



## UvA-DARE (Digital Academic Repository)

### Is interpretation in international law a game?

Venzke, I.

**DOI**

[10.1093/acprof:oso/9780198725749.003.0017](https://doi.org/10.1093/acprof:oso/9780198725749.003.0017)

**Publication date**

2015

**Document Version**

Final published version

**Published in**

Interpretation in international law

[Link to publication](#)

**Citation for published version (APA):**

Venzke, I. (2015). Is interpretation in international law a game? In A. Bianchi, D. Peat, & M. Windsor (Eds.), *Interpretation in international law* (pp. 352-370). Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780198725749.003.0017>

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, P.O. Box 19185, 1000 GD Amsterdam, The Netherlands. You will be contacted as soon as possible.

# Is Interpretation in International Law a Game?

*Ingo Venzke\**

## Introduction

International lawyers of contrasting colours converge in thinking of international law as a language. The United Nations, in its 1995 Congress on Public International Law, already chose *International Law as a Language for International Relations* as its overarching theme.<sup>1</sup> Depending on their specific outlook, international lawyers perceive the language of international law as doing a whole range of things. It offers a steadfast vocabulary of progress and resistance, it brings opponents together through a pacifying grammar, or it provides a battleground on which to carry out conflicts. Some note with a sense of sober nonchalance that international law is nothing more than rhetoric. Others show an upbeat attitude against ages of realist critique, arguing that international law is a pervasive language after all.

The present chapter explores what it means to play with that language of international law. It takes the metaphor of the language of international law seriously and combines it with the analogy between interpretation and the playing of games.<sup>2</sup> This overall outlook resonates with images such as that drawn by Marc Weller, who notes that ‘to some, the practice of international law is akin to an exciting game of chess. Expert players, or litigators move the pieces on the board, seeking to convert tactical dominance into strategic victory in the case they argue’.<sup>3</sup> The chapter will discuss three common ways of using the metaphor of the language of international law. It highlights the linguistic assumptions nested in each usage, thereby elucidating precisely what it means to play the interpretative game from each perspective. It then draws attention to the limits connected to this analogy

\* Thanks to Valerio Priuli, Tim Staal, and Matthew Windsor for valuable comments and suggestions.

<sup>1</sup> United Nations, *International Law as a Language for International Relations* (Kluwer Law International 1996).

<sup>2</sup> See Chapter 1 (Daniel Peat and Matthew Windsor).

<sup>3</sup> Marc Weller, ‘Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?’ (2011) 24 LJIL 127, 127.

between interpretation in international law and the playing of games. Finally, it points out ways to overcome them.

First, the metaphor of the language of international law is used in the sense that it functions as a defence against the powerful for the benefit of the right and virtuous. It stands firm and unyielding against forces that corrupt. In just one instance of such a view, Dino Kritsiotis argues that '[t]he rhetoric and reality of might, power, force, and war are thus gradually being displaced by a new rhetoric—or, more accurately—a new language of law, principle, precedent, and procedure'.<sup>4</sup> The language of the law is at least sufficiently stable so as not to be easily corrupted. From a linguistic perspective, language relates to speaking like a background scheme relates to its execution (Part I).

A similar view is nested in a second approach, according to which the language of international law bridges troubled waters and allows conflicting sides to converse in a common idiom. Especially where issues are sensitive and divisive, international law offers, as Georg Nolte put it, 'a language in which states and other relevant actors exchange views on the specific problems of difficult cases'.<sup>5</sup> The idiom of international law brings opponents together in a pacifying grammar. To play the game of interpretation requires a competence or technique shared by other professionals that allows them to speak to one another when others have stopped speaking. On this account, professional competence decides what counts as a good performance in the game (Part II).

A third variation breaks with the first two approaches by rejecting a dualism between a background scheme, or grammar, and its execution. Instead, it emphasizes how participants in international legal discourse try to use and bend the rules of the game in a struggle for the law.<sup>6</sup> As Martti Koskenniemi observes, 'international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents'.<sup>7</sup> Here, the language of international law provides a battleground to carry out conflicts and interpretation involves a potential exercise of power (Part III(A)).

While the first two understandings portray language as providing the rules of the game and as clarifying which moves are possible and correct, the third opens up towards a view in which success in the interpretative game decides what the law is and how the game should be played. The nature of the game accordingly changes. The dualism between rules of the game and their performance, I will argue, should indeed be rejected. The focus should instead fall on the side of concrete performances and the forces that shape them (Part III(B)). The continuing challenge is to make sense of interpretation in international law without

<sup>4</sup> Dino Kritsiotis, 'The Power of International Law as Language' (1998) 34 Cal W L Rev 397, 409.

<sup>5</sup> Georg Nolte, 'Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer' (2013) 24 EJIL 283, 290.

<sup>6</sup> For such a view in further detail see Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 37–64.

<sup>7</sup> Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 Cam Rev Int'l Aff 197, 199.

(re-)introducing such a dualism (Part III(C)). It ultimately transpires that interpretation may in fact not be well understood by analogy to a game, not if that game is anything like chess. In law, as in language, we make up the rules ‘as we go along’.<sup>8</sup>

I argue that the continuing challenge may be met by understanding interpretation as a practice that is stabilized by tradition (Part IV). A powerful and radical alternative, finally, is to suggest that there is no language to play with. Interpretation, on this account, is not viewed as participating in the linguistic practice of international law at all. Such a view instead allows for a better appreciation of the interpreter and draws out what she takes to be true in international law (Part V).

By investigating these ways of understanding international law as a language and interpretation as a game, I pursue three aims. First and foremost, my inquiry aspires to contribute to a better view of the practice of interpretation. Second, I will critically discuss the different ideas about the relationship between language and interpretation. How much water do they hold? This comes, finally, with programmatic ambitions of informing views of interpretation in international law more thoroughly with theories of language. The aim is to irritate and to possibly provoke adjustments in our conceptions of interpretation. Put simply, I want to see what traction the analogy between interpretation and playing games has and to thereby contribute to mapping the game of game-playing.<sup>9</sup> I will place my bets on the third approach, which presents the language of international law as a battleground and interpretation as a struggle for the law. To make good sense of that approach, interpretation should either be seen as a practice that shapes the rules of the game or, alternatively, it should be seen as an attempt at better understanding what the interpreter takes to be true in international law. The choice between the latter two views depends on strategy and the specific interests of inquiry.

