New International Legal Positivism: Formalism by Another Name?

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Abstract: This chapter explores the work of Jörg Kammerhofer and Jean d'Aspremont. Through a review of Kammerhofer's Kelsenian approach to international law and d'Aspremont's HLA Hart-inspired theory of the sources of international law and the nature of international law more generally, it questions the distinctiveness of the positivism they advocate and contests the contemporary value of a positivistic approach to international law.

1 Introduction

A review of positivism's contemporary standing as a theory of international law is an essential part of this book's inquiry into legal positivism in a global and transnational age. This chapter will undertake just such a review, focussing on "new international legal positivism" (NILP).[1] NILP is a broad, relatively open-textured theoretical approach that has come to prominence in recent years under the informal leadership of Jean d'Aspremont and Jörg Kammerhofer.[2] NILP argues for the contemporary importance of positivism as a core element of international legal theory, whilst emphasising the sense in which more recent positivist accounts of international law have moved on from a classical emphasis on, for example, the pre-eminence of the state in international law-making.[3]

This chapter will question the distinctiveness and value of NILP's contribution to international legal theory. It argues, first, that NILP, in the Kelsenian version presented by Kammerhofer,[4] the Hartian approach to the sources of international law developed by d'Aspremont,[5] and d'Aspremont's more recent work on international law as a "belief system,"[6] is best seen as a form of international legal formalism. This argument is developed in two parts. First, I offer a critique of Kammerhofer's Kelsenian approach, drawing on Stanley L Paulson's work to argue that Kammerhofer's approach implies the sociological perspective that it so emphatically rejects. I argue that Kammerhofer's theory is unable to

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[1] The term is used by d'Aspremont, in d'Aspremont (2014b), p. 130, referring to "a possible agenda for a new international legal positivism," and by Telman (2014), pp. 241–242.
[2] See Kammerhofer and d'Aspremont (2014), p. 14:

> "International legal positivism" does not need to be defined in this volume. Although revolving around a few recurring "theses" (for example, Hartian positivism, the separation, autonomy and social or conventional theses) and paradigms (for example, the necessity for formal law-ascertainment, the political and creative character of interpretation, the idea of autonomy or the possibility of a critique of law), the meaning of international legal positivism is not fixed and purposely left in flux for the sake of the reflexive exercise attempted here.

[3] See Kammerhofer and d'Aspremont (2014), pp. 4–7.
[4] Kammerhofer (2012).
[5] d'Aspremont (2011); d'Aspremont (2012); d'Aspremont (2014a); d'Aspremont (2014b).
[6] d'Aspremont (2018).

exclude the importance of social facts to the ontology and making of law – something that underpins d'Aspremont's Hartian analysis – given the weakness of his argument for a barrier between law and reality. Second, shifting the focus to d'Aspremont's work, I argue that d'Aspremont's Hartian analysis and his more recent work on *International Law as a Belief System* (the title of his 2018 book) are not fundamentally distinct from Martti Koskenniemi's argument for a "culture of formalism,"[7] in which case d'Aspremont's "new positivism" can be seen as an offshoot of Koskenniemi's formalism. In summary, then, Kammerhofer's Kelsenianism virtually collapses into d'Aspremont's sociological perspective and d'Aspremont's Hartian approach collapses into Koskenniemi's formalism (which pre-dates the NILP project), making NILP a variant form of international legal formalism rather than a freestanding theoretical perspective.[8]

2 Kammerhofer and Kelsen

In *Uncertainty in International Law: A Kelsenian Perspective*, his 2011 monograph, Jörg Kammerhofer argues for the importance of Hans Kelsen's Pure Theory of Law in contemporary international legal thought. Kammerhofer explains that his Kelsenian perspective implies that "the goal of legal science is to perceive law in the most objective fashion possible."[9] He applies this Kelsenian perspective to the theme of "uncertainty in international law," exploring issues ranging from self-defence under the UN Charter to the nature of customary international law,[10] and the possibility of "a constitution for international law."[11] As Mónica García-Salmones Rovira points out, Kammerhofer provides no real definition of uncertainty and "presupposes too much specialized knowledge of Kelsen's legal theory on the part of the reader."[12] García-Salmones Rovira also notes "dogmatic aspects" in Kammerhofer's argument – specifically "faithfulness to the text of the law … belief in the sovereignty of international law, and … adherence to the duality of 'is' and 'ought'."[13]

Kammerhofer, in later work, defines this is / ought distinction by reference to Kelsen's explanation that "'it does not follow from the fact that something *is* that it *ought to be* and –

[7] Koskenniemi (2001), pp. 500–509.

[8] I have previously noted the connection between Koskenniemi's and d'Aspremont's work – see Nicholson (2016), p. 104, noting "a late-twentieth century [approach to international law as a] professional language which, despite its critical origins [in Koskenniemi's work, and the early work of David Kennedy], is now cautiously embraced in a return to the positivist tradition," citing d'Aspremont's (2011) as an example of this "return."

[9] Kammerhofer (2012), p. 2. The book was first published in 2011 and issued in paperback in 2012. References in this chapter are to the 2012 paperback edition.

[10] Kammerhofer (2012) chapter 2 (pp. 5–56) and chapter 3 (pp. 59–85).

[11] Kammerhofer (2012), chapter 6 (pp. 195–239).

[12] See García-Salmones Rovira (2015), p. 545:

> Neither in the very thin introduction (four pages) nor in the subsequent references to the notion made throughout the book, in which the Pure Theory is alternately viewed as both augmenting and diminishing uncertainty, does Kammerhofer engage in theoretical explanation or provide a definition of what "uncertainty" means now, in the 21st century, in relation to international law.

And ibid., p. 547: "[t]he author's standpoint of taking Kelsen's work and persona as a given means that Kelsen himself remains elusive in these pages and presupposes too much specialized knowledge of Kelsen's legal theory on the part of the reader."

[13] García-Salmones Rovira (2015), p. 547.

vice versa – because something *ought to be* that it *is*. The relationship of Ought to Is is that of an insoluble *dualism*.'"[14] Because "the goal of legal science is to apprehend or cognise the law" and because "law is comprised of norms, i.e. of 'ought'" it follows – according to Kammerhofer – that "the possibility of norms is expressed in the Is-Ought dichotomy."[15]

On that basis Kammerhofer critiques Martti Koskenniemi's *From Apology to Utopia*,[16] emphasising that the distinction between "the argumentative practice of international lawyers," on which Koskenniemi focuses, and "the law itself," which is Kammerhofer's concern, is "extremely important."[17] Koskenniemi analyses the structure of international legal argument in terms of "ascending" and "descending" patterns.[18] Arguments can be based either on the "State behaviour, will or interest" – this is an "ascending" argument that "attempts to construct a normative order on the basis of the 'factual' State behaviour, will and interest" – or, in the "descending" variant, on the basis of "a given normative code which precedes the State and effectively dictates how a State is allowed to behave" grounded in ideas of "justice, common interests, progress, [and the] nature of the world community."[19] In relation to "Koskenniemi's structural analysis" Kammerhofer argues that "Kelsen would probably first point out that the analysis of lawyers' arguments is not a proper function of legal scholarship, but perhaps a task for linguists, sociologists or anthropologists."[20] The point, it seems, is that from a Kelsenian perspective "the law itself" – the law in its "pure" form, as norms – is the only "proper" concern of "legal scholarship."

Kelsen's is / ought distinction is the foundation for Kammerhofer's approach and connects with perhaps the most familiar element of Kelsen's Pure Theory, the *Grundnorm* or, as Stanley L Paulson translates the term, the "basic norm."[21] As Kammerhofer explains, "[l]aw is positive if it has been *positus*, i.e. set / put into the world, as the sense of an act of will";[22] if it has been posited by someone. The posited / positive nature of law raises "the question of how positivity can exist without further normative validation at the apex of a normative order,"[23] and the *Grundnorm* is the Pure Theory's answer to this question. If, as Kammerhofer insists, "[t]he validity of norms is only founded in further norms" then a norm,[24] serving as the ultimate foundation of the normative order, and in which all posited norms can be grounded, is required. The existence of that norm cannot be proved, nor can the specific *Grundnorm* of any particular legal order be identified with certainty. Rather, the

[14] Kammerhofer (2014), p. 86, quoting Kelsen. (Emphasis in original).
[15] Kammerhofer (2014), p. 85.
[16] Koskenniemi (2005).
[17] Kammerhofer (2014), p. 87.
[18] Koskenniemi (2005), p. 59.
[19] Koskenniemi (2005), p. 59. Parts of these quotations from Koskenniemi are included by Kammerhofer (2014) at p. 87. See Mark D. Retter's chapter in this book for an exploration of "ascending" and "descending" perspectives on peremptory norms in international law (noting Retter's reference to Koskenniemi in his footnote 2).
[20] Kammerhofer (2014), p. 88.
[21] Paulson (1992), p. 324.
[22] Kammerhofer (2014), p. 88.
[23] Kammerhofer (2014), p. 92.
[24] Kammerhofer (2014), p. 93.

