TOWARDS A MORE CONSTRUCTIVE ANALYSIS OF THE IDENTITY OF SPECIAL REGIMES IN INTERNATIONAL LAW—THE CASE OF PROPORTIONALITY

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Abstract

This article inquires into the defining features of special regimes in international law. It starts from the assumption that a special regime, rather than simply a collection of rules and principles, is a variety of language. If international legal scholars wish to come to grips with the identity of special regimes in international law, as the author suggests, they should be less concerned with phenomena such as the resolution of normative conflicts and the systemic interpretation of treaties. Instead, they should study carefully the effect on the communication of legal propositions of transferring a piece of language from one particular part of international legal discourse to another. The argument proceeds in three steps. First, as the author argues, proportionality is a term that may be used to express many different meanings. Because of this, utterers may wish to bolster proportionality propositions in language tailored specifically to support an understanding of their intended meanings. Second, the author provides examples of the usage by international lawyers of the term *proportionality* in discussions of three different areas of regulation, namely state responsibility law, the law of maritime delimitation, and the law of the European Convention on the Protection of Human Rights and Fundamental Freedoms. As the examples go to show, the supporting language used by utterers in communicating proportionality propositions varies greatly with the particular law discussed. Third, the author explains how such differences help in clarifying the different defining features of different areas of regulation.

Keywords

Special regimes, proportionality, concepts, conceptual terms, pragmatics

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1 Introduction

Over the last fifty or so years, international law and legal practice have become increasingly specialised. As stated by the International Law Commission (ILC) Study Group on Fragmentation of International Law, '[w]hat once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", "European law" and even such exotic and highly specialised knowledges as "investment law" or "international refugee law" etc.'¹ As a result of this development, increasingly lawyers have started referring to international law as being made up of general international law and a number of *special regimes*.² The idea of the existence of special regimes in international law raises questions about the identities of such regimes. Generally, and more or less as a matter of course, international lawyers appear to be thinking of a special regime primarily as a collection of rules and principles. This was the approach of the ILC Study Group. It quite naturally led the Group to focus its attention on the formal relationships that exist between norms of international law, and phenomena such as legal hierarchy, the resolution of normative conflicts, the filling of legal gaps, and the systemic interpretation of treaties.

As this article will take for granted, although the generally adopted idea of a special regime as a collection of rules and principles might facilitate easy reference, if taken to imply a *definition* of the concept, it does not withstand analysis. If international law is a legal system—and the ILC Study Group maintained it is³—for the same reason that no one rule of international law can ever be described separately from any other such rule, a special regime cannot be identified with merely a set of rules and principles. Hence, the fundamental question remains: what are the defining features that allow us to think about particular spheres of regulation, such as international human rights law or international trade law, as special regimes separated from other such spheres of regulation and from general international law? Differently stated, if we choose to continue thinking about the international legal system as consisting partly of a series of special regimes, in what sense can we be justified in doing so?

To investigate ways towards a more constructive analysis of the identity

¹ 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', *Report of the ILC Study Group*, UN Doc. A/CN.4/L.682, 13 April 2006, para 8.

² See M Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (2012).

³ Report of the ILC, 58th session, UNGA OR, 61st session, Suppl. 10, UN Doc. A/61/10, para 251.

of special regimes in international law, I will approach the issue from a new angle. Throughout the article, I will conceive of special regimes as varieties of language. The concept of a *language variety* is defined by sociolinguistics as a set of linguistic forms (such as words, lexicalised phrases, and grammatical or pragmatical patterns) used under distinctive social circumstances.⁴ Speaking about varieties of a language like English is simply a way of recognising that, within a particular community of people joined by some particular common field of interest or activity, particular language patterns may often develop that are partly different from the patterns existing among English-speaking people in general. Consequently, communities of practice such as neurobiology, odontology, archaeology, literature, carpeting, printing, running, yoga, or rugby football each demonstrate their own distinctive language patterns. If there are things like special regimes in international law, as I will suggest, those regimes can be looked upon similarly.

In a conceptual universe where different international legal regimes are looked upon as language varieties, focus is naturally shifted from the international rights and obligations entailed by those regimes to the language used by participants in international legal discourses in the communication of legal propositions. Since I believe that concepts are always formed relative to other concepts, I am accordingly of the opinion that the identity of a special regime is best studied relative to other such regimes and to general international law. However, rather than looking to the purely formal side of those relationships, I suggest analyses should focus upon language contact phenomena such as borrowing and loan translation. What should be investigated is the effect on the communication of legal propositions of transferring a piece of language from one particular part of international legal discourse to another. It is the purpose of this article to illustrate how such studies may be conducted.

The article is designed as a case study. Hence, I will confine my investigation of the identity of special regimes in international law to one particular element of the language used in international legal discourse, namely conceptual terms. A *conceptual term* is a term used for the verbal representation of a concept; a *concept*, in turn, is the generalised idea of an empirical or normative phenomenon or state of affairs, or a class of such phenomena or states of affairs.⁵ To make the investigation manageable, I will tailor it around one conceptual term in particular,

⁴ See e.g. J Holmes, *An Introduction to Sociolinguistics* (3rd ed 2008), 7-8.

⁵ On the functionality of concept and conceptual terms, see generally U Linderfalk, 'On the Functionality of Conceptual Terms in International Law and International Legal Discourse' (2013) *European Journal of Legal Studies*, forthcoming.

namely *proportionality*. Proportionality has long been used in the context of regulatory fields such as the law of state responsibility, the law on the use of force, international human rights law, and the law of armed conflict. Proportionality language is gaining in popularity, however, and it can now also be observed in other areas, such as the law of maritime delimitation and international finance law. While preliminary studies indicate that the effect of proportionality on legal communication varies greatly with the particular sphere of regulation addressed,⁶ proportionality appears to be a particularly suitable candidate for studying the identity of special regimes in international law.

This article will consider the usage of proportionality in the communication of propositions about state responsibility law, the law of maritime delimitation, and the law of the European Convention on the Protection of Human Rights and Fundamental Freedoms (*ECHR*). The following three questions will be addressed:

1. What is the meaning potentially borne by the term proportionality in the context of a discussion about state responsibility law, maritime delimitation law, and the law of the ECHR respectively?
2. Given the answer to question (1), what is the effect on legal communication of transferring proportionality from a discussion of one of the three areas of international law to any of the others?
3. What does the answer to Question (2) tell us about the defining characteristics of special regimes?

The three questions will be addressed in turn, in sections 3, 4, and 5 of the article, respectively.

2 Theory

The purpose of this article presupposes a theory that can explain the meaning of a term like proportionality when used in the context of a contribution to international legal discourse. Similarly, it presupposes a theory that can explain the dependency of human verbal communication on socially defined contexts.

⁶ See e.g. W J Fenrick, 'Targeting and Proportionality during the NATO Bombing Campaign Against Yugoslavia' (2001) 12 *European Journal of International Law*, 489; M Andenas and S Zleptnig, 'Proportionality: WTO Law in Comparative Perspective' (2007) 42 *Texas International Law Journal*, 371; J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009).

To meet those concerns, I have found it convenient to draw on the branch of linguistics generally known as pragmatics. *Pragmatics* is the study of language use and human verbal communication.⁷ According to pragmatics, every act of human verbal communication includes three elements. It includes an *utterer*, i.e. a speaker or writer; it includes an *addressee*, i.e. a listener or reader; and it includes an *utterance*, i.e. a word or a string of words used by an utterer on a particular occasion.