## I. Like a Game of Chess

In the words of former UN Secretary-General Boutros Boutros-Ghali, ‘next to the society of states, there is an international scientific community that desires to establish law as a language of international relations’.<sup>10</sup> The UN supports such desires, as Rosalyn Higgins explained, in order ‘to promote a common language of international law among the peoples of the United Nations and a universal culture shared by all nations that is conducive to peace, justice, and the rule of law’.<sup>11</sup>

<sup>8</sup> Ludwig Wittgenstein, *Philosophical Investigations* (Basil Blackwell 1958) [83]; see also Donald Davidson, ‘Communication and Convention (1982)’ in *Truth, Language and History* (Clarendon Press 2005) 265, 267–8.

<sup>9</sup> See Chapter 2 (Andrea Bianchi).

<sup>10</sup> Boutros Boutros-Ghali, ‘Foreword’ in United Nations, *International Law as a Language for International Relations*, xiv.

<sup>11</sup> Rosalyn Higgins, ‘Teaching and Practicing International Law in a Global Environment: Toward a Common Language of International Law’ (2010) 104 ASIL Proceedings 196, 200.

The language of international law offers a vocabulary of virtue. Playing the game of interpretation puts it to use.

Further examples in this vein abound. For Dino Kritsiotis, international law provides 'a new communicative medium which professes to be: more peaceful in its outlook... [and] more secure in terms of the answers and solutions it provides'.<sup>12</sup> It would be easy to belittle this view as rosy naivety; it would be unfair as well. Arguments that law is as much an expression of power as its antidote prompt Kritsiotis to ask: 'Is international law a meaningful and real counter-language to power, or are its credentials skin-deep and ephemeral?'<sup>13</sup> His answer first reverts to well-known accounts of power politics in which the language of the law prevailed.<sup>14</sup> But whatever the critique, the language of international law is pervasive and that bodes well. According to Kritsiotis, we should not be 'distract[ed] from the increasing influence that international law has as a language for inter-state and even intra-state intercourse'.<sup>15</sup> On balance, that language functions as a bulwark against power.

This view of the language of international law boils down to the postulation of a language that instructs and supports its speakers. Interpretations tap into the resources that the language of international law provides for its speakers in order to fight the rival language of power and to aim at peace, justice, and the rule of law. Interpretations are structured and supported by the language they use.

This view of the practice of legal interpretation finds support in the classic work of Ferdinand de Saussure, who famously distinguished between a language (*langue*) and speaking (*parole*).<sup>16</sup> The former orders the latter. Saussure influentially paved the way for modern linguistics by developing a theory of language that overcame modes of thinking which tied language all too closely to the world. Previously, the meaning of words in one way or another was linked to what they represented in reality. Through its representation of reality, language was thought to gain stability.<sup>17</sup> Saussure freed himself from this spell. On his approach, the meaning of 'combatant', for instance, is not stable because it represents a combatant. Instead it gains its meaning through its distinction from other expressions such as 'civilian'. Saussure's core proposition was that '[l]anguage is a system of signs'.<sup>18</sup> Such a system is markedly different from any act of speaking. The two are

<sup>12</sup> Kritsiotis, 'The Power of International Law as Language', 398. See also Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (2001) 281 *Recueil des Cours* 13, 28.

<sup>13</sup> Kritsiotis, 'The Power of International Law as Language', 400.

<sup>14</sup> Kritsiotis, 'The Power of International Law as Language', 400–1 with reference to Abram Chayes, *The Cuban Missile Crisis* (OUP 1974) 13–14.

<sup>15</sup> Kritsiotis, 'The Power of International Law as Language', 401.

<sup>16</sup> Ferdinand de Saussure, *Course in General Linguistics* (Philosophical Library 1965) 13.

<sup>17</sup> Foucault bitingly described how this way of thinking has endured in the human sciences: Michel Foucault, *The Order of Things: An Archeology of the Human Sciences* (Random House 1994) 57–63.

<sup>18</sup> Saussure, *Course in General Linguistics*, 16. I am leaving aside the strand of critique that focuses on the relationship between signs and sounds in Saussure's work: see Jacques Derrida, *Of Grammatology* (Johns Hopkins University Press 1997) 30–44.

related, but ‘their interdependence does not prevent their being two absolutely distinct things’.<sup>19</sup> On this account, language orders the facts of speech and constitutes ‘the norm of all other manifestations of speech’.<sup>20</sup>

Saussure offers an illustrative and evocative comparison in this regard. ‘[O]f all comparisons that might be imagined’, he writes, ‘the most fruitful is the one that might be drawn between the functioning of language and a game of chess... A game of chess is like an artificial form of what language presents in a natural form’.<sup>21</sup> Certainly each move on the chessboard changes the state of the game and it affects later moves. But it does not affect the rules of the game. For present purposes, this would mean that speaking the language of international law does not change the law. Language not only exists independently of its operation, but it also forms the basis for deciding which operations are correct, and which are mistakes. Accordingly, the language of international law is something like a sweet symphony in which interpreters play by the score and the score ensures that every individual interpretation contributes to something beautiful in the broader scheme of things.<sup>22</sup> Mistakes are not only easy to hear, at least to the trained ear. They also leave the score unblemished.

## II. The Grammar of the Game

A second and related way of thinking about the language of international law does not imply a similar degree of faith in the virtues of a given vocabulary. Yet it sees certain benefits in using its grammar. If not a bulwark against power, the language of international law nonetheless builds bridges. Participants in contentious political disputes speak the language of law if, or especially when, waters are rough. One commentator argues that:

[t]he desire to test the objectivity of international law vis-à-vis the alleged subjectivity of politics obscures the most universal claim that international law makes—that of a constructive, problem-solving communicative device for the speech community of diplomats.<sup>23</sup>

For example, James Crawford notes that the discourse on the divisive issue of Palestinian statehood does not give up the pretence of the legal game itself. Instead, ‘the obstinate fact remains that the actors, most of the time, continue to

<sup>19</sup> Derrida, *Of Grammatology*, 19. For a discussion of the reasons that might have driven Saussure to such a view, see Sybille Krämer, *Sprache, Sprechakt, Kommunikation* (Suhrkamp 2001) 22.

<sup>20</sup> Saussure, *Course in General Linguistics*, 9.

<sup>21</sup> Saussure, *Course in General Linguistics*, 88.

<sup>22</sup> The comparison with a symphony, too, stems from Saussure’s treatise. He asserts that ‘what the symphony actually is stands completely apart from how it is performed; the mistakes that musicians make in playing the symphony do not compromise this fact’: Saussure, *Course in General Linguistics*, 18.

