

Briefly Noted

Jean d'Aspremont. *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules*. Oxford: Oxford University Press, 2011. Pp. 266. £60. ISBN: 9780199696314; Jörg Kammerhofer. *Uncertainty in International Law. A Kelsenian Perspective*. Oxon & New York: Routledge, 2011. Pp. 288. £85. ISBN:9780415577847.

The two books reviewed here invite international lawyers to mobilize. Jean D'Aspremont's *Formalism* calls for a renewal of the practice of formally ascertaining international legal rules. D'Aspremont attempts to develop a theory for this endeavour to be employed in an age of pluralized normativity. Essentially this theory is grounded in a social thesis with robust Hartian support. Jörg Kammerhofer's *Uncertainty in International Law*, for its part, argues in favour of a much more theoretical approach to international law, one that is normativist and, more specifically, Kelsenian. Both texts are original and challenging in their effort to draw our attention to new ways of thinking about *form*. In d'Aspremont's view, the most problematic aspect of the ascertainment of law is the absence of social consciousness in law-applying authorities. He views the absence of a subjective (community) commitment to formalism – that is a commitment to respect the necessity of legal boundaries – as more of an obstacle in the objective production of law than fragmentation. The remedy proposed for this problem is the elaboration of written linguistic indicators which ensure the identification of international legal acts – as distinct from informal mechanisms such as the intent of the law-maker. D'Aspremont regards the written linguistic indicators generally as more suitable to the reality of our times, where informal law-making procedures abound, but nevertheless the need to distinguish law from non-law remains. According to d'Aspremont, what is at stake in the issue of formalism is not just an elementary respect for the rule of law, but also the possibility of critique of international legal rules. Kammerhofer dissects important aspects of the positive international legal order: self-defence, customary international law, interpretation and modification, conflicts of norms, and the idea of a constitution, following Kelsen's Pure Theory. The author devotes the larger part of the book to showing the impossibility of avoiding uncertainty in current international law. The climax is reached in the last chapter with a call to rethink the need for the *Grundnorm* (Kelsen's famous basic norm) in international legal theory. As Kelsen famously put it, the cognition of a norm as norm, rather than as a psychological or sociologico-empirical reality, is possible only if the norm has a presupposed *Grundnorm*, because to deny the dichotomy of Is and Ought means to deny the nature of (international) norms. According to Kammerhofer we need, and will always need, to return to the *Grundnorm*. In essence – and here is the gist of Kammerhofer's formalism – this means to accept the distinction between reality and value. Kammerhofer's insight that the *Grundnorm* does nothing but restate the idea of normativity reveals his reading of Kelsen and, more generally, his familiarity with the Vienna School of Law. But rather than in taking the Vienna School further, his contribution lies in using some of the theories developed in that school to think about current positive international law. *Formalism and the Sources of International Law* and *Uncertainty in International Law* both consider that the rules which determine the law-making powers of any given authority have an existence autonomous from the actual relations of power. In that sense, they constitute useful texts for gaining insights into the latest developments in positivist international legal theory.

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