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Gleider Hernandez

The Determinability of Law: Indetermincy and the Social and Communatarian Foundations of Authority

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THE DETERMINABILITY OF LAW: INDETERMINACY AND THE SOCIAL AND COMMUNITARIAN FOUNDATIONS OF AUTHORITY

By Gleider Hernandez

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 law-creative potential and law-applying competence, there remains a lack of systematicity in addressing how certain international actors claim and exercise authority within the system. But as with nature, law abhors a vacuum, and certain practices serve to cure the indeterminacies that arise from time to time. Authority thus can be located in the antecedent existence of indeterminacy; rather than to condemn international law to incoherence, the solution in legal theory has been to recognize or construct mechanisms of determinability: in situations of legal indeterminacy, the legal system empowers certain law-applying actors to exercise their discretion by taking law-creative measures, measures which are then accepted as authoritative in the legal system itself (Section 2). This phenomenon demonstrates a self-empowering dimension in filling the vacuum: the discretion that is opened up for law-applying authorities is not limited by prior judicial decisions, but is in fact 'a result of the multiplicity of previous judgments.'[1]

Inherent in any discussion of how to resolve situations of indeterminacy is the identification of the actors tasked with addressing these. Accordingly, Section 3 considers the multifaceted question of identifying authority in international law. I seek

[1] J. Beckett, 'The Hartian Tradition in International Law' (2008) 1 *Journal of Jurisprudence* 51, at 65 [emphasis in original].

to situate the concept similarly as does Ingo Venzke,[2] as the ability to influence conduct or behaviour not merely through the content or the merits of what is willed through persuasion, but through what Herbert Hart called content-independent authority.[3] The specific understanding of content-independent authority 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 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 this social practice is constitutive of the international legal system itself.

The social thesis has two important limitations, which will be addressed in Section 5. The first is internal: it suggests that the there is insufficient theorising as to how legal officials come to be identified and the reasons why. Though broadening the category of 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. The second critique is more far-reaching, and points to a circularity in the approach to law-applying authorities, where their existence is contingent on an enabling legal rule, and yet is necessary for the legal system that creates the rule in the first place to exist. The circularity in this approach presumes the necessity of the existence of legal officials to interpret and apply legal rules.

As such, Section 6 will argue that the social thesis needs to be understood as well in relation to the proficiency of law-applying authorities in deploying the common discourse rules that define the interpretive community of international lawyers. Such rules, which privilege the systemic unity of international law as a whole, act to constrain law-applying actors, channelling their arguments into a specific form acceptable to the

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[2] I. Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law' (2013) 4 *Transnational Legal Theory* 351.
[3] H.L.A. Hart, 'Commands and Authoritative Legal Reasons', in H.L.A. Hart (ed.), *Essays on Bentham: Studies in Jurisprudence and Political Theory* (1982), at 243.

wider community. Such practices signal their membership as part of the interpretative or epistemic community of international lawyers, and the 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'.[4] As such, it serves as the most powerful tool in their arsenal for exercising authority within the international legal order;

2. Indeterminacy

Though 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.[5] Such claim is premised on a faith in the immanent rationality or of objectivity in law.[6] 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 conveyed through a language which is itself indeterminate, (international) lawyers invariably face the question of what they ought to do with such indeterminacy.'[7]

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[4] M. Koskenniemi, 'What is International Law For', in M. Evans (ed.), *International Law* (4th edn 2014), 29, at 42.

[5] The classic argument being put forward as the 'juridically natural view': see G.G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation' (1951) 28 *BYBIL* (1951) 1, at 3–4; and Gerald G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–1954: Treaty Interpretation and Other Treaty Points' (1957) 33 *BYBIL* 203, at 204. A modern exemplar of a similar approach is that of A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008).

[6] See e.g., generally, E. Weinrib, 'Legal Formalism, on the Immanent Rationality of Law' (1997-1998) 97 *Yale Law Journal* 949.

[7] S. Marks, *The Riddle of all Constitutions* (2003), at 144.

