International Law and Pragmatics
— An Account of Interpretation in International Law

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Abstract

In this interdisciplinary paper, a legal scholar and a linguist aim to combine the scientific strands of linguistics and *international* law. Linguistics, and especially pragmatics, has not yet been fully integrated into the study of interpretation in international law, although some international legal scholars have started to apply the labels "linguistic" or "pragmatic" to their work on interpretation. While they do take into account research in the field of law and language, there is a tendency to follow very traditional approaches according to which semantics and pragmatics are divided into neatly separated domains. We posit a parallel between legal interpretation and pragmatics. Pragmatics has evolved from the so-called "wastebasket" of linguistics to become a fully-fledged discipline. The same should be true of legal interpretation and its study in international law, which should no longer be considered merely a legal afterthought – as if meaning were "all in the text". We argue that scientifically grounded pragmatics should be applied to legal interpretation. Recent research in linguistics and pragmatics, and the concepts that such research has provided, may also help us to build a stronger scientific foundation for the debate within international law on interpretation. Integrating pragmatics may allow for a more suitable model of legal interpretation than the sociological approaches some international lawyers have turned to. This may also provide a plausible link between the actors and structures of legal interpretation.

1. Introduction

In this interdisciplinary paper, a legal scholar and a linguist aim to combine the scientific strands of linguistics and international law. As we will show, despite some first efforts, linguistics, and especially pragmatics, has not yet been fully integrated into the study of interpretation in international law.[1] Legal scholars ask that legal linguists base their arguments on scientifically grounded theories (Galdia, 2009: 35), but we will argue that international legal scholars who apply the labels "linguistic" or "pragmatic" to their work on interpretation tend to exhibit a lack of scientific rigour themselves.

Scholars of international law may be familiar with early models of pragmatics, such as speech act theory, but have not given much notice to approaches developed in the last thirty years. While they do take into account research in the field of law and language, they continue to follow very traditional approaches according to which semantics and pragmatics are divided into neatly separated domains. The domain of semantics is seen as the study of relationships between linguistic signs and what they refer to. The domain of pragmatics is the relationship between linguistic signs and their users. International lawyers seem to quite some extent unaware of the cognitive turn in pragmatics, and other recent trends in linguistic and pragmatic theory[2] that suggest that the relationship between semantics and pragmatics is complex.

We posit a parallel between legal interpretation and pragmatics. Pragmatics has evolved from the so-called "waste-basket" of linguistics to become a fully-fledged discipline. The same should be true of legal interpretation and its study in international law, which should no longer be considered merely a legal afterthought – as if meaning were "all in the text". We argue that scientifically grounded pragmatics should be applied to legal interpretation. Integrating current theory in pragmatics into legal interpretation may fundamentally change the way international lawyers think about interpretation. Recent research in linguistics and pragmatic, and the concepts that such research has provided, may help us to build a stronger scientific foundation for the debate within international law on interpretation. Integrating pragmatics may allow for a more suitable model of legal interpretation than the sociological approaches some international lawyers have turned to. As will be shown, this can provide a plausible link between the actors and structures of legal interpretation.

We begin this article with a practical example of the way linguistic theory offers an opportunity to adequately assess and describe the process of legal interpretation. Once the usefulness of linguistics and pragmatics has been shown, we provide a brief overview of recent developments in linguistics and pragmatics, including the cognitive turn and Relevance Theory, and then explore the complex boundaries between seman-

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[1] Linguistics and pragmatics can be applied to any field of law, but we confine our analysis to the debate on interpretation in international law, from which the pragmatic perspective is notably lacking.

[2] In the present paper we systematically speak of "linguistics" and "pragmatics" with these more recent developments in mind, and we do not consider pragmatics a mere subset of linguistics.

tics and pragmatics. After exploring the relationship between international legal scholarship and linguistics, we next expose the misconceptions about pragmatics that prevail. We conclude with an argument, based on practical examples, for integrating pragmatics and modern linguistics into the study of interpretation, and outline the benefits such an approach could offer.

2. Using linguistics to assess legal interpretation

An example may help to prove the usefulness of linguistic concepts for the study of interpretation in international law at this point. Our example is drawn from the jurisprudence of the International Court of Justice, simplified for our present purposes. Because language changes over time, those who interpret treaties must decide whether it is more appropriate to use the language conventions "adhered to at the time the treaty is interpreted" ("contemporary language"), or to use the language "adhered to at the time the treaty was concluded" ("historical language") (Linderfalk, 2007: 73). Judges always offer reasons for the decision they eventually take but, from a linguistic and pragmatic perspective, they are not always sufficiently transparent (Solan, 2012: 95–96 with examples from United States constitutional law). Legal scholars do recognise that no answers can be found in the text, and that "normative evaluation" is indispensable to decide between "normative differences between historical problems and present ones" (Benett, 2012: 123). What tends to go unnoticed is that normative evaluation is based on underlying concepts that are used in pragmatics, including cognition and relevance.

