Epistemic Communities in International Adjudication

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Subject(s):
Sources of international law — Arbitrators — Counsel — Evidence — Judges — Judicial reasoning — Registry — Sociology of international law

Published under the direction of Hélène Ruiz Fabri, with the support of the Department of International Law and Dispute Resolution, under the auspices of the Max Planck Institute Luxembourg for Procedural Law.
A. Introduction

1 Epistemic community is a descriptive and analytical category used in social sciences as a whole to denote a group of technicians or professionals sharing common constructed sensibilities. The concept has proved very popular across disciplines and has been constantly transposed across fields. As a result, it has not been univocally understood and its contours have continuously taken the particular shapes of the discipline to which it has been transposed.

2 Conceiving international law as an argumentative practice (Koskenniemi, 2007), we will evaluate whether it is possible to assert the existence of an adjudicatory epistemic community, or a collective of legal technicians that regulates this practice. From that perspective, it will be shown that the adjudicatory epistemic community plays a critical role in designing the criteria of validity of arguments and assessing their application by the various actors of the field (d'Aspremont, 2020; Cardenas, 2020). Although epistemic communities as producers of technical knowledge are usually distinct from policy makers, the distinction collapses when applied to international adjudication. This being said, the following is no exercise of transposition of a notion originally developed in other social sciences and hence the following paragraphs come with a certain degree of reinvention.

3 The discussion regarding the existence of an epistemic community in international adjudication will primarily refer to the work of international judges, arbitrators, counsel, and members of registries with a view to evaluating whether practice shows sufficient common sensibilities for them to constitute an epistemic community. The argument starts with some background observations as well as some remarks on the origin of the concept of epistemic community. This will include a snapshot about how the concept has been received in international legal studies (see sec B below). An overview of some of the alternative theorizations of the communities of international lawyers will be provided (sec C). This article, using the dominant understanding of epistemic community, will then turn to the central question of whether judges, arbitrators, counsel, and members of registries can constitute an epistemic community in international adjudication (sec D). Although it will be shown that judges, arbitrators, counsel, and members of registries do not constitute an epistemic community according to the dominant theorization, the concept of epistemic community will be appropriated and reinterpreted to emphasize some of the shared sensibilities of judges, arbitrators, counsel, and members of registries (sec E). The last section offers a few concluding remarks on the exercise of any appropriation and re-interpretation of concepts of social sciences for the study of international law (sec F).

B. The Concept of Epistemic Community

4 In sociology the idea of community is usually a relational notion that presupposes the existence of a joined plurality of individuals (Neal and Neal, 2014) who: share a common space, either geographically or professionally (Bell and Newby, 1974); hold a set of common beliefs, values, behaviours, culture, and even feelings that govern their interaction (Crow and Allen, 1994, 1); try to achieve common goals (Johnson, 1986); have a way of doing things and solving problems; share a sense of belonging (Cater and Jones, 1989) with accepted parameters of inclusion and exclusion, among others (Stebbins, 1987, 534); etc.

5 For its part, the term epistemic denotes the fact that it is the possession and practice of some knowledge by the epistemones that holds the community together (Plato, Theat. 145e, Soph. 232a, Stat. 258b). This does not make it epistemological, for their members are not primarily or directly concerned with the theory of such knowledge, but mainly with its possession and practice (Kuhn, 1962). Furthermore, while knowledge has been traditionally considered a property of an individual (Plato and Jowett, 1990), new trends in social epistemology have started to consider knowledge as held by groups (Kuhn, 1962). Thus, by
epistemic communities we will refer here to a group of people sharing an episteme, or a unit of knowledge, regardless of whether they have or do not have an underlying epistemology or a theory depicting their knowledge, and considering the underlying social aspect of such knowledge (Kuhn, 1962).

6 Unsurprisingly, the concept of epistemic community together has been the object of a great variety of understandings (Cross, 2013). One of the best known uses of the concept of epistemic community is the so-called ecological epistemic community (Gough and Shackley, 2001), which refers to the community composed of natural scientists, engineers, ecologists, and economists, that work in substantive issues related to the environment in order to provide technical knowledge for the production of policies regarding global environmental protection (Haas, 2007). Even this famous conceptualization is subject to diverging understanding. Indeed, while some believe that this community is open to lawyers and other social sciences professionals, some assert that this spectrum of knowledge is restricted to what some call hard scientists because they allegedly are capable of producing causal ideas (Haas, 2007).