<sup>23</sup> Jared Wessel, ‘International Law as Language—Towards a “Neo” New Haven School’ (2010) 23 IJSL 123, 123–4.

use the language of law in making and assessing claims'.<sup>24</sup> This game is meaningful because it provides the participants with yardsticks for critique. For Crawford:

International law scholars are not like critics in an empty theatre... [the fact that] the language of law is used implies that these claims can be assessed, on the basis of values which extend beyond allegiance to a particular party, country, bloc or religion.<sup>25</sup>

In this vein, Ian Johnstone has traced the prevailing legal discourse in Security Council deliberations, concluding that 'international law is at once the language of international society and an important determinant of who has a voice'.<sup>26</sup> While it excludes those who do not know its technique or lack access to venues of authoritative discourse, it also brings actors together. Johnstone notes that 'the specialized discourse of international law provides an additional layer of cohesiveness', and that 'governmental, inter-governmental, and nongovernmental actors... speak the language of law'.<sup>27</sup> The game is characterized by a distinct grammar. It isolates the speaker from other contexts and reconstitutes her as a player in a different game. Oscar Schachter embraced this idea when he pointed to lawyers' capacity to speak to one another while other disciplines are divided through specializations.<sup>28</sup>

Much international legal scholarship has converged on the view that international law is, above all, a technique—a technique that allows for meaningful engagement with one another as lawyers and a technique that constitutes law as a distinct discipline. It is this idea of potentially unifying rules of the game that partly underpins the recent calls to defend a 'culture of formalism' and to safeguard international law's autonomy against the intrusion of other language games of morality and politics.<sup>29</sup> The common grammar can unite a variety of actors with different roles and different world-views.<sup>30</sup> What interpreters do as they speak the language of international law is to employ their technical competence and demonstrate their craft as legal professionals. What accounts for their competence?

Noam Chomsky might have an answer when he suggests that language is indeed best studied as a competence. It is easiest to unfold his argument against

<sup>24</sup> James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' (1990) 1 EJIL 307, 307.

<sup>25</sup> Crawford, 'The Creation of the State of Palestine', 307.

<sup>26</sup> Ian Johnstone, 'The Power of Interpretive Communities' in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (CUP 2005) 185, 192.

<sup>27</sup> Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (OUP 2011) 181.

<sup>28</sup> Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72 North U L Rev 217, 222. See also James Crawford, 'International Law as Discipline and Profession' (2012) ASIL Proceedings 471, 480.

<sup>29</sup> See Martti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2001) 494; Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 MLR 1; Jan Klabbers, 'The Relative Autonomy of International Law or The Forgotten Politics of Interdisciplinarity' (2004) 1 JILIR 35; Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP 2010) 271.

<sup>30</sup> Such actors may even be different national courts. See Francesco Francioni, 'International Law as a Common Language for National Courts' (2001) 36 Tex Int'l L J 587.

the backdrop of an apparent puzzle: children learn the correct use of a language in spite of the fact that the input to which they are exposed mostly consists of grammatically truncated sentences ('poverty of stimulus').<sup>31</sup> Moreover, the input certainly falls short of the unlimited possibilities for using any language:

A record of natural speech will show numerous false starts, deviations from rules, changes of plan in mid-course, and so on. The problem for the linguist, as well as for the child learning the language, is to determine from the data of performance the underlying system of rules that has been mastered by the speaker-hearer and that he puts to use in actual performance.<sup>32</sup>

The poverty of stimulus prompts Chomsky and others to argue that language is really best explained in terms of the innate competence of every speaker. This innate competence enables speakers who are faced with the mixed record of actual performance to identify grammatically correct uses of language. Martti Koskenniemi likewise noted that '[a] grammar is not a description of what native language-speakers say in fact—it is an account of *what it is possible to say* in that language'.<sup>33</sup>

Chomsky argues that it is not feasible to approach language through observation of what speakers actually say or through studying language as a system of signs, as Saussure would have it.<sup>34</sup> Deep structures (language/competence) cannot be identified by looking at surface structures (speaking/performance), he notes, simply because there are an infinite set of potential deep structures that could explain any act of speaking.<sup>35</sup> The choice between different possible deep structures thus requires intuition. Speakers of native language(s) have a feeling for what is right even when they cannot articulate the grammatical rule.<sup>36</sup>

While Chomsky rejects Saussure's juxtaposition of language and speech, he introduces a new dichotomy between linguistic competence and actual performance. Echoing Saussure's comparison of speaking a language and playing a game of chess, Chomsky makes 'a fundamental distinction between competence (the speaker-hearer's knowledge of his language) and performance (the actual use of language in concrete situations)'.<sup>37</sup> Innate linguistic competence enables every speaker to separate the correct uses of a language from its deformations.<sup>38</sup> This theoretical distinction reminds us that performance does not feed back into what

<sup>31</sup> Noam Chomsky, *Language and Mind* (CUP 2006) xi.

<sup>32</sup> Noam Chomsky, *Aspects of the Theory of Syntax* (MIT Press 1965) 4.

<sup>33</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 589 (emphasis added).

<sup>34</sup> Chomsky, *Aspects of the Theory of Syntax*, 4.

<sup>35</sup> Chomsky, *Language and Mind*, 27; Noam Chomsky, *Topics in the Theory of Generative Grammar* (Mouton 1966) 17.

<sup>36</sup> Over time, Chomsky switched from speaking about *rules* that are followed to *parameters* and *principles*: *Language and Mind*, 23–4.

<sup>37</sup> Chomsky, *Aspects of the Theory of Syntax*, 4.

<sup>38</sup> One may even follow Chomsky and distinguish between internal and external languages, where the former offers the scheme against which to judge the latter: *Language and Mind*, 175; Neil Smith, 'Chomsky's Science of Language' in James McGilvray (ed), *The Cambridge Companion to Chomsky* (CUP 2005) 21, 35–6.

it means to speak a language correctly. It does not affect the rules of the game. In other words, the symphony's score remains unblemished by mistakes in its performance.

On this account, interpreters in the game of international law are tied together by a deep structure of syntactic rules and principles. This grammar draws the contours of what it means to speak the language of international law and what it means to speak it correctly. The language of international law is less a model against which specific interpretations could be termed right and wrong. Instead, knowing the grammar of the language allows an infinite variety of things to be said and done with that language. In this way, Chomsky differs from Saussure. The role of international law changes from constituting a bulwark against power to a shared competence that brings opponents together. But like Saussure, who privileged language over speaking, Chomsky regards linguistic competence as ordering actual performance. Transposed to the language of international law, it is this language that stabilizes interpretation.