In our example, certain rights to free navigation on a river, "for the purposes of commerce",[3] were granted to Costa Rica by Nicaragua within the framework of a treaty on navigational rights. The parties to the dispute disagreed on the interpretation of "commerce". The question was whether the term retained its 1858 meaning (the moment the treaty was concluded), which encompassed trade in goods, or whether it should take a contemporary meaning, which would expand the definition to include trade in services, in particular passenger transport (para. 57). The Court's minimalistic solution was to find that "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (para. 64). In such cases, when parties used "generic terms" in a treaty entered into for a "very long period", they must be "presumed, as a general rule, to have intended

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[3] International Court of Justice, *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* ICJ Reports 2009, p. 213, para. 51 ff, see here in particular para. 57 on the original Spanish version "con objetos de comercio".

those terms to have an evolving meaning" (para. 66). While convincing in principle, the Court's explanation is somewhat shallow and fails to adequately define "generic term", or explain why "commerce" is such a generic term in the treaty at issue.

Scholars who use linguistic concepts offer more elaborate accounts of the same problem. Linderfalk, in his discussion of linguistic reference, distinguishes singular referring expressions, which refer to one phenomenon (e.g. a celestial body), from general referring expressions, which refer to a group of phenomena (e.g. a specific group of celestial bodies), and generic referring expressions, which refer to a *class* of phenomena (e.g. objects that qualify as celestial bodies) (Linderfalk, 2007: 75–76). In the case of singular and general referring expressions, the referent can be either defined or undefined. If the referent is extensionally defined, the communicator has a specific phenomenon or group of phenomena in mind. If the referent is intensionally defined, the communicator does not have a specific phenomenon or group of phenomena in mind. In the case of generic referring expressions, the number of possible referents of a generic referring expression could be listed, if the list of referents that have these specific properties (e.g. to qualify as a celestial body) is finite (Linderfalk, 2007: 77). For generic referring expressions, the question is whether or not the original communicator assumed that the class of the referent would stay the same or evolve. In the first case, the generic referring expression is defined, so the "referring possibilities" are constrained by the linguistic conventions applicable at the moment the treaty was concluded (Linderfalk, 2007: 78). But if the class of the referent is assumed to be alterable, the referent is undefined. As a result, the interpreter is not constrained by the linguistic conventions of the moment of conclusion of the treaty, and can apply contemporary conventions. In our example of the treaty on navigation rights, an interpreter would have to decide what is more plausible: did the parties assume "commerce" would act as a defined or undefined generic referring expression? In a nutshell, what linguistics and pragmatics offer is not a new method of interpretation within international law, but rather a particular way of understanding the process of interpretation, including the methods of interpretation applied within international law by international courts and tribunals.

3. An overview of recent developments in linguistics and pragmatics

Recent writing in international law arguably does not fully take into account current research in the fields of linguistics and pragmatics. It may thus be useful at this point to provide a brief history of pragmatics and describe the current state of research, to show the cognitive turn and the emergence of a complex relationship between the

fields of semantics and pragmatics. Some modern approaches such as Relevance Theory (Clark, 2013: xv) are based on elements drawn from the cognitive sciences, while others eschew cognitive elements. These modern approaches show that the boundaries between semantics and pragmatics[4], and between linguistics and pragmatics, are far from simple to draw. Following the theoretical discussion in this section, we apply insights from pragmatics to written communication in the following section that deals in more detail with the interpretation of international legal treaties. For the sake of simplicity, we mainly use the terms of speaker and addressee. The main tenets apply, however, regardless of the form of communication.

3.1. Some basic notions

Depending on one's scientific standpoint, pragmatics[5] is part of linguistics or of the cognitive sciences. Traditionally, the discipline of pragmatics is regarded as a subdiscipline of linguistics, which encompasses various fields of study. For instance, syntax focuses on grammar and the relation between linguistic signs. Semantics is concerned with meaning and the relationship between linguistic signs and what they refer to. Pragmatics turns the focus on the relationship between linguistic signs and their users. Initially, pragmatics was concerned only with expressions of certain extralinguistic situational meaning, such as place and time, and was not an active field of research (Reboul & Moeschler, 1998a: 26–27, quoting Morris, 1938). In a widely used metaphor, pragmatics was once the *waste-basket* of linguistics (Mey, 1993: 247, quoting Yehoshua Bar-Hillel).

To explain the development of pragmatics, we must clarify the difference between two perspectives on verbal communication. The first perspective is that communication is encoded, directly or indirectly, in language (a *code* model). The second perspec-

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[4] The border between semantics and pragmatics is, in fact, so difficult to draw that the attempts at doing so appear to have resulted in "semantics/pragmatics border wars" (Horn, 2006: 21) in the sense that "much of the excitement in the study of meaning these days transpires in the unstable borderlands between what linguistic content provides and what post-semantic inference accounts for" (Horn, 2006: 43–44). There are views that differ slightly from the version of Relevance Theory that is presented in the present paper according to which one should "reconstrue the interaction between semantics and pragmatics as the intimate interlocking of distinct processes, rather than, as traditionally, in terms of the output of the one being the input of the other" (von Heusinger & Turner, 2006: 10, quoting Levinson, 2002). In other words, semantic and pragmatic processes may be combined in a more simultaneous manner than presented here. There are also attempts to gain ground for semantics in the sense that "there will always be doubts about whether a better semantic analysis of the relevant construction might not accommodate the apparent pragmatic intrusions in some other way" (ibid.). Most recently, the view has been expressed that "[a]s often, the route to success [in the past three decades or so of the semantics/pragmatics border wars] is in the middle, in recognizing the importance of both the multidimensional nature of meaning (that is, its many different sources and ways) and the formal methods of representation" (Jaszczolt, 2016: 61).