7 Although epistemic communities have been discussed and theorized by many people in various disciplines (Dunlop, 2012, 232), the concept’s use in international legal literature primarily relies on Peter Haas’s theorization as it is presented in his study on international policy-making developments (Haas, 1992, 1–35; see also Haas, 2013, 351–59). Haas popularized the concept although he borrowed it from constructivist international relations theorists (Ruggie, 1975, 557; see genealogy in Bianchi, 2019, 251–66). In discussing governance and international cooperation, constructivist perspectives to international relations originally developed the theory that epistemic communities constitute the vehicle producing and circulating the beliefs and ideas that influence state practice and interests. However, for Haas, epistemic communities are also capable of producing causal ideas avoiding probable conflicts of interests (Haas, 2007, 794). In one of the most quoted definitions, Haas affirms that an epistemic community is a ‘network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area’ (Haas, 1992, 3). This descriptive and analytical category allows one to capture the selection and production of policy-relevant knowledge-based claims by a given group and the way in which such knowledge-based claims end up impacting policy-making (Haas, 1992, 20).

8 According to Haas’s common and dominant perspective, the production of policy-relevant knowledge-based claims presupposes a series of minimal features such as: shared principled beliefs providing a value-based rational for the social action of community members; shared causal beliefs or analytical and established ways to produce knowledge; common standards for the validation of knowledge; and a common policy enterprise, including the identification of issues and priorities within their domain (Haas, 2007, 793). An epistemic community can be comprised of professionals from different disciplines sharing an expertise in a particular domain no matter if they work for governments, think tanks, firms, or academic institutions (Haas, 2007). It is important to highlight that Haas’s conceptualization does not aim to discuss the relations or interactions between the members of the community but it focuses on the production process of knowledge, so actors and their interactions do not hold an inner relevance but are considered instrumental for the production of that knowledge as ‘ideas would be sterile without carriers’ (Haas, 1992, 27). Therefore the context of Haas’s theorization is the politics of ideas and how this knowledge is consensually produced to become relevant in concrete policy-making enterprises. Furthermore, it is important to highlight that Haas conceives of an epistemic community as a social entity totally different from decision-making authorities. So whereas the latter are seen as political units that respond to the dynamics of power, epistemic communities are comprised of technicians that have attained their membership due to their
professional capacities. Likewise, whereas decision-makers create claims based on their authority, the knowledge produced by epistemic communities is provided through causal exercises governed by the technicalities of their discipline (Haas, 2013). Thus, Haas’s epistemic communities are not empowered to do policy-making themselves but their technical knowledge is addressed to inform and influence the decision-making powers of policy-making authorities. In that vein, it would be contradictory for the same social entity to have both the power to produce technical knowledge and to engage in policy-making.

9 It is noteworthy that, as a descriptive and analytical category, the concept of epistemic community has enjoyed resounding success in international legal studies over the last decade and has been extensively relied upon to describe, explain, or evaluate some of the dynamics at work in the making of discourses about international law (Noortmann, 2015, 233–47; Galbreath and McEvoy, 2013, 169–86). This success is not without irony as the idea that international lawyers constitute an epistemic community has been refuted in international relations studies on the notion of epistemic community (Haas, 1992; Werner, 2014, 44–62).

C. Alternative Theorizations of Communities of International Lawyers

10 Before discussing further the possible relevance of the concept of epistemic community to describe and evaluate the entity that international judges, arbitrators, counsel, and members of registries can possibly constitute and whether it builds on some shared sensibilities, it may be useful to recall that the concept of epistemic community is not the only tool which can potentially be resorted to by international lawyers to make sense of the entity they can possibly constitute through their practice. The possibility that international lawyers constitute a community through their shared practice can be apprehended in numerous ways. Until recently, international lawyers would mostly look at international judges, arbitrators, counsel, and members of registries from the angle of the law-appliers (Culver and Giudice, 2010), auctoritatis interposition (Schmitt, 1971, 41; Rajkovic, 2014, 331–52) or that of the undertheorized, but very popular, notion of the invisible college (Schachter, 1977–78, 217–27). Other cognitive models have also come to stand out, some of which have been transposed from social sciences, too. Five of these descriptive and analytical concepts must be mentioned here.

