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Special regimes as communities of practice A new way to improve communication across legal specializations

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Abstract: International lawyers refer to international criminal law, European human rights law, WTO-law and many other branches as 'special regimes'. As traditionally defined, a special regime is a collection of norms. As this article suggests, a special regime should be conceived instead as a community of practice in the sense of educational theorist Etienne Wenger. The article makes a convincing case for this new understanding, which entails a description of a special regime by reference to the social relationships that exist between the individuals and institutions that are engaged with understanding, discussing and applying legal norms. This understanding has many advantages. Not only does it help to explain why, sometimes, lawyers and legal decision-makers active in different fields of law have reason to do similar things differently. It also explains why international lawyers have such difficulty understanding each other across legal specializations, and why divergent practices of international law cause so much contention.

Keywords: Special regimes theory of communities of practice fragmentation of international law legal specialization.

Received: March 8, 2024 *Accepted:* October 22, 2024

(A) INTRODUCTION

Over the last thirty or so years, international law and legal practice have become increasingly more specialized and diversified. As stated by the ILC Study Group on Fragmentation of International Law in its Final Report of 2006:

> What 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 specialized knowledge as "investment law" or "international refugee law" etc.[1]

This trend has seen the development of some strikingly divergent legal practices lawyers and legal decision-makers active in different fields of law do things differently. Below are a few prominent examples:

- The International Criminal Tribunal for Former Yugoslavia has adopted a different understanding than the International Court of Justice of the rule that

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1 Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group prepared for the 58th session of the International Law Commission (2006), 1 May-9 June and 3 July-11 August 2006, UN Doc A/CN.4/L.682, Corr 1 and Add 1, at 10.

attributes to a state the action of a group of private persons when it controls it.[2] It has similarly adopted a different conception of *jus cogens*.[3]

- The European Court of Human Rights ascribes an effect to invalid reservations to the European Convention that differs significantly from how international lawyers other than human rights specialists conceive of the effect of invalid reservations to a treaty.[4]
- International environmental law specialists understand the concept of a conflict of norms differently than most other international lawyers.[5]
- The WTO Appellate Body has always been reluctant to resort to the proportionality principle to justify its decisions, in contrast to the European Court of Human Rights, which readily uses this principle for similar purposes.[6]
- International investment lawyers are reluctant to resort to the principle of sustainable development. This principle, however, is an important element in the reasoning of many other international lawyers, such as those specialising in international environmental law or the law of the sea.[7]

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2 For the understanding of the ICTY, see *Prosecutor v. Duško Tadić*, Case No IT-94-1-A, Appeals Chamber, Judgment (15 July 1999), available at: https://www.icty.org, at paras 88-145. For the understanding of the ICJ, see *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*, Merits (1986), ICJ Reports 1986, 14, at paras 113-115; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (2007), ICJ Reports 2007, 43, at paras 308-407.

3 For the conception adopted by the ICTY, see e.g. *Prosecutor v. Anto Furundžija*, Case No IT-95-17/1-T, Trial Chamber, Judgment (10 December 1998), available at: https://www.icty.org, at paras 155-157. For the conception adopted by the ICJ, see *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (2012), *ICJ Reports 2012*, 99, at paras 92-93. For an analysis of these different conceptions of *jus cogens*, see U. Linderfalk, 'The Legal Consequences of *Jus Cogens* and the Individuation of Norms', 33 *Leiden JIL* (2020), 893-909.

4 For the understanding of the European Court, see e.g. *Belilos v Switzerland*, ECHR (1988), available at: https://hudoc.echr.coe.int, at paras 50-60; *Weber v Switzerland*, ECHR (1990), available at: https://hudoc.echr.coe.int, at paras 36-38; *Grande Stevens v Italy*, ECHR (2014), available at: https://hudoc.echr.coe.int, at paras 204-211. For the understanding of international lawyers other than human rights specialists, see e.g. A. Pellet, 'Article 19: Formulation of a Reservation', in O. Corten & P. Klein (eds.), *The Vienna Conventions on the Law of Treaties. A Commentary* (OUP, Oxford, 2011), Vol. 1, 442.

5 For the understanding of international environmental law specialists, see e.g. D. Brack, 'Reconciling the GATT and Multilateral Environmental Agreements with Trade Provisions: The Latest Debate', 6 Review of European, Comparative & International Environmental Law (1997), 112-120; S. Charnovitz, 'Multilateral Environmental Agreements and Trade Rules', 26 *Environmental Policy & Law* (1996), 163-169; S. Hydnall, 'Towards a Greener International Trade System: Mutilateral Environmental Agreements and the World Trade Organisation', 29 *Columbia Journal of Law & Social Problems* (1996), 175. On other possible ways of understanding the concept of a conflict of rules, see U. Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (EEP, Cheltenham, 2020), 156-161.

6 For the practice of the WTO Appellate Body, see e.g. A. Mitchell, 'Proportionality and Remedies in WTO Disputes', 17 *EJIL* (2006), 1004-1008. For the practice of the European Court, see e.g. B. Pirker, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing, Groningen, 2013), Chapter 5.

7 For the perspective of international investment lawyers, see e.g. M. Chi, *Integrating Sustainable Development in International Investment Law* (Routledge, Abingdon, 2018). For the perspective of international environmental law specialists, see e.g. C. Voigt, *Sustainable Development as a Principle of International Law* (Martinus Nijhoff, Leiden, 2009).

In their attempts to explain and to justify these divergent legal practices, international lawyers have coined a new term. They now widely refer to international criminal law, European human rights law, WTO-law, international environmental law and many others as 'special regimes'.[8] Such references raise two critical questions:

1. What are the defining features that allow international lawyers to think about a subpart of the international legal system as a special regime separate from other special regimes and from general international law?
2. What does the concept of a special regime help doing that cannot as easily be done without it?

International lawyers answer these questions differently. For many, the feature that distinguishes a collection of norms and defines it as a special regime is either the pedigree or logical form of these norms.[9] Because of the close connection of this particular understanding of a special regime with the legal positivist's conception of the international legal system,[10] I will refer to it as 'the legal positivist's conception of a special regime'. Special regimes, a legal positivist would argue, include branches such as diplomatic law, which has a very distinct form, structured, as it is, based on a relationship between a sending and receiving state.[11] They include the law of the United Nations a collection of norms, which all have their basis in the Charter of this organisation, directly or indirectly. Similarly, they include European human rights law, if by this moniker we understand the collection of all norms that come within the jurisdiction of the European Court of Human Rights. From the perspective of the legal positivist's conception of a special regime, the concept of a special regime helps to understand and to describe social facts in a logically coherent fashion.[12]

For other lawyers, what defines a collection of norms as a special regime is what these norms refer to either a set of distinct facts or a set of predictable legal consequences.[13] Because of the close connection of this particular understanding of a special regime with the legal realist's conception of an international legal system,[14] I will refer to it as 'the legal realist's conception of a special regime'. From the point of view of legal realism, diplomatic law is a special regime, since it addresses diplomatic activities. International

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8 See e.g. G. Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law', 25 *Michigan JIL* (2004), 849-863; S. Humphrey, 'Climate Change: Too Complex for a Special Regime', 34 *Journal of Energy & Natural Resources Law* (2016), 51-56; D. Joyner (ed.), *Non-Proliferation Law as a Special Regime* (CUP, Cambridge, 2012); M. Koskenniemi, 'The Politics of International Law', 20 *EJIL* (2009), 7-19; M.T. Lanquetin, 'L'égalité entre hommes et femmes dans le régime spécial de retraite de fonctionnaires', 2 *Droit social* (2002), 178-199; K. Siehr, 'A Special Regime for Cultural Objects in Europe', 8 *Uniform Law Review* (2003), 551-563; R. van Steenberghe, *Droit international humanitaire. Un regime special de droit international?* (2013); J. Viñuales, 'Cartographies imaginaires: observations sur la portée juridique du concept de 'régime spécial' en droit international', 140 *Journal de droit international* (2013), 405-425. See also Fragmentation of International Law, *supra* n. 1, 37.