A. The Determinability of the Law

As such, most mainstream accounts in 20th century legal scholarship, on both the domestic and international planes, have sought instead to resolve indeterminacy through recourse to systemic principles, such as effectiveness[8] or systemic integration[9] that would serve to cure the gap. In short, indeterminacy has been regarded as a prima facie problem, to be resolved through mechanisms that apply rules which to combat indeterminacy; it is a position that suggests that these mechanisms render law determinable. To take a few canonical examples, 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.[10] His critique of classical legal positivism 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.11 To Kelsen, the legal system constitutes a 'frame' which serves to confine the available choice of norms in concrete cases,12 the act of individual application by systemic actors (in the main, judicial institutions) helping further to determine and constitute a general legal rule.[13] Similarly, Hart foresaw that certain hard cases served to prove a fundamental 'incompleteness' in law, where the law could provide no answer.[14] 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.15 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

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[8] H. Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *BYBIL* 48, at 75-6.
[9] C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279.
[10] H. Kelsen, *Pure Theory of Law* (M Knight trans, 2nd edn, 1970), at 350.
[11] *Ibid*., at 82-3.
[12] *Ibid*., at 351.
[13] *Ibid*., at 349.
[14] H.L.A. Hart, *The Concept of Law* (3rd edn, 2012), at 252.
[15] *Ibid*., at 145. Hart's theory on judicial interpretation was justified by his theory of the open texture of language: *ibid*., at 120-32.

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 system, in line with systemic principles, which he understands as those systemic values which underlie all legal rules.[16]

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.

B. Koskenniemi and the Radical Indeterminacy Thesis

On the international plane, it Koskenniemi who, with the publication of From Apology to Utopia,[17] triggered renewed debates 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.[18] Instead, Koskenniemi argued that international legal argument 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

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[16] R. Dworkin, *Taking Rights Seriously* (1978), 31-2. 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* note 10, at 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'.

[17] M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (1989, reissued 2005).

[18] *Ibid.*, at 122.

delineate 'law' fully from other social processes.[19] That oscillation is confined by the 'generative grammar' of international law, which delimits and channels the form in which international legal arguments are made.[20] That 'generative grammar', however, does 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 in international law.[21]

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 the ontological indeterminacy in international law,[22] what is relevant here is his semantic critique of the hermeneutic approach. 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 coherence of law.[23] 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'.[24]

Koskenniemi's coruscating critique of the determinability of law is therefore not to argue 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

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[19] *Ibid*., at 387.
[20] *Ibid*., at 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.'
[21] *Ibid*., at 591.
[22] 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 J. Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL', (2005) 16 *EJIL* 213.
[23] Koskenniemi, *supra* note 17, at 584-8. 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 J. Beckett, 'A Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project' (2006) 7 *German Law Journal* 1045, at 1054-55.
[24] *Ibid*., at 608.

actors who privilege certain interests, in particular coherence itself, and succeeds in imposing them. His argument is reflected in Emmanuelle Jouannet's later critique of the act of judging as inextricably tied to power: '... le juge international joue un rôle non négligeable, voir décisif, dans l'affirmation de ces hiérarchies normatives et qu'au souci de participer au maintien du système dans lequel il s'insère s'ajoute une exigence de cohérence formelle de son propre discours judiciaire.'[25] But the salient point here remains that Koskenniemi's critique of determinability recognizes the space, opened by the indeterminacy of the law, for law-applying authorities, and in particular judicial institutions, to claim authority in the interpretation and application of international law. By moving authority away from words and to observable behaviour, the question becomes not whether law is indeterminate, but rather, how there come to exist law-applying actors who wield interpretative authority over legal norms with sufficient legitimacy so as to be accepted as legitimate by other actors within the system. Though intertwined concepts, before turning to the authorities that would wield such authority, it is important to situate exactly what is meant here in the use of the term.

3. Authority in Legal Systems

A. 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

[25] E. Jouannet, 'Le juge international face aux problèmes d'incohérence et d'instabilité du droit international' (2004) 108 *Revue générale de droit international public* 929, at 943. Both Koskenniemi and Jouannet seem on this point to align their thoughts on this point with that of P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 814, at 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'.

to a named institution or actor.[26] 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 law as 'content-laden reference points' that inexorably shape the discourse, and can only be ignored at a cost.[27] The social practice that serves to legitimate and reify 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 different from it in that authority has the potential to induce the consent of the addressee in a fundamentally different manner than other kinds 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.'[28] Understood in this sense, authority compels obedience in the absence of consent, on the basis that the exercise of authority is accepted as legitimate. The next section will seek to clarify how the legitimacy of that claim to authority is constructed.

