

**REVIEW ESSAY**  
**TOWARDS A COMMUNICATIVE THEORY OF  
INTERNATIONAL LAW**

*FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF  
THE ASCERTAINMENT OF LEGAL RULES* BY JEAN D'ASPREMONT  
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CONTENTS

I	Introduction .....	1
II	The Role of Formalism in Finding International Law .....	4
III	A Communicative Theory of International Law .....	10
	A A Need for Formalism? .....	11
	B Communication and Expectations .....	15
IV	Conclusion.....	18

‘The Lord came down to see the city and the tower the people were building. The Lord said, “If as one people speaking the same language they have begun to do this, then nothing they plan to do will be impossible for them.”’

— Genesis 11: 5–6

I INTRODUCTION

Article 38 of the *Statute of the International Court of Justice* proclaims that the Court shall apply ‘international conventions’, ‘international custom’, ‘the general principles of law recognized by civilized nations’, and as a subsidiary means for the determination of the rules of law, ‘judicial decisions and the teachings of the most highly qualified publicists’. Although expressly framed as a list of applicable law in disputes before the International Court of Justice (‘ICJ’) and not as an exhaustive list of the sources of international law, generations of law students have been taught that the sources of international law can be found simply by reading art 38. Armed with this succinct menu, graduates sally forth into international legal practice where they find that the neat world of art 38 is a fiction.

For upon entering international legal practice in almost any field it is readily apparent that art 38 misses entire categories of norms that international lawyers and states appear to treat as if they have some legal consequence. In some cases, international lawyers try to resolve this tension by describing putative legal norms as customary international law, despite implausible evidence as to the

state practice and *opinio juris* that accompany them.<sup>1</sup> In other instances, instruments are described as ‘soft law’, suggesting that they have some legal qualities while lacking others.<sup>2</sup> Some of these soft law norms are created by non-governmental organisations, meaning that under traditional state-centric theories of international law they cannot be binding law.<sup>3</sup> Yet many, if not most, lawyers have the intuition that, despite the traditional doctrine of sources, juris-generation is no longer the sole province of the state.<sup>4</sup> Some scholars have thus produced theories to explain the normative force of new kinds of quasi-legal rules,<sup>5</sup> while others have emphatically pushed back and argued for the preservation of traditional and strict notions of what constitutes ‘law’.<sup>6</sup>

Into this cacophony enters Jean d’Aspremont, an associate professor of international law at the Centre for International Law at the University of Amsterdam. His book, *Formalism and the Sources of International Law*,<sup>7</sup> builds on his earlier work published in the *European Journal of International Law*<sup>8</sup> and the *Finnish Yearbook of International Law*,<sup>9</sup> among other places.<sup>10</sup>

<sup>1</sup> See Daniel Bodansky, ‘Prologue to a Theory of Non-Treaty Norms’ in Mahnouch H Arsanjani et al (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Martinus Nijhoff, 2010) 119; Hiram E Chodosh, ‘Neither Treaty nor Custom: The Emergence of Declarative International Law’ (1991) 26 *Texas International Law Journal* 87.

<sup>2</sup> See, eg, Kenneth W Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 421.

<sup>3</sup> See, eg, Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007) 89 (listing examples of soft law instruments promulgated by non-state actors, including: International Law Association, *The Helsinki Rules on the Uses of the Waters of International Rivers and Comments* (Paper presented at the 52<sup>nd</sup> Conference, Helsinki, 1966); *Note Verbale Dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva Addressed to the Centre For Human Rights*, UN ESCOR, 43<sup>rd</sup> sess, Agenda Items 8 and 18, UN Doc E/CN.4/1987/17 (8 January 1987) annex (*The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*); *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998) 20 *Human Rights Quarterly* 691, 693–4; Stephen Macedo (ed), *The Princeton Principles on Universal Jurisdiction* (Princeton, 2001)).

<sup>4</sup> See, eg, Boyle and Chinkin, above n 3, 41–5 (discussing the increasing role of non-state actors in international lawmaking and the literature thereon).

<sup>5</sup> See, eg, David M Trubek et al, “‘Soft Law”, “Hard Law” and EU Integration’ in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, 2006) 65, 66–7. See also Orly Lobel, ‘The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought’ (2004) 89 *Minnesota Law Review* 342, 394–5, discussing the use of soft law in international law to accomplish what cannot be accomplished through traditional legal pathways.

<sup>6</sup> See, eg, Prosper Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 *American Journal of International Law* 413, 415 n 7: ‘sublegal obligations are neither “soft law” nor “hard law”: they are simply not law at all’.

<sup>7</sup> Jean d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment Of Legal Rules* (Oxford University Press, 2011).

<sup>8</sup> Jean d’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials — A Rejoinder to Tony D’Amato’ (2009) 20 *European Journal of International Law* 911; Jean d’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials’ (2008) 19 *European Journal of International Law* 1075.

<sup>9</sup> Jean d’Aspremont, ‘The Foundations of the International Legal Order’ (2007) 18 *Finnish Yearbook of International Law* 219.

<sup>10</sup> See, eg, Jean d’Aspremont, ‘The Doctrinal Illusion of Heterogeneity of International Lawmaking Processes’ in Héléne Ruiz-Fabri, Rüdiger Wolfrum and Jana Gogolin (eds), *Select Proceedings of the European Society of International Law: 2008* (Hart Publishing, 2010) vol 2, 297.

The book is a greatly welcome addition to the literature on the sources of international law. Drawing on both general and international legal theory, d'Aspremont develops a formalist theory of how linguistic indicators can and should be used to identify legal norms and distinguish them from non-legal norms. The book is divided into eight chapters. The early chapters introduce the study and defend a formalist approach to identifying legal norms, while the middle chapters explore the intellectual history of formalism in legal thought and international legal thought in particular. Later chapters examine critiques of formalism and the deformalisation of sources of international law. The final two chapters present d'Aspremont's theory of formal 'law-ascertainment' (or as I shall sometimes refer to it, identification) — an approach to determining whether a particular instrument or norm gives rise to legal obligations.

