Concepts as Tools of Legal Reasoning – How Pragmatics May Promote the Rationality of International Legal Discourse and the Work of Legal Scholars

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Abstract

Concepts are an important element of the way international lawyers think and talk about international law. They materialise as conceptual terms, such as ‘jurisdiction’, ‘self-defence’ and ‘abuse of rights’. To enable a critical evaluation of international law and legal discourse, it is important that single instances of use of such terms be fully understood. This task presupposes a full recognition of the social meaning of legal utterances. Conceptual terms are uttered not only to describe the law, but also to affect the beliefs, attitudes and behaviour of readers and listeners. International lawyers are acquainted with this social side of legal meaning but lack a theory firmly grounded in pragmatic research that can help them systematically describe and investigate it. This article provides precisely such a theory. Crucially, it also explains how the suggested theory of meaning may promote the rationality of international legal discourse and the work of legal scholars.

Keywords

international legal discourse – social meaning – concepts – conceptual terms – the work of international legal scholars
1 Introduction

Concepts are an important element of the way in which international lawyers think and talk about international law. For example, international lawyers can hardly have any meaningful conversation about the hierarchy of international norms without the concept of *jus cogens*. A discussion of the legality of Operation Enduring Freedom presupposes the concept of an *armed attack*. It would similarly seem very difficult to conceive of the powers of the Economic and Social Council of the United Nations without the concept of *human rights*, or the jurisdiction of ICSID Tribunals without the concepts of an *investment* and an *investor*.

Essentially, a concept is a mental representation. It is the generalised idea of an empirical or normative phenomenon or state of affairs or a class of such phenomena or states of affairs.1 As implied by the word ‘generalised’, concepts are formed through a process of abstraction. They are the result of the ability of the human brain to perceive of particular qualities or properties of phenomena as common characteristics relevant for the categorisation of phenomena or states of affairs as coming within the scope of some certain concept, irrespective of the many particular qualities or properties that those same phenomena or states of affairs do not have in common.2 Thus, concepts are an important tool used by human beings to create a fair amount of order among their collected assumptions about the world.3

For this same reason, concepts are crucial for the productivity of thought.4 Take, for example, the concept of a *treaty*. Not only does this concept help lawyers to discriminate among the many different phenomena that they come across in their daily work, but it also helps them to draw certain inferences about these phenomena.5 If an international lawyer has identified a phenomenon as a treaty, he or she may infer, for example: that it imposes legal obligations on its parties; that it may be subject to ratification or reservations; that it must be performed in good faith; that its understanding is governed by some certain rules of interpretation; that parties may not withdraw from it for just any reason; and so forth.

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2 Ibid.

3 Ibid.

4 Ibid.

5 Ibid.
In international law and legal discourse, concepts materialise as conceptual terms, such as ‘jus cogens’, ‘armed attack’, ‘human rights’, ‘investor’, ‘investment’ and ‘treaty’. To ensure the rationality of international legal discourse, it is important that single instances of use of such terms be fully understood. This objective presupposes a full recognition of the social meaning of legal utterances. Irrespective of the agent that uses a conceptual term – whether an organ or a representative of a state or an international organisation, a legal counsellor, a legal advisor, a non-governmental organisation (NGO), a judge or an arbitrator, or a legal scholar – this term is part of an argument intended to have some or other effect on the beliefs, attitudes and behaviour of human beings. Indeed, it is an important part of the job of representatives of states and international organisations to make known the position taken by their employers, to obtain acceptance of their actions and muster disapproval of the action of others. Organs of an international organisation may encourage member states to study the impact of some general phenomenon; they may similarly urge or call upon member states to take some certain action to promote the realisation of some ideal state of affairs. Legal advisors work to make their employers understand the state of the law and/or the legal and other consequences of taking some certain course or courses of action. Legal counsellors work to gain the confidence of their clients. NGOs may direct the attention of the international community to distressing and unwanted states of affairs; they may encourage solutions; and they may campaign for changes of public policy. Even judges and scholars tend to think of themselves as engaged in social interaction of this same kind, as shown by the critical questions that define their respective tasks: Will the parties be convinced by this reasoning? Will they think of the outcome as fair? Will colleagues accept the soundness of my premises and conclusions? Will they trust my authority and good judgment?

Although legal scholars are well acquainted with this social side of legal meaning, as of yet, they lack a theory of meaning firmly grounded in pragmatic research that can help them systematically investigate and describe it. They cannot rest content with the referential theory of meaning that the Danish legal philosopher Alf Ross adopted when he introduced the topic on the agenda of legal scholarship.6 The referential theory of meaning equates the meaning of conceptual terms with their reference in legal inferences from identifying criteria to legal consequences. It assumes that lawyers can learn

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the meaning of a conceptual term by merely clarifying: (1) the particular properties that identifies a particular phenomenon or state of affairs as one that comes within the scope of the concept that the term represents; and (2) the particular significance that international law ascribes to having so categorised a particular phenomenon or state of affairs.7

The insufficiencies of the referential theory of meaning become particularly obvious when lawyers try to come to grips with the meaning of a term such as ‘jus cogens’ or ‘proportionality’. These terms are very common in international legal discourse. Interestingly, use seems to be motivated not so much by what the two terms refer to as by what their utterance does to the beliefs, attitudes and behaviour of other participants in international legal discourse. This is a point that I have tried highlighting in my earlier writing.8 In the present article, I will engage with the meaning of conceptual terms more generally. I will do what I did not have time or space to do before: I will provide a solid background to the concept of the social meaning of the utterance of conceptual terms, which I hope will facilitate the further significance of the topic for the analysis of international legal discourse and the work of legal scholars. I will also take the opportunity of filling some of the gaps of my earlier writing and correcting some of its minor flaws.

In section 2, the article will clarify how, according to pragmatics, the social meaning of utterances can be generally accounted for, much like the lexical meaning of words. As noted, the key to any explanation of utterance meaning is the relationship between particular kinds of language and what the uttering of this language potentially does to the beliefs, attitudes or behaviour of potential addressees in particular categories of contexts. In section 3, the article will establish a definition of the concept of a context. As explained, contrary to what pragmatics have often assumed, there are reasons not to conceive of a context as a set of assumptions held by addressees, at least for the purpose of this article. Instead, it should be conceived along the lines of the theory developed by cognitivist scientists Dan Sperber and Deirdre Wilson – as a set of assumptions manifest or available to an addressee.9 In section 4, the article draws the contours of a theory of the meaning of the utterance of conceptual terms in international legal discourse. As the article infers, the completion of

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7 See Ross supra note 6.
this theory demands further clarification of the dependency of the meaning potential of the utterance of a conceptual term on the kind of assumptions that are available to its potential addressee or addressees. Sections 5 will provide some illustration of how this task can be met. Section 6, finally, will inquire into the crucial question of how, more precisely, the suggested theory of meaning may promote the work of international legal scholars.

2 How the Social Meaning of Utterances Can beGenerally Accounted For

The social meaning of utterances is the object of study of the branch of linguistics referred to as pragmatics. According to pragmatics, using language is to engage in social interaction. Hence, when a person makes an utterance, whether the utterance takes the form of a text or is performed orally, this is always done with the intention to affect in some or other way the attitudes, beliefs, or behaviour of some addressee or addressees. Consider for instance the following sentence uttered by a person, Jill, addressing her husband, Jerry:

(1) “Trees are shedding their leaves!”