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[26] G. Schwarzenberger, 'Myths and Realities of Treaties of Treaty Interpretation: Articles 27–29 of the Vienna Draft Convention on the Law of Treaties' (1968) 9 *Virginia Journal of International Law* (1968) 1, at 11; A McNair, *The Law of Treaties* (2nd edn, 1961), at 531-532. This has to be distinguished from Kelsen's idea of 'authentic' interpretation (as distinguished from 'scientific' interpretation); as explained by J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (2011), at 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'.

[27] Venzke, *supra* note 2, at 353. Venzke relies heavily, on this point, on Bourdieu, *supra* note 25, at 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.'

[28] J. Raz, 'Legitimate Authority' in J. Raz (ed), *Between Authority and Interpretation* (2009) 3, at 19.

B. 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 done.'[29] In fact, the distinguishing feature of authority remains its content-independence, a term introduced by Hart[30] and elaborated further by Raz: 'a reason is content-independent if there is no direct connection between the reason and the action'.[31] 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.[32] In practice, this entails that our normal decision-making and reasoning processes are definitively shaped by the authoritative directive, in that the command is given due weight in the decision-making process.[33]

It is precisely because the authorities seek to induce obedience with their directives, irrespective of whether the addressee accepts the underlying substantive reasons for so doing, that an authority positions itself as content-independent.[34] Authority in this sense goes so far as 'to require a subject actually to do or decide something other than what she would have done or decided in the absence of the

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[29] See Hart, *supra* note 3, at 254-5. See also L. Green, 'Legal Obligation and Authority' in E.N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2010 edn, 2010); and S. Shapiro, 'Authority' in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002), at 389. See also S. Sciariffa, 'On Content-Independent Reasons: It's not in the Name' (2009) 28 *Law and Philosophy* 233.

[30] As was convincingly demonstrated by Hart, *supra* note 3, at 261-6; and J. Raz, *The Authority of Law: Essays on Law and Morality* (1983), at 234.

[31] J. Raz, *The Morality of Freedom* (1986), at 35.

[32] F. Schauer, 'Authority and Authorities' (2008) 94 *Virginia Law Review* 1931, at 1935.

[33] This allows for authority to persist even when it is defied: see I. Venzke, 'Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction', (2013) 14 *Theoretical Inquiries in Law* 381, at 399, referring to Max Weber's idea that authority exists as the *potential* to command obedience, and not merely as the command itself.

[34] Schauer, *supra* note 32, 1935-36.

authoritative directive.'[35] 'Persuasive authority', an oft-used term in both domestic and international law,[36] 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 compelling, there is no obligation so to do.[37] 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.[38] 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'.[39]

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 comply, obedience from other actors.[40] 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.[41] 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

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[35] *Ibid.*, 1939. See also Raz, *supra* note 30, at 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.

[36] For a fuller treatment of the principle, see G. Lamond, 'Persuasive Authority in the Law' (2010) XVII *Harvard Review of Philosophy* 16; H.P. Glenn, 'Persuasive Authority' (1987) 32 *McGill Law Journal* 281.

[37] Schauer, *supra* note 32, at 1941; Venzke, *supra* note 2, at 359. John Gardner's term 'permissive' might be preferable to 'persuasive': see J. Gardner, 'Concerning Permissive Sources and Gaps' (1988) 8 *Oxford Journal of Legal Studies* 457, 458.

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

[39] H. Arendt, 'What is Authority?' in *Between Past and Future* (2006) 91, at 93, cited in Venzke, 'Between Power and Persuasion', *supra* note 2, at 353.

[40] M. Barnett and M. Finnemore, *Rules for the World: International Organizations in Global Politics* (2004), at 5.

[41] See Raz, *supra* note 30, at 113; see also Schauer, *supra* note 32, at 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.'

because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.'[42]

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?[43] To fixate on this line of reasoning, however, might be to elevate unduly a 'myth' of authority delegated in prior moments of recognition.[44] 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',[45] 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[46] from either power or persuasion. As such, the question of how the system designates given actors as empowered or authorized to exercise such legitimacy becomes apposite.

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[42] T. Franck, *The Power of Legitimacy among Nations* (1990), at 24 [emphasis added]. A similar point has been made by Venzke, 'Between Power and Persuasion', *supra* note 2, at 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'.

[43] For a functionalist viewpoint, see generally K.J. Alter, 'Delegation to International Courts and the Limits of Re-Contracting Political Power' in D.G. Hawkins, D.A. Lake, D.L. Nielson and M.J. Tierney (eds.), *Delegation and Agency in International Organizations* (2006) 312.