11 Firstly, one of the most used and widest perspectives that could describe the technical operation of judges, arbitrators, counsel, and members of registries within international adjudication is Bourdieu’s field: a place where agents and institutions permanently fight with each other in order to appropriate a disputed product (Wacquant and Bourdieu, 1992, 102). This permanent confrontation is governed by rules and regularities developed by its participants, who may hold unequal positions of power (Wacquant and Bourdieu, 1992, 102). According to Bourdieu, a field possesses the following minimal features. First, it has a limited space of action, so only those trained in the specific profession may participate. Second, it constitutes a battle field where combatants aim to attain dominant positions. Third, its members’ capabilities can be very different. A field thus comprises both weak and powerful actors. Fourth, it is socially regulated by the habitus of its members, which may change in times of crisis when rules can be modified (Hilgers and Mangez, 2015). Bourdieu’s approach to the concept of community is worth noting as it constitutes an important paradigm shift that has influenced the most recent efforts of conceptualization. Contrary to Haas’s approach, Bourdieu’s sociological perspective focuses its attention not on the production of knowledge nor on the object of study as such—the community itself—but rather on the interaction among its members. For Bourdieu, social reality is relational, thus its observation should concern the “relationships among the elements, and not the elements themselves” (Hilgers and Mangez, 2015, 3; Cassirer, 1944). Likewise, within
Bourdieu’s field there can be as many subfields as the special domains, interests, occupations, and expertise that the members can build through their interactions. Although Bourdieu himself confessed that he did not have much affinity with lawyers (Bourdieu, 2004, 54), applying his notion of field to international law could potentially allow one to describe international law as the most general field which itself can be composed of substantive subfields, such as international environmental law (→ Environment, International Protection), → international criminal law, International Humanitarian Law (→ Humanitarian Law, International), International → Human Rights Law, etc, but also of specific practices and roles, like the ones constituted by those working within international adjudication or international doctrine (Dezalay and Garth, 1996). Additionally, it is interesting to stress that theorization of field did not stop with Bourdieu but was continued by some of his followers who focused on field’s functionalities. So, while Bourdieu describes law as a discourse of force and power, integrated by both dominant and dominated actors, shaped by the very practices and artificial discourses based on the rhetoric of universality and neutralities, Bourdieusians would elaborate on the purposes of the legal field as symbolic power, or as a ‘tool for ordering politics without actually doing politics’ (Dezalay and Madsen, 2012). They would describe adjudicators not only as legal operators but as actual juridical entrepreneurs capable of building a transnational legal field as complex and dynamic as they are (Dezalay and Garth, 1996). So whereas they would not see a differentiation between domestic and international orders, they would rather speak about a transnational field where all sorts of interactions are part of a whole, just like a strict monist theory of international law.

12 Second, international judges, arbitrators, counsel, and members of registries can be modelled according to the more fluid and open idea of community of practice (→ Practice Theory and International Adjudication). According to such a construction, international judges, arbitrators, counsel, and members of registries constitute a community of practice as long as they ‘are informally as well as contextually bound by a shared interest in learning and applying a common practice’ (Adler, 2005, 15) while also sharing a common ‘repertoire of communal resources, such as routines, words, tools, ways of doing things, stories, symbols, and discourse’ (Adler, 2005, 15). This presupposes ‘social communication through which practitioners bargain about and fix meanings and develop their own distinctive identity and how to practice it’ (Adler, 2005, 17). The concept of community of practice is slightly more fluid and dynamic than that of an epistemic community, in that it expresses more explicitly the idea that the members’ shared sense of joint enterprise is constantly being renegotiated (Adler, 2005, 14) and membership is not fixed as members constantly move in and move out (Adler, 2005, 14). Notwithstanding some inevitable incommensurable elements that distort any comparison between the two notions, it seems possible to say, with a good deal of oversimplification, that communities of practice constitute a more all-encapsulating notion than that of epistemic community, the latter being a special kind of community of practice. Like the notion of epistemic community, the notion of community of practice has found an echo in international legal scholarship (Brunnée and Toope, 2010), especially in relation to the doctrine of sources (Cohen, 2012, 1049–83) and, to a lesser extent and in a slightly altered version, in relation to international courts and tribunals (Dunoff and Pollack, 2018, 252–72).