Jill may have many reasons for uttering this sentence. If taken for granted that it is made in the temporal context of autumn, Jill may wish to suggest that she and Jerry (or just Jerry) rake the leaves and remove them from the lawn; she may wish to make Jerry aware of the danger entailed by leaves on the ground (since wet leaves generally make quite a slippery walk); or she may just wish Jerry to share her gloomy state of mind (knowing that they have many dark months ahead of them until next spring). According to pragmatics, any sound theory of utterance meaning will have to accommodate for this social aspect of human language. Whatever motivates Jill to utter “Trees are shedding their leaves!”; in some way, it has to be accounted for as part of the meaning of her utterance.

As illustrated by the example, utterance meaning is essentially intentional. When a person makes an utterance, he or she intends this utterance to communicate something: as for instance, in the earlier paragraph, the suggestion that Jill and Jerry rake the leaves and remove them from the lawn. This intended

10 For some excellent, easy-to-read introductions to the topic, see e.g. SC. Levinson, *Pragmatics* (1983); D. Blakemore, *Understanding Utterances* (1992).
something is referred to by pragmatics as ‘the meaning of the utterance’. One of the great challenges of pragmatics is to explain how an intention – a phenomenon tied to a particular individual and a particular occasion – can ever be recovered by a listener or a reader. As assumed, verbal communication would be impossible if utterances did not present certain patterns, which allow for an account of utterance meaning as a general phenomenon, in much the same way as the meaning of words can be accounted for in terms of a lexicon, and the construction of word forms and the composition of sentences in terms of a grammar. Pragmatics depart from the idea that these patterns reside in the relationship between particular kinds of language and the context of their utterance.

In seeking to define this relationship, theorists have tried a number of different approaches. Probably the best known of these is speech act theory – especially among people outside of pragmatics proper. According to this theory, the meaning of an utterance eventually always turns on the kind of speech act that the utterer is performing in making it, as for example a promise, a question or a request. Communication is successful only if an utterer can convey to a reader or listener that his utterance belongs to a particular category of speech act. Hence, an utterer who wishes to make a promise must convey that he or is making a promise; an utterer who wishes to make a question must convey that he is making a question; an utterer who wishes to make a request must convey that he is making a request. Stated the other way around, a reader or listener will not be able to understand an utterance if she is unable to identify the category of speech act that is being performed.

Speech act theorists see it as one of their important tasks to specify the conditions under which each category of speech acts can be successfully performed. In pursuit of this task, they have noted the importance of certain verbs, which would seem to have a very distinct performative function, as for example ‘promise’, ‘warn’, ‘forbid’, ‘invite’ or ‘apologise’. If, for example, a person utters the below sentence (2), the addressee will easily understand it as an invitation. If a person utters sentence (3), the addressee will easily understand it as a warning.

(2)”I invite you to submit an article addressing the relevance of language theory for the study of international law.”
(3)”I warn you, you need to handle this knife with great care, as it is very sharp.”

Other grammatical features, such as mood, may similarly help a listener or reader recover the kind of speech act that is being performed, as in the case of a question, a request and an assertion:

(4) “Will you submit your article as promised?”
(5) “You must submit your article as promised!”
(6) “I have submitted my article as promised.”

Despite this relevance of grammar and grammatical knowledge, it is obvious that there is eventually no simple one-to-one correspondence between the grammatical form of an utterance and the kind of speech act that it performs. Take the example of an invitation or a warning. In the proper context, an utterer will have little trouble performing an invitation without the verb ‘invite’, or a warning without the use of the verb ‘warn’, as illustrated by examples (6) and (7):

(7) “Do you have anything planned for Saturday night? I’m throwing a party.”
(8) “This dog bites.”

The successful performance of a speech act may not even require the grammatical verb. Say, for example, that Jill and Jerry have spent already considerable time raking the leaves in their garden, but that, one morning, after a heavy storm, they discover a significant amount of new leaves dispersed all over their lawn. This being the context, Jill may successfully impart to Jerry the suggestion that she and Jerry once again take up the task of raking the leaves by uttering a grammatically incomplete sentence such any of the two below:

(9) “Lucky us!”
(10) “More exercise for us, darling!”

In a similar manner, the importance of grammatical mood for the understanding of an utterance cannot be determined once and for all, but is eventually always dependent on the context in which it is made. Take for example the below sentence:

(11) “I just had that knife sharpened.”

The declarative mood of the sentence would suggest that it is uttered to perform an assertion. In many instances of its use, this inference may be perfectly correct, as when the utterer and the addressee are admiring a collector’s item.
in a cabinet. In other contexts, however, the very same declarative sentence may be uttered to perform other categories of speech acts. If uttered in the kitchen to a dinner guest, who has offered to assist with the preparation of a meal, it may be used to successfully perform a warning. If uttered in a dark alley by a robber, who is calling upon a person to throw over his wallet or his car keys, it may be used to successfully perform an act of extortion. If uttered in a restaurant by the kitchen manager to one of the members of his staff, who is collecting knives in need of sharpening, it may be used to successfully perform a command: Don’t sharpen that knife!

By these observations, speech act theorists have revealed something important about their object of study. There is certainly a relationship between particular kinds of language and the context of their utterance, as pragmatics have posited, but this relationship does not describe the meaning of utterances but merely their meaning potential. Speech act theory adherents would refer to this relationship as one between the linguistic form of utterances and the categories of speech acts that these utterances can potentially be used to perform in particular contexts. In this article, to accommodate for the fact that not all pragmatics share the fundamental premise of speech act theory – the assumption that successful communication is dependent on the addressee’s ability to recover the utterer’s intention to perform a particular category of speech act – this conclusion will be framed somewhat differently. As the conclusion will be put, there is a relationship between particular kinds of language and what the uttering of this language potentially does to the beliefs, attitudes or behaviour of potential addressees in particular contexts.

This conclusion prompts a close look at the concept of a context. Throughout most of section 2, this concept has been used rather loosely. It is due time that this tricky concept be given a clear definition. If the meaning potential of the utterance of a piece of language is in all cases dependent on the context of its utterance, the question arises: What is this thing called context? On what, more precisely, is it that the potential meaning of the utterance of a piece of language is dependent? To respond to this question will be the task of section 3.

