

THE ROLE OF LEGAL TRANSLATION IN THE INTERPRETATION OF INTERNATIONAL LAW DOCUMENTS

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In this paper, legal translation and its role in the interpretation of international law documents have been taken into consideration, both from a theoretical and a practical perspective. As far as theoretical aspects are concerned, legal translation in the light of civil law (Roman law) and common law systems, the status of legal translation in international law, the principles of plain language, and the equivalence of legal words are discussed. Accordingly, the interconnection between legal translation and interpretation of international law documents has been examined. As regards the practical perspective, the practice of the International Court of Justice, as well as applicable rules of the World Trade Organization and the European Union in respect of legal translation, has been discussed. The study carried out shows that due to the nature of international law and different foundations, goals, structures, sources and concepts of international legal order on the one hand, and divergent legal and cultural characteristics, as well as non-equivalent technical terms of various legal systems on the other, legal translators, who are inevitably influenced by their own national laws, are confronted with many profound difficulties.

Keywords: legal translation; interpretation; international law; legal texts; legal documents.

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Table of Contents

Introduction

1. Legal Translation in the Light of the Two Major Legal Systems
2. The Importance of Legal Translation in International Law

3. Essentials of Proper Legal Translation in International Law

4. Examples of the Application of Legal Translation within International Institutions

4.1. International Court of Justice

4.2. World Trade Organization

4.3. European Union

Conclusion

Introduction

Like it or not, the law pervades every area of our lives, from accepting terms and conditions when downloading an app to withdrawing money from an ATM. We spend much of our lives completing administrative forms which are then processed on the basis of pre-existing administrative categories, that support and influence decisions that will affect our personal and professional lives. The law – and, as a consequence, the legal system of any country – is the result of the historical, political, and cultural development of its people. Legal texts are intricately connected to this development and reflect the complexity of the legal, political, administrative, and social systems they represent. Even in one's own language, legal texts can be obscure and incomprehensible; because legal language has a tendency to present even simple ideas in complex, archaic language. If we take into account globalization and increased population mobility in the 21st century, legal translators undeniably have a vital role to play.¹

The law is a system of social convention defined by social agreement and legislation that regulates the orderly coexistence of people within their culture. It has been created and developed over time. All aspects of life – dealing with offence and crime, trade, family affairs, administration, education, etc. – are governed by law and legislation. The fields where such rules apply are both national and international. Then there is also supranational law. Furthermore, today there is global interaction in the field of business and commerce, and the formation of hybrid societies due to migration. That means that in one country political entity there might live persons with divergent legal worldviews as a result of which different concepts of law confront each other.²

"Language" is a much broader term than is typically understood and includes not only the standard conception of languages (French, Spanish, and English); but also "languages" such as dialects and professional jargon. Legal language, or legalese, is

¹ Catherine Way, *The Challenges and Opportunities of Legal Translation and Translator Training in the 21st Century*, 10 *International Journal of Communication* 1009 (2016).

² Radegundis Stolze, *The Legal Translator's Approach to Texts*, 2(1) *Humanities* 56 (2013).

one such jargon used by lawyers, government officials, and others in fields related to the legal profession for court documents, legislation, and more. Though there has long been a clear link between language and the law, increasingly, linguists are studying the “technolect,” or technical dialect, of legal language in comparative and forensic contexts as an interdisciplinary study, collectively termed “legal linguistics.” Comparative linguistics, which is based largely on a geographic viewpoint, has come to play a particularly large role in the globalizing world as the need for competent translators and interpreters in every language continues to increase.³

The theory of translation is based on an understanding of two texts: a source text, which is to be translated, and a target text, which is the result of the actual translation process. The task of the translator is to establish a relationship of equivalence between the source and target texts, i.e. a substantive homogeneity.⁴ The generally accepted definition of translation competence assumes the ability to express the source language message in the target language on all language levels, also including cultural elements present in the text or utterance. This transfer is to be accurate and should reflect the complexity of the original.⁵

Legal language did not develop recently – it has a rich history going back thousands of years. While based on ordinary language, legal language is a jargon primarily characterized by a complex and specialized lexicon, which requires interpretation to be understood and often makes the language completely foreign and incomprehensible to a layperson. The Latin genesis of many of the terms makes it even less accessible, and polysemy frequently adds to the confusion.⁶

Despite the fact that translation of legal documents is among the oldest and most important types of translation in the world, legal translation has been neglected in translation studies and studies in the field of law. Instead the recognition of legal translation as a separate discipline, translation theorists have considered it as simply one of the branches of professional translation. In translation studies, it is often marginalized for its alleged “inferiority.”⁷ To date, legal translation has primarily been researched through the perspective of terminology. In this regard, the emphasis has

³ Samantha Hargitt, *What Could Be Gained in Translation: Legal Language and Lawyer-Linguists in a Globalized World*, 20(1) *Indiana Journal of Global Legal Studies* 424 (2013).

⁴ Marcus Galdia, *Comparative Law and Legal Translation*, 1 *The European Legal Forum* 1 (2003) (Feb. 10, 2019), also available at <http://www.simons-law.com/library/pdf/e/355.pdf>.

⁵ Ewa Kościółkowska-Okońska, *Interpreters in the Courtrooms: The Importance of Competence and Quality*, 2 *Comparative Legilinguistics* 39 (2010).

⁶ Hargitt 2013, at 427.

⁷ Susan Šarčević, *Legal Translation and Translation Theory: A Receiver-Oriented Approach*, Paper presented at Legal Translation: History, Theory/ies, Practice, International colloquium organized by the School of Translation and Interpretation of the University of Geneva and the Swiss Translators, Terminologists and Interpreters Association at the University of Geneva, 17–19 February 2000, at 1 (Feb. 10, 2019), available at <http://www.tradulex.com/Actes2000/sarcevic.pdf>.

fallen largely on the question of how terms indigenous to one legal system can be conveyed in the equivalent terms of another legal system.⁸

Globalization, apart from various definitions oriented towards economic objectives and outcomes, is a process of extensive interaction between people, entities and nations worldwide. In order to make such interaction practicable, swift and efficient a common code is useful and even necessary to enable communicating parties to interact.⁹ If we take into account globalization and increased population mobility in the 21st century, legal translators undeniably have a vital role to play.¹⁰

Increasing global interconnectivity and heightened awareness of shared challenges accentuate the irreplaceable role of international fora in promoting multilateral co-operation. International relations and processes of supranational convergence are formalized in multilingual legal instruments that rely on translation for dissemination and implementation at regional and national levels. International law (in the broad sense) evolves through a combination of lawmaking, monitoring and adjudication procedures which place legal texts at the heart of multilateral and supranational co-operation, and make legal translation a vital component of institutional activities.¹¹

The dismantling of international boundaries in the pursuit of international markets and global agreements has resulted in the streamlining of different legal frameworks in the global context, as well as the implementation of legislative procedures and juridical processes across countries. Therefore, it could be said that globalized business activities and dispute resolution through arbitration between individuals and institutions has been accompanied by a process of legal internationalization. However, such a process requires a common language for legal officials and scholars to understand one another. That language is, undeniably, English.¹²

1. Legal Translation in the Light of the Two Major Legal Systems

Legal translation bears the added burden of taking into account legal aspects that are not found in other texts. Legal translators must work not only between two languages and two cultures but between legal systems that are very different due to

⁸ Galdia 2003, at 1.

⁹ Marta Chromá, *Traps of English as a Target Language in Legal Translation*, 26 *Comparative Legilinguistics* 71 (2016).

¹⁰ Way 2016, at 1009.

¹¹ Fernando Prieto Ramos, *International and Supranational Law in Translation: From Multilingual Lawmaking to Adjudication*, 20(3) *Translator* 313 (2014).