Grundnorm is the logical "assumption" of a normative order in which any particular norm has its basis in another, prior norm.[25]

The *Grundnorm* is, then, a means of addressing what d'Aspremont has referred to as "the problem of infinite regress"[26] in which the foundations of any particular norm depend on the validity of some prior norm whose own validity is dependent on some prior norm. The *Grundnorm*, as a purely theoretical construct, a way of acting "as if" there were some ultimate basis of validity within a legal order,[27] prevents "infinite regress."

Kammerhofer goes so far as to claim that "[t]he *Grundnorm* is nothing more and nothing less than the only way in which humans can conceive of (perceive) norms."[28] In making this claim Kammerhofer recognises that "[t]o perceive norms as norms is not necessary."[29] Whilst "[a] sociologist may rely solely on 'real' phenomena and might formulate theories according to the factual regularities, patterns of real events and human behaviour" in what Kammerhofer concedes to be "an acceptable approach … [this] is not a juridical or normativist approach."[30] This "juridical or normativist approach" seems to involve an arbitrary decision, endorsed by Kammerhofer, to focus on norms in isolation – "the law itself" – without reference to reality. Defending this choice, Kammerhofer suggests that "to be able to conceptualise 'ought' requires a modicum of idealism" for "[o]nly if we believe that an ideal can form a 'reality' in some sense, rather than trying to reduce 'the world' to brute reality, can we conduct a legal *science*."[31] Something more than a "modicum of idealism" is implied, however, in Kammerhofer's explanation that "legal theory is not a quasi-mathematical description of real events (as natural science is) … we trade in ideal ideas, not in reality."[32] Whilst this separation between law and reality may be what a "legal science" requires, it is not clear why one should prefer this legal scientific approach to one which connects or understands law in terms of its connection to reality, society and politics.

2.1 '[A] Mere Scheme of Analysis'

So understood, what is the appeal of this approach? For lawyers – for those who are already professionally or intellectually invested in law – the appeal seems to lie in the separation of law from all things real and from all other things ideal, from all other disciplines. Sociologists, for example, can be dismissed as non-lawyers, and reality and non-legal concepts of truth can be cast aside as irrelevant for "legal science." For those who have already made a professional-personal decision to invest in the "cognition of legal norms,"[33] a "pure" explanation of how norms are cognised is, of course, very attractive: they are pre-

[25] Kammerhofer (2012), p. 246 (quoting Kelsen): "[T]his is the genius of Kelsen's *Grundnorm*: it is self-referential … In cognising norms as norms, in cognising norms as a normative order, we act *as if* the norm or normative order were valid. 'On the precondition [assumption] that it is valid, the whole legal order under it is valid'" (square brackets around "assumption" in Kammerhofer's text).
[26] d'Aspremont (2014a), in particular at p. 113.
[27] "as if" – see quotation from Kammerhofer in note 25.
[28] Kammerhofer (2012), p. 242.
[29] Kammerhofer (2012), p. 242.
[30] Kammerhofer (2012), p. 242.
[31] Kammerhofer (2014), p. 85. (Emphasis in original).
[32] Kammerhofer (2012), p. 260.
[33] Paulson (1992), p. 326.

disposed, by factors extraneous to the content of the theory, to accept the theory because it explains or describes what they do. For those who have no established professional or intellectual attachment to law or the "cognition of legal norms," whilst they can perhaps be encouraged to embrace the purity of the theory, if they reject the theory all "we" can do is dismiss them as unscientific non-lawyers. The theory itself, however, offers no compelling reason why those without a prior investment in law ought to accept it.[34]

This, in essence, is Stanley L Paulson's argument, and it leads him to label the Pure Theory "a mere scheme of analysis" that "must simply take its place alongside other normativist legal theories,"[35] an approach that "is perhaps best understood as offering a *legal point of view*,"[36] rather than *the* legal point of view. Kammerhofer effectively maintains that the Pure Theory offers *the* legal point of view, however, insisting that "[t]he *Grundnorm* is nothing more and nothing less than the only way in which humans can conceive of (perceive) norms."[37]

Paulson explains that Kelsen starts from the assumption that "we" have knowledge of legal materials:

> Kelsen is not asking whether we cognize legal material, whether we know certain legal propositions to be true. Rather, he assumes that we have such knowledge, and is asking how we can have it. To capture something of the peculiarly transcendental twist to Kelsen's question, we might ask: given that we know something to be true, what presupposition is at work? More specifically, what presupposition is at work without which the proposition that we know to be true could not be true?[38]

Kelsen's argument is, according to Paulson, "regressive."[39] It starts with an initial assumption of legal cognition – "[o]ne has cognition of legal norms" [40] – and works backwards. The next step, after the initial assumption, is the "transcendental premiss" that "[c]ognition of legal norms is possible only if the category of normative imputation is presupposed."[41]

The "category of normative imputation" can be defined in terms of the notion that "positive laws … link legal condition with legal consequence."[42] So, for example, if the relevant positive law fixes the speed limit in urban areas at thirty miles per hour, and the relevant "legal condition" is one in which someone drives at forty miles per hour in an urban area, then the necessary "legal consequence" of the relationship between the law and the condition is a fine or other appropriate sanction: this is what *ought*, legally, to happen. In this way the "positive law" imputes an "ought" into the relationship between a particular state of affairs – a "legal condition" – and a particular outcome – a "legal consequence" – and, so the

[34] See Paulson (1992), pp. 326–329 on the position of "the sceptic."
[35] Paulson (1992), p. 332.
[36] Paulson (1992), p. 332. (Emphasis in original).
[37] Kammerhofer (2012), p. 242 (also quoted above at note 28).
[38] Paulson (1992), p. 324.
[39] Paulson (1992), pp. 322–332.
[40] Paulson (1992), p. 326.
[41] Paulson (1992), p. 326.
[42] Paulson (1992), p. 326

argument goes, it follows (and this is the third step in the "regressive" argument) that "the category of normative imputation is presupposed,"[43] or, in other words, that thinking about law as norms necessarily means thinking in terms of "ought."

In this way, and starting from an assumption that legal normative cognition is something that "we" do, "[t]he legal system, as the ultimate reference point of imputation" – the ultimate source of "oughts," as it were – "must presuppose itself."[44] Those who are unwilling to presuppose the existence of a legal system, "the sceptic" in search of proof based on the "data of consciousness, as given,"[45] rather than an initial assumption of legal cognition, cannot be converted by the Pure Theory precisely because of its normative purity, its commitment to conceiving of law only in terms of norms or "oughts."[46]

The Pure Theory is, then, founded on a "thoroughgoing normative framework . . . so thoroughgoing . . . that no systemic relation is possible between the factual and the normative."[47] Whilst Kelsen recognises that his theory prioritises a normative perspective, and acknowledges that other non-normative perspectives focusing on "'power relations,'" for example, are possible,[48] the Pure Theory depends on the assumption that there is such a thing as a "legal science": "'the enquiry is directed not to the process and apparatus of cognition, but to its result, to science itself.'"[49]

Given its regressive origins in an assumption of legal cognition, Kelsen's theory is founded on a sense of a "we" who cognise norms and know the law. It functions, as Paulson suggests in labelling the Pure Theory "a mere scheme of analysis," as a means of analysing a social practice or science – the "cognition of legal norms" – practiced by lawyers. The theory would be utterly valueless without this connection to practice and, consequently, it is founded on a sociological analysis – on the social fact that a group of people (lawyers) engage in a practice (law) which involves the cognition of norms.