9 See U. Linderfalk, *The International Legal System as a System of Norms* (EEP, Cheltenham, 2022), 111-112.

10 *Ibid*, 115-116.

11 See the Vienna Convention on Diplomatic Relations, 500 UNTS 95 (adopted on 18 April 1961, entered into force 24 April 1964), and the Vienna Convention on Consular Relations, 596 UNTS 261 (adopted on 24 April 1963, entered into force 19 March 1967.

12 See Linderfalk, *supra* n. 9, 117-118.

13 *Ibid*, 115-116.

14 *Ibid*.

trade law is a special regime, since it addresses trade across borders. International responsibility law is a special regime, since it ensures the full reparation of injury caused to a state or an international organisation, and the non-repetition of wrongful behaviour. International criminal law is a special regime, since it establishes individual criminal responsibility for certain acts. From the perspective of the legal realist's conception of a special regime, the concept of a special regime helps to think and talk in general terms about detected differences in legal practice.[15] This seems to be necessary if predictions of future legal decisions are to be at all possible.

Neither of the legal positivist's and the legal realist's conceptions of a special regime provides a full explanation of the divergence of legal practices such as any of those in the earlier list of examples. The positivist's conception directs attention to the formal relationship between legal norms: its explanation to why specialists prefer different solutions is that they address norms with partly different logical structures or pedigrees. The realist's conception directs attention to the referential meaning of legal norms: its explanation is that specialists focus upon norms that address different categories of facts or legal consequences. Both explanations beg further questions. They do not explain why the different logical structures or pedigrees of norms, or the focus of these norms on different categories of facts or legal consequences, cause or give specialists reason to prefer different solutions. They lack the depth of a sound explanation of human behaviour, for the same reason that legal positivism and legal realism do not offer any full explanations of the concept of legal obligation.

This shortcoming, I insist, is an important cause of legal fragmentation. Fragmentation of international law has been a much-discussed issue among international lawyers and scholars, all since the mid-1990.[16] Discussions led the International Law Commission to include the topic on its agenda of work, and to establish a group for the purpose of conducting a study on the topic.[17] In parallel to the work of the ILC, scholars published a long series of articles and monographs addressing particular issues of legal fragmentation.[18]

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15 *Ibid*, 118-119.

16 See e.g. M. Andenäs & E. Björge (eds.), *A Farewell to Fragmentation* (CUP, Cambridge, 2015); L. Barnhoorn & K. Wellens (eds.), *Diversity in Secondary Rules and the Unity of International Law* (Nijhoff, The Hague, 1995); A. Fisher-Lescano & G. Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan JIL* (2004), 999-1046; C. Giorgetti & M. Pollack (eds.), *Beyond Fragmentation* (CUP, Cambridge, 2022); M. Koskenniemi & P. Leino-Sandberg, 'Fragmentation of International Law: Post-Modern Anxieties', 15 *Leiden JIL* (2002), 553-579; U. Linderfalk, 'Cross-fertilisation in International Law', 84 *Nordic JIL* (2015), 428-455; A. Paulus, '*Jus Cogens* in a Time of Hegemony and Fragmentation', 74 *Nordic JIL* (2005), 297-334; S. Sur, 'The State between Fragmentation and Globalization', 8 *EJIL* (1997), 421-434; M. Young (ed.), *Regime Interaction in International Law* (CUP, Cambridge, 2012).

17 Report of the International Law Commission, Fifty-fourth Session, 29 April-7 June and 22 July-16 August 2002, Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10), at paras 492-494.

18 See e.g. A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*', 74 *Nordic JIL* (2005), 27-66; N. Matz & R. Wolfrum, *Conflicts in International Environmental Law* (Springer, Berlin, 2003); C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *ICLQ* (2005), 279-320; A. Orakhelashvili, *Peremptory Norms in International Law* (OUP, Oxford, 2006); Paulus, *supra* n. 16, 297-334; J. Pauwelyn, *Conflict of Norms in Public International Law* (CUP, Cambridge, 2003); D. Shelton, 'Normative Hierarchy in International Law', 100 *AJIL* (2006), 291-323; B. Simma & D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17 *EJIL* (2006), 483-529; C. Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP, Cambridge,

This research much like the work of the ILC Study Group concentrated mainly on the formal relationships that exist between rules of international law, and on phenomena such as legal hierarchy, the resolution of normative conflicts, the filling of legal gaps, the systemic interpretation of treaties, and the possibility of review of international legal decisions. It paid little attention to the more acute issue of communication across legal disciplines. Because of the increasing specialisation and diversification of international law, specialists are experiencing increasingly greater difficulty with understanding the reasoning of other specialists and their particular solutions to legal problems. Generalists are having similar problems with understanding the specialists, and vice versa. This is the real threat posed by an increasingly more specialized and diversified international law and legal practice. When international lawyers cannot any more understand each other, all that they will see is incorrect thought and behaviour. It is at this point that they start seriously questioning the fundamental idea of international law as a single legal system.[19]

The objective of this article is to introduce in international legal discourse a new understanding of the concept of a special regime. The increasing specialization of international law calls for a theory that can explain why, time and again, international lawyers find themselves doing similar things differently. The traditional theories of a special regime cannot perform this task. There is need for a theory of a fundamentally different nature one that explains the existence of a special regime by reference to the social relationships between the individuals and institutions that are engaged with understanding, discussing and applying legal norms. This article suggests that special regimes be conceived as communities of practice. The concept of a community of practice derives from educational theorist Etienne Wenger, who is probably best known for his book, published in 1998, called "Communities of Practice: Learning, Meaning and Identity".[20] The book is essentially an investigation into the everyday concept of 'learning'. For Wenger, learning is a social phenomenon. It is an enterprise that people pursue in the context of some or other social community, through engaging in and contributing to its practices. A community of practice presupposes the existence of a particular kind of relationship between community members. According to Wenger, this relationship manifests itself in a distinct set of normative presuppositions: community members think it desirable that they join forces and collaborate in the pursuit of some enterprise; they have an idea of what desirable state of affairs they are pursuing; and they have a shared understand of what tools are appropriate to use in this pursuit. As this article will demonstrate, this theory serves to describe branches such as WTO-law, European human rights law and international criminal law as special regimes. It has great appeal and the potential to muster wide approval, as it helps describing explicitly and in a systematic way what international lawyers already know intuitively.

2005); E. Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory', 17 *EJIL* (2006), 395-418.

19 The ILC Study Group concludes: "International law is a legal system". See Report of the ILC Study Group. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group prepared for the 58th session of the International Law Commission, 1 May-9 June and 3 July-11 August 2006, UN Doc A/CN.4/L.702, at 7.

20 E. Wenger, *Communities of Practice. Learning, Meaning and Identity* (CUP, Cambridge, 1998).

The organisation of the article will follow the logic of the objective. In Section (B), I will draw up the contours of the theory of communities of practice and explore how it translates to the context of international law and the concept of a special regime. In Section (C), I will clarify some of the methodological issues that would have to be addressed every time that a person refers to a branch of law as a special regime and another person challenges this suggestion. In Sections (D), (E) and (F), I will provide a number of concrete examples that will help to illustrate the utility of the theory of communities of practice. In Section (G), finally, I will briefly reflect on the reason for why international lawyers have such difficulty understanding each other across disciplines. I will similarly ruminate about the reason for why divergent practices of international law cause so much contention.