### III. The Nature of the Game Reconsidered

#### A. The game as a struggle for the law

In a third approach the stabilizing ground of a given language is lost.<sup>39</sup> Instead, that language is shaped in the process of playing the game. With their interpretations, actors struggle for the law and thereby make the law. They try every trick in the book in order to pull the law onto their side. The emphasis here does not fall on a background language but on the act of speaking, less on competence and more on performance. This third approach to interpretation may be captured as a semantic struggle in which actors try to find acceptance for the claims they make about the law as they try to influence what is considered (il)legal.<sup>40</sup> The language of international law above all provides a battleground to carry out conflicts.

This understanding is well reflected in Jean Combacau's and Serge Sur's general treatise on international law, where they write lucidly that '[t]he controversies pertaining to interpretation would not be so animated were they not a translation of a struggle for the mastery of the legal system'.<sup>41</sup> The understanding is also reflected in Koskenniemi's aphorism that 'international law is what lawyers do and how they think'.<sup>42</sup> If actors want to play the game of international law, then

<sup>39</sup> A helpful early overview is offered by Deborah Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law' (1996) 65 *Nord J Int'l L* 341.

<sup>40</sup> I have sketched such a perspective of semantic struggles in the practice of legal interpretation in detail in Venzke, *How Interpretation Makes International Law*, 37–64.

<sup>41</sup> Jean Combacau and Sergio Sur, *Droit international public* (Montchrestien 2010) 172 (translation by the author).

<sup>42</sup> Martti Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in United Nations (ed), *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organisations and Practitioners in the Field of International Law* (United Nations 1999) 495, 523.

they need to compete on its terms. But these terms are incapable of telling us who is right and who is wrong. Such an essence remains elusive. Each interpretative claim remains particular and its aspiration to universality doomed to fall flat. According to Koskenniemi, if an interpretation of international law succeeds, it is hegemonic in the sense that it portrays as universal what is really particular.<sup>43</sup> In his view, '[t]he task for international lawyers is not to learn new managerial vocabularies but to use the language of international law to articulate the politics of critical universalism'.<sup>44</sup> International lawyers emulate Sisyphus in their quest for objectivity only to realize that it escapes them every time they think they have laid their hands on it.<sup>45</sup> Interpretation is a game without end.<sup>46</sup>

A number of studies have embraced a similar understanding of the language of international law to show its emancipatory potential as well as the factors that hold it back.<sup>47</sup> Others, with a bleaker outlook, have suggested that the language of international law offers little more than a lullaby that lures its speakers into mantras of objectivity and progress while catastrophes pile up.<sup>48</sup> Even worse, it could lift burdens of responsibility from the shoulders of those who should feel them heavily. David Kennedy notably argues that in war, the language of international law ultimately camouflages political decisions and stifles second thoughts.<sup>49</sup> In international criminal law, it has been argued that legal language might, above all, offer comfort for practitioners, academics, and politicians alike.<sup>50</sup>

Several things have happened to the game of interpretation in this variation of the theme when compared to the first two approaches. It seems that there is no longer a model that could offer guidance. With a shift in focus from competence to performance, the distinction between the law and its interpretation is questioned. The dualism between a linguistic model and its execution collapses.

<sup>43</sup> Koskenniemi, 'International Law and Hegemony'. See also Ingo Venzke, 'Legal Contestation about "Enemy Combatants": On the Exercise of Power in Legal Interpretation' (2009) 5 JILIR 155.

<sup>44</sup> Koskenniemi, *The Gentle Civiliser of Nations*, 1.

<sup>45</sup> Jochen von Bernstorff, 'Sisyphus was an International Lawyer: On Martti Koskenniemi's "From Apology to Utopia" and the Place of Law in International Politics' (2006) 7 German LJ 1015.

<sup>46</sup> See Anthony Carty, 'Language Games of International Law: Koskenniemi as the Discipline's Wittgenstein' (2012) 13 Melb J Int'l L 1.

<sup>47</sup> Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP 2005) 31; Arnulf Lorca, 'International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination' (2006) 47 HILJ 283; Michelle Burgis, 'Discourses of Division: Law, Politics and the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (2008) 7 Chinese JIL 33.

<sup>48</sup> David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 Harv Hum Rts J 101; David Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise' (2001) 5 EHRLR 463, 478; James Dawes, 'Language, Violence, and Human Rights Law' (1999) 11 Yale J L & Human 215.

<sup>49</sup> David Kennedy, *Of War and Law* (Princeton University Press 2006). See also Martti Koskenniemi, 'The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law' (2002) 65 MLR 159.

<sup>50</sup> Christine Schwöbel, 'The Comfort of International Criminal Law' (2013) 24 Law & Crit 169.

## B. Why reject the dualism?

The linguistic assumptions nested in attempts at making sense of the language of international law by analogy to a game of chess, where a move in the game leaves the rules unaffected (speech ordered by language), or where its stable grammar transcends geographical and professional boundaries (performance ordered by competence), have come under criticism from a variety of angles. Critics question the decision to privilege the model over its application, the abstract and idealized over the concrete and perceptible. For them, speech and performance should be the primary object of study. In other words, interpretation in international law should be the object of study in its own right, rather than the proxy of an underlying scheme of rules. Wittgenstein already suggested as much when he pushed the notion of language games into the limelight:

[I]n philosophy we often compare the use of words with games and calculi which have fixed rules... But if you say that our languages only approximate to such calculi you are standing on the very brink of a misunderstanding. For then it may look as if what we were talking about were an ideal language. As if our logic were, so to speak, a logic for a vacuum.<sup>51</sup>

Dell Hymes, in his contribution to the counter-current of sociolinguistics, thus described Chomsky's work as offering a 'garden of Eden view'.<sup>52</sup> For Hymes, the focus of study should really fall on the *sociocultural* features that permeate language acquisition and usage. It is not that the rules of the game remain unmoved by the practice of playing. Rather, they are the product of the game as it is played in specific situations. In order to capture context-specific differences, Hymes presents the notion of a *speech community*, which he defines as 'a community sharing rules for the conduct and interpretation of speech, and rules for the interpretation of at least one linguistic variety'.<sup>53</sup> The concept of *communicative* rather than *linguistic* competence reflects the shift from background language to surface communication.<sup>54</sup>

In international legal communication, the spotlight would fall on differences between ways of speaking in human rights and trade law, for instance.<sup>55</sup> They

<sup>51</sup> Wittgenstein, *Philosophical Investigations*, [81].