3 The Concept of a Context

Contexts are important for the understanding of utterances; this is precisely the reason for why the meaning potential of the utterance of a piece of language is

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15 For an elaborate dismissal, see e.g. Sperber and Wilson supra note 9, pp. 243–254.
in all cases dependent on the context of utterance. Utterance understanding is an inferential process that consists of several analytically distinct stages.\textsuperscript{16} To illustrate, take the below sentence uttered by a speaker in relating a story for a colleague:

\begin{quote}
(12) “Tom, the old man, ran after the dog. He had his false teeth in his mouth.”
\end{quote}

In a first stage, the listener would take notice of the piece of language that is being uttered. In a second stage, typically, the listener would decode the sentence drawing upon his knowledge of the lexicon and grammar of the English language. He would find that this exercise does not enable him to identify the referent of the noun ‘he’. Hence, it is not clear whether it is the person referred to as Tom, who had the false teeth in his mouth, or the dog. In a third stage, the listener would make the sentence dependent on a context. He would perhaps think:

\begin{quote}
(13) “False teeth is something that men have, but not dogs.”
\end{quote}

In a fourth stage, the listener would infer the meaning of the utterance, drawing upon the assumed relationship between the piece of language uttered and the context. Given assumption (13), he would reason along the lines of the below syllogism:

\begin{quote}
(14)
The utterer says either that the old man, Tom, had the false teeth in his mouth, or that the dog had them.
Men, but not dogs, have false teeth.

It was Tom that had the false teeth in his mouth.
\end{quote}

In this example, obviously, the process of understanding of utterance (12) is dependent upon proposition (13). This proposition is not part of the physical world. It is an assumption made by an addressee – in this case, the colleague that hears the two sentences being uttered. Some would say that the physical world affects the process of understanding the utterance, but the truth is that it does so only indirectly, through the medium of the addressee’s mental representations of it.\textsuperscript{17}

\textsuperscript{16} See e.g. Blakemore supra note 10, pp. 10–16.
\textsuperscript{17} Ibid, pp 16–22.
For any sound definition of the concept of a context, it is of crucial importance to understand the source of the assumptions that addressees use to retrieve the meaning of utterances such as (12). As for assumption (13), it would typically be based upon knowledge or experience stored as a general proposition in the addressee’s memory. For someone who has ever before come across or heard about people with false teeth, and who is the least familiar with dogs, it is indeed a very natural assumption that men but not dogs have false teeth. Based on examples similar to this, many pragmatics have conceived of a context as the set of assumptions held by an addressee at the occasion that an utterance is being made. This does not serve as a sound general definition of the concept of a context. While, in many cases, the assumptions that addressees use to retrieve the meaning of utterances derive from their memories, assumptions may also derive from other sources. For example, they may derive from the perception by addressees of elements that belong only to the situation of the utterance, or from inference of evidence provided by an utterer, either as a part of the utterance itself, or in other (preceding or ensuing) segments of a discourse.

To illustrate this claim, take once again utterance (12):

(12) “Tom, the old man, ran after the dog. He had his false teeth in his mouth.”

This utterance prompts a very reasonable question: Why on earth did Tom run after the dog? Say that the addressee has some previous experience of dogs, and that she knows that some dogs are prone to snatch all kinds of things that they can get into their mouth, especially if they are bored and see an opportunity of play. Say that the listener has also at least some familiarity with the cost of false teeth or of how difficult it may be to obtain them. Because of the deep-rooted desire of human being to find rational reason in behaviour, she may then infer from utterance (12) the below general proposition:

(15) “If a dog has somehow got hold of the false teeth of some person, then that would give him or her good reason to run after the dog to retrieve them.”

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18 On this topic, see Sperber and Wilson supra note 9, pp. 38–46.
19 See e.g. S. Schiffer, Meaning (1972); D. Lewis, Convention (1969).
20 See Sperber and Wilson supra note 9, pp. 38–46.
If the listener bring the understanding of utterance (12) to bear on this contextual assumption, rather than assumption (13), then obviously, her reasoning will be different, as will her conclusion:

(16)
The utterer says either that Tom had the false teeth in his mouth, or that the dog had them.
If the dog had somehow got hold of Tom's false teeth, then that would give Tom good reason to run after him.

It was the dog that had the false teeth in his mouth.

As shown by this example, the assumptions that addressees use for their understanding of utterances are not necessarily fixed in advance. Sometimes, they may be construed in the course of the very process of understanding. This is why the traditional definition of the context does not hold.21 Sperber and Wilson have suggested that the context be conceived of instead as the set of assumptions that are available to an addressee.22 On the adoption of this suggestion, an assumption can be available to the addressee of an utterance – and, thus, it can form part of the context – although it is actually not being assumed. Sperber and Wilson give the example of the proposition 'Ronald Reagan and Noam Chomsky never played billiards together':

Although it presumably followed non-demonstrably from what you knew and assume before you read this sentence ... this was not, until now, an assumption of yours: it was only an assumption that was manifest to you.23

As they further explain, an assumption can be manifest already for the reason that it is based on perceptible evidence:

A car is audibly passing in the street. You have not yet paid any attention to it, so you have no knowledge of it, no assumption about it, even in the weakest sense of “knowledge” and “assumption”. But the fact that a car is passing in the street is manifest to you.24

21 Ibid.
22 Ibid, p. 46.
23 Ibid, p. 40.
24 Ibid, p. 41.
Sperber and Wilson’s new definition of the concept of a context implies a shift of focus. The important thing for the understanding of utterances is no longer the mental representations that addressees make of the factual world, but the mental representations that they are capable of making. For the successful fulfilment of the objective of this article, as section 4 will move on to explain, this shift of focus is very helpful.

4 The Potential Meaning of the Utterance of Conceptual Terms in International Legal Discourse: The Contours of a Theory

The task of this article is to provide a theory that will help legal scholars to systematically investigate and describe the meaning of utterances of conceptual terms in international legal discourse. The very idea of the possibility of such a theory presupposes that the meaning of the utterance of conceptual terms can be accounted for as a general phenomenon – as one which exists apart from how any individual reader or listener may understand these utterances in particular cases. As section 2 explained, this requirement prompts consideration of the meaning potential of the utterance of conceptual terms. It similarly prompts consideration of the context of utterances, since there is in all cases a relationship between particular kinds of language and what the uttering of this language potentially does to the beliefs, attitudes or behaviour of potential addressees in particular contexts.

The concept of a context is the cause of some concern. If the task of this article is ever to be completed, there must be a way in which the context of utterances can be conceived of as in some sense shared by at least some individuals. Obviously, no general account of the meaning of the utterance of conceptual terms in particular contexts can be given as long as a context remains in all cases relative to each individual listener or reader. The important thing about Sperber and Wilson’s definition of the concept of a context is that it very neatly accommodates this concern. According to this definition, the context is the set of assumptions that are available to an addressee at the occasion of an utterance. As Sperber and Wilson emphasise, an assumption is available to an individual if she is capable of making it – such as when the assumption is manifest in the cognitive environment of this individual, and she is capable of representing it mentally. When this definition is adopted – despite the fact that an assumption is essentially a mental state of affairs, being by its very nature inextricably tied to a single individual – a context may be common to several individuals. The only requirement is that these individuals have fairly similar cognitive abilities. This is arguably the case with participants in international
legal discourse, who share the same education and have a fairly similar experience of legal decision-making and problem-solving by resort to legal norms.

These observations provide the contours of a general theory. To make this theory complete, sections 5 will now illustrate some of the many different meanings that may be conveyed by the utterance of a conceptual term in international legal discourse. Even more importantly, it will explain how each of these potential meanings is dependent on available assumptions.