¹² Maria Angeles Orts Llopis, *Legal English as the Lingua Franca for International Law. Traits and Pitfalls for ESP Practitioners and Legal Translators*, Conference Paper, VAKKI Symposium XXXVII, Vaasa, Finland, 9–10 February 2017, at 17 (Feb. 10, 2019), available at http://www.vakki.net/publications/2017/VAKKI2017_Orts_Llopis.pdf.

the strong sociocultural and historical influence exerted on them. This is aggravated by the fact that the systems are not even synonymous with countries: Common Law, as the basis of the legal system, may apply in the United States, England, and Wales, but not in Scotland; nor entirely in the state of Louisiana, which has a mixed legal system due to the French influence there; Australia may use common law; but this has developed according to its own sociocultural context. In the United States, the division of federal law and state law also complicates the task. Roman law extended from Spain to much of South America, where it evolved differently within each system and is subject to the linguistic variations of each country. This added complexity is partly to blame for the field of legal terminology being neglected.¹³

From the hermeneutical point of view, legal interpretation in continental law generally has (and this includes Nordic countries, where preparatory legislative material, doctrines and cases supplement gaps in meaning) a contextual and purposive orientation: the legislative text is the starting point for the scrutiny of specific instances of legal performance, and the interpretive approach is teleological or spiritual, as, not only the words in the text, but also the intention of the legislator, count. The contextual and purposive aspect of Continental hermeneutics implies that the legal text must be both fully flexible and unique in order to adapt to legal purposes. This means that Civil Law legislative texts are characterized by their broad wording and made up of simple, uncomplicated sentences that state policy and principles in broad terms, rather than comprehensively exploring every conceivable contingency. In contrast, in the inductive legal tradition within which Anglo-American systems exist, the interpretive mechanism is ontological: every word has its own specific weight, and, consequently, to construe law and subsequently apply it, words have to be dismembered, pulled apart, so as to disambiguate the text. It is, precisely, the tension between precision, i.e. to be as accurate as possible, and flexibility, i.e. to be able to capture every possible contingency, that, ironically, makes legislative texts in English so difficult to understand.¹⁴

The fact that English is currently the main tool for international communication among the different communities of experts may pose fewer problems in the field of scientific terminology, where words, mostly Latin cognates, have a definite meaning understood by the community at large. However, in fields such as law, linguistic phenomena coming from different cultural systems and structures are peculiar to each language and country, thus challenging the translator's, linguistic and/or specialist skills in the area.¹⁵

One major problem with the adoption of English as the global legal language comes from its relationship with the common law legal system. As mentioned

¹³ Way 2016, at 1012.

¹⁴ Llopis 2017, at 24.

¹⁵ *Id.* at 19–20.

above, the majority of legal systems follow civil law, and many of the concepts of common law, including those that go by the same or similar terms, have very different meanings in civil systems. The Central and Eastern European countries of the European Union provide an example of the difficulties of using English. The European Union writes directives in either French or English and then must translate them into each of the official national languages of the Member States. For many Member States, this presents little problem because they have worked so closely for many years, and, despite occasional divergence, learned users mutually understand many of the European continental concepts of law, such as the English respect for the judiciary. For others, like Eastern bloc countries, where Roman law has had a less pronounced influence, and where language families are farther apart, translation can prove nearly impossible because of the complete absence of conceptual equivalencies. International law already appears very Western-centric. If English were somehow imposed on the global community as a global legal language, it would undoubtedly contribute to the Western conceptions of international law and would most likely do so at the expense of the unique features of other legal systems. This seems especially true in Asia and the Middle East, where the Western presence has not been felt as strongly as elsewhere. China in particular presents a unique example because its incredibly long dynastic history has combined with the Occidentalization of many areas of the law to create a truly unique legal system.¹⁶

2. The Importance of Legal Translation in International Law

Legal translation is a very important topic in the era of globalization; it aims to make national legal systems more connected to the international standard through a comparative study of legal terms in different languages. Therefore, legal translation may play a vital role in globalizing local laws by encouraging the use of standard legal and technical terms. The translation of legal texts of any kind, from statute laws to contracts to courtroom testimony, is a practice that stands at the crossroads of legal theory, language theory and translation theory. It has been advocated that

the demand for legal translation is on the increase around the world owing to globalization and the increased contact and exchange between peoples and states.¹⁷

The public sector of international law is very different from the private sector where multinational corporations are the primary actors. In the public sphere, the

¹⁶ Hargitt 2013, at 439–440.

¹⁷ Morad Yasin Deab Al-Refo & Raed S.A. Faqir, *From Legal Translation to Legal Globalization: Globalization of Criminal Laws to Counter Global Crimes*, 6(4) *International Journal of Social Science and Humanity* 275, 276 (2016).

primary actors are states themselves; but a number of important international organizations also exist. The United Nations obviously remains the most notable, but it is certainly not the only one. The World Trade Organization, the International Monetary Fund, and various international lobbying groups and non-governmental organizations could also benefit from the use of lawyer-linguists. The United Nations is one of the most well-known users of translators and interpreters in the legal world. Definitions and concepts associated with human rights, opinions and understandings vary significantly from continent to continent and even among seemingly similar countries. Consider, for example, the definition of a terrorist, which can vary drastically depending on the region. Opinions in the United States differ markedly from those in the Middle East and parts of Asia. Lawyer-linguists could help to close this gap and to achieve mutual understanding that could facilitate a stronger international legal regime in the future.¹⁸

Terminological problems in this context epitomize the dilemmas of articulating international or supranational legal structures for the co-ordination and harmonization of national policies and legislation. Translators must follow institutional terminology established to designate univocal shared concepts in all the official languages, including all kinds of bodies, procedures and technicalities (e.g., translations of “extended continental shelf” in the law of the sea or “tariff escalation” in international trade law). Such terms are regarded as the sacrosanct backbone of the common framework and, as a general rule, they are also considered authoritative by specialized users outside the organization.¹⁹

The conceptual framework and specific terminology of each shared system are reproduced in all its instruments, while other discursive conventions vary by text typology. For example, negotiated legislative texts are more likely to include vague language in order to facilitate consensus, with a high degree of hybridity as a result of multiple input sources in the drafting process. In contrast, style is generally more coherent in documents drafted by adjudicative bodies, than those submitted by litigating parties; and references to national legal realities are much more commonplace in texts of adjudication and monitoring procedures than in legislative provisions.²⁰

The language (or languages) of international treaties play an important role because they embody and communicate the substance of the agreement. It is not irrelevant whether a treaty is made in one or several languages, whether the language of the treaty is a third party language for (most of) the contracting parties or whether it is in their official language. Even if the restriction of a linguistic regime might be justified for practical reasons, it might, at the same time, cause practical

¹⁸ Hargitt 2013, at 445.

¹⁹ Prieto Ramos 2014, at 319.

²⁰ *Id.* at 318–319.

problems in the case of international treaties which might be applied directly by national courts and which might confer rights or impose obligations on individuals. Given the fact that only an authentic language version can be used for authoritative interpretation, the contracting parties which do not have one of the authentic languages as their national language or do not understand them might encounter difficulties in understanding and interpreting a legally binding text; Nevertheless, these treaties are often translated into the official language(s) of the contracting parties and published in the national newspaper of these states when the treaty concerned is being promulgated. These translations remain non-authentic texts, i.e. they will not be authoritative for interpretation and mainly serve to ensure the availability of these texts in the national language. However, their importance might be crucial because individuals and the national courts of the contracting party will most probably consult and use these versions when applying treaty provisions. While the language regime of multilateral treaties is – even if plurilingual – rather restricted, bilateral agreements are generally drafted in the official languages of the two contracting states and are authentic in both or in all of these languages. In some cases (typically for tax treaties), a “neutral language” is added (usually English or French), which prevails in the event of diverging texts. Recently, some countries have begun to conclude tax treaties in English only, even where English is not the official language of any of the contracting states.²¹

The multilateral and EU systems formalized over the past century did not emerge and do not develop from a tabula rasa. Since languages shape worldviews, and legal languages are bound to specific legal traditions, it is often argued that the conceptual network expressed in the predominant language of interstate communication can exert a considerable influence on international legal language. The principle of equal authenticity of the official languages of all Member States (as opposed to a limited number of languages in other organizations) and the direct applicability (and enforceability by national courts) of EU secondary legislation in all the Member States certainly entail a stronger relationship with the domestic legal systems integrated into the “confederal” structure. A shared layer of EU law on a wide range of areas of harmonization of the 28 Member States in 24 languages implies an ambitious commitment to accountability in multilingualism and a higher risk of linguistic discrepancies. This contrasts with the more fragmented domestic reception and enforceability mechanisms of the law generated through intergovernmental organizations, and their more “global” approach to language policy (six languages for 193 countries in the case of the U.N., and three languages for 159 WTO Members).²²

²¹ Réka Somssich et al., *Language and Translation in International Law and EU Law*, EU Publication, DGT/2011/MLM2, 30 July 2012, at 15–16 (Feb. 10, 2019), available at https://www.academia.edu/37495194/Studies_on_translation_and_multilingualism_Language_and_Translation_in_International_Law_and_EU_Law.

²² Prieto Ramos 2014, at 317.