13 Third, international judges, arbitrators, counsel, and members of registries can be characterized in terms of an interpretive community. This perspective, which draws on literary and linguistic philosophy, offers useful insights on the social unit that international judges, arbitrators, counsel, and members of registries can possibly form (→ Law and Literature Approaches to International Adjudication). The concept of interpretive community refers to the conventional point of view that constrains argumentative practice of international law as well as the production of meanings (Fish, 1984, 1331–32; Fish, 1980, 13–14). It presupposes a common understanding of what constitutes valid practice. Like the
concept of community of practice, the notion of interpretive community is not fixed (Fish, 1984, 1325-47, 1329). Thanks to its ordering and anti-indeterminacy virtues as well as its fluidity, it is not surprising that the concept of interpretive community has enjoyed considerable success in international legal scholarship. According to that notion, international judges, arbitrators, counsel, and members of registries constitute an interpretive community as soon as they share a language that allows them to speak to one another and a system of principles that each of them has internalized and which come to constrain the type of legal argumentation they recognize as valid (Fish, 1980, 5).

14 Fourth, international judges, arbitrators, counsel, and members of registries can be apprehended by the idea of a communicative community (d’Aspremont, 2011, 11-29; d’Aspremont, 2012, 575-602; Meyer, 2013, 1-19). According to this conceptualization, there is a communicative community of international judges, arbitrators, counsel, and members of registries as soon as there is a striving for a shared vocabulary that allows communication and argumentation among scholars. Short of any communicative tool, international judges, arbitrators, counsel, and members of registries cannot constitute a communicative community. This approach acknowledges that the shared vocabulary of the community is bound to be ever changing and will fluctuate constantly (Marmor, 2009, 14). Yet, it is this striving that creates the possibility of communication necessary for the identification of a communicative community. International judges, arbitrators, counsel, and members of registries could be seen as constituting such a communicative community by virtue of their shared argumentative protocols and vocabularies, which is certainly overlapping with the way in which the concept of epistemic community is rewritten here.

15 Fifth, the social unit possibly constituted of international judges, arbitrators, counsel, and members of registries can be understood as a bureaucratic community (Venzke, 2008, 1401-28). According to this understanding, international judges, arbitrators, counsel, and members of registries, by virtue of their control of the social reality, act as bureaucratic bodies. This understanding builds on the idea that they exercise rational-legal power which, according to Max Weber (2012, 330-36), constitutes a feature of a bureaucratic mode of organization. From such a perspective, international judges, arbitrators, counsel, and members of registries—and their institutions—can be constructed as bureaucratic bodies because their power is exercised through knowledge (MacIntyre, 2007, 86). From that vantage point, the knowledge which international judges, arbitrators, counsel, and members of registries deploy is supposedly very wide and includes information as diverse as the positive rules and their content (→ Jura Novit Curia), the modes of legal reasoning, the modes of establishment of the facts, the procedure, etc.

16 Each of these five additional cognitive models to apprehend and model the social unit potentially constituted by international judges, arbitrators, counsel, and members of registries has its own merits and weaknesses. It would be of no avail to try to evaluate each of them here and determine which is the most useful, descriptive, and analytical category in the context of international adjudication. Their respective value remains claim-dependent and would hinge on the type of insights one wants to generate. For the sake of the discussion attempted here, it suffices to highlight that the concept of epistemic community is thus not alone in offering tools to make sense of what it is that international judges, arbitrators, counsel, and members of registries are doing, possibly together.

17 The following discussion is articulated around the concept of epistemic community rather than field, community of practice, interpretive community, communicative community or bureaucratic community. It is true that some of the abovementioned concepts could provide useful angles and tools to capture some of the shared sensibilities of international judges, arbitrators, counsel, and members of registries. Yet, the concept of epistemic community is preferred as it makes the apprehension of the shared
argumentative sensibilities rather simple while being simultaneously better known to international lawyers.

D. An Epistemic Community of International Adjudicators?

18 As a descriptive and analytical category, the concept of epistemic community, albeit having been extensively deployed by international lawyers, has certainly not exhausted its potential. In particular, the concept has never been seriously mobilized to claim, or refute, that international judges, arbitrators, counsel, and members of registries be described as an epistemic community. What is more, engaging with international adjudication from the vantage point of the concept of epistemic community would certainly not be idiosyncratic, especially in a discipline which over the last few decades has grown eager to borrow concepts, frameworks, and ideas from other disciplines with a view to appropriating them and generating new perspectives while also producing new forms of erudition. In that sense, the concept of epistemic community could very naturally and intuitively be applied to international judges, arbitrators, counsel, and members of registries with a view to projecting a new image of international adjudication and making a claim thereon.

19 In line with Haas’s abovementioned referential concept, can the entity comprised of international judges, arbitrators, counsel, and members of registries be considered as an epistemic community? It is argued here that, despite sharing some of an epistemic community’s general features, it cannot. Yet, it is submitted that they share some common sensibilities around which their community is configured.