5 The Dependence of the Meaning Potential of the Utterance of a Conceptual Term on Available Assumptions

5.1 Potentially Economises Legal Thinking

In international legal discourse, concepts serve as intermediate links or connectives in legal reasoning.25 On the one hand, a concept is a link to the criterion or criteria used to identify an individual, an action or a states of affairs – or a class of individuals, actions or states of affairs – as one that comes within the extension of a concept. For the purpose of the application of international responsibility law, for example, if an action is taken by a state A in order to induce another state B to comply with its international obligations, this action can be conceived of as a disproportionate countermeasure, if (a) its effects extend over a markedly longer period of time than the injury suffered by A; or if (b) it affects a markedly more important principle or interest than that affected by this injury; or, again, if (c) it causes a markedly more extensive material loss that that which the injury caused by B. Henceforth in this article, criteria such as (a), (b) and (c) will be referred to as identifying criteria.26

On the other hand, a conceptual term is a link to the legal inferences allowed by the categorisation of an individual, an action or a state of affairs – or a class of individuals, actions or states of affairs – as one that comes within the extension of a concept. In the case of international responsibility law, if an action is conceived of as a disproportionate countermeasure, then this prompts at least the following conclusions: (d) the action shall be immediately terminated; (e) the acting state has the obligation to offer assurances and guarantees of non-repetition; and (f) the acting state has the obligation to make full


reparation for the injury caused. Henceforth in this article, inferences such as (d), (e) and (f) will be referred to as legal consequences.\textsuperscript{27}

As legal philosophers have pointed out, because of this function of concepts in legal reasons, conceptual terms serve as important instruments of cognition.\textsuperscript{28} They help addressees think about law in a more economic fashion. In the case of the example, if the concept of a disproportionate countermeasure had not existed, the relevant international law would have had to be conceived of as a rather long list of rules:

\begin{align*}
\text{If (a), then (d).} \\
\text{If (a), then (e).} \\
\text{If (a), then (f).} \\
\text{If (b), then (d).} \\
\text{If (b), then (e).} \\
\text{If (b), then (f).} \\
\text{If (c), then (d).} \\
\text{If (c), then (e).} \\
\text{If (c), then (f).}
\end{align*}

Using the concept of a disproportionate countermeasure, the exposition can be considerably shortened:

\begin{align*}
\text{If (a), (b), or (c), then an act is a disproportionate countermeasure.} \\
\text{If an act is a disproportionate countermeasure, then (d).} \\
\text{If an act is a disproportionate countermeasure, then (e).} \\
\text{If an act is a disproportionate countermeasure, then (f).}
\end{align*}

Of course, this function remains dependent on the assumed number of identifying criteria and legal consequences.\textsuperscript{29} It would seem to require the assumption that there are at least two identifying criteria and at least two legal consequences, and that there are three or more of either one of them.\textsuperscript{30} Depending on the availability of this assumption, the utterance of a conceptual term potentially helps participants in international legal discourse to think about law in a more economic fashion.

\textsuperscript{27} Ibid, p. 8.
\textsuperscript{29} Compare Spaak \textit{supra} note 6, pp. 468–469.
\textsuperscript{30} Compare Lindahl \textit{supra} note 28, p. 190.
5.2  Potentially Adds to the Normativity of Legal Arguments

Several of the many concepts that are verbally represented in international legal discourse have counterparts in neighbouring moral or political discourses. As experience shows, interaction goes both ways. Consequently, international legal discourse sometimes draws upon terminology used in moral or political discourses; moral and political discourses sometimes draw upon terminology used by international lawyers. When any such act of borrowing occurs, this adds to the meaning potential of language.\textsuperscript{31} In moral and political discourses, concepts are used in normative inference schemes, too. In political discourse, for example, the concept of \textit{genocide} is linked to norms that condemn acts of genocide in the strongest possible terms. When in legal discourse an utterer uses the term \textit{genocide} in an argument, he may be understood to have a similar attitude toward whatever acts of genocide are being referred to. Depending on the availability of this assumption, the utterance of a conceptual term potentially adds to the normativity of legal arguments. In so doing, it may provoke reactions that international law alone is unable to trigger. For example, depending on whether the systematic killing of a group of people is categorised as genocide, or as a mere breach of an international legal obligation tied to legal consequences like compensation and satisfaction, typically, the commission of the crime may provoke more or less detest.

5.3  Potentially Helps Understanding Legal Utterances in a More Systematic Fashion

According to the ontological stance taken in this article,\textsuperscript{32} concepts are formed through a process of abstraction. They are the result of the ability of the human brain to perceive of particular properties of individuals, actions or states of affairs as characteristics shared by all entities belonging to the extension of some certain concept, irrespective of the many properties that these individuals, actions or states of affairs do not have in common.\textsuperscript{33} This inherent nature of a concept potentially affects the understanding of conceptual terms. A conceptual term will always express an assumption about the existence of some certain relationship or relationships between particular individuals, actions or


\textsuperscript{32} On the ontology of concept, see e.g. E. Margolis and S. Laurence, “The Ontology of Concepts: Abstract Objects or Mental Representations?”, \textit{41 Noûs} (2007) pp. 561–593.

states of affairs.\textsuperscript{34} If, for example, a determinate or indeterminate number of corporations are referred to by an utterer as ‘investors’, then the utterer may be understood to have implicitly committed himself to the assumption that there is a special kind of relationship between all those corporations that does not obtain between any entities that do not belong to the extension of the concept of an investor. Depending on the availability of this assumption, the use of a conceptual term potentially helps understanding legal utterances in a more systematic fashion – as generalizable propositions rather than propositions that are valid only with respect to specific cases.

5.4 \textit{Potentially Emancipates Addressees from Previous Understandings}

When states and international organisations draft a legal document, and they use in that document a conceptual term, they do not always provide the criteria which define the extension of the corresponding concept. This opens the possibility of later arguing that international lawmakers used the term to identify a referent defined only generically.\textsuperscript{35} According to this argument, lawmakers decided that the extension of the concept be determined based on some particular institutional practice, such as for example the usage of a language, the moral principles followed within some certain community, the teaching of natural science, or the practice of some certain institution or judicial body.\textsuperscript{36} From this position, there is but a small step to insisting on a dynamic interpretation of the conceptual term – that its meaning follows the evolution of the relevant institutional practice. To illustrate, take Articles 13 and 62 of the Charter of the United Nations. According to Article 13, “[t]he General Assembly shall initiate studies and make recommendations for the purpose of … assisting in the realization of human rights and fundamental freedoms of all”. Similarly, according to Article 62, the Economic and Social Council shall have the power to “make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all”. It can be argued that “human rights and fundamental freedoms”, in these provisions, refers to whatever the General Assembly and the Economic and Social Council understand this expression to mean in their work. This argument implies a

\textsuperscript{34} Ibid.


\textsuperscript{36} Ibid.
very particular assumption: that this was precisely the referring intention of those who once adopted the document. Depending on the availability of this assumption, the uttering of a conceptual term potentially helps participants in international legal discourse to process and understand legal documents independently of how they were earlier understood by others.