[44] Venzke, *supra* note 33, at 392-4; see also Bourdieu, *supra* note 25, at 828.

[45] Venzke, *supra* note 2, at 357. The point is also developed in I. Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation' (2012) 34 *Loyola of Los Angeles International and Comparative Law Review* 99, *passim*, and Venzke, *supra* note 33, at 389.

[46] Beckett, *supra* note 23, at 1061.

4. On Law -- Applying Authorities

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

An under-explained element in the definition of legal systems has been the necessary presence of the law-applying official; for example, Hart's second 'necessary and sufficient' condition for the existence of the legal system[47] was that its rules of recognition be effectively accepted as common public standards of official behaviour by legal officials: this acceptance is 'taken to be system-constituting, constantly reaffirming and creating the edges of their legal system.'[48] Joseph Raz also argues 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.[49]

That international judges play a role in the development of international law is not a controversial point: the argument was first forged in relation to the PCIJ and ICJ before being further developed to accommodate the proliferation of courts and tribunals in the 1990s.[50] The question arises as to why the practice of certain norm-

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[47] Hart, *supra* note 14, at 117.
[48] K. Culver and M. Giudice, *Legality's Borders: An Essay in General Jurisprudence* (2010), at 4.
[49] J. Raz, 'The Institutional Nature of Law' (1975) 38 *Modern Law Review* 489, at 491 [emphasis added]. See also S. Shapiro, *Legality* (2011), at 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'.
[50] J.I. Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 New York University Journal of International Law and Policy 697, 704; C.P. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 New York University Journal of International Law and Policy 709, 751; See also the 'Cross-Fertilization' debates: L. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication' in B.A. Simmons (ed), *International Law* vol IV (2008), 9; C. Koh, 'Judicial Dialogue for Legal Multiculturalism' (2004) 25

applying institutions, to be distinguished from 'norm-enforcing' institutions such as police, prison officials, and other enforcement and administrative officials who are not 'key' to the identification of legal systems,[51] comes to be regarded as authoritative. There is certainly no official designation of 'authorities' or 'officials' within international law; in fact, because he could identify no functional distinction between the subjects of international law and its authorized officials, that 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.[52]

It is important, though, to 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.[53] What is more, it is difficult to observe the proliferation of international courts and tribunals who apply 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.[54] Because they command a general

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Michigan Journal of International Law 979; and F. Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal System: The European Court of Human Rights' (2008) 38 *Texas International Law Journal* 547.

[51] Raz, *supra* note 30, at 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'.

[52] Hart, *supra* note 14, at 214.

[53] J. d'Aspremont, *Formalism and the Sources of International Law* (2012), at 141.

[54] *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

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.[55] 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.[56]

Though a fully articulated concept of law-applying authorities and their role in the international legal system is perhaps beyond the scope of this article, there are some limited observations that 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.'[57] Courts, for example, 'have power to make an authoritative determination of [legal subjects'] legal situation'.[58] 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 determine the legal situation in specific cases.[59] Instead of international law's institutional differences being considered as defects to be resolved in the domestic law paradigm,[60] they ought better to be read as illuminating the different

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[55] M. Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2010) 21 *EJIL* 967, at 986, citing the United States Supreme Court.

[56] See K.E. Himma, 'Law's Claim of Legitimate Authority' in J. Coleman (ed.), *Hart's Postscript: Essays on the Postscript of the* Concept of Law (2001) 271, at 293.

[57] Raz, *supra* note 30, at 106.

[58] *Ibid.*, at 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.]

[59] *Ibid.*, at 109-10.

[60] 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, 'The Hartian Tradition in International Law', *supra* note 1, at 68. On the domestic analogy, see also M. Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *EJIL* 113, at 122: '[t]he domestic analogy that

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.[61] 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.[62] It is this characteristic; above all, that endows the decisions of such relevant norm-applying institutions with authority. 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.

B. The Social Practice of Officials as an Explanatory Device

1. Hart's Social Thesis on the International Plane

If law exists 'as institutional fact',[63] existing because of a belief in law rather than its abstract existence as a thought object,[64] the recognition of law as such in social practice

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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'.

[61] J. d'Aspremont, 'Herbert Hart in Today's International Legal Scholarship' in J. Kammerhofer and J. d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (2014) 114, at 134.