As implied by the focus on both utterer and addressee, pragmatics work on the assumption that using language is to engage in social interaction. Consequently, when an utterer makes an utterance, it is always in the expectation that it will affect the attitudes, beliefs, or behaviour of some person or persons.⁸ Consider, for instance, the following sentence uttered by a person, Jane, addressing her husband, John: 'it's raining!' If we take for granted that the utterance is made while the two are preparing to leave home to go to work, Jane may wish to cause John to think that he had better bring an umbrella; she may wish to cause John to think that now he may not need to water the plants in the garden (as he suggested he would do earlier that morning); she may wish to cause John to offer her a lift to work; or she may wish to cause John to think that he should help Jane move tables from the garden inside (as she is planning a garden party later that evening).

According to pragmatics, any sound theory of utterance meaning will have to accommodate this social aspect of human language. Whatever motivates Jane, in some way or another, to utter 'it's raining!', has to be accounted for as part of the meaning of her utterance. For the same reason, whether Jane wishes to cause John to think he had better bring an umbrella, whether she wishes to cause John to think that he may not need to water the plants, whether she wishes to cause John to offer her a lift, or whether she wishes to cause him to think that he should help her move tables inside, in order for John to fully understand Jane's utterance, she must communicate this intention to him. Pragmatics has assumed as its main tasks to explain how she may possibly do this.

In addressing this explanatory task, pragmatics note the relevance of context.⁹ Certainly, the lexicon and grammar of a language such as English may help utterers signal to addressees in whatever way they wish to affect their attitudes, beliefs, or behaviour. For instance, if Jane actually wishes to cause John to bring an umbrella, she may use a grammatical imperative: 'bring an umbrella!' Similarly,

⁷ For an excellent, easy-to-read introduction to the topic, see e.g. SC Levinson, *Pragmatics* (1983); D Blakemore, *Understanding Utterances: An Introduction to Pragmatics* (1992).

⁸ Cf J Lyons, *Semantics* (1977) 725.

⁹ For an excellent overview of this topic, see Blakemore, above n 7, Chap. 1, especially 16 ff.

if Jane wishes to cause John to think that he does not need to water the garden plants, she may use a sentence expressed as a tag question: 'now you don't need to water the plants anymore, do you?' In the final analysis, however, pragmatics find that there is no one-to-one correspondence between the grammatical form of a sentence and the intention or intentions that it may be used to communicate. If Jane wishes to impose on John the task of helping her move tables from the garden inside, she does not necessarily have to use an imperative sentence like 'Help me move the tables inside!' As implied by the example, depending on the context, this intention may be communicated equally well using a declarative sentence like, 'it's raining!' The context may be such that communication may not even require the usage of the grammatical verb. If, for instance, Jane and John already spent plenty of time arranging furniture for the garden party, Jane may succeed in imparting to John that now she wishes that he helps her move tables inside by uttering a grammatically incomplete sentence like 'lucky us!', or 'more exercise for you, darling!'

By the *meaning* of an utterance, pragmatics generally understand the intention that the utterer wishes to communicate by making it. Admittedly, an utterer cannot use just any string of words to communicate just any intention. However, as the examples show, the meaning of an utterance can never be determined independently of context. This observation sets the parameters for my further inquiries into the meaning of proportionality in international legal discourse. In this article, I am not really interested in any particular intention of any particular utterer. I am interested in utterances containing the term proportionality, but as far as the purpose of this article goes, I will have to address the meaning of such utterances generally, although I will do so in the particular context of state responsibility law, the law of maritime delimitation, and the law of the ECHR respectively. Stated differently, the term proportionality is the focus of this article rather than any particular utterance using that term. This means I will have to limit my inquiries to the *meaning potential* of proportionality. The meaning potential of proportionality in international legal discourse is what the uttering of proportionality potentially does to the beliefs, attitudes or behaviour of participants of that same discourse.¹⁰ For ease of reference, I will be terming this as the *functionality* of the term.

The functionality of a term such as proportionality must not be confused with the actual function or effect of its utterance. While the functionality of a piece of language may help an utterer affect the beliefs, attitudes, or behaviour of an

¹⁰ Cf Lyons, above n 8, 725; Blakemore, above n 7, 5-6, 112.

addressee in some particular way, the actual effect can never be guaranteed. As I already explained, this is because the understanding of an utterance is always dependent on a particular context. If Jane utters 'it's raining!' to her husband John, her utterance may cause John to think that he should help Jane move tables from the garden inside. In that sense, causing people to think that they should help utterers move tables from the garden inside is part of the functionality of the sentence 'it's raining!' However, in order for Jane's utterance actually to cause John to think that he should help Jane move tables from the garden inside, John has to interpret the utterance in the context of certain assumptions, such as the assumption that Jane is throwing a garden party later that evening. If instead John chooses to interpret Jane's utterance in the context of the assumption that a rain shower will give the plants all the water they need, it will obviously affect him differently.

The functionality of a piece of language, such as a term or a sentence, is context-dependent too, but in a different sense. As explained, the actual effect of the utterance of a piece of language is dependent on whether some particular contextual assumption was actually used by a particular addressee in the process of understanding it. The functionality of a piece of language, on the other hand, is dependent on whether some certain *kind* of contextual assumption is *available* to some certain *potential* addressee or addressees.¹¹ For instance, if the potential addressee of the utterance of a sentence like 'it's raining!' does not know that the utterer is throwing a garden party later that evening, and cannot be expected to figure that out by himself—based, for instance, on the general situation prevailing at the occasion of the utterance—then this same sentence can never work to help the utterer cause the addressee to think that he should help the utterer move tables from the garden inside, *not even potentially*. Henceforth in this article, I will use the term *cognitive environment* to refer to the entire set of contextual assumptions available to an addressee.¹²

This intimate relationship between the functionality of a piece of language and the cognitive environment of the addressee or addressees of an utterance of that same piece of language explains the dependency of human verbal communication on socially defined contexts. Obviously, the cognitive environment is not the same for every participant in a discourse. In a strict sense, of course, it varies from person to person. However, as pragmatics have noted, it typically varies also more generally, depending on such factors as the time and place of an utterance

¹¹ Cf D Sperber and D Wilson, *Relevance: Communication and Cognition* (1986) 81-93.

¹² *Ibid*, 38 ff.

and the identity of the utterer.¹³ Consequently, the cognitive environment of a participant in international legal discourse on 11 September 2013 is typically not the same as that of that same participant twelve years earlier, on 11 September 2001. The cognitive environment of an international lawyer based in Germany is typically not the same as that of a lawyer based in the People's Republic of China. The cognitive environment of an international lawyer reading a judgment of the International Court of Justice is typically different than that of a lawyer listening to a junior colleague at an international conference. Similarly—and more importantly for the purpose of this article—the cognitive environment of participants in a discourse will typically vary depending on the socially defined context. If a special regime is looked upon as a socially defined subpart of international legal discourse, this means that we can expect the cognitive environment of international lawyers engaged in the discourse of state responsibility law to be partly different from the cognitive environment of lawyers engaged in the discourse on maritime delimitation law or the law of the ECHR. As I will discuss in section 4, this helps to explain the different effect of proportionality on the communication of propositions about those three branches of international law.

3 The meaning potential of proportionality

Like all conceptual terms, the functionality of proportionality is intimately connected with its role as an intermediate link in legal inferences.¹⁴ On the one hand, proportionality is a link to the criterion or criteria used for the categorisation of an action as proportionate (or not proportionate). Take, for instance, the proportionality test applied to countermeasures.¹⁵ Let us assume for the sake of argument that, according to international law, the assessment of the proportionality of a countermeasure shall be done based on three different criteria. Consequently, a countermeasure M taken by a state S is not proportionate if: (a) the effects of M extend over a period of time, which is markedly longer than the extension in time of the injury originally suffered; or (b) M necessarily affects a principle or an interest, which is markedly more important than the principle or interests originally injured; or (c) M necessarily causes a material loss, which is markedly more extensive than the material loss earlier

¹³ See e.g. Levinson, above n 7, 54 ff.