Kelsen's and Kammerhofer's approach seems, then, to originate in the recognition of a social fact or social practice – "[o]ne has cognition of legal norms"[50] – but then moves away from any connection to social facts or practices. This is reflected in Kammerhofer insistence, in relation to Koskenniemi's *From Apology to Utopia* (discussed above), that there is an important distinction between "the argumentative practice of international lawyers" and "the law itself,"[51] and takes an even stronger form in Kammerhofer's defence of the dogmatic character of his approach:

> [T]he choice [of normative legal theory] cannot be attacked by showing that it is falsified by reality. We simply cannot prove that a theory of norms is contradicted by reality, because we are concerned with a different realm, which does not depend on reality for its "truth". The choice is existential, because everyone

[43] Paulson (1992), p. 326.
[44] Paulson (1996), p. 808.
[45] Paulson (1992), p. 329.
[46] Paulson (1992) pp. 329-330 (on the position of "the sceptic").
[47] Paulson (1996), p. 804.
[48] Paulson (1992), pp. 328–329 (quoting Kelsen).
[49] Paulson (1992), p. 330 (quoting Hermann Cohen).
[50] Paulson (1992), p. 326.
[51] Kammerhofer (2014), p. 87.

> cognising norms has already made the choice, even if they are not aware that they have done it. It is an expression of our existential freedom to choose our own dogmas and is thus most profound. We all have to live with our choice and are damned to it; we are responsible for the choices we make – even and especially for our theories because with relentless *Konsequenz* the consequences of our choices will ensue.[52]

To describe the approach he advocates in terms of "dogmas" clarifies the lengths Kammerhofer is willing to go to in defence of the Pure Theory's purity. That purity depends on the separation of norms from social context. Whilst it *may* be "an expression of our existential freedom to choose our own dogmas" the freedom involved in the making of this choice is lost the moment the choice is made, with the "dogma" embraced and elevated to a constraint on what one may think about, and how one may think, within the limits of "legal cognition."

Kammerhofer's approach reflects critical philosopher Theodor Adorno's critique of idealist modes of cognition: "method takes the place of what it ought to make known."[53] In place of any attempt, in Kammerhofer's theory, to make any-*thing* known – any reality – Kammerhofer insists on a pure form of idealism, on the existence of "a different realm, which does not depend on reality for its 'truth'." Possibly appreciating the potency of the anti-idealist / materialist critique of this ultra-idealist position, he accepts that it is dogmatic, defending its dogmatic nature on the basis that acceptance of the dogma is the result of free choice.

The free nature of that choice is, however, in my view, undermined by Kammerhofer's insistence, in the passage quoted above, that "everyone cognising norms has already made the choice, even if they are not aware that they have done it." This passage seems, at first glance, evenly balanced between two possible readings: the first, that those cognising norms have, whether they know it or not, made *a* choice as to their normative legal theory; the second, that those cognising norms have, whether they know it or not, made a *specific* choice to accept Kelsen's Pure Theory. Kammerhofer also maintains, however, that "[t]he *Grundnorm* is nothing more and nothing less than the only way in which humans can conceive of (perceive) norms."[54] Connecting this insistence that the *Grundnorm* is "the only way" of conceiving norms with the suggestion that "everyone cognising norms has already made the choice, even if they are not aware that they have done it," it becomes apparent that Kammerhofer is maintaining that, consciously or unconsciously, anyone cognising norms has accepted Kelsen's Pure Theory.

That amounts to the assertion of a social fact. It is not simply a theoretical claim about the nature of legal cognition, but more fundamentally a claim about the place of this theory of legal cognition *in society*, the place of this theory as *the* foundation of actual legal practice. It elevates Kelsen's Pure Theory from "a mere scheme of analysis," as Paulson describes it, to a statement of *the* way in which law exists and is practiced in society by lawyers. Kammerhofer offers no evidence to support this social fact assertion and, whilst this might seem surprising,

[52] Kammerhofer (2012), pp. 260–261.
[53] Adorno (2007), p. 314.
[54] Kammerhofer (2012), p. 242 (also quoted above at n 28 and n 37).

it is consistent with Paulson's analysis of the Pure Theory as dependent on a "regressive" argument.

Recalling the discussion above, in Paulson's analysis the first step in Kelsen's "regressive" argument is the social fact claim that "[o]ne has cognition of legal norms." Kelsen simply "assumes that we have [legal] … knowledge, and is asking how we can have it,"[55] and, whilst he elevates the Pure Theory from "a *legal point of view*,"[56] to *the* legal point of view, as discussed above, Kammerhofer employs essentially the same intellectual strategy in making the social fact assumption that the *Grundnorm* is "the only way" of conceiving norms. Whilst Kammerhofer, quoting Kelsen, notes that the content of law is subject to change over time, because "positive law is a product, something generated by human activity, and, moreover, something eminently changeable,"[57] the form in which the law exists, its foundation in the *Grundnorm*, are presented as eternal.[58]

2.2 '[N]ormative alternatives', Austrian Constitutions, and Dichotomy / Dialectic

This leaves Kammerhofer and Kelsen with considerable work to do in defending the separation of the form of the law, expressed in the is / ought distinction and the *Grundnorm*, from the evolving realities of legal practice and society. That defence often appears weak, and in some respects absurd.

Paulson offers an example of a situation in which Kelsen's insistence on the purity and coherence of the legal order goes too far. Consider the possibility that a particular jurisdiction's final court of appeal issues a judgment containing an "individual norm [which] proves to be efficacious" despite the fact that there is "no underlying general legal norm that would lend validity to the individual norm *qua* judicial holding, which is valid, then, only in the trivial sense of being efficacious."[59] This, which Paulson describes as an "unconstitutional legal norm," was addressed by Kelsen through the "bizarre doctrine of 'normative alternatives'."[60] This doctrine maintains that in circumstances where "'a statute enacted by the legislative organ is considered to be valid although it has been created in another way or has another content than prescribed by the constitution'" we must accept that "'[t]he legislator is entitled by the constitution either to apply the norms laid down directly in the constitution or to apply other norms which he himself may decide upon'" because "'[o]therwise … [the statute] could not be regarded as valid.'"[61] Kelsen goes so far as to insist that "'[t]he provisions of the constitution concerning the procedure of legislation and the contents of future statutes do not mean that laws can be created only in the way decreed and only with the import prescribed by the constitution,'"[62] notwithstanding the fact that this approach, in

[55] Paulson (1992), p. 324.
[56] Paulson (1992), p. 332. (Emphasis in original).
[57] Kammerhofer (2012), p. 260.
[58] See Luca Siliquini-Cinelli's chapter in this book on questions of "temporality" and the notion (at p. [8 in the current draft – PAGE NUMBER TO BE FINALISED] that "legal positivism [as] a rationalist meta-theory of law … produces (or 'posits') social facts".
[59] Paulson (2008), p. 35
[60] Paulson (2008), p. 35.
[61] Paulson (2008), p. 35 (quoting Kelsen).
[62] Paulson (2008), p. 35 (quoting Kelsen).

Paulson's view, "would lead straightaway to the collapse of a rule-based legal system, the very system that [Kelsen] … has gone to such great lengths to explicate and defend."[63]

Kelsen's doctrine of "normative alternatives" addresses the choice between flexibility in the legal order – it adapts to fit current social and political circumstances – on the one hand, and formality, consistency and purity in the legal order, on the other. Kelsen's Pure Theory, certainly as presented by Kammerhofer, prefers the latter, and the strength of that preference leads Kammerhofer into the language of "dogmas" and a form of ultra-idealism. But Kelsen's attempts to engage, through the doctrine of "normative alternatives," with a judgment or statute inconsistent with the established constitutional order reveals the incompatibility between the Pure Theory and the complexities and diversity of social and political reality. A sense that Kelsen had consistently preferred normative consistency and order and then, in his doctrine of "normative alternatives," changes course leads Paulson to label the doctrine 'bizarre," on the basis that the "'unconstitutional legal norm' … does not fall within the scope of the applicable general norm;"[64] that is, it cannot be traced back to the *Grundnorm*.

