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EDITORIAL

Wording in International Law

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Abstract

Since the demise of philosophical foundationalism and that of the Aristotelian idea of an inner meaning of words, scholarship about international law is no longer perceived as a mining activity geared towards the extraction of pre-existing meaning. Rather, international legal scholarship is in a state of fierce competition for persuasiveness and semantic authority. This does not elevate persuasiveness into the determinant of legality, nor does it lead to a total rejection of the internal point of view. The configuration of that competition for naming is informed by the current structure (and the membership) of the interpretative community of international law. In this competition for naming, words constitute semantic weaponry. Mention is made here of uses of words in international law to create textual economy, generate semantic instability, rough out and hone scholarly ideas, enhance textual aesthetics, yield empiricism, create straw men and preserve the argumentative character of scholarly idea, gratify oneself, boost fame and careers, and intimidate peers. It is also argued that there is nothing to rein in in the use of such semantic tactics in the interpretative community of international law, for paradigmatic revolution is meant to be permanent. It is only if international legal scholars were to lose their social identity that the competition for naming and the interpretative community of international law would vanish altogether.

Key words

international law; international legal scholarship; interpretative community; legal science; paradigmatic revolution; production of knowledge; semantic instability; semantic persuasiveness; textual aesthetics; wordfare

Since international law was elevated into an academic discipline more than a century ago, no interpretative authority has been able to empower itself as a monopolistic setter of the interpretation of international legal rules.[1] Neither the establishment of a world court nor that of an *Institut de droit international* – meant to mirror 'the legal conscience of the civilized world'[2] – has come to offset the absence of supreme guardian of interpretation in the epistemic community of international lawyers.

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1 In the following paragraphs, interpretation is not used in the strict sense and is thus not limited to the determination of the legal effects of existing rules, but is construed in a broad sense so as to include any construction of arguments about international law.

2 It is interesting to note that the French text that is the only authoritative version goes as follows: 'Il a pour but de favoriser le progrès du droit international . . .. En travaillant à formuler les principes généraux de la

Interpretative power in international law has accordingly remained extremely diffused. It is nowadays scattered between influent prolific minds affiliated with prestigious research institutions, domestic and international courts, international and regional law-codifying bodies, and, more occasionally, non-governmental organizations (NGOs), which compete with one another for interpretative authority and persuasiveness. All the participants in the struggle for interpretative authority and persuasiveness constitute the interpretative community of international law.[3] Such a struggle is not an inherent feature of social orders short of supreme interpretative authority. Domestic legal orders or areas of international law in which interpretative powers have been vested in one judicial body also witness competition for interpretative authority and persuasiveness. Yet, in social orders – like international law – falling short of instituting a supreme guardian of interpretation, the struggle for interpretative authority and persuasiveness is a more decisively existential feature of the community of professionals formed around it.

As I will explain in the observations to follow, the competition for interpretative authority and persuasiveness in the interpretative community of international law is a competition about naming: naming rules, naming standards of conduct, naming legal effects, naming social dynamics, naming compliance variations, naming underlying structures and prejudices of the reasoning of law-applying authorities, naming tensions and habitus within the social group studying or applying international law, etc. This competition about naming not only revolves around substantive argumentation, but equally constitutes a 'wordfare', namely a struggle for and through words.[4] It is the ambition of this paper to show how the tactics of wording used by international legal scholars engaged in this wordfare is, as much as the substance of their argument, informed by the dynamics of the competition for naming. It will be particularly argued here that words, rather than constituting the medium of an alleged art of scholarly writing, are better construed as one of the principal weaponries of the interpretative competition for naming.[5] This paper will also show that, although ultimately geared towards persuasiveness and semantic authority, wording by international legal scholars simultaneously reveals a tangle of complex dynamics inherent in the specific features and meta-structures of the

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science de manière à répondre à la conscience juridique du monde civilisé.' For some critical insights, see M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), 39.

3 On the concept of interpretative community, see S. Fish, *Is There a Text in This Class? The Authority of Interpretative Community* (1982); see also S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989), 141. See also sections 2 and 5, *infra*.

4 In the same vein, see the remarks formulated by I. Venzke, 'Legal Contestation about "Enemy Combatants" on the Exercise of Power in Legal Interpretation', (2009) 5 *Journal of International Law and International Relations* 155.

5 It should be noted that seeing the competition for naming as wordfare is not exclusive of its being simultaneously a business. The competition for naming can even be an extraordinarily lucrative business, for there are some actors in the profession who have been able to make an incredible amount of economic profit – often commercializing the unpaid craftwork of others – just by trading words. The profit they make has even allowed them to perpetuate their business model despite the compelling forces towards gratuity of the cybersphere where more and more knowledge is produced and disseminated outside the traditional money-making blueprints. For some critical remarks on these changes and how they may impact the configuration of academic publishing, see L. van den Herik, 'LJIL in the Cyberage', (2012) 25 LJIL 1, at 1–8. See also J. d'Aspremont, 'In Defense of the Hazardous Tool of Legal Blogging', EJIL:Talk !, 6 January 2011, available at www.ejiltalk.org/in-defense-of-the-hazardous-tool-of-legal-blogging.

epistemic community that has built itself around the production of knowledge and opinions about international law.

The argument made here is articulated as follows. It will first be explained that, since the demise of philosophical foundationalism and that of the Aristotelian idea of an inner meaning of words,[6] scholarship about international law is no longer perceived as a mining activity geared towards the extraction of pre-existing meaning. Rather, international legal scholarship is in a state of fierce competition for persuasiveness and semantic authority. This, however, does not elevate persuasiveness into the determinant of legality, nor does it lead to a total rejection of the internal point of view (section 1). It will then be argued that the configuration of that competition for naming is informed by the current structure (and the membership) of the interpretative community of international law (section 2). The next section will illustrate how, in this competition for naming, words constitute semantic weaponry. Mention will be made of uses of words in international law to create textual economy, generate semantic instability, rough out and hone scholarly ideas, enhance textual aesthetics, yield empiricism, create straw men and preserve the argumentative character of scholarly idea, gratify oneself, magnify erudition, boost fame and careers, and intimidate peers (section 3). It will be then argued that there is nothing to rein in in the use of such semantic tactics in the interpretative community of international law, for paradigmatic revolution is meant to be permanent (section 4). A few concluding remarks will argue that it is only if international legal scholars were to lose their social identity that the competition for naming and the interpretative community of international law would vanish altogether (section 5).

Before inviting the reader to a reflection along the above-mentioned lines, a preliminary remark must be formulated in connection with the delineation of the fraction of the interpretative community of international law that I focus on here. This contribution is premised on the idea that the competition for naming besets the entire interpretative community of international law.[7] However, these observations, albeit rejecting too formalistic a segmentation of the subgroups of the interpretmunity of international law and recognizing the kinship between them,[8] are exclusively limited to the competition for naming taking place within one specific subgroup of that interpretative community of international law, namely international legal scholarship. It is acknowledged that domestic and international law-applying authorities and those NGOs that have managed to empower themselves with semantic authority and persuasiveness can certainly be considered as

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6 See the famous para. 201 of L. Wittgenstein, *Philosophical Investigations* (translated by G. E. M. Anscombe) (2001). The abandonment of the varieties of philosophical foundationalism is described in R. Rorty's famous book, *Philosophy and the Mirror of Nature*, 25th Anniversary Edition (2009).

7 On the concept of interpretative community, see Venzke, *supra* note 4.

8 It is acknowledged here that the division of labour in the argumentative arena of international law can prove very unstable and is often fluctuating. It can even be extremely fickle at times. For instance, it is not uncommon that judges and international legal scholars engage in swaps of their roles. A recent interesting illustration is the case of the ICJ's *Germany v. Italy*, in which the Court seemed to behave more as a scholarly institution than an adjudicative body and gave the impression of addressing scholars rather than states. See ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 3 February 2012, available at www.icj-cij.org. On these changing of caps, see C. Steer, 'Non-State Participants in International Criminal Law', in J. d'Aspremont (ed.), *Non-State Participants in the International Legal Order* (2011), 295–310.

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belonging to the global interpretative community of international law. Nonetheless, these groups, albeit sharing with international legal scholars membership of the same interpretative community and involvement in the competition for naming, and despite their privileged mutual relations, are not engaged in the exact same struggle for persuasiveness and semantic authority as international legal scholars. Indeed, these groups' quest for persuasiveness and semantic authority rests on dynamics that are, to a significant extent, different from those cutting across international legal scholarship. Consequently, the observations formulated here cannot always be mechanically transposed to the wording by courts or NGOs that are part of the interpretative community of international law. Moreover, the dynamics of the quest for semantic authority and persuasiveness by other members of the interpretative community, and especially international courts, have already been artfully studied elsewhere[9] and it would be of no avail to revisit this question here. This is why, although taking note of the numerous bridges between the subgroups of the interpretative community of international law, the following observations only zero in on the community of international legal scholars.

