THE LANGUAGE OF INTERNATIONAL LAW

Linguistic Considerations Involved in the Drafting and Interpretation of International Legal Instruments

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The function and scope of language in municipal legal texts is adquately discussed in the relevant literature,[1] and the general conclusions that can be drawn from discussions and analysis is that for the purpose of legal predictability, certainty, and ultimately for the purpose of justice, the language of legal texts should be as clear, unambiguous, and as complete as possible so as to match to the utmost possible extent the intentions of the legislator and to limit the margin of interpretation by those who apply it (the civil service) or settle legal disputes (the courts).

This proposition is quite valid in the context of municipal law and municipal legal texts, and as such it is a relatively attainable goal, that is, with the higher level and quality of coherence, homogeneity, and narrow dimensions of pluralism that municipal legal systems imply.

When the same proposition is applied to the language of international law, the result is an incongruity between the proposition and what is frequent practice in the sphere of international legal instruments. In an attempt to eliminate this incongruity, one solution would be to limit the validity of the proposition to the sphere of municipal legal texts, and another solution would be to discard international law as atypical or even as not genuine law. There have been sufficient arguments in support of the second option, such as, international law does not have a general, institutionalised legislative (law-making) system; it does not have an administrative and judicial

[1] See, for example, G. G. *Thornton: Legislative Drafting* (2nd edn., 1980).

enforcement system; and it does not have a sufficient degree of internal coherence and homogeneity because its subjects, the states in the first place, have diverse historical, cultural, and ideological backgrounds. Hence, one may conclude, texts and documents of international law should not be subjected to the same standards of linguistic rigour as those applicable to municipal legal texts.

The present paper is based on the view that the validity of international law cannot be judged with reference to standards of municipal law as a model, and its purpose is to draw attention to the fact that, beyond what is known as "deliberate ambiguity", a "*functional* ambiguity" is one of the characteristics of the language of international law and that such "functional ambiguity" fulfils a useful and necessary purpose, that is, it is closely linked with the way contractual obligations are generated under international law. One of the obvious conclusions of the paper is that a general theory of jurilinguistics cannot claim completeness without including the function of language in the sphere of interstate legal relationships.

From the angle of a formal and pure theory of jurilinguistics, the language of law can be reduced, in its application to legislative texts and other legal documents, to one lying on a scale stretching between two extreme poles. One pole would correspond to a theoretical state of possibilities in which the language of a text is so tightly drafted and so highly detailed that any margin of ambiguity, and hence of interpretation, is eliminated. The other pole would coincide with a situation in which a legal text would involve the highest (but still workable) level of ambiguity and therewith a very wide margin of necessary (and complex) interpretation. These two extreme situations exist only as fictions or points of reference in the intellect. In fact, most, if not all, legal documents occupy various respective points on the scale between them. While a clear and precise linguistic formulation of legal texts is highly desirable for a high level of predictability and legal certainty, it is not a practical feasibility both with respect to the limits of language as an instrument of clear and precise fixation, and the necessity of endowing a legal text with sufficient flexibility and adaptability in relation to social and other dynamics of change. If this point is kept in mind, the apparently very wide gap between the language of municipal legal texts, on the one hand, and of international legal texts, on the other, will assume smaller dimensions.

Legal texts in both spheres are governed by the inexorable truth that the words of human language do not carry an inherent and self-evident, and, as such (unless defined), exclusive meaning: "*no* item in

a language has a fixed, determinate meaning[; . . .] for each term there is a cluster of meanings and functions, or several such clusters[;][2] every term in a natural language has a literally unlimited range of functions. If we think that we have restricted its function prescriptively, or that its function is restricted "essentially" today, our view can easily be falsified tomorrow."[3] Thornton, too, has rightly pointed out that "understanding that the connexion of language and reality is only through the mental image makes it easier to accept and remember the axiomatic but absolutely fundamental principle that words have no "proper" meaning and no "absolute" meaning."[4] The question and problem of polysemy has to be coped with when dealing with the drafting or interpretation of municipal or international legal texts, and a difference between the two categories is in this respect quantitative, one of degree, and not qualitative.[5] Moreover, the given quantitative difference is not due to a quality of deficiency on the side of international law, but to a *functional* necessity quite in keeping with the decentralised nature of international law, the very diversified background of states as its subject, and with the dynamics of international and inter-state legal relations and relationships.