D'Aspremont's book is ambitious in scope; part intellectual history and part legal theory. In this essay, I shall focus on a few key points. My main objective is to connect d'Aspremont's application of general legal theory, based on H L A Hart's social thesis and Ludwig Wittgenstein's theory of communitarian semantics, to institutionalist thinking in international law. Although perhaps not obviously connected at first blush, d'Aspremont's theory of law-identification — if extended beyond the formal dichotomy between law and non-law on which he places his emphasis to encompass broader notions of how states signal their commitments to each other — opens the door to what I refer to as a communicative theory of international law. In short, d'Aspremont's theory of law-identification explains how states shape each other's expectations about how they will behave in the future. In institutionalist theories of international law, as in d'Aspremont's theory, these expectations — rather than the intent of the parties that is the cornerstone of jurisprudential approaches to international law — are critical. States apply sanctions to each other when their legal expectations are disappointed rather than when a state fails to honour its intentions. How states communicate with each other is thus a critical aspect of institutionalist theory, because it explains how states translate their intentions — the traditional focus of jurisprudence — into expectations; the critical aspect of an institutionalist theory of international law. D'Aspremont's descriptive account of how legal language is formed and used to indicate commitment suggests a research agenda focused on the use of language in legal instruments as a means of testing broader ideas about how states design international instruments and the role of reputation in international law.

In Part II, I shall briefly review the book's key arguments, focusing on the defence of formalism in law-identification, the putative need to have a sharp distinction between law and non-law and the workings of d'Aspremont's theory of formal law-ascertainment. In Part III(A), I shall consider whether the defence of formalism and the alleged need for a sharp distinction between law and non-law is compelling in light of research from behaviouralist and institutionalist perspectives on how ambiguity can increase the effectiveness of the law. In Part III(B), I shall argue that d'Aspremont's theory of law-identification, when expanded beyond the narrow context in which d'Aspremont applies it, helps fill a significant gap in institutionalist thinking about how international law structures articulate incentives to comply with the law. Specifically, the theory of law-identification laid out in *Formalism and the Sources of International Law*

offers an explanation of how states communicate, or fail to communicate, expectations to each other. This account of communication between states fills an important gap in institutionalist theories of international law.

## II THE ROLE OF FORMALISM IN FINDING INTERNATIONAL LAW

In 1955, Sir Hersch Lauterpacht wrote that ‘the absence of agreed rules partaking of a reasonable degree of certainty is a serious challenge to the legal nature of what goes by the name of international law’.<sup>11</sup> This quotation captures an intuition felt by many international lawyers — that an essential task of international lawyers is to say what the law is. The goal of clarifying the law is often associated with international lawmaking processes and institutions, from dispute resolution to the codification of customary international law.<sup>12</sup>

By defending his call for a renewed formalism in identifying international legal norms on the grounds that formalism reduces ambiguity and indeterminacy in the law, d’Aspremont is thus in good company. He argues that

some elementary formal law-ascertainment in international law [is] a necessary condition to preserve the normative character of international law, in that uncertainty regarding the existence of international legal rules prevents them from providing for meaningful commands.<sup>13</sup>

He goes on to argue that, in the absence of formal identification criteria, actors cannot anticipate the effects of rules and thus legal rules ‘fall short of generating any change in the behaviour of its addressees’.<sup>14</sup> D’Aspremont thus calls for ‘the preservation of the distinction between law and non-law’ and the use of formal indicators to mark the boundary between the two<sup>15</sup> in order to further the effectiveness of international law, which is to say its ability to change state behaviour by inducing states to try to comply with legal rules.<sup>16</sup> In short, he believes that clarity promotes effectiveness.

Formalism itself is hardly a self-defining term. The early chapters of the book are devoted to reviewing the history of formalism, its different conceptions and its critics (in both general and international legal theory). In the interest of space, I will not discuss at length the very comprehensive and illuminating review of the intellectual and philosophical history of formalism that d’Aspremont offers. Suffice it to say that these chapters should be required reading for anyone interested in the origins of contemporary debates about the sources of

<sup>11</sup> Hersch Lauterpacht, ‘Codification and Development of International Law’ (1955) 49 *American Journal of International Law* 16, 19.

<sup>12</sup> See, eg, Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green and Co, 1905) vol 1, 39–43; Timothy Meyer, ‘Codifying Custom’ (2012) 160 *University of Pennsylvania Law Review* 995. For an argument that non-compliance with legal rules may stem from ambiguity and imprecision, see Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995).

<sup>13</sup> D’Aspremont, *Formalism and the Sources of International Law*, above n 7, 29–30 (emphasis altered).

<sup>14</sup> *Ibid* 30. D’Aspremont also grounds his call for formalism on a need for lawyers to maintain their authority within the norm-making and political processes, to promote coherent scholarly debates about international rules and indeed to make a critique of international law possible, and to promote rule of law values: at 31–6.

<sup>15</sup> *Ibid* 5.

<sup>16</sup> *Ibid* 30–1.

international legal rules. Particularly noteworthy is Chapter 5, which discusses some possible agendas behind efforts to deformalise international law, including: efforts to expand international law's reach; to solve accountability problems thought to arise from the pluralism of international norm-creation; a 'self-serving quest for new legal materials';<sup>17</sup> and, of course, advocacy by counsel in international judicial proceedings who use the deformalisation of law-ascertainment as a way to expand the set of possible rules at the service of their clients.<sup>18</sup> Although one might wish that d'Aspremont had developed the nuances of these motivations a bit more,<sup>19</sup> this discussion challenges the reader, particularly the reader interested in soft law or customary international law, to think about how and why she deploys the theory of the sources of international law.

D'Aspremont himself adopts a definition of formalism based on the so-called 'source thesis', which 'provides that law is ascertained by its pedigree defined in formal terms and that, as a result, identifying a norm as a legal norm boils down to a formal pedigree test'.<sup>20</sup> He modifies the 'source thesis' with reference to H L A Hart's social thesis, under which the formal indicators — the pedigree a rule must have to be deemed legal — are determined by 'the converging practice of law-applying authorities'.<sup>21</sup> Following Brian Tamanaha's work,<sup>22</sup> d'Aspremont adopts an expansive notion of what constitutes a law-applying authority, including judges, non-state actors and legal scholars.<sup>23</sup> D'Aspremont therefore argues that the indicators that should be used to identify legal norms are not determined independently of legal practice, but rather emerge (and in his view, hopefully converge) organically from the practice of international legal actors.<sup>24</sup>

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<sup>17</sup> Ibid 133.

<sup>18</sup> Ibid 130–4.

<sup>19</sup> In particular, d'Aspremont's discussion of a 'self-serving quest for new legal materials' suggests that competition among international legal scholars to distinguish themselves has driven legal scholars to expand the bounds of what is considered law for reasons of professional advancement, rather than out of an intellectual conviction that new forms of international ordering should be studied alongside law. While there is no doubt some truth in what d'Aspremont says, there is a less cynical view of this phenomenon. Much of non-legal or quasi-legal ordering could easily be structured as 'law' if the parties generating the norms so wished. For example, social norms could be embedded in enforceable contracts or enacted as statutes, while non-binding international agreements could be made binding. Thus, for those scholars interested in the design of legal systems, studying traditional international law alongside new forms of 'non-law', to use d'Aspremont's term, is necessary because the attribute of interest — formal legality — is endogenous. Put differently, to understand why a norm is a formal legal norm requires studying the comparative considerations that went into structuring the norm as such.