A similar caveat must be formulated regarding the community of international legal scholars itself. This subgroup of the interpretative community of international law has itself grown into a cluster of different families, each pursuing different ambitions and informed by varying dynamics. Areas of specialization, schools of thought, educational traditions, and many other parameters have fragmented the community of international legal scholars. Although recognizing the plurality of that community, this contribution seeks to formulate remarks of a general character that apply to the entire community of international legal scholars. Inevitably, such remarks will be overgeneralizing at times. Their generality should, however, not undermine the relevance they can bear for all the various branches of the group of professionals who devote their effort to the study of international law and whose existence cannot be denied.[10]

The necessity to clearly delineate the topic with which this brief contribution grapples calls for another preliminary remark. Centred on the wording by international legal scholars, this paper pays no heed to the use of words in international law-making and, in particular, those that permit official international legal instruments to lay down rules and directives of conduct. Nor do these observations delve into the question of how words operate in the system of international law as a communicative tool to filter what is legal and non-legal.[11] By the same token, the struggle for persuasiveness and semantic authority for legitimization purposes by

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9 See I. Venzke, *How Interpretation Makes International Law: On Semantic Authority, Legal Change and Normative Twists* (2012); see also I. Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation', 34 *Loyola of Los Angeles International and Comparative Law Review* (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868423.

10 While some people have denied the existence of international law as law, the existence of the community of professionals studying international law is nowhere to be challenged.

11 This is what is called in system theory the operation of 'autopoiesis', namely the filtering and processing of information from the environment into the system; see N. Luhmann, *A Sociological Theory of Law* (1985) and *Law as a Social System* (translated by Klaus A. Ziegert) (2003); see also G. Teubner, *Law as an Autopoietic System* (1992).

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actual warring parties in an armed conflict – the so-called lawfare – is similarly left aside.[12] Rather than the lawfare, it is the wordfare that is the exclusive object of the following considerations.

I trust the previous preliminary observations have already sufficiently indicated that the following paragraphs are informed by sociological and epistemological insights. I acknowledge that such insights are rather banal in social sciences. However non-innovative they may be in themselves, the observations made here nonetheless point to dynamics that international legal scholars likely to use this journal for archiving, certifying and disseminating their research output tend to overlook. In that sense, it does not seem unbecoming for its editor-in-chief to invite all potential authors – as well as its readership – to further reflect on some of the strong determinants of the shape and textual expression of international legal arguments that this journal has been continuously publishing for the last 25 years.

1. The competition for the power of naming in international law

Recalling the extent to which international legal scholarship is inherently adversarial requires a very short inroad into the philosophy of language and linguistics. I acknowledge that, too often, philosophy of language and linguistics, despite being not fully apprehended by legal scholars,[13] is used to decorate international legal scholars' argumentative construction – a practice that I discuss in section 3 – without bringing real insights to the discussion.[14] I will resist that temptation here. I simply indulge in a short reminder about the mainstream understanding of the places of words in international legal scholars' argumentative engineering.

As we all know – almost intuitively – words are articulated with one another and such an articulation creates meaning. Put together, they generate semantics. The semantics created by our aggregation of words can be of several types. Among them, promises and orders are those speech acts that most obviously generate an action.[15] They are said to be performative. Yet, this is not the type of statement that

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[12] J. d'Aspremont, 'The International Legal Scholar in Palestine: Hurling Stones under the Guise of Legal Forms? A Talk with Martti Koskenniemi and Mudar Kassis', 19 April 2011, available at SSRN, http://ssrn.com/abstract=1846867. The concept of lawfare is said to have been coined by C. J. Dunlap, 'Lawfare Today: A Perspective', (2008) 3 *Yale Journal of International Affairs* 146. On that concept, see M. Kearney, 'Lawfare, Legitimacy and Resistance: The Weak and the Law', available at SSRN, http://ssrn.com/abstract=1772806.

[13] This has been a criticism levelled against Hart according to which his forays into Wittgenstein's philosophies should probably not be exaggerated. For instance, according to J. Raz, very little seems to have been gained in all of Hart's forays into the philosophy of language: J. Raz, 'The Nature and Theory of Law', in J. Coleman (ed.), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (2001), 1, at 6. Endicott has gone even further by claiming that there is no semantic theory in Hart's work and that it is incorrect to think that Hart relied on Wittgenstein; see T. Endicott, 'Herbert Hart and the Semantic Sting', in Coleman, *supra*, at 41.

[14] For an exception, see the insightful transposition by N. Onuf, 'Do Rules Say What They Do? From Ordinary Language to International Law', (1985) 26 Harv. ILJ 385.

[15] Promises or orders are considered to be illocutionary acts. Any act of asking, commanding, or promising is generally considered an illocutionary act. John Searle is said to have proposed one of the most authoritative classifications of illocutionary acts, distinguishing between assertives, directives, commissives, expressives, and declarations.

international legal scholars are most busy constructing. Although their principal objects of study – rules and judicial pronouncements – generate action like promises and orders,[16] scholars' reflections on such rules and judicial pronouncements are merely constative statements.[17] Indeed, such speech acts interpret the content of a rule or a decision, its environment, its genesis, or the dynamics around it. What the speech act theory developed by philosophers of language teaches us, however, is that even such constative statements are performative. Constative statements not only 'say' something, but also perform a certain kind of action.[18] More particularly, the actual utterance of the constative statement and its ostensible meaning performs an action: naming. Once the addressees of a statement understand it, they understand the intention of the author to communicate with them and to name. This is no different in the case of international legal scholarship. When making scholarly statements, international legal scholars perform an operation of naming.[19]

It is noteworthy that, in the context of the community of international legal scholars, naming can have a great variety of objects. The objects of naming can be distinguished on the basis of the methodological vantage point used while performing the speech act. For those who take an internal perspective on international law, the naming is about existing rules (i.e., issue of ascertainment) or the legal effect of existing rules (i.e., interpretation *stricto sensu*). These two are usually the same interpretative competition as that in which domestic and international judges are engaged.[20] For those who take an external point of view when approaching international law, naming competition is about deciphering the social, moral, political, etc., dynamics of law – those of international legal scholarship or those affecting compliance with the rules of international law.

Likewise, the operation of naming can have a great variety of addressees. In this regard, an important remark must be formulated as to the nature of the intra-communitarian exchanges. It seems hardly contested that the communicative flows within the community of international legal scholars are all-directional. It would certainly be oversimplifying to consider them as being purely inter-scholars. Members of the community of international legal scholars seek persuasiveness and semantic authority with respect to a varying and fluctuating – sometimes multilayered – (sub)group of the interpretative community. In particular, some scholars wage their

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16 On the question of the normativity of rules and their ability to prescribe a standard of conduct, see J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', (2008) 9 EJIL 1075.

17 Such constative acts are called locutionary acts. Speech acts can thus be locutionary and illocutionary. Mention is also made of a third type of speech act, namely perlocutionary act: its actual effect is persuading, convincing, scaring, enlightening, inspiring, or otherwise getting someone to do or realize something, whether intended or not (see, generally, J. L. Austin, *How to Do Things with Words* (1975).

18 Ibid., at 5.

19 See the illustration provided by U. Linkerfalk in 'State Responsibility and the Primary–Secondary Rules Terminology: The Role of Language for an Understanding of the International Legal System', (2009) 78 NJIL 53, at 71 ('[l]et us assume an international legal scientist publishes an article, criticising the usage of some particular legal terminology. The article announces what the author considers to be the pros and cons of the usage in question; it asserts that the provided description of the pros and cons is correct; it commits the author to maintain his position over time; and it invites other users of the international legal language to stop availing themselves of the terminology').

20 See the work of Venzke, *supra* note 4.

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wordfare solely against law-applying authorities and, more incidentally, influential peers – this would, for instance, be the case in the current state of international criminal law. Others would exclusively target peers studying and working on exactly the same questions – this would, for instance, be a feature of international legal theorists who are not directly interested in influencing judges. The striving for persuasiveness that is discussed here concerns the use of words by all strands of international legal scholarship, whatever the actual addressees may be.

Needless to say, the performative character of international legal scholars' constative statements naturally presupposes a mutually shared background information – linguistic and non-linguistic.[21] Legal scholarly analyses and propositions can only be performative if they are communicated between scholars who assumed – to a reasonable extent – similar distinctions, categories of understanding, and stipulations of relevance and irrelevance. This is why such speech acts presuppose a (sub-)*interpretative community*. In other words, speech acts occur within a (sub-)interpretative community to which access is more or less restricted. The membership of that community is a question to which I will revert in section 2.

The elementary proposition that constative statements – like scholarly analyses – perform the action of naming that I have borrowed from the philosophy of language and linguistics is as far as I want to venture into this social science. Such a detour is, however, worthwhile because it constitutes a finding that sociologists – and one of them is the object of a special symposium in this issue[22] – have brought one step further. According to them, by making a constative statement and thus by simply naming, international legal scholars engage in a competition for the power of naming.[23] Indeed, like all social fields, international legal scholarship is the site of competition for control of naming.[24] Naming is carried out through interpretation and the struggle for interpretation is a competition about naming. By such an account, this competition for naming boils down to a mere power struggle in which words constitute the primary weapon.