¹⁴ See Linderfalk, above n 5, Section 2.

¹⁵ See Article 51 of the Articles on the Responsibility of States for Internationally Wrongful Acts, *ILC Ybk* 2001/II(2), 30.

suffered. Properties like (a), (b), and (c) are used to identify a countermeasure as not proportionate. For this reason, they may be referred to as *identifying criteria*.¹⁶

On the other hand, proportionality is a link to the inferences allowed by the categorisation of a particular action as proportionate (or not proportionate).¹⁷ In the case of the proportionality test applied to countermeasures, if a countermeasure M taken by a state S is not proportionate, then this prompts at least the following conclusions: (d) S has the obligation immediately to terminate M; (e) S has the obligation to offer assurances and guarantees of non-repetition; and (f) S has the obligation to make full reparation for the injury caused. In the context of law, inferences like (d), (e), and (f) are usually referred to as *legal consequences*.¹⁸

Because of its role as an intermediate link in legal inferences, proportionality has an *economising* functionality.¹⁹ It may help utterers write and talk about law in a more economic fashion. In the case of our example, if proportionality had not existed, the relevant international law would have had to be stated by means of a rather long list of rules:

1.2

If (a), then (d). If (a), then (e). If (a), then (f).

1.2

If (b), then (d). If (b), then (e). If (b), then (f).

1.2

If (c), then (d). If (c), then (e). If (c), then (f).

Using proportionality as an intermediate link between identifying criteria and legal consequences, the statement can be considerably shortened:

If (a), (b), or (c), then M is not proportionate.

1.2

If M is not proportionate, then (d). If M is not proportionate, then (e). If M is not proportionate, then (f).

¹⁶ Linderfalk, above n 5, Section 2.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid, Section 3.

Now, if proportionality would seem to economise the verbal expression of international law, the really interesting thing about the role of conceptual terms in legal inferences is that it allows utterers to use this term for many other purposes too.²⁰ First of all, proportionality has what may conveniently be referred to as a *normative* functionality. Like many conceptual terms used in legal discourse, proportionality is tied to a series of moral and political norms. Depending on whether those norms are available to addressees or not, uttering proportionality may work to provoke reactions that international law itself cannot provoke. Take, for instance, the case of *Olsson v. Sweden*.²¹ The social authorities of Sweden decided to transfer the custody of a child from its natural to its foster parents, and to impose severe visiting restrictions upon the former. The natural parents brought a complaint to the European Court of Human Rights, arguing a violation of Article 8 of the ECHR. The Court obviously had to decide whether the interference with the complainant's right to his private life was necessary in a democratic society 'for the protection of the rights and freedoms of others'.²² In the practice of the Court, such a decision requires a weighing of the conflicting interests involved. Weighing involves, on the one hand, the mutual interests of natural parents and children in developing a family relationship, and the psychological harm risked by the absence of an opportunity of developing such a relationship.²³ On the other hand, weighing also involves the potential harm caused to a child's personal development if deprived of a stable and harmonious living environment.²⁴ In a case like this, by referring to the outcome of the consideration as proportionate, the Court would typically provoke a more favourable reaction than by just saying that the one conflicting interest overrides the other. It would do so because, in political discourse, the concept of proportionality is tied to norms that value the equal respect of the interests of all human beings and the means-end rationality of governmental interference with private life.

Second, proportionality has a *systemising* functionality. According to the ontological stance taken in this article, concepts are formed through a process

²⁰ On the many functionalities of conceptual terms in international legal discourse generally, see Linderfalk, above n 5, Sections 3-8.

²¹ *Olsson v. Sweden* (No. 2) (1994) 17 E.H.R.R. 134.

²² *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by Protocol No 11 to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998) article 8(2).

²³ *Olsson v. Sweden* (No. 2), above n 21, paras 87-91.

²⁴ *Ibid.*, paras 87-91.

of abstraction. They are the result of the ability of the human brain to perceive of particular properties of phenomena or states of affairs as characteristics shared by all entities belonging to the extension of some certain concept.²⁵ This means that by the mere nature of what they represent, conceptual terms like proportionality will always express an assumption about the existence of some certain systemising criterion or criteria. If, for instance, a particular action taken by a state is referred to by an utterer as not proportionate, then the utterer may be taken to commit herself to the assumption that there is some certain property or properties that can be used to distinguish actions that are proportionate from actions that are not. Depending on the availability of this assumption, the usage of proportionality may prompt addressees to make further inferences about the particular action in question. The addressee may come to learn, for instance, that the particular action is inequitable; that it is unjust; or that it is not instrumental to, or not necessary or sufficient for, the achievement of some certain defined purpose, for instance the protection of national security.

Third, proportionality has an *emancipating* functionality. As earlier indicated, a proportionality assessment is inevitably relative to some certain criterion or criteria. Such criteria derive from the intended purpose of the particular law at issue. It can be argued that it is an intended purpose of the ECHR not only to ensure the protection of human rights, but also to allow for such limitations of rights that are necessary in a democratic society. Similarly, it can be argued that it is the intended purpose of the law of maritime delimitation to ensure equitable division of maritime areas, and that it is at least one of the intended purposes of the law of state responsibility to ensure that the adoption of countermeasures does not lead to inequitable results. What makes those observations relevant in this context is the fact that, obviously, in no case did law-makers define purposes in any detail. They did not have any exact understanding of the notions of 'equity' and 'necessary in a democratic society'. Rather, they intended the precise meaning of those notions to be determined based on institutional practices like everyday language conventions, the moral principles followed within the community where the law is to be applied, the teaching of natural science, and—in the case of the law of the ECHR—the practice of the institutions of the Council of Europe. From this observation, there is but a small step to contending that the meaning of 'equity' and 'necessary in a democratic society'—and hence also the contents

²⁵ See e.g. E Margolis and S Laurence, 'Concepts' in E Zalta (ed) *Stanford Encyclopedia of Philosophy*, Summer 2010 Edition, <<http://plato.stanford.edu/archives/sum2010/entries/concepts>> [accessed 4 January 2014].

of the criteria applied in the assessment of an action as proportionate—should be determined based not on the institutional practices existing at the time of the making of each respective law, but in accordance with institutional practices as they develop. This explains the emancipating functionality of proportionality. Depending on the way addressees understand the definition of the purpose or purposes of the relevant international law over time, proportionality potentially helps utterers muster acceptance for arguments about the *lex lata* independently of any law-makers' understanding.

Fourth, proportionality has a *formative* functionality. As noted by linguistics, the meaning of a conceptual term is typically dependent on its relationship with other conceptual terms belonging to the same language system.²⁶ To illustrate, the meaning of 'football' (in the sense of the ball object) is dependent on its relationship with the concept of the game known as 'football'. The meaning of 'kick' is dependent on its relationship with 'foot'. The meaning of 'arm' is dependent on its relationship with 'finger', 'shoulder', and 'body', and so on. Every such proposition about the relationship between two conceptual terms implies the existence of some principle that can explain why, for instance, 'kick' is more closely related to 'foot' than 'sky', or why 'arm' is more closely related to 'shoulder' than 'maritime transport'.²⁷ The formative functionality of conceptual terms builds on this fact. Consequently, depending on whether an addressee can acquaint herself with the organisational principle or principles assumed by an utterer in referring to an action as proportionate, proportionality may facilitate the addressee's understanding of other conceptual terms, which the utterer may also wish to use. For example, if an addressee learns that in the conceptual universe of an utterer, a proportionate limitation of a human right must be strictly necessary to attain some particular purpose, then this would typically help her capture what the utterer means by *proportionality rules*. Similarly, if an addressee learns that in the conceptual universe of the utterer, a proportionate division of maritime areas is instrumental to the achievement of an equitable result, this would typically help her understand what the utterer means by *equitable principles*.