In the doctrine of "normative alternatives" we face the core tension between Kelsen's *Grundnorm*-based Pure Theory and HLA Hart's social fact-based positivism. As d'Aspremont explains:

> Whilst Kelsen sees all secondary rules as having been ultimately validated as rules of the system by a hypothetical Grundnorm, Hart construes the ultimate rule of recognition from which all secondary rules are derived as being grounded in the social practice of the law-applying authorities, who must feel an internal sense of obligation to obey the rules that is quite separate from the threats or rewards they associate with compliance … In that sense, law exists when there is a community of officials who perceive the law as having a distinctive authority and when a sufficient number of citizens conform to the primary rules, regardless of their reasons for conforming … As a result the ultimate rule of recognition from which all the rules of the system are derived if neither valid nor invalid. It simply exists (or does not exist) as a matter of social fact.[65]

Kelsen's attempt to recognise the "social fact" that an apparently unconstitutional judgment or statute is nevertheless effective threatens to collapse his broader approach. Whilst Paulson acknowledges this, to an extent, he concludes that "the doctrine is an aberration, and eliminating it in no way affects other doctrines of Kelsen's."[66]

This seems altogether too neat a conclusion. In the doctrine of "normative alternatives" Kelsen confronts the challenge of inconvenient social facts that threaten the coherence and consistency of any normative legal order. To respond to that challenge a legal theory needs, arguably, to have both a social fact ("is") and a normative ("ought") component. Without *both* of those components the theory risks arbitrarily preferring one over the other, effectively ignoring one half of the dialectic that seeks to engage with law's ideal *and* its real.

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[63] Paulson (2008), p. 36.
[64] Paulson (2008), p. 36.
[65] d'Aspremont (2011), pp. 53–54.
[66] Paulson (2008), p. 37.

The strength of Martti Koskenniemi's analysis of international law is its capacity to engage with both sides of that dialectic, through the dialectical opposition of a sociologically grounded theory of law focussed on social facts vulnerable to collapse into an apology for the existing social order and the distribution of power within it, and a normative, utopian concept of law as a set of ideals, a values-based structure – hence the book's title: *From Apology to Utopia: The Structure of International Legal Argument*.[67] In stark contrast to Koskenniemi's dialectical approach, and Kelsen's albeit unsuccessful engagement with social facts through the doctrine of "normative alternatives", Kammerhofer avoids the problems of inconvenient social facts and the sociological dimension of law only by erecting an absolute, yet flimsy, barrier between "the law itself" and reality, defending an arbitrary preference for the normative, ideal side of the dialectic through the language of "dogmas." In doing so Kammerhofer does nothing to weaken the force of Koskenniemi's observations – made some ten years before Kammerhofer published his 2011 monograph – that the pure theory "offers only a *transcendental* realm of legality," that "[t]he problems of the pure theory do not lie in its internal coherence but in its relationship to the surrounding world," and that "Kelsen's arguments … emanate from nineteenth-century German legal thought: academic, system oriented, and neurotically concerned over its status as *Wissenschaft*."[68]

The weakness of Kammerhofer's barrier between law and reality is apparent in his discussion of the post-Second World War Austrian constitution. He notes that "[i]n 1945, Austria's main political parties declared that the 1920 constitution was reinstated."[69] Kammerhofer explains that "in Austria in 1945, both the new democratic legal order and the [predecessor] National Socialist regime can be understood as legal orders: both presented claims to be observed – both stipulated 'oughts' – but it just so happened that the *debellatio* of the latter made it ineffective."[70] This introduction of effectiveness into the assessment of what constitutes law seems to muddy the pure, supposedly non-sociological waters of the Pure Theory. Kammerhofer seeks to explain this away, noting that "Kelsen simply accords the name 'law' to the most effective normative order as a matter of normative epistemology."[71] The more significant observation is contained in Kammerhofer's footnote:

> On the view of the Pure Theory presented here, Kelsen was being particularly unhelpful in his formulations – arguably writing contrary to the spirit of the Pure Theory of Law – when at points he defined the (overall) efficacy of a legal order as a condition of its continued validity.[72]

Kammerhofer's reading of the Pure Theory is too pure. It attempts to completely exclude the sociological and, in the text quoted above, criticises Kelsen for being insufficiently pure ("particularly unhelpful") in his application of his own theory. Perhaps the reality, which Kammerhofer is unwilling to entertain, is that the Pure Theory is never as pure as

[67] Koskenniemi (2005), see in particular pp. 17–23. For my analysis of Koskenniemi's *oeuvre* see Nicholson (2017).
[68] Koskenniemi (2001), p. 249. (Emphasis in original).
[69] Kammerhofer (2014), pp. 99–100.
[70] Kammerhofer (2014), p. 101.
[71] Kammerhofer (2014), p. 101.
[72] Kammerhofer (2014), p. 101 (footnote 92).

Kammerhofer suggests, that Kammerhofer's absolute (yet flimsy) barrier between law and reality is, in truth, porous, and that Kelsen himself knew or at least came to recognise this. Kammerhofer's recognition of effectiveness, as a relevant consideration in the assessment of what constituted the post-war constitutional order in Austria, demonstrates that "we are [*not*] concerned with a different realm" and that the realm with which we are concerned "*does* … depend on reality for its 'truth'."[73]

Kammerhofer's absolute insistence on the separation of "is" and "ought," on "the dichotomy of Is and Ought,"[74] rather than the *dialectic* of Is and Ought (dialectic here implying an "unstable," mutually constitutive relationship between the two, in contrast to dichotomy with its implication of fixed separation and outright opposition),[75] is the flaw in his approach. He critiques HLA Hart, and Jean d'Aspremont's Hart-based work on the sources of international law (considered in the next Section), for "fail[ing] to provide an account that separates Is and Ought."[76] Kammerhofer objects to the "'transformation' of facts into law,"[77] as implied in a Hartian approach, only a few pages after recognising the relevance of social fact, effectiveness considerations to the post-war Austrian legal order. Whilst there may be some force in the point that social facts are not, and do not, in and of themselves, make law, there is equal force in the point that social facts are essential to the ontology and making of law. Kammerhofer insists on the former point and virtually ignores the latter in an ultra-idealist approach that is – unsurprisingly – lacking in realism.

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[73] See quotation in text to note 52 above (emphasis - "*does*" - here added). See also, making a similar point, García-Salmones Rovira (2014), p. 804:

> I cannot fail to point to the limitations, not to say narrowness, of their [Kelsen's and Kammerhofer's] method. In particular, the method used in the exposition of their arguments misleadingly denies that jurisprudence, especially international jurisprudence, has an impact on reality, and that like any other science it contributes to explaining reality.

[74] Kammerhofer (2014), p. 104.

[75] Jameson (2009), pp. 26–27:

> The dialectic proceeds by standing outside a specific thought – that is the say a conceptual conclusion about a problem (which might range from object to subject, from ethics or politics to philosophy, from the pragmatic to the epistemological, art to science, etc, etc.) – in order to show that the alleged conclusions in fact harbour the working of unstable categorical oppositions. The paradoxes, antinomies, and ultimately contradictions which then historicize the previous moment of 'conclusion' and enable a new dialectical 'solution' then in some sense reincorporate this lack back into 'philosophy' or 'system' and come as a new – more properly dialectical – conclusion in their own right.

See also Adorno (2007), p. 5:

> The name of dialectics says no more, to begin with, than that objects do not go into their concepts without leaving a remainder, that they come to contradict the traditional norm of adequacy. Contradiction . . . indicates the untruth of identity, the fact that the concept does not exhaust the thing conceived . . . Dialectics is the consistent sense of nonidentity. It does not begin by taking a standpoint … What we differentiate will appear divergent, dissonant, negative for just as long as the structure of our consciousness obliges it to strive for unity: as long as its demand for totality will be its measure for whatever is not identical with it.

On the value and potential of non-identity thinking see Nicholson (2016).

[76] Kammerhofer (2014), p. 104.

[77] Kammerhofer (2014), p. 104.

Given the foundations of Kelsen's pure theory in the social fact assumption of legal cognition and his "regressive" argument for the Pure Theory (discussed above), the porous boundary between "is" (social fact) and "ought" (normativity), and the superiority of a dialectical approach to the relationship between "is" and "ought," as against Kammerhofer's dichotomous understanding of that relationship, a theory of international legal positivism that takes social facts seriously within some broader framework of legal cognition – or, certainly, more seriously than Kammerhofer does – would be welcome. The need for such a theory is so clear, on close analysis of Kammerhofer's argument that, in effect, Kammerhofer's argument opens up the space for, and virtually collapses into, a social fact perspective on international law. Jean d'Aspremont offers just such a theory.