<sup>20</sup> D'Aspremont, *Formalism and the Sources of International Law*, above n 7, 13.

<sup>21</sup> Ibid 201. See also H L A Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982).

<sup>22</sup> Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001).

<sup>23</sup> D'Aspremont, *Formalism and the Sources of International Law*, above n 7, 203.

<sup>24</sup> Ibid 13–15. He carefully distinguishes formalism in law-ascertainment from the evidentiary process that may be associated with proving a rule exists and the process of interpreting a rule. Evidentiary procedures involve proving, for example, the existence of a document alleged to contain a legal rule or a conversation alleged to have created a contract. Whether a legal rule actually arises from the document or conversation is the subject of law-ascertainment. Only after a rule has been ascertained can its content be interpreted.

Although one can imagine different kinds of indicators emerging from social practice, d'Aspremont focuses on the role of linguistic indicators.<sup>25</sup> His theory is, in essence, a theory of how international legal actors can and should communicate with each other and of the benefits of developing a common legal language to signal legal commitment. Determining what constitutes the 'convergences of the practice of law-applying authorities'<sup>26</sup> is an exercise in communitarian semantics, derived from the philosophy of language and particularly Wittgenstein's work. On this account, rules (including rules of recognition) are specific to the social contexts in which they emerge.<sup>27</sup> The meaning of a rule is determined by 'the conduct of the social group'.<sup>28</sup>

D'Aspremont's theory is thus both a descriptive account of how international legal actors to develop a set of shared linguistic tools that they understand are used to mark the creation of a legal obligation, as well as a normative call for such development. Critically, d'Aspremont's emphasis is on language's power to mark legal obligation, rather than other possible markers such as compliance with formal procedures. As an example of a formal linguistic indicator, d'Aspremont offers the ritualistic language used in Security Council resolutions that create binding obligations under Chapter VII of the *Charter of the United Nations*. There, the Security Council intones that there has been a breach of or threat to international peace and security, invokes Chapter VII, and then 'decides' upon the obligations imposed on members.<sup>29</sup> These kinds of ritualistic linguistic indicators, understood by the legal community to connote the creation of a legal obligation, provide a pedigree that can be evaluated objectively to determine whether an instrument in fact creates binding legal obligations.

D'Aspremont acknowledges that states already pay a great deal of attention to linguistic indicators of their intent to be legally bound by an agreement, citing in particular the *Copenhagen Accord*<sup>30</sup> as an example of an instrument in which states clearly signalled the political nature of the instrument.<sup>31</sup> The list of examples of international instruments that are clearly not intended to be legally binding could easily be expanded to include, to name but a very few: the *Basel Accords on Capital Adequacy* ('*Basel Accords*');<sup>32</sup> the *Nuclear Suppliers*

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<sup>25</sup> Ibid 12: 'this book ... seeks to demonstrate that written linguistic indicators should play the predominant role in the ascertainment of international legal rules'.

<sup>26</sup> Ibid 197.

<sup>27</sup> Ibid 200. See generally Norman Malcolm, *Nothing is Hidden: Wittgenstein's Criticism of His Early Thought* (Blackwell, 1986); Dennis Patterson, 'Law's Pragmatism: Law as Practice and Narrative' in Dennis Patterson (ed), *Wittgenstein and Legal Theory* (Westview, 1992) 85, 86.

<sup>28</sup> D'Aspremont, *Formalism and the Sources of International Law*, above n 7, 200.

<sup>29</sup> Ibid 190.

<sup>30</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Parties on its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009 — Addendum — Part Two: Action Taken by the Conference of the Parties at Its Fifteenth Session*, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010).

<sup>31</sup> D'Aspremont, *Formalism and the Sources of International Law*, above n 7, 183 n 190.

<sup>32</sup> Basel Committee on Banking Supervision, *Basel III: International Framework for Liquidity Risk Management, Standards and Monitoring* (Bank for International Settlements, 2010); Basel Committee on Banking Supervision, *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems* (Bank for International Settlements, 2011).

*Group Guidelines*;<sup>33</sup> the *Rio+20 Declaration*;<sup>34</sup> and various memoranda of understanding on cooperation between, for example, national antitrust authorities.<sup>35</sup>

Yet d'Aspremont is correct to note that ambiguity plagues a variety of contemporary instruments. Perhaps the clearest example is the decisions of Conferences of the Parties ('COP') to various treaties that appear to extend beyond the lawmaking authority granted to the COP. For example, the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* ('*Kyoto Protocol*')<sup>36</sup> specifies that any compliance mechanism resulting in binding legal consequences must be adopted by means of a formal amendment to the *Protocol*. Yet the *Kyoto Compliance Mechanism*,<sup>37</sup> which contemplates imposing penalties such as reduced emissions limits in future emissions reductions agreements, was adopted by a simple decision of the parties. Similarly, the *Convention on the International Trade in Endangered Species of Wild Fauna and Flora* ('*CITES*') endows the COP with the ability, among other things, to 'make recommendations for improving the effectiveness of *CITES*'.<sup>38</sup> Since 'recommendations' are not legally binding, this authority would appear to authorise the COP to do little more of a legally binding nature than subject species to the strict trade controls spelled out in *CITES* for species listed in Appendix I,<sup>39</sup> or the slightly less strict controls that apply to Appendix II species.<sup>40</sup> Despite this paucity of legal mandate, the *CITES* COP has erected a complicated compliance mechanism in which roles are assigned to the COP itself

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<sup>33</sup> Nuclear Suppliers Group, *Guidelines for Nuclear Transfers*, IAEA Doc INFCIRC/254/Rev.10/Part1 (July 2011); Nuclear Suppliers Group, *Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software and Related Technology* IAEA Doc INFCIRC/254/Rev.10/Part1 (June 2010).

<sup>34</sup> *The Future We Want*, GA Res 66/288, UN GAOR 66<sup>th</sup> sess, 123<sup>rd</sup> plen mtg, Agenda Item 19, UN Doc A/RES/66/288 (11 September 2012).

<sup>35</sup> See, eg, *Memorandum of Understanding on Antitrust Cooperation between the United States Department of Justice and the United States Federal Trade Commission, and the Ministry of Corporate Affairs (Government of India) and the Competition Committee of India*, signed and entered into force 27 September 2012 <<http://www.ftc.gov/oia/agreements/1209indiamou.pdf>>.