Again, the elementary proposition that international legal scholars are engaged in a competition for naming can be pushed a bit further, and especially in the direction

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21 As famously explained by John Searle, 'speaking a language is engaging in a (highly complex) rule-governed form of behavior'; J. Searle, *Speech Acts* (1969), 12.

22 It certainly is a remarkable coincidence that these few observations appear in an issue of the *Leiden Journal of International Law* that simultaneously opens its pages to a symposium dedicated to Michel Foucault. His famous 1975 work on *Surveiller et punir* as been translated as M. Foucault, *Discipline and Punish* (1977), 27: 'There is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.' In the context of the argument made here, the work of Foucault is particularly insightful, as it shows how these power relationships work and cannot be reduced to pure domination.

23 P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', (1987) 38 *Hastings Law Journal* 814, at 838: 'Law is the quintessential form of symbolic power of naming that creates the things named'; see also p. 837: 'What is at stake in this struggle is monopoly of power to impose a universally recognized principle of knowledge of the social world.'

24 On the adversarial character of the legal arena and the extent to which such an adversarial setting is determinative of the linguistic dynamics, see, generally, D. Kennedy, 'Theses about International Legal Discourse', 23 GYIL 353 (1980); M. Koskenniemi, 'International Law and Hegemony: A Reconfiguration', (2004) 17 *Cambridge Review of International Affairs* 197, at 199. See also the remarks by Venzke, *supra* note 4.

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of the general contemporary demystification of science in general. The competition for naming is a competition for the production of knowledge in international legal scholarship. Indeed, in international law, naming is what produces knowledge. Whether this suffices to call international legal scholarship a science is a question that has received varying answers[25] and one that I do not need to address here.[26] What needs to be highlighted is that this idea that the production of knowledge is the result of a social process is no longer contested.[27] It seems now widely recognized that knowledge is produced by power relations between professionals.[28] Indeed, knowledge production hinges on the persuasiveness of the argument and thus on how the latter is received by the other members of the community. In that sense, production of knowledge boils down to a process of securing argumentative authority among one's peers, which is parasitic on the process of communication between the actors of that community.[29] This means that the competition in which legal scholars are engaged and within which they are fighting with words is a struggle for the power to produce knowledge.

The naming and production of knowledge in the specific epistemic community of international law are no different. The knowledge produced by naming is the result of the confrontation among international legal scholars and judges, themselves divided into different subgroups driven by divergent agendas.[30] In the struggle for naming in international legal scholarship, persuasiveness and semantic authority are highly contingent upon a great variety of past parameters. Credentials, reputation, place of publication, affiliation, repetition, proliferation, intense dissemination, footnoting, peer-referencing, moment of production, and linguistic aptitudes are usually also among the parameters that determine whether an argument gains authority (and thus generates knowledge) or evanesces. Although probabilities show that semantic authority and persuasiveness can be more easily secured through massive scholarly production and dissemination in top-tiered platforms of distribution, it always remains difficult to predict which idea will eventually survive and which author will be accordingly empowered with persuasiveness and semantic authority. That means that the outcome of the struggle is uncertain and open-ended.

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25 See the famous argument by Karl Popper according to which the falsifiability of a theory is what makes it a scientific theory (meaning it can be tested through data and experiment). The rest is metaphysical. According to that criticism, law can hardly qualify as a science. See, generally, K. Popper, *The Logic of Scientific Discovery* (2002).

26 The argument can be made that the rhetoric of scientificity reflects the competition about apportioning weight among the various knowledge produced in the society. As argued by M. Hesselink, calling the production of a certain knowledge 'science' is a political decision. There is no compelling argument about why a certain research question should be more scientific than another; see M. Hesselink, 'A European Legal Science?', *Centre for the Study of European Contract Law Working Paper Series*, No. 2008/02, at 12.

27 B. Latour, *Science in Action* (1987).

28 Bourdieu, *supra* note 23, at 827.

29 See Latour, *supra* note 27, 40 ('You may have written a paper that settles a fierce controversy once and for all, but if readers ignore it, it cannot be turned into a fact; it simply cannot. You may protest against the injustice; you may treasure the certitude of being right in your inner heart; but it will never go further than your inner heart; you will never go further in certitude without the help of others. Fact construction is so much a collective process that an isolated person builds only dreams, claims and feelings, not facts').

30 L. V. Prott, 'Argumentation in International Law', (1991) 5 *Argumentation* 299, at 299 ('Persuasive discourse, or argumentation, has been a key technique in the development of international law').

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It is of import to highlight at this stage that the elementary finding recalled here falls short of elevating persuasiveness and semantic authority into the determinant of legality, for that would lead to a total rejection of the internal point of view.[31] This means that acknowledging the adversarial formation of persuasiveness and semantic authority does not necessarily entail an abandonment of internal determinants of legality.[32] Securing persuasiveness and semantic authority lies as much in the fluctuating balance of powers of international legal scholarship as in the internal consistency of the argument. In this competition for the production of knowledge about international law, words play a twofold function. Words are the medium through which propositions are translated and perform the action of naming. Yet, at the same time, authority of scholarly constructions is not a pure manifestation of internal cogency.[33] Wording constitutes an exercise of power in itself. The choice and use of words are a form of muscle-flexing in the quest for semantic authority and persuasiveness.

Wording as argumentative bodybuilding is a phenomenon to which section 3 is more specifically dedicated. For now, it is of great relevance to point out that this competition for naming neither takes place outside any structure nor is short of any constraints. Unsurprisingly, the struggle for semantic authority and persuasiveness in international legal scholarship unfolds in a strongly organized and hierarchical semantic and social system that is far from egalitarian. There are hierarchies that are rarely acknowledged as such but that fundamentally impinge on how the competition for naming is carried out.[34]

In this respect, and although the focus here is exclusively on the use of words as semantic weaponry by *international legal scholars*, it is important to briefly mention the peculiar social checks that hinder international judges and from which legal scholars are immune. Indeed, it is obvious to all observers that courts and tribunals have felt bound to perpetuate the 'Montesquieuan myth' of textualism in judicial application of law and have kept on demoting their function to textual mining – that is, extracting something that is already out there. Everyone in the epistemic community of international law politely repeats that courts do not fight for semantic authority, but simply unearth the semantics that are already there. The rules of interpretation of the Vienna Convention

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31 For a total rejection of internal determinant of legality, see Friedrich Kratochwil, according to whom legality manifests the persuasiveness of a form of argument and is a quality bestowed on rules by virtue of a given reasoning by an epistemic community trained in that legal reasoning; F. Kratochwil, 'Is International Law "Proper" Law?, (1983) 69 *Archiv fur Rechts- und Sozialphilosophie* 13.

32 For an attempt to preserve internal determinants of legality while acknowledging the role of external dynamics, see J. d'Aspremont, *Formalism and the Sources of International Law* (2011).

33 As demonstrated by Bruno Latour, it is never completely possible to describe law fully from an external perspective, since one inevitably draws on the concepts and vocabularies used by actors; B. Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (translated by M. Brilman and A. Pottage) (2009), 260 ('there is no stronger meta-language to explain law than the language of law itself'). Yet, at the same time, according to Latour, it is dependent on the setting and the behaviour of these actors. The internal–external distinction breaks apart. On that aspect of the work of Latour, see the remarks of K. Petroski, 'Varieties of Post-Positivism', *Saint Louis University School of Law, Legal Studies Research Paper Series*, No. 2012-03, at 17.

34 Customary international law and non-formal sources of law offer much more room for projections of power. On this aspect, see d'Aspremont, *supra* note 32, at 151–4, 162–70.

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on the Law of Treaties even buoy this fiction. However, at the same time, very few members of the community of international legal scholars still believe in such a parable. A century of legal realism as well as two decades of critical thinking in international legal scholarship have severely undermined the paradigm of mechanical application of rules and the idea that adjudicative legal argumentation is made behind a veil of ignorance,[35] even among those that remain attached to the internal point of view. This being said, societal legends serve societal functions. The perpetuation of this Montesqueuian myth in the epistemic community of international law is surely not accidental and can be easily explained. Semantic fighting under the guise of textualism has been deemed indispensable to preserve the legitimacy of judicial decision-making processes. Shorn of that myth, the exercise of governance by courts and tribunals would be dug out completely, which would not be without severe repercussion on their authority as well as on the whole adjudicative practice. It is true that, once the power-exercising by law-application authorities is completely unearthed other modes of legitimation of judicial decision-making will be needed to sustain the authority of courts and tribunals.[36] This is probably why theories of interpretation are still flourishing in international legal scholarship.[37] Linguistic theories are even imported to support such a textualism.[38] Problems related to an abandonment of the myth of textualism and the finding of new modes of legitimation of power-exercising by international judges are, however, not a question with which I want to grapple here. It is only necessary to emphasize that international legal scholars – despite their very special kinship with the international judiciary – have never been bound to preserve their legitimacy in the same way as judges. As a result thereof, international legal scholars have been less surreptitious about their strategic uses of words and the competition for semantic authority and persuasiveness they were engaged in. It must be acknowledged that they have often taken refuge behind formalistic argumentation with a view to securing greater authority and persuasiveness within the community.[39] Yet, the need for formalistic argumentation,[40] while an integral part of the quest for persuasiveness, is not the result of the same legitimacy constraints as those binding international judges. The social constraints that hinder the moves of international legal scholars are too different from those of international judges. This is both the cause and the consequence of the fact that they belong to two different – albeit intertwined – subgroups of the interpretative community of international law.