20 It is submitted here that international judges, arbitrators, counsel, and members of registries do not constitute an epistemic community according to the dominant theorization of the concept due to a lack of some of its fundamental features. This can be explained as follows. Firstly, even though members of this community share principled beliefs providing a value rationale for them, their content is not always univocal and the meaning thereof could vary according to the context, the case, or even the jurisdiction of the court concerned. Secondly, and just as Haas himself pointed out to affirm that international lawyers do not constitute an epistemic community (Haas, 2007), their production of knowledge does not follow the application of specific shared causal beliefs. Thus, although members of the adjudicative community agree that legal claims should be based on the → sources of international law, their final use in every particular case will always depend on a series of factors allowed by the still flexible realm of international legal interpretation (Koskenniemi, 2007; → Interpretation in International Law) which would always be argumentatively constructed (Cardenas, 2020). Furthermore, it has been argued that in opposition to Haas’s epistemic communities, members of the adjudicative community can also produce knowledge based on their authority without having to justify their findings on the technicalities of their domain, which has been discussed as assertion in international law (Talmon, 2014). Thirdly, although Haas’s definition conceives of epistemic communities as technical producers of knowledge different from the ones entitled to decision-making, members of the adjudicative community hold both the capacities of knowledge production and decision-making. Fourthly, even if they implicitly aim at the realization of international justice as a common policy enterprise, particular perspectives and understandings of such justice will always be relative and extremely dynamic. Fifthly, members of the adjudicative community do not always attain their membership exclusively due to their technical capacities as jurists, and even though they should demonstrate some relevant professional credentials endorsed through academic and professional experience, their final appointment will always be determined also by social and political circumstances both at the national and international levels. So international jurisdictions do not necessarily include the most representative experts in their field, nor do such most recognized experts necessarily attain appointments in the different jurisdictions. Hence, it is argued here that
judges, arbitrators, counsel, and members of registries do not constitute an epistemic community in Haas’s view. They are, however, a non-systematically organized network of professionals belonging to a broader and overarching epistemic community in the sense that they share some epistemes or units of knowledge constituted by common sensibilities that allow them to contribute to the production of policy-relevant claims within their domain.

21 The foregoing shows that the concept of epistemic community remains useful to apprehend the epistemic kinship which international judges, arbitrators, counsel, and members of registries can possibly share, not in terms of policy-relevant knowledge that they produce but in relation to a number of common sensibilities in terms of legal argumentation and discourse-making. In other words, the concept of epistemic community can be used here to make the argument that international judges, arbitrators, counsel, and members of registries, despite great variations in terms of background, legal culture, institutional constraints, and self-perceived functions, share some minimal sensibility in terms of modes of legal reasoning, and hence, they constitute an epistemic community. This is why, at this stage, this article abandons Haas’s theorization and comes to embrace a much broader understanding of epistemic community in a way that de-emphasizes the selection and production by the group concerned of policy-relevant knowledge-based claims which inform political behaviour (Haas, 1992, 20) and re-emphasizes the common sensibilities and beliefs that characterize the interactions among such a group and which allow the group to produce their knowledge-based claims (Bianchi, 2019, 251–66). This appropriation and reinterpretation of the concept of epistemic community allows us, in the next section, to show that international judges, arbitrators, counsel, and members of registries constitute an epistemic community in international adjudication characterized not by the features of Haas’s conceptual approach but by much broader types of epistemes or units of knowledge configured by shared fundamental argumentative sensibilities that characterize the exercise of international adjudication.

E. Shared Fundamental Argumentative Sensibilities Between International Judges, Arbitrators, Counsel, and Members of Registries