[5] Pragmatics should not in any way be confused with legal pragmatism as developed, e.g., by Glennon (2010) as an approach to international law.

tive emphasises that successful communication may not depend on exact encoding in language, but on the addressee's ability to recognise the *intention* of the speakers or writers. The addressee discerns this intention, and, by drawing on certain principles, makes inferences (the *inferential* model) (Zufferey & Moeschler, 2012: 19). Proponents of this second perspective invited cognitive theory into pragmatics. To further clarify the difference between the two perspectives and to lay the foundation for our argument, in the next section we provide a short overview of the history of pragmatics.

3.2. Non-cognitivist approaches

Pragmatics emerged as a sub-discipline from the foundations of Austin's Speech Act Theory in the 1950s (Reboul & Moeschler, 1998a: 27 ff.) and Searle's subsequent elaborations (Reboul & Moeschler, 1998a: 30–31)[6] in the 1960s and 1970s (Zufferey & Moeschler, 2012: 19). Pragmatics focuses on acts that correspond to an action that is realised by saying something (illocutionary acts). A speaker who says, "Can you close the window?" is hardly ever understood as asking a question about the addressee's ability to close the window. Instead, it is generally understood to be a request – though this intention is not explicit in the statement. In speech act theory, such phenomena suggest that there are underlying rules – or conventions – that enable successful communication (Zufferey & Moeschler, 2012: 102). Despite integrating the notion of intention and modelling inferences that allow the addressee to recover the speaker's meaning, this body of work does not take into account cognitive aspects, such as the mental states of the addressee, and is thus a non-cognitive approach. While speech act theory emerged in parallel with the cognitive sciences, and although one may argue that the intentions expressed in speech acts are nothing but the mental states of the speaker, speech act theory requires conventions for communication to succeed, and thus is a conventionalist theory. Conventions are, in the end, no different from codes.

Non-cognitive approaches to pragmatics are interested in mental states only as far as they are conventionally expressed in sentences. According to Searle's principle of expressibility, mental states can be explicitly and literally expressed by sentences. The observation of mental states is reduced to the sentences that express them, which, in turn, makes expressibility resemble the code model of communication (Reboul & Moeschler, 1998a: 39–40). Non-cognitive theory persists in a number of areas, including linguistic pragmatics (Reboul & Moeschler, 1998a: 43) and text linguistics.[7] It is similar

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[6] Searle worked mostly on the conventional and intentional dimensions of illocutionary acts.

[7] Beaugrande and Dressler are a noteworthy example of a very modern approach in the sense that these text linguists realised early on that "the artifacts of speech and writing alone […] are inherently incomplete when isolated from the processing operations performed upon them" (de Beaugrande & Dressler, 1981: 35). They also refer to cognitive concepts, including "intentionality" (de Beaugrande & Dressler, 1981: 31), "*attitudes* of text users" (de Beaugrande & Dressler, 1981: 113), and their "beliefs and knowledge" (de Beaugrande & Dressler, 1981: 132–133). However, Beaugrande and Dressler do not provide a "psychologically plausible" model of

to the argument for a plain meaning doctrine in international law (Bianchi, 2010: 36 ff. on this notion), since non-cognitive theories assume everything is contained in the words or sentences. Even when non-cognitive theory draws back from the sentence to view the whole text as a larger linguistic unit (text linguistics), its assumption appears to be that "if we cannot say that it is all in the sentence, we will say that it is all in the text" (Reboul & Moeschler, 1998b: 17).[8] Similarly, discourse analysis tends to neglect mental states, by claiming all meaning is contained in the discourse or in the societal structures that surround the discourse.[9] While discourse analysis has incorporated cognitive concepts, such as *"frame analysis"* (cognitive patterns that structure knowledge) (Spitzmüller & Warnke, 2011: 92), it appears that the even supposedly cognitive approaches within discourse analysis are essentially non-cognitive, as they seem interested in mental states only as far as they are conventionally expressed in sentences: for instance, Fraas claims that, in principle, implicit knowledge can only be found in texts, where it is verbalised (Spitzmüller & Warnke, 2011: 91, quoting Fraas, 2003). In other words, these approaches appear to take a mostly external perspective on internal cognitive processes.

3.3. Grice and the emergence of modern pragmatics

Grice's work began the cognitive turn in pragmatics. With the 1975 publication of one of the founding articles of modern pragmatics, *Logic and Conversation* (Grice, 1975), the shift away from non-cognitive theory started. Grice postulated that the success of a communication act does not depend on exact linguistic coding. Instead, such success requires the addressee to recognise the speaker's *intention*. Grice introduced the distinction between a *sentence* and an *utterance* (Reboul & Moeschler, 1998a: 50). In linguistics and pragmatics, sentences and their meaning are context-independent[10] and "sen-

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cognitive processing since they cannot explain why concepts would be activated, how this activation would spread to activate other concepts, how many inferences may be drawn, or where and why cognitive processing would stop (de Beaugrande & Dressler, 1981: 102). This problem seems to lead them, in spite of their insights, to maintain conventionalist criteria or standards of textuality, such as cohesion (de Beaugrande & Dressler, 1981: 19).