Fifth, proportionality has a *camouflaging* functionality. In describing the identifying criteria and legal consequences tied to a conceptual term, utterers will always be dependent on the available means for the determination of law. As we all know—whether because the relevant means in fact offer very scant information, or because different authorities give completely different pictures of

²⁶ See e.g. Lyons, above n 8, 231 ff.

²⁷ Ibid.

the prevailing legal state of affairs—the description given may often be the result more of the utterer’s own moral and political universe than of her assessment of the relevant means for the determination of law. The usage of a conceptual term as a link between identifying criteria and legal consequences may help to conceal this. This is certainly the case with proportionality. Depending on whether or not the addressee is already familiar with the poor productivity of the relevant means for the determination of law, proportionality potentially helps utterers convince addressees that in fact they are in possession of knowledge that will allow them to provide a fairly good description of the *lex lata*.

4 The effect of proportionality on legal communication

4.1 The dependency of legal communication on the functionality of proportionality and the role of supporting language

What is the effect on legal communication of transferring proportionality from a discourse on one area of international law rather than another? To answer this question, first of all, we need to clarify the dependency of legal communication on the meaning potential (or functionality) of proportionality. The meaning potential of proportionality should not be confused with its meaning on particular occasions of utterance. By the *meaning of an utterance*, pragmatics generally understand the intention that the utterer wishes to communicate by making it.²⁸ Communication is said to occur when an addressee captures the communicative intention of the utterer. Stated in the inverse, miscommunication occurs when the addressee does not capture such a communicative intention.

Although it may not be the primary focus of an utterer and an addressee when communicating, naturally, the meaning potential (functionality) of language bears on that activity. As already indicated in section 2 of this article, although the meaning of utterances can never be determined independently of contexts, an utterer cannot use just any string of words to communicate just any intention. Consequently, whether or not an addressee succeeds in capturing the communicative intention of an utterer in uttering a conceptual term will typically depend partly on the functionality of this term, and partly on whether the addressee actually uses the relevant contextual assumption or assumptions.

²⁸ See Blakemore, above n 7, 3 ff.

Given the dependency of the functionality of a conceptual term on cognitive environments—that is, the entire set of assumptions available to an addressee—there are several reasons why utterers and addressees may at times find themselves to be miscommunicating. First, the addressee may simply not have access to the relevant contextual assumption or assumptions. If, for instance, an utterer uses proportionality for the sole purpose of camouflaging for an addressee the true nature of his argument, the addressee might already be familiar with the poor productivity of traditional legal methodology. The utterance will then obviously not have the intended effect. Similarly, if an utterer uses proportionality for the purpose of convincing an addressee of the correctness of his argument, it might be that the addressee bases her understanding of the utterance on a different moral or political norm than the one assumed by the utterer. This norm might exercise a different persuasive force upon her, with the result that, again, the utterance will not have the intended effect.

Second, the addressee may have access to the relevant contextual assumption or assumptions, but for some reason may choose to understand the utterance against the background of some other assumption that is also available to her. Let us assume, for instance, that an utterer uses proportionality for the purpose of transferring to an addressee the proposition that some particular human rights limitation has some particular property, such as that it is unjust. The addressee may know that, depending on the situation, utterers use different systemising criteria to categorise human rights limitations as not proportionate; apart from the criterion assumed by the utterer, human rights limitations may also be categorised as not proportionate because they are not sufficient for the achievement of some certain defined purpose. In such a situation, although the addressee is certainly familiar with the systemising criterion assumed by the utterer, it might be that the addressee expects the utterer to be applying the latter criterion rather than the former. Similarly, all things being equal, since proportionality has more than one functionality, it might be that the addressee bases her understanding of the utterance on some assumed underlying moral or political norm because she thinks that, for the utterer, proportionality is more a tool for emancipation than systemisation. In neither case will the utterance have the intended effect.

An utterer may take action to avoid such misunderstandings. For example, if an utterer uses proportionality for the purpose of camouflaging for an addressee the true nature of his argument, he may stress that it is the result

of a 'proportionality calculus'.²⁹ Similarly, if an utterer uses proportionality as a tool for emancipation rather than systemisation, he may highlight 'the evolutive character' of the relevant law generally.³⁰ This seems to be the reason why in discourses on different areas of international law, the usage of proportionality may affect communication differently. A special regime, according to the perspective taken in this article, is a socially defined subpart of general international legal discourse. If cognitive environments vary depending on socially defined contexts, as pragmatics claim to have established, then it seems a reasonable guess that in discourses on different areas of international law, utterers will need to use different supporting language to ensure that communication succeeds. The following sub-sections 4.2-4.6 confirm this assumption at least to the extent of discourses on the law of state responsibility, maritime delimitation law, and the law of the ECHR.

4.2 How utterers draw attention to assumed moral and political norms

If an utterer uses proportionality for the purpose of convincing addressees of the correctness of his argument, he may wish to add language to ensure the availability of his assumption about the underlying moral or political norm or norms. To facilitate further reference, I will refer to this as *normative supporting language*. In each of the three discourses considered in this article, utterers use such language rather frequently. In the case of state responsibility law, supporting language is conspicuously ambiguous. Some utterers call attention to 'the need to ensure that the adoption of countermeasures does not lead to inequitable results'.³¹ Others point out that, according to international law, the proportionality of a measure 'is tested by what appears reasonably necessary to induce the wrongdoer to cease its course of action'.³² This ambiguity seems to be just a natural consequence of the ambivalence felt by international lawyers when trying to define the ultimate purpose of countermeasures.³³ Many utterers try to

²⁹ See below at § 4.6.

³⁰ See below at § 4.4.

³¹ Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, *ILC Ybk* 2001/ II(2), 135. See also G Arangio-Ruiz, 'Fourth Report on State Responsibility', *ILC Ybk* 1992/II(1), 22-23.

³² R Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' (2004) 51 *Netherlands International Law Review*, 41, at 51-52, citing E Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 *EJIL* 889.

³³ Cf Cannizzaro, *ibid*, 889-916.

avoid this difficulty by using non-committal normative language. Consequently, utterers stress that 'the test of proportionality is very important' and that it is a 'basic condition for the lawfulness of a countermeasure'.³⁴ They warn that, since recourse to countermeasures involves the great risk of causing an escalation, and hence a worsening of conflict, countermeasures should be 'a wager on the wisdom, not on the weakness of the other [p]arty'.³⁵ They infer that countermeasures should be proportionate as long as they serve goals 'which are consistent with the expressed desire of the international community'.³⁶

In the discourse on maritime delimitation law, overall, normative supporting language takes on a more homogenous character. Indeed, in many cases, when trying to direct addressees' awareness to the moral and political dimension of proportionality, utterers merely repeat language used earlier by others. Consequently, utterers stress that 'the final line [of delimitation] should result in an equitable solution'.³⁷ They remind us that equity in this context is an emanation, not of 'abstract justice', but of 'justice according to the rule of law',³⁸ why any delimitation should be 'both equitable and as practically satisfactory as possible'.³⁹ The emphasis generally is on disproportion rather than any 'general principle' of proportionality.⁴⁰ Hence, as emphatically stated, when proportionality is considered, the task is not one of a 'completely refashioning nature',⁴¹ but of 'remedying the disproportionality and inequitable effects produced by particular geographical configurations or features'.⁴² More specifically, the task is to verify that a delimitation line does not lead to 'an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation

³⁴ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, ICJ Reports 1997 p 223 (Judge Vereshchetin, diss) (*Gabčíkovo-Nagymaros*).