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35 This is the reason why I am convinced that international legal positivism is not about providing means to establish authoritative interpretation. The complex theories of interpretation that have been established to provide rationality (and hence authority) to argumentative reasoning are, in my view, alien to the knowledge of international law. They are, more simply, theories of argumentation.

36 For such an endeavour, see Venzke, *supra* note 9, both publications.

37 Over recent years, no fewer than six monographs have been written on interpretation. For a critical review of these works, see M. Waibel, 'Demystifying the Art of Interpretation', (2011) 22 EJIL 571, at 571–88.

38 For some critical remarks, see M. Greenberg, 'Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication', in A. Marmor and S. Soames (eds.), *Philosophical Foundations of Language in the Law* (2011), 217.

39 On the sublimating role of formalism, see Bourdieu, *supra* note 23, at 828.

40 In my view, formalistic argumentation should be distinguished from the use of formal law-ascertainment criteria; see d'Aspremont, *supra* note 32.

To grasp the politics and dynamics of the wording of international legal scholars, it is important to more clearly identify the branch of the interpretative community of international law that is constituted by legal scholars. In particular, it is necessary to shed some light on the modes of accession to that community that enable access to the argumentative arena in which the competition for naming takes place. This is the question to which I now turn my attention.

2. Membership in the community of international legal scholars

The struggle for persuasiveness and semantic authority depends on internal and external parameters. As far as the latter are concerned, and as I already pointed out, the struggle for naming unfolds not in a social vacuum, but rather against the backdrop of a well-organized social system. International legal scholarship is a community that operates as a magnet on all its members, who are correlatively subjected to the forces and pulls thereof. These internal protocols and constraints that organize the interpretative competition within international legal scholarship, however, only yield their effects upon a scholar once in the community. In other words, it is not until one has acceded to the community of international law that one accedes to the argumentative arena and is bound by such protocols and constraints that shape the competition for naming. This inevitably raises the question of who is entitled to partake in the wordfare in international law. It is the problem of access to the argumentative arena and thus the question of membership of the community of international legal scholars. Such a question raises considerations of both internal and external character.

It seems uncontested that, as a matter of fact, access to the argumentative arena in which the competition for naming takes place is restricted. Indeed, not everyone is allowed in that argumentative ring. Elevating oneself into an authorized interpreter of international law – and thus stepping into the argumentative fray of international law – is not a universal entitlement. However, the conditions of access to the scene of the competition are nowhere formally defined and there is, as such, no formal rule prescribing the criteria of eligibility to be an authorized interpreter. In that sense, the international legal scholarship, at least in its non-domestic and international dimension, is not a formally 'protected profession' whose access is expressly made dependent on formal qualification certified by a given degree.[41] Rather, it is the social field of international law that has generated its own criteria of membership.

Among the criteria of membership of the community of international legal scholars, the possession of an advanced university degree with a strong (international) law component is a common prerequisite. But there is more needed than the requirement to have earned one's mark at a recognized higher-education institution. Besides prior appropriate education, affiliation to an academic

[41] In national constituencies, access to the domestic zone of the international argumentative arena is sometimes restricted by occasionally backward or obsolete formal prerequisites.

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institution is classically seen as one of the most prominent parameters. Indeed, the competition for the production of knowledge has remained often de facto restricted to those who can show some sort of affiliation with a recognized academic institution. Employment with a university or a research centre would usually operate as such a certificate of interpretative aptitude that gives one access to the argumentative arena. Demonstrating academic affiliation thus provides a passport that gives access to the argumentative arena. And, usually, the more prestigious the scientific institution, the more comfortable the position one is offered in the argumentative arena.[42] There certainly are geographical variations in this respect, as some traditions – like the American one – prove more liberal as to the credentials that ought to be demonstrated to be admitted to that community. Yet, as a matter of practice, affiliation – whether we like it or not – has often been used as a filter for accessing international legal scholarship.

Accessing the argumentative arena is one thing. Actively taking part in the wordfare is quite another. Indeed, once a member of that community, there are also rules to be abided by to partake in the competition for naming, for the entitlement to access the argumentative arena comes with obligations pertaining to the way in which the wordfare are carried out. Any member of the community ought to accept some communicative conventions. Such conventions relate to both writing and oral argumentation. The best example thereof is the necessity to systematically refer to the sources that one has relied upon in the operation of naming. Likewise, one needs to decorate one's argument with adequate references to peers to convey the impression that one has a sufficient grasp of the existing state of the debate in which the contribution concerned is anchored. These communicative requirements may of course vary according to geographical criteria as well as the social and institutional position of the interpreter. For instance, it is well known that referencing is much more systematically practised, organized, and overseen in the American tradition. Likewise, for one who has reached a certain level of seniority – or a certain age – writing a piece without bothering to refer to anyone else or not making a single footnote is more socially acceptable. Such communicative protocols are sometimes ludicrous or nonsensical. Their absurdity occasionally spawns some unease within the social field of international law.[43] Yet, they usually enjoy enough social consensus within the community of international legal scholars to be perpetuated across generations. Anyone wishing to step into the interpretative fray is expected to abide by these social conventions.

The above-mentioned restrictions on the membership of the community of international legal scholars and its codes of expression are not without paradox.

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[42] To illustrate that point, it suffices to recall how suspicious we are when we open a book, an article, or a working paper from someone whose name is unknown to us and who does not provide his or her professional affiliation. In such a case, and unless it comes with the recommendation of trustworthy peers or a very sexy title, there is a high chance that we do not even bother to read it. This is also why it always proves so important to mention one's affiliation on open-access repositories and databases like SSRN.

[43] See F. Rodell, 'Goodbye to Law Reviews', (1936) 23 VLR 38; F. Rodell, 'Goodbye to Law Reviews – Revisited', (1962) 48 VLR 279.

Indeed, the power of international law extends far beyond that branch of the interpretative community of international law, affecting actors who are not members thereof and who do not necessarily master its communicative conventions. Likewise, international law is being used as a powerful narrative by all kinds of actors who do not claim to belong to the community of international legal scholars. However, irrespective of the accessibility of international law as a discourse or the possible universality of its actual legal effects – and, again, whether we like it or not – not everyone is allowed into the argumentative arena. While the lawfare is accessible to a large public, the wordfare is much less so. Argumentation about international law is far from universal. In that sense, these membership and communicative restrictions clearly impede the 'horizon' of a universal legal argumentation wished by some scholars.[44] In other words, these requirements frustrate universal access to legal debate and exclude alternative voices from being heard and performing acts of naming in connection with international law. Some may, for that reason, bemoan such restrictions and hope for greater universality of legal argumentation. Restricted access to the argumentative arena of international law nonetheless constitutes a social reality of that branch of the interpretative community of international law.

Because affiliation seems to be one of the main passports to access the argumentative arena, it is fair to say that the size of the community of international legal scholars – and the number of participants allowed in the argumentative arena – hinges, to a large extent, on the means that universities and governments are ready to invest in research into international law. Indeed, despite the existence of private research institutes as well as continuing dependence on some private endowments in some parts of the world, research into international law is, to a large extent, financed by public funding. This means that the size of the community of international legal scholars – and the number of participants allowed to take part in the competition for naming – depends on the funding made available by public authorities. Interestingly, despite the recent cuts in university budgets in some parts of the world, research in international law seems to continue to muster steady attention and support. The reasons for this are not always clear. Globalization and the correlative perceived need to structure knowledge about the internationalization of regulation have surely fuelled such governmental generosity. The 'international' is sexy and university authorities have understood the show case that good research that centres on international law can provide. Whatever the motivations of the flush of public money poured into research about international law, it seems that the community of international legal scholars has continued to grow unabated. Limited to a handful of participants in the nineteenth century, it has grown nowadays into a

[44] This is the famous concept of 'culture of formalism' floated by Martti Koskenniemi; Koskenniemi, *supra* note 2, at 500–8. For a discussion of that concept, see E. Jouannet, 'Présentation critique', in M. Koskenniemi, *La politique du droit international* (2007), 32; see also I. de la Rasilla del Moral, 'Martti Koskenniemi and the Spirit of the Beehive in International Law', (2010) 10 *Global Jurist* 1; J. von Bernstorff, 'Sisyphus as an International Lawyer: On Martti Koskenniemi's "From Apologia to Utopia" and the Place of Law in International Politics', (2006) 7 *German Law Journal* 1015, at 1029–31; J. A. Beckett, '"Rebel without a Cause": Martti Koskenniemi and the Critical Legal Project', (2006) 7 *German Law Review* 1045; see also the book review of M. Koskenniemi, 'The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960 by Nicholas Tsagourias', (2003) 16 LJIL 397, at 398–9.

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gigantic debating club. It is fair to say that the strict membership criteria mentioned above have thus not hampered the growth of the community of international legal scholars.