[62] Venzke, 'Understanding Authority', *supra* note 33, 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 A. von Bogdandy and I. Venzke, 'In Whose Name? An Investigation of International Courts Public Authority and Its Democratic Justification', (2012) 23 *EJIL* 7, at 18; A. von Bogdandy and I. Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' in A. von Bogdandy and I. Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer, Heidelberg 2012) 3, esp. 15-20.

[63] See N. MacCormick, 'Law as Institutional Fact' in N. MacCormick and O. Weinberger, *The Institutional Theory of Law: New Approaches to Legal Positivism* (1986), at 49.

[64] Beckett, *supra* note 1, at 73-4.

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.[65] 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'.[66] 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.[67]

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 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.[68] D'Aspremont has taken this theory even further, to advance his claim that that formal law-ascertainment can potentially provide sufficient guidance as to what is law and what is not law. In so doing, though he concedes that even that 'limited determinacy' does not deprive law-applying authorities

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[65] Hart, *supra* note 14, at 116-7.
[66] *Ibid.*
[67] H.L.A. Hart, 'Jehring's Heaven of Concepts and Modern Analytical Jurisprudence' in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983) 265, at 277. See also, more generally, Hart, *supra* note 14, at 108-9. 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* note 61, at 133.
[68] D'Aspremont, *supra* note 53, 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 B. Simpson, 'The Common Law and Legal Theory' in W. Twining (ed.), *Legal Theory and Common Law* (1986) 8, at 18-21.

of the large margin of discretion they enjoy when determining what constitutes an international legal rule,[69] 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.[70] Though in Section 6, the common discourse rules of epistemic communities will be further explored, it suffices merely to observe that the justification of authority through social practice is another technique through which to argue in favour the determinability of the law through the internal mechanisms of the legal system.

2. Social Practice as Constitutive of the International Legal System

The second feature of d'Aspremont's 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, especially in the absence of a formalized role for law-creation.[71] For him, the 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,[72] and law-making is only generated through the subsequent validation of the decisions of international courts and tribunals by States

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[69] *Ibid.*, at 141. See also J. Klabbers, *The Concept of Treaty in International Law* (1996), at 12; Hart, *supra* note 14, at 148.

[70] Raz calls this the *semantic thesis*: Raz, *supra* note 30, at 37. D'Aspremont cites this approvingly, *supra* note 53, at 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* note 14, at 116.

[71] 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 grâce à cette énonciation qui lui donne vie et lui confère une existence propre*' [emphasis added]: P. Weil, 'À propos du droit coutumier en matière de délimitation maritime', in *Le droit international à l'heure de sa codification: Études en l'honneur de Roberto Ago* vol II (1987) 549, at 551.

[72] D'Aspremont, *supra* note 53, at 205.

in their practice through the emergence of a shared and sustainable 'feeling of convergence of the practices of law-ascertainment'.[73] This 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.[74] 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.[75] The combination of shared values signals their membership in, or at least the acceptance of an interpretation, by the wider community of international lawyers, a point to be addressed in Section 6.

5. Challenges with the Social Thesis

A. 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

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[73] *Ibid.*, at 213.

[74] The indispensable contemporary example has been the 'transnational judicial dialogue' approach favoured by A.-M. Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191, at 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 at 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 A.-M. Slaughter, 'A Typology of Transjudicial Communication' (1995) 29 *University of Richmond Law Review* 99, and A.-M. Slaughter, 'International Law in a World of Liberal States' (1995) 6 *EJIL* 503, at 535.

[75] D'Aspremont, *supra* note 53, at 202, using the term 'accessible'.

to be identified, and why. This problem is not of d'Aspremont's making, and he has in fact taken seriously Brian Tamahana's critique against Hart, for failing to establish in precise terms who qualifies is a legal official.[76] Yet Tamahana'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"'.[77] Certainly, Tamahana's definition 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, regulatory bodies and certain non-governmental organisations such as the Red Cross).[78] Yet the criterion for acceptance as a law-applying authority under this definition remains socially-based, and even somewhat circular: recognition by other legally 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.[79] The fact that norm-applying institutions are regarded as essential in order to ascertain the existence of a legal system remains unquestioned.[80]

Though d'Aspremont is correct in arguing that in practice 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,[81] he has neglected to provide a persuasive theory of how exactly the position of these authorities should be apprehended. His favoured solution, enlarging the social thesis by