(B) THE THEORY OF COMMUNITIES OF PRACTICE

Etienne Wenger's book introduces a new perspective to the understanding and further study of the everyday activity of *learning*. "Our institutions", Wenger explains, "are largely based on the assumption that learning is an individual process, that it has a beginning and an end, that it is best separated from the rest of our activities, and that it is the result of teaching".[21] Wenger's perspective is another. For him, learning is a social phenomenon.[22] It is an enterprise that people pursue relative to the activities of some or other social community. Dentistry, for example, is learned relative to the activities of dentists; law is learned relative to the activities of lawyers and adjudicators; carpentry is learned relative to the activities of carpenters. Social communities of this kind are not formed by coincidence. As Wenger argues, they come into being because of the engagement of their members in a common enterprise dentistry, law, carpentry, and so forth. This engagement manifests itself in the contributions of these members to a practice.[23]

This idea reflects Wenger's assumptions about the nature of knowledge and what learning is eventually all about. Briefly put:

(1) Humans are social beings.

(2) *Knowledge* is a matter of competence with respect to valued enterprises.

(3) *Knowing* is a matter of participating in the pursuit of such enterprises.

(4) *Meaning*, in the sense of an ability to experience the world and our engagement with it as meaningful, is ultimately what learning is to produce.[24]

These assumptions form the basis for his theory, which characterizes learning as participation in the practice of a social community.

Participation in the practice of a social community is a form of belonging, Wenger argues. Not only does it affect what people do, and how they do what they do, but it is also

[21] *Ibid*, 3.
[22] *Ibid*.
[23] *Ibid*, 6-7.
[24] *Ibid*, 4.

an important factor in the development of their identities.[25] Based on this assumption, Wenger suggests that we look upon learning as a process that has altogether four necessary components:

(1) *Meaning*: a way of talking about our (changing) ability individually and collectively to experience our life and the world as meaningful.

(2) *Practice*: a way of talking about the shared historical and social resources, frameworks, and perspectives that can sustain mutual engagement in action.

(3) *Community*: a way of talking about the social configuration in which our enterprises are defined as worth pursuing and our participation is recognizable as competence.

(4) *Identity*: a way of talking about how learning changes who we are and create personal histories of becoming in the context of our communities.[26]

Three of these components are immediately relevant for our understanding of a special regime. I will explain them one by one, in Sub-sections (1), (2) and (3).

(1) The concept of a practice

A practice, in the sense of Wenger, originates in the pursuit of a group of individuals of some common enterprise.[27] This pursuit requires that individuals interact, and this, in turn, forces them to modify, to some degree, their relations with each other to accommodate for the needs of their common pursuit.[28] It gradually changes how individuals understand and interact with their factual environment.[29] Bit by bit, they learn how to do things. Over time, this collective learning results in a practice, which reflects not only the pursuit of the many individuals involved, but also how they perceive of each other and their factual environment.[30]

Translated to the context of international law, a practice is what international law specialists develop while doing their jobs. The international law specialists are a heterogeneous bunch. They are accredited representatives of states to international organisations and their organs; they are the own officers of international organisations; they are experts appointed by international organisations to perform particular missions; they are delegates at diplomatic conferences; they are legal counsellors and legal advisors; they are judges and arbitrators; international law scholars; NGO employees; and so forth. Depending on the particular capacity in which an international law specialist is acting, his or her job may include the performance of many different tasks. Thus, specialists negotiate; they draft and adopt international agreements, resolutions and other similar instruments; they make oral statements; they write reports and *amicus curiae* briefs; they deliver written submissions; they hold and participate in plenary and committee

[25] *Ibid*.
[26] *Ibid*, 5.
[27] *Ibid*, 45.
[28] *Ibid*.
[29] *Ibid*.
[30] *Ibid*.

meetings and in hearings of courts and arbitration tribunals; they plead; they adjudicate; they publish articles and monographs; they participate in academic conferences; they present papers at such conferences; they contribute to blogs; and so forth. As Wenger emphasizes, practice includes the explicit as well as the tacit.[31] For the purpose of my investigation of international law, this means that we would also have to recognize the importance of the less visible parts of the job of international law specialists. For example, specialists develop certain attitudes and mind-sets; they adopt certain perspective and approaches to the world and their fellow-specialists; they endorse and maintain certain understandings; they assume and take certain things for granted; and so forth.

(2) The concept of meaning

Wenger's interest is not so much in the concept of meaning as such as in its role in the process of learning. Since Wenger has already defined a practice as a process by which people can experience the world and their engagement with it as meaningful, the important question for him is how a practice can bring about meaning.[32] As he argues, meaning is created through a combination of 'participation' and 'reification'.[33]

'Participation', as Wenger understands this term, presupposes action and social connection. It stands for the experiences that come from membership in social communities and active involvement in the social enterprises that social communities pursue.[34] This definition makes participation a very wide-ranging concept, indeed. In the sense of Wenger, "[i]t is a complex process that combines doing, talking, feeling, and belonging".[35] It is not synonymous with collaboration, but "involves all kinds of relations, conflictual as well as harmonious, intimate as well as political, competitive as well as cooperative".[36]

In a legal context, participation materializes as legal discourse. Lawyers argue this is what they do. By oral and written statements, they seek to affect the beliefs, attitudes and behaviour of other people. Participation includes active engagement in such argumentation. More subtly, it involves also the mental state or states of affairs that participants provoke or seek to affect: approval, belief, apprehension, sympathy, endorsement, satisfaction, commitment, determination, concurrence, assent, conviction, expectation, hope, suspense, impatience, ambivalence, doubt, mistrust, disbelief, suspicion, fear, misgivings, qualm, grievance, unease, reluctance, concern, dedication, hesitation, indecision, disapproval, dissatisfaction, and so forth.

'Reification' is the term that Wenger uses to represent the process, by which people give form to their experience of a practice by producing "things" that congeal it, such as abstractions, tools, terms and concepts.[37] In a community of practice, he explains, such

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31 *Ibid*, 51.
32 *Ibid*, 51.
33 *Ibid*, 52.
34 *Ibid*, 55-56.
35 *Ibid*, 56.
36 *Ibid*.
37 *Ibid*, 58.

products unavoidably affect the way in which its members experience their activities and pursuits.[38] If, for example, community members are given a new tool to perform an activity, this typically changes the way in which they conceive of this same activity. Similarly, if community members are given a term to denote a particular relation between those who participate in an activity, this term typically changes the way in which they conceive of each other. In Wenger's terminology, this is to say that reification creates new meanings.[39] This interplay between reification and participation is an ever-continuing process: new meanings lead to further developments of the community practice, which in turn inspire new processes of reification, and so forth *ad infinitum*.[40]

Translated to the context of international law, reification brings one to think of the sources of law. Products of reification are practically everything that the basic criteria of the international legal system prompt lawyers to consider: treaties concluded by states and international organisations; established patterns of state practice; general principles of law recognized by civilized nations; unilateral declarations of states; judicial decisions; resolutions adopted by international organisations; draft articles and other instruments adopted by the International Law Commission; and so forth. Importantly, products of reification include also other kinds of output of international legal discourse: terminologies, concepts, principles, axioms, maxims, instructions, regulations, guidelines, codes of conduct, model conventions, theories, doctrines, modes of operation, general approaches, methods, ways of dressing, ways of talking, writing and behaving more generally, etc.

(3) The concept of a community

The very idea of a social community presupposes the existence of a very particular kind of relationship between community members. As Wenger argues, this relationship has three distinctly different dimensions.[41] First, there must be a mutual engagement: a feeling of "togetherness" an idea among community members that they are engaged in something together.[42] This mutual engagement, Wenger points out, may require different things, depending on the particular enterprise that engages the community.[43] For some, it may be a requirement that community members come to an office and work together in a defined physical environment. For others, such as singers or carpenters, focus is more on the performance of some presupposed task than on the place in which the task is being performed. Importantly, Wenger emphasizes, mutual engagement does not imply homogeneity; real life experience indicates rather the opposite.[44] Thus, when people engage in the pursuit of a common enterprise, community members specialize and make themselves known for their different ability to do whatever their enterprise requires them to do. Without these different competences, a mutual engagement would

38 *Ibid*, 56.
39 *Ibid*, 62.
40 *Ibid*, 58.
41 *Ibid*, 72-73.
42 *Ibid*, 73.
43 *Ibid*, 74.
44 *Ibid*, 75.

often not be possible.[45] In the sense of Wenger, consequently, mutual engagement draws upon what community members do and what they know, as much as on their ability to connect meaningfully to what they do *not* do and what they do *not* know.[46]

In the activities of international law specialists, a mutual engagement manifests itself in the existence of two different phenomena. A first phenomenon is the existence of a legal discourse. It is of critical importance that specialists not only take action — such as the adoption of international instruments, the adjudication of an international dispute, or the holding of presentation at an academic conference — but that they do this to affect the beliefs, attitudes and behaviour of other members of the community. A second phenomenon is specialisation. European human rights law, international criminal law and WTO-law are examples of enterprises that require the involvement of different competences, much like all international law. Thus, when international law specialists ascribe different functions to different categories of community members — judges, NGOs, scholars, international organisations, and so forth — this is a clear indication of their mutual engagement.