From the point of view of the translator, we examine legal translation within three interrelated contexts of text production that come into play in the development of international and supranational law:

(1) Lawmaking by legislative, quasi-legislative or policy-making bodies with powers to design international or supranational rules, including the drafting, negotiation and adoption of: (a) legal instruments that, regardless of their various designations (see Article 2.1(a) of the Vienna Convention on the Law of Treaties (the “VCLT”) (1969)) and adoption procedures, become legally binding (e.g., treaties, conventions, agreements or directives); these texts may require some mechanism (e.g., by domestic statute or executive act in Canada) for integration into national legislation, often literally (e.g., WTO agreements in Spanish in Chile), or may be directly applicable as domestic law in the case of legislation made by supranational entities (e.g., EU regulations); and (b) other instruments that are not legally enforceable (e.g., recommendations, guidelines, and declarations) but may produce legal effects and may attain some degree of legal force in practice through control procedures or as models for mandatory national legislation²³ (e.g., on the integration of the UNCITRAL Model Law on International Commercial Arbitration) at the domestic level.²⁴

(2) Monitoring of legal implementation comprises various control mechanisms established in accordance with surveillance provisions of international legislation. These mechanisms entail reporting obligations for the parties to whom the relevant legal instruments belong on the basis of which conclusions and/or recommendations are made by the monitoring bodies. National legislation and policies are reviewed in detail, e.g., trade policies in the framework of the trade policy review mechanism at the WTO, or the human rights record of U.N. Member States as part of the Universal Periodic Review (under the auspices of the U.N. Human Rights Council (HRC)). In some cases, these processes have an investigative or quasi-judicial nature, for example, the HRC’s special procedures on human rights situations or violations, and the complaint procedures under U.N. human rights treaty bodies’ communications procedures.²⁵

(3) Adjudication, through which courts or adjudicative bodies address problems of application or interpretation as they surface in the implementation of legal instruments. They not only settle disputes but also conduct advisory proceedings (e.g., those initiated by U.N. bodies and authorized specialist agencies at the International Court of Justice (ICJ), or national courts’ requests for a preliminary ruling on EU law at the CJEU).²⁶ International courts specifically created for the interpretation of a given international treaty might be more open to comparing authentic texts, although

²³ Prieto Ramos 2014, at 315.

²⁴ Maurizio Gotti, *Legal Discourse in Multilingual and Multicultural Contexts in Language and the Law: International Outlooks* 21 (K. Kredens & S. Goźdz-Roszkowski (eds.), Frankfurt am Main: Peter Lang, 2007).

²⁵ Prieto Ramos 2014, at 316.

²⁶ *Id.*

they often avoid admitting the existence of translation failures or having a linguistic approach to interpretation.²⁷ Regardless of the adjudicators' effectiveness, translators of texts in those settings (including both submissions from parties and judicial decisions) are confronted with the challenges of dissecting interpretation issues and legal argumentation on the basis of previously translated instruments, which can themselves cause interpretation problems due to linguistic discrepancies.²⁸

Another aspect of translation in international law relates to language rights. There is no agreement, either in state practice or in scholarly literature, on the objectives of protecting languages or persons speaking that language. There are nevertheless, three commonly recognized, and partly competing, purposes of the protection of language rights in international law. They can be summarized as the preservation of peace and security, the promotion of the fair treatment of individuals and the preservation of linguistic diversity.²⁹

In addition to the above-mentioned purposes, language rights including the availability of language support in international criminal proceedings, are of great importance in international law. Both the right to personal freedom and the right to a fair trial are futile if the person affected cannot understand the charges raised.³⁰

Accordingly, Article 5(2) of the European Convention on Human Rights provides in relation to the habeas corpus guarantee that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. The guarantees related to the right to a fair trial in Article 6 of the Convention are more practical. Article 6(3)(a) declares that everyone charged with a criminal offence "has to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him." Furthermore, Article 6(3)(e) also guarantees those charged with a criminal offence the right "to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court."³¹

In *Kamasinski v. Austria*, the European Court of Human Rights ruled that the right to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and pre-trial proceedings.³²

Within the international war crimes sentencing framework, and for reasons highlighted above, the linguistic competences of internationally convicted persons

²⁷ Somssich et al. 2012, at 28.

²⁸ Prieto Ramos 2014, at 316.

²⁹ Lauri Mälskoo, *Language Rights in International Law: Why the Phoenix Is Still in the Ashes?*, 12(3) Florida Journal of International Law 431, 434 (2000).

³⁰ Somssich et al. 2012, at 69.

³¹ *Id.* at 69.

³² *Kamasinski v. Austria*, Application No. 9783/82, Judgment, 19 December 1989, ECHR, Series A/168 (1989), Para. 74.

need to play an elevated and more significant role in the enforcement of sentences; international sentencing authorities should give full weight to the linguistic abilities of convicted persons and recognize that their ability to function meaningfully in foreign prisons and undertake rehabilitative programs is dependent on individual second language competence as well as the availability of language support (e.g., language classes and access to competent language services, particularly where a lack of lexical equivalence is apparent). On the other hand, receiving states, in determining the actual prison in which an internationally convicted person will serve the sentence, have an obligation to competently assess not only comprehension but the overall linguistic abilities and corresponding linguistic needs of prisoners at the first point of detention. The use of inmates as ad hoc interpreters and translators in detentions and prison settings is procedurally incorrect and ethically questionable where the need for the use for professional services is clear.³³

3. Essentials of Proper Legal Translation in International Law

For more than 2,000 years the general theory of translation was dominated by the debate on whether translation is to be literal or free. In literal and word-for-word translation, the words of the source text are translated literally into the target language and even the grammatical forms and word order of the source language are preserved. Word-for-word translation is basically strict literal translation. In literal translation, the basic unit of translation is a word; but some grammatical changes are here, e.g., in syntax, with respect to the target language and in the interests of clarity, while the translator follows the source language as closely as possible.³⁴

The law changes over time and consequently rules and ontological classes also change (e.g., the definition of EU citizenship changed in 2004 with the addition of 10 new member states to the European Community). It is also fundamentally important to assign dates to the ontology and to the rules, based on an analytical approach; to the text, and to analyze the relationships among sets of dates.³⁵

In short, *Koskenniemi's* epistemological conception maintains that law should not be conceived as a formal expression of a kind of ontological and metaphysical "truth" to be found outside the linguistic form of the utterances that are defined as "law," but has to be analyzed with special regard for the structure of precisely those

³³ Dragana Spencer, *Overview of Language Rights in the International Criminal Law Sentencing Models*, 31(4) *International Journal for the Semiotics of Law* 787 (2018).

³⁴ Anna Schneiderová, *On the Development of Translation Strategies in Rendering of Legal Texts*, 29(2) *Journal of Modern Science* 348, 350 (2016).

³⁵ Monica Palmirani et al., *Legal Rules, Text and Ontologies Over Time*, Conference Paper, RuleML2012@ECAI Challenge and Doctoral Consortium, 6th International Rule Challenge, Montpellier, France, 27–29 August 2012, at 3 (Feb. 10, 2019), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.416.4063&rep=rep1&type=pdf>.

utterances.³⁶ Going into more detail, this general assumption can be divided into five distinct claims. The first is that the law can be best understood if we interpret it as a *specific language*; in this sense, the most brilliant legal theory is the theory that addresses the linguistic structure of the law. Second, the law does not refer to any *truth content* outside the legal discourse; therefore, no ontological basis and no normative claims outside the law guarantee the validity of legal propositions. The third claim is that the law has *no inherent truth content*, regardless of whether it is supposed to have a normative or a functional character. Fourth, although legal concepts are deeply related to social power, they do not limit themselves to mirroring the reality of social relations; on the contrary, as linguistic expressions, they are characterized by a dialectic relationship with reality, both in the sense that legal concepts are defined by interpretation and that their interpretation may be highly contested. The fifth claim – and, at the same time, the conclusion that can be drawn from the former assumptions – is that the normativity of the law can only be based on its formalism, without any reference whatsoever to truth content or clear-cut references to the social context. On the basis of this general framework of interpretation, the first Section reconstructs Koskenniemi's epistemological theory as it is laid down, mainly; in his *From Apology to Utopia*, and secondarily in many other texts.³⁷

Due to the “sensitive” nature of legal texts, this issue is particularly controversial in legal translation; since legal issues are concerned. Given that legal and religious texts are prescriptive, it is not surprising that the early history of legal translation is most often associated with the literal translation of the Bible until the Middle Ages, when there was a slight deviation from the literal translation, and the Bible was translated into vernacular languages using “moderately literal translation”; Due to the authoritative, binding nature of legal texts, legal translation remained under the influence of literal translation a lot longer than other areas of translation. The first incentive to move away from a literal translation occurred as late as in 20th century, when the translators of less used official languages began to demand equal language rights and thereby paved the way for change from literal to near idiomatic and idiomatic translation.³⁸ Put simply, interpretation of the legal text may not cross the outer line of words, i.e. the result of interpretation must be anchored to the lexical meaning of the legal text (verbal meaning of statute). Furthermore, certain terms used in the legal text can be interpreted as having a precise judicial-technical meaning.³⁹ However, criminal law

³⁶ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 568 (Cambridge: Cambridge University Press, 2005).

