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## In/Excluding Pragmatics: Interpretative Formalism and Its Discontents*

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## Abstract

The Vienna Convention on the Law of Treaties' articles on interpretation while practical, are built on an exclusive approach. They ignore the fact that normativity is expressed through the means of the messy, clumsy, and incomplete natural language we use in our everyday lives. International lawyers overlook some of these traits when they consider legal language to be formal and perfect. This oversight leads to an incomprehension of the interpretative process and of its results. States react negatively when obligations unfold in an unexpected direction, breaching obligations or withdrawing from treaties.

This paper focuses on how the inclusion of pragmatics can contribute to legal interpretation in international law. How does it harm the interpretative process to exclude a pragmatic understanding of natural language from legal interpretation? How can we, through the insight brought by philosophy of language, draft better treaties and interpret them in a more rationalised way to prevent states from contesting the sometimes unpredictable results of treaty interpretation?

I argue that a more inclusive approach to interpretation, taking into account language's natural ambiguity through philosophy of language and pragmatics, would lead to a better understanding of the interpretative process and contribute to making its outcome more predictable. Inspired by the works of the philosopher of language Paul Grice, I first demonstrate the gap between natural and legal language and how a pragmatic awareness is excluded from the interpretative process in international law. Secondly, I show how including these teachings would benefit both interpreters who would have a better grasp of the intricacies of natural language, and states who would better understand the interpretative process.

## Keywords

Interpretation, philosophy of language, pragmatics, Vienna Convention on the Law of Treaties

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### Introduction

> 'Information, like money, is often given without the giver's knowing to just what use the recipient will want to put it.' – Paul Grice[1]

There are three main stages in the life of a treaty. First, the states' signature. This happens often enough for it to not gather much attention. Yet, states do not sign just any treaty. They negotiate the terms first so that the content fits their interests best, so much so that treaties are often described as 'an agreement to disagree further'.[2] The treaty is the greatest common divisor, the most states can agree upon. Therefore, there is some expectation from the states that the norm will not go any further than was consented to, or at least not too much, otherwise, had they known they might not have signed.

Second, treaty content changes. May it be subsequent practice, may it be judicial interpretation, or the society that evolves, the content does not stay the same. However, international lawyers do not think about it as content *changing*, but rather as the treaty content being *redefined*, suggesting that it is merely a matter of interpretation. The content may very well be quite different between points $t_1$ and $t_2$ in time (think before and after the apparition of the notion of positive obligations before the European Court of Human Rights).[3] In light of contemporary international legal practice, it would be ill-judged to reduce content to text and equate them to deny that since the text does not change, the content does not either and that it is merely our interpretation that changes.[4]

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[1] Grice H. P., 'Logic and Conversation' in *Syntax and Semantics*, Cole P. and Morgan J.L. (ed.), 1975, Brill 57.

[2] Allott P., 'The Concept of International Law' (1999) 10 *European Journal of International Law* 31 at 43; Besson S., 'State Consent and Disagreement in International Law-Making. Dissolving the Paradox' (2016) 29 *Leiden Journal of International Law* 289 at 292.

[3] ECtHR, *Case relating to certain aspects of the laws on the use of languages in education in Belgium,* no. 1474/62 et al., 9 July 1968.

[4] On this understanding of change in legal obligations see, Etkin B., 'The Changing Rivers of Customary International Law – The Interpretative Process as Flux' *ESIL Reflections*, forthcoming.

Last, but not least, states react (negatively) to this change. When obligations unfold in an unexpected direction through interpretation, their contestation can manifest in varying degrees, from refusal to apply the norm as it henceforth to treaty withdrawal.[5] While contestation does not *necessarily* undermine normativity, it is still damaging for norms from a policy standpoint at the very least.[6] This is a simple observation that has generated much attention in international relations theory,[7] but not so much in international law. Interpretation is a crucial part of this change in content, and more generally of the life of a treaty obligation, which is why better understanding it would allow for better identifying the reasons of such contestation, and therefore potentially for better law-making and better treaty compliance.

Through the interpretative process, norms evolve over time; they bend, expand, and retract—and interpretation is so prevalent that it has become second nature for international lawyers. They apply the rules set out by the Vienna Convention on the Law of Treaties[8] and do not second guess their method. However, these rules, while practical, are built on an exclusive approach—i.e. excluding pragmatics. The treaty and the draft International Law Commission articles it is based on do not take into consideration the fact that law is made through language and the consequences that ensue, beyond the taking into account of the ordinary meaning of words.[9]

Contributing to legal theory and bridging a gap between international law and jurisprudence, this paper focuses on how the inclusion of pragmatics can contribute to legal interpretation in international law. How does it harm the interpretative process to exclude a pragmatic understanding of natural language from legal interpretation? How can we, through the insight brought by philosophy of language, draft better treaties and interpret them in a more rationalised way to prevent states from contesting the sometimes unpredictable results of treaty interpretation? I argue that a more inclusive approach to interpretation, which takes into account language's natural ambiguity through philosophy of language and pragmatics, would lead to a better understanding of the interpretative process and contribute to making its