In a community of practice, secondly, community members entertain the idea that they are engaged in *a joint enterprise*.[47] This enterprise is not fixed at the outset but is defined and developed by community members in the course of their pursuit. Thus, it is the result of a process of negotiation in much the same way as the experiences of meaning that it creates.[48] Community members may have different opinions on how to do things and why they do them, but they may conceive of their activities as a joint enterprise nevertheless. If an enterprise is joint, it is because it is communally negotiated.[49] Such negotiations among community members define the goal of their enterprise, manifested in the existence of an idea among community members that some certain states of affairs are desirable: effective political democracy,[50] respect for human dignity,[51] the effective prosecution of international crimes,[52] the maintenance of international peace and security,[53] and so forth. Negotiations also help to develop relations of mutual accountability,[54] which is essentially an idea of the proper way to perform assignments. In the context of international law, this idea may entail, more specifically: an understanding of which states of affairs community members should spend efforts improving; an understanding of which legal propositions these members should take the troubling of justifying; an understanding of which legal issues they should consider important; an understanding of the proper way to ascribe importance to different assignments; an understanding of the proper way to prioritize among different outstanding assignments; and so forth.

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45 *Ibid*.
46 *Ibid*, 76.
47 *Ibid*, 77.
48 *Ibid*, 78-79.
49 *Ibid*, 78.
50 See e.g. Statute of the Council of Europe, ETS No. 1, preambular para 4.
51 See e.g. *Prosecutor v Anto Furundžija*, *supra* n. 3, *para 183.*
52 See e.g. Statute of the International Criminal Court, 2187 UNTS 90 (adopted 17 July 1998, entered into force 1 July 2002), preambular para 4.
53 See e.g. Charter of the United Nations, 892 UNTS 119 (adopted 26 June 1945, entered into force 24 October 1945), Art. 1(1) and (2).
54 See Wenger, *supra*, n. 20, 81.

In a community of practice, finally, community members have *a shared repertoire*.[55] The repertoire of a community of practice provides resources for negotiating meaning.[56] As Wenger explains:

[it] includes routines, words, tools, ways of doing things, stories, gestures, symbols, genres, actions, or concepts that the community has produced or adopted in the course of its existence, and which has become part of its practice. The repertoire combines reificative and participative aspects. It includes the discourse by which members create meaningful statements about the world, as well as the styles by which they express their forms of membership and their identities as members.[57]

In a legal context, since law is all about argumentation, the bulk of this repertoire will consist of rhetorical tools of various kinds, such as:

- *Terminologies*: the terms that specialists use and the meanings that they associate these terms with.
- *Concepts*: *e.g.* the concept of the reasonable person,[58] or the concept of incidental jurisdiction.[59]
- *Methods*: *e.g.* the ecosystem services approach used for calculating environmental damages,[60] or the historical method used for the interpretation of treaties and other similar instruments.[61]
- *Forms of argument*: *e.g.* arguments based on analogies,[62] or on the perceived further consequences of the application of a norm generally.[63]
- *Doctrines*: *e.g.* the margin of appreciation doctrine,[64] or the doctrine of intertemporal law.[65]
- *Theories*: *e.g.* the dualist and monist theories of the relation between international and domestic law,[66] or the declarative theory, according to which states can exist irrespective of other states' recognition.[67]

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55 *Ibid*, 82.
56 *Ibid*.
57 *Ibid*, 83.
58 See e.g. V. Jeutner, *The Reasonable Person* (OUP, Oxford, 2023).
59 See e.g. *Prosecutor v Duško Tadić* (IT-94-1), Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for Former Yugoslavia, Appeals Chamber, Decision of 2 October 1995, available at: www.icty.org, at para 20.
60 See e.g. *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation* (2018), ICJ Reports 2018, 15, at paras 45-48.
61 See e.g. O. Ammann, *Domestic Courts and the Interpretation of International Law* (Brill Nijhoff, Leiden & Boston, 2019), 215.
62 See e.g. S. Vöneky, 'Analogy in International Law', in R. Wolfrum (ed.), *The Max Planck Encoclopedia of Public International Law* (OUP, Oxford, 2012), Vol. 1, 374-380.
63 See e.g. T. Clark, 'The Teleological Turn in the Law of International Organisations', 70 *ICLQ* (2021), 533-567.
64 See e.g. Y. Shany, 'Towards a General Margin of Appreciation Doctrine', 16 *EJIL* (2005), 907-940.
65 See e.g. U. Linderfalk, 'The Application of International Legal Norms Over Time: The Second Branch of Intertemporal Law', 58 *NILR* (2011), 147-172.
66 See e.g. P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed (Routledge, Abingdon, 1997), 63-64.
67 See e.g. *ibid*, 83.

(C) A METHODOLOGY FOR IDENTIFYING A SPECIAL REGIME

Since the publication of Wenger's book, the term 'community of practice' has become very popular. It is used by authors of academic and management literature to refer to organizational groupings and areas of activity in a wide range of different situations.[68] Over time, this has made the meaning of the term imprecise and has blurred some of the fundamental tenets of Wenger's theory. As scholars have argued, many of the forms of social interaction that are referred to in the literature as communities of practice are not communities of practice at all, or at least not in the sense of Etienne Wenger.[69] This criticism raises questions of justification. How can you justify a proposition assimilating an area of activity, such as a subpart of the international legal system, with a community of practice?

To answer this question successfully, we need to be perfectly clear about the ontology of a community of practice. As Wenger argued, there can be no community of practice without a mutual engagement, a joint enterprise and a shared repertoire.[70] These elements, however, are not defining features of the concept of a community. As Wenger warned, he was not suggesting that everything that anybody might call a community is a community of practice.[71] The three elements describe the relationship that in a community of practice always obtains between the practice and the community. They are the dimensions of *the social relationship* that defines a multitude of people participating in a practice as precisely a community of practice.

Thus, a community of practice exists in the sense of a set of normative presuppositions of its members. When, in Section 3, I explored the concept of a joint enterprise, I articulated it in terms that make this explicit. I referred to it as an idea among community members that some certain states of affairs are *desirable*. As I pointed out, this idea comes hand in hand with an understanding of the *proper* way to perform assignments. The other two elements of the trio exist in the same sense, if not as obvious. A mutual engagement, I wrote, is a feeling of togetherness. It does not exist just because community members have a common interest. In the sense of Wenger, two individuals (P and Q) are mutually engaged if, and only if, P and Q both think it *desirable* that they join forces and collaborate in the pursuit of some enterprise. As for a shared repertoire, in a legal context, it takes essentially the form of a set of rhetorical tools: terminologies, concepts, methods, forms of argument, etc. I made this point already in Section 3. What I should have spelled out is that a shared repertoire is more than just a set of rhetorical tools. In the sense of Wenger, there is a shared repertoire if, and only if, community members consider the use of these tools *appropriate*.