It is noteworthy that, as a result of the sweeping enlargement of the community of international legal scholars, the modes of promotion and appointment – subject to a few reactionary national constituencies – are less dynastic. Careers are more open, dynamic, and constantly re-orientating. For the new generation of international legal scholars, being groomed by one's research director is far less an option than it used to be. The labour market of academia has turned much more liberal. These changes in professional mobility and promotion have, in turn, further impacted on the competition for naming. The competition is indeed much fiercer between participants who, more often than before, see themselves as self-made rather than as heirs of a dynastic legacy.

The fact that, despite strict membership criteria, the community of international legal scholars has continued to snowball is a finding that has direct repercussion on the competition for naming mentioned in section 1. Although the foregoing has sometimes been seen as an encouraging and cheerful development,[45] the size of the professional community of international law has directly influenced the power dynamics thereof. Indeed, as I have explained elsewhere,[46] because scholars are so numerous today, each of them endures much harder difficulties in finding enough room to breathe in the argumentative arena of international law. The feeling of asphyxiation sometimes felt by many members of the community has exacerbated the ferocity of the struggle for naming. This has been aggravated by the feeling that the growth of the community was necessarily accompanied by a diminution of the influence that any member could potentially have on the whole. It is accordingly not unreasonable to say that the size of the community has dramatically impinged on the semantic methods and weaponry used by its members. It is to those specific tactical uses of words that these observations now turn.

3. Semantic weaponry and scholarly tactics in international law: wording

While decency certainly remains a bottom line of our practice of wording, liberalism prevails and there are a whole range of semantic tactics that are socially permitted. The following paragraphs sketch out some of the most common uses of words in the contemporary production of scholarly ideas and the scholarly tactics in the competition of naming that they reflect. Mention is specifically made of uses

45 The variety and richness of scholarly opinions are often seen as positive consequences of the unforeseen development of legal scholarship. See the remarks of B. Stephens on the occasion of the panel on 'Scholars in the Construction and Critique of International Law', held on the occasion of the 2000 ASIL meeting, (2000) 94 *ASIL Proceedings* 317, at 318.

46 d'Aspremont, *supra* note 16; see also J. d'Aspremont, 'La doctrine du droit international face à la tentation de la juridicisation sans limites', (2008) 118 RGDIP 849.

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of words to create textual economy, generate semantic instability, enhance textual aesthetics, yield empiricism, create straw men in order to preserve the argumentative character of scholarly idea, gratify oneself, rough out and hone scholarly ideas, magnify erudition, boost fame and careers, and, eventually, intimidate peers.

Before embarking on such a – quick – rundown, three caveats must be formulated. First, it should be noted that all the following textual techniques found in contemporary legal scholarship often overlap. They should accordingly not be taken in isolation from one another. Second, such practices vary according to the subgroups of the community of international legal scholars, and especially according to the subject that they study. Scholars engaged in international legal theory will usually not resort to the same wording tactics as those who study – and are often trying to develop – international criminal law. Third, there is inevitably a great dose of oversimplification in the account made below. The strategies driving the wording by international legal scholars are certainly more subtle than depicted here. However, despite the broad strokes with which I venture to delineate some of the most common uses of words in the production of knowledge about international law, the following – cursory – observations should suffice to invite further reflection on the textual tactics of the profession.

Subject to the occasional venting of limited express disapprovals, the following depiction of the contemporary practices of wording by international legal scholars is generally not meant to be judgmental. This is why the account made here falls short of providing concrete and specific examples. Indeed, such specific and concrete examples could convey the impression of making a value judgement. The observations that follow are accordingly formulated in very general terms.

3.1. Wording and protective textual economy

One of the most common textual tactics is laconism. Being succinct is time-saving. Indeed, laconism allows the author to float half-baked ideas without unveiling the lack of ripeness thereof. But textual economy can be simultaneously very self-protective. Indeed, words define the surface of scholarly arguments and, by the same token, determine the surface of legal scholars' engagement in the argumentative competition for naming. The less scholars say, the less they expose themselves. Said differently, the less scholars say, the less they venture into the argumentative fray. Textual stinginess can prove an extremely protective measure, as it reduces the surface of argumentation exposed by its author. It can simultaneously prove an efficient argumentative conflict-avoidance strategy. It is important to note that textual economy is, however, not always resorted to for argumentative-avoidance purposes. It may also help to create semantic instability, about which I must also make a remark.

3.2. Wording and the pursuit of semantic instability

Words express concepts that, by definition, have an economizing function, for they refer to a given state of affairs. The greater the state of affairs referred to by words,

the more economizing they are.[47] As a matter of fact, words of international law are becoming more and more economizing. Indeed, international law constitutes cumulative knowledge. It is ever-growing and self-enriching. As a result of continuous application and interpretation, each concept enriches itself, as do the semantics of the words through which they are translated. Thus, the semantic load of words in international law grows unabated. This is an important point, for the more economizing words are, the more room for semantic instability is generated.

The use of highly economizing words to yield semantic instability is a growing practice. Words' semantics are purposely kept open to allow semantic oscillation. It can take various forms, including the borrowing of words and idioms from social or hard sciences, for they will usually be not entirely fathomable by other members of the community of international legal scholars, thereby allowing a wide space for semantic fluctuation. Semantic instability allows the destabilization of fellow scholars. It confuses the reader, who can never clearly delineate or grasp an ever-changing and instable argument. It bars any argumentative backfire while allowing the author to dodge most counterarguments by taking refuge under a semantic shelter. It simultaneously allows magnificent textual acrobatics and wordplays. Such benefits make semantic instability a textual tool of great convenience. It is because of their instrumentality to semantic instability that some of the buzzwords permeating the current literature on international law[48] have proved so successful. Some strands of the community of international legal scholars have even made semantic instability their principal and systematic text-making tool.[49] Interestingly, such vagueness has not necessarily been construed as running against transparency.[50]

3.3. Wording and the aesthetics of scholarly arguments

It seems hard to deny that, nowadays, the aesthetics of scholarly construction are often deemed as important as the substantive argument that is pursued therewith. That is because international legal scholars think that the aesthetics contribute to the persuasiveness of their argument. Besides providing a buttress for the authority of an argument, footnoting has for a long time played such an aesthetic-enhancing role. The number of references as well as the names that are referred to have always contributed to embellishing a scholarly piece. This has even constituted an institutional prerequisite for an article to be deemed publishable. Yet, in their quest for aesthetics, international legal scholars now also systematically use words to embellish what can otherwise be perceived as a rather monotonous and insipid construction. At the price of being sometimes pompous, international legal scholars have a much greater inclination to infuse their texts with what they perceive as the most impeccable

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47 A. Ross, 'Tû-tû', (1956–57) 70 *Harvard Law Review* 812, especially at 813. For a contemporary translation of that idea and a critical evaluation thereof, see U. Linderfalk, 'On the Many Functions of International Legal Concepts, Part One', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1863048.

48 One of the best illustrations is probably the semantic instability that has been nurtured around the idiom of legal pluralism.

49 On the use of semantic instability in the work of J. Derrida, see F. Kastner, 'The Paradoxes of Justice: The Ultimate Difference between a Philosophical and Sociological Observation of Law', in O. Perez and G. Teubner (eds.), *Paradoxes and Inconsistencies in the Law* (2005), 168–70.

50 See T. Endicott, 'The Value of Vagueness', in Marmor and Soames, *supra* note 38, at 14–30.

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locution or idioms. They accordingly spend hours finding the finest textual ornament. Thesauruses become the indispensable tool of scholars in the quest for the most textually embellishing expression. This can also manifest itself in the borrowing of words and idioms that are deemed of great aesthetical virtue from social or hard sciences or from foreign languages. Needless to say, like all judgements of aesthetic value, the decorative effect of their words still depends on the sensory, affective, and emotional predisposition of the reader. Yet, such a practice already suffices to flatter authors themselves. This textual pompousness has grown more common among the new generation of international legal scholars, often prompting the previous generation to bemoan what they see as artificial textual bodybuilding. Although I believe that international legal scholars have at their disposal a greater panoply of concepts – and hence of words – this criticism is not always far-fetched. Textual bodybuilding and the quest for aesthetics are nowadays endemic in international legal scholarship. And that phenomenon has been exacerbated by some strands of the community that systematically resort to aesthetic-enhancing mechanisms.

3.4. Wording and the construction of empirical data

It is of an embarrassing conspicuity to recall that there is no such a thing as empirical objectivism. Concepts are the tools with which reality is observed and constructed.[51] That means that descriptive fact cannot determine its own rational significance and 'value facts' are necessary to bring practice to life.[52] Said again differently, thought categories contribute to the construction of the world.[53] Data collection is necessarily data construction. This is why empirical methodology is always inevitably conceptual and normative. While it is traditionally the concepts – and not the words in which they are translated – that construct reality, international legal scholars more often succumb to the temptation of letting their empirical data be exclusively built on words. Indeed, catchy words or idioms, without any conceptual flesh, are elevated in empirical lenses. This means that it is the word that drives empiricism. Empiricism is instrumentalized to serve the aesthetics. It is the elegant or graceful word or idiom that is elevated into a reality-constructing tool. The word, rather than the concept, becomes the building block of empirical data. When this is the case, the conceptual fleshing is usually postponed until the flashy word has secured sufficient popularity and has been adopted or espoused by a great number of members of the community. It is, however, at the conceptual fleshing-out stage that the

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[51] See the famous and oft-quoted assertion by P. Allott, *Eunomia* (2001), xxvii: 'We make the human world, including human institutions through the power of the human mind. What we have made by thinking we can make new by new thinking.' On this point, see the remarks of J. Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL', (2005) 16 EJIL 213, especially at 214–16. See also J. Raz, *Between Authority and Interpretation* (2009), 31: 'In large measure what we study when we study the nature of law is the nature of our own self-understandings . . .. It is part of the self-consciousness of our society to see certain institutions as legal. And that consciousness is part of what we study when we inquire into the nature of law.'