³⁷ Sergio Dellavalle, *Law as a Linguistic Instrument Without Truth Content? On the Epistemology of Koskenniemi's Understanding of Law*, 77(1) Heidelberg Journal of International Law 199, 200–201 (2017).

³⁸ Schneiderová 2016, at 348–349.

³⁹ Jussi Tapani, *The Quagmire of Impossible Attempts – How to Distinguish Between Punishable and Non-punishable Cases of Criminal Attempt?*, 54 Scandinavian Studies in Law 131, 133 (2009).

is far more dependent on the lexical meaning of texts; compared to other fields of law, such as civil, constitutional and international law, and it is because of this that criminal law is based on narrow interpretation and the principle of "*nullum crimen, nulla poena sine lege*" (the principle of legality of crimes and punishment).

Legal texts usually make or amend the law or regulate relationships between persons, being informative, explicative and factual, often referring in specialized terminology and complex style to realities, concepts and distinctions that are not material, concrete or physical.⁴⁰

Šarčević proposes a division of legal texts into three categories according to their language function; those that are (1) primarily prescriptive; (2) primarily descriptive but also prescriptive; and those that are (3) purely descriptive.⁴¹ Harvey argues for a broader definition and includes contracts, wills, court documents etc., "which are 'bread and butter' activities for lawyers and legal translators."⁴² Tiersma differentiates between constitutions, statutes and private legal documents such as wills and certain types of contracts.⁴³

Simonnæs argues for the inclusion of legislative texts and judicial decisions because of their dual addressees and uses those text types for her analysis. She finds three particular categories very useful, based on their purpose: (1) normative texts, often referred to as "legislative texts" in the literature, (2) texts that interpret a normative text and (3) judicial decisions, which all be characterized as "authoritative legal texts."⁴⁴

The four key characteristics of a professional interpreter are fidelity, impartiality, confidentiality and, finally, professional conduct. Fidelity refers to the necessity, or rather the obligation, to transfer the entire meaning of the message uttered by the speaker. The interpreter is not allowed to alter, add to or omit anything contained in the utterance. This obligation is not only of a professional nature but, most of all, of legal one. The text translated into the target language is to contain all elements (both linguistic, such as grammatical or lexical structures and non-linguistic, such as body language, voice tone or pauses in speech) that occur in the original. Another duty of the interpreter in this respect is to report any problems with faithful interpretation (e.g., the tempo of the speech being too high, no breaks while interpreting, sentences or speech fragments being too long and, therefore, difficult to remember). Impartiality is the feature that should be inherent to all interpreters at all times, regardless of the venue of an interpreting event. The interpreter, and the court interpreter in particular,

⁴⁰ *The Pragmatics of Translation* (L. Hickey (ed.), Clevedon & Philadelphia: Multilingual Matters, 1998).

⁴¹ Šarčević 2000, at 11.

⁴² Malcolm Harvey, *What's So Special About Legal Translation?*, 47(2) *Meta: Translators' Journal* 177, 178 (2002).

⁴³ *The Oxford Handbook of Language and Law* (P.M. Tiersma & L.M. Solan (eds.), Oxford: Oxford University Press, 2012).

⁴⁴ Ingrid Simonnæs, *Challenges in Legal Translation*, 53(2) *Linguistica* 91, 93 (2013).

should be impartial and neutral, and his or her personal stance on certain case-related issues should not affect his or her performance. In court, since the parties to the case might be in conflict and tend to distrust one another, the interpreter is in control of the communicative situation and must interpret everything in a precise and accurate manner so that both parties remain comfortable that nothing that is said and interpreted has been distorted or altered. As far as confidentiality is concerned, the court interpreter should never disclose or take benefit of the information obtained in his or her work. This rule requires that the interpreter avoid making any comments in public on issues or cases they are to interpret. The last feature, i.e. professional conduct, refers to respecting the court and its protocol; it also concerns the ability to cooperate with other interpreters, providing them with support if necessary or seeking help from others. The interpreter should also be honest and perform tasks for which he or she has appropriate qualifications; if they accept a given assignment they should be adequately prepared by means of doing any necessary research and collecting vital information. This is strictly related to the obligation of every interpreter to be motivated to constantly develop and broaden their knowledge through, e.g., taking part in conferences, professional symposiums and meetings, exchanging experiences and ideas with other professionals and being up-to-date with literature on the specific field; in which they specialize.⁴⁵

Although terminology makes up no more than 30% of legal language (usually its proportion is lower) it is the most visible part of the language of law on which (not only) translators primarily concentrate. Concepts as mental representations (units of knowledge) are essentially context-bound. Terms, strictly speaking, are their spelling or sound forms (lexical units). Every legal term is supported by its definition, containing basic conceptual elements. Every legal system has its own sets of concepts (sometimes expanded in legal institutions). Simultaneously, there are sets of legal terms linguistically representing the concepts. Both concepts and terms are unique and historically and culturally anchored in the respective legal tradition. One of the main tasks of the translator is to identify equivalence between source law concepts and target law terminology, if any, and to deal with situations where no equivalence has been traced. In trying to attain equivalence in the translation of legal terms, one cannot dispense with the conceptual analysis of a particular term. Translation need not only require a comparative conceptual analysis of the source term (and the concept behind the term) and its potential equivalent in the target language and/or legal system, but sometimes also comparative research into the wider extra-linguistic and possibly extra-legal contexts.⁴⁶

In fact, an entire text – and not just terms – is the subject of translation, even though many translators concentrate only on the terms as such. Every text also has a connotative

⁴⁵ Koscalkowska-Okonska 2010, at 43.

⁴⁶ Chromá 2016, at 91–92.

level, which is semantically as important as the denotative level. Furthermore, a text is defined by tense, mood and other linguistic features; it is constituted but also limited by the specific language system. Naturally, connotative aspects of a legal language are incorporated into the translation.⁴⁷

Simple contexts involve stable problems where clear cause-and-effect relationships are evident, i.e. situations in which translation norms or accepted behavior could be used. In this context, the decision-maker must consider or identify the problem, categorize it, and then resolve it by using established translation practices. Simple contexts, nevertheless, may still be more complex than expected: If the problem is not identified correctly or if the decision maker falls into what the authors call “entrained thinking,” i.e. by implementing a conditioned response acquired through previous experience or training and success, she or he may become complacent when facing apparently familiar problems). In complicated contexts, on the other hand, multiple right answers may exist to the problem, requiring the decision-maker to analyze the diverse possible solutions before implementing them, which will often be time-consuming, because more than one right answer may be viable. These problems should be introduced gradually in translation courses; because they require greater diagnostic skills and expertise. Complex contexts involve problems with a wide array of interacting elements, which are dynamic and nonlinear, and imply that minor changes may produce disproportionately serious consequences, often impeding predictions of the outcome. They are unpredictable and often require creativity and innovative approaches. These problems are less common in translation than in interpreting; but they are found occasionally. Chaotic contexts are full of unknowns because of constantly changing circumstances.⁴⁸ Simple contexts result from the principle of plain language, which has been considered as an important factor in the simplification of legal texts.

Although the principles of plain language have been adopted, at least in part, by the majority of English-speaking countries with regard to legislative texts, this is by no means the case as regards contracts. Of course, there are many notable exceptions to this statement. In a number of states the United States, for example, consumer contracts and lease agreements must be drafted in Plain language by law. Moreover, some companies take pride in the fact that their contracts are drafted according to the principles of Plain language. Generally though, contracts still tend to be plagued with old-fashioned forms of legalese, particularly adverbs such as *hereby*, *therein* or *whereof*. The phenomenon has been widely studied and manuals have been devoted to how to draft contracts in a more modern style. Yet the problem persists, even in this increasingly globalized world where English is becoming ever more the *lingua franca* of international business, and where one would imagine the need for

⁴⁷ Galdia 2003, at 3.