22 International judges, arbitrators, counsel, and members of registries constitute an epistemic community in international adjudication characterized by the fundamental argumentative sensibilities shared by them which allow them to produce policy-oriented technical knowledge within their field. The broader concept of epistemic community as we understand it here is not exclusive of the larger professional group comprising all the technicians working as international judges, arbitrators, counsel, and members of registries as a whole but it can be used to describe specialized communities and sub-communities at the same time. Indeed, it is possible to perceive international judges in inter-state dispute settlement, investment law arbitrators, human rights judges, and international criminal law judges as belonging to four distinct epistemic sub-communities (→ Transnational Arbitral Community). Such epistemic fragmentation has been the object of scholarly discussion (Waibel, 2015, 147–65) and some of the diverging practices in the field have been explained through the existence of distinct epistemic communities (Roberts, 2013, 45–94; Schill, 2011b, 875–908). The plurality of epistemic communities—and the corresponding epistemic fragmentation of the field—among international judges, arbitrators, counsel, and members of registries is however not what draws attention here. It must also be acknowledged that using the concept of epistemic community in relation to international judges presupposes a belief that international courts and tribunals can possibly constitute a network of professionals geared towards the production of policy-relevant knowledge-based claims (Kingsbury, 2012, 203–27). The mere fact that we accept this possibility comes with a huge
number of normative presuppositions, hopes, and images as to what international judges, arbitrators, counsel, and members of registries do and the functions they perform. There is some inevitable oversimplification in studying international judges, arbitrators, counsel, and members of registries using the concept of epistemic community and presuming that they could all be seen as belonging to the same community. In fact, letting them all be absorbed by the concept of epistemic community diminishes the heterogeneity of adjudicatory practice. This is why it is important to highlight at this preliminary stage that approaching international adjudication from the standpoint of the appropriated and reinterpreted concept of epistemic community is not meant to flatten the variety of actors involved in the practice of international adjudication.

23 Subsequently, this section expounds on some of the shared fundamental argumentative sensibilities of international judges and arbitrators that drive their production of knowledge-based claims and which are, for this reason, constitutive of the epistemic community possibly formed by international judges, arbitrators, counsel, and members of registries. Three specific fundamental argumentative sensibilities draw attention: (1) the making of arguments in terms of rules and sources, (2) the systematization of arguments, and (3) the communication of produced knowledge in terms of interpretation, evidence, and precedents.

24 Before shedding light on these three specific fundamental argumentative sensibilities which inform the production of knowledge-based claims by international judges, arbitrators, counsel, and members of registries, three preliminary remarks are warranted. First, these three sensibilities are said to be of an argumentative character as they determine the way in which knowledge-based claims and arguments are constructed, designed, and shaped. Second, it must be recalled that the knowledge-based claims produced by international judges, arbitrators, counsel, and members of registries are not only nourished by common argumentative sensibilities, but also by shared discursive techniques (d’Aspremont, 2016a), aesthetics (Schlag, 2002, 1047–1118), rituals (Franck, 1990, 92), world views (Korhonen, 1996, 6), beliefs (Durkheim, 1947, 79–80), grammar (Koskenniemi, 2005, 589), techniques of reading and using the law (Bourdieu, 1987, 827), typical arguments (Kennedy, 2003, 634), sense of the discipline (Kennedy, 1999, 13, 17), mind-sets or traditions, cultural unity (Prost, 2012, 153, 159), ethos (Mégret, 2010, 66), legal culture (Glenn, 2007), normative universe (nomos) (Cover, 1983, 4–5), ‘communifying’ language (Berman, 2013, 38), etc. In other words, in forming an epistemic community and producing knowledge-based claims, international judges, arbitrators, counsel, and members of registries could share much more than a set of argumentative sensibilities. Third, it is important to realize that international judges, arbitrators, counsel, and members of registries come to share argumentative sensibilities despite their undergoing distinct socialization processes (Damaska, 1968, 1363–78). In that sense, sharing common argumentative sensibilities with the result that they come to form an epistemic community does not presuppose that they have all been subject to a similar socialization process (d’Aspremont, 2016a, 1–31).

1. **Rules and Sources Sensibility**

25 For most international judges, arbitrators, counsel, and members of registries, rules are the very materials which they build their arguments on and from. Indeed, for most of them, international law is made of rules and building argument boils down to rules-plumbing (d’Aspremont, 2016b, 366–87). This is so for the standards of conduct prescribed by international law as well as the mechanisms and principles which govern the formation, termination, and interpretation of such standards of conduct as well as the consequences of a breach thereof. In the final judgments that international judges, arbitrators, counsels, and members of registries contribute to—notwithstanding the understanding of international law they may be advocating in other capacities or in different contexts—everything is often
reduced to a matter of rules. This rule sensitivity of the arguments of international judges, arbitrators, counsel, and members of registries requires another type of sensitivity, ie a constant resort to the sources of international law. Indeed, the rules which international judges, arbitrators, counsel, and members of registries build their arguments on must be given a foundation and this is the function they assign to the doctrine of sources. The use of rules and sources by international judges, arbitrators, counsel, and members of registries is probably attractive because it seems to generate normativity—ie a reason for compliance—and to reinforce the authority of the sources of international law themselves among those involved in the practice of law-ascertainment, that is, in the practice of recognition (Lamond, 2014, 1–24). Although such an approach to normativity can be called into question (Schauer, 2012, 1, 4), many international judges, arbitrators, counsel, and members of registries feel they need ‘ruleness’ and sources to explain the bindingness of the legal system in the first place. The resort to rules and sources also allows international judges, arbitrators, counsel, and members of registries to disguise normative problem-avoidance and evade frustrating theoretical explorations (Talmon, 2012; → Ideology of International Adjudication).