Thinking that something (p) is desirable, proper or appropriate is to assume that p *should* be the case. The question that would have to be answered is how you establish the existence of such a normative presupposition on the part of a person or group of

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68 See e.g. A. Amin & J. Roberts, 'Knowing in Action: Beyond Communities of Practice', 37 *Research Policy* (2008), 353-369.

69 *Ibid*.

70 See *supra*, Section (B).

71 Wenger, *supra* n. 20, 72.

persons. As I believe, no normative presuppositions of the members of a community of practice can themselves be observed. What can be observed are the ways in which the normative presuppositions manifest themselves in community practice. As Wenger was careful to stress, a mutual engagement, a joint enterprise and a shared repertoire are not phenomena that exist in a vacuum. They develop in the course of a community practice as the result of a process of negotiation, much like the meanings that participants experience.[72] This observation is key. If it is through the interactions of community members that their normative presuppositions form and develop, then it is through the medium of these same interactions that these presuppositions must be studied.

Such studies require a very particular methodology. Habermas refers to it as 'rational reconstruction'.[73] When you study the interactions of people, and you conclude that these people form a community of practice, you confer meaning of those interactions. According to Habermas, the meaning of communicative action is what people infer from its mere occurrence, combined with the assumption that the author of that action behave rationally and, thus, that he or she is committed to some certain standard or standards of communication.[74] In international legal discourse, he argued, as in all practical discourses, discussants are committed to the below three general standards of communication:

1. You must speak the truth.
2. You must act as you yourself consider socially appropriate.
3. You must be sincere about that which you express, that is to say, you must mean what you express.[75]

This may seem to be a very modest claim, but it helped Habermas to work out an elaborate methodology that he suggested should be used for the further analysis and understanding of practical discourse, be it ethical, political or legal. In the context of this article, it similarly helps to explain the methodology that will have to be used to justify a proposition assimilating a subpart of the international legal system with a community of practice.

As Sections (D), (E) and (F) will help to illustrate, the normative presuppositions that characterize a community of practice certainly lend themselves to systematic study. They can be studied as implicit in the actual conduct of community members, based on the assumption that these members act rationally and that they recognize the appropriateness of their own action. To establish this proposition, I will direct all my attention to the example of European human rights law. International lawyers have grown used to thinking of this branch of law as a special regime. In Sections (D), (E)

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72 See *supra*, Section (B).

73 On the concept of rational reconstruction and the utility of this method for legal analysis, see U. Linderfalk, 'Rational Reconstruction and International Legal Reasoning' (December 13, 2022). Available at SSRN: https://ssrn.com/abstract=4300851.

74 See J. Habermas, *The Theory of Communicative Action*, Vol I: Reason and the Rationalization of Society, translated into English by T. McCarthy (Polity Press, Cambridge, 1984), 307 et passim.

75 *Ibid*. For further analysis of the validity claims, see e.g. M. Cherem, 'Jürgen Habermas', Section 3, in *Internet Encyclopedia of Philosophy*, https://iep.utm.edu/habermas, last visited on 28 November 2022.

and (F), I will investigate how this assumption coheres with the suggestion that special regimes be characterized as communities or practice in the sense of Etienne Wenger.

(D) A MUTUAL ENGAGEMENT

From the point of view of the idea that assimilates a special regime with a community of practice, the categorization of European human rights law as a special regime entails the claim that there is among European human right lawyers a mutual engagement. A mutual engagement is a feeling of togetherness. Thus, if there is a mutual engagement among European human rights lawyers, this is because these lawyers do what they do based on a very particular normative presupposition: they believe that it is desirable that they all join forces and collaborate in the pursuit of some certain enterprise.

To establish such normative presuppositions, as Section (C) helped to explained, we need to assume that European human right lawyers act rationally and that they recognize the appropriateness of their own action. Having made this assumption, the existence of a mutual engagement among European human rights lawyers can be understood to be implicit in a variety of different actions. Among other things, it can be inferred from the existence among these lawyers of a distinct way of ascribing functions to international legal scholars.

International legal scholars do a whole lot of things. A considerable part of their activities can be captured by the use of a grammatical verb.[76] Thus, international legal scholars:

1. *Describe*: *e.g.* a scholar may engage in the description of an arbitration award in which the abuse of rights doctrine is applied to the facts of a particular dispute.
2. *Interpret and understand*: *e.g.* a scholar may engage in the study of an arbitration award in order to understand whether a reference by the arbitrators to the conduct of an investor as an "abuse of process" means something other than an "abuse of rights".
3. *Systemize*: *e.g.* a scholar may engage in the study of a vast series of arbitration awards seeking to establish a pattern that can help to come to grips with the abuse of rights doctrine in the context of investor-state arbitration disputes.
4. *Analyse*: *e.g.* a scholar may engage in the study of arbitration awards in order to understand whether the occasional reference by arbitrators to the abuse of rights doctrine as an aspect of the principle of good faith sheds further light on the precise relationship between these two legal phenomena.
5. *Conceptualize and define*: *e.g.* a scholar may investigate what it is precisely that defines the conduct of investors as an abuse of rights.
6. *Critically reflect*: *e.g.* a scholar may demonstrate a lack of coherence between the abuse of rights doctrine and the theory according to which the definition of the

[76] Although analytically distinct, in the actual conduct of legal research, these activities tend to overlap and are often difficult to distinguish.

precise terms of application of an investment treaty is a matter exclusively for the treaty parties.

7. *Theorize*: *e.g.* a scholar may draw up a theory which explains the relationship between the abuse of rights doctrine and the principle of good faith.
8. *Speculate*: *e.g.* a scholar may ruminate on the future assessment by arbitrators of certain kinds of conduct on the part of investors.
9. *Solicit*: *e.g.* a scholar may propose that the abuse of rights doctrine be applied differently in investor-state arbitration disputes or not at all.

In carrying out this work, international legal scholars make an important contribution to international legal discourse. A legal discourse, as I understand this rarely defined concept, is a collection of verbal exchanges of legal propositions. In this article, consequently, 'international legal discourse' refers to the sum of all utterances in oral or written form expressing a proposition about international law. Understood in this sense, international legal discourse extends over a great number of different activities. They include, but are certainly not limited to, the negotiation and adoption of international agreements, the issuing of public statements and decisions, the pleading on behalf of a disputing party before an international court, the holding of conference presentations, and the publication of reports, academic articles and monographs.

International legal scholars contribute to international legal discourse in two fundamentally different ways.[77] First, scholars contribute by developing an understanding of phenomena or issues, which were earlier either not clearly defined or insufficiently studied. In the earlier list of scholarly activities, the ones that tend to leave such contributions are the first seven. I will refer to these activities as 'exploratory research'.

Second, scholars contribute by predicting the consequences of phenomena or issues and by proposing conduct relative to these, such as discontinuing earlier practices, enacting new legislation, or negotiating a new treaty. In the earlier list of scholarly activities, the ones that tend to leave such contributions are the last two. I will refer to these as 'argumentative legal research'.

If argumentative legal research is properly conducted, it uses information obtained by exploratory research to support its proposals. Hence, we should not think of the relationship between exploratory and argumentative research as in any way antagonistic, but rather as complementary. Stated more precisely, we should think of exploratory research as subservient to argumentative legal research and other normative contributions to international legal discourse.[78] Still, it remains a fact that in different communities of international lawyers, scholars place different emphasis on the different kinds of legal research. To put it simple, the specialization of scholars would seem to make them unequally prone to argumentative legal research.