⁴⁸ Way 2016, at 1022–1023.

clarity of expression using easily understood, everyday terms would be paramount. Many corporate lawyers evidently prefer to play safe and use a phraseology that has been accepted by the common law courts for centuries rather than run the risk of introducing a more modern way of drafting.⁴⁹

If the United Kingdom and, to some extent, the United States have shown a greater readiness to embrace the principles of Plain language in recent years, the major international institutions where English is one of the official languages would appear to be more resistant to change, except as regards gender neutrality. Plain language – at least in English – can be found in the “Plain Language Version” of some of its most important Treaties and Conventions. These adaptations of original texts into Plain language have long been part of the educational ethos promoted by the U.N. which provides summaries of the main points contained in U.N. Treaties and Conventions. The example below contains the Plain language versions of Articles 1, 3 and 4 of the Universal Declaration of Human Rights of 1948, followed by the original texts of the three articles:

1. When children are born, they are free and each should be treated in the same way. They have reason and conscience and should act towards one another in a friendly manner.

3. You have the right to live, and to live in freedom and safety.

4. Nobody has the right to treat you as his or her slave and you should not make anyone your slave.

Article (1): All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article (3): Everyone has the right to life, liberty and security of person.

Article (4): No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

On the other hand, as regards drawing up legally binding texts, the situation would seem to have remained static ever since the U.N. was set up in 1944. For example, occurrences of *shall*, of syntactic discontinuities, and of long sentences with complex subordination and coordination – indicators of a more conservative drafting policy – can still be found today.⁵⁰

Nevertheless, to assume that words have a “plain” meaning independent from the tradition within which the word is used permits interpreters to interpret legal texts according to whatever seems suitable to them. This is because the meanings of words cannot be derived from their physical properties or reduced to the real-world objects to which they refer. Thus, the danger of the textual approach is that it opens the door to arbitrary interpretations. Because of this ambiguity, the textual approach may

⁴⁹ Christopher Williams, *Legal English and Plain Language: An Update*, 8 *ESP Across Cultures* 139, 146 (2011).

⁵⁰ *Id.* at 146–147.

create greater uncertainty than an approach which insists upon a comprehensive, contextual examination of all factors potentially relevant to common intent.⁵¹

Legal systems exist independently of the legal languages they use and are created through social and political circumstances. There is no direct correlation between legal language and legal systems. One legal system may use different legal languages (Canada, Switzerland, bilingual areas in Slovenia, Austria, Italy, Belgium, etc.), while one language area may be divided into different legal systems, as is the case in the United Kingdom or in the USA. The legal systems pertaining to the civil (i.e. continental) law, which includes the Romanic, the German and the Nordic legal systems, are relatively close. They have common foundations in the Roman legal tradition and are characterized by codification – the most important rules and regulations are set out in written sources of law. In the case of the continental legal systems, a considerable closeness with respect to the legal concepts applied can be expected. On the other hand, the legal systems of other countries and cultures, derived from different traditions, are difficult to compare, such as the Far-Eastern, the Islamic, the Hindu and, finally, the so-called Anglo-American legal family, based on *common law*, *equity* and *statute law*. Within the Anglo-American legal family, common law is the legal system in force in England, Wales and, with some differences, in the USA, whereas Scotland and Ireland have substantially different legal systems related to the continental law, similar to the legal system of Louisiana, which has its foundations in French law. These differences certainly affect the translatability of terms from/into different legal languages, as there is no complete equivalence between the legal concepts.⁵²

Legal translation is inherently linked to the particular legal culture of its source text which, more often than not, is different from the legal culture in the target text. This is commonly acknowledged and examples of the ensuing translation problems have been discussed in many publications. Such translation problems occur because each legal system/culture has its specific conceptual structure. The differences between legal systems, e.g., legal institutions, judicial systems, and courtroom procedures, vary significantly, especially when common law and civil law are at stake.⁵³

The complexity of the interlinguistic rendering of a legal text is particularly due to the fact that the translation from one language to another is generally bijural, due to the differences in the source and the target legal and linguistic systems. This is the reason why a legal translation is mainly assessed on the basis of its adequacy for its communicative purpose in the target culture. This is also valid in many multilingual (but unijural) countries, in which all translations of a statute have the same authentic

⁵¹ Katayoun Hosseinnejad, *Towards a New Approach to Treaty Interpretation: Interactions of Theory and Practice*, PhD Thesis, Graduate Institute of International and Development Studies, Geneva, Switzerland (2017), at 240–241 (Feb. 10, 2019), available at <http://www.graduateinstitute.ch/home/research>.

⁵² Alenka Kocbek, *Language and Culture in International Legal Communication*, 4(3) *Managing Global Transitions* 231, 235–236 (2006).

⁵³ Simonnæs 2013, at 92.

status and are considered parallel texts. Thus, the principle of legal equivalence has emerged, which underlines the consideration of the legal effects that a translated text will have in the target culture.⁵⁴

Although legal documents in all languages address similar issues, they do so in distinctive ways; because of the different languages in which they are constructed, and the cultural differences between the societies in question and their legal systems. A legal translation is particularly challenging not only because of the culture-laden nature of legal discourse; but also because of a need for formal correspondence between equally authoritative versions of the same text.⁵⁵

For instance, when translating a Czech law document for those familiar with U.S. law, the U.S. term “stock corporation” should be the primary option for the translator as this term has an unambiguous meaning corresponding to the substance of that entity under Czech law. However, within Common Law, the English term “joint-stock company” has at least two basic (and wide spread) meanings, neither of which reflects the main conceptual elements of the Czech “akciová společnost”: in Great Britain, it is mostly perceived as a terminological archaism denoting an unincorporated entity established to pool the share capital of individual shareholders usually with unlimited liability (*see* Joint-Stock Companies Act 1856); in the USA, some states, such as Texas or New York, define a joint-stock company as “a company *usually unincorporated* which has the capital of its members pooled in a common fund; transferable shares represent ownership interest; shareholders are *legally liable for all debts of the company*.” Under U.S. law, such entity has some conceptual elements typical of a corporation but others are closer to a partnership (the type of business entity essentially missing in Czech law). What significantly differs if compared with the Czech “akciová společnost” are the two conceptual elements indicated in italics in the above definition of an unincorporated entity (i.e. not registered in a register of companies), and personal liability of shareholders for the debts of the entity, which is fully absent in the Czech “akciová společnost,” where shareholders are not liable for the debts of their company at all.⁵⁶

The level of equivalence of terms depends on the extent of relatedness of the legal systems (and not of the languages) involved. The relatedness of languages may, in some cases, even cause the creation of false friends, such as the German *Direktor* versus the English *director*. When deciding on the solution, the context of the translation, its purpose (*skopos*) and the character of the text play an important role. A wide range of *skopoi* is possible – from mere information on the source text for a receiver who does not speak the target language to a translation which will have

⁵⁴ Maurizio Gotti, *The Translation of Legal Texts: Interlinguistic and Intralinguistic Perspectives*, 4(1) Journal of English for Specific Purposes at Tertiary Level 5, 6 (2016).

⁵⁵ *Id.* at 7.

⁵⁶ Chromá 2016, at 76.

the status of an authentic text equal to that of the source-text (as is the case with international contracts made in two or even more equivalent language versions).⁵⁷

In cases in which there is no synonymic equivalent in the two languages involved, the translator may decide to coin a calque, thereby filling a semantic gap in the target language. This is the case, for instance, of the expression *minorités visibles* or *visible minorities*, strictly connected with the Canadian political tradition, which – as aptly pointed out by Garzone and Catenaccio⁵⁸ – is defined in the Canadian Employment Equity Act 1995 (last amended on 29 June 2012) as “persons, other than Aboriginal people, who are non-Caucasian in race or non-white in colour,” in contrast with *invisible minorities*, which are determined by invisible traits, such as language or nationality. This expression was transferred into the Italian translation of Canadian texts as *minoranze visibili*, and then spread to EU documents to refer to minorities and empowerment.⁵⁹

In some cases, the lack of a proper equivalent in the target language can cause confusion in understanding the meaning of the word involved. For instance, there is no exact Persian equivalent for the term “reservation to a treaty.” In fact, the Persian equivalent means “right of stipulating or specifying something as a condition of a treaty”; whereas we know that the latter is not an adequate and sufficiently expressive equivalent for the English term “reservation to a treaty.” The definition of this term as mentioned in the VCLT, confirms the non-equivalence. Article 2(1)(d) of the VCLT defines a reservation as follows:

a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Another example is the term “international law” in Arabic. The Arabic equivalent of this term means “interstate law,” which is by no means equal to “international law.” The Arabic equivalent is not inclusive, in that it does not cover all aspects of international relations and merely denotes relations between states, whereas international law governs legal relations between states, international organizations, and, under certain circumstances, non-state corporations and even individuals.