[5] There are many examples but one that is particularly illustrative is the Pratt and Morgan case (Judicial Committee of the Privy Council, *Pratt & Morgan v. The Attorney General of Jamaica* [1994] 2 AC 1.), the Privy Council (the high appellate court for Caribbean Commonwealth countries) found that beyond five years on the death row was cruel, inhuman and degrading treatment, which was too short a time to allow for the Inter-American Court of Human Rights' review procedure to take place. The IACHR refused Trinidad and Tobago's request to expedite its cases in 18 months and therefore banned death penalty in effect. In response, Trinidad and Tobago withdrew from the American Convention on Human Rights (for more, Soley X. and Steininger S., 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights' (2018) 14 *International Journal of Law in Context* 237).

[6] Etkin B., 'The Cynic's Guide to Compliance: A Constructivist Theory of the Contestation Threshold in Human Rights' (2021) Special Issue June 2021 *Quebec Journal of International Law* 183.

[7] Wiener A., *A Theory of Contestation*, 2014, Springer; Wiener A., *Contestation and Constitution of Norms in Global International Relations*, 2018, Cambridge University Press.

[8] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[9] Though admittedly the rules of interpretation are also in evolution and they also are susceptible of change; see, Merkouris, P., Pazartzis, P., Ulfstein, G., & Peat, D., 'Final Report of the ILA Study Group on Content and Evolution of the Rules of Interpretation (Kyoto, 29 November-13 December 2020)', ILA (2020). one could also argue whether these rules are actually 'rules': see, Peat, D., 'Disciplining Rules? Compliance, the Rules of Interpretation, and the Evaluative Dimension of Articles 31 and 32 of the VCLT' (2022) 69 *Netherlands International Law Review* 221.

outcome more predictable, eventually leading to less norm contestation and better compliance.[10]

Studies in law and philosophy of language are not new, and there are more and more of them in international law.[11] Pragmatics are also finally being taken into consideration but it is clearly an area that needs more research.[12] Inspired by the works of philosophers of language like John Searle and Paul Grice, I first demonstrate the gap between formal and natural language and how a pragmatic awareness is excluded from the interpretative process in international law. Secondly, I show how including these teachings would benefit both interpreters who would have a better grasp of the intricacies of natural language, and states who would better understand the interpretative process.

## 1. Excluding Pragmatics

### *A. What is Pragmatics?*

Language is the device people use to make law, one might even say it constructs the law.[13] Whether it is oral or written, language is the *only* medium through which law can be expressed, but natural language is far from being the perfect means for this task. Philosophers have demonstrated the gap between natural language and the formal devices of logic which are reliable signifiers (such as negation, conjunction, disjunction, and implication). Grice explains this divergence in his 1975 chapter *Logic and Conversation*; as natural language is imperfect and therefore does not allow for precise definitions, concepts are not fully intelligible.[14] Indeed, it is the ambiguity and polysemy of natural language that make it a less than ideal instrument to communicate clear instructions and rules. To overcome this problem, Grice suggests turning to pragmatics, which is the study of how context contributes to meaning. He expounds his 'theory of implicature' in this same chapter: part of what is communicated is not or does not have to be literally expressed, but merely implied. The premise of this theory is the cooperative principle, which posits 'Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged'[15]. This means that 'exchanges do not normally consist of a succession of disconnected remarks'[16] and that a cooperative effort is made to communicate. The point of

[10] Others have argued in the same direction before, Pirker B. and Smolka J., 'Making Interpretation More Explicit: International Law and Pragmatics' (2017) 86 Nordic Journal of International Law 228.

[11] See, the special issue on 'Language and International Law' of the *Nordic Journal of International Law*, 2017, 86:2; Venzke I., *How Interpretation Makes International Law - On Semantic Change and Normative Twists*, 2012, Oxford University Press; Wyatt J., *Intertemporal Linguistics in International Law*, 2019, Hart.

[12] Pirker B. and Smolka J., 'International Law and Pragmatics - An Account of Interpretation in International Law' (2016) 5 *International Journal of Language and Law* 1; Pirker B. and Smolka J., 'Making Interpretation More Explicit: International Law and Pragmatics' *supra* note 10; Pirker B. and Smolka J., 'International Law, Pragmatics and the Distinction Between Conceptual and Procedural Meaning' (2018) 7 *International Journal of Language and Law* 117; Pirker B. and Smolka J., 'International Law and Linguistics: Pieces of an Interdisciplinary Puzzle' (2020) 11 *Journal of International Dispute Settlement* 501.