³⁵ *United States of America v France*, Decision of 9 December 1978, 18 RIAA 417, para 91 (*Air Services Agreement*).

³⁶ Rayfuse, above n 32, 72.

³⁷ *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, ICJ Reports 2009 p 61, para 120 (*Maritime Delimitation in the Black Sea*), citing Arts 74 and 83 of the UNCLOS.

³⁸ *Continental Shelf (Libya/Malta)*, ICJ Reports 1985 p 13, para 45, citing *Continental Shelf (Tunisia/Libya)*, ICJ Reports 1982 p 192, para 71.

³⁹ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment of 19 November 2012, para 244, citing *Barbados/Trinidad and Tobago Maritime Delimitation*, Award of 11 April 2006, 27 RIAA, para 215.

⁴⁰ *Continental Shelf (Libya/Malta)*, above n 38, para 57.

⁴¹ *Ibid*, para 57, citing *Anglo-French Continental Shelf*, 18 RIAA, para 101.

⁴² *Maritime Delimitation in the Black Sea*, above n 37, citing *Anglo-French Continental Shelf*, *ibid*, para 210.

line'.⁴³

In the discourse on the law of the ECHR, as a way of generally introducing the concept of proportionality, utterers often start by pinning down the standard that 'a fair balance has to be struck between the demands of the general interest and the requirements of the protection of the individual's fundamental rights'.⁴⁴ An explicit general definition of the concept of 'fair' is typically not provided, however. Instead, this concept is often explained implicitly, in a piecemeal fashion, by reference to the particular systemising criterion or criteria considered in the application of the proportionality test to particular cases. Consequently, depending on the specific context of use, utterers may refer to a measure as disproportionate when it entails an 'individual and excessive burden',⁴⁵ when it is the result of an arbitrary or discriminatory application of a rule of law;⁴⁶ when it is not 'accompanied by specific reasoning';⁴⁷ when it thwarts 'the free expression of the people in the choice of the legislature';⁴⁸ when public authorities have failed to act with 'diligence' or within a 'sufficiently prompt' time-frame;⁴⁹ when the decision-making process resulting in the adoption of a measure does not involve a judiciary;⁵⁰ when the measure is contrary to the demands that 'pluralism, tolerance and broadmindedness without which there is no "democratic society"',⁵¹ and when there is no access to a court or possibility of appeal.⁵²

4.3 How utterers draw attention to assumed systemising criteria

If an utterer uses proportionality for the purpose of prompting addressees to make further inferences about a particular action, he may wish to add language to ensure the availability of his assumption about the systemising

⁴³ *Bay of Bengal Maritime Delimitation (Bangladesh/Myanmar)*, ITLOS Case No 16, (Judgment, 14 March 2012) para 233, citing *Maritime Delimitation in the Black Sea*, above n 37, para 122.

⁴⁴ *Perdigão v. Portugal*, Judgment of 16 November 2010, para 63.

⁴⁵ *Depalle v. France*, Judgment of 29 March 2010, para 83.

⁴⁶ *Evans v. The UK*, Judgment of 10 April 2007, para 89; *Animal Defenders International v. The UK*, Judgment of 22 April 2013, para 122.

⁴⁷ *Frodl v. Austria*, Judgment of 8 April 2010, para 35.

⁴⁸ *Scoppola v. Italy (No. 3)*, Judgment of 22 May 2012, para 84.

⁴⁹ *Rousk v. Sweden*, Judgment of 25 July 2013, paras 124 and 122.

⁵⁰ *Scoppola v. Italy (No. 3)*, above n 48, para 98.

⁵¹ *Otto-Preminger Institut v. Austria*, Judgment of 20 September 1994, para 49.

⁵² *Stubbings and Others v. UK*, Judgment of 22 October 1996, paras 65-66.

criterion or criteria used in referring to this action as either proportionate or non-proportionate. I will refer to this as *systemising supporting language*. In each of the three discourses considered in this article, utterers resort to such language, although less so in the discourse on maritime delimitation law than in the others. In the case of state responsibility law, systemising supporting language shows the same teleological ambivalence as the language illustrated in sub-section 4.2. Consequently, some utterers stress the effects of countermeasures, which must be 'commensurate with the injury suffered'.⁵³ Others call attention to the long and short term goals of countermeasures, noting that 'proportionality requires not only employing the means appropriate to the aim chosen', but that it 'implies, above all, an assessment of the appropriateness of the aim itself'.⁵⁴ A conspicuous number of utterers use language tailored to avoid taking a stance in the discussion of what might be the ultimate purpose or purposes of countermeasures. They refer instead to criteria such as 'how serious the unlawful conduct attributed to both parties was',⁵⁵ or whether or not an action violated 'an essential provision of a treaty',⁵⁶ or a provision 'essential to the accomplishment of the object and purpose' of a treaty.⁵⁷

In the case of maritime delimitation law, supporting language once again takes on a more homogenous character. Utterers remind us that 'the real role of proportionality is one in which the presence of different lengths of coastlines needs to be taken into account so as to prevent an end result that might be "disproportionate" and hence inequitable'.⁵⁸ They call attention to the function of proportionality assessment, which is to 'verify that the [delimitation] line [...] [provisionally drawn] does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line'.⁵⁹

In the case of the law of the ECHR, supporting language is extremely varied. This would seem to be the consequence of the great number of systemising criteria assumed, as illustrated in sub-section 4.2. The impression is, however,

⁵³ *Gabčíkovo-Nagymaros*, above n 34, 56. See also W Riphagen, 'Sixth Report on State Responsibility', ILC Ybk 1985/II(1), 3, 11.

⁵⁴ Rayfuse, above n 32, 51, citing Cannizzaro, above n 32, 897.

⁵⁵ *Gabčíkovo-Nagymaros*, above n 34, 194 (Judge Herczegh, diss).

⁵⁶ *Ibid.*, 195.

⁵⁷ *Ibid.*

⁵⁸ *Barbados/Trinidad and Tobago Maritime Delimitation*, above n 39, para 240.

⁵⁹ *Maritime Delimitation in the Black Sea*, above n 37, para 122.

that utterers do not consider all criteria generally applicable. Judged by the usage of supporting language, some criteria are regarded as context-specific, in the sense that as far as utterers are concerned, the relevance of criteria varies with the particular right and cultural context considered. Some utterers make this explicit. As stated by the European Court of Human Rights, in the context of Article 3 of Protocol 1 to the ECHR: 'There are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.'⁶⁰

4.4 How utterers draw attention to assumed definitions of legal purposes over time

If an utterer uses proportionality for the purpose of mustering acceptance for an argument about the *lex lata* independently of any law-makers' understanding of it, he may want to add language to ensure the availability of his assumption about the definition of the purpose or purposes of that law over time. I will refer to this as *emancipating supporting language*. In the discourse on state responsibility law, utterers sometimes resort to such language, although this may not always (or even typically) be the case. Utterers caution that 'judging the "proportionality" of countermeasures is not an easy task', adding that it 'can at best be accomplished by approximation'.⁶¹ They refer to what they claim is 'widely recognised', namely 'that the test of proportionality ... is very uncertain and therefore complex'.⁶² They remind us that, according to the ILC, 'there is no uniformity ... in the practice or the doctrine as to the formulation of the principle, the strictness or flexibility of the principle and the criteria on the basis of which proportionality should be assessed'.⁶³

In the discourse on maritime delimitation law, emancipating supporting language is more widely resorted to. Some utterers are fairly explicit about their assumptions. They remark, for example, that although certain, 'drawing a delimitation line in a manner that is mathematically determined by the exact ratio of the lengths of the relevant coastlines ... would in many cases lead to an inequitable result'.⁶⁴ Or, even more explicitly, they bolster their propositions in

⁶⁰ *Hirst v. UK (No. 2)*, Judgment of 6 October 2005, para 61.