Sometimes terms from different legal contexts are only partially equivalent, as they cover a mere part of the meaning of the “corresponding” term and are therefore

⁵⁷ Kocbek 2006, at 235–236.

⁵⁸ Giuliana Garzone & Paola Catenaccio, *Building Shared Values Through Rewriting: The Case of the Montréal Charter of Rights and Responsibilities*, Paper given at the 26th AIA Conference, Remediating, Rescripting, Remaking: Old and New Challenges in English Studies, University of Parma, 12–14 September 2013.

⁵⁹ Gotti 2016, at 14.

not to be considered fully interchangeable. This is the case, for example, with the French term *droit des obligations*, which – although often rendered as contract law in English – covers a broader semantic area regarding not only contract law; but also restitution law and the law of torts.⁶⁰ This is the reason why the search for a functional equivalent requires a certain amount of legal knowledge of both the source and the target legal systems in order to assess whether the functions of a terminological unit in the source legal system and that in the target text are identical.⁶¹

4. Examples of the Application of Legal Translation Within International Institutions

4.1. International Court of Justice

In a *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the ICJ had a chance to consider the meaning of an Arabic word. The parties disagreed on the question of the method of recourse to the court. For Qatar, paragraph 2 of an agreement between the parties authorized unilateral recourse to the court by means of an application filed by one or the other party; whereas for Bahrain, the text only authorized a joint recourse to the court by means of a special agreement. The parties have devoted considerable attention to the meaning which, according to them, should be given to the expression *al-tarafan* [Qatar: “the parties”; Bahrain: “the two parties”] as used in the second sentence of the original Arabic text of paragraph 2 of the Doha Minutes. In the context of the manner in which the court was to be requested to consider the *Qatar v. Bahrain* case, the critical issue was that of interpretation of the 1990 Doha Minutes, as already reflected in the 1994 Judgment. While contesting the court’s jurisdiction to deal with the 1991 Application of Qatar, Bahrain emphasized that a preliminary version of the Doha Minutes provided that “either of the two parties” should be entitled to recourse to the court, and that, on the insistence of Bahrain, this text was modified to permit such recourse to the court only by “the two parties” (“*al-tarafan*” in Arabic).⁶²

The court observed that the dual form in Arabic serves simply to express the existence of two units (the parties or the two parties), so what has to be determined is whether the words, when used here in the dual form, have an alternative or a cumulative meaning: in the first case, the text would leave each of the parties with the option of acting unilaterally, and, in the second, it would imply that the question be submitted to the court by both parties acting in concert, either jointly or separately.⁶³

⁶⁰ Máirtín Mac Aodha, *Legal Translation – An Impossible Task?*, 201 *Semiotica* 207 (2014).

⁶¹ Gotti 2016, at 13.

⁶² Barbara Kwiatkowska, *The Qatar v. Bahrain Maritime Delimitation and Territorial Questions Case 6* (Durham: International Boundaries Research Unit, 2003).

⁶³ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, 1995 I.C.J. 6.

The court first analyses the meaning and scope of the phrase “*Once that period has elapsed, the two parties may submit the matter to the International Court of Justice.*” It notes that the use in that phrase of the verb “may” suggests, in the first place, and in its most material sense, the option for, or right of, the parties to recourse to the court. In fact, the court had difficulty in seeing why the 1990 Minutes, the object and purpose of which were to advance the settlement of the dispute by giving effect to the formal commitment of the parties to refer it to the court, would have been confined to opening up for them a possibility of joint action which had not only always existed but, moreover, had proved to be ineffective. On the contrary, the text assumes its full meaning if it is taken to be aimed, for the purpose of – accelerating the dispute settlement process, at opening the way to a possible unilateral recourse to the court in the event that – the mediation of Saudi Arabia failed to yield a positive result by May 1991. Consequently, it seemed to the court that the text of paragraph 2 of the Doha Minutes, interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the said Minutes, allowed the unilateral recourse to the court. Therefore, the court in its Judgment of 15 February 1995, found that it had jurisdiction to adjudicate upon the dispute submitted to it between the State of Qatar and the State of Bahrain; it also found that the Application of the State of Qatar as formulated on 30 November 1994 was admissible.⁶⁴

In his Qatar v. Bahrain Dissenting Opinion, Vice-President Schwebel found persuasive Bahrain’s interpretation that alteration in the text of the phrase “either party” into that of “the two parties” (“al-tarafan”) demonstrated that its intention was to exclude unilateral recourse to the court. In his view, the explanation the court offered in support of its position that the travaux préparatoires did not provide it with conclusive supplementary elements for interpretation of the Doha Minutes was unconvincing. The court, despite the compelling character of the travaux, gave it inconclusive weight. In effect, it set aside the preparatory work, because it vitiated rather than confirmed the court’s interpretation, or because its construction of the treaty’s text was in the court’s view so clear that reliance upon the preparatory work was unnecessary.⁶⁵

For the reasons already set out in his 1994 Dissenting Opinion and partly repeated in his present 1995 Dissenting Opinion, Judge Shigeru Oda was of the view that neither the 1987 Exchanges of Letters nor the 1990 Doha Minutes fell within the category of “treaties and conventions in force” specially providing for certain matters to be referred to the court for a decision by means of a unilateral Application under Article 36(1) of the ICJ Statute. In his opinion, the court was not empowered to exercise jurisdiction unless the relevant Qatar/Bahrain disputes were jointly referred to the court by a compromise, which has not been done in this case. Even if the

⁶⁴ *Maritime Delimitation*, *supra* note 63.

⁶⁵ Kwiatkowska 2003, at 7.

Doha Minutes could constitute a basis on which the court could be requested to consider the dispute, Judge Oda believed that there seemed to be nothing in the 1995 Qatar v. Bahrain Judgment to show that the amended or additional submissions of Qatar filed on 30 November 1994 in fact comprised “the whole of the dispute,” as compared to the opposite position apparently taken by Bahrain (which has not had the opportunity to give any official expression to its views on this point).⁶⁶

As can be seen, the court was under the influence of the contextual and purposive orientation of the civil law legal system, in that it concentrated on the object and purpose of the Doha Minutes, instead of the mere literal meaning of the expression *al-tarafan*. In fact, the court ruled out the ontological interpretive mechanism of the common law legal system, by which the abstract meaning of every word would be determinative of the interpretation of the text.

In the *Mavrommatis Palestine Concessions case*, the Permanent Court said,

...where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it [the Court] is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties.

In that case, the Permanent Court preferred a more restrictive interpretation “because the original draft of this instrument was probably made in English.”⁶⁷ However, in formulating paragraph 3 of the draft article, the Commission rejected the idea of a general rule laying down a presumption in favor of restrictive interpretation in the case of an ambiguity in plurilingual texts. The Commission rejected creating a legal presumption in all cases in favor of the language in which the treaty was drafted, “since much might depend on the circumstances of each case and the evidence of the intention of the parties.” In the *Young Loan Arbitration case*, the Tribunal confirmed that the earlier international practice of referring to the original text as an aid to interpretation is incompatible with the principle of the equal status of all authentic texts in plurilingual treaties, which is incorporated in Article 33(1) of the Vienna Convention.⁶⁸

In the *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, in interpreting a provision of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic of 1948, the ICJ noted that it was possible to interpret the English and Italian texts “as meaning much the same thing,’ despite a potential divergence in scope.” In that case, the United States claimed that Italy had violated Article VII of the Treaty, which ensured

⁶⁶ Kwiatkowska 2003, at 8.

⁶⁷ *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. Rep., Series A, No. 2, at 19.