[13] Gibbons J., 'Language Constructing Law' in Gibbons J. (ed.), *Language and the Law*, 1994, Routledge.

[14] Grice, 'Logic and Conversation", *supra* note 1.

[15] *Idem*, 45.

[16] *Ibidem*.

the cooperative principle and the four maxims that stem from it (quality, quantity, relation, and manner) is to ensure 'a maximally effective exchange of information'.[17]
While his theory is based on oral conversation, it is also commonly applied to written communication, and therefore can be applied to law, which communicates rules.[18] It is also true that legal language could be considered a distinct mode of language,[19] but indeterminacy-wise it has the same characteristics, or flaws, as any other form of natural language. Yet, this area has been traditionally excluded from legal interpretation.

### *B. Excluding Pragmatics from Interpretation*

Neither the International Law Commission's draft articles nor the Vienna Convention on the Law of Treaties take into account philosophy of language, linguistics, semantic, or pragmatics. Indeed, words derived from the root 'pragmatic' (i.e. pragmatics, pragmatical, pragmatically) are only used twice in the draft articles with commentaries, and both in the ordinary sense to mean practical, and 'language' is referred mostly in the context of the different language versions of a treaty.[20] The commentaries seem to be totally oblivious to philosophy of language.[21]
A formalistic approach was rather prevalent in international law, especially until the end of the 20th century, covering the period during which the rules of treaty interpretation were negotiated and adopted. Formalism here is understood as 'adjudicative neutrality and immanent intelligibility of legal arguments', and is a theory that 'minimizes choice in law-application and maximizes predictability'.[22] Such formalistic beliefs have resulted in focusing on international law as a particular, normative type of language that would allow precision, overlooking the fact that this normativity is expressed through the means of the same messy, clumsy, and incomplete natural language we use in our everyday lives.
Many international legal positivists have embraced formalism despite these criticisms. A plausible explanation is that many wrongly assume that all law is based on consent, and this voluntaristic stance typically requires formalism in order to bind consent and content together. Seen this way, formalism is a vital element to assure legal certainty. Yet, positivism does not entail rigid or inflexible formalism. On the contrary, it necessarily implies a rejection of formalism.[23]
Moreover, if natural language does not allow *full* intelligibility as per Grice, *immanent* intelligibility is as per formalism is impossible, and therefore formalism is not viable unless an ideal language of mathematics and logic is constructed. Maximising predictability is a noble cause, though *perfect* predictability is unattainable due to the open texture of law, as H.L.A.

[17] *Id.*, 47.
[18] 'Speech acts are communicative acts that happen through the oral or written language'; Korta K. and Perry J., 'Pragmatics' in Zalta E.N. (ed.) *The Stanford Encyclopedia of Philosophy*, Spring 2020 Edition.
[19] Maley Y., 'The Language of the Law' in Gibbons J. (ed.), *Language and the Law*, 1994, Routledge.
[20] International Law Commission, 'Report of the International Law Commission on the Work of its 18th Session' (4 May–19 July 1966) UN Doc A/6309/Rev.1.
[21] Bar the minor passage; '[t]he different genius of the languages, the absence of a complete *consensus ad idem*, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the text' , passage which I am potentially reading too much into; *id.*, 225.
[22] d'Aspremont J., *Formalism and the Sources of International Law*, 2011, Oxford University Press, 18-19.
[23] Hart H.L.A., *The Concept of Law*, 1961, Clarendon Press, 124-154.

Hart covers extensively in Chapter 7 of The Concept of Law.[24] Both open texture and implicature rely on uncertainty to allow for more than what is plainly put in black and white, which leads to change. And treaty content is bound to change, as is the language in which it is expressed—it is their nature. Hence, when international lawyers consider legal language as a distinct, more formalistic type of natural language, they overlook some of its traits that are brought by the fact that it is merely another form of communication through an imperfect medium.

## 2. Including Pragmatics

Including pragmatics would be a valuable addition to our understanding of treaty interpretation —even more so to the process of treaty making, as this is the point during which ensuring that the cooperative principle is used would lead to the best results for clarity and compliance in the future. The above-mentioned Gricean maxims would provide guidance in deciding what is put on paper in black and white and what is left out in the optimal way. Since pragmatics is, as stated above, the study of how context contributes to meaning, it would be appropriate to take it into account with the context as suggested in the Vienna Convention.

As previously mentioned, the four maxims are quality, quantity, relation, and manner. The maxim of quality is 'make your contribution one that is true' and the maxim of relation is, quite laconically, 'be relevant'.[25] These two are maybe more suitable for a dialogue than for legal text, as law could not tell a lie and there is no obvious point of reference to compare a legal rule to in order to judge its relevance.[26] On the other hand, the maxims of quantity ('1. Make your contribution as informative as required, and 2. Do not make your contribution more informative than is required') and manner ('1. Avoid obscurity of expression, 2. Avoid ambiguity, 3. Be brief, and 4. Be orderly') are particularly interesting for law.