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[76] B. Tamahana, *A General Jurisprudence of Law and Society* (2001), at 139.
[77] *Ibid*., at 142.
[78] D'Aspremont, *supra* note 53, 60, at 141.
[79] R. Collins, 'Law-Applying Institutions' in International Law: The Problematic Concept of the International Legal Official' (2015) *Transnational Legal Theory* (forthcoming; paper on file with author), at 14.
[80] J. Raz, 'The Institutional Nature of Law' (1975) 38 *Modern Law Review* 489, 491; and A Marmor, *Positive Law and Objective Values* (2001), 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.
[81] D'Aspremont, *supra* note 61, at 134.

adopting Tamahana's 'socio-legal positivism',[82] simply continues to presume the systemic necessity of law-applying authorities. What is more, Tamahana'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. This is problematic for a number of reasons; as Bourdieu commented in relation to judges specifically,

> 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. 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.[83]

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.[84] 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, in fact, the reification[85] of the official's role within a legal system: the institutional role is deemed essential and yet it is merely presumed, with no further justification.

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[82] D'Aspremont, *supra* note 53, at 60.
[83] Bourdieu, *supra* note 25, at 824.
[84] For a brief overview of the process of autopoesis in sustaining and nourishing a system, see N. Luhmann, 'The Autopoiesis of Social Systems' In F Geyer and J Van d Zeuwen. (eds), *Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-Steering Systems* (1986) 172.
[85] The complex term 'reification' is understood here in the manner advanced by S. Marks, 'Big Brother is Bleeping Us—With the Message that Ideology Doesn't Matter' (2001) 12 *EJIL* 109, at 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'.

B. 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: '[l]aw is what officials recognise as law, no more and no less.'[86] As Jason Beckett has argued, it serves more as a method for 'understanding (interpreting) official behaviour';[87] using Hart's own words against him,

> ... [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.[88]

By linking this, as Hart does, with his second necessary and sufficient condition for the existence of a legal system,[89] 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 out that law-applying officials accept, apply and use international law. The key point to be retained is their role within the system: they must discharge a specific function within the legal system by virtue of the very office they hold.[90]

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[86] J. Beckett, 'The Hartian Tradition in International Law' (2008) 1 *Journal of Jurisprudence* 51, 58 [emphasis added]. Law becomes a 'brute fact', with sufficient amongst these facts constituting the legal system: ibid, 70. See 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.' P Ricoeur, *The Just* (D. Pellaeur trans., 2000) 109, 114.
[87] *Ibid.*, at 60.
[88] Hart, *supra* note 14, 59.
[89] See, *supra*, section 4.A.
[90] A. Marmor, 'Legal Conventionalism' in J. Coleman (ed.), *Hart's Postscript: Essays on the Postscript of the* Concept of Law (2001), at 10.

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 character, but rather, except 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.'[91] To recall, Hart's basic critique of international law's failure to meet his criteria of a legal system was the lack of official agencies to determine authoritatively the fact of violation of the rules, is 'a much more serious defect'[92] than any official monopoly on sanctions, or a centralized law-creative power. 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.'[93] 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.[94] To insist unduly on recognition as constitutive conceals the difficult questions of the strategies used by the norm-applying authority to achieve recognition. For this reason, it is important also to

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[91] J. Gardner, 'The Legality of Law' (2004) 17 *Ratio Juris* 168, at 170.
[92] Hart, *supra* note 14, at 93.
[93] Bourdieu, *supra* note 25, at 817 [emphasis in original].
[94] Culver and Giudice, *supra* note 48, at 20.

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

A. 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'.[95] Oscar Schachter's 'invisible college' of international lawyers[96] 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 Pierre-Marie Dupuy's metaphor of a grammar[97] or syntax common to international lawyers, which enables the creation and justifies the validity of international legal rules[98] which might emanate from functionally different specialized regimes in international law. Dirk Pulkowski, in his recent study of self-contained regimes in international law, has

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[95] C.W. Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *BYBIL* 401, at 416.
[96] O. Schachter, 'The Invisible College of International Lawyers' (1977-78) 72 *Northwestern University Law Review* 217. For a less laudatory approach to the invisible college, see D Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise' (2001) 5 *European Human Rights Law Review* 463.
[97] Ironically, the same term used by Koskenniemi to describe a vastly different phenomenon: see text accompanying note 20, *supra*.
[98] P.-M. Dupuy, 'L'unité de l'ordre juridique international' (2002) 297 *Recueil des Cours* 1.

updated Dupuy's 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.[99] 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'.[100] 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.[101]

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

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[99] D. Pulkowski, *The Law and Politics of International Regime Conflict* (2014), at 238 [emphasis added]. Pulkovski 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 R. Cover, '*Nomos* and Narrative', (1983) 97 *Harvard Law Review* 4, at 10.