[52] M. Greenberg, 'How Facts Make Law', UCLA School of Law, *Public Law & Legal Theory Research Paper No. 05-22*, at 173.

[53] Bourdieu, *supra* note 23, at 839; according to Bourdieu, this is the 'creative power of representation'.

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data-constructive role of words comes to light and that one realizes the empirical power of words, occasionally requiring some face-saving ruses.

3.5. Wording and the construction of straw men

As explained above, adversity is inherent in the making of arguments. It is in that sense that international legal scholarship is inherently adversarial. Arguments are built on (and geared towards) peers' stances on – seemingly – similar questions. If an idea built by an international legal scholar does not respond to a pre-existing one, it fails to qualify as an argument in the first place and the question of its persuasiveness or semantic authority does not even arise. Seeking persuasiveness and semantic authority thus presupposes a conflict of thought. Yet, often, in making and fine-tuning their scholarly constructions, international legal scholars find out that the conflict of naming they had presupposed had been nothing more than a mirage. When this is the case, it often happens that they feel already too wedded to their own idea – or have already invested too much time therein – to be able to backtrack or trash their whole construction. In such a case, they feel pressed to create an argumentative straw man whom they can subsequently batter at whim, allowing their idea to become an argument in its own right. There are two ways to build straw men. Either one fabricates empirical data, as explained above, or one just fabricates semantics. Either way, words will be the fabric of the straw man that will provide argumentative trappings to scholars' constructions. When used in that way, words serve as the safeguarding tool of the argumentative character of scholarly thinking.

3.6. Wording and the 'roughing-out' process of scholarly ideas

The following use of words is more unconscious. Following the developments of new technologies and writing materials, scholars – at least those of young generations – have changed their thought-forming processes. Whilst previous generations were constrained to work out any idea mentally before couching it on paper, new technologies allow scholars to carve their ideas directly on the screen. The screen has become the drawing board of scholarly constructions, directly impacting on how scholarly thoughts are carved.[54] It is true that thought-forming processes vary and there probably are as many of them as there are members of the community. Yet, new technologies have made writing look like action-painting. Rough ideas are

[54] Elsewhere, I have elaborated on other transformations of the thought-forming processes in our epistemic community as a result of new technologies: 'Debating – and the culture of the critique that comes along with it – are now an integral part of the activity of being an international legal scholar. Debate has become an essential component of the production of legal thoughts. Ideas are no longer mulled over for years in an – often dusty and messy – isolated study and kept secret until the day of their solemn revelation through publication in a top-tiered international-law journal. While still being the product of a long individual cerebral effort, ideas are now shared, tested and further refined through peer-to-peer experimentation at an earlier stage of the scholarly thought-making process . . . [L]egal scholars of the 21st century have grown more faithful in the Socratic virtues of the exchange of ideas which they now see as instrumental in the mutual development and sharpening of legal thinking as a whole . . . [T]hanks to the new means of transfer of knowledge, scholarly debates have simultaneously undergone a process of deformalization. Lack of seniority no longer bars access to the experts' debate and the implicit hierarchies of the profession have ceased to constitute compelling barriers to the expression of disagreement. Legal blogging has been both the cause and the consequence of these fundamental changes in the debating culture – and the thought-making process – of the international legal scholarship of the 21st century'; see d'Aspremont, *supra* note 5.

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thrown on the screen before being subjected to several stages of refinement. Scholars will begin by spewing their ideas on the drawing board before knocking off the large portions of unwanted words. In this pitching operation, words will be eliminated. Those portions of words that are eliminated constitute the testing ground where the refined idea took shape. A large portion of words used by international legal scholars are simply testing materials meant to be subsequently refined by their scholarly mallet in a 'roughing-out' process. It remains that not all the words that were specifically thrown on the screen as building materials are eliminated at by the 'roughing-out' process, thereby continuing to infuse the texts that are finally transformed in portable document format. It can thus be said that, as a result of new technologies, texts about international law bear much more manifestly than before the imprints of the earlier stages of scholars' thought-forming processes.

3.7. Wording and scholarly self-gratification

International legal scholars are fetishist. They worship their own textual production. This is inherent in the action of producing and publishing. It is difficult to imagine a scholar publishing a text that he or she would be appalled by. Sometimes, under the strain of insane deadlines because of recurrent and imprudent over-commitment, international legal scholars happen to submit scholarly pieces that they are not entirely satisfied with and that they could not, because of lack of time or lack of passion, sharpen and deepen sufficiently. Yet, it seems that pride is a constitutive element of pushing an idea out in the argumentative arena. It is not only until the words and the articulation thereof generate a feeling of satisfaction that international legal scholars venture to float them in the argumentative arena. International legal scholars would hardly publish and let disseminate their textual creation if they did not feel any satisfaction with the words they have couched on their screen and the (purported lack of) semantics they produce. Words are thus often self-gratifying. They redeem international legal scholars with a self-constructed satisfaction without which they would not feel sufficiently self-confident to step into the argumentative fray.

3.8. Wording and the magnifying of erudition

Sharing some kinship with the wording for self-gratifying purposes, the techniques geared towards the promotion of erudition are rife in the literature about international law. Indeed, through words, international legal scholars can easily display their knowledge about areas that are unrelated to international law. Indeed, words and idioms help them convey the impression of general as well as specific knowledge on disciplines or culture alien to (international) law. Preferred areas of knowledge about which (international) legal scholars relish manifesting erudition are of all kinds. They include humanities, and social and hard sciences.[55] They also include references to the names of scholars unknown to the discipline – which will often

[55] It cannot be excluded that the very short detour through the philosophy of language attempted in section 1 will be perceived by the reader as manifesting a similar endeavour.

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be accompanied by citations taken out of context and artfully rebranded to provide authority to an argument about naming in international law. Using words of a language foreign to that in which the scholarly work is written is similarly a common erudition-enhancing technique, Latin or French often being the languages *à la mode*. Such promoting techniques are popular because of their efficiency. Just one word or idiom suffices to impart a feeling of great erudition. Actually, the more alien or technical the word is, the more erudite the author thinks he or she will sound. The use of such a technique is often accompanied by the above-mentioned care for the aesthetics of the text and the self-gratifying attitude described earlier. By the same token, such a practice is often instrumental to the intimidating tactics that are discussed below.

3.9. Wording and the making of fame and careers

In the competition for naming unfolding in international legal scholarship, there is no more comfortable a position than being recognized as having coined a given word or idiom. Indeed, being in a position to claim ownership of a particular word or idiom naturally provides extra authority in the argumentative struggle that inevitably ensues over the semantic of that word and idiom. Fighting for the semantics of existing concepts is far more strenuous and arduous than defending one's textual invention. It goes without saying that coining a new buzzword may take various forms. It may be the creation of a catchy neologism. It may be the use of a particular semantics. It can amount to unearthing a word or idiom in ancient texts of the discipline. Or it can boil down to borrowing words and idioms in sister disciplines and importing them into the argumentative arena of international law. Because of the tactical advantage that such paternity provides, the coining of new words or idioms often constitutes a passport to the hall of fame, usually ensuring greater prospects of career promotion. Unsurprisingly, this fame-enhancing effect of a magic formula has led international legal scholars to be extremely creative. Everyone ventures new words or idioms every now and then, with the hope that they will be picked up by peers. As a result, the literature is continuously imbued with new neologisms and idioms.[56] Needless to say, most such endeavours falter. It is noteworthy that international legal scholars are not the only group of the interpretative community of international law to perform such linguistic experiments – so do international judges, whose linguistic creativity probably has a higher chance of success given the visibility and authority traditionally attached to their functions.[57]

[56] The use of wordfare in the present contribution could be perceived as being informed by such tactics. Indeed, although Google yields some occurances of the idiom – especially with respect to videogames – the expression does not seem to be commonplace in the literature about international law.

[57] See the classical examples of praetor-created idioms of '*erga omnes* obligations' or 'countermeasures', which were immediately picked up by the international community.