[8] In the original "à défaut de pouvoir dire que tout est dans la phrase, on dit que tout est dans le DISCOURS".

[9] Discourse analysis has a different scope from text linguistics. For a discussion of their relationship, see Adam (2005: 19). Discourse analysis neglects mental states in favour of predominantly sociological research topics – such as in critical discourse analysis. Critical discourse analysis is applied e.g. in sociolinguistics and studies the relationship between aspects of society and the use of language. Critical discourse analysis may also take a sociology of knowledge approach. Keller (2006: 130), a proponent of the sociology of knowledge approach, cites Fairclough, van Dijk and Jäger as scholars who actively take a sociolinguistic approach.

[10] The concept of "context-independence" leads us back to the semantics/pragmatics border wars mentioned in footnote 4. Semantics can refer both to context-independent words or sentences, but also to "what is said" in utterances (von Heusinger & Turner, 2006: 1, quoting Stalnaker). In other words, there is "an ambiguity in the word 'semantics' that too often goes unnoticed", which, in turn, makes the contextdependence/independence distinction less clear-cut (von Heusinger & Turner, 2006: 2). In Relevance Theory (see section 3.4. and footnote 18), which draws on Grice's theory, this distinction could translate into "a conception of

tence" refers to "information associated with that sentence according to the underlying linguistic system" (Linderfalk, 2007: 30, quoting Blakemore, 1992: 3–10). Utterances and their meaning (also called speaker meaning – Sperber & Wilson, 1995: 21) are context-dependent and refer to "the information associated with that utterance according to the intentions of the utterer" (Linderfalk, 2007: 30, quoting Blakemore, 1992: 3–10). According to Grice, a speaker or writer who utters intends the addressee to recognise the intention behind the utterance, and this recognition is what produces the effect. The addressee may use logical inferences, based on certain assumptions, to recognise the speaker's intention, if the addressee assumes that the author is rational. This involves what Grice calls the principle of cooperation and the conversational maxims of quality, quantity, relation, and manner. Exploiting these maxims triggers the implicit meaning of an utterance, which Grice calls *conversational implicatures*.[11] For example, if Peter asks, "Will you go to pragmatics class?" and Mary answers, "I have a doctor's appointment at four", Peter, who assumes that Mary is rational, believes that her utterance must contain an answer to his question. When he compares the time of the class with that of the appointment, Peter concludes that Mary's answer is no (Zufferey & Moeschler, 2012: 106). Conversational implicatures are built on context-based hypotheses, rather than on linguistically encoded information. The Gricean model of communication aligned pragmatics more closely with the cognitive sciences (Zufferey & Moeschler, 2012: 19–20), which intend to explain the way the human mind works (Reboul & Moeschler, 1998a: 59).

3.4. Relevance Theory and the turn towards the cognitive sciences

Sperber and Wilson built on a number of elements from Grice's work when they made their seminal contribution in the form of Relevance Theory. Relevance Theory recognises the existence of implicature, and accepts that the addressee *infers* the speaker's implicated meaning from the words that are spoken. But Relevance Theory also intends to reveal the way implicatures are *triggered* (Wilson & Sperber, 2004: 607, emphasis added). Sperber and Wilson thus give special importance to the content of only one of Grice's maxims: the notion of relation (*relevance*):

> "[U]tterances raise expectations of relevance, but [Relevance theorists] question several other aspects of his account, including the need for a Cooperative Principle and maxims, the focus on pragmatic contributions to implicit (as opposed to explicit) content, the role of maxim violation in utterance interpretation [...] The central claim of relevance theory is that the expectations of relevance raised by

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semantics as actually two separate, though related systems that interact with a *pragmatics* system" (Börjesson, 2014: 302–303).

    [11] Conversational implicatures, in turn, are the starting point for dominant contemporary pragmatic theories, i.e. neo-Gricean approaches and post-Gricean approaches. The principal representatives of neo-Gricean approaches are Levinson and Horn. Post-Gricean approaches were inaugurated by the 1986 publication of Sperber and Wilson's *Relevance*.

an utterance are precise and predictable enough to guide the hearer toward the speaker's meaning. The aim is to explain in cognitively realistic terms what these expectations amount to, and how they might contribute to an empirically plausible account of comprehension." (Horn, 2004: 22)[12]