<sup>36</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005) ('*Kyoto Protocol*').

<sup>37</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties to the Kyoto Protocol on Its First Session, Held in Montreal from 28 November to 10 December 2005 — Addendum — Part Two: Action Taken by the Conference of the Parties to the Kyoto Protocol at Its First Session*, UN Doc FCCC/KP/CMP/2005/8/Add.3 (30 March 2006) Decision 27/CMP.1 ('*Procedures and Mechanisms relating to Compliance under the Kyoto Protocol*'): compliance with the *Kyoto Protocol* is handled by the Compliance Committee.

<sup>38</sup> *Convention on the International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 244 (entered into force 1 July 1975) art XI ('*CITES*'). The Conference of the Parties' other powers are primarily administrative in nature, such as making provisions for the Secretariat's operation.

<sup>39</sup> *Ibid* art III.

<sup>40</sup> *Ibid* art IV.

and a body created by the COP, referred to as the Standing Committee.<sup>41</sup> The compliance mechanism can result in ‘recommendations’ from the Standing Committee to the Parties to suspend trade with a particular party if they are in the view of the Standing Committee violating *CITES* either in the way it administers the *Convention’s* trade controls or by failing to file reports *CITES* mandates.<sup>42</sup> These compliance procedures appear not to be legally binding due to the absence of treaty authorisation for the COP to impose binding consequences. They are, however, adopted by the COP in accordance with a legislative process and result in real-world consequences that prompt changes in state behaviour, facts that muddy the legal status of the *CITES* compliance mechanism.<sup>43</sup>

Ambiguity as to whether an instrument is legally binding is, in d’Aspremont’s view, a product of international law’s traditional reliance on parties’ intent, an insufficiently formal criterion that gives rise to indeterminacy about whether an instrument is in fact legally binding.<sup>44</sup> Intent is ‘a fickle and indiscernible psychological element’.<sup>45</sup> Resort to intent as the ultimate indicium of bindingness in international law thus introduces into treaties one of the main problems with customary law — the difficulty of ascertaining the psychological state of complex organisations. The problems of indeterminacy are compounded when one moves beyond written international instruments. D’Aspremont claims that unwritten legal rules are currently not subject to formal law-ascertainment.<sup>46</sup> In his view, the indeterminacy that has plagued debates about customary international law can be traced to the informal criteria that are used to identify custom.<sup>47</sup> Moreover, while oral treaties and promises could in principle be identified using formal linguistic indicators, in practice they have tended to turn on the non-formal criterion of the intent of the parties, making distinction between binding oral promises and mere political statements difficult.<sup>48</sup>

D’Aspremont argues that substituting written indicators for intent goes a long way towards providing a solution to the indeterminacy that exists in identifying legal rules.<sup>49</sup> Although he suggests that the creation of a legal obligation through formal procedures could also play a role in formal law-identification, the resort

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<sup>41</sup> Conference of the Parties, Convention on the International Trade in Endangered Species of Wild Fauna and Flora, ‘Decisions of the Conference of the Parties to *CITES* in Effect after the 12<sup>th</sup> Meeting’ (*CITES* Decisions, 3–15 November 2002) [12.84]; Conference of the Parties, Convention on the International Trade in Endangered Species of Wild Fauna and Flora, ‘Decisions of the Conference of the Parties to *CITES* in Effect after the 14<sup>th</sup> Meeting’ (*CITES* Decisions, 3–15 June 2007) [14.3].

<sup>42</sup> See David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 4<sup>th</sup> ed, 2011) 1079 (discussing the *CITES* compliance mechanism).

<sup>43</sup> *Ibid* 1079 (describing how the possibility of trade sanctions imposed through the *CITES* compliance process prompted Dominica, Rwanda and Vanuatu to come into compliance with their reporting obligations).

<sup>44</sup> D’Aspremont, *Formalism and the Sources of International Law*, above n 7, 178–82.

<sup>45</sup> *Ibid* 180.

<sup>46</sup> See *ibid* ch 7.

<sup>47</sup> *Ibid* 162–70.

<sup>48</sup> *Ibid* 171–3.

<sup>49</sup> *Ibid* 185–6. See also at 182–3: d’Aspremont acknowledges that the process of identifying intent has itself been subjected to formal identification through the use of procedural devices but, as discussed above, does not believe that these procedural indicators have gone far enough in resolving ambiguity about whether an obligation is binding.

to written indicators does not require formal procedures.<sup>50</sup> As the discussion regarding legislative decision-making by COPs indicates, there is wisdom in d'Aspremont's view on the limits of procedures to mark formal lawmaking. Procedures, such as bicameralism and presentment to create a statute or notice-and-comment rulemaking by agencies in the United States, are commonly used as a formal marker of the creation of a legal obligation in domestic contexts.<sup>51</sup> But the creative use of legislative bodies in international law to effectively amend treaties without formal amendment calls into question whether procedures can play the same role in international law. The institutions states create to engage in norm-production do not feel compelled to adhere tightly to the procedures of rulemaking spelled out in their constitutive treaties and yet, in the case of the compliance systems of the *Kyoto Protocol* and *CITES*, states appear to treat certain of these instruments as if they are legally binding.

D'Aspremont also recognises that the use of written linguistic indicators cannot totally eliminate indeterminacy in law-identification.<sup>52</sup> Indeed, its success in introducing determinacy is contingent on the convergence of social practices among law-applying authorities, an empirical fact that it is by no means clear exists.<sup>53</sup> Indeed, Harlan Cohen has argued that the fragmentation of international law is not the product of conflicting legal rules, but rather the product of disagreement about the sources of law itself,<sup>54</sup> a point that d'Aspremont acknowledges.<sup>55</sup> If Cohen is correct, it is not clear that formalism offers any greater respite from the indeterminacy of international law-identification than deformalised criteria. D'Aspremont attempts to elude this difficulty by making two moves. First, he argues that perfect convergence in social practices is not necessary, but rather only a 'feeling' that law-applying authorities are speaking the same language.<sup>56</sup> While one can sympathise with d'Aspremont's intuition that perfect convergence is not necessary, the notion of a 'feeling' of commonality seems somewhat underspecified.

Secondly, acknowledging the questionable empirical basis for a convergence of social practice among international lawyers, d'Aspremont calls for a greater 'social consciousness' among law-applying authorities.<sup>57</sup> He places particular emphasis on the role of informal cooperation and networks among international judges and tribunals.<sup>58</sup> Judicial dialogue can promote the social consciousness

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<sup>50</sup> Ibid 189.

<sup>51</sup> *United States Constitution* art I § 7.