5.5 **Potentially Facilitates the Understanding of Other Conceptual Terms**

As noted by linguistics, the meaning of a conceptual term is always dependent on its relationship with other conceptual terms belonging to the same language system. To illustrate, the meaning of ‘cake’ is dependent on its relationship with ‘biscuit’. The meaning of ‘kick’ is dependent on its relationship with ‘foot’. The meaning of ‘law’ is dependent on its relationship with ‘obligation’, ‘judge’ and ‘jurisdiction’, and so on. By the uttering of a conceptual term, an utterer commits himself to the assumption of the existence of some principle that can explain these relationships: why ‘cake’ is more closely related to ‘biscuit’ than ‘thunderstorm’, for example, or why ‘law’ is more closely related to ‘jurisdiction’ than ‘daffodil’. Depending on the availability of this assumption, the uttering of a conceptual term in international legal discourse potentially facilitates the understanding by participants in that discourse of other conceptual terms used by the same utterer. For example, if an addressee learns that in the conceptual universe of an utterer, ‘state continuity’ means a situation where a state continues to exist despite unconstitutional changes in its government or substantial loss of territory, then this would typically help her capture what the utterer means by a ‘state’. 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’.

5.6 **Potentially Invites Ethical Consideration**

In international legal discourse, concepts serve as intermediate links in legal inferences, from identifying criteria to legal consequences. Depending on how this link is verbally represented, it may work to expose the true nature of the assumed legal inference. Take, for example, the concept of an *internationally wrongful act of a state*, which is essential for the application of state responsibility law. According to Article 2 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), “[t]here is an internationally wrongful act of a state”.

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37 Ibid.
38 See e.g. Lyons supra note 11, p. 230 et seq.
39 Ibid.
wrongful act of a State when conduct consisting of an act or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international legal obligation of the State.40 This provision makes a distinction between a breach of an international obligation and an internationally wrongful act. The inference can be made that a breach of an international obligation of a state does not necessarily always classify as internationally wrongful. Articles 20–25 of ARSIWA confirm this conclusion by providing that if an act comes within the scope of application of any of these six Articles, the wrongfulness of that act is precluded – even though it may constitute a breach of an international obligation of a state – in which case international responsibility will not be entailed.

The significance of the concept of an internationally wrongful act of a state is particularly notable in situations where, according to Articles 20–25 of ARSIWA, circumstances preclude the wrongfulness of an act of a state. To illustrate, consider the Torrey Canyon incident.41 In 1967, a Liberian tanker ship carrying large amounts of crude oil ran aground off the coast of the United Kingdom, in the high seas. The accident caused considerable oil spills threatening to severely damage the coastline and the marine environment. UK authorities decided to bomb the ship. That caused the remaining oil to burn, thereby containing the damages considerably. Since Liberia had not consented to the operation, the measures taken by UK authorities were in breach of the principle of exclusive flag state jurisdiction, which makes the exercise of enforcement jurisdiction over a ship on the high seas a prerogative of the flag state.42 Nevertheless, as international lawyers have described the operation, it did not entail the international responsibility of the UK.43 The bombing, they say, was the only way for UK authorities to safeguard an essential interest against a grave and imminent peril, and, as a result, it did not classify as “an internationally wrongful act of a state”.

People may be interested in knowing what actually prompted UK authorities to act as they did. Obviously, when Torrey Canyon ran aground, and

40 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its 53rd session, Report of the International Law Commission on the work of its 53rd session, ILC Yearbook 2001, Vol 2, Part 2, p 26 et seq. On 12 December 2001, the UN General Assembly adopted resolution 56/83, recognising the work of the ILC and the adoption of the ILC Articles. From then on, the ILC Articles have been officially referred to as the ‘Articles on Responsibility of States for Internationally Wrongful Acts’.
41 On this incident, see further e.g. V. Nanda, “The Torrey Canyon Disaster”, 44 Denver Law Journal (1971), pp. 400–425.
considerable oil spills threatened to damage the marine environment, UK authorities were forced to make a decision. They had to decide whether to bomb or not. If they decided to bomb they would ensure the protection of the interest of a clean environment. If they decided not to bomb they would ensure the protection of the interest of freedom of navigation. From the perspective of the law of state responsibility, whether eventually UK authorities opted for the one or the other alternative, it would make little practical difference, since either way, their action would entail no international responsibility. As it appears, the decision to bomb was not prompted by law but by ethical considerations. By referring to the bombing operation as an internationally non-wrongful act of a state, an utterer may be understood to have implicitly committed to the assumption that the decision taken UK authorities was ethically correct. Depending on the availability of this assumption, the utterance potentially invites ethical consideration.

5.7 Potentially Helps to Conceal a Lack of Legal Knowledge
As section 5.1 noted, the utterance of a conceptual term potentially helps participants in international legal discourse to think about law in a more economic fashion. This potential has an effect on legal communication. In an exchange of opinion, in which the focus is on legal consequences rather than identifying criteria, an utterer must not repeat all the criteria that identify an individual, an action or a state of affairs as one that comes within the extension of a concept. In many cases, as indicated by the example of a disproportionate countermeasure, he or she may use the conceptual term to replace these criteria:

“If an action is a disproportionate countermeasure, then this action shall be immediately terminated; the state taking the action has the obligation to offer assurances and guarantees of non-repetition; it similarly has the obligation to make full reparation for the injury caused.”

Identifying criteria derive from the sources of law. They are the criteria that law uses to identify an individual, an action or a state of affairs as one that comes within the extension of a concept. Thus, it is by virtue of customary international law that the high seas are defined as all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state. It is by virtue of the law of treaties that a treaty is defined as an international agreement governed by international law and concluded in written form between states or international organisations. It is by virtue of Article 1(3) of the 1997 Czech Republic-Israel BIT that Israeli investors are defined as “natural persons
who are nationals of the State of Israel in accordance with its laws who are not also nationals of the Czech Republic in accordance with its laws” and “legal entities incorporated or constituted in accordance with Israeli law and having their permanent seat in the territory of the State of Israel”.44

When an utterer uses a conceptual term, identifying criteria may not be fully known to him, for various reasons. The utterer may not have studied the relevant means for the determination of law. In the alternative, although the utterer may have spent considerable time engaging with the relevant means for the determination of law, it may be that these studies still do not allow him to say what the criteria are. Take, for example, the concept of *jus cogens*, which by common Article 53 of the 1969 and 1986 Vienna Conventions on the Law of Treaties is not defined by reference to any identifying criteria, but to the acceptance and recognition by states of some generally defined legal consequences.45 The fact is that international lawyers have a great many reasons for identifying international norms as *jus cogens*.46 Depending on who you ask, that person will struggle to convince you that *jus cogens* norms derive from natural law;47 that *jus cogens* norms constitute an “international constitution”;48 that they embody the idea of an “international *ordre public*”;49 or “the common good of the international community”;50 or that the concept of *jus cogens* serves to protect some specific objective such as an “open international market”,51 or “the essential dignity of the individual”.52

Whatever the situation, when an utterer uses a conceptual term such as ‘the high seas’, ‘Israeli investors’ or ‘*jus cogens*’, although the utterer is not in

44 2078 unts 298.
46 For further consideration of this fact, see e.g. U Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (2021), pp. 116–117.
the position to provide a description of the relevant identifying criteria, it commits him to the assumption that he is. 53 Depending on the availability of this assumption, the conceptual term potentially helps to conceal this lack of knowledge.