⁶¹ *Air Services Agreement*, above n 35, para 83.

⁶² *Gabčíkovo-Nagymaros*, above n 34, 223 (Judge Vereshchetin, diss).

⁶³ *Ibid.*

⁶⁴ *Barbados/Trinidad and Tobago Maritime Delimitation*, above n 39, para 328.

language like the following:

The Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to States themselves, or to the courts, to endow this standard with specific content.⁶⁵

Other utterers choose to communicate their assumptions implicitly, emphasising either the shared responsibility of law-maker and judiciary for achieving an equitable result, or the general nature of the proportionality/disproportionality test, which by sheer necessity demands that equity constantly be defined anew, in relation to each and every particular case of delimitation. Consequently, they remind us that the disproportionality test cannot be ‘applied in a mechanical fashion’;⁶⁶ that it ‘does not depend upon a mathematical operation’;⁶⁷ and more specifically, that ‘[t]aking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front [of Parties]’.⁶⁸ Utterers explain that, within the constraints imposed by law, a judiciary ‘has both the right and the duty to exercise judicial discretion in order to achieve an equitable result’.⁶⁹ They emphasise that while it is the task of the judiciary ‘to check for a significant disproportionality ... [w]hat constitutes such a disproportionality will vary according to the precise situation in each case’.⁷⁰

In the case of the law of the ECHR, emancipating supporting language is more homogenous. Since the late 1970’s, utterers have stressed that the ECHR is ‘a living instrument which ... must be interpreted in the light of present-day conditions’.⁷¹ Although this is the exact phrase often resorted to, utterers sometimes use similar language, stressing for instance that regard must be had to ‘the changing conditions in Contracting States’,⁷² or that states, in applying the

⁶⁵ *Continental Shelf (Libya/Malta)*, above n 38, para 28.

⁶⁶ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, above n 39, para 194.

⁶⁷ *Ibid*, para 166, citing *Continental Shelf (Libya/Malta)*, above n 38, para 68.

⁶⁸ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, ICJ Reports 1993 p38, para 69.

⁶⁹ *Barbados/Trinidad and Tobago Maritime Delimitation*, above n 39, para 244.

⁷⁰ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, above n 39, para 240.

⁷¹ Application No 5856/72, *Tyrer v UK*, Judgment of 25 April 1978, para 31. For more recent examples, see e.g. Application No 19010/07, *X and Others v Austria*, Judgment of 19 February 2013, para 139.

⁷² *Ünal Tekeli v Turkey*, Judgment of 16 November 2004, para 54.

ECHR, 'must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life'.⁷³

4.5 How utterers draw attention to assumed relationships between conceptual terms

If an utterer uses proportionality for the purpose of facilitating addressees' understanding of other conceptual terms, he may want to add language to ensure the availability of his assumption about the organisational principles used for the explanation of the relationship of proportionality with other conceptual terms. I will refer to this as *formative supporting language*. In each of the three discourses considered in this article, utterers resort to such language. To begin with, utterers frequently use composite terminology such as 'disproportionality',⁷⁴ 'the test of proportionality',⁷⁵ or 'the proportionality principle'.⁷⁶ In all such cases, the assumed relationship with 'proportionality' can be inferred by addressees using nothing more than the grammar of the English language. Apart from such obvious examples, in the discourse on state responsibility law, by contrasting countermeasures with neighbouring concepts such as 'reprisals', 'sanctions', and 'retorsion', utterers imply that the proportionality test does not necessarily apply equally to all.⁷⁷ By proposing terminology like 'external' and 'internal' proportionality,⁷⁸ utterers imply that proportionality takes on a more general meaning. By suggesting that a particular action is not 'clearly' or 'manifestly disproportionate',⁷⁹ utterers imply that the meaning of proportionality is dependent on a burden of proof.

In the discourse on maritime delimitation law, when utterers describe the role of proportionality assessments in the whole of delimitation proceedings—as

⁷³ *Scoppola v Italy (No 3)*, above n 48, para 94.

⁷⁴ *Maritime Delimitation in the Black Sea*, above n 37, para 210.

⁷⁵ Rayfuse, above n 32, 50.

⁷⁶ P E Dupont, 'Countermeasures and Collective Security: the Case of the EU Sanctions Against Iran' (2012) *J of Conflict & Security* L 1, 31; Application No 48876/08, *Animal Defenders v The UK*, Judgment of 22 April 2013 para 3 (Judges Ziemele, Sajó, Kalaydieva, Vučinić and de Gaetano, diss).

⁷⁷ Rayfuse, above n 32, 44.

⁷⁸ *Ibid*, 51, citing Cannizzaro, above n 32.

⁷⁹ *Air Services Agreement*, above n 35, para 83; *Gabčíkovo-Nagymaros*, above n 34, 223 (Judge Vereshchetin, diss).

either the consideration of a relevant circumstance,⁸⁰ or a final check upon the equity of a tentative delimitation⁸¹—it would seem they similarly aim at bringing assumed organisational principles to the attention of addressees. It suffices to quote the International Court of Justice in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*:

In the *first stage*, the Court establishes a provisional delimitation line between territories (including the island territories) of the Parties. In doing so it will use methods that are geometrically objective and appropriate for the geography of the area. This task will consist of the construction of an equidistance line, where the relevant coasts are adjacent, or a median line between the two coasts, where the relevant coasts are opposite, unless in either case there are compelling reasons as a result of which the establishment of such a line is not feasible ... In the *second stage*, the Court considers whether there are any relevant circumstances which may call for an adjustment or shifting of the provisional equidistance/median line so as to achieve an equitable result ... In the *third and final stage*, the Court conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted or shifted, is that the Parties' respective shares of the relevant area are markedly disproportionate to their respective relevant coasts.⁸²

There is a clear parallel between the way proportionality is described in the overall context of maritime delimitation proceedings, and the way it is often described in the context of at least some rights laid down in the ECHR. Proportionality assessments (in the narrow sense) are said to be a final test in the overall methodology used by the European Court for assessing whether or not a measure interfering with a right constitutes a violation of the obligations of a state under the ECHR or not. Off and on, this methodology is described as consisting of either two or three stages.⁸³ According to the description, when following the three-stage procedure, the Court first establishes whether a 'pressing social need' justi-

⁸⁰ See e.g. *Continental Shelf (Libya/Malta)*, above n 38, paras 55-66.

⁸¹ *Barbados/Trinidad and Tobago Maritime Delimitation*, above n 39, para 238.

⁸² *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, above n 39, paras 191-193.