2. System Sensibility

26 International judges, arbitrators, counsel, and members of registries do not necessarily seek to understand international law as a system—systemic thinking about international law as a whole being primarily an academic activity (Visscher, 1970, 171)—but constantly strive to provide their decisions with some kind of argumentative systematicity. This is the second type of argumentative sensitivity that informs the design of the knowledge-based claims made by international judges, arbitrators, counsel, and members of registries. To understand this specific type of sensitivity, a distinction must be made between the idea of system of rules and the idea of system of arguments. It is submitted here that, from the perspective of international judges, arbitrators, counsel, and members of registries, a great part of legal argumentation necessarily comes down to an exercise of argumentative systematization. For them, legal arguments about international law are meant to be the systemic product of pre-existing argumentative structures, the derivation of the former from the latter creating systematicity in legal argumentation on the basis of which the validity of legal argument will be assessed. The famous doctrine of precedent (Shahabuddeen, 1996; Hernandez, 2014, 156–93), for instance, is a manifestation of this need for a systemic derivation of legal argument from more general structures of argumentation (Somek, 2009, 424–41; Cohen, 2015, 268–89). In fact, the doctrine of precedent can be understood as a system of arguments meant to build past-based and future-determinative coherence (Cohen, 2015, 268–89). Another manifestation of the quest for systematicity in international legal argumentation can be found in the doctrine of interpretation which tries to build predictability in content-determination on the basis of an overarching abstract set of interpretive constraints (d’Aspremont, 2015, 111–29). As is illustrated by the doctrine of precedents and the doctrine of interpretation—and the amount of scholarly discussion which they generate—systemic reasoning can be said to constitute an intrinsic component of the generation of authority in legal arguments. This is a form of argumentative sensitivity that is ubiquitous in international adjudication.

27 That said, most international judges, arbitrators, counsel, and members of registries, at least when they speak in their official capacity, remain unresponsive to the question of whether international law simultaneously constitutes a system, that is, whether international law is a set of rules where relations between such rules and composite orders (see ILC, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi’, 13 April 2006, paras 65–101) are systematically organized, possibly creating a unity of sorts (Sands, 1998, 95). In that sense,
the system sensitivity of international judges, arbitrators, counsel, and members of registries is one pertaining to micro-argumentative systematicity only and is alien to any claim or meta-claim about the systematicity of international law as a whole.

3. Communicative Sensibility

The knowledge-based claims produced by international judges, arbitrators, counsel, and members of registries are constitutive of certain social realities. International judges, arbitrators, counsel, and members of registries inevitably communicate about the social realities which they produced through the application of rules and the definitional categories of those rules, such social realities feeding into the knowledge-claims. Without seeking any comprehensiveness, two specific communicative tools used by international judges when communicating about the social realities must be mentioned here: techniques of evidence and precedents. Whilst these communicative tools can also be instrumental to the system systematicity examined in the previous subsection, they are also part of another type of sensitivity, that is, how international judges, arbitrators, counsel, and members of registries communicate about their use of the definitional categories of international law. Said differently, these tools can simultaneously be the expression of different types of sensitivity. From the perspective adopted in this sub-section, rules of evidence and precedents are understood as means to package the social realities constituted by the deployment of the definitional categories of international law.

The way in which international judges, arbitrators, counsel, and members of registries communicate about the establishment of the facts of the case must be mentioned here. The facts of the case constitute a social reality constituted on the occasion of an adjudicatory process (Ferrajoli, 1995). The communication about the establishment thereof is meant to be subject to certain techniques of evidence. This means that, for the sake of the discussion carried out here, evidentiary techniques constitute a set of communicative tools about the factual findings made by international judges, arbitrators, counsel, and members of registries. In this respect, it is worth recalling that international judges, arbitrators, counsel, and members of registries usually organize their communication about their factual findings by distinguishing between the burden of proof and standards of proof (Roscini, 2015, 234–73). At each level, international judges, arbitrators, counsel, and members of registries enjoy a considerable leeway to tailor their communication, especially given the fact that there is no such thing as a ready-made and all-encapsulating ‘doctrine’ of evidence which applies across the board and which all international judges and arbitrators would be expected to share and apply (Dunoff and Pollack, 2018, 252–72) (International Courts and Tribunals, Evidence).