<sup>52</sup> D'Aspremont, *Formalism and the Sources of International Law*, above n 7, 189.

<sup>53</sup> Ibid 197: 'Short of any convergence, lawyers end up speaking different languages, thereby depriving law of any normativity'.

<sup>54</sup> Harlan Grant Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community' (2012) 44 *New York University Journal of International Law and Politics* 1050.

<sup>55</sup> D'Aspremont, *Formalism and the Sources of International Law*, above n 7, 34: 'It is as if the international legal scholarship had turned into a cluster of different scholarly communities, each of them using different criteria for the ascertainment of international legal rules'.

<sup>56</sup> Ibid 201.

<sup>57</sup> Ibid 213.

<sup>58</sup> Ibid 213–14.

required to sustain the book's approach to formalism, and so d'Aspremont urges greater attention to the interaction between international tribunals and judges.<sup>59</sup>

D'Aspremont's theory of formal law-ascertainment can thus be divided into its descriptive and its normative components. Descriptively, he offers a revitalised version of formalism, based on Hart's social thesis, in which the convergence of practice among international legal actors leads to linguistic indicators that become focal points for states in identifying the legal significance of international instruments.<sup>60</sup> Normatively, d'Aspremont calls for greater convergence in the use of linguistic indicators, for the primacy of linguistic indicators over other possible law-identifying criteria, for the use of linguistic indicators to police the boundaries between law and non-law and ultimately for the conscious development of a common legal language of commitment.

### III A COMMUNICATIVE THEORY OF INTERNATIONAL LAW

In this Part, I discuss the implications of institutionalist theories of international law for d'Aspremont's theory, and in turn the contribution of his theory of law-ascertainment to institutionalist theories. Institutionalism is a school of thought originating in international relations that studies the ways in which states use international institutions to facilitate cooperation. At its base, institutionalism is a behavioural school of thought, asking how international institutions change patterns of state conduct.<sup>61</sup> Although law is only one institution of interest to international relations scholars, legal scholars have in recent years borrowed the insights from institutionalist theory to explain why international legal institutions look as they do and when we can expect international law to generate compliance and change state behaviour.<sup>62</sup>

It might seem that institutionalist theories of international law are far afield from a study of the formal ascertainment of legal rules. However d'Aspremont's defence of formalism is based on an argument that formalism in law-identification and a sharp bifurcation between law and non-law is necessary to maintain law's ability to change behaviour. His defence thus invites dialogue with other behavioural theories of international law. As I shall argue below, I believe the dialogue to be very fruitful for both institutionalist theories of international law and for d'Aspremont's own theory.

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<sup>59</sup> Ibid 214.

<sup>60</sup> See, eg, *ibid* 16.

<sup>61</sup> See, eg, Barbara Koremenos, 'Institutionalism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012) 59.

<sup>62</sup> To name but a very few, see Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2012); Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99 *American Journal of International Law* 581; Jeffrey L Dunoff and Mark A Pollack (eds), *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship* (Cambridge University Press, 2012); Laurence R Helfer, 'Exiting Treaties' (2005) 91 *Virginia Law Review* 1579; Timothy Meyer, 'Power, Exit Costs, and Renegotiation in International Law' (2010) 51 *Harvard International Law Journal* 379; Gregory C Shaffer and Mark A Pollack, 'Hard Law vs Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 *Minnesota Law Review* 706; Rachel Brewster, 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement' (2011) 80 *George Washington Law Review* 102.

A *A Need for Formalism?*

Institutionalist theories of international law hold that international law can generate changes by reducing transaction costs to negotiation, facilitating informational exchange and reducing uncertainty, and providing monitoring and enforcement procedures and tools that increase sanctions for violations of legal rules.<sup>63</sup> Sanctions are critical for such theories because they provide incentives to change state behaviour. Institutions allow states to commit to abiding by rules by making sanctions for violation more likely. There are roughly speaking three different kinds of sanctions: retaliatory, reciprocal and reputational.<sup>64</sup> Retaliatory sanctions are imposed in response to a breach of an obligation but the sanction need not be related to the obligation breached. Classic examples include military or economic sanctions. Reciprocal sanctions are imposed when a state ceases to comply with its own obligations under a legal rule because another state has breached an obligation. Finally, reputational sanctions are imposed when a state changes its view of how likely another state is to honour its obligations in the future. Such changes in reputation are costly because states with poor reputations may be excluded from international agreements or may have to offer greater concessions in order to induce other states to risk an agreement with them.<sup>65</sup> Of course, states can impose sanctions simply to try to change another state's behaviour. The key for institutionalist theories of law is that the existence of a legal obligation makes sanctions more likely by, for example, lowering the cost of a sanctioning state imposing retaliatory sanctions or by authorising reciprocal withdrawal from a treaty that has been breached by the other party. This marginal increase in the incentive to comply with a legal rule, owing to the increased possibility of being sanctioned, provides international law's 'compliance pull'. Reputational sanctions are especially important for institutionalist theories of international law because, unlike other kinds of sanctions, they are costless to impose and are thus the most frequently applied kind of sanction.<sup>66</sup>

Institutionalist theories of international law call into question d'Aspremont's assertion that making international law effective requires a sharp distinction between law and non-law that is policed with formal indicators.<sup>67</sup> Institutional theories, particularly reputational accounts, explain how much of the variation in formality and bindingness we observe in international legal ordering enhances the ability of states to cooperate. In particular, reputational theories explain how soft law — norms that are neither binding law nor purely political agreement, but have some lesser legal consequences — can improve the effectiveness of law.

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<sup>63</sup> See, eg, Koremenos, above n 61.

<sup>64</sup> See, eg, Guzman, *How International Law Works: A Rational Choice Theory*, above n 62, ch 2.

<sup>65</sup> Ibid ch 3.

<sup>66</sup> See, eg, *ibid*.

<sup>67</sup> D'Aspremont, *Formalism and the Sources of International Law*, above n 7, 122. D'Aspremont discusses what he terms effect- or impact-based conceptions of international law-ascertainment, whereby international legal rules are identified in terms of their ability to effect state behaviour. Institutionalism, properly understood, does not define legal rules in terms of their effects, as doing so conflates effects with causes: see Raustiala, above n 62, 582.

There are at least two ways in which soft law increases the effectiveness of international law.

First, soft law expands the range of instruments available to states and therefore makes regulation of certain topics more likely and may indeed make stricter regulation of certain areas possible. Variation in degrees of legality allows states to signal to each other the likelihood they will comply with an obligation. It allows them, in other words, to control the expectations of other states that determine the kinds of sanctions they face for violating a legal obligation. When a state makes a legal commitment, it pledges its reputation for complying with legal rules. If it makes a promise and fails to abide by that promise, the state suffers reputational harm that may hurt its ability to cooperate in the future. States thus have an incentive to be truthful about the likelihood they will comply with an obligation.