3 d'Aspremont, Hart, and 'Belief'

The barrier that concerns Jean d'Aspremont in his 2011 *Formalism and The Sources of International Law* is not that between law and reality – the barrier, expressed in the is / ought dichotomy, that concerns Kammerhofer – but that which "draw[s] a line between law and non-law."[78] d'Aspremont's desire, as the sub-title of the book makes clear, is to develop "[a] [t]heory of the [a]scertainment of [l]egal [rules]" and, to do this, d'Aspremont employs insights from HLA Hart.[79]

d'Aspremont emphasises that his 2011 book is not to be read as a general endorsement of formalism as a theory of law or international law,[80] and maintains that "a defence of formal law-ascertainment cannot be conflated with a plea for international legal positivism."[81] In other work d'Aspremont has, however, positioned his approach as "a reductionist understanding of [international legal positivism] construed as a theory of identification of international legal rules based on a theory of sources,"[82] explaining that "Hart's theory renders legal positivism a tool of limited scope which does not lay down a grand theory of law."[83] d'Aspremont's more recent work, in the form of his 2018 monograph *International Law as a Belief System*, suggests a move from "reductionist" to more ambitious – one might even say grand – theory. I will consider this move after a review of the 2011 book and its connection with Martti Koskenniemi's work.

3.1 The 'Source Thesis', the 'Social Thesis', and the 'Culture of Formalism'

[78] d'Aspremont (2011), p. 5.
[79] On Hart and international law in general see Richard Collins' chapter in this book.
[80] d'Aspremont (2011), p. 5:

> While not being construed as a tool to delineate the whole phenomenon of law . . . or a theory to describe the operation of international law, formalism is solely championed here for its virtues in terms of distinguishing law from non-law and ascertaining international legal rules.

[81] d'Aspremont (2011), p. 8.
[82] d'Aspremont (2012), p. 368.
[83] d'Aspremont (2014b), p. 115.

d'Aspremont's argument about the sources of international law is built around two theses – the "source thesis" and the "social thesis."[84] The source thesis maintains that "law is ascertained by its pedigree defined in formal terms and that, as a result, identifying the law boils down to a formal pedigree test."[85] Consistent with the source thesis, Kelsen developed a theory of "formal law-acertainment" based on the *Grundnorm*.[86] "Because law is identified in accordance with the rules about how law is made, or in other words because law regulates its own creation, a formal test becomes necessary to identify the law,"[87] with the *Grundnorm* as the theoretical, "as if" basis of that test.[88]

Hart's social thesis, by contrast, "replaced the hypothetical rules of Kelsen [the *Grundnorm*] by a social fact, i.e. the practice of law-applying authorities."[89] As d'Aspremont explains, "Hart completely skirted the problem of the foundation of the Grundnorm by grounding the ultimate rules on which the system is based on social facts."[90] The role played by the Grundnorm in Kelsen's theory is taken by "rules of recognition" in Hart's work, as d'Aspremont explains:

> Whilst Kelsen sees all secondary rules as having been ultimately validated as rules of the system by a hypothetical Grundnorm, Hart construes the ultimate rule of recognition from which all secondary rules are derived as being grounded in the social practice of the law-applying authorities . . . law exists when there is a community of officials who perceive the law as having a distinctive authority and when a sufficient number of citizens conform to the primary rules, regardless of their reasons for conforming . . . the ultimate rule of recognition from which all the rules of the system are derived is neither valid nor invalid. It simply exists (or does not exist) as a matter of social fact.[91]

d'Aspremont argues for a move from specific rules designating the sources of international law, focussed on the source thesis, to an approach that merges the source and social theses, with the social thesis playing the dominant role.[92] d'Aspremont argues, in relation to the source thesis, for "the systematic use of written linguistic indicators [to] … ensure formal law-ascertainment in international law,"[93] framing this as an argument against state intent-based criteria and the identification of rules of law in the absence of "a written instrument."[94] He points to difficulties in, for example, the identification of *opinio juris* in customary international law,[95] or establishing the intention of the parties to create legal relations by

[84] d'Aspremont (2011), p.7: "the so-called source and social theses have been the lynchpins of my argument."
[85] d'Aspremont (2011), p. 13.
[86] d'Aspremont (2011), pp. 48–49.
[87] d'Aspremont (2011), p. 49.
[88] On 'as if' see discussion above in text to notes 24–27..
[89] d'Aspremont (2011), p. 51.
[90] d'Aspremont (2011), p. 50.
[91] d'Aspremont (2011), pp. 53–54.
[92] d'Aspremont (2011), p. 195: "[T]he source thesis [as presented in the relevant chapter of d'Aspremont's book, chapter 7] can itself be rooted in the social practice of law-applying authorities (the social thesis)."
[93] d'Aspremont (2011), p. 186.
[94] d'Aspremont (2011), p. 171 (discussing the example of "[g]eneral principles of law").
[95] d'Aspremont (2011), pp. 162–163.

treaty (in connection with Article 2(1)(a) of the Vienna Convention on the Law of Treaties and the requirement that, for any particular instrument to constitute a treaty, it must be "governed by international law").[96] As an alternative to intention-based approaches or reasoning in the absence of "written linguistic indicators" d'Aspremont argues for "linguistic indicators . . . as a self-sufficient law ascertainment criteria,"[97] articulating a more normative, systematised approach to the identification and verification of law, and the drawing of the line between law and non-law, when compared with practices that defer to the intent and practice of states. d'Aspremont presents this move away from state-centrism as one of his argument's principal virtues:

> [L]ooking at linguistic indicators, not as an evidentiary process or a tool to evidence intent to make law but as a self-sufficient law ascertainment criterion, permits a move away from a purely intent-based system of law-identification and paves the way for an international legal system where States' intent, although inevitably instrumental in the making of international law, ceases to be the central parameter on the basis of which that system is identified.[98]

This move from state-centrism to a more normative, criterion-based system of "law-identification" is, in Koskenniemi's terms, a shift "[f]rom [a]pology to [u]topia": a shift from a system built on the actual practice and intent of states that, in a sense, apologises for a lack of normative autonomy consequent on its deference to States' power and control, to a system of clear criteria with the normative independence to identify law and discriminate between law and non-law.[99]

The first, source thesis element of d'Aspremont's theory of "law ascertainment" involves, as discussed above, "written linguistic indicators." The second, more foundational element is supplied by d'Aspremont's approach to the social thesis, which maintains that "at least for the sake of law-ascertainment, it ceases to be necessary to think of formal law-ascertainment criteria in terms of "rules" or "meta-principles," for they originate, not in a formal rule, but in a social practice."[100] d'Aspremont's utopia is a utopia of empowered, independent international lawyers. Building this utopia "requires that we agree upon those who participate in the formulation of … linguistic indicators,"[101] but does not require "actual, total, and absolute agreement among law-applying authorities."[102] Rather, "a shared *feeling* of applying the same criteria" is "essentially require[d]."[103] This, d'Aspremont contends, is "no different from ordinary language."[104] "[T]wo persons may … [use] the same words and believe that they attribute to them the same meaning, but … actual[ly be] talking past each other," but that

[96] d'Aspremont (2011), pp. 178–182; Vienna Convention on the Law of Treaties, 1946 UNTS 3.
[97] d'Aspremont (2011), p. 192.
[98] d'Aspremont (2011), p. 192.
[99] Koskenniemi (2005). For a summary of Koskenniemi's opposition of apology and utopia see text to note 67 above.
[100] d'Aspremont (2011), p. 194.
[101] d'Aspremont (2011), p. 193.
[102] d'Aspremont (2011), p. 201.
[103] d'Aspremont (2011), p. 201. (Emphasis in original).
[104] d'Aspremont (2011), p. 201.