<sup>52</sup> Dell Hymes, 'On Communicative Competence' in JB Pride and Janet Holmes (eds), *Sociolinguistics* (Penguin 1979) 269, 272. For a more recent articulation of the critique, see Dell Hymes, 'Speech and Language: On the Origins and Foundations of Inequality among Speakers' in *Ethnography, Linguistics, Narrative Inequality: Toward and Understanding of Voice* (Taylor & Francis 1996) 25. See also Kanti Lal Das, *Philosophical Relevance of Language: A Methodological Reflection* (Northern Book Centre 2006) 207.

<sup>53</sup> Dell Hymes, 'Models of the Interaction of Language and Social Life' in John J Gumperz and Dell Hymes (eds), *Directions in Sociolinguistics: The Ethnography of Communication* (Wiley-Blackwell 1991) 35, 54. See also Dell Hymes, 'Speech and Language', 30–4.

<sup>54</sup> Dell Hymes, 'Two Types of Linguistic Relativity' in William Bright (ed), *Sociolinguistics* (Mouton 1966) 114.

<sup>55</sup> On those differences, see Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 LJIL 49; Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals' in Jeffrey Dunoff and Mark Pollock (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 445.

would not be brushed aside as variations of the same language.<sup>56</sup> From the angle of sociolinguistics, it could be seen how 'people act out the social structure, affirming their own statuses and roles and establishing and transmitting the shared systems of value and of knowledge'.<sup>57</sup> This would easily get lost if the analogy between the practice of interpretation and the playing of a game were to suggest a dualism between an ideal set of rules in the background, on the one hand, and acts of interpretation as their manifestation.

In a sweeping blow against idealizations aiming at objectivity, Pierre Bourdieu further adds to the critique of linguistics à la Saussure and Chomsky. His argument first supports the view of international law as a battlefield on which actors struggle for the law when he notes that '[t]he practical content of the law... is the product of a symbolic struggle between professionals possessing unequal technical skills and social influence'.<sup>58</sup> He decidedly rejects forms of objectivism that fall for:

the illusion of linguistic communism... the illusion that everyone participates in language as they enjoy sun, the air, or water... [But] access to legitimate language is quite unequal, and the theoretically universal competence liberally granted to all by linguists is in reality monopolised by some.<sup>59</sup>

In a broader methodological critique, Bourdieu argues that there is a profound problem with presenting language 'as an objective reality that exists independent of the individuals who live and act in that reality'.<sup>60</sup> It matters what speakers want to do with language, how they act with it, and what they practically can do with it. Bourdieu argues that abstracting from these contexts and constraints is a 'scholastic fallacy', with reference to the work of linguist John Austin.<sup>61</sup>

Austin himself presented two main arguments for rejecting the dualism between language and speech or between competence and performance.<sup>62</sup> The first one is crucial and programmatic: speaking is a creative activity. '[T]here can hardly be any longer a possibility of not seeing that stating is performing an act', he writes prominently.<sup>63</sup> Austin develops his argument with dramatic tension.

<sup>56</sup> For an account of how that can be done with good reasons in international law, see Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265.

<sup>57</sup> Michael Halliday, *Language as a Social Semiotic: The Social Interpretation of Language and Meaning* (University Park Press 1978) 2. See also Michael Halliday and Ruqaiya Hasan, *Language, Context, and Text: Aspects of Language in a Social-Semiotic Perspective* (OUP 1989) 16–24.

<sup>58</sup> Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings L J* 814, 827.

<sup>59</sup> Pierre Bourdieu and Loïc Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press 1992) 146.

<sup>60</sup> Bourdieu and Wacquant, *An Invitation to Reflexive Sociology*, 141.

<sup>61</sup> Bourdieu and Wacquant, *An Invitation to Reflexive Sociology*, 141. In further detail, see Pierre Bourdieu, 'The Scholastic Point of View' (1990) 5 *Cult Anthropol* 380.

<sup>62</sup> See Sybille Krämer, 'Sprache und Sprechen oder: Wie sinnvoll ist die Unterscheidung zwischen einem Schema und seinem Gebrauch?' in Sybille Krämer and Ekkehard König (eds), *Gibt es eine Sprache hinter dem Sprechen?* (Suhrkamp 2002) 265.

<sup>63</sup> John Austin, *How to Do Things with Words* (OUP 1979).

At the outset he suggests distinguishing *constative* from *performative* speech acts, where the former are of a descriptive nature such as ‘this is a combatant’ in the laws of war, and the latter do things with words, such as baptizing a child or christening a ship.<sup>64</sup> Then the inexorable conclusion slowly transpires. Any attempt at distinguishing constative and performative speech acts ultimately fails. All speech acts are performative. It is impossible not to interpret and to partake in the creation of the world and of the language in it.<sup>65</sup>

The second complementary reason for rejecting the dualism observes that not all speech acts succeed in performing what they want to achieve.<sup>66</sup> Clearly, not anybody can christen a ship in passing. Whether speech acts succeed is subject to a series of contextual constraints. The standard against which they need to be assessed, according to Austin, is not any background scheme that could identify them as true or false. They are measured by their success. By way of illustration, a statement such as ‘this is a combatant’ would fail not because there really was a civilian and not a combatant. Saussure already cut those ties between words and what they represent.<sup>67</sup> For Austin, social conventions and context are the only standard against which it is possible to say whether a speech act succeeds. Does social convention support that the person with army insignia and a rifle is called a combatant? The standard of success sits nowhere other than in the contextualized practice of speaking.

In sum, Austin argues that any distinction between constative and performative speech acts collapses and that speech acts cannot be assessed on any basis sitting behind or beyond the context of performance. Instead, the context of speaking and the conventions to which it gives rise offer the only test for the success of speech acts.<sup>68</sup> Austin, who was a contemporary of HLA Hart in Oxford, wrote with a sideswipe to lawyers: ‘[o]f all people, jurists should be best aware of the true sense of affairs... Yet they succumb to their own timorous fiction, that a statement of “the law” is a statement of fact.’<sup>69</sup> Quite to the contrary, a statement of the law contributes to the making of law.<sup>70</sup> Austin himself concludes:

We have discussed the performative utterance and its infelicities. That equips us, we may suppose, with two shining new tools to crack the crib of reality maybe. It also equips us—it always does—with two shining new skids under our metaphysical feet. The question is how we use them.<sup>71</sup>

<sup>64</sup> Austin, *How to Do Things with Words*, 140–1.

<sup>65</sup> Austin, *How to Do Things with Words*, 141.

<sup>66</sup> They can be ‘infelicitous’, as Austin would say: ‘Performative Utterances’ in *Philosophical Papers* (OUP 1961) 220, 235, 244.

<sup>67</sup> See Saussure, *Course in General Linguistics*, 13.

<sup>68</sup> On these three main conclusions from Austin’s work, see Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (University of Minnesota Press 1987) 78.

