle for interpretative authority between these actors is the social practice that *constitutes* a legal system; the activities of law-applying authorities have great normative consequences purely because they are recognized and acknowledged by other actors within the system.[103] To insist unduly on recognition as constitutive conceals the difficult questions of the strategies used by the norm-

[100] Gardner (2004), p. 170.

[101] Hart, *supra* n. 14, p. 93.

[102] Bourdieu, *supra* n. 25, p. 817 [emphasis in original].

[103] Culver and Giudice, *supra* n. 48, p. 20.

applying authority to achieve recognition. For this reason, it is important also to look at the communitarian semantics in which a claim to authority is constructed, which the next section will address.

6. Authorities as Members of Social Communities

6.1. The 'Common Discourse Rules' of International Law

The picture painted throughout this article thus far is perhaps bleak: a system of like-minded elites, mostly international judges and legal practitioners and advisers, resolve legal conflicts amicably and with a view towards their preference safeguarding systemic coherence, perhaps through 'prudence in drafting', 'general agreement' and 'judicial determination'.[104] Oscar Schachter's 'invisible college' of international lawyers[105] would root its authority in social practice, with judicial institutions in particular situated within it and dedicated to the maintenance of hegemonic preferences which masquerade, and are upheld, as universal.

That shared ethos of commonality can be perhaps approached more neutrally: it privileges systemic unity and coherence over other priorities, and deigns to presume, or if necessary, construct the existence of norms that resolve normative conflicts, imposing order through the exercise of authority. But whilst rooting authority in social practice posits a basis for the authority claimed by norm-applying actors, it does not fully explain the method through which this is achieved. For this, one may turn to the increasingly common metaphor of a *grammar*[106] or *syntax* common to international lawyers, which enables the creation and justifies the validity of international legal rules[107] which might emanate from functionally different specialized regimes in

[104] Jenks (1953), p. 416.

[105] Schachter (1977-78) p. 217. For a less laudatory approach to the invisible college, see Kennedy (2001).

[106] Dupuy (2002); see also Peat, in this issue (2022); and Bianchi (2015), pp. 49-52.

[107] Ironically, the same term is used by Koskenniemi to describe a vastly different phenomenon: see text accompanying see *supra* n. 20.

international law. Dirk Pulkowski, in his recent study of self-contained regimes in international law, has updated the metaphor and termed these techniques the '*discourse rules of international law*—a grammar for communicative interaction' that decision-makers in issue-specific regimes routinely use to situate the prescription of their regime in relation to norms of other regimes.[108] The linguistic metaphor, however imperfect, helps to understand the exercise of authority not merely as based in recognition of institutions filling the vacuum wrought by indeterminacy, but also, in the proficiency with which institutions master, adopt and deploy the canons and discourse rules through which international law discourse takes place.

If international law-applying authorities partake in these common discourse rules, then beyond their mutual recognition for one another, they assert authority for themselves by appeal to the general fabric of international law as created by States, thus emphasising the commonality of their approach with that of an extant, legitimate system, and thereby facilitate the recognition of their approach as legitimate and authoritative by other actors within that system. Even when departing from those universal rules, a norm-applying actor would seek carefully to emphasize the particularity of its constitutive instrument, situating its justification according to 'universal rules of justification, provided by the system of public international law'.[109] Aside from the insistent assertions of the CJEU as to the autonomy of EU law, one can observe such rather integrative practices and an insistence on distinction, rather than fragmentation, across many judicial bodies,

[108] Pulkowski (2014), p. 238 [emphasis added]. Pulkowski draws inspiration from Robert Cover's view that legal interactions are defined as such if they are located in a *nomos*—a common script—shared by all participants. See Cover (1983), p. 10.

[109] Ibid., p. 239.

from investment tribunals,[110] the WTO dispute-settlement mechanism,[111] and even quasi-judicial bodies such as human rights treaty monitoring bodies.[112] In short, any particularity is only specific, a distinct exception rather than a fragmentation away from the general international legal system.