Compare, for example, the way that case notes are typically framed, depending on whether they are written by an international law generalist or a European human rights law specialist. European human rights law specialists *describe*: for example, a scholar

77 See Linderfalk, *supra* n. 73, 13.
78 *Ibid*.

may provide an outline of the factual and legal context of a case brought before the European Court of Human Rights, and give an account of the response of this court to the arguments of the applicant and respondent.[79] They *interpret*: for example, a scholar may provide her opinion on what might have been perceived by the European Court as a factor in its assessment of the proportionality of a measure restricting the exercise of a human right.[80] They *systemize*: for example, a scholar may refer to the pattern of practice of the European court to establish that a certain kind of conduct could amount to an inference with a certain right.[81] *They analyse*: for example, a scholar may find that concerns raised by dissenters have little bearing on a case.[82] They *conceptualize*: for example, a scholar may distinguish the case at hand from one or several earlier human rights cases brought before the European Court under the same provision of the European Convention.[83] They *critically reflect*: for example, a scholar may remark that the response of the European Court to arguments probably took many by surprise.[84] They *theorize*: for example, a scholar may infer that, generally speaking, the European Court has applied a European consensus in order to establish an expanded scope of protection for the European Convention in areas not expressly mentioned within it or contemplated at the time of its drafting.[85] They *speculate*: for example, a scholar may warn about the risk that a certain judicial approach poses to the continuing development of "a rights-based, constitutionalist public order" throughout Europe.[86] They *solicit*: for example, a scholar may advise a government not to rely on the non-binding nature of MoUs to escape the scrutiny of courts with regard to its efforts to ensure their enforcement.[87] Overall, generalists do much the same things, but to different degrees. It is only on rare occasions that you find them speculating and soliciting.[88]

If it is our assumption that international legal scholars recognize the appropriateness of their own action, these differences can be understood to reflect some very different ideas of the function of legal scholarship. All scholars look upon themselves as engaged in an enterprise that seeks to affect the behaviour of legal and political decision-makers. Whereas generalists admit that their role is largely limited to providing the groundwork

79 See e.g. F. de Londras & K. Dzehtsiarou, 'Grand Chamber of the European Court of Human Rights, A, B & C v Ireland, Decision of 17 December 2010', 62 *ICLQ* (2013), 250, at 257; J. Maher, 'Eweida and Others: A New Era for Article 9', 63 *ICLQy* (2014), 213, at 224-225; T. Eatwell, 'Selling the Pass: *Habeas Corpus*, Diplomatic Relations and the Protection of Liberty and Security of Persons Detained Abroad', 62 *ICLQ* (2013), 727, at 734.

80 See e.g. de Londras & Dzehtsiarou, *supra* n. 79, 257.

81 See e.g. Maher, *supra* n. 79, 224-225.

82 See e.g. Eatwell, *supra* n. 79, 734.

83 See e.g. *ibid*, 738.

84 See e.g. Maher, *supra* n. 79, 220.

85 See e.g. de Londras & Dzehtsiarou, *supra* n. 79, 251.

86 See e.g. *ibid*, 258.

87 See e.g. Eatwell, *supra* n. 79, 739.

88 See e.g. C. Barker, 'International Court of Justice: Jurisdictional Immunities of the State (Germany v. Italy) Judgment of 3 February 2012', 62 *ICLQ* (2013), 741, at 753; F. Fontanelli & E. Björge, 'International Court of Justice, Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v Greece) Judgment of 5 December 2011', 61 *ICLQ* (2012), 775, at 775. This is not to say that speculating and soliciting are equally rare in other kinds of texts. Still, I do believe that whatever kind of text we are studying, we will find European human rights law specialist more prone to argumentative legal research than the generalists.

for practical argument, human rights specialists believe that they are themselves acting to affect directly the behaviour of those decision-makers, much like any other participant in international human rights discourse. This is proof of a mutual engagement among human rights lawyers that does not exist among the generalists.

(E) A JOINT ENTERPRISE

From the point of view of the idea that assimilates a special regime with a community of practice, the categorization of European human rights law as a special regime entails the claim that European human rights lawyers are engaged in a joint enterprise. To say that European human rights lawyers are engaged in a joint enterprise is to assume the existence of a normative presupposition. It is to assert that European human rights lawyers do what they do based on the idea that some certain state of affairs is desirable. If, once again, we assume that European human rights lawyers act rationally and that they recognize the appropriateness of their own action, the existence of such a presupposition can be established based on actual conduct. Among other things, it can be inferred from the way in which European human rights lawyers perform assignments. A case in point is their particular conception of proportionality.

Proportionality assessments are conducted by legal decision-makers in the course of the application of many norms of international law.[89] They concern the relationship between a measure taken by a legal agent pursuant to an international norm and the injury that this measure entails. The relationship is examined in the light of a presupposed legal objective. Thus, simply put, proportionality assessments are conducted to ensure that a measure is not incommensurate with the injury suffered, considering the legal objective for the sake of which the measure is being taken [90] in the application of law, as in other spheres of human activity, the end does not always justify the means. This fixation on the presupposed legal objectives makes proportionality assessments a perfect candidate for a study of the suggestion that assimilates European human rights law with a community of practice. By identifying the objectives involved in the proportionality calculi, we can gain a fuller understanding of the state of affairs that European human rights lawyers find desirable. As a point of comparison, I will consider also the way in which proportionality assessments are being conducted in international responsibility law a discipline that most international lawyers classify as general international law.

As provided by international responsibility law, the proportionality of a countermeasure is a condition for its legality. Thus, according to the Articles on the Responsibility of States for Internationally Wrongful Acts, "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question".[91] The Draft Articles on the Responsibility of International Organizations, adopted by the International Law Commission in 2011, include an

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89 See U. Linderfalk, 'Proportionality and International Legal Pragmatics', 89 *Nordic JIL* (2020), 422-437.

90 *Ibid*.

91 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session, Report of the International Law Commission on the work of its fifty-third session, *Yearbook of the International Law Commission* 2001, Vol. 2, Part 2, 26 *et seq*. On 12 December 2001, the UN General Assembly adopted resolution 56/83, recognising the work of the

identically worded provision.[92] Interestingly, neither of these provisions include any information about the objective that they seek to protect. International lawyers have reacted differently to this absence.

Some express the proportionality test in terms that would allow those who take countermeasures considerable flexibility, as when they suggest that countermeasures should serve goals "which are consistent with the expressed desire of the international community".[93] Some believe that the proportionality rule is based on a very specific objective, but do not agree on what that particular objective might be. Thus, according to one commentator, the proportionality of a measure "is tested by what appears reasonably necessary to induce the wrongdoer to cease its course of action".[94] As other commentators express it, it is the objective of the proportionality rule to ensure that countermeasures do not lead to inequitable results.[95] The great majority of commentators, however, use language that altogether avoids recognizing the relevance of any objective. Lawyers may warn, for example, that since recourse to countermeasures involves the great risk of causing an escalation of conflict, counter-measures should be "a wager on the wisdom, not on the weakness of the other party".[96] This survey of the discourse on international responsibility law gives a very clear impression: overall, lawyers do not seem to have a very clear idea of what desirable state of affairs that they are pursuing.

This observation is in stark contrast with the jurisprudence of the European Court of Human Rights. In the application of the European Convention and its additional protocols, the European Court uses "the principle of proportionality" in various situations.[97] Often, it uses it to establish the necessity of measures restricting the enjoyment of fundamental freedoms.[98] In these situations, the Court would typically start by pinning down 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".[99] This standard implies consideration of an objective that can help to determine when a fair balance has been struck and when it has not. It is not often that the Court articulates this objective explicitly, but it would seem to have done so in the two cases of *Refah Partisi* and *United Communist Party of Turkey*, both of which concerned complaints of the dissolution of a political party by the Turkish Constitutional Court.

ILC and the adoption of the ILC Articles. From then on, the ILC Articles are officially referred to as the *Articles on Responsibility of States for Internationally Wrongful Acts*. See Art. 51.

92 Draft Articles on the Responsibility of International Organizations with Commentaries, Report of the International Law Commission on the work of its sixty-third session, *Yearbook of the International Law Commission* 2001, Vol. 2, Part 2, 39 *et seq*. See Art. 54.

93 R. Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement', 51 *NILR* (2004), 41, at 71.

94 E. Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures', 12 *EJIL* (2001), 889, at 910

95 Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* n. 91, 135. See also Fourth Report on State Responsibility, by Mr Gaetano Arangio-Ruiz, Special Rapporteur, Report of the International Law Commission on the work of its forty-fourth session, *Yearbook of the International Law Commission* 1992, Vol. 2, Part 1, 1, at 23.