[100] *Ibid*., at 239.

[101] *Ibid*., at 255, though Pulkowski suggests that it is a result that may also be avoided. *Cf.* d'Aspremont, *supra* note 53, at 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.

and rationally justifiable readings of legal texts entail, rules of interpretation serve to confine the field of 'permissible' constructions.[102] Rules of legal reasoning and forms of argument, in particular, fall within this category.[103] In this respect, law-applying actors thus operate in a self-constraining fashion: deploying a common grammar of 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 may 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, which in turn serves as the social element in constructing their authority through recognition.

B. 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.[104]

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

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[102] *Ibid.*, at 276.
[103] *Ibid.*, at 243.
[104] S. Fish, *Is There a Text in this Class? The Authority of Interpretive Communities* (1980), at 338-55.

process.[105] 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 discourse rules deployed; to use them is both to construct the interpretive community but also to claim a place within it.[106] 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'.[107]

Interpretive communities, which concern primarily the act of interpretation, can 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'.[108] 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

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[105] See O. Fiss, 'Objectivity and Interpretation' (1982) 34 *Stanford Law Review* 739.
[106] A. Bianchi, 'Looking Ahead: International Law's Main Challenges' in D. Armstrong (ed.), *Routledge Handbook of International Law* (2009) 392, at 404. J. d'Aspremont, 'The Idea of "Rules" in the Sources of International Law' (2014) 84 *BYBIL* (forthcoming; online version available on SSRN), at 21, suggests that the doctrine of sources would be one such elementary discourse rules for international lawyers.
[107] Koskenniemi, *supra* note 17, at 566.
[108] J. Ruggie, 'International Responses to Technology' (1975) 29 *International Organization* 557, at 569-70. See also Kennedy, *supra* note 96, 466.

assessment of knowledge by relevant actors in the domain of their expertise.[109] In so doing, they not only share 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.[110]

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.[111] That shared language and ethos serves simultaneously to reinforce the legal order and the authority actors operating within it; if acting in concert, the epistemic community of

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[109] P. Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1, at 3.
[110] Koskenniemi, *supra* note 17, at 573-4. 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* note 25, at 820, and also Venzke, *supra* note 45, at 120.
[111] *Ibid.*, at 616.

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

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.[112] Interpretation in particular can take place without the application of a rule, as would be the case with scholarly engagements with the law.[113] Yet, if the application of a legal rule is inextricably intertwined with the interpretation of it,[114] 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'.[115] As such, the interpretative activity of a law-applying authority imbues any process of legal reasoning, as to distinguish hermetically interpretation (as discovering meaning) and development (purely as clarification of existing legal rules) 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,[116] the indeterminacy of law as described above necessarily

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[112] P.-M. Dupuy, 'Le juge et la règle générale' (1989) 93 *Revue générale de droit international public* 569, at 569; Venzke, *supra* note 45, at 105.

[113] See, in this respect, Kelsen, *supra* note 10, at 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.'

[114] 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: G. Schwarzenberger, 'Myths and Realities of Treaties of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties', (1968) 9 *Virginia Journal of International Law* 1, at 7.

[115] Kelsen, *supra* note 10, 353-4.

[116] But *cf.* J. Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis' in J. Coleman (ed.), *Hart's Postscript: Essays on the Postscript of the* Concept of Law (2001) 99, at 115:

opens up a vacuum in which a 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.[117] 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.[118]

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.[119] 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

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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.

[117] 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), at para 468.

[118] Jouannet, *supra* note 25, at 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'.

[119] J. Stone, 'Fictional Elements in Treaty Interpretation: A Study in the International Judicial Process' (1954) 1 *Sydney Law Review* 344, at 364.

institutions, and other 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.'[120] And yet for all this, the privileging of coherence over other substantive values by certain systemic actors who are authorized by the legal system to act remains under-explored. 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, internally, the contours of the epistemic community of which we are all a part.

[120] Koskenniemi, *supra* note 17, at 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 R. Falk, 'On Treaty Interpretation and the New Haven Approach: Achievements and Prospects' (1967–1968) 8 *Virginia Journal of International Law* 323, at 324-5: '[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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