⁶⁸ Yearbook of the International Law Commission, 1966, Vol. II, p. 225–226.

the right “to acquire, own and dispose of immovable property or interests therein within the territories of the other High Contracting Party,” in English, and “acquistare, possedere e disporre di beni immobili o di altri diritti reali nei territori dell’altra Alta Parte Contraente,” in Italian. Italy argued that this Article did not apply to the U.S. Company because its property rights (“diritti reali”) were limited to shares in the Italian company that owned the immovable property in question. The United States contended that “immovable property or interests therein” was sufficiently broad to include indirect ownership of property rights held through a subsidiary that is not a United States corporation. The court rejected the U.S. argument. While “interest” in English has several possible meanings, in English usage it is a term commonly used to denote different land rights. It was therefore possible to interpret the English and Italian texts of Article VII as “meaning much the same thing,” especially since the clause in question was limited to immovable property.⁶⁹

In the *LaGrand (Germany v. United States of America)* case, the ICJ applied Article 33(4) of the VCLT to a divergence of text in Article 41 of the ICJ Statute (“doivent être prises” in French and “ought to be taken” in English). After recourse to Articles 31 and 32 of the VCLT did not remove the difference in meaning, the court considered the object and purpose of the ICJ Statute to find that orders under Article 41 are binding, a conclusion that conformed to the travaux préparatoires of Article 41.⁷⁰

4.2. World Trade Organization

English, French and Spanish are the official languages of the WTO. Each of the English, French and Spanish legal texts of the WTO is authentic. Versions in other languages are not authentic. In practice, English is the “working” language of the WTO. While formal trade negotiations and meetings of WTO bodies are conducted in the three official languages; with the use of simultaneous interpretation, other, more informal meetings are conducted in English. Most panel and Appellate Body reports are written in English and then translated into French and Spanish. Likewise, the Uruguay Round Agreements were drafted in English and then translated into French and Spanish. These agreements cover hundreds of pages of treaty text. It is therefore not surprising that the authentic texts sometimes diverge. When there is a divergence of treaty language among the authentic texts, the rules of interpretation of Article 33 of the VCLT can be applied to reconcile the divergence.⁷¹ It provides as follows:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

⁶⁹ *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, 1989 I.C.J. 15.

⁷⁰ *LaGrand (Germany v. United States of America)*, 2001 I.C.J. 466.

⁷¹ Bradley J. Condon, *Lost in Translation: Plurilingual Interpretation of WTO Law*, 1(1) *Journal of International Dispute Settlement* 191, 194 (2010).

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

For instance, the text of DSU (Dispute Settlement Understanding) Article 7(2) is different in the English and French texts, on the one hand, and the Spanish text, on the other. The English and French texts require panels to “address the relevant provisions in any covered agreement or agreements cited by the *parties to the dispute*” [emphasis added], whereas the Spanish text refers only to the “provisions,” omitting the word “relevant.” DSU Article 7(1) (part of the context of DSU Article 7(2)) sets out the standards terms of reference of panels: “to examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the *parties to the dispute*)...” [emphasis added]. DSU Article 7(1) refers to the “relevant” in all three languages. DSU Article 3(3), which indicates the object and purpose of the WTO dispute settlement system and also serves as context, provides that the prompt settlement of disputes “is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.” The reference to “provisions” in the Spanish text of DSU Article 7(2) should be interpreted to refer to “relevant provisions,” since this interpretation is consistent with both the context and the objective of achieving the prompt settlement of disputes. The divergence in this situation can be removed by considering the context and the object and purpose, in accordance with Article 31 of the VCLT.⁷²

States attempt to impose language requirements related to labelling on imported products. This principally serves to protect consumers by reducing information costs by granting them information through the labelling.⁷³ Second, it may also aim at the protection of domestic producers by increasing the costs of importing because of the required compliance with labelling requirements. The same cost is not incurred by companies producing for the domestic market only (except in a country with more than one official language). The adoption of language-related labelling requirements can weaken economies of scale: the same product may be placed on the market only with different labels or packaging in different countries or linguistic areas. Although it must be acknowledged that, while linguistic costs may indeed make entry into

⁷² Condon 2010, at 206–207.

⁷³ Jill E. Hobbs, *Labeling and Consumer Issues in International Trade in Globalization and Agricultural Trade Policy* 269, 269–270 (H. Michelmann et al. (eds.), London: Lynne Rienner Publishers, 2001).

a market more difficult, they do not lock out new entrants but rather delay their appearance on the market.⁷⁴

Language requirements are relevant from the perspective of more agreements concluded under the WTO regime. Language requirements affecting the provision of services (such as advertising or media services) may be considered as non-tariff barriers according to the General Agreement on Trade in Services. As far as the labelling of goods is concerned, agreements related to the trade in goods are more important. If linguistic labelling rules are adopted for food safety reasons, the Agreement on the Application of Sanitary and Phytosanitary Measures (the “SPS Agreement”) may be applicable to such requirements. Linguistic labelling requirements adopted for ensuring food safety may be considered as sanitary or phytosanitary measures. Under the SPS Agreement, Member States remain free to adopt sanitary and phytosanitary measures, but these must comply with the provisions of the SPS Agreement; in particular, they must be based on scientific evidence, cannot be applied arbitrarily or be unjustifiably discriminatory and cannot constitute a disguised restriction on international trade. For our purposes, however, the Agreement on Technical Barriers to Trade (the “TBT Agreement”) is the most significant agreement.⁷⁵

Within the WTO system, the TBT Agreement sets forth binding disciplines on the development and application of standards, technical regulations and conformity assessment procedures, the range of which may be relevant for evaluating whether a particular labelling requirement is an unnecessary barrier to trade.⁷⁶

In general, linguistic labelling rules may constitute technical barriers to international trade. More precisely, labelling requirements (including linguistic ones) may qualify as technical regulation pursuant to the TBT Agreement. Technical regulation is defined in Annex I to the TBT Agreement. Accordingly, a technical regulation is a

document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include, or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.⁷⁷

The obligation to notify the states under the TBT Agreement is an important element of a set of procedures that governments are expected to follow in order to ensure

⁷⁴ Aurélien Portuese, *Law and Economics of the European Multilingualism*, 34(2) *European Journal of Law and Economics* 279, 290, 293 (2012).

⁷⁵ Somssich et al. 2012, at 110–111.

⁷⁶ Barbara Fliess, *Analysis of Non-Tariff Measures: The Case of Labelling: Overview and Analysis of WTO Data*, OECD Publication, TD/TC/WP(2002)40/FINAL, 13 November 2003, at 14 (Feb. 10, 2019), available at <http://www.oecd.org.trade>.

⁷⁷ Somssich et al. 2012, at 111.

that labelling and other types of technical barriers are not unduly restricting trade. The review of labelling notifications finds that labelling schemes are predominantly aimed at consumer information and protection, although governments also use labelling to advance other objectives, including the facilitation of trade.⁷⁸

4.3. European Union

The EU generally seeks to ensure that every EU official language is acknowledged as an authentic language of a treaty. This can be justified by the fact that international agreements are part of the EU legal order and may contain provisions directly applicable to individuals. It is therefore necessary that the text of such agreements is not only available to the individuals throughout the EU in their own language but that each is, at the same time, a legally binding language version. Since only authentic languages are decisive for the interpretation of the agreement, this purpose is best served if the agreement is authoritative in all EU languages. Furthermore, the exclusion of some official EU languages from the list of authentic languages of a specific international agreement may raise the issue of discrimination on the basis of native language, which is strictly forbidden by EU law.⁷⁹

In order to ensure that the authorities and populations in the member states can read the EU source texts and be able to understand them, as well as to ensure legal equality with regard to the direct effects of EU law in member-state's legal systems, the EU arrangements are multilingual. The first ECSC treaty was monolingual authentic in French; but that was soon changed in favor of all official EU languages being authentic. Nowadays, when it comes to the question of the languages used in the EU and its institutions, one can look at what is done as a matter of practice and what is laid down as rules of law. The EU legislative texts are published in the EU languages by the Official Publications Office and the language versions can be consulted individually. In EU treaty texts, it is customary to insert an article at the end which gives information about the language versions of the treaty. This is useful, for example, if one wants to know how many language versions exist for the text and the status of each language version, i.e. whether it is an original source text to be used for interpretation (authentic) or a "translation," in which case it should be put aside for judicial interpretation in favor of the authentic version, which incidentally places that version in a different and more favorable position.⁸⁰

In the case of bilateral agreements, all official languages of the EU and the official language (or languages) of the other contracting parties become, as a general rule, authentic languages of the international treaty as well. The treaty is negotiated in

⁷⁸ Fliess 2003, at 30.

⁷⁹ Somssich et al. 2012, at 39.