96 *Air Services Agreement*, Decision of 9 December 1978, 18 RIAA 417, at para 91.

97 See e.g. J. Christoffersen, *Fair Balance* (Nijhoff, Leiden, 2009), 31 *et seq*.

98 Sometimes, the Court uses the principle to establish the very substance of human rights, such as the right to life, the right to property, and the right not to be subjected to inhuman or degrading treatment or punishment.

99 *Perdigão v. Portugal*, ECHR, Grand Chamber (2010, available at: https://hudoc.echr.coe.int, at para 63.

In commenting upon the possibility of imposing restriction on the enjoyment of the right to freedom of association, the Court affirmed: "the Convention was designed to maintain and promote the ideals and values of a democratic society".[100] As it insisted, "no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society".[101] This same objective explains why the Court refers to measures as disproportionate when they are the result of an arbitrary or discriminatory application of a rule of law;[102] when they are not "accompanied by specific reasoning";[103] when they thwart "the free expression of the people in the choice of the legislature";[104] when public authorities have failed to act with "diligence" or within a "sufficiently prompt" time-frame;[105] when the decision-making process resulting in the adoption of a measure does not involve a judiciary;[106] when measures are contrary to "the demands of that pluralism, tolerance, and broad-mindedness, without which there is no democratic society";[107] when there is no access to a court or possibility of appeal;[108] and so forth. Overall, the European Court seems to have a very clear idea of what desirable state of affairs it is pursuing when applying the proportionality test. For those European human rights specialists who accept its jurisprudence, it can be considered as proof of the existence of a joint enterprise.

(F) A SHARED REPERTOIRE

From the point of view of the idea that assimilates a special regime with a community of practice, the categorization of European human rights law as a special regime entails the claim that European human rights lawyers have a shared repertoire. To say that European human rights lawyers have a shared repertoire is to say that they consider the use of a set of rhetorical tools appropriate. If, once again, we assume that European human rights lawyers act rationally and that they recognize the appropriateness of their own action, the existence of such a presupposition can be established based on actual conduct. Among other things, it can be inferred from the use of a distinct set of theories.

The language of the European Convention on Human Rights is imbued with terms that would seem to refer to concepts of domestic law. Prominent examples include "normal civic obligations",[109] "the lawful arrest or detention of a person",[110] "alcoholics",[111]

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100 *United Communist Party of Turkey and Others v Turkey* (1998), available at: https://hudoc.echr.coe.int, at para 45.

101 *Refah Partisi (The Welfare Party) and Others v Turkey*, ECHR, Grand Chamber (2003), available at: https://hudoc.echr.coe.int, at para 99.

102 *Evans v United Kingdom*, ECHR, Grand Chamber (2007)available at: https://hudoc.echr.coe.int, at para 89; *Animal Defenders International v United Kingdom*, ECHR, Grand Chamber (2013), available at: https://hudoc.echr.coe.int, at para 122.

103 *Frodl v Austria*, ECHR (2010), available at: https://hudoc.echr.coe.int, at para 35.

104 *Scoppola v Italy (No 3)*, ECHR, Grand Chamber (2012), available at: https://hudoc.echr.coe.int, at para 84.

105 *Rousk v Sweden*, ECHR (2013), available at: https://hudoc.echr.coe.int, at paras 124 and 122, respectively.

106 *Scoppola v Italy (No 3)*, *supra* n. 104, at para 98.

107 *Otto-Preminger Institut v Austria*, ECHR (1994), available at: https://hudoc.echr.coe.int, at para 49.

108 *Stubbings and Others v United Kingdom*, ECHR (1996), available at: https://hudoc.echr.coe.int, at paras 65-66.

109 Art. 4(3)(d). For further consideration of this concept, see e.g. *Karlheinz Schmidt v Germany*, ECHR (1994), available at: https://hudoc.echr.coe.int, at para 23.

110 Art. 5(1)(f). For further consideration of this concept, see e.g. *Akram Karimov v Russia*, ECHR (2014), available at: https://hudoc.echr.coe.int, at para 177.

111 Art. 5(1)(e). For further consideration of this concept, see e.g. *Witold Litwa v Poland*, ECHR (2000), available at: https://hudoc.echr.coe.int, at paras 60-61.

"criminal offence",[112] "penalty",[113] "association",[114] "expulsion",[115] "responsibilities of a private law character",[116] and "marriage".[117] The European Court of Human Rights has established a very particular approach to the interpretation of these terms. Scholars refer to it as "the theory of autonomous concepts".[118] According to this theory, terms such as any of those in the list of examples enjoy a status of semantic independence.[119] The meaning that domestic law and legal practice ascribe to them is certainly not irrelevant for the way in which they should be understood in the context of the European Convention.[120] It cannot be, since, typically, this is their ordinary meaning and thus a frame of reference throughout the entire process of interpretation of this instrument.[121] In effect, what the theory of autonomous concepts does is to confirm the importance of other means of interpretation. Even though it is indeed very difficult to think of a *criminal offence* or a *penalty* without regard to domestic law and legal practice, the domestic legal meaning of a term is never itself decisive if, for example, the context or the object and purpose of the European Convention suggest that it be understood differently.

Now, references to domestic legal concepts are not unique for the European Convention. They can be found in many international treaties. Consider, for example, the UN Convention on Jurisdictional Immunities of States and Their Property,[122] which uses terms such as "witness",[123] "contract of employment",[124] "immovable property",[125] "intellectual property",[126] "attachment or arrest",[127] and "the central bank".[128] This Convention allows for some interesting comparison, since in the interpretation of

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112 Art. 6(2). For further consideration of this concept, see e.g. *Engel and Others v The Netherlands*, ECHR (1976), available at: https://hudoc.echr.coe.int, at para 81.

113 Art. 7. For further consideration of this concept, see e.g. *M v Germany*, ECHR (2009), available at: https://hudoc.echr.coe.int, at para 120.

114 Art. 11. For further consideration of this concept, see e.g. *Chassagnou and Others v France*, ECHR, Grand Chamber (1999), available at: https://hudoc.echr.coe.int, at para 100.

115 Art. 4 of Protocol 4. For further consideration of this concept, see e.g. *N.D. and N.T. v Spain*, ECHR, Grand Chamber (2020), available at: https://hudoc.echr.coe.int, at para 185.

116 Art. 5 of Protocol 7.

117 Art. 5 of Protocol 7.

118 See e.g. G. Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 15 *EJIL* (2004), 279, at 282; A. Legg, *The Margin of Appreciation in International Human Rights Law* (OUP, Oxford, 2012), 111. The approach is sometimes also referred to as "autonomous interpretation". See e.g. F. Matscher, 'Methods of Interpretation of the Convention'", in R. St. J. Macdonald *et als* (eds.), *The European System for the Protection of Human Rights* (Nijhoff, Dordrecht, 1993), 63, at 70-73.

119 Letsas, *supra* n. 118, 282; C. Ovey & R. White, *Jacobs & White, European Convention on Human Rights*, 3rd ed. (OUP, Oxford, 2002), 31.

120 See, emphatically, R. Bernhardt, 'Thoughts on the Interpretation of Human Rights Treaties', in F. Matscher & H. Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J Wiarda* (Heymann, Köln, 1988), 65, at 67.

121 See Arts. 31-32 of the Vienna Convention on the Law of Treaties, 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980).