⁸³ See e.g. Application No 27308/74, *Rousk v Sweden*, above n 49, para 113; Application No 13470/87, *Otto-Preminger Institut v Austria*, above n 51, para 50 (Judges Palm, Pekkanen and Makarczyk, diss) para 3; Application Nos 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, *Informationsverein Lentia and Others v Austria*, Judgment of 24 November 1993, para 39; Application Nos 41340/98,

fies the interference;⁸⁴ in assessing whether such a need exists, contracting states have a certain margin of appreciation.⁸⁵ Second, the Court inquires whether or not there are other means to achieve the same end that would interfere less seriously with the right concerned.⁸⁶ Third, since there must always be ‘a reasonable relationship of proportionality between the means employed and the aim pursued’, the Court ascertains whether ‘a fair balance’ has been struck between the demands of the general interest and the requirements of the protection of the individual’s fundamental rights.⁸⁷ When following the two-stage procedure, the least restrictive interference test is considered by the Court either as an integral part of the proportionality assessment, or it is discarded altogether. By so describing the role of proportionality, obviously utterers communicate an assumption about the relationship of proportionality assessment with other assumed stages of decision-making. For instance, in referring to proportionality assessment as the final test in a three stage-procedure, utterers imply that neither does the proportionality test entail an assessment of the alleged aim of an infringement measure, nor does it entail an assessment of whether it is instrumental to, and strictly necessary for, the achievement of this aim.

4.6 How utterers draw attention to assumed productivity of traditional legal method

If an utterer uses proportionality for the purpose of convincing addressees that she can provide a fairly good description of the *lex lata*, she may want to add language to ensure the availability of the assumption that she is in fact possessing knowledge allowing her to provide this description, which I will henceforth refer to as *camouflaging supporting language*. Given that proportionality assessments always involve the comparison of two units, the justification of any such assessment in a particular case inevitably presupposes the correctness of two separate decisions. First, whoever makes the determination has to explain exactly which units she is comparing and why. Second, she has to explain how exactly—that is, based on which criterion or criteria—she is making the

41342/98, 41343/98 and 41344/98, *Refah Partisi (The Welfare Party) and Others v Turkey*, Judgment of 13 February 2003, para 106; Application No 126/05, *Scoppola v Italy (No 3)*, above n 48; Application No 16130/90, *Sigurður A Sigurjónsson v Iceland*, Judgment of 30 June 1993, para 41; Application No 13444/04, *Glor v Switzerland*, Judgment of 30 April 2009, para 94.

⁸⁴ See e.g. *Sigurður A. Sigurjónsson v Iceland*, above n 83, para 41.

⁸⁵ See e.g. *Otto-Preminger Institut v Austria*, above n 51, para 50.

⁸⁶ See e.g. *Glor v Switzerland*, above n 83, para 94.

⁸⁷ See e.g. *Rousk v Sweden*, above n 49, para 113.

comparison. As seen in sub-section 4.3, while in all three discourses considered in this article, utterers typically take great pains to provide the first part of the explanation, they typically say very little (or nothing) that can help addressees obtain anything like an idea about the latter. However, and interestingly, the language utterers use to support their opinions about the proportionality of actions may be seen to imply that those propositions are still the result of the application of law, rather than the usage by the utterer of any discretion that law leaves to those that apply it.

Consequently, utterers refer to proportionality assessments using terms such as 'the test of proportionality',⁸⁸ or the proportionality 'rule'.⁸⁹ Utterers indicate that assessments are the result of a 'proportionality calculation',⁹⁰ or a 'proportionality equation',⁹¹ or again the outcome of 'the requisite' or 'correct balance'.⁹² They appeal to 'the essential criteria' for assessing the proportionality of an action.⁹³ In so far as it concerns the frequency of usage of language of this kind, generally, no great difference can be noted between the discourses on state responsibility law, maritime delimitation law, and the law of the ECHR. If there is a difference, it would seem to lie rather in the sources of authority invoked by utterers to support the existence of said 'tests', 'requirements', and 'rules', or to determine the meaning of concepts such as 'requisite' and 'correct'. Whereas in the discourse on state responsibility law, utterers often refer rather sweepingly to 'doctrine and jurisprudence',⁹⁴ or to what they claim to be 'well-known',⁹⁵ in the other two discourses, references are typically more precise, directing attention to particular case law, such as 'the *North Sea Continental Shelf* cases',⁹⁶ or 'the *Hirst Judgment*'.⁹⁷

⁸⁸ *Continental Shelf (Libya/Malta)*, above n 38, para 74; *Gabčíkovo-Nagymaros*, above n 34, 223 (Judge Vereshchetin, diss).

⁸⁹ *Air Services Agreement*, above n 35, para 83.

⁹⁰ *Continental Shelf (Libya/Malta)*, above n 38, para 74.

⁹¹ Application No 30814/06, *Lautsi and Others v Italy*, Judgment of 18 March 2011, (Judge Rozakis & Judge Vajić).

⁹² Ibid.

⁹³ *Scoppola (No. 3)*, above n 48, para 99.

⁹⁴ *Gabčíkovo-Nagymaros*, above n 34, p 223 (Judge Vereshchetin, diss).

⁹⁵ *Air Services Agreement*, above n 35, para 83.

⁹⁶ *Continental Shelf (Libya/Malta)*, above n 38, para 74.

⁹⁷ *Scoppola (No. 3)*, above n 48, para 99.

5 Defining characteristics of special regimes

It is time to start pulling strings together. As indicated in section 4, the usage of proportionality affects communication differently in discourses on state responsibility law, maritime delimitation law, and the law of the ECHR. Depending on the particular discourse and functionality considered, the language used to support the communication of an opinion about the proportionality of an action can be anything from extensive to practically non-existent. It can take various forms, from a seemingly habitual repetition of a single phrase to a rich variety of impasses short of any visible pattern. I will now move on to analysing the implications of those observations for a discussion of the identity of special regimes in international law.

To make the analysis fairly simple, I will conduct it on the basis of two variables only. Consequently, I will take into account, first, the amount of language generally used to support the communication of proportionality propositions in the discussion of one field of law relative to a discussion of any of the others. Second, I will take into account the variation in the language exploited. As I will take for granted, when extensive language is used supporting the understanding of some certain kind of communicative intention equivalent to some certain functionality of proportionality, this shows that overall, within the relevant language community, this potential meaning is much appreciated. When supporting language is limited, this shows either that the potential meaning considered is little appreciated, or that utterers think it obvious that the assumption required for the understanding of an intention is already available to addressees. When supporting language takes the form of a more or less habitual repetition of a single phrase, this shows that the required assumption is fairly specific and widely agreed upon. In the inverse, when supporting language takes on a heterogenous character, this shows that the required assumption is either contentious or highly complex.

As shown by the usage of normative supporting language in the three discourses, utterers assume different moral and political norms. More surprisingly perhaps, norms have different persuasive force. In the discourse on maritime delimitation law, a high degree of repetition of supporting language indicates a degree of consensus about the identity of the underlying norm: delimitation should result in an equitable solution. This should not be surprising since this is already explicitly stated in Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea. In and of itself, equity is certainly a very vague concept, but in the context where it is used, it seems to have taken on a very specific meaning. Ar-

guably, if the norm had been less specific, more supporting language would have had to be used by utterers wishing to draw on the normative functionality of proportionality. In relative terms, this would seem to confer a high degree of persuasive force on the assumed underlying norm. Comparison with the discourse on state responsibility law—where supporting language is ambiguous between two alternative norms—confirms this conclusion. In the discourse on the law of the ECHR, supporting language indicates the assumption of a normative framework rather than any single norm—the idea of the democratic society.⁹⁸ In a superficial sense, this idea is consensual; indeed, it is what drives much of the work of the Council of Europe.⁹⁹ In that sense utterers certainly agree on what it is exactly that confers normativity upon proportionality. At the same time, as observed in sub-section 4.2, supporting language varies greatly with the specific context of the use of proportionality, which is why I am inclined to infer that the contents of this idea are not very clear. While the idea of the democratic society has an immediate ethical appeal, it would still seem to have a persuasive force lacking in at least the corresponding norms underlying the usage of proportionality in state responsibility law.