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3.10. Wording and scholarly intimidating tactics

In a crammed and teeming argumentative arena of international law,[58] keeping other participants at a distance and preserving one's breathing space have turned existential. In this struggle for breathing space, semantic intimidation has proved a convenient and efficacious tool. Indeed, words – especially those that one borrows from other fields and which may be unknown to peers – can be used as the heavy artillery that one causes to appear on adversaries' radar to intimidate them. Such a practice is grounded in the belief that argumentative adversaries will accordingly be deterred from directly engaging with one's argument – which can, in turn, create some comforting distance. Interestingly, there is even a tendency to cling to such heavy artillery when the argumentative turbulences are particularly violent. In that sense, the more unchartered the water of the debate, the greater the temptation to make use of such intimidating means. Such a wording can manifest itself in various ways. Like many other of the above-mentioned tactics, it can take the form of a transplant of words and idioms from social or hard sciences that are often unfathomable to peers.

There is no doubt that the above-mentioned account of the wording in contemporary legal scholarship points to mundane phenomena. And, to some extent, these observations can themselves be seen as an embodiment of some of the semantic practices depicted above. This said, while I certainly resort to such semantic weaponry myself, there is only one of them that I came to despise. I do not conceal that, over the years, in my capacity both as consumer of legal scholarship and as editor-in-chief of a peer-reviewed journal that selects and helps disseminate scholarship, I have grown quite resentful of intimidating tactics in the practice of wording. Indeed, too often, such artillery constitutes a makeshift – and rather 'cheap' – shroud quickly thrown on half-baked ideas. Such tactics also come at the expense of the depth of scholarly debates and exchanges. First, they alienate a part of the community that – because these scholars are either intimidated or simply not willing to bother translating these linguistic artefacts – shies away from engaging with arguments when they are formulated in these terms. Second, such tactics obfuscate the surface where thoughts and arguments can be traded and discussed. As I have said earlier, it is undisputed that the linguistic sharpness and nuances are very conducive to the refinements of legal concepts themselves. Yet, linguistic intimidation bears the exact opposite effect. I am of the opinion that such tactics lead to an impoverishment of the exchanges within the community of international legal scholars and are extremely detrimental to the intelligibility as well as the quality of scholarly debates. This is why I construe the detection of such intimidating tactics as being among the main responsibilities of any editor of a journal like the *Leiden Journal of International Law*.

[58] On this aspect, see section 2, *supra*.

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4. WORDING AND THE ABIDING (NEED FOR) PARADIGMATIC REVOLUTION IN INTERNATIONAL LAW

As has been explained above, following the realization of the death of foundationalism and in the absence of a supreme source of authoritative interpretation, the meaning of texts has been condemned to be in constant fluctuation. Ever since, the whole community of international legal scholars has built itself around such fluctuating semantics. The way in which the international community of scholars has organized itself has informed the contemporary practice of wording and explains some of the uses of words depicted above. This section intends to push the argument a bit further. It submits that, against the backdrop of these constant semantic fluctuations, pacific agnosticism is not possible because competing for naming comes with a recognitory dimension. Indeed, failing to impose one's words comes with the risk of perishing and falling into the oblivion of an ever-rejuvenating epistemic community – a dramatic fate that only past credentials, accumulated prestige, affiliation, or official function could help to avert. On the contrary, imposing naming generates recognition by those who have come to accept that naming, and correlatively manifests successful empowerment as an authoritative interpreter.[59] Members of the community of international legal scholars, constantly confronted with the plight of non-remembrance, are – consciously or unconsciously – driven in this quest to empower themselves – albeit very temporarily – as authorized interpreters. As a result, there is little room for pacific agnosticism in the struggle for naming.

It is argued here that such a finding holds for all strands of international legal scholarship. It is true that the fraction of international legal scholars who believe in the ability of international legal scholarship to serve justice and progress[60] might be less inclined to acknowledge this self-serving force behind their quest for expanding and reforming international law through scholarly interpretation.[61] Yet, even in the case of reformist idealist scholarship,[62] the self-serving drive of securing persuasiveness and semantic authority cannot be completely downplayed, for the belief that one is making a useful contribution to the advancement of humanity is never entirely recognition-free.

It must be noted that the recognition that scholars generally seek to secure is peer recognition. International legal scholars are traditionally not interested in recognition by the general public – which often is simply out of reach despite the possible penetration of international law in political discourse.[63] They may at times

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59 Bourdieu, *supra* note 23, at 837 ('Each, with its own individual authority, seeks general recognition and thereby its own self-realization').

60 On the idea of progress, see T. Skouteris, *The Notion of Progress in International Law Discourse* (2008), Chapter 3, later published as *The Notion of Progress in International Law Discourse* (2010).

61 On the various dimensions of this enthusiasm for the international, see D. Kennedy, 'A New World Order: Yesterday, Today and Tomorrow', (1994) 4 *Transnational Legal and Contemporary Problems* 329, at 336; see also S. Marks, *The Riddle of All Constitutions* (2003), 146.

62 These scholars have been dubbed 'the idealists' by F. Megret; see F. Megret, 'International Law as Law', in J. Crawford and M. Koskenniemi (eds.), *Cambridge Companion to International Law* (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672824, at 8–9.

63 See, e.g., P. Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005).

be seeking the recognition they could earn from international courts and tribunals in the form of an endorsement of an argument, an explicit or vague reference to one's work in a judgment. Yet, because the community of international legal scholars outsized the amount of adjudicatory practice from which they could hope to gain recognition, recognition by law-applying bodies remains a limited possibility. This is why, in sharp contrast to domestic legal scholars,[64] recognition by courts is a limited drive in the profession that has primarily remained geared towards peer recognition.

The foregoing is undoubtedly overgeneralizing and simplistic, as the place and role of peer recognition among international scholars can fluctuate on the basis of a wide variety of parameters, like geographical demarcation lines, varying egos, changing need for distinct identity, local institutional culture, university salaries, self-confidence of authors, etc.[65] Salaries earned from lucrative side activities may also assuage the quest for recognition. Likewise, their craving for recognition may sometimes be alleviated by the recognition they have eared in their local constituencies by the exercising of local and faculty management responsibilities. Albeit insufficiently nuanced, the above consideration of the role of recognition suffices to demonstrate the impossibility of an agnostic pacifism in the competition for naming in the community of international legal scholars. Indeed, because the wordfare in international legal scholarship is a competition for recognition, it makes the need for paradigmatic revolution permanent.[66] The struggle for naming boils down to a permanent quest for renewal that can never be interrupted.

It must be acknowledged that this structural impossibility of interpretative peace is occasionally mitigated. First, there are geographical variations in the need for permanent revolution. For instance, paradigmatic revolution is a more structural dynamic in US legal scholarship than in European legal scholarship, which could be seen as more stable. In Europe, it is even fair to say that paradigmatic revolutions have been looked at dimly. Young peers are judged by the eldest on the basis of their ability to reproduce the paradigms in force and not on their capacity to devise a new framework for naming. Although it is more conservative and more resistant to paradigmatic change, in the European tradition, because it remains driven by the quest for recognition, innovative research constitutes the primary yardstick of evaluation. Rather than in the form of a new methodology or a new paradigm, innovative research in Europe is most often determined by the novelty of the subject itself or that of the practice or dynamics on which one seeks to shed light. All in all, and whatever the differences between schools and traditions, continuous paradigmatic

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64 M. Hesselink, *supra* note 26, at 14.

65 In the specific case of the community of international legal scholars, it is worth noting that, because international legal scholarship is most of the time produced in the offices of publicly funded institutions and depends on public resources, salaries, as a matter of fact, can never buy frustrated egos. Unless one can complement one's scholarly activities by some lucrative counselling or arbitration, recognition is bound to remain the main driving force in the competition for naming.

66 See F. Ost and M. van de Kerchove, 'De la scène au balcon: D'où vient la science du droit?', in F. Chazel and J. Commaille (eds.), *Normes juridiques et régulation sociale* (1991), 68; S. Santos, *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (1995); see also Hesselink, *supra* note 26, at 20.

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change is an inherent feature of the epistemic community of international legal scholars, thereby barring any possibility of an interpretative peace.

Second, the role of formal hierarchies and divisions of tasks can sometimes temper the permanent paradigmatic change. Indeed, interpretative truce is sometimes possible if the social field is locked by (and organized along the lines of) formal hierarchies between participants that preclude one lower-ranked scholar challenging a higher-ranked colleague. In that sense, the institutional and social organization of the power for naming may dictate peace. However, it must be recognized that the pacifying role of formal hierarchies is dwindling in the contemporary community of international legal scholars. Indeed, as this epistemic community has grown more internationalized and careers, subject to a few notable exceptions, have turned less dependent on the politics of domestic constituencies, domestic pacifying incentives have evaporated, thereby making interpretative truce even more unlikely.

Among the conflict-perpetuating parameters, internationalization thus plays a great role. But it certainly is not the only one. Other aggravating factors also include the – already-mentioned[67] – growing size of the community of international legal scholars. Certainly, chances of an interpretative truce were, of course, greater when the community was restricted to a close circle of diplomats and private international lawyers who had recycled themselves in publicists.[68] In light of the foregoing, there is no reasonable prospect of international legal scholars' yielding to some 'battle fatigue' and reaching an interpretative peace. As a result, the branch of the interpretative community of international law constituted of scholars is doomed to remain divided. And, as this community grows,[69] so does the divide between its factions and the ferocity of the competition for naming unfolding between them.