5.8 **Potentially Facilitates the Acquisition of New Legal Knowledge**

As section 5.5 observed, the uttering of a conceptual term may be understood to commit an utter to the assumption that there is some special relationship between all referents of this term that allows him to conceive of them as members of a single conceptual category. Depending on the availability of this assumption, the use of a conceptual term potentially helps understanding legal utterances as generalizable propositions. This potential meaning pays no regard to the precise nature of the relationship that an utterer presupposes exists between the various members of the conceptual category. It is dependent only on the assumption that some such relationship exists. There is, however, only a very short step to also thinking of the utterer as committed to the assumption of the existence of a relationship of a very precise nature. Depending on the availability of this further assumption, the uttering of a conceptual term potentially does something more – it potentially facilitates the acquisition of new pieces of legal knowledge. If, for example, an utterer refers to the introduction or application of a piece of domestic legislation as a “disproportionate restriction of a human right”, participants in international legal discourse may come to learn that this measure is unjust; that it is discriminate or arbitrary; that it is not necessary to the achievement of some certain defined purpose, such as the protection of national security; or that it is inimical to the idea of a democratic society.

5.9 **Potentially Prevents Addressees from Questioning the Intents of Utterers**

The potential meaning of the utterance of a conceptual term is in all cases dependent on the availability of one or other assumption. Hence, it is because of the availability of the assumption that it is appropriate to take a certain moral or political attitude to a concept that the uttering of a conceptual term potentially adds to the normativity of legal arguments. It is because of the availability of the assumption that some special relationship exists between all individuals, actions or states of affairs that belong to the extension of a concept that the uttering of a conceptual term potentially helps to understand

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53 Obviously, if addressees are already well acquainted with the state of the *jus cogens* discourse, this assumption will not be available.
legal utterances in a more systematic fashion. It is because of the availability of the assumption that the drafters of a legal document made the meaning of a conceptual term contingent on the evolution of some particular institutional practice that the uttering of this term potentially helps participants in international legal discourse to process and understand legal documents independently of how they were earlier understood by others. The interesting thing about these assumptions is that they sometimes combine to enable yet other potential meanings.54

To illustrate, take the following sentence uttered by a scholar at a legal conference: “The prohibition of torture is *jus cogens*.” As the author of this article has earlier suggested, in a sentence like this, the reference to the prohibition of torture as ‘*jus cogens*’ potentially prevents addressees from questioning the intents of the utterer.55 In many cases, in fact, the effect may be quite similar to that of the following utterance: “I find that the prohibition of torture is *jus cogens*, and if by any chance you do not share this opinion, this shows that to you, torture may sometimes be legitimate.” This potential meaning of the utterance of *jus cogens* is conditional upon the availability of two assumptions. Participants in international legal discourse must be capable of assuming, first, that it is appropriate to take a certain moral or political attitude to the concept of *jus cogens*, and, second, that the utterer is in the position to provide a description of the legal criteria that identify an international norm as *jus cogens*. Neither of the two assumptions is sufficient to itself potentially prevent participants in international legal discourse from questioning the intents of an utterer. The assumption that it is appropriate to think of *jus cogens* breaches as a vile does not explain why it is inappropriate to question a statement characterising the prohibition of torture as *jus cogens*. The assumption that the utterer is in the position to provide a description of the legal criteria that identify an international norm as *jus cogens* does not explain why it is appropriate to think of *jus cogens* breaches as a vile. It is only when both of these assumptions are available that a reference to the prohibition of torture as ‘*jus cogens*’ will potentially prevent participants in international legal discourse from questioning the intents of an utterer.

54 For further consideration of this topic, see Linderfalk, “All the Things That You Can Do With *Jus Cogens*” supra note 8, pp. 373–379.
6 How Pragmatics Promotes the Work of International Legal Scholars

6.1 Pragmatic Theory and the Conditions for Successful Communication

The focus of this section is on the community of international legal scholars. The work of international legal scholars contributes to international legal discourse, much like the activities of any organs or representatives of states, legal counsellors, legal advisors, judges and arbitrators, and NGOs. It has, however, a very specific objective, which distinguishes it from the work of all other participants in international legal discourse. The work of international legal scholars is conducted in order to obtain clarification of law and legal practice. This goal confers instrumental value on any theory of meaning of the utterance of conceptual terms in international legal discourse. It similarly explains the importance of the question, to which this final section will be devoted: How does the suggested theory of meaning help international legal scholars to accomplish their task?

Any attempt to answer this question must begin by clarifying the conditions for successful legal communication and their dependency on the meaning potential of the utterance of conceptual terms. As section 2 explained, what pragmatics refer to as the meaning of an utterance is what the utterer intends the utterance to convey. In any case where an utterance is being made, communication is successful when the addressee of the utterance manages to retrieve this intention. This observation explains the two important conditions for successful communication.

First, the piece of language that the utterer uses must be capable of conveying his intention. Obviously, an utterer cannot convey by the utterance of a piece of language what is not within the scope of the meaning potential of that utterance. As earlier sections of this article should have clarified, the meaning potential of an utterance is dependent on the cognitive environment of its addressee or addressees. If successful communication requires that the utterance of a piece of language is capable of conveying some particular intention, and this potential meaning requires the availability of a very particular assumption, then communication will not succeed if this assumption is not available to the addressee or addressees. If, for instance, an utterer uses the term ‘disproportionate countermeasure’ to conceal that, eventually, he has no genuine knowledge of the criterion or criteria that identifies an action as a member of this conceptual category, addressees might be already familiar with the poor productivity of the recognised means for the determination of international law. Similarly, if an utterer uses this same term to add normativity to the argued legal proposition, it might be that addressees make their understanding of this utterance dependent on the assumption of the
appropriateness of a different moral or political norm than the one that the utterer assumed. Addressees may assume, for example, that a proportionate countermeasure is typically not enough to induce a recalcitrant state to comply with its international obligations.

Secondly, the available assumption must be actually used. Even though an assumption may be available to addressees at the occasion of an utterance, there is always the possibility that they make their understanding of this utterance dependent on some other assumption that is also available. Say, for example, that an utterer refers to some international institution as a ‘court’, and that he does this to convey to addressees the proposition that this institution has some particular property, such as the power to take legally binding decisions. The addressees may have some previous knowledge of the use of the concept of a court. They may have experienced, for example, that lawyers often make the classification of an institution as a court dependent on a series of different criteria. These criteria may include the criterion that the utterer actually uses, but they may also include others, such as whether an institution is independent of the political body that created it, whether it confers on litigating parties certain rights, or whether it provides the reasons for its decisions. In such a situation, although the assumption that all courts are empowered to take legally binding decisions is certainly available to the addressees, they may not be able to pick out this precise assumption among the many others that are available. Similarly, all things equal, since the term ‘court’ has a potential meaning that goes beyond that of merely facilitating the acquisition of new legal knowledge, it might be that the addressees make their understanding of the utterance dependent on the assumption on the appropriateness of some certain moral attitude to the argument that the utterer is making, rather than the assumption that all courts have the power to take legally binding decisions. In neither of these situation will communication be successful.