The multilingual dimensions of international treaties can be the cause of ambiguities, because not seldom absolutely equivalent terms in all the languages cannot be found because they do not exist. A classical example is the French term *ordre public* which cannot be squarely translated with public policy or public order. The Permanent Court of International Justice (PCIJ) had to deal with a similar problem with respect to the use of the terms "public control" and "contrôle public" in the English and French texts, respectively, of the Palestine Mandate. As the definitional scope of the two terms was not identical in the two languages, in the *Mavrommatis Palestine Concessions* (*Jurisdiction*) case (1924), the PCIJ adopted the English term for application as the one compatible with a more limited interpretation.[6]

The *Mavrommatis Palestine Concessions* case and scores of other cases decided by the PCIJ and the International Court of Justice show that the ambiguous language of many international treaties

2 A. *Allott, The Limits of Law* (1980), p. 36.
3 Ibid, p. 35.
4 *Thornton* (fn 1 above), p. 7.
5 See ibid, p. 15 ff; on semantics, see R. H. *Robins, General Linguistics* (3rd edn., 1980), pp. 15 ff, 21 ff.
6 PCIJ, Series A, No. 2, p. 19. See also *Lord McNair, The Law of Treaties* (1961), pp. 431, 434.

becomes evident when the question of interpretation of treaty provisions arises. To cope with ambiguity, courts and publicists have developed and discussed various methods of interpretation. Their relatively large number, compared with methods of interpretation of municipal legal texts, is a reflection of the functional ambiguity of many international texts. The contribution of these methods cannot be said, however, to be conclusive, but this may have more to do with the nature of interpretation in general than with methods used in the sphere of international law. Kelsen's words apply: "The different methods of interpretation may establish different meanings of one and the same provision. Sometimes, even one and the same method, especially the so-called grammatical interpretation, leads to contradictory results [. . .] The view [. . .] that the verbal expression of a legal norm has only one, "true" meaning which can be discovered by correct interpretation is a fiction, adopted to maintain the illusion of legal security [.]"[7]

If "[i]t is incumbent upon the law-maker to avoid as far as possible ambiguities in the text of the law", and "the nature of language makes the fulfilment of this task possible only to a certain degree[,]"[8] states as contracting parties concluding an international agreement or (multilateral) convention are not law-makers comparable to the municipal legislators; they are entities interested in extracting, through negotiations, the maximum of concessions from the other negotiating parties, with a minimum of commitment, as far as possible, from one's own side. Very often, international treaty texts are not drafted for the purpose of maximum clarity and precision. They are so-to-say least common denominators serving the twin purpose of (i) clarifying the minimum obligations and rights of the contracting parties *at the time* of treaty conclusion, and (ii) committing the parties to an undertaking possibly to elaborate, clarify, or even expand the scope of ambiguities in the text through further negotiations. As aptly formulated by P. Pescatore, now a judge at the European Community Court of Justice (ECJ), in a lecture in 1963, "[T]reaties [. . .] are negotiated [and] it is [. . .] one of the rules of negotiation that one does not

7 On interpretation in international law, see A. *Verdross* B. *Simma, Universelles Völkerrecht* (1976), pp. 389 ff; D.P. *O'Connell, International law* (2nd edn., 1970), 2 vols., vol 1, pp. 251 ff.: D. W. *Greig, International Law* (2nd edn., 1976), pp. 476 ff.; I. *Brownlie, Principles of Public International Law* (2nd edn., 1973), pp. 604 ff.; V. D. *Degan, L'interprétation des accords en droit international* (1963); *Lord McNair* (fn 6 above); H. *Kelsen, The Law of the United Nations* (1950), pp. xiii ff.; see also Articles 31 and 32 of the *Vienna Convention on the Law of Treaties,* text in I. *Brownlie* (ed.), *Basic Documents in International Law* (2nd edn., 1975), p. 293 ff, at 245.