In so doing, actors simultaneously situate their own authority within the system and strengthen the coherence of the system itself. Thus, coherence is not an inherent property of law, but the logical consequence of its application and use by systemic actors; it is a result *achieved* in the course of a practice of rational argumentation.[113]

Canons and methods of interpretation are wholly separate from the process of constructing the meaning of legal rules. But the justification of an interpretation—the claim to authority—generally requires conformity with methodological constraints. Because each legal system has its own background understandings of what appropriate and rationally justifiable readings of legal texts entail, rules of interpretation serve to confine the field of 'permissible' constructions.[114] Rules of legal reasoning and forms of argument, in particular, fall within this category.[115] In this respect, law-applying actors thus operate in a self-constraining fashion: deploying a common grammar of

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[110] For example, in respect of concepts such as necessity as a circumstance precluding wrongfulness, full protection and security clauses, and the definition of reparations. A detailed analysis of such an 'integrationist' approach is found throughout in F Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (CUP, 2013).

[111] See J Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can we Go?' (2001) 95 *American Journal of International Law* 535, examining the interpretative practices of the DSB, its treatment of customary international law, and its emphasis on the WTO Agreement as a self-contained regime within international law.

[112] On this point, see the generally favourable treatment of the ICJ and ILC given to the pronouncements of human rights monitoring bodies and the reasons given, as gathered in D Azaria, 'The Legal Significance of Expert Treaty Bodies Pronouncements for the Purpose of the Interpretation of Treaties' (2020) 22 *International Community Law Review* 33.

[113] Ibid., p. 255, though Pulkowski suggests that it is a result that may also be avoided. *Cf.* d'Aspremont, *supra* n. 53, p. 213, who envisages a more limited social consciousness on the part of law-applying authorities, though he does concede that they seem generally heedful of the need to achieve the overall coherence and consistency of international legal rules.

[114] Ibid., p. 276.

[115] Ibid., p. 243.

legal discourse rules limits the range of permissible arguments for law-applying actors, compelling them to channel their arguments into that legal form. This constrained approach limit the reservoir of legal concepts to which they may have recourse, but equally, serves to reinforce the acceptance of these concepts within the system over time. As such, law-applying actors legitimate themselves by acting as part of the wider interpretive or epistemic community of international lawyers, a crucial element in how their authority is constructed through processes of social recognition.

6.2. The Epistemic Community of International Lawyers

Stanley Fish popularized the term 'interpretive communities', a term taken to refer not so much to a group of individuals who share a common point of view, but a point of view or way of organising experience that binds individuals together in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance are themselves the content of the consciousness of a community. That community's members are no longer regarded as individuals for the purpose of the community, especially in so far as they find themselves embedded in the community's common enterprise.[116]

So confined, law-applying actors are not only constrained by a text; they are constrained by the need to secure acceptance of their claim as appropriately legal. The interpretive community shares background assumptions and shared ideas which form part of their professional ethos, and in so doing, generate a standard to judge the correctness and acceptability of interpretation, thus constraining the interpretative process.[117] This is achieved through the internalisation of these shared canons in their choice of argument or strategy. As such, the interpretive community of international lawyers who are engaged with that system is characterized precisely by the common

[116] Fish (1980), pp. 338-355.

[117] See Fiss (1982).

discourse rules deployed; to use them is both to construct the interpretive community but also to claim a place within it.[118] It matters not a whit whether the international lawyer in question is the agent or employee of a State, an international institution, a private actor or organisation, or speaking in an academic or private capacity: membership in the community demands adherence to the shared canons of the interpretive community. It is technical proficiency, therefore, that defines membership and emerges as the hallmark of the international lawyer, who can 'develop an ability to distinguish between competent arguments and points ... that ... somehow fail as legal arguments'.[119]