As shown by the usage of systemising supporting language in the three discourses, utterers assume organisational schemes that are not only different but are also more or less clear and developed. Less supporting language is used in the discourse on maritime delimitation law than in any of the other fields of law. This difference may be explained by the fact that, in discussing maritime delimitation law, while there is still some confusion about the concept of relevant coasts,¹⁰⁰ utterers and addressees alike have less of a problem identifying the units to be compared—in this case, the lengths of the relevant coasts and the areas delimited. In the discourse on the law of the ECHR, the underlying normative framework seems quite naturally to entail a great number of systemising criteria. The general impression is that utterers do not consider all criteria generally applicable. Judged by the usage of supporting language, some criteria are regarded as context-specific, in the sense that as far

⁹⁸ Cf R Clayton, 'Regaining a Sense of Proportionality: the Human Rights Act and the Proportionality Principle', (2001) 6 EHRLR 504, 505; Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002), 244, quoting *Austria v Italy* (1961) 4 Ybk ECHR 116, 138.

⁹⁹ See especially preambular para 4 of the ECHR; and Art 1(a), and preambular para 2, of the Statute of the Council of Europe.

¹⁰⁰ See e.g. *Bay of Bengal Maritime Delimitation*, ITLOS Case No 16, (Judgment, 14 March 2012) paras 480–495.

as utterers are concerned, the relevance of criteria varies with the particular right and cultural context considered.¹⁰¹ This would explain why utterers spend so much time clarifying and explaining criteria. In the discourse on state responsibility law, the ambiguous purpose of countermeasures explains why utterers sometimes emphasise the appropriateness of aims and sometimes the injury suffered by the state taking countermeasures. It also explains why utterers refer to non-committal criteria such as the object and purpose of a treaty.

As shown by the usage of emancipating supporting language in the three discourses, utterers perceive differently of their own roles relative to international law-makers. In the discourse on state responsibility law, supporting language leaves the impression that, while utterers certainly recognise their role in the development of international law, they do not take this role for granted. It might be that this is just the consequence of the fact that, in this field of law, utterers are still struggling to understand the moral and political dimension of proportionality. Arguably, before you can form an idea of your own role relative to the operation of some law, you would first need to have a fairly developed understanding of its normative underpinnings. In the discourses on maritime delimitation law and the law of the ECHR, utterers would seem to have fully accepted that they too play a role in the development of each respective regime. In the case of the former, utterers still seem very anxious of vindicating their assumed role. In the case of the latter, utterers appear rather more comfortable, given the long tradition of repeated references to the ECHR as a 'living instrument which must be interpreted in the light of present-day conditions'.¹⁰²

As shown by the usage of formative supporting language in the three discourses, utterers assume different conceptual schemes. If we disregard composite language such as 'proportionality test' or 'proportionality calculus', which needs nothing more than knowledge of English grammar to be understood, the conceptual schemes assumed in the discourses on maritime delimitation law and the law of the ECHR are better developed than in the discourse on state responsibility law. The qualitative difference lies in the emphasis put by utterers participating in the former two discourses on the role of proportionality in the overall context of the relevant judicial decision-making process.

As shown by the usage of camouflaging supporting language in the three discourses, utterers assume different legal universes. This should not be

¹⁰¹ The following statement by the European Court would seem to be symptomatic: *Scoppola* (No. 3), above n 48, para 83.

¹⁰² Above n 71.

surprising, since in the discourses on maritime delimitation law and the law of the ECHR, but not in the discourse on the law of state responsibility, most of the discussion takes place in the immediate context of a vast body of judicial practice.

A cognitive environment includes not only contextual assumptions aiding the comprehension of an utterer's intention equivalent to some certain functionality of proportionality. It also includes assumptions about the relative importance for the utterer of the many different functionalities of this term. As shown by the usage of supporting language in the three discourses generally, utterers make different priorities. This difference would seem to lie mainly in the way utterers conceive of the emancipating and camouflaging functionalities of proportionality.

To begin with the emancipating functionality of proportionality, it would seem to be more appreciated in the discourse on maritime delimitation law than in the discourses on state responsibility law and the law of the ECHR. In the discourse on state responsibility law, admittedly, some emancipating supporting language is used, but not to the extent of the usage of such language in the other two discourses. In the discourse on the law of the ECHR, the habitual repetition of supporting language leaves the impression that, as utterers see it, the evolutive character of the ECHR is not really a matter that needs to be debated. In other words, if the emancipating functionality of proportionality was certainly a priority of utterers in the early years of existence of the ECHR, it is not any more.

The camouflaging functionality of proportionality would seem to be more appreciated in the discourses on maritime delimitation law and the law of the ECHR than in the discourse on state responsibility law. First, it is only in the former two discourses that utterers add precise references to earlier case-law to near-empty phrases, such as 'the test of proportionality' or the proportionality 'rule'. Arguably, camouflaging is typically easier when backed by previous decisions taken by international judicial bodies such as the International Court of Justice or the European Court of Human Rights, although analytically speaking, those decisions cannot help justify an argument. Second, only in the discourses on maritime delimitation and the law of the ECHR are proportionality assessments referred to as a final stage in an overall methodology used by judiciaries when deciding on the legality of an action. As noted in sub-section 4.5, such categorisations may serve a formative function. However, it may also serve to emphasise the importance of the camouflaging functionality of proportionality. Utterers may find it difficult not to recognise the role of judicial discretion for the outcome of a proportionality assessment. At the same time, they may want to communicate that, in the final analysis, proportionality assessments

play only a minor role in the whole of the relevant decision-making process. Judged by the development of the discourse on maritime delimitation law in the 21st century, the camouflaging functionality of proportionality would now seem to be more appreciated by utterers participating in this discourse than ever before. Up until recently, proportionality assessment was generally described as a second stage of the delimitation process—that is, as a factor to be taken into account in the context of the consideration of relevant circumstances. Now, as explicitly confirmed by the International Court of Justice in *Maritime Delimitation in the Black Sea*, the understanding is that proportionality assessment serves as '[a] final check for an equitable outcome',¹⁰³ and, hence, that it forms only a third stage in the whole of the delimitation process.

As a general conclusion, it would seem that if we are justified in speaking about state responsibility law, maritime delimitation law, and the law of the ECHR as parts of different legal regimes, then this is because:

- Discussion of those areas of law generally takes place in the context of partly different moral and political universes.
- Discussion of those areas of law generally takes place in the context of different assumed schemes for the organisation of legally relevant data.
- Lawyers active in those areas of law generally perceive of their own roles in the making of international law differently.
- Discussion of those areas of law generally takes place in the context of partly different *conceptual* universes.
- Discussion of those areas of law generally takes place in the context of partly different *legal* universes.
- Depending on the area of law discussed, priorities of discussants are generally different.

To some extent, this conclusion confirms what other scholars have already guessed.¹⁰⁴ My article has developed and substantiated their ideas, anchoring them firmly in a theory of pragmatic meaning and human verbal communication. The further implications of the conclusions remain to be explored.

¹⁰³ *Maritime Delimitation in the Black Sea*, above n 37, para 122.

¹⁰⁴ Above n 2.