Sperber and Wilson point out that there are more or less implicit – as well as nonverbal – forms of communication (Sperber & Wilson, 1995: 59–60). They argue that implicit communication is much more vague than explicit statements, and that this vagueness is often intentional (Sperber & Wilson, 1995: 56). Relevance Theory can accommodate these cases because the speaker's informative intention is to modify directly "not the thoughts but the cognitive environment of the audience" (Sperber & Wilson, 1995: 58). In contrast to accounts that follow a strict code model of communication, Relevance Theory claims that "thoughts do not travel" from one brain to another (Sperber & Wilson, 1995: 1) by means of encoding and decoding. Instead, thoughts must be attributed and inferred on the basis of the interlocutors' cognitive environment. A cognitive environment is a set of assumptions that are "*manifest* to an individual; that is, *assumptions that are entertained as true or inferable*" in the inferential process of verbal communication (Moeschler, 2009, emphasis added).[13] The interpretive or contextualising process of formulating, confirming, or infirming hypotheses generates new assumptions or strengthens, weakens, or suppresses old assumptions (Moeschler, 2009: 13–14). The process as a whole is geared by the search for relevance. The more similar assumptions two people share, the greater the overlap between their cognitive environments (Sperber & Wilson, 1995: 41) and the more likely the search for relevance will lead to successful communication (Sperber & Wilson, 1995: 44).

However, as is shown subsequently (section 4.3), scholars in international law sometimes have drawn erroneous conclusions from these insights, replacing a code model of communication with a solely inferential model, which certainly goes too far. Sperber and Wilson argue that all forms of communication involve a two-fold intentional (*ostensive-inferential*) process (Reboul & Moeschler, 1998a: 72). The speaker must explicitly show a communicative intention (*ostension*) to communicate a particular piece of information to the addressee, which the addressee then has to infer (*inference*) (Zufferey & Moeschler, 2012: 108). If we use Relevance Theory to explain verbal communication, "the correct interpretation is a by-product of *linguistic information*, contextual premises and deductive processes" (Moeschler, 2009: 8, emphasis added).[14] Relevance Theory does not consider semantic meaning to be peripheral to a cognitive pragmatic theory

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[12] These basic differences can be attributed to the fact that "Grice's concerns lay in an account of speaker meaning (of which implicature constitutes a proper subpart), while relevance theorists have been primarily concerned with developing a [realistic] cognitive psychological model of utterance interpretation" (Horn, 2004: 22).

[13] We base ourselves on the following version of this paper: Online Source 1–26; https://docs.google.com/file/d/oBoSyOnDGrlhyZmQwZWVmZWEtMDFlZSooYTU5LWFhNTctNjQ2ZWUxMTZkODRm (accessed 15 June 2016) 13.

[14] Linguistic information is what distinguishes non-verbal from *verbal* communication: "[v]erbal communication proper begins when an utterance … is manifestly chosen by the speaker for its semantic properties" (Sperber & Wilson, 1995: 178).

of meaning and interpretation in verbal communication, but "marries […] decoding and inferential processes" (Reboul & Moeschler, 1998a: 63).[15]

According to Sperber and Wilson, interlocutors may not cooperate, and still successfully communicate. They thereby criticise Grice's cooperative principle, and his concept of conversational maxims (Wilson & Sperber, 2004: 611, 613). They claim that "any external stimulus or internal representation which provides an input to cognitive processes may be relevant to an individual at some time" and that "the search for relevance [regarding those stimuli and representations] is a basic feature of human cognition, which communicators may exploit" (Wilson & Sperber, 2004: 608). In Relevance Theory, human cognition is entirely constrained by the principle of relevance, also termed the First (or Cognitive) Principle (Sperber & Wilson, 1995: 261). Human cognition is intended to maximise relevance (Moeschler, 2009: 11, quoting Wilson & Sperber, 2004). The First Principle entails the Second (or Communicative) Principle of relevance (Sperber & Wilson, 1995: 261): every utterance presumes its own optimal relevance (Moeschler, 2009: 12, quoting Wilson & Sperber, 2004).

Relevance can be schematised as cognitive effects and processing effort. Relevance is a matter of degree (Wilson & Sperber, 2004: 609) and characterised in terms of cost-benefit (Wilson, 2003: 252). The more cognitive effects or pieces of information available to the addressee, the greater the relevance of the utterance, and vice versa (Zufferey & Moeschler, 2012: 108). Information is relevant if it has at least one positive cognitive effect in a given context – if it adds, modifies, or deletes information (Moeschler, 2009: 11). A "positive cognitive effect is a worthwhile difference to the individual's representation of the world: a true conclusion, for example" (Wilson & Sperber, 2004: 608), such as establishing the correct meaning of a treaty provision. Relevance Theory suggests that cognitive effects and cognitive processing can be naturally balanced internally: "a. Follow the path of least effort in computing cognitive effects (…). b. Stop when your expectations of relevance are satisfied (or abandoned)" (Moeschler, 2009: 12–13, quoting Wilson & Sperber, 2004: 613).

Relevance Theory draws on cognitive science, specifically the Theory of Mind, to explain how inferential processes result in the correct interpretation of utterances. Relevance Theory is a form of cognitive pragmatics in which speakers are mind-readers (Moeschler, 2009: 10, citing (Baron-Cohen, 1995) as a representative of this approach). This ability to read minds is "neither random nor the result of social or linguistic conventions", but is produced by what the cognitive philosopher Daniel Dennett called the *intentional stance*, the idea that humans have an innate ability to attribute mental states, such as intentions and beliefs, to others (Moeschler, 2010: 223, emphasis added, citing (Dennett, 1987) as the scholar who coined this concept). Relevance Theory thus combines utterance interpretation in context with elements of cognitive theory (Moeschler & Auchlin, 2009: 178).