122 UN Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/59/508 (adopted 2 December 2004, not yet in force).

123 Art. 8.

124 Art. 11.

125 Art. 13.

126 Art. 14.

127 Art. 18.

128 Art. 21.

terms such as these, lawyers tend to defer largely to their meaning in domestic law and legal practice.[129] It is evident that in the interpretation of the UN Convention on Jurisdictional Immunities of States and Their Property, little place is reserved for something like a theory of autonomous concepts. This observation raises a crucial question. Why do judges of the European Court of Human Rights think of the theory of autonomous concept as appropriate for the understanding of the European Convention, when obviously international lawyers do not think it of it as appropriate in other legal contexts? The answer would seem to reside in the characterization of European human rights law as a special regime. Judges of the European Court believe that the theory of autonomous concept helps them to obtain some certain desirable state of affairs. To illustrate this proposition, consider the two judgments of the European Court in *Engel v. The Netherlands* and *Chassagnou v. France*.

In *Engel and Others v. The Netherlands*,[130] four conscripted soldiers complained over the penalties for offences against military discipline that had been passed on them by their respective commanding officers. The applicants argued that that the proceedings before the military authorities were not in conformity with the requirements of Article 6 of the European Convention. The Government, for its part, claimed that disciplinary measures did not come within the extension of a "criminal charge" in the sense of Article 6. This gave the Court reason to clarify the importance of the distinction made in all contracting states between disciplinary and criminal proceedings:

> It must thus be asked whether or not the solution adopted in this connection at the national level is decisive from the standpoint of the Convention. Does Article 6 (art. 6) cease to be applicable just because the competent organs of a Contracting State classify as disciplinary an act or omission and the proceedings it takes against the author, or does it, on the contrary, apply in certain cases notwithstanding this classification?[131]

To answer this question, the Court introduced the idea that criminal charge was an autonomous concept. A sovereign state is free, it said, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line as it sees fit. For purposes of the application of the European Convention, however, this freedom is exercised subject to certain conditions:

> If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of … [Article 6] would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with *the purpose and object of the Convention*.[132]

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[129] See e.g. H. Fox, *The Law of State Immunity*, revised and updated third edition (OUP, Oxford, 2015); R. O'Keefe *et als* (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP, Oxford, 2013). See also Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries, Yearbook of the International Law Commission 1991, Vol. 2, Part 2.

[130] *Case of Engel and Others v The Netherlands*, *supra* n. 112.

[131] *Ibid*, at para 80.

[132] *Ibid*, at para 81. Italics are added.

In *Chassagnou and Others v. France*,[133] the applicants were owners of landholdings in Western France. They complained over the compulsory inclusion of their land in the hunting grounds of a local hunting association an *Associations communales de chasse agréées*, an "ACCA" for short. Similarly, the complained over the obligation to join this association, although, as members of the anti-hunting movement, they strongly disapproved of its objectives. They submitted that they had suffered an infringement of their right to freedom of association, in the sense of Article 11 of the European Convention. The Government maintained that the hunting organisation in case was in fact not an association but a "public-law para-administrative institutions", as it called it.[134] The Court noted that, in French law, the question whether ACCAs are governed by private or public law had not yet been settled. It continued in terms similar to its findings in *Engel and Others v. The Netherlands*:

[T]he question is not so much whether in French law ACCAs are private associations, public or para-public associations, or mixed associations, but whether they are associations for the purposes of Article 11 of the Convention.

If Contracting States were able, at their discretion, by classifying an association as "public" or "para-administrative", to remove it from the scope of Article 11, that would give them such latitude that it might lead to results incompatible with *the object and purpose* of the Convention, which is to protect rights that are not theoretical or illusory but practical and effective […].[135]

As it concluded:

The term "association" therefore possesses an autonomous meaning; the classification in national law has only relative value and constitutes no more than a starting-point.[136]

(G) THE DIFFICULTY OF COMMUNICATION ACROSS LEGAL DISCIPLINES

The developments towards an increasingly more specialized and diversified international law have had an effect on the self-image of international lawyers. Today, rarely do you hear a person describe him or herself as an international lawyer, pure and simple. Instead, international lawyers identify themselves as either "specialized generalists" or as preoccupied with the practice or scholarly study of particular branches of international law, such as international investment law, international human rights law, international environmental law, international peace and security law, the law of the sea, and so on. Lawyers affiliating themselves with these groups are experiencing increasingly greater difficulty with understanding each other. Consider one of the divergent legal practices referred to in Section (A): the European Court of Human Rights ascribes an effect to invalid reservations to the European Convention that differs significantly from how international lawyers other than human rights specialists conceive of the effect of invalid reservations to a treaty. Non-human rights specialists are aware of the practices

[133] *Case of Chassagnou and Others v France*, *supra* n. 114.
[134] *Ibid*, at para 98.
[135] *Ibid*, at para 100. Italics are added.
[136] *Ibid*.

developed by the European Court. Still, they cannot understand why an approach such as that of the Court should be adopted. Why is understanding this so difficult?

My suggestion that special regimes be conceived as communities of practice helps answering this question. It directs attention to the social context the relationship between the human beings and institutions that are engaged with understanding, discussing and applying legal norms. Access to the social context of human behaviour is often crucial to understanding it. Assume, for example, that in the beginning of a game of football, a TV commentator sounds off: "United has a good bench". Football buffs will immediately understand that the commentator is referring to the substitutes of the one team. Outside of the community of football buffs people will understand this utterance differently, and they will no doubt conceive of it as very peculiar. As I have demonstrated in this article, a special regime is fully comparable to the community of football buffs. In line with this particular conception of a special regime, if lawyers that are not themselves active in a field of law are not equipped to understand the reasoning and behaviour of those who are, this is because they do not have full access to the social context in which these other lawyers operate. This is indeed a very plausible explanation to why different groups of lawyers have great difficulty understanding each other.

This observation turns our attention to a related question. Why is it that divergent legal practices such as any of those referred to in Section (A) cause so much contention? Stated from an inter-personal perspective, why is it that international lawyers active in one field of law have such difficulty accepting that lawyers active in other fields of law do things differently? The theory of communities of practice helps answering this question, too.

A community of practice, Wenger insists, does not just entail the negotiation of meaning. Since a community of practice can only exist among people, who acknowledge each other as community members, a practice also entails the negotiation of ways of being a person in that community.[137] More than anything else, identity forms because of the competence that community members develop from participating in a practice.[138] Wenger analyses this competence along the same three dimension that he earlier examined the concept of a community.

For Wenger, consequently, identity inheres, first, in a mutuality of engagement. In a community of practice, we learn certain ways of engaging with other people:

We develop certain expectations about how to interact, how people treat each other, and how to work together … As an identity, this translates into a form of individuality defined with respect to a community. It is a certain way of being part of a whole through mutual engagement.[139]

Secondly, identity inheres in the accountability to an enterprise:

As we invest ourselves in an enterprise, the forms of accountability through which we are able to contribute to that enterprise makes us look at the world in certain ways

[137] See Wenger, *supra* n. 20, 149.
[138] *Ibid*, 152.
[139] *Ibid*.

… As an identity, this translates into a perspective … [and] a tendency to come up with certain interpretations, to engage in certain actions, to make certain choices, to value certain experiences […].[140]

Thirdly, and finally, identity inheres in the negotiability of a repertoire.

Sustained engagement in a practice yields an ability to interpret and to make use of the repertoire of that practice … As an identity, this translates into a personal set of events, references, memories, and experiences that create individual relations of negotiability with respect to the repertoire of a practice".[141]

This close relationship between competence and identity helps Wenger to explain what most people experience when being exposed to a practice with which they are themselves largely unfamiliar:

When we come into contact with new practices, we venture into unfamiliar territory. The boundaries of our communities manifest as a lack of competence along the three dimensions I just described. We do not quite know how to engage with others. We do not understand the subtleties of the enterprise as the community has defined it. We lack the shared references that participants use. Our non-membership shapes our identities through our confrontation with the unfamiliar.[142]

Wenger does not have any particular community in mind, but this passage feeds directly into my investigation of international law and the concept of a special regime. It can be argued that it is precisely because the identities of international lawyers are at stake that their different solutions to similar legal problems cause so much contention.

[140] *Ibid*, 152-153.
[141] *Ibid*, 153.
[142] *Ibid*.