According to legal positivism, law as social facts is not infinite and can run out, therefore no law can ever be exhaustive, despite all efforts. This is where the maxim of quantity can come into play. Indeed, one could argue that there is a sweet spot between saying too little and saying too much, leaving enough room for interpretation and time to take over and have their effect on the law. For example, article 6 of the European Convention on Human Rights reads:

> '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but […].
>
> 3. Everyone charged with a criminal offence has the following minimum rights: […] (c) to defend himself in person or through legal assistance of his own choosing or, *if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*; […]'[27]

[24] *Ibid*.
[25] Grice, 'Logic and Conversation', *supra* note 1, 46.
[26] Both of these affirmations seem less obvious once articulated but are beyond the scope of this paper.
[27] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR), article 6 [emphasis added].

The Convention clearly states the right to free legal aid in criminal proceedings, but makes no such specification for civil ones. *A contrario*, one could easily argue that there is no civil counterpart for the right to free legal aid. As expected, this is what states argued both before the European Commission and Court of Human Rights:

> 'In fact, the Convention's only express provision on free legal aid is Article 6 para. 3 (c) which relates to criminal proceedings […] Since Ireland, when ratifying the Convention, made a reservation to Article 6 para. 3 (c) with the intention of limiting its obligations in the realm of criminal legal aid, a fortiori it cannot be said to have implicitly agreed to provide unlimited civil legal aid.'[28]

If we take that the cooperative principle was not respected during the drafting of this provision, then it is not possible to make a judgment on whether the decision conforms with the intentions of the treatymakers and this hypothetical argument cannot proceed. In order to continue, and since we aspire to minimise legal uncertainty, it makes sense to imagine that the drafters had the cooperative principle in mind—which would mean that there should be no right to free legal aid in the civil limb. Yet, the Court decided otherwise, meaning the Convention was poorly interpreted. The maxim of quantity is no more and no less information than necessary, by explicitly mentioning the right to free legal aid in the criminal limb and excluding it in the civil one, the drafters implied that there was no equivalent right for civil proceedings. Then, it can only be the interpreters' transgression to go against this *implicatum* (what is implied). The exclusive approach did not *dictate* this result, but it *allowed* it, while the inclusive approach would not have. The exclusive approach cannot lead to one result since it does not lead at all, instead it leaves the field open, making multiple results possible and requiring other deciding factors to come to a conclusion. It is most often in such cases that states cannot predict that they react and contest decisions, and this unpredictability and the contestation that follows hurts legal certainty and compliance, and is damaging for the court from a legitimacy standpoint.

The maxim of manner also plays an important role. Ambiguity is partially unavoidable due to the open-texture of law and is sometimes an intentional part of law-making in order to avoid disagreement. It is also very often a source of conflict when non-legal metrics are used, such as relevance, reasonableness, proportionality, or necessity. It is this open-texture that makes implicature possible. The penumbra, where 'debatable cases in which words are neither obviously applicable nor obviously ruled out',[29] is what makes implicature possible.

Hart's conclusions on open-texture are not directly derived from a philosophy of language point of view,[30] which is why the legal 'indeterminacy' must be confronted and enhanced with the implicature brought along by the imperfection of natural language. The point is not to get rid of the penumbra or implicature, but to understand them better to make the best of them.

Following the maxims during drafting and not during interpretation, or vice versa, defeats the purpose of the cooperative principle. One cannot opt in and out—if there is ambiguity, and the interpreters can know that the drafters made a cooperative effort, they can then know that this ambiguity was on purpose, and proceed accordingly. Otherwise, the drafters have done a poor

[28] EctHR, *Airey v. Ireland,* no. 6289/73, 9 October 1979, §26.

[29] Hart H.L.A., 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review*, 593 at 607.

[30] Bix B., *Law, Language, and Legal Determinacy*, 2004, Oxford University Press, 18.

job and either the treaty content will evolve in a potentially unexpected direction and/or compliance will suffer. It is when we exploit the maxims without opting out of the cooperative principle that there is implicature and *implicatum*, therefore the cooperative principle must be ensured at every stage of the life of a treaty.

## Conclusion

The theory of implicature should be adopted, or considered to be implied in the Vienna Convention. As demonstrated above, interpretation has a lot to gain from such an addition, which would render the whole process more predictable and less messy, but this cannot be divorced from the drafting stage. By applying the maxims, drafters can better choose the words the obligations they have negotiated and interpreters would be less in the dark about their intentions. Nothing is black and white, but legal certainty is and should be the guiding principle towards which drafting and interpretation aspire, for better compliance but also for the sake of legitimacy. This would not be a neo-formalist approach, but a neo-positivist one that admits and takes into account the imperfect nature of language while also trying to compensate for it.