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[15] In the original, Relevance Theory "marie […] les processus codiques et les processus inférentiels".

The intentional stance, though not infallible (Reboul & Moeschler, 1998b: 48), allows an individual to predict the behaviour of others, based on two premises. First, other individuals are rational agents. Second, other individuals are endowed with beliefs, desires, and other mental states (Reboul & Moeschler, 1998b: 47). Inferential processes in verbal communication are thus interpretive processes of formulating and confirming or infirming context-based hypotheses. Context, in turn, is partly determined by the linguistic meaning of utterances (Reboul & Moeschler, 1998b: 49–50), and partly by the information the addressee can retrieve at a given moment from short-term or working memory – for instance, the addressee may process sensory information, or the preceding utterances, or long-term memory triggered by the semantic content of utterances (Moeschler & Auchlin, 2009: 180).

At this point, we can now describe the process by which utterances are interpreted, including the notions of explicature and implicature. The addressee first decodes linguistic meaning and then follows the path of least effort to *"enrich it at the explicit level* and *complement it at the implicit level* until the resulting interpretation meets [their] expectation of relevance" (Wilson & Sperber, 2004: 613, emphasis added). By "explicit level," we mean "what is said", and by "implicit level" we refer to what is implicated by a speaker. The linguistically coded content of communication is relevant, but the addressee cannot infer everything from those codes. One marked difference between Relevance Theory and Gricean accounts is that Relevance Theory does not restrict pragmatic inferential processes that trigger implicatures to what is implied, but also relies on those processes to determine what is said. Explicit content has to be pragmatically inferred because utterances do not usually express complete propositions.

Pragmatic enrichment of explicit content is called *explicature* (Zufferey & Moeschler, 2012: 121). The need for pragmatic enrichment at the explicit level can be illustrated with the example of attribution of referents. Begin with the sentence: "She carried it in her hand." The addressee must pragmatically enrich the sentence to obtain its full meaning or proposition (Moeschler & Reboul, 1994: 124–125) which, here, determines *who* carried *what* in their hand.[16] Only after enriching the sentence can the addressee evaluate the truth of the proposition,[17] which is part of semantics (see next section below).[18]

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[16] The example illustrates pragmatic enrichment with the help of *procedural* meaning. The distinction between *conceptual* and *procedural* meaning is another element not typically covered by legal scholars. This omission becomes visible when we discuss the misreading of pragmatics by some international lawyers. In the statement, "she carried it in her hand", *she, it* and *her* are not descriptive, as would be the case with conceptual meaning. Procedural meaning is contained in personal pronouns and conjunctions, which guide the addressee's interpretation. In the above statement, personal pronouns instruct the addressee to determine their referent. International lawyers often neglect procedural meaning and favour conceptual meaning. This is why, to keep matters simple, we also continue to focus on conceptual meaning, and return to procedural meaning only in footnotes 21, 33, 38 and 47.

[17] This is because "she" and "it" do not correspond to definite concepts, but mark an unoccupied place where a concept might go (Sperber & Wilson, 1995: 72–73). Pragmatic enrichment also plays a role in the correct referent attribution in case of lexical ambiguities (Reboul & Moeschler, 1998a: 87).

An example of explicature in international law can be found in the *Chevreau* case.[19] The case concerned a complaint by Mr Chevreau that he had been mistreated while detained in Persia and Baghdad in 1918. The arbitrator in the case was faced with a problem caused by the way the *compromis* was worded when the parties submitted the dispute to arbitration. The *compromis* gave him jurisdiction only over Mr Chevreau's detention "in Persia in 1918", but the arbitrator decided to extend his jurisdiction to cover the detention period in Baghdad as well, because the parties did not indicate a desire to exclude this period from his consideration. Instead, they had constantly discussed the circumstances of the whole period of Mr Chevreau's detention. The arbitrator concluded that the parties had erred when they used certain terms in the *compromis*. These terms, if "taken literally", would limit the arbitrator's jurisdiction only to the period of Mr Chevreau's detention in Persia.[20]

From the semantic point of view, "Persia" does not refer to Baghdad, since Baghdad is not in Persia. But the conceptual term may be pragmatically enriched, if, as the arbitrator indicated, the parties were probably referring to a broader geographic area, something akin to the eastern-central part of the Middle East, which includes Baghdad. The arbitrator bases this reading of "Persia" on his general knowledge and on the context of the statement. He knows that people do not always describe geography in sufficient detail. The human mind flexibly forms categories, uses stereotypes, and is limited by its level of knowledge about the subject (Zufferey & Moeschler, 2012: 42–43). Consequently, the arbitrator understands that the parties in the case may have used "Persia" as a general designation for "Middle East". Finally, the arbitrator is aware that the parties constantly discussed Mr Chevreau's detention in Persia and in Baghdad, without distinguishing between the two detention periods. A broader understanding of "Persia" may be understood as mutually manifest, or as part of the parties' shared cognitive environment. Consequently, the arbitrator (the addressee) did not limit his understanding of "Persia" to its semantic meaning, but attributed to it a pragmatically enriched conceptual meaning.[21]