<sup>69</sup> Austin, *How to Do Things with Words*, 4.

<sup>70</sup> See also Niklas Luhmann, *Law as a Social System* (OUP 2004) 243.

<sup>71</sup> Austin, *Philosophical Papers*, 228.

### C. How interpretation is unlike playing a game

One way of using the 'shining new skids' further develops Austin's inchoate theory concerning the contextual conditions that account for the success of speech acts. When does a claim in the language of international law succeed? John Searle continues in Austin's tracks when he argues that the success of a speech act depends on whether it conforms to background conventions. What Searle purports to add is an exhaustive taxonomy of speech acts which are based on background conventions, ensuring that speakers can do the things with words that they want.<sup>72</sup> Background conventions tie speakers and hearers together and permit others to understand what the speaker means. Accordingly, Searle's main argument is that '[s]peaking a language is engaging in a (highly complex) rule-governed form of behaviour'.<sup>73</sup> Speaking is constituted by rules and would not be possible otherwise.

Like Saussure, Searle draws an analogy with chess. The rules for both language and chess are constitutive in the sense that they render the activity possible in the first place.<sup>74</sup> Background conventions are constitutive rules establishing that a sentence *x* counts as *y* in a given context *c*. This can be illustrated by a straightforward example from the language of international law. If the UN Security Council decides that a situation amounts to a threat or breach of international peace and security, then this opens up options under Chapter VII of the UN Charter. Searle supports his argument by suggesting that:

[t]he semantic structure of a language may be regarded as a conventional realisation of a series of sets of underlying constitutive rules, and that speech acts are acts characteristically performed by uttering expressions in accordance with these sets of constitutive rules.<sup>75</sup>

In this way, Searle notably re-introduces the dualism of a background scheme and its execution. He turns around midway on the 'shining new skids' with which Austin had equipped him.

Searle's work has inspired a number of international law and international relations scholars, especially in their quest to offer a definition of international law.<sup>76</sup> Nicholas Onuf, for example, framed the international legal order as a set of interconnected speech acts in order to argue that it is the defining feature of legal claims that they are able to achieve what they want without the assent of the hearer.<sup>77</sup> Probing what Onuf and others have to offer for an understanding of

<sup>72</sup> That the notion of background is important in Searle's grander theoretical set-up suggests that speakers do not need to be aware of the rules they follow. See John Searle, *Making the Social World* (OUP 2010) 155–60.

<sup>73</sup> John Searle, *Speech Acts: An Essay in the Philosophy of Language* (CUP 1969) 12.

<sup>74</sup> Searle, *Speech Acts*, 33–4.

<sup>75</sup> Searle, *Speech Acts*, 37.

<sup>76</sup> See eg Dick Ruiters and Ramses Wessel, 'The Legal Nature of Informal International Law: A Legal Theoretical Exercise' in Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (OUP 2012) 162, 167–70; Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) 4 EJIL 305, 309; Jean d'Aspremont, 'Wording in International Law' (2012) 25 LJIL 575, 579.

<sup>77</sup> Nicholas Onuf, 'Do Rules Say What They Do? From Ordinary Language to International Law' (1985) 26 HILJ 385, 408.

interpretation starts to reveal some of the main problems that come with understanding the language of international law in light of speech act theory à la Searle (that is, by analogy to a game of chess).

I see three main problems. First, Searle pursues a strategy of deliberate idealization when he argues that background conventions provide the conditions for speech acts to be successful. Conventions in fact ensure that speakers' intentions can be revealed.<sup>78</sup> Generally, such a view can be critiqued on methodological grounds. Again there is a stabilizing background that structures performance. The more specific point of critique becomes clearer in light of a related second problem. It was Searle's aim to provide an account of how understanding is possible. That is typically not the issue in any interpretative dispute in (international) law. It is not that opponents do not understand one another, although that can happen. Usually they do understand and disagree. The third problem is that constitutive rules are troubled by indeterminacy. It is unconvincing to simply take any given context *c* as a given. Speaking is not like playing chess because the world is not chequered in black and white, because speaking typically has an ulterior purpose, and because in speaking we make the rules 'as we go along'.<sup>79</sup>

There is one way in which the analogy between interpretation and playing a game can be rescued from the pitfalls of an easy dualism between rules and moves. That is to understand speaking the language of international law as a practice (Part IV). The more radical alternative would be to suggest that there is no language to play with (Part V).

#### IV. International Law as a Practice

How could it be possible to make sense of interpretative games in international law without a background scheme that serves as a standard against which interpretations can be assessed as right or wrong moves? What could stabilize the language of international law if it is not some kind of guiding background structure? Saussure already hinted at an answer when he argued that nothing outside language secures the meaning of words. He argued instead that meaning is only created through arbitrary distinctions, and that the sole thing that can stabilize those distinctions is tradition. 'Because the sign is arbitrary', he wrote, 'it follows no law other than that of tradition, and because it is based on tradition, it is arbitrary'.<sup>80</sup>

This idea has now caught on. A truly ubiquitous way of rearticulating the stabilizing role of tradition is to say that meaning is conventional in the way I have just discussed. Indeed, for Wittgenstein, meaning cannot possibly be found anywhere but in the conventions about how words are used.<sup>81</sup> This is precisely how he

<sup>78</sup> Following Searle, they even allow thinking of interpretation as an act of cognition: Krämer, *Sprache, Sprechakt, Kommunikation*, 70.

<sup>79</sup> Wittgenstein, *Philosophical Investigations*, [83].

<sup>80</sup> Saussure, *Course in General Linguistics*, 74.

<sup>81</sup> Wittgenstein, *Philosophical Investigations*, [43]; Ludwig Wittgenstein, *Philosophical Grammar* (Basil Blackwell 1974) [32] ('[A]n explanation of meaning is... a rule, a convention').

thought of language games. But the way Searle refined this position re-introduces a dualism not between language and speaking but between conventions and their application. The main problem is that any rule—generally,  $x$  counts as  $y$  in context  $c$ —will be troubled by indeterminacy. What, for instance, counts as context  $c$ ? Following Wittgenstein, the articulation of a rule that explains meaning is subject to the same fate of only gaining meaning through another rule of conventional use. The result is an infinite regress: ‘Any interpretation . . . hangs in the air along with what it interprets, and cannot give it any support.’<sup>82</sup> In a similar vein, HLA Hart observed that:

the canons of interpretation . . . are themselves general rules for the use of language, and make use of general terms which themselves require interpretation. They cannot, any more than other rules, provide for their own interpretation.<sup>83</sup>

The way to get out of this conundrum leads via practice, for Wittgenstein as well as for Hart.<sup>84</sup> Wittgenstein’s idea is that actors learn and internalize in a process of socialization what signposts mean or, arguably, what the words of treaty norms mean.<sup>85</sup> How then is it at all possible to tell that a rule can be said to be applied (in)correctly? What orders interpretation if it is not that which is being interpreted? The law itself does not give away the answer because it gains its meaning only through the practice of how it is used. Interpretation substitutes one expression of the rule for another.<sup>86</sup> Together with the interpretation, the law hangs in the air and cannot offer support for what are regarded as (in)correct interpretations.