States develop levels of commitment in order to calibrate the expectations of their partners. Commitments that do not rise to the level of a binding obligation entail less of a pledge of reputational capital, and therefore less of a sanction in the event of a violation. In a sense, the difference between legally binding commitments in treaties and informal or soft law pledges is the difference between saying 'I shall arrive for dinner at six' as opposed to 'I hope to arrive at dinner by six'. The former connotes certainty on the part of the speaker and therefore creates firmer expectations in the mind of the hearer than does the latter statement. In the case of the former statement, if the declarant fails to arrive at six the hearer is more likely to reassess the credibility of the declarant's statements. In short, the hearer is more likely to be disappointed (and perhaps to rethink the guest list for future dinners) because the declarant raised his expectations.

Having a menu of commitment levels is valuable to states because it allows them to reduce the costs of violations that are unavoidable,<sup>68</sup> may facilitate renegotiation in areas of the law that are rapidly changing,<sup>69</sup> may allow states to broaden the reach of norms beyond those states who have formally consented to the norm<sup>70</sup> and creates an opportunity for states to engage in dynamic contestation of legal norms.<sup>71</sup> These benefits, in turn, increase the ability of states to cooperate, a crucial goal of legal ordering. Faced with a binary decision between law and non-law, states might well choose to forego legal commitments entirely to save, for example, renegotiation costs incurred in a fast-changing area like international financial law. In so doing, of course, these states would also forego the benefits of cooperation that arise from negotiating soft law instruments such as the *Basel Accords*. Moreover, states may be willing to make stricter soft law commitments rather than hard law commitments because the costs of violation are lower if they fail to live up to the stricter standards.<sup>72</sup>

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<sup>68</sup> Andrew Guzman, 'The Design of International Agreements' (2005) 16 *European Journal of International Law* 579. See also Chris Brummer, *Soft Law and the Global Financial System* (Cambridge University Press, 2011).

<sup>69</sup> See Timothy Meyer, 'Soft Law as Delegation' (2009) 32 *Fordham International Law Journal* 888.

<sup>70</sup> See Andrew Guzman and Timothy Meyer, 'International Soft Law' (2010) 2 *Journal of Legal Analysis* 171.

<sup>71</sup> See Shaffer and Pollack, above n 62.

<sup>72</sup> Raustiala, above n 62, 610.

Whatever problems it may create for courts trying to apply the law, this variety lubricates international bargaining by giving states more choices when designing international agreements.

Secondly, d'Aspremont assumes that clarity about the legal effect of a rule is a virtue from the standpoint of effectiveness. This assumption is common in international legal scholarship. The managerialist school, for example, has, at its base, assumed that states have a predisposition to comply with international law.<sup>73</sup> On this account, most non-compliance with international law can be traced to ambiguity and indeterminacy, as well as informational problems and resource constraints.<sup>74</sup> Clarification of legal rules and increased transparency in legal process are cures for these compliance ills.

But ambiguity and indeterminacy have a number of benefits that are frequently overlooked, making the claim that clarification of a norm's legal status (and therefore a formalist approach aimed at such clarification) is a desirable one that might deserve a more robust defence than that given it by d'Aspremont. The benefits of ambiguity and indeterminacy of legal rules flow from the effects on behaviour of uncertainty about what will be considered compliance. Behavioural studies have shown that under certain conditions, such as where individuals are risk averse or have a predisposition to comply with the law, a lack of clarity as to what the law requires can enhance efforts to comply with the law.<sup>75</sup> The logic behind this counterintuitive finding is that individuals will make extra efforts to ensure they are compliant when what counts as compliance is unclear. They will leave themselves a margin of error. Providing clarity in what the law requires removes the need for this margin. Even individuals predisposed to comply with the law need only make the minimum effort necessary to comply. Extending this logic to states suggests that the managerialist account of the need for clarity in the law is backwards. If states truly have a predisposition to comply with the law (one that is independent of the sanctions they face for violation), then clarity may reduce their efforts to comply, thereby reducing the effectiveness of the law in changing state behaviour.

Beyond the benefits of ambiguity, dynamism in the law (with the associated lack of clarity) and in legal language also has benefits that are lost in a formalist approach to law-identification. As d'Aspremont notes, international law has seen an explosion in the numbers of actors claiming authority in the international legal system.<sup>76</sup> Moreover, international law has changed its approach to the relationship between states and individuals. Investment law (under investment treaties) now accords corporations the right to bring direct causes of action against states,<sup>77</sup> and human rights law has evolved to regulate the purely internal

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<sup>73</sup> See, eg, Chayes and Handler Chayes, above n 12.

<sup>74</sup> *Ibid* 9–28.

<sup>75</sup> See, eg, John E Calfee and Richard Craswell, 'Some Effects of Uncertainty on Compliance with Legal Standards' (1984) 70 *Virginia Law Review* 965. For a review of the literature relating to the effect of uncertainty on compliance decisions, see James Alm, Betty Jackson and Michael McKee, 'Institutional Uncertainty and Taxpayer Compliance' (1992) 82 *American Economic Review* 1018.

<sup>76</sup> D'Aspremont, *Formalism and the Sources in International Law*, above n 7, 2.

<sup>77</sup> See Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community', above n 54, 1083–4.

conduct by a state towards its own citizens,<sup>78</sup> something largely unthinkable a hundred years ago. Many scholars, including d'Aspremont, have noted that this shift has been accompanied by greater variation in the kinds of criteria that legal actors apply in determining whether an instrument creates legal obligations.<sup>79</sup> D'Aspremont's theory is, of course, a reaction to this underlying fragmentation of sources doctrine.<sup>80</sup> D'Aspremont recognises that international law, and particularly the lawmaking process, is much more dynamic than the formal approach he advocates would suggest.<sup>81</sup> Formalism is useful, he argues, chiefly for the exercise of law-identification.

But I doubt that d'Aspremont's theory can be so neatly cabined. The identification of formal indicators through community consensus about legal language implies a dynamism to d'Aspremont's approach to formalism that belies his call for a greater convergence in legal language among law-applying authorities. Languages, after all, are constantly evolving to express new ideas and sentiments. It should hardly be surprising, given the radical changes in how international law regulates states and in particular the relationship between states and non-state actors discussed above, that legal language would also change and perhaps fragment. Put differently, d'Aspremont's normative call for convergence on the use of legal language in the process of law-identification is somewhat at odds with the descriptive aspects of his theory. Consensus about the meaning of legal terminology can form and dissolve over time. This dynamism and the ambiguity it produces at times, even just at the level of law-identification, seems valuable insofar as it allows the doctrine of sources to evolve to take into account international law's contemporary challenges.