It is one of the more fascinating things about Sperber and Wilson’s theory of human communication that it explains how an utterer may take action to affect the conditions for successful communication. As their theory goes, if an utterer is not perfectly sure that the cognitive environment of addressees allows them to recapture his intention, it is within his powers to take action to alter it in such a way that misunderstandings can be avoided. Thus, in cases where an utterer is not sure that a required assumption is available, he may take action that makes it available.56 In cases where an utterer suspects that addressees will have some difficulties picking out the required assumption among the many that are available, he may take action that directs the

56 Sperber and Wilson supra note 9.
attention of addressees to precisely this assumption. Sperber and Wilson gives the example of two individuals, Mary and Peter, looking at a landscape where Mary has noticed a distant church. Mary says to Peter: “I’ve been inside that church.” She does not stop to ask herself whether he [Peter] has noticed the building, and whether he assumes she has noticed, and assumes she has noticed he has noticed, and so on, or whether he has assumed it is a church, and assumes she assumes it is, and so on. All she needs is reasonable confidence that he will be able to identify the building as a church when required to: in other words, that a certain assumption will be manifest in his cognitive environment at the right time. He need not have accessed this assumption before she spoke. In fact, until she spoke he might have thought the building was a castle: it might be only on the strength of her utterance that it becomes manifest to him that the building is a church.

These interesting observations suggest a method that international scholars can use to improve their understanding of single contributions to international legal discourse. Section 5 should have given some idea of the dependency of the meaning potential of the utterance of conceptual terms on available assumptions. This idea will enable scholars to detect and interpret the kind of action that utterers take to alter the cognitive environment of actual or potential addressees, and by so doing come to better grips with utterers’ intentions. Section 6.2 will illustrate how this method plays out relative to utterances of conceptual terms and their meaning potential, as illustrated in section 5. It will serve the purpose of also summarising the findings of this entire article.

6.2 **How Utterers Can Improve the Conditions for Successful Communication: The Suggested Theory at Work**

The utterance of a conceptual term potentially economises legal thinking. Section 5.1 illustrated this suggestion with the help of the term ‘disproportionate countermeasure’. By referring to an action as a ‘disproportionate countermeasure’, an utterer may help addressees to organise long and convoluted strings of legal information into greater chunks and thus to reduce their cognitive load. This can be illustrated by a discussion, in which most of the focus is on the criteria that help identifying an action as a disproportionate countermeasure. In this discussion, addressees may not have to project mentally all

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58 *Ibid*, pp. 43–44.
the legal consequences ensuing from having identified an action as a disproportionate countermeasure, but can be content with thinking:

“If a state A takes action to induce another state B to comply with its international obligations, and the effects of that action extend over a markedly longer period of time than the injury caused by B, then this action shall constitute a disproportionate countermeasure.”

“If a state A takes action to induce another state B to comply with its international obligations, and that action affects a markedly more important principle or interest than that the injury caused by B, then this action shall constitute a disproportionate countermeasure.”

“If a state A takes action to induce another state B to comply with its international obligations, and this action causes a markedly more extensive material loss than the injury caused by B, then this action shall constitute a disproportionate countermeasure.”

This potential meaning requires the availability of the assumption that identifying criteria and legal consequences are fairly numerous, as they certainly are in the case of the concept of a disproportionate countermeasure. There are various ways in which utterers can contribute to making this assumption available, or help to direct the attention of addressees to it. They can emphasise the great complexity of the law of countermeasures,\(^59\) for example, or refer to the key function of the proportionality principle.\(^60\) They can refer to the need for simplification.\(^61\) Again, they can simply provide a comprehensive list of all identifying criteria and legal consequences of the concept of a disproportionate countermeasure,\(^62\) similar to that which was provided in section 5.1.

The utterance of a conceptual term potentially adds to the normativity of legal arguments. Section 5.2 illustrated this suggestion with the help of the term ‘genocide’. By referring to a systematic killing or transfer of a group of people as ‘genocide’, utterers may provoke emotional reactions that law alone is unable to trigger, and in so doing secure greater acceptance of their legal arguments. This potential meaning requires the availability of the assumption

\(^{59}\) See e.g. Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ Reports 1997, p. 1, Dissenting opinion of Judge Vereshchetin, at 223.

\(^{60}\) Ibid.


that it is appropriate to take some certain moral or political attitude to some category of individuals, actions or states of affairs. In the case of ‘genocide’, utterers can contribute to making this assumption available, or help to direct the attention of addressees to it, by quoting the preamble to the 1948 Genocide Convention,\(^\text{63}\) which refers to genocide as “an odious scourge” and a crime “condemned by the civilized world”.\(^\text{64}\) They can remark that the obligation not to perpetrate genocide is owed *erga omnes*, and that this makes the prevention of breaches of this obligation a priority concern of humankind.\(^\text{65}\) They can declare that the prohibition of genocide “is the kind of rule that it would shock the conscience of mankind and the standards of public morality for a State to protest”.\(^\text{66}\) Again, they can categorise genocide as a “heinous” crime,\(^\text{67}\) or refer to it as an “atrocity crime”,\(^\text{68}\) which places it in the same category as war crimes and crimes against humanity.

The utterance of a conceptual term potentially helps understanding legal utterances as generalizable propositions. Section 5.3 illustrated this suggestion with the help of the term ‘investor’. By referring to a corporation as an investor, an utterer may convey that whatever property of this corporation prompts him to think of it as an investor, to the extent that this property is shared by other corporations, these should similarly be conceived of as investors. This potential meaning requires the availability of the assumption that some kind of relationship obtains between all those individuals, actions or states of affairs that come within the extension of the concept that the term represents, as in the case of the example, a distinguishing feature characterising all investors. Utterers can contribute to making this assumption available, or help to direct the attention of addressees to it, by not throughout addressing an issue in the context of any specific case or incident.\(^\text{69}\) Similarly, they can hint that it is their

\(^{63}\) See e.g. Reservations to the Convention on Genocide, Advisory Opinion of 28 May 1951, ICJ Reports 1951, p. 15, at 23.