A second expression of the communicative sensibility of international judges, arbitrators, counsel, and members of registries can be found in the way in which international judges, arbitrators, counsel, and members of registries communicate about the weight they assign—in the present—to past judicial decisions (Venzke, 2008, 1401–28). From this perspective, past pronouncements and their present significance establish another type of social reality constituted on the occasion of an adjudicatory process. In this context, the declared absence of a formal doctrine of precedent (Stare decisis) can be constructed as a communicative strategy about the authority of the past in the present, and thus a form of indirect control over knowledge (Shahabuddeen, 1996; Judicial Precedent; De Brabandere, 2016, 24–55). After all, the choice to turn down the principle of stare decisis and the rejection of a formal doctrine of precedents boils down to a choice for a wide communicative discretion about how the past is used and constituted. In other words, the current state of practice pertaining to precedents is itself a strategy about how much leeway international judges, arbitrators, counsel, and members of registries enjoy when they communicate about the relevance and content they give to the past in the present.
From the perspective of the discussion conducted here, this choice is nothing more than a mode of communication (Cohen, 2015, 268–89). This does not mean however that that mode of communication is short of powerful constraints (Kaufmann-Kohler, 2007, 23; Schill, 2011a, 1083).

F. Concluding Remarks: Appropriating the Concept of Epistemic Community

31 In this contribution, the concept of epistemic community, as developed in the social sciences, has been applied to international adjudication with a view to making the argument that international judges, arbitrators, counsel, and members of registries, despite great variations in terms of background, legal culture, institutional constraints, and self-perceived functions, do share some minimal epistemes or units of knowledge constituted by shared fundamental sensibilities in terms of legal argumentation. In doing so, this paper has appropriated and reinterpreted the dominant concept of epistemic community in a way that de-emphasizes the selection and production of knowledge-based claims by the group concerned which inform legal and political behaviour and re-emphasizes the common sensibilities and beliefs that characterize the interactions among that group and which allow the group to design their knowledge-based claims. The dominant concept of epistemic community as is understood in social sciences has thus been adjusted in a way that obfuscates the epistemic pluralism of the field (Roberts, 2013, 45–94; Schill, 2011b, 875–908; see contra Waibel, 2015, 147–65).

32 In spite of the previous main claim, we would like to point out that transposing a concept from one discipline to another will often boil down to a heuristic enterprise. The heuristics produced here have shown the existence of an epistemic community in international adjudication by virtue of the shared argumentative fundamental sensibilities between international judges, arbitrators, counsel, and members of registries. So, cross-disciplinary transposition is a contradiction in terms as much as a practical impossibility. The concept of epistemic community, when deployed by international lawyers, and even more so when applied to international judges, arbitrators, counsel, and members of registries, is necessarily appropriated and reinvented, giving rise to a multitude of different understandings thereof (Bianchi, 2019, 251–66). Appropriation and reinvention are the fate of concepts (d’Aspremont and Singh, 2019, 1–24). There cannot be a mechanical application or transposition of a concept that does not reinvent it. And such appropriation and reinvention are always at the service of a claim.

33 A final epistemological remark is in order. Concepts travel across disciplinary borders. As they travel, they are appropriated and reinvented by their cross-disciplinary movements. Interestingly, in this constant process of cross-disciplinary appropriation and reinvention, concepts, their original meaning, and their normative heritage are never fixed. For this reason, it is preposterous to seek any kind of authentic use, transposition, or interpretation of a concept, like the one that has been discussed here. If anything, the discussion carried out here shows that the concept of epistemic community is a malleable framework which one should not baulk at deploying to shed light on some possible shared sensitivities in international adjudication and create new space for the re-imagination of international adjudication along a unitary paradigm. This means that the original meaning and the normative heritage of the concept of epistemic community cannot restrict imagination and prevent one from projecting unity onto a group of professionals riven by huge variations in terms of background, legal culture, institutional constraints, and self-perceived functions.
What we gain from such an image of unity and homogeneity of an otherwise very eclectic group is a question for another day.

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