Finally, although assessing compliance in order to apply sanctions is critical to an institutionalist theory of international law, there is really only one kind of actor in the international system that is required to resolve with clarity the question of whether a law has been complied with (and thus whether an instrument creates legal obligations): international tribunals. States and negotiators can proceed to bargain over the resolution of a dispute without ever resolving some underlying uncertainty about whether a legal obligation exists. But in the process of resolving disputes, courts are tasked with making binary determinations as to who is right and wrong in a dispute and in what ways. A theory of the law that caters to or privileges this need of tribunals might be termed an adjudicative theory of law.<sup>82</sup> D'Aspremont's theory is based on such an adjudicative understanding of international law. In his view, 'there is no doubt that the central law-applying authority whose behaviour is the most instrumental

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<sup>78</sup> Ibid 1074–5.

<sup>79</sup> D'Aspremont, *Formalism and the Sources of International Law*, above n 7, 34. See also Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community', above n 54; Bodansky, above n 1.

<sup>80</sup> See also Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community', above n 54.

<sup>81</sup> D'Aspremont, *Formalism and the Sources of International Law*, above n 7, 5 (emphasis altered): 'While not being construed as a tool to delineate the whole phenomenon of law — especially the flux of dynamics at the origin of the creation of legal rules, the content thereof, or the sense of obligation therein'.

<sup>82</sup> See Harland Grant Cohen, 'International Law's Erie Moment' (2013) 34 *Michigan Journal of International Law* (forthcoming)

in defining the standard of law-ascertainment is the International Court of Justice'.<sup>83</sup>

Yet this pride of place accorded the ICJ (and after the ICJ, other tribunals) overlooks the fact that much of international practice still occurs outside of the shadow of international tribunals. International disputes are still regularly resolved, not by resort to formal courts, but through negotiated resolutions that provide the basis for future legal claims.<sup>84</sup> In short, much of international law remains directly under the control of states. States keep track of and publicise their own practices in order to communicate to each other their beliefs about what the law requires — beliefs that are played out in a variety of interactions far away from The Hague. The US Department of State, for example, annually publishes the *Digest of the United States Practice in International Law*.<sup>85</sup> Moreover, much of the contestation over international legal process is about defining what those obligations are in the first place. States are simultaneously the subjects and creators of international law. In the latter role, they are constantly renegotiating the terms of their commitments to each other. In doing so, they apply the law because the law shapes their bargaining positions. But formal law-ascertainment criteria are less important where this latter task is concerned.<sup>86</sup> Instead of being concerned with the mechanical task of categorising the kinds of commitments states have made to each other in the past, states are concerned with defining their obligations going forward. Such a task can accommodate some uncertainty as to the legal status of the obligations being debated. Certainty is but a means, and far from the only one, to the end of a negotiated resolution. Indeed, many international disputes recognise this reality explicitly, setting parameters for state negotiations rather than declaring firmly a resolution to a particular dispute.<sup>87</sup>

## B                      *Communication and Expectations*

Institutionalist theories of law thus offer an explanation for why the existence of quasi-legal norms and, similarly, ambiguity about the legality of a norm, may be desirable from a behavioural perspective. The existence of quasi-legal norms may allow states to regulate some areas that would be unregulated in a world in which states could only choose between binding and non-binding agreements. Moreover, ambiguity may in certain instances increase compliance efforts.

Yet institutionalist theories do not specify precisely how states go about signalling their desired level of commitment in an instrument. They assume that there are binding commitments, soft law commitments, and purely political

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<sup>83</sup> D'Aspremont, *Formalism and the Sources of International Law*, above n 7, 205.

<sup>84</sup> For a theory of international law's evolution in response to negotiated resolutions of claims, see Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971) 92–8.

<sup>85</sup> CarrieLyn D Guymon (ed), 'Digest of United States Practice in International Law 2011' (United States Department of State, 2011).

<sup>86</sup> This is not to say that having a theory of what constitutes a legally binding obligation — that is, a theory of the pure type — is not important. Such a theory provides a measuring stick by which to judge the legality of different kinds of instruments. I mean only to say that the approach to determining what constitutes a legally binding obligation need not be devoid of uncertainty.

<sup>87</sup> *Gabčíkovo–Nagyymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, 78–9 [141]–[142].

commitments, but offer at best a thin description of how states distinguish between these different categories. These theories, in other words, tend to assume flawless communication between states, rather than exploring how states in fact communicate their desired level of commitment.<sup>88</sup> States do not communicate with each other without error, however. What one state believes it is signalling is not necessarily what another states hears. Institutional theories thus require an account of how states indicate the level of commitment associated with a particular legal instrument.

Enter d'Aspremont's theory of law-identification. One of the key contributions of d'Aspremont's theory is the recognition that treaty law has remained beholden to the psychological notion of 'the intent of the parties'.<sup>89</sup> The reasons for this allegiance stem from the contractual nature of international agreements, as well as a more general concern about sovereignty that permeates certain quarters in international law. A fidelity to the intent of the parties vindicates a respect for sovereignty because it ultimately leaves the control of what obligations bind a state in that state's own hands.

But the intent of the parties is at best secondarily relevant once we consider a theory of international law based on incentives to comply. An institutionalist account of international law — one that emphasises how international legal institutions change the incentives for state behaviour by creating sanctions for deviating from legal rules — cares not about the intent of a party when it gives its consent to be bound to an obligation. Rather, it cares about the expectations that are created in the parties that will apply future sanctions. When those expectations are disappointed, sanctions (reputational or otherwise) are applied. Once a legal obligation is created, a state bases its future behaviour on the expectations of other states because those expectations — and not the state's intent when it entered into the legal commitment — determine the kinds of penalties the state will face. Intent, of course, remains relevant insofar as a state has an incentive to set the expectations of other states in line with its own intentions. But on this account what matters is not intent per se. Rather, it is how intent is communicated and perceived by other states.

This insight is critical. Theories of international law, particularly theories of customary international law, have focused on *opinio juris*, the psychological component of the law.<sup>90</sup> Yet institutionalism's focus on expectations as the basis for sanctions makes clear that international law is most likely to be effective in generating behavioural change, not when states act out of a sense of legal obligation, but rather when there are shared expectations about the kinds of

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<sup>88</sup> For an argument that international law proceeds through justificatory discourse and that international law is enfeebled when that discourse breaks down, see Monica Hakimi, 'A Functional Approach to Targeting and Detention' (2012) 110 *Michigan Law Review* 1365, 1367–8: 'international law operates largely through a process of justificatory discourse'. See also Ian Johnstone, *The Power of Deliberation* (Oxford University Press, 2011) 22–7: 'lawmaking ... is a process of communication'. W Michael Reisman, 'International Lawmaking: A Process of Communication' (1981) 75 *American Society of International Law Proceedings* 101, 105.