⁸⁰ Colin Robertson, *How the European Union Functions in 23 Languages*, 28 SYNAPS: A Journal of Professional Communication 20 (2013).

a lingua franca, which is English in the majority of cases. The text is agreed in this language and this text will serve as a basis for producing the authentic texts, then the authentic texts are produced by each party for its own languages. Therefore, the EU prepares the EU language versions and the contracting party prepares its own language version. The translation phase is even more important because translators might reveal inconsistencies in the original text which, as a consequence, might be improved by agreement with the other contracting party. This kind of late intervention to an original treaty text makes one think about the possibility of involving translators and representing linguistic aspects already at the drafting phase of an international treaty, especially for those of a complex nature. After the treaty text is translated into the official languages of the EU, these versions and the language version(s) of the contracting party are submitted to the European Council for legal and linguistic verification of the text. The European Council must make sure that all official language versions and the language version(s) of the contracting party are equal in substance. The staff of the Council's Legal Service is of course able to make legal revision in the official languages of the EU; however, the revision of the language version of the contracting party – often an exotic language in the EU context – must be outsourced in the majority of cases. At the same time, the contracting party verifies the translations into the official languages of the EU. Time constraints are again a decisive factor, often affecting the quality of the revision. The treaty must be signed and, if all official languages are authentic languages of the treaty, they must all be ready (translated and legally revised) for the date of signature.⁸¹

The choice of the authentic languages is also influenced by whether the international treaty is a bilateral or a multilateral agreement. As mentioned, bilateral agreements are generally authenticated in the official languages of the EU and in the official language(s) of the other contracting party (if that latter is not an official language of the EU). In the case of bilateral agreements concluded with international organizations which have a restricted number of official languages, the same restricted system will usually apply, i.e. bilateral treaties concluded with the International Atomic Energy Agency are authentic in English and French only. Even in the case of bilateral agreements concluded with third countries and not with international organizations, it might happen that there is only one authentic language of the agreement, generally English.⁸²

The situation is somewhat different in the case of multilateral agreements; if they are negotiated in the context of an existing linguistic regime, or if a large number of parties requires a more restrictive linguistic regime. In such a case, agreements are generally only authenticated in the languages used in this framework or chosen by the contracting parties as a compromise acceptable to all of them. Even where

⁸¹ Somssich et al. 2012, at 47–48.

⁸² *Id.* at 39–40.

a multilateral agreement is not negotiated within an existing legal framework, the resulting linguistic regime may be more restrictive than that of the European Union because of the high number of parties to the agreement. In these cases, the languages chosen as authentic reflect the linguistic composition of the contracting parties. Some agreements which are authentic in several languages distinguish one language to be determinative in the event of inconsistencies of interpretation (the language which should prevail). Usually it is the English version which has precedence but sometimes the French version or two language versions prevail over the others.⁸³

The language situation is different in the Commission, given its more administrative character. The European Commission's Rules of Procedure are silent on languages so that, formally speaking, Regulation 1/58 applies. It is indeed that strict regime which applies in the Commission's external dealings. Moreover, it is even possible for citizens to deal with the Commission in the "additional" languages enjoying official status in Spain. On the other hand, in its role as instigator of legislation, the Commission must prepare reports, proposals, or other documents, which must be drafted internally into a given language. It is apparent from the Commission's translation statistics that only two languages (French and English) are generally used for drafting texts.⁸⁴

The European Court of Justice is left free to determine for itself the procedural languages which may be used in cases before it. In fact, however, the court's list is exactly the same as that provided in Regulation 1/58.⁸⁴ Therefore, cases may be brought or referred in any of the official languages. Internally, however, the case must be deliberated, and at an early stage, the court adopted the practice of using French for deliberations amongst the judges. French remains the dominant language within the institution. The Rules of Procedure of all three courts provide that the court may request any institution which is party to a case to provide "translations" of its pleadings into other official languages. In practice, however, no translation is requested if the procedural language is French.⁸⁵

The EU integrates Member States with different official languages, fragmenting the internal market into various linguistic territories. The multilingual regime of the EU hinders the free movement of goods. A product must often be modified in order for its label to conform to the language requirements of the Member State of import. As such, language requirements may raise barriers to one of the fundamental economic freedoms of the EU; the free movement of goods. Secondary legal sources – regulations and directives – contain various requirements concerning labelling. These legal sources impose diverse language requirements. The linguistic rules on labelling

⁸³ Somssich et al. 2012, at 41–42.

⁸⁴ Julian Currall, *Official Languages Inside and Outside the Institutions: An Analysis of Recent Cases*, 39(3) *Georgia Journal of International and Comparative Law* 587, 599 (2011).

⁸⁵ *Id.* at 600–601.

contained in secondary legal sources may be divided into four categories. First, several secondary legal acts require the use of a language easily understood by consumers on labels. Second, other legal sources authorize Member States, as the place of the marketing of the products, to stipulate the use of their own official language. Third, certain legislative acts directly require the use of the language of the Member State where the product is marketed on the label. Finally, there are regulations and directives that restrict themselves to determining the required linguistic appearance of certain terms or descriptions on labels.⁸⁶

Conclusion

The status and impact of language and translation in the globalization process are obviously undeniable and deserve thorough investigation. In the age of globalization, translation is a vital tool that tries to make common legal rules applied all over the world. This phenomenon has resulted in new applicable rules for both civil law and common law legal systems. However, as our world continues down the path of globalization, the increased international interaction leads to greater potential for linguistic confusion and misunderstanding.

Legal translation is a key factor in the interpretation of international law documents; it aims to make national legal systems more connected with international standards; by creating common understandings of international legal instruments. In fact, in all the fields of law, including international law, translation and interpretation are inseparable and interconnected.

Legal translation in international law is a highly specialized field, demanding an interdisciplinary approach from the translator which takes into consideration the specifics of legal science, especially the findings of international and comparative law, as well as the peculiarities of legal language. Translators are increasingly perceived as expert intercultural communicators. The task of the translators of legal texts is important; in that inconsistencies may lead to erroneous translation resulting in serious legal consequences.

In recent years there has been greater progress made in the direction of plain language drafting. However, such progress is slower in international organizations such as the EU and the WTO where a number of languages are of equal rank and have legal force. Additionally, because of multilingual systems adopted in such institutions, legal translation is heavily based on interpretation principles.

Both structure and content are crucial factors for the translation of international legal instruments. The translator applies a double perspective to both the language structure and the content of meaning. One of the main tasks of the translator is to identify the equivalence between source law concepts and target law terminology,

⁸⁶ Somssich et al. 2012, at 114–115, 131.

if any, and to deal with situations where no equivalence has been traced. In trying to attain equivalence in the translation of legal terms, one cannot dispense with the conceptual analysis of a particular term. Legal translators must work not only between two languages and two cultures but between legal systems that are very different due to the strong sociocultural and historical influence exerted on them.

In international judicial proceedings, it is very important for judges to understand the content and meaning of any legal and factual evidence presented by the parties. Therefore, translation is a key factor in this process. In some cases it is a combination of translation (should the need arise) and interpreting with all potential problems related to differences between those two modes, with differing specificities of the job, and with a variety of areas to be covered.

Since the international legal system is built through language, the role of translation in building international and supranational law can be a central one. Legal translation at international organizations is conditioned by the constraints, purposes and expectations of the international or supranational legal system itself. Intergovernmental and supranational co-operation ascribes to instrumental translation the delicate task of conveying shared legal meaning accurately and consistently as it emerges and evolves through the interaction of lawmaking, law application and adjudication processes. Translators are not mere spectators or informants in these processes; but experts responsible for giving linguistic shape to authentic texts which ultimately become sources of law. Their professional activity is not strictly limited to the target texts. Translation can actually have a positive impact on the crafting of originals, and the product of translation can also help resolve problems of ambiguity affecting a multilingual instrument.

There are nevertheless three commonly recognized, partly competing purposes of the protection of language rights in international law. They can be summarized as the preservation of peace and security, the preservation of linguistic diversity and the promotion of the fair treatment of individuals; the latter has resulted in the recognition of language rights, including the availability of language support in international proceedings. The right to a fair trial is an essential element of language rights, especially in international criminal trials.

Harmonization of both the universal and regional perception of international legal concepts is one of the main functions of legal translators. Under the ongoing harmonization of the legal systems of the EU member states, a sort of supranational language, i.e. legal Euro-English, is being created, which includes terms which are neologisms with respect to the Anglo-American legal language.

Last but not least, I would like to make a passing reference to finding adequate solutions to lingual conflicts caused by diversity in linguistic, cultural and legal characteristics of states whose languages are identified as official within a plurilingual legal instrument. These agreements cover hundreds of pages of treaty text. It is,

therefore, not surprising that the authentic texts sometimes diverge. Although this may cause some confusion as to what the correct interpretation should be in every case, there is no insoluble problem in this regard. For instance, the plurilingual nature of the WTO Agreements does not make treaty interpretation significantly more difficult than it would be with a text authentic in one language only. Such instruments normally contain principles of interpretation in order to resolve a problem. However, in the absence of specified principles and rules in the instrument involved, general principles of international law as well as the provisions of international treaties can be invoked. For instance, when there is a divergence of treaty language among authentic texts, the rules of interpretation of Article 33 of the VCLT can be applied to reconcile the divergence.

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