"does not preclude that they are speaking the same language."[105] "[M]oderate misunderstandings" may occur but that does not prevent "the emergence of communitarian semantics,"[106] of "a shared feeling," of, in Koskenniemi's terms, a "culture of formalism" (with)in which we use the same language to frame our arguments about what does and does not constitute law.[107]

Addressing the question of which actors constitute "law-applying authorities," d'Aspremont points to the International Court of Justice;[108] international courts and tribunals and domestic courts;[109] non-state actors including, for example, the International Committee of the Red Cross;[110] the International Law Commission (although its contribution is "very modest" because of "[t]he almost impossibility of distinguishing between progressive development and codification [of international law in the ILC's work]");[111] and notes the "secondary role played by international legal scholars" who "come to play the role of grammarians of formal law-ascertainment who systematize the standards of distinction between law and non-law."[112] Whilst "legal scholars do not constitute law-applying authorities *sensu stricto*" for d'Aspremont,[113] it is important to recognise that they have played a vital role in the "systematization and streamlining of the criteria for the distinction between law and non-law."[114]

d'Aspremont does not, in the 2011 book, review the practice of the specified "law applying authorities" to identify specific "written linguistic indicators" for "law ascertainment." His argument operates at a relatively abstract level, promoting a move away from rules towards a sociological, "communitarian" understanding of how and by whom international law is identified. This approach is articulated even more clearly in d'Aspremont later, 2014 *British Yearbook* article.[115] Describing the notion that "the sources of international law constitute a set of rules for the identification of other rules" as "a comforting parable" he argues that "[t]he sources of international law are better understood as a set of communitarian constraints irreducible to rules."[116] Consistent with the argument in the 2011 book, he maintains that the "practice of law-applying authorities, and not the will of States, is what nourishes the sources of international law,"[117] noting the "dynamic character" of "the law ascertainment criterion" which "can evolve with the social practice."[118] Amplifying the sense of "culture" apparent in the earlier monograph, d'Aspremont argues, with reference to Stanley Fish's work, that "the creation of the social is constrained by the community, not by rules,"[119] and that "[t]he sources [of international law] . . . are the product of a community [of international lawyers]

[105] d'Aspremont (2011), p. 201.
[106] d'Aspremont (2011), p. 201.
[107] "culture of formalism" - see Koskenniemi (2001), pp. 500-509.
[108] d'Aspremont (2011), p. 205.
[109] d'Aspremont (2011), pp. 206–207.
[110] d'Aspremont (2011), p. 207.
[111] d'Aspremont (2011), p. 209.
[112] d'Aspremont (2011), p. 209.
[113] d'Aspremont (2011), p. 210.
[114] d'Aspremont (2011), pp. 210–211.
[115] d'Aspremont (2014a).
[116] d'Aspremont (2014a), p. 103.
[117] d'Aspremont (2014a), p. 115.
[118] d'Aspremont (2014a), p. 116.
[119] d'Aspremont (2014a), p. 122.

over which they hold no monopoly,"[120] the product of "a set of communitarian constraints which [the community] . . . constantly perpetuate[s] and adjust[s]."[121]

The actor-language-community focussed argument emerging from d'Aspremont's 2011 monograph and his 2014 article is closely connected with Martti Koskenniemi's "culture of formalism," and d'Aspremont acknowledges this. He observes that "the formalism advocated [in the 2011 book] equally [alongside Koskenniemi's argument] aspires . . . to making of international law claims through a common platform,"[122] notes the connection between his call for "communitarian semantics in the international legal order" and Koskenniemi's formalism,[123] and notes that "the insights gained from the "culture of formalism" [and a range of other approaches to international legal theory]. . . will probably remain of utmost relevance."[124]

I want to go beyond merely noting the connection between d'Aspremont and Koskenniemi, however. My argument is that d'Aspremont's argument for a formal / positivist approach to law ascertainment and the sources of international law, and his more recent work on international law as a "belief system," operate inside Koskenniemi's wider theory of international law and, as such, do not move international theory beyond the limits established by Koskenniemi's *oeuvre*. As such, then, d'Aspremont's work needs to be seen as an off-shoot of Koskenniemi's formalism, rather than a fully independent theoretical project.

I have, elsewhere, engaged in extended analysis of Koskenniemi's scholarship, arguing for a psychoanalytic interpretation of his work.[125] A detailed review of the "culture of formalism," in the wider context of Koskenniemi's published work, is not possible here,[126] but the salient points can be highlighted. Koskenniemi's argument for the "culture of formalism" emerges out of a review of the argumentative practices of some European international lawyers (for example, Bluntschli, Jellinek, Le Fur, Scelle, Hersch Lauterpacht, Carl Schmitt and Hans Morgenthau) in the period 1870-1960.[127] Despite the divergences in their approaches and methods, Koskenniemi discerns some commonality, a shared "culture." He articulates this "culture" through the vehicle of a May 1966 debate in New York City between Professors A.J. Thomas, Adolf Berle, and Wolfgang Friedmann.[128]

In the debate, which concerned the legality of US military action in the Dominican Republic, Thomas and Berle argued in favour of the action on essentially political grounds, disregarding – at least in Koskenniemi's interpretation – the relevant international law on the use of force.[129] Friedmann, however, challenged this approach, defending, on Koskenniemi's reading, a concept of law as "a practice that builds on formal arguments that are available to all under conditions of equality."[130] He accused Thomas and Berle of, in effect, ignoring the

[120] d'Aspremont (2014a), p. 128.
[121] d'Aspremont (2014a), p. 128.
[122] d'Aspremont (2011), p. 29.
[123] d'Aspremont (2011), p. 218.
[124] d'Aspremont (2011), p. 223.
[125] See Nicholson (2017).
[126] For a more comprehensive review see Nicholson (2017).
[127] See Koskenniemi (2001).
[128] For a more comprehensive analysis of this May 1966 debate see Nicholson (2017).
[129] Koskenniemi (2001). pp. 497-498.
[130] Koskenniemi (2001), p. 501.

law: “[D]on’t let us pretend that we argue in terms of international law, when in fact we argue in terms of power or ideology.”[131]

Koskenniemi’s "culture of formalism," derived from the practice of past international lawyers and illustrated in the story of this 1966 debate, is built on the ideas of the social, of community, and of language that form the basis of d’Aspremont’s 2011 and 2014 argument. Koskenniemi, in an early passage from *Gentle Civilizer* – the book that concludes with the story of the May 1966 debate and the argument for a "culture of formalism" – pulls these ideas together, noting that “[i]t may be too much to say that international law is *only* what international lawyers do or think. But at least it is that.”[132] This, bearing in mind the publication date of 2001, might be seen as something like an *avant la lettre* version of d’Aspremont’s Hartian "social thesis."

That sense is only amplified when Koskenniemi’s earlier (1989) *From Apology to Utopia* is considered, with its perspective on "international law *as* a language" in which “[a]t the [relatively surface] *parole* level, human agents appear as conscious builders of the world” whilst at “the [more fundamental] *langue* level they work within the possibilities offered by a historically given code which the actors are routinely unable to transgress.”[133] d’Aspremont say this in his 2014 *British Yearbook* article:

> Those involved in the practice of law-identification, whether as judge, legal advisor or other relevant actor involved in law-identification, anchor their interpretation of what constitutes international law in a pattern inherited from the past which is reconstructed for the situation they face.[134]

Of course d’Aspremont acknowledges, in a footnote, the connection between this point and Koskenniemi’s work, pointing to Koskenniemi’s observations, in a 2006 journal article, on the nature of “traditions.”[135] My point is that the connection between d’Aspremont’s point and Koskenniemi’s work goes deeper; that Koskenniemi’s understanding of international law as a social practice defined by the work of international lawyers and their use of an empowering yet constraining language fixes the horizons for d’Aspremont’s project. This becomes even clearer when d’Aspremont’s most recent book is considered.