The question of what is a wrong interpretation can only be answered by other participants in an interpretative community. Other participants need to say what an interpreter can get away with. There are many factors that influence the likely success of an interpretation. The most important one in the language of (international) law is how any legal claim connects to tradition. Robert Brandom, speaking on strands of semantic pragmatism in the philosophy of language, has expressed this thought with profound insight when he wrote that ‘[t]he current judge is held accountable to the tradition she inherits by the judges yet to come’.<sup>87</sup>

<sup>82</sup> Wittgenstein, *Philosophical Investigations*, [198]. See also Immanuel Kant, *Critique of Pure Reason* (CUP 1998) 263.

<sup>83</sup> HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 126.

<sup>84</sup> Wittgenstein, *Philosophical Investigations*, [202]; Ludwig Wittgenstein, *On Certainty* (Basil Blackwell 1969) [501]. HLA Hart, on his part, showed the way out as part of his ‘social thesis’. See Jean d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2011) 55 and 201.

<sup>85</sup> Wittgenstein, *Philosophical Investigations*, [219].

<sup>86</sup> Wittgenstein, *Philosophical Investigations*, [201]; Dennis Patterson, ‘Interpretation in Law’ (2005) 42 *San Diego L Rev* 685, 692.

<sup>87</sup> Robert Brandom, ‘Some Pragmatist Themes in Hegel’s Idealism: Negotiation and Administration in Hegel’s Account of the Structure and Content of Conceptual Norms’ (1999) 7 *Eur J Philos* 164, 181. For a concise introduction and summary, see Jasper Liptow, *Regel und Interpretation: Eine Untersuchung zur sozialen Struktur sprachlicher Praxis* (Velbrück 2004) 220–6; Ralph Christensen, ‘Neo-Pragmatismus: Brandom’ in Sonja Buckel, Ralph Christensen, and Andreas Fischer-Lescano (eds), *Neue Theorien des Rechts* (Lucius und Lucius 2009) 239.

It is a characteristic feature of the language of (international) law that it compels its speakers to connect to the past, to prior instances of speaking.<sup>88</sup>

Interpretative games in international law, on this account, present themselves as a practice that is both creative and constrained. Actors struggle for the law. Language offers a battleground.<sup>89</sup> It may look like a game but it is not well understood by analogy to something like chess. It is a game like those of children when they make up the rules as they go along.<sup>90</sup> The trick is to see interpretation as a rule-guided activity without stipulating the rules as a background scheme that sits on the outside. Only later interpretations will tell what is right and wrong. Stability in this practice flows from tradition and from historical practices.<sup>91</sup> Wittgenstein sums this up with typical eloquence: 'Grammar is the account books of language. They must show the actual transactions of language.'<sup>92</sup> David Lewis picked up this idea in his seminal paper 'Scorekeeping in a Language Game' and Brandom develops it further, showing how scorekeeping tracks the correct use of words.<sup>93</sup> The imagery of playing games sneaks back in, but Brandom is quick to note how it misleads and should thus be treated with caution.<sup>94</sup>

## V. And if There Was No Language to Play With?

Lewis not only developed the idea of scorekeeping in language games. He also opined that '[i]t is a platitude that language is ruled by convention.'<sup>95</sup> In addition, he noted that it is the profession of philosophers to question platitudes.<sup>96</sup> Sure enough, the platitude that language is ruled by convention has also been questioned. Donald Davidson has probably set out the most refined argument in this regard, causing a stir when he concluded that 'there is no such thing as a language, not if a language is anything like what many philosophers and linguists

<sup>88</sup> Johnstone, *The Power of Deliberation*, 25; Martti Koskenniemi, 'The Place of Law in Collective Security' (1996) 17 *Mich J Int'l L* 455, 478 (the language of international law 'compels a move away from one's idiosyncratic interests and preferences *by insisting on their justification in terms of the historical practices*') (emphasis added); Friedrich Kratochwil, 'How do Norms Matter?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 35, 47. See Chapter 13 (Harlan Grant Cohen).

<sup>89</sup> Ralph Christensen and Michael Sokolowski, 'Recht als Einsatz im Semantischen Kampf' in Ekkehard Felder (ed), *Semantische Kämpfe. Macht und Sprache in den Wissenschaften* (de Gruyter 2006).

<sup>90</sup> Wittgenstein in fact uses the concept of 'game' to show how the things referred to as a game do not share a common core but a family resemblance: *Philosophical Investigations*, [67]–[70].

<sup>91</sup> These factors underpin what counts as 'competent performance'. For the understanding of practice as competent performance, see Emanuel Adler and Vincent Pouliot, 'International Practices' (2011) 3 *Int Theory* 1, 4–5.

<sup>92</sup> Wittgenstein, *Philosophical Investigations*, [44].

<sup>93</sup> Robert Brandom, *Making it Explicit: Reasoning, Representing and Discursive Commitment* (Harvard University Press 1988) 181–2 with reference to David Lewis, 'Scorekeeping in a Language Game' (1979) 8 *J Phil Logic* 339.

<sup>94</sup> Brandom, *Making it Explicit*, 184–5.

<sup>95</sup> David Lewis, *Convention: A Philosophical Study* (Blackwell 2002) 1.

<sup>96</sup> Lewis, *Convention*, 1.

have supposed'.<sup>97</sup> The core of his argument is that conventions or anything like a shared language—a shared vocabulary and a shared sense of how words ought to be used—are not at all necessary for communication to be successful. Communication, he argues, can and should be understood without reference to such a thing as a language.