Sometimes, international legal scholars bemoan the effects of such a structural inevitability of the interpretative competition within the profession of international law.[70] I do not believe that such a state of affairs ought to be deplored. It is simply a fact of life inherent in a community that has organized itself around fluctuating semantics. This is, however, not the point with which this section ought to end. In my view, it is more important to highlight at this stage that the primary wordfare agency remains international legal scholars themselves. I believe that international legal scholars, while adversaries on the surface, are accomplices in the perpetuation of wordfare.[71] It is not unreasonable to say that international legal scholars, driven by their unquenchable thirst for recognition and their fear of non-remembrance, are accordingly embroiled in a process of circular reinforcement of the competition for naming.[72] And there is simply no reasonable prospect that such complicity in

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67 Cf. section 2, *supra*.

68 For some interesting insights about what international legal scholarship looked like at the beginning of the twentieth century through the lens of the international judiciary, see O. Spiermann, *International Legal Argument in the Permanent Court of International Justice* (2005); see, more generally, Koskenniemi, *supra* note 2, at 39 ff.

69 Cf. section 2, *supra*.

70 A. Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method', (2009) 22 LJIL 665.

71 Bourdieu, *supra* note 23, at 823.

72 Ibid., at 836.

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the fomenting of the competition for naming will someday be counterbalanced by pacifying social forces.

5. Concluding remarks: battling for naming under a shared social identity

The ambition of the observations formulated here has been modest, as they only sought to show and illustrate how the wording of international legal scholars is, as much as the substance of their argument, informed by the dynamics of the competition for naming besetting international legal scholarship. Section 1 started by recalling the elementary finding that the production of knowledge is the result of a competition for naming determined by power relations between professionals. In that social process, international legal scholars compete for the persuasiveness of their argument, not only through substantive engagement, but also through wording.[73] It was highlighted on that occasion that this finding does not elevate persuasiveness and semantic authority into the determinant of legality, nor does it lead to a total rejection of the internal point of view. It more simply meant that securing persuasiveness and semantic authority also hinges on how words are received by other members of the community whose contours were discussed in section 2. It was then specifically shown how the wording of international legal scholars is informed by the general competition for naming taking place in their epistemic community. These specific uses were discussed in section 3. This has sufficed to demonstrate the extent to which the words of international law are the expression of a social process that is, as discussed in section 4, self-generating and whose intensity grows unabated as the epistemic community continues to expand.

A final remark must now be formulated. It pertains to the preservation of a social identity without which international legal scholars cannot form a proper branch of the interpretative community of international law. The competition for naming is a struggle through words. Words constitute the semantic weaponry with which adversity among international legal scholars manifests itself. Words are the conveyers of arguments through which international legal scholars seek to secure epistemic authority. Yet, at the same time, it should be realized that words are also the conveyer of the social identity of the belligerents. Indeed, it is argued here that, without a common social identity, international legal scholars cannot belong to a common interpretative community at all. If we understand an interpretative community as a group of individuals who share at least a way of organizing experience and stipulations of relevance and irrelevance,[74] the existence of an interpretative (sub-)community of international law presupposes a quest for a common vocabulary among all its members. Only the search for common vocabulary – which boils down to a quest for social identity – allows the existence of a communicative platform where the interpretative community can develop itself. When striving for a common vocabulary, scholars, in the competition for naming, constantly reach

[73] Ibid., at 827.
[74] Fish, *Doing What Comes Naturally*, *supra* note 3, at 141.

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out to one another and allow the emergence of a communicative platform. Short of such a quest for a vocabulary, international legal scholars cannot constitute a branch of the interpretative community of international law and are bound to fight past another. Certainly, the shared vocabulary – like any social identity – is bound to be ever-changing and constantly fluctuating. Such a common vocabulary can never be ascertained and will always constitute a horizon that members of the community strive for. But it is this striving that creates the communicative platform necessary for the subsistence of that branch of the interpretative community of international law.

Deciphering and unravelling the abiding – but ever-changing – quest for common vocabulary at the heart of the community of international legal scholars constitutes what I construe as the main responsibility of an international legal theory that seeks to be more than a mere recreational playground. This is where the contribution of those scholars who dedicate their cerebral effort to the cognition of law rather than the cognition of rules themselves[75] can prove particularly crucial. In different terms, what I see as the essence of international legal theory is the search for possibilities of a common vocabulary in which the interpretative community of international law can potentially be rooted.

I have advocated elsewhere that the common vocabulary determinative of the interpretative community of international law necessitates a theory of sources. Such a theory of sources, as I argued, ought to radically depart from the static pedigree-determining blueprints found in the mainstream literature and be shaped as a dynamic model of rule ascertainment grounded in an ever-evolving social practice.[76] Unsurprisingly, there is disagreement with such a contention, for some people contend that either the current theory of sources suffices or that such a common vocabulary needs to be sought elsewhere.[77] This certainly is not a debate that I need to take on here, as this question is irrelevant to the point made here. More than the determination of the ultimate common vocabulary of the interpretative community of international law, it is the *possibility* of such a quest for a social identity that is determinative of the interpretative community of international law. As said, striving for such a vocabulary is foundational of the social identity without which there cannot be an interpretative community of international law properly so called. This means that, in my view, the continued existence of an interpretative community of international law necessitates a consensus about the need to continue looking for a social identity. In other words, for the argumentative arena to avoid being a cacophonic hen house, scholars need to come to an agreement on the necessity to preserve the linguistic consensus at the heart of their interpretative community.

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75 See the famous distinction drawn by Salmond between those seeking to study what the law is and those pursuing the study of what is law; J. W. Salmond, *First Principles of Jurisprudence* (1893), 1.

76 d'Aspremont, *supra* note 32.

77 For a snapshot of contemporary theories that advocate a move away from a formal model of sources, see J. d'Aspremont, 'The Politics of Deformalization in International Law', (2011) 3 *Goettingen Journal of International Law* 503; see also N. Onuf, 'Law-Making in the Global Community', reproduced in N. Onuf, *International Legal Theory, Essays and Engagements (1966–2006)* (2008), 63 (arguing that what we need is not a language of sources, but a theory of law-making; a language of sources is a standardization and an artefact created by international lawyers to justify the existence of the international legal order, itself a creation of lawyers).

Too often, however, contemporary literature shows that international legal scholars, enmeshed in their self-promoting fight for semantic authority and persuasiveness, are oblivious to such an elementary prerequisite. The growing absence of feeling of membership in an interpretative community and, above all, the shrinking perception of the need to preserve a social identity through common vocabulary put into question the extent to which the community of scholars devoting their thinking to international law constitutes an interpretative community. In light of the current limited care for the preservation of the social identity of the community, and despite some constructions of convenience that may contribute to perpetuating the feeling of membership in an interpretative community,[78] one may even wonder whether the competition for naming that has been described here is a proper competition in the first place. The dissonance that we regularly hear in the argumentative arena of international law can sometimes raise the question of whether international legal scholarship boils down to a recreational pastime between intellectuals who, subject to their common interest in recreational activities, do not share much social identity.

In my view, the necessity to preserve the possibility of a common vocabulary is not only a question of preserving the possibility of an interpretative community of international law. As was just said, I believe that international legal scholars could well live without it and abide by a cacophonic argumentative arena. Yet, there is more behind this question. First, the challenge of preserving the consensus in the argumentative arena over the necessity to build the interpretative community of international law on a common communicative platform is also a matter of financial viability. Indeed, how could one ensure the sustainability of a profession that is so dependent on public funding and could never be financially self-standing and self-sufficient? More specifically, how can one convince – increasingly bankrupted, tepid, and stingy – governments to continue financing research in international law as long as international legal scholars are nothing more than the – sometimes arrogant – members of an expensive debating club in which everyone talks past one another?

But there is even more than the necessity of ensuring continuous public support for an epistemic community whose societal benefit is not always clear to governments and university authorities. The absence of common vocabulary by virtue of which a social identity can be shared and on which an interpretative community properly so called can be grounded inevitably raises a question of the cost-effectiveness of scholars' participation in the competition for naming and that of the scholarly engagement with international law. More specifically, the

[78] I believe that the widespread faith of international legal scholars in the systemic character of the international legal system boils down to the manifestation of a feeling of common ownership of international law as an object of study. By upgrading international law in a system, we do not only seek to make it more noble a topic to study, maybe worthy of what we consider to be a scientific study. Endowing international law with systemic virtues expresses a collective claim for monopolistic interpretative privileges by a community of professionals. In that sense, the systemic character of international law can be seen as reflecting the feeling of membership of international legal scholars in an interpretative community in the absence of any supreme interpretative authority in the field.

want of common vocabulary determinative of the interpretative community of international law inevitably creates some unease when it is weighed against the – often underestimated – societal and environmental cost of that specific human activity.[79] In that sense, preserving the possibility of the social identity foundational of an interpretative community properly so called is also a way to uphold an entire profession's self-esteem.

[79] As I have argued elsewhere, such charges are not limited to the compulsory levies upon taxpayers and also include huge environmental costs; see the foreword of d'Aspremont, *supra* note 32.

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