8 H. *Kelsen* (fn 7 above), p. xiii.

always reveal one's intentions. It is not, in actual fact, on the intentions of the contracting parties that agreement is reached, but on the *written formulas* (emphasis added) of the treaties [. . .] It is by no means certain that agreement on a text in any way implies agreement as to intentions. On the contrary, divergent, even conflicting intentions may perfectly well underlie a given text [. . .] the art of treaty-making is in part the art of disguising irresolvable differences between the contracting parties." In other words, in many instances, parties to international agreements may prefer to adopt a text of functional ambiguity which contains a minimum of unambiguous commitments but a possibility to elaborate and extend such commitments. According to Lord McNair, this may necessitate to interpret relative expressions such as "suitable, appropriate, convenient" not in a stereotyped meaning as at the date of the treaty conclusion, but "*in the light of the progress of events and changes in habits of life*." (emphasis added)[9]. In *Towne v. Eisner*[10], Mr. Justice Holmes said: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used." One may add to these words: international treaty provisions may expand and also contract in content according to the circumstances and the time in which the contracting parties implement them. The custom of functional ambiguity in international treaty texts offers to the parties the possibility to use a term in an initially rather indeterminate way, until such time as common agreement may promote its elaboration or also definite fixation. An example in this respect is the vague and at the same time comprehensive term "integration" in the context of the European Economic Community (EEC). It is not finitely outlined, it has an open-ended direction and its deployment is dependent on the agreement and cooperation of the parties to the EEC Treaty. Another example, from the EEC Treaty, is the term "abuse" "of a dominant position" in Art. 86 relating to the competition policy and law of the EEC. It involves a wide margin in which a corresponding legal policy may or may not be developed.[11]

Sometimes the functional ambiguity of treaty texts is implied by the arrangement that disputes concerning the "interpretation or the execution" of a treaty shall be first treated for resolution at the level of *negotiations between the parties*, and failing this, commissions or

9 *Lord McNair* (fn 6 above), p. 467.
10 245 U.S. 418, at 425.
11 See the related remarks of *Thornton* (fn 1 above), p. 12 f.

other bodies may be addressed to as provided in the treaty text. Examples in this respect are the three Peace treaties signed in 1947 between the Allied Powers, on the one hand, and Bulgaria, Hungary, and Romania, on the other.[12]

It is not possible to conclude that the functional ambiguity of international treaty texts is tantamount to advantages only. It involves an element of risk in two respects. If the negotiating position of a contracting party weakens under the impact of economic, diplomatic, and other non-legal factors, this party will experience great difficulty in asserting its views concerning the elaboration, clarification, or fixation of an initially ambiguous treaty term or clause. Secondly, in case of a judicial interpretation of an ambiguous term, "if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties" may be adopted.[13]

Related to functionally ambiguous treaty terms, which the contracting parties may prefer to use, is the category of if not vague then general terms used particularly in (multilateral) conventions. The conclusion and ratification of such conventions involves a very complicated and costly procedure. This means that a revision or amendment of such a convention may be, procedurally, a practical impossibility. Moreover, we should note that a convention like the Charter of the United Nations is not an ordinary multilateral instrument, but a fundamental legal text which will have to survive change and evolution in the circumstances in which it will be continuously implemented. With these points in mind, such a fundamental text will have to be drafted in a particular way. For this reason, "[i]t can generally be said of treaties and constitutions that substantive changes and adaptations are more commonly achieved by a process of interpretation and application to situations as they arise than by formal amendment."[14]

Conclusions

The main point which emerges from what has been said above is that the function which language, with ambiguity as one of its dimensions, fulfills in the sphere of international law is an element of

[12] ICJ, Advisory Opinion, Reports 1950, p. 221.

[13] PCIJ, in the *Mossul* (Interpretation of Art. 3, Par. 2 of the Treaty of Lausanne), Series B, No. 12, p. 25.

[14] L. M. *Goodrich* E. *Hambro* A. P. *Simons, Charter of the United Nations,* Commentary and Documents (3rd rev. edn., 1969), p. 13. See also in general H. *Kelsen* (fn 7 above).

importance for the area of jurilinguistics. This function is in keeping with the nature of international law as the law of a system in which the states as participants competing with each other are interested in initially minimal legal commitments which they may later to some extent modify, expand, or finalise on the basis of changing negotiating positions or interests.

The particular function of language in international legal texts explains the relative profusion of theories and systems of interpretation applicable to international law. They all tend to elicit, without being decisively conclusive, the intention(s) of the contracting parties. The latter may be, however, disguised behind a layer of terms and clauses which are intentionally, that is functionally, ambiguous.

A very positive function fulfiled by the vagueness, generality, or ambiguity of international texts is that it enables states with heterogenous historical, cultural, ideological, geographical, and economic interest backgrounds, to establish, in the form of least common denominators, a common ground of legal commitments. The latter, for example in the form of the Charter of the United Nations, constitutes the foundation for the progressive development of more elaborate and less ambiuous legal frameworks of international cooperation.