Having described and illustrated pragmatic enrichment at the explicit level of the utterance interpretation process, we now turn to the implicit level of this process. In contrast to explicatures, *implicatures* are contextual inferences that an addressee draws from the meaning of the sentence; these inferences then lead to cognitive effects in

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[18] This brings us back to footnote 10 and more recent discussions in Relevance Theory (Börjesson, 2014: 114) that suggest conception of *semantics* as actually two separate, though related systems that interact with a *pragmatics* system (ibid. 302–303). "*[L]inguistic semantics*" deals with the lexical meanings of linguistic expressions and their composition, while in "*real semantics*" propositions are semantically interpreted (ibid. 298): "Thus, it is the contributions of *linguistic semantics* and *pragmatics* that are interpreted by *real semantics* at various steps during utterance interpretation. While the *linguistic semantic* contribution is stable, the pragmatic contributions might change, since they are defeasible" (ibid. 303).

[19] *Affaire Chevreau (France contre Royaume-Uni)* (1931) 2 RIAA 1113, 1137–1138.

[20] "[P]ris à la lettre" in the original.

[21] Note that there are no instructions contained in Persia as it was in the case of the procedural meaning of "she carried it in her hand", see footnote 16, but that the arbitrator enriched the conceptual content of "Persia".

their cognitive environments (Moeschler & Auchlin, 2009: 179).[22] If Peter says "It is four o'clock", Mary might infer, depending on the context, that they will be late for a class that starts at four o'clock, or that they still have time for a coffee before an appointment at five o'clock (Zufferey & Moeschler, 2012: 122). The proposition "It is four o'clock" is either true or false (see also next section below). Implicatures, in contrast, fall on a range from stronger to weaker (Sperber & Wilson, 1995: 199). This means that an utterer may not always be fully committed to the truth (Linderfalk, 2013/2014: 33) of implicatures, but instead may have more or less confidence in them, and communicate them more or less powerfully (Sperber & Wilson, 1995: 75, 199).

3.5. Shifting the boundaries between semantics and pragmatics

As illustrated above, explicatures can be so-called "pragmatic intrusions" into the truth or falsity (truth-condition) of utterances (Zufferey & Moeschler, 2012: 176). Traditionally, semantics and pragmatics are separate realms. Semantics focuses on elements that influence the truth-condition of utterances. Pragmatics is concerned with elements unrelated to truth (Zufferey & Moeschler, 2012: 180). For example, semantic analysis enables us to determine if the utterance "it is four o'clock" is true or not. Pragmatics examines what is implied, a complementary level of meaning that does not influence truth-condition. In our example, "it is four o'clock", a speaker could be implying that the addressee will be late for a four o'clock appointment (Zufferey & Moeschler, 2012: 122). This implied content has nothing to do with whether it is four o'clock or not (Zufferey & Moeschler, 2012: 172). The implied content may therefore be cancelled: even if it turns out that it is *not true* that the addressee has an appointment at four o'clock, it may still be *true* that it is four o'clock. While still relevant, the traditional distinction between semantics and pragmatics has, however, recently been brought into question.

In an attempt to maintain traditional distinctions between semantics and pragmatics, some scholars suggest confining semantic analysis strictly to linguistic elements; this would potentially leave a wide gap between speaker meaning and what is covered by this new focus in semantics (Zufferey & Moeschler, 2012: 179).[23] But the borders between semantics and pragmatics are not clear cut. Many factors affect truth-condition, which would normally relegate them to semantics, but they may also draw on context, which place them squarely within pragmatics (Zufferey & Moeschler, 2012: 180). Presuppositions are a good example of this. They are implicit premises, intrinsically linked to semantic sentence content, but they depend on inference from context. A

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[22] There are different types of contextual inferences or *implicatures*. These correspond roughly to Gricean conversational implicatures. Yet, they are not triggered by a conversational maxim, but by the principle of relevance (Sperber & Wilson, 1995: 194–197).

[23] See also generally on so-called semantic underdeterminacy (Carston, 2002: 11).

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speaker who says, "Peter's daughter arrived yesterday", takes for granted that the addressee knows that Peter has a daughter (Zufferey & Moeschler, 2012: 88). The addressee would have to draw on their knowledge of Peter's daughter to interpret the intent of the speaker. But if presuppositions are cancelled, it affects truth-condition (Zufferey & Moeschler, 2012: 90).[24] We can see how this works if we explicitly cancel the presupposition in the above example. For example, "Peter's daughter arrived yesterday, *and Peter has no daughter*" cannot be considered true, unless we construe a very exceptional context. Presuppositions fall within pragmatics because they draw on context, but they defy traditional categorisation because they also affect truth-condition (Zufferey & Moeschler, 2012: 180).