Interpretive communities, which concern primarily the act of interpretation, can be distinguished somewhat from *epistemic* communities, a slightly narrower approach which emphasizes the network of experts and their role in creating regimes and knowledge, though the two can be broadly reconciled for the purposes of the argument put forward here. But the concept of an epistemic community is perhaps more useful in going beyond the mere use of shared discourse rules but in emphasising the inter-relation between the community's actors, all of which reinforce the 'episteme' of the community, in that they together construct a 'dominant way of looking at social reality, a set of shared symbols and references, mutual expectations and a mutual predictability of intention'.[120] Through their shared, even coordinated activities, members of the epistemic community develop both a shared set of normative and principled beliefs, which provide shared notions of *validity*, or inter-subjective, internal criteria for the assessment of knowledge by relevant actors in the domain of their expertise.[121] In so doing, they not only share

[118] Bianchi (2009), p. 404. d'Aspremont (2014), p. 21, suggests that the doctrine of sources would be one such elementary discourse rules for international lawyers.

[119] Koskenniemi, *supra* n. 17, p. 566.

[120] Ruggie (1975), pp. 569-570. See also Kennedy, *supra* n. 97, p. 466.

[121] Haas (1992), p. 3.

common discourse rules, but they share a belief in their authority and a willingness to safeguard them: they create a 'feedback loop' of mutual reinforcement.

In this light, the concepts of interpretive and epistemic communities are useful in situating further the place of law-applying authorities within a social practice. They serve to rebut the conceit of the epistemic community of international lawyers who maintain they are essentially engaged in a scientific, descriptive enterprise, one essentially detached from politics:

> A professionally competent argument is rooted in a *social concept of law*—it claims to emerge from the way international society is, and not from some wishful construction of it. On the other hand, any such doctrine or position must also show that it is not just a reflection of power—that it does not only tell what States do or will but what they *should* do or will.[122]

The idea of international lawyers as an epistemic or interpretive community helps one to visualize the episteme created by the shared language of international lawyers: its canons and discourse rules, its elementary doctrines on what is valid and acceptable legal argument, and the apparatus which is deployed in assessing acceptability and recognizing authority. Koskenniemi's call for a 'culture of formalism', the insistence that one should subordinate their idiosyncratic preferences and situate them in shared historical practices, represents a pragmatic acceptance of precisely this reality.[123] Our shared international legal language and ethos serve simultaneously to reinforce the legal order, and the authority of actors engaging with it. If acting in concert, the epistemic community of international lawyers, and especially its key systemic actors, potentially wield formidable normative influence in the development of the law itself.

7. Final Thoughts: On Law-Creation and Authority

[122] Koskenniemi, *supra* n. 17, pp. 573-574. Such professional competency is then rooted in a mastery of the past: the reproduction of the canon of past texts and modes of thinking and action that have constituted a discipline: see Bourdieu, *supra* n. 25, p. 820, and also Venzke, *supra* n. 45, p. 120.

[123] Ibid., p. 616.

As a matter of strategy and technique, international institutions defend their activity as the application of the law that they are competent to apply because to do so reinforces their authority merely as law-applying authorities.[124] Interpretation in particular can take place beyond the limited exercise of clarification or application, as would be the case with scholarly engagements with the law.[125] Yet, if the application of a legal rule is inextricably intertwined with the interpretation of it,[126] the determination of the content of a legal rule arises at each instance of application. If that is the case, then the interpretative activity of any 'authorised' law-applying authority is constitutive: as Kelsen put it peremptorily, '[t]he interpretation by the law-applying organ is always authentic. It creates law'.[127] As such, the interpretative activity of a law-applying authority imbues any process of legal reasoning. Otherwise, it is to distinguish artificially the processes of interpretation (as discovering meaning) and development (if understood purely as clarification of existing legal rules, which of course only tells part of the story), and creates an unrealistic expectation that law-applying institutions play no role in the development of the law.

Even if the international legal system might not *require* the existence of law-applying authorities, in the sense of being necessary for the existence of the system as such, as a descriptive claim,[128] the indeterminacy of law as described above necessarily opens up a vacuum in which a

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[124] Dupuy (1989), p. 569; Venzke, *supra* n. 45, p. 105.