<sup>89</sup> See d'Aspremont, *Formalism and the Sources of International Law*, above n 7, 178–82.

<sup>90</sup> For an argument that state practice is declining in importance and can be dispensed with for certain kinds of customary norms, see, eg, Niels Petersen, 'Customary International Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' (2008) 23 *American University International Law Review* 275.

obligations created by an instrument and what the instrument requires of states. D'Aspremont's theory thus very helpfully provides a jurisprudential underpinning for institutionalism's focus on expectations rather than intent. At the same time, it provides institutionalist scholars with an empirical field of study: the comparative use of language in written instruments across time and fields. A communicative theory of international law would seek to explain the development and use of legal language across regions, substantive legal fields and in different kinds of legal instruments.

Effective communication requires a common legal language, the development of which d'Aspremont's version of the social thesis can explain. A common legal language allows the intentions of one party to be translated into the expectations of other parties. As d'Aspremont points out and as discussed above, the indicators currently in existence do not rid us of indeterminacy entirely. Nor, as I have argued, is it clear that zero is the optimal amount of indeterminacy about what constitutes a legal obligation. Nevertheless, a communicative theory of international law grounded in the institutionalist logic of sanctions does require some minimum level of ability to communicate to translate the intentions of one party into the expectations of others.

Of course, many of these formal indicators in fact exist. For example, denoting an instrument as an 'agreement' suggests the instrument is binding; denoting an instrument as a 'memorandum of understanding' suggests it is not. Referring to the signatories to an instrument as 'parties' suggests the instrument is binding; referring to them as 'participants' suggests it is not. At the level of individual obligations, 'shall' connotes a binding obligation, while 'should' indicates a non-binding obligation.

But we would not expect the development of this common language to stop at linguistic indicators marking the distinction between law and non-law, d'Aspremont's focus. Instead, based on the need to signal variation in commitment levels, one might predict that states would develop a robust set of linguistic indicators that allow them to calibrate the level of commitment associated with a particular obligation. For example, one of the key attributes of soft law obligations is that they are not purely political commitments. Rather, they have some quasi-legal attribute: they implicate in some way a state's reputation for complying with its legal obligations. But what sort of linguistic indicators mark these kinds of obligations and distinguish them both from binding obligations and from purely political commitments? Can evidence for the existence and importance of soft law be found in the use of language in international instruments?

One possible indicator is a textual reference to a binding legal obligation, indicating that states view the soft law obligations as related to binding legal obligations. This relationship distinguishes the soft law obligation from the purely political one. By including a reference to a binding legal obligation in an otherwise non-binding instrument, states signal to each other that they view the obligations therein as more than purely political commitments. Moreover, tracing the textual references between different kinds of instruments might allow scholars to develop a typology of different kinds of instruments based on linguistic usage. Instruments that are more closely associated with clearly

binding legal instruments might be more frequently invoked by states both in judicial proceedings as well as in diplomatic correspondence.

More generally, a communicative theory of international law opens a potentially fruitful line of research into how language is used in different legal communities. If, as I have suggested above, the legal language states use to mark different levels of legal agreement is dynamic, then the use of legal language in instruments across time, regions and substantive fields may shed light on underlying patterns of international lawmaking. Variation between, for example, the way in which linguistic indicators are used in human rights law versus trade law may indicate that specialisation in international law has in fact produced distinct legal communities. Such a finding would have significant implications for how we think about the fragmentation of international law,<sup>91</sup> as well for reputational accounts of international law, where one of the central questions is whether states have a single reputation for compliance or have multiple reputations based on issue area.<sup>92</sup> In conjunction with a more nuanced typology of different levels of commitment based on linguistic indicators and cross-references to other instruments, scholars might be able to map the relative legalisation of international relations across time, issue area and geography.

#### IV CONCLUSION

In the tale of the Tower of Babel, the people of the earth are said to have spoken a common language. Because of their ability to communicate with each other, there were no limits to their potential and they settled in a plain to build a city and tower that would reach to the heavens. Displeased, God shattered their unified language and scattered them across the earth. In many ways, the story of Babel captures the hopes and fears of international lawyers. If international law speaks with a common voice, it offers the possibility of cooperative solutions to some of the world's most vexing problems. But if lawyers fail to speak in one tongue, international law loses its force and nations may be scattered.<sup>93</sup>

In *Formalism and the Sources of International Law*, d'Aspremont has offered one of the most insightful defences of this view in many years. He skilfully shows how a common legal language can emerge to delineate the multitude of international instruments those which give rise to legal obligations from those which do not. Moreover, he has offered a thoughtful defence of the virtue of developing this common legal language for the purpose of marking the boundary between the legal and the non-legal, between law and politics.

Languages are constantly changing, however, and pushing for unity of language has costs. Changes in languages happen for important reasons. Underlying ideas change and the speakers — the participants in the legal system — also change over time. Moreover, more varied language and more varied law increases the ability of international legal actors, most importantly

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<sup>91</sup> See Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community', above n 54.

<sup>92</sup> See Guzman, *How International Law Works: A Rational Choice Theory*, above n 62, ch 3; Rachel Brewster, 'Unpacking the State's Reputation' (2009) 50 *Harvard International Law Journal* 231.

<sup>93</sup> Cf Anthony Carty, 'The Yearning for Unity and the Eternal Return of the Tower of Babel' (2007) 1 *European Journal of Legal Studies* 4.

states, to tailor the level of commitment in their rules to the specific nature of the problem in question. There is no doubt that pluralism in international legal sources comes with costs and creates confusion. At the same time, however, this increase in language also creates the possibility of order where there would only be anarchy, of cooperation where a bifurcated world of law and non-law would relegate certain matters to pure politics.

At the same time, d'Aspremont's theory of linguistic indicators in international law has opened a potentially fruitful avenue of research for international lawyers. His descriptive account of how linguistic indicators can provide a common set of expectations offers jurisprudential micro-foundations for institutionalist theories of international law that rely on expectations — rather than the well-worn concept of intent — to impose the sanctions that make international law effective. A robust study of the language of international law and, in particular, how uses in language converge and diverge across time and issue areas might well help explain much of the dynamism in international law that has characterised the last century.

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