In this light, approaches to interpretation in international law appear to maintain very traditional distinctions of "what is said" and "what is implied", and too easily dismiss semantic elements as peripheral, or tend to claim seemingly clear categories of context that may turn out to be untenable. Pragmatic intrusions into semantics thus offer a reason to weave together international law and pragmatics. The fact that Sperber and Wilson adopt cognitive psychological concepts like the intentional stance illustrates the intent of these authors to expand the traditional boundaries of linguistics and to put intentionality – one's own and others' – at the centre of their theory (Reboul & Moeschler, 1998b: 47). As more recent insights blur the distinctions between semantics and pragmatics, and move us towards a more cognitively grounded theoretical architecture, we should arguably also move away from simplistic understandings of the process of communication, interpretation, and intentionality in international law. However, there are not many accounts of interpretation in international law that would take into account these insights. In the next section, we therefore turn the lens of linguistics and pragmatics on accounts of interpretation offered by those international lawyers that do take into account these disciplines. But a closer look finds their accounts still too quite some extent based on concepts and distinctions that linguistics and pragmatics have already mostly abandoned.

4. Research in international law on interpretation, linguistics, and pragmatics

A potentially broad field of scholarship emerges if we examine all contributions that have engaged with both linguistics or pragmatics and the topic of interpretation in ways that may be relevant to international law scholarship. We briefly describe research efforts to date, and exclude research that does not focus sufficiently on linguistics or pragmatics. The busy reader may wish to jump to section 5 at this point if they

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[24] Zufferey and Moeschler point out, however, the exceptional case of metalinguistic negation.

are more interested in the integration of pragmatics into the study of legal interpretation than in the state of the scholarly debate. We find two problems with the work of scholars who do engage seriously with the mentioned topics. The first is that they often bypass pragmatics, and overlook its potential when they turn to sociological approaches to explain the phenomenon of interpretation. The second is that when they engage pragmatic theory they sometimes misread theory or base their critiques on very traditional work.

4.1. Legal scholarship on interpretation in international law

International legal scholarship is focusing, more and more, on the interpretation of international law. This development has engendered a rich set of interdisciplinary approaches (Dunoff & Pollack, 2013). The powerful and diverse international judiciary is now recognised to play the role of a veritable "law-maker" (von Bogdandy & Venzke, 2011, 2012). As the role of international courts and tribunals increases and their range of activities expand, more and more scholars in international law are focusing on the judiciary and in particular its interpretation of international treaty norms. The 40-year anniversary of the Vienna Convention on the Law of Treaties has garnered much attention and inspired many publications, including several that focus on the rules of interpretation for treaties enshrined in the Convention's Articles 31 to 33 (Villiger, 2009; Orakhelashvili & Williams, 2010; Corten & Klein, 2011; Cannizzaro, 2011; Fitzmaurice, Elias, & Merkouris, 2010; Merkouris, 2015). Scholars have written monographs on interpretation in international law (Kolb, 2006; Fernández de Casadevante Romani, 2007; Orakhelashvili, 2008; Gardiner, 2008), in general, and in specific fields of international law (Van Damme, 2009; Abi-Saab, 2010; Waelde, 2009; Schreuer, 2010; Waibel, 2011; Benavides Casals, 2010). More recently, the focus has shifted towards the interpretation of international law by domestic courts (Aust & Nolte, 2016). They have used different methods, including critical legal theory (Zarbiev, 2010), indeterminacy critique (Lang, 2011: 350), and empirical approaches (Shaffer & Ginsburg, 2012; Pauwelyn & Elsig, 2013: 445).[25]

But one has to take a closer look to find scholarship that engages with linguistics. Intuitively, one might think that the field of law and language might be a good candidate for exploring the link between international law, interpretation, and linguistics. Law and language does recognise that "law *is* language" because it relies on language for its use (McAuliffe, 2012: 200). A look at recent handbooks of law and language, also termed legal linguistics or comparative legal linguistics, makes it obvious that many of the issues they raise pertain to pragmatics. While the term legal linguistics "has no set

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[25] Pauwelyn and Elsig for example built a framework to explain the variety of interpretive choices faced by international courts and tribunals through the lens of notions such as demand-side interpretation space and supply-side interpretation incentives.

content" (Mattila, 2013: 25), prominent research directions (Solan & Tiersma, 2012: 4) include the creation (Galdia, 2009: 89), history (Mattila, 2013: 161 ff. on the heritage of legal Latin; Tiersma, 2012: 13 ff.), and structure of legal language as a "language for special purposes" (Mattila, 2012: 27), its application (Galdia, 2009: 156 ff.) in legal interpretation as a speech act (Schane, 2012: 100), texts and genres (Gotti, 2012: 52), rhetoric (Mattila, 2013: 5–6), norms and culture, cognition (Solan & Tiersma, 2012: 3), reasoning and rationality (Galdia, 2009: 171 ff.), multilingualism and translation (Bastarache, 2012: 159; Engberg, 2012: 175), and forensic linguistics.[26] But law and language approaches do not situate language and its use within a coherent analytical framework. These approaches generally tend to account only for fragments of linguistics and its different related branches. Except for some discussions of speech act theory, law and language as a discipline appears to engage both with pragmatics and international law mainly from the perspective of multilingualism and translation.[27] Researchers in law and language are not usually international lawyers, which may to some extent explain this particular perspective. There are, however, some international lawyers who do focus on pragmatics.

4.2. Linguistics, pragmatics, and the sociological approach to language and interpretation

Some international legal scholars who study legal interpretation have ventured into the field of linguistics. They have touched on, but not fully integrated, pragmatics. Instead, they