[125] See, in this respect, Kelsen, *supra* n. 10, p. 355: '[t]he interpretation of law by the science of law (jurisprudence) must be sharply distinguished as nonauthentic from the interpretation by legal organs. Jurisprudential interpretation is purely cognitive ascertainment of the meaning of legal norms. In contrast to the interpretation by legal organs, jurisprudential interpretation does not create law.'

[126] It is conceded that the process of interpretation, in the hermeneutic sense of ascribing meaning or content to a rule, is distinct in its teleology from the process of application, if the latter is understood as a process of determining the consequences or effects of that rule: Schwarzenberger (1968), p. 7.

[127] Kelsen, *supra* n. 10, pp. 353-354.

[128] But *cf.* Coleman, 'Incorporationism' (2001), p. 115:

> Acceptance from the internal point of view by officials is a conceptual requirement of the possibility of law; acceptance from the internal point of view by a substantial proportion of the populace is neither a conceptual nor an efficacy requirement.

claim to law-applying authority can be made. Again, when indeterminacy arises in our non-hierarchical, institutionally decentralized international legal system, norm-applying institutions are particularly well situated to assert discretion in choosing between plausible legal alternatives, claiming as they do an important role in the mitigation and resolution of normative conflicts.[129] The interpretative authority which is required by the indeterminacy of law and facilitated by social practices, therefore, empowers the law-applying authority to claim that space that Hart described, and to assume an important function within the legal system, participating in law-creation and the resolution of normative conflicts, and again, in safeguarding the coherence and stability of that legal system.[130]

I have sought to demonstrate how the reliance by law-applying institutions on the language of law represents more than merely to claim authority to interpret and to apply the law in respect of a dispute. Concealed behind the fiction that maintains that interpretation as an act of discovery, the activity of law-applying authorities is an essential component in the construction of a legal system and the maintenance of its coherence. Here, it has been argued that, despite its roots in social practice, a claim to authority appeals to the rationality of the law as the justification for its exercise, thus lending renewed relevance to Julius Stone's claim that '... to conceal creative power by fictions does not prevent its actual exercise'.[131] It is an appeal to the values and shared ethos of the epistemic community of international lawyers, whether in their academic discipline but also in their own capacity as professionals serving States, international institutions, and other

[129] A point raised in the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission*, UN Doc A/CN.4/L.682 (13 April 2006), as corrected UN Doc. A/CN.4/L.682/Corr.1 (11 August 2006) (finalized by Martti Koskenniemi), para 468.

[130] Jouannet, *supra* n. 25, p. 946: the judge assumes 'une fonction d'acteur à part entière du système, où il prend part au débat sur les valeurs les plus fondamentales de ce système, où il est vecteur et créateur reconnu d'une certaine hiérarchie minimale, de la cohérence et de la stabilité du système juridique'.

[131] Stone (1954), p. 364.

international actors. In turn, such reliance on those shared values privileges the coherence of the legal system over other substantive values, in which law can play an important political role. That coherence has its darker side: when imposed by systemic officials, it is the 'end-point of a hegemonic process in which some agent or institution has succeeded in making its position seem the universal or "neutral" position.'[132]

And yet, for all this, the privileging of coherence over other substantive values by duly authorized actors remains under-explored within international law. Is there another way? Can the source of these actors' authority can nevertheless be questioned and better understood, as they need not be seen immanent features of international social organization, but as contingent on the particular legal form that has been constructed to regulate international social life? This may well prove an insurmountable challenge; but for the international lawyer to view such authority as contingent raises the imaginative possibilities of change, and allow for one to continue to challenge—from the inside—the constraints of the epistemic community of which we all form a part.

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[132] Koskenniemi, *supra* n. 17, p. 597, suggesting that the entire process of hermeneutics is a 'universalisation project, a set of hegemonic moves that make particular arguments or preferences seem something other than particular because they seem, for example 'coherent' with the 'principles' of the legal system'. A version of this argument was also advanced in Falk (1967–1968), pp. 324-325: '[s]elf-interested interpretation presented as authoritative or objective interpretation has been an essential ingredient of all patterns of domination, veiling oppressive and exploitative relationships in the guise of that which is 'natural' or 'true' or 'necessary'.

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