\(^{67}\) See e.g. Report of the International Commission of Inquiry on Darfur to the Secretary-General, pursuant to UNSC res 1564 (2004) of 18 September 2004 (Annex to UN Doc S/2005/60), para 506.


task as scholars to systemise legal practice,\textsuperscript{70} or allude to the moral obligation of a judicial body to decide like cases alike.\textsuperscript{71}

The utterance of a conceptual term potentially emancipates addressees from any previous understandings of other addressees. Section 5.4 illustrated this suggestion with the help of the term ‘human rights and fundamental freedoms’. This term is used in Articles 13 and 62 of the Charter of the United Nations, which define the powers of the UN General Assembly and the Economic and Social Council, respectively. As suggested, it permits the argument that the scope of these powers is today probably more extensive than, say, ten or twenty years ago. This potential meaning requires the availability of the assumption that the utterer made the meaning of the term ‘human rights and fundamental freedoms’ contingent on the evolution of the practice of those two of the main organs of the UN that actively engage with the human rights issue – the UN General Assembly and the Economic and Social Council. Utterers can contribute to making this assumption available, or help to direct the attention of addressees to it, by emphasising that the Charter of the United Nations was concluded for an unlimited period of time.\textsuperscript{72} They can remark that the Charter reflects the conditions of modern times,\textsuperscript{73} or that it has the character of a constitution.\textsuperscript{74} They can raise the question whether, at the time of the adoption of the Charter of the UN, its drafter actually had at all any determinate understanding of ‘human rights and fundamental freedoms’, since the concept was then still only nascent.\textsuperscript{75} Again, they can contend that it is in the nature of all human rights and fundamental freedoms that they remain at all times a reflection of “a universal juridical conscience”.\textsuperscript{76}

The utterance of a conceptual term potentially facilitates the understanding of other conceptual terms. Section 5.5 illustrated this suggestion with the

\begin{footnotes}
\footnote{\textsuperscript{71} See e.g. Scoppola v. Italy (No. 3), Judgment of 22 May 2012, para 81.}
\footnote{\textsuperscript{72} See e.g. EP. Hexner, “Teleological Interpretation of Basic Instruments of Public International Organizations”, in S. Engel (ed), \textit{Law, State, and International Legal Order. Essays in Honour of Hans Kelsen} (1964), pp. 119–138.}
\footnote{\textsuperscript{74} See e.g. R. Deplano, “Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry”, \textit{6 European Journal of Legal Studies} (2013), p 67, at 84.}
\footnote{\textsuperscript{76} See e.g. AA. Canção Trindade, \textit{International Law for Humankind. Towards a New Jus Gentium}, 2nd ed (2013), pp 232–233 et passim.}
\end{footnotes}
help of the term ‘a proportionate division of maritime areas’. As submitted, if an addressee refers to a decision as ‘a proportionate division of maritime areas’, then that would typically help her understand what the utterer means by ‘equitable principles’. This potential meaning requires the availability of the assumption that some certain principle can explain how the intended meaning of this term relates to the meaning of other conceptual terms used by the same utterer. In the example, it is only if an addressee learns that ‘a proportionate division of maritime areas’ is instrumental to the achievement of an equitable result that the utterance of this term helps her understand what the utterer means by ‘equitable principles’. Utterers can contribute to making this assumption available, or help to direct the attention of addressees to it, by remarking that proportionality is a test of whether a division of maritime areas is equitable or not.77 They can refer to it as a final check upon the equity of a tentative delimitation.78 Again, they can outline the details of the three stages of the process of modern-day maritime delimitation, as did the International Court 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.79

77 See e.g. *Barbados/Trinidad and Tobago Maritime Delimitation*, Award of 11 April 2006, 27 RIAA, p. 147, at para 249.
78 Ibid, para 238.
The uttering of a conceptual term potentially invites ethical consideration. Section 5.6 illustrated this suggestion with the help of the term ‘internationally wrongful act of a state’. As alleged, the utterance of this term makes apparent the ethical choices that eventually determine the action of states in precarious situations, such as when the UK had to decide whether to bomb the Liberian tanker ship Torrey Canyon and ensure the protection of the environment, or not to bomb the ship and ensure the protection of freedom of navigation. This potential meaning requires the availability of the assumption that the concept represented by the uttered term serves as a link in inferences that to some extent involve ethical considerations. Utterers can contribute to making this assumption available, or help to direct the attention of addressees to it, by passing comments on “the limits of law”.80 They can refer, explicitly or implicitly, to the discretion that law confers on decision-makers.81 Again, they can take notice of the sensitive nature of the inference involved,82 or the delicate decision envisaged.83

The utterance of a conceptual term potentially helps to conceal a lack of legal knowledge on the part of the utterer. Section 5.7 illustrated this suggestion with the help of the term ‘jus cogens’. In international legal discourse, because the 1969 and 1986 Vienna Convention do not provide the criterion or criteria that define an international norm as jus cogens, this concept remains essentially contested. Consequently, when lawyers suggest that a jus cogens status has been conferred on some or other international norm, this is often the result of something other than these lawyers’ assessment of the relevant means for the determination of law. When in legal inferences, the legal consequences ensuing from the conferral of a jus cogens status on a norm are linked to the recognition by states of this status, rather than to the relevant identifying criteria, this character of legal propositions is potentially concealed. This potential meaning requires the availability of the assumption that the utterer is in the position to give a fairly good description of the applicable identifying criteria, as in the example, the defining property or properties of jus cogens norms. Utterers can contribute to making this assumption available, or help to direct the attention of addressees to it, by introducing a proposition as “obvious” or

80 See e.g. Air Services Agreement, Decision of 9 December 1978, 18 riaa 417, at para 89.
81 See e.g. Continental Shelf (Libya/Malta), Judgment of 3 June 1985, ICJ Reports 1985, p. 13, at para 28.
“self-evident”,84 or by frankly remarking about the proposition that “anything else would be absurd”.85 Referring to the proposition as the result of “a general understanding”,86 or as something ingrained in “the universal conscience”,87 may also do the trick.

The utterance of a conceptual term potentially facilitates the acquisition of new legal knowledge. Section 5.8 illustrated this suggestion with the help of the term ‘internationally wrongful act of a state’. As submitted, if an utterer refers to the introduction or application of a piece of domestic legislation as a “disproportionate restriction of the right of freedom of expression as provided in the European Convention”, addressees may infer, for example, that this measure is unjust, that it is discriminate or arbitrary, or that it is inimical to the idea of a democratic society. This potential meaning requires the availability of the assumption that some very precise relationship obtains between all those individuals, actions or states of affairs that come within the extension of the concept that the term represents. In the case of the example, utterers can contribute to making this assumption available, or help to direct the attention of addressees to it, by indicating the purpose of the European Convention.88 They can refer, explicitly or implicitly, to the preamble of the Convention,89 in which fundamental freedoms are described as “the foundation of justice”.90 They can take notice of the great importance of the rule of law for the work of the Council of Europe.91 Again, they can remark that a mere two years before the adoption of the European Convention, members of the United Nations reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women.92

The utterance of a conceptual term potentially prevents addressees from questioning the intents of utterers. Section 5.9 illustrated this suggestion with the help of the term ‘jus cogens’. As submitted, when an utterer insists that a norm such as the prohibition of torture is ‘jus cogens’, this may prompt addressees to abstain from expressing dissent, since they do not wish to be understood

85 Ibid, pp. 153 and 164.
87 Ibid, p. 1234.
88 See e.g. Refah Partisi (The Welfare Party) and Others v Turkey, Judgment of 13 February 2003, echr 2003-ii, para 99.
89 See e.g. J Christoffersen, Fair Balance (2009), p. 33.
90 ETS No. 5.
91 See e.g. the preamble to the European Convention on Human Rights, para 5.
92 See e.g. ibid, para 1.
to be pro-torture. This potential meaning requires the availability of two assumptions: first, that it is appropriate to take some certain moral or political attitude to torture, and, secondly, that the utterer is in the position to give a fairly good description of the criteria which identify some infliction of pain or suffering on a person as a member of this category. Earlier paragraphs of this section have already illustrated how utterers can contribute to making these assumption available, or help to direct the attention of addressees to them.