In order to show how that might be possible, Davidson suggests shifting the perspective from the speaker to the hearer.<sup>98</sup> The paradigmatic focus of his argument is not the capacity of the speaker to make herself understood, but the role of the interpreter who has to make sense of the world, the text and the noise around her. His focus rests on radical interpretations, namely moments in which an interpreter enters a completely new context such as a hypothetical field linguist in some forgotten place of the earth.<sup>99</sup> What does that radical interpreter need to do in order to make sense of the linguistic practice of any person? She needs to observe social and linguistic behaviour and, gradually, build up a theory on what the speaker takes to be true when she says certain things.<sup>100</sup>

Over time, we get so good at it that understanding becomes effortless and even automatic, according to Davidson.<sup>101</sup> Most international legal arguments are immediately accessible to us whether we agree with them or not. But the fact of rather effortless understanding is prone to mislead, he notes. It makes us think all too readily that we are indeed speaking the same language. For Davidson:

[w]hat is conventional about language, if anything is, is that people tend to speak much as their neighbours do. But in indicating this element of the conventional, or of the conditioning process that makes speakers rough linguistic facsimiles of their friends and parents, we explain no more than the convergence; we throw no light on the essential nature of the skills that are thus made to converge.<sup>102</sup>

Since understanding frequently proceeds effortlessly, it is easy to think that there is a language that brings interlocutors together. But that assumption is not necessary. It *can* be done away with, according to Davidson, and it also *should* be rejected.<sup>103</sup> There are two main reasons. First, from the perspective of the interpreter, any theory that she will come up with about what a speaker

<sup>97</sup> Donald Davidson, 'A Nice Derangement of Epitaphs' in *Truth, Language and History* (OUP 2005) 89, 107. For a nicely accessible introduction to the work of Davidson that is geared to the context of law, see Jochen Bung, 'Theorie der Interpretation: Davidson' in Sonja Buckel, Ralph Christensen, and Andreas Fischer-Lescano (eds), *Neue Theorien des Rechts* (Lucius und Lucius 2009) 271.

<sup>98</sup> Krämer, *Sprache, Sprechakt, Kommunikation*, 175–7.

<sup>99</sup> Donald Davidson, 'Thought and Talk (1975)' in *Inquiries into Truth and Interpretation* (Clarendon Press 1984) 155, building on Willard Quine, *Word and Object* (MIT Press 1960) 26–31.

<sup>100</sup> The concept of truth employed in Davidson's line of argument is markedly not an epistemological one. Language offers no window onto the world. See Donald Davidson, 'Seeing Through Language (1997)' in *Truth, Language and History* (OUP 2005) 127.

<sup>101</sup> Donald Davidson, 'The Social Aspect of Language (1994)' in *Truth, Language and History* (OUP 2005) 112.

<sup>102</sup> Davidson, 'Communication and Convention (1982)', 278.

<sup>103</sup> Krämer, *Sprache, Sprechakt, Kommunikation*, 190.

takes to be true is bound to be indeterminate.<sup>104</sup> There is the indeterminacy of what a sentence refers to. When a speaker says ‘this is a combatant’, does she do so because the person she points to holds a rifle or because that person wears insignia of an army? Interpreters can reasonably come up with different theories about what a single speaker takes to be true. Second, there are no grounds for choosing only one out of the many possibilities. Whether the same sentence ‘this is a combatant’ is taken to be true depends on the specific speaker—one speaker could take it to be true whenever she sees an individual with a rifle, another when she sees army insignia. The sentence can be true under different conditions (if the person has a rifle, if the person has army insignia). Once again: how could the interpreter choose *the* language of international law that counts? It is for these two reasons that Davidson suggests ‘[w]e must give up the idea of a clearly defined shared structure which language-users acquire and then apply to cases.’<sup>105</sup> There is ‘no learnable common core of consistent behaviour, no shared grammar or rules, no portable interpreting machine set to grind out the meaning of an arbitrary utterance’.<sup>106</sup> What interpreters must develop is the ability to arrive at theories on what others take to be true. In Davidson’s view then, knowing a language amounts to the same thing as ‘knowing our way around in the world generally’.<sup>107</sup> Doing so well is like setting up new theories in any field and is ‘derived by wit, luck, and wisdom’.<sup>108</sup>

With the curt statement that ‘there is no such thing as language’, Davidson concludes an argument focused on the necessary conditions for people to understand one another. A shared language is not part of those conditions. When it comes to the semantic struggle for international law, to be sure, actors not only want to understand and to be understood. They also want to find recognition and endorsements for their claims so that their language becomes *the* language of international law. Davidson’s theory has the effect of alerting us that there might well not be any such language, at least as long as it is thought of as a background scheme that can be learned with a shared grammar and a stable vocabulary.<sup>109</sup> The

<sup>104</sup> See Kathrin Glüer, *Sprache und Regeln: Zur Normativität von Bedeutung* (Akademie Verlag 1999) 89.

<sup>105</sup> Davidson, ‘A Nice Derangement of Epitaphs’, 107.

<sup>106</sup> Davidson, ‘A Nice Derangement of Epitaphs’, 107.

<sup>107</sup> Davidson, ‘A Nice Derangement of Epitaphs’, 100 and 107. In a similar vein, Ian Johnstone has remarked that participants in the field of legal practice ‘have learned its purpose and conventions not as a set of abstract rules but through the acquisition of “know-how”, a mastering of discipline or technique’: Johnstone, ‘The Power of Interpretive Communities’, with reference to Gerald Postema, ‘Protestant Interpretation and Social Practices’ (1987) 6 *Law & Phil* 283, 304.

<sup>108</sup> Davidson, ‘A Nice Derangement of Epitaphs’, 107.

<sup>109</sup> But note that Davidson’s theory leaves room for a stock of autonomous meaning that is invariant between different theories of truth. See Donald Davidson, ‘Reality without Reference’ in *Inquiries into Truth and Interpretation* (Clarendon Press 1984) 215, 225. Davidson is adamant about the ‘autonomy of meaning’, precisely because the pitch of his argument pulls in the opposite direction. See Donald Davidson, ‘Communication and Convention’, 274–5.

upshot of this perspective is that it studies interpretation in its own right, not as an application of a model. Thinking that way draws attention to the beliefs of the interpreter. It offers an alienating view that might just help to better understand the familiar: the practice of interpretation.<sup>110</sup>

<sup>110</sup> See Bertolt Brecht, 'Short Description of a New Technique of Acting which Produces an Alienation Effect' in John Willett, *Brecht on Theatre: The Development of an Aesthetic* (Eyre Methuen 1977) 136, 143–4 ('The alienation-effect consists in turning the object of which one is to be made aware, to which one's attention is to be drawn, from something ordinary, familiar, immediately accessible, into something peculiar, striking and unexpected. What is obvious is in a certain sense made incomprehensible, but this is only in order that it may then be made all the easier to comprehend'). I was referred to this passage in presenting Davidson's theory by Bung, 'Theorie der Interpretation: Davidson', 271–2.