3.2 ‘International Law as a Belief System’

d’Aspremont’s 2018 book, *International Law as a Belief System*, can, I argue, be seen as an evolution of the 2011 and 2014 argument reviewed above.[136] d’Aspremont, however, suggests the opposite, noting that whilst “much of my earlier work engaged with international legal arguments in their own terms and especially in terms of sources and interpretation” this book “extend[s] an invitation to all international lawyers to ‘unlearn’ their knowledge and

[131] Koskenniemi (2001), p. 499.
[132] Koskenniemi (2001), p.7.
[133] Koskenniemi (2005), p. 568 and p. 11.
[134] d’Aspremont (2014a), p. 123.
[135] d’Aspremont (2014a), p. 123 (footnote 117).
[136] d’Aspremont (2018).

sensibilities regarding the formation and functioning of the fundamental doctrines,"[137] going so far as to argue for "a radical break from international lawyers' common representations of their fundamental doctrines in terms of sources and interpretation."[138]

The 2018 book, consistent with the "social thesis" of earlier work, argues that international law is the "belief system of a community of professionals who constantly turn to some unjudged fundamental doctrines to construct their legal discourse."[139] d'Aspremont understands "belief system" in terms of "a set of mutually reinforcing beliefs prevalent in a community or society that is not necessarily formalised."[140] The term is not used in a religious sense,[141] nor does d'Aspremont intend it to have ideological connotations.[142]

As to the content of a belief system, "transcendental validators" are central: they are "simultaneously said to be systemic and to constitute a belief system because of their mutually supportive character and the fact that they explain, justify and vindicate one another."[143] These "transcendental validators" take the form of "fundamental doctrines,"[144] "e.g. sources, responsibility, statehood, personality, interpretation, *jus cogens*,"[145] which sustain themselves through "self-referentiality,"[146] generating "a sense of constraint" for international legal practice.[147] This "self-referentiality" hinges on the doctrines of sources and interpretation.[148] As d'Aspremont explains, "once fundamental doctrines are equated to rules derived from international instruments, their making and functioning become the object of the specific doctrines that explain the formation and functioning of rules in international law."[149] In a sense, then, the doctrines of sources and interpretation are international law's meta-doctrines, the very foundation of the "belief system."

d'Aspremont builds his account of the system only to call for its "temporary suspension,"[150] for a process of "unlearning."[151] In making this call d'Aspremont walks a tightrope. Whilst he supports "fundamental disruption of some of the 'routines' of international lawyers … a falsification of the transcendental character of the fundamental doctrines to which international lawyers turn to generate truth,"[152] he insists that "[w]hat is sought … is a reflexive distance from the fundamental doctrines, not their abandonment."[153] He makes an explicit warning against "one potential use of the suspension of the belief system:"[154] the book "should [not]… be read as an invitation for apostasy, that is, a

[137] d'Aspremont (2018), p. xii.
[138] d'Aspremont (2018), p. xii.
[139] d'Aspremont (2018), p. 6.
[140] d'Aspremont (2018), p. 4.
[141] d'Aspremont (2018), p.7.
[142] d'Aspremont (2018), p. 4, footnote 8: "Ideology does not really capture what I have in mind because of the risk of being equated with grand ideologies, that is, an entire system of thoughts and values."
[143] d'Aspremont (2018), p. 5.
[144] d'Aspremont (2018), p. 3.
[145] d'Aspremont (2018), p. 3.
[146] d'Aspremont (2018), p. 45.
[147] d'Aspremont (2018), p. 31.
[148] d'Aspremont (2018), p. 46.
[149] d'Aspremont (2018), p. 46.
[150] d'Aspremont (2018), p. 17.
[151] d'Aspremont (2018), p. 104.
[152] d'Aspremont (2018), pp. 17–18.
[153] d'Aspremont (2018), pp. 21–22.
[154] d'Aspremont (2018), pp. 120–121.

renunciation by international lawyers of all their current beliefs in terms of modes of legal reasoning."[155]

d'Aspremont calls for a "suspension" or "unlearning" of "sources based self-referentiality,"[156] a departure from a process in which "the design of modes of legal reasoning [is] … construed as a top-down process by which some modes of legal reasoning are derived from an international instrument" – say the Statute of the International Court of Justice and, in particular, its Article 38 – in favour of "a process of inventing tradition,"[157] rather than merely receiving it. Similarly, he calls for an "[u]nlearning [of] [i]nterpretation-[b]ased [s]elf-[r]eferentiality,"[158] calling for a more conscious "exercise" of international lawyers' "interpretive craft" when engaged in interpretation, and less deference to "the fundamental doctrine of interpretation."[159]

The book concludes with a tentative statement of "ambition:"

> Of all the possible consequences that the image of international law as a belief system and its suspension may engender, contributing to the consolidation of a readership that is both theoretically aware and doctrinally apt is maybe where the epistemological ambition of the intellectual exercise conducted here lies.[160]

For d'Aspremont, "capturing and suspending the international belief system … provide[s] not only a toolbox for reflection but also an improved capacity of all professionals to situate themselves and their discourse … reinforcing the capacity for political action."[161] Koskenniemi captures something of d'Aspremont's balance between theoretical awareness and doctrinal aptitude, between situating oneself and one's discourse and discovering "the capacity for political action" in and through that discourse, in this reflection on *From Apology to Utopia*:

> Structural research of the kind displayed in [*From Apology*] tries to keep alive the political intuitions of the researcher by demonstrating that there really is no safe ground of 'mere professionalism' where attitudes of blasé neutrality would be appropriate. On the other hand, by making express the rules that provide for legal competence, such research seeks to empower the critical researcher to operate in actually existing institutions in potentially influential ways, aware of the structural constraints but also of the malleability, gaps and loopholes of their official rhetoric.[162]

[155] d'Aspremont (2018), p. 121.
[156] d'Aspremont (2018), p. 106
[157] d'Aspremont (2018), p. 106.
[158] d'Aspremont (2018), p. 112.
[159] d'Aspremont (2018), p. 115.
[160] d'Aspremont (2018), p. 123.
[161] d'Aspremont (2018), pp. 118–119.
[162] Koskenniemi (2016), p.734. For a more comprehensive analysis of *From Apology* see Nicholson (2017), noting that this quotation from Koskenniemi is included (at footnote 241) in that article.

One of the key messages of *From Apology* is that what are ordinarily presented as international legal doctrines can, more accurately, be seen as language-based structures of practice, amenable to reform in the pursuit of political projects – hence the book's conclusion that "[a]s international lawyers, we have failed to use the imaginative possibilities open to us … It is not that we need to play the game better, or more self-consciously. We need to re-imagine the game, reconstruct its rules, redistribute the prizes."[163] Koskenniemi's call for re-imagination and re-distribution – echoed in d'Aspremont's call for "unlearning" and "suspension" – is tempered by Koskenniemi's later call for a "culture of formalism" in which the possibilities of political argumentation through law are limited – recalling the 1966 New York debate – by fidelity to international law's form; by the need to make arguments that take law seriously as a linguistic structure that creates opportunities *and* constraints.[164] This is echoed in d'Aspremont's call for "political action" within the belief structure, for projects of reform and change that challenge the structure whilst avoiding descent into "apostasy." Koskenniemi balances the call for political agency in *From Apology* with a call for a "culture of formalism" in the later *Gentle Civilizer*. d'Aspremont balances his call for "suspension" and "unlearning" with this rejection of "apostasy."

In previous work, I have analysed the importance of Ernesto Laclau's and Chantal Mouffe's political philosophy to Koskenniemi's scholarship.[165] Laclau and Mouffe, through their theory of hegemony, develop a philosophy of praxis that exploits "fissure[s]" in the structure of language.[166] Abandoning the pretence that complete agreement is possible, that social and political structures might be perfected, that order might be achieved, they argue for hegemony as a practice of intervening in "fault[s]" and "fissure[s]."[167] The point is not to completely abandon the structure, to revolutionise or perfect it. Instead, hegemony involves a political project of using the opportunities available to you within the present, imperfect, to some extent broken structure. That is what Koskenniemi calls for – he tells us to "use the imaginative possibilities open to us ... to re-imagine the [existing] game" – and d'Aspremont makes essentially the same call in his 2018 book, calling for an understanding of the structure, the "belief system," and the taking of some distance from it: "what is sought here is a reflexive distance from the fundamental doctrines, not their abandonment."[168] He does this, significantly, in terms of the connection between his and Koskenniemi's work, by drawing on Laclau and Mouffe.

d'Aspremont cites a collection of seven essays by Laclau, on topics ranging from emancipation to universalism, particularism and identity, politics and language, subjectivity and politics, power, representation, and community,[169] in support of the point that "interventions in the formation of fundamental doctrines constitute huge exercises of power that are not devoid of hegemony because they seek to universalise specific modes of legal

[163] Koskenniemi (2005), p. 561.
[164] For a fuller development of this analysis of Koskenniemi's work, with a focus on the concept of hegemony, see Nicholson (2017).
[165] See Nicholson (2017), in particular at pp. 465–470 and pp. 476–486.
[166] Laclau and Mouffe (2001), p. 8; see Nicholson (2017), pp. 465–470 for a fuller development of this analysis.
[167] See Nicholson (2017), pp. 466–467.
[168] d'Aspremont (2018), p. 22.
[169] Laclau (2007).

reasoning."[170] Consistent with Laclau and Mouffe's concept of hegemony as a practice within the existing structure, d'Aspremont cites Laclau in support of a "[suspension of] the international belief system" as a means to enhance "capacity for political action,"[171] pointing to Laclau's observation that "'an oppositionist force'" within a particular system, that depends on that system for its "'identity,'" "'destabilizes [that] identity'" when it achieves "'[a] victory against the system.'"[172]

d'Aspremont contrasts (by the use of 'Cf.' in the relevant footnote) his claim that "projecting an image of international law as a belief system and immediately calling for its suspension come[s] with an unprecedented empowerment of reformers" with Mouffe's observation that "'[t]o negate the political does not make it disappear'" but "'leads to bewilderment in the face of its manifestations and … impotence in dealing with them.'"[173] Arguably Mouffe's point here actually supports d'Aspremont's argument – and so there is not, as d'Aspremont suggests, a contrast between his and Mouffe's position – in the sense that negation of the political / the structure is not possible, and the challenge is to find possibilities within it, to discover possibilities for reform and agency within the structure, if necessary by "temporary suspension,"[174] but certainly not be negating it or falling into "apostasy."

As I argued above,[175] Koskenniemi fixes the theoretical horizons for d'Aspremont's project. Nothing makes this more obvious than the fact that d'Aspremont grounds his "belief system" argument in the political theory of Laclau and Mouffe – the same political theory that underpinned Koskenniemi's earlier and (in the ways mapped above) similar work.

4 Conclusion: The Form, The Ideal, and The Real

The analysis above has explored two visions of positivism, one based on a pure concept of normativity, the other on the social facts of international legal practice. Kammerhofer offers an ultra-idealist approach that seeks to erect an absolute barrier between law and reality. The fragility of this barrier – indeed, in my view, its impossibility – implies a social fact perspective on international law and, employing a Hartian social thesis, d'Aspremont develops just that. Clearly, from the analysis developed above, my view is that d'Aspremont's approach is preferable to Kammerhofer's, but the originality and distinctiveness of d'Aspremont's analysis is limited – in ways considered above – by its confinement within horizons fixed by Koskenniemi's earlier work and by the sense in which, as outlined above, it repeats many of Koskenniemi's moves.

The domino-like analysis offered here – Kammerhofer's approach collapses into d'Aspremont's approach, which collapses into Koskenniemi's approach – leads to the

[170] d'Aspremont (2018), pp. 109–110 (and see his footnote 19 at p. 110)
[171] d'Aspremont (2018), pp. 118–119.
[172] d'Aspremont (2018), p. 119 (footnote 10, quoting Laclau).
[173] d'Aspremont (2018), p. 118 (the relevant footnote on that page, containing the quotation from Mouffe, is footnote 9).
[174] See text to note 150 above.
[175] See text between n 135 and n 136.

conclusion that international legal theory is turning back on itself.[176] Kammerhofer's 2011 monograph seeks to revive interest in Kelsen's Pure Theory, not by addressing the well-recognised challenge that Kelsen's theory is unrealistic – in Koskenniemi's terms it "offers only a *transcendental* realm of legality"[177] – but by re-enforcing the barrier between law and reality. From 2011 through to 2018 d'Aspremont's project, seen in its entirety, echoes Koskenniemi's formalism, representing a vision of international law as a professional, language-based practice. *Plus ça change, plus c'est la même chose*. Kelsen is repackaged in the former project, and the central tenets of Koskenniemi's *oeuvre* are reiterated in the latter.

Both projects manifest what Alexander Somek, in the course of his critique of positivism and, in particular, the Hartian variety, labels "conventionalism."[178] As Somek explains:

> [I]t is empowering to play by the rules that have been laid down by others and not to ask too many questions . . . it pays to be cooperative and to show off one's smarts, but not in an imprudent way . . . it is advantageous to profess belief in the greatness of the legal enterprise.[179]

In Kammerhofer's case this "conventionalism" leads to dogmatism whilst, in d'Aspremont's approach, it generates a mild challenge to the existing "belief system" in the form of a "temporary suspension."

Somek points to the potency of being able to claim that "'[t]his is what we do' and 'I do as others do'."[180] The power of "we," of community, runs through Kammerhofer's and d'Aspremont's projects. "We" dominates the closing passages of Kammerhofer's book:

> *We* simply cannot prove that a theory of norms is contradicted by reality . . . *we* are concerned with a different realm . . . an expression of *our* existential freedom to choose *our* own dogmas . . . *We* all have to live with our choice . . . *we* are responsible for the choice *we* make . . . the consequences of *our* choices will ensue.[181]

Ideas of "we," of the collective, permeate d'Aspremont's Hartian positivism, in the form of the "social thesis," the notion of "communitarian constraints,"[182] the concept of "international legal discourse,"[183] and the notion of a "belief system."

It is striking, at least to me, that Kammerhofer's and d'Aspremont's projects say nothing about the contemporary moment. These projects legitimate disengagement from the contemporary moment by promoting a sense that it is now proper, even necessary, for international lawyers and international legal scholars to focus on the internal, systemic

[176] See Nicholson (2016), in particular at p. 104: "The more international law is confronted with a complex and fragmented reality of competing values and complex choice the more it retreats into conservative self-reassurance."
[177] Koskenniemi (2001), p. 249, also quoted in text to note 68 above. (Emphasis in original).
[178] Somek (2011), p.738.
[179] Somek (2011), p.749.
[180] Somek (2011), p.748.
[181] Kammerhofer (2012), pp. 260–261. (Emphasis added).
[182] See text to note 116 above.
[183] d'Aspremont (2018), p. 1.

dimensions of their work – on an ultra-idealist "pure theory" or the structure of their own "belief system" – excluding, in the process, any real concern with material realities that are, in some sense, outside. [184] If "outsideness if the very source of fear"[185] – if the outside is threatening and destabilising, unstructured / unstructurable, unsystematic / unsystematizable – then "[t]he pure immanence of [Kammerhofer's and d'Aspremont's] positivism, its ultimate product, is no more than a so to speak universal taboo."[186] This positivism demands that international lawyers and international legal scholars do not look outside: that is its "taboo." Hence Kammerhofer's resort to the language of '"dogmas" and d'Aspremont's need to disclaim "apostasy."

Actually capturing or defining the contemporary moment is, of course, impossible, but it seems reasonable to note, for example, that a recent rise in authoritarianism is widely perceived in a range of jurisdictions (the United States, Turkey, and China, for example),[187] and that faith in the liberal international order is waning in the light of the conflict in Syria and the UN's apparent inability to manage or resolve that conflict,[188] and changes in the earth's climate consequent on a history of industrialisation and natural resource exploitation that is expected to lead to huge rises in sea levels and widespread population displacement.[189] Kammerhofer's and d'Aspremont's projects have nothing to say about a contemporary moment that includes challenges such as these. They address different questions, "we" questions, questions about those who identify with / through international law, how and in what forms or modes they exist, and how they can ground or defend their existence through the *Grundnorm* or a "belief system." These are, in my view, absolutely the wrong questions to be asking at this time. Those with an interest in international law should not be lost in a psychodrama of personal-professional-disciplinary identity.[190] International legal scholarship must, in my view, and as I have argued in previous work,[191] instead seek out new ways to engage with and represent contemporary reality through what I have described as "anti-structuralist, anti-hegemonic, anti-discourse kinds of thinking."[192]

For Somek "[o]nly legal scholarship that adopts as its task piercing through the veil of idealizations will be in a position to rescue legal scholarship from an encumbrance by money and power . . . [T]he relevant scholarship has to base itself candidly on a requisite political commitment [and] it can no longer continue the positivist project."[193] I would not make the point in exactly this way, but I agree with the sentiment.

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[184] I am grateful to Dr. Ruth Houghton (Newcastle Law School) for helping me to frame this aspect of my argument.
[185] Adorno and Horkheimer (1997), p.16.
[186] Adorno and Horkheimer (1997), p. 16.
[187] See, for example, George (2018).
[188] See Rayes, Orcutt, Abbara, and Maziak (2018).
[189] See Crist (2018).
[190] See Nicholson (2017).
[191] See Nicholson (2016); Nicholson (2017).
[192] Nicholson (2017), p. 508.
[193] Somek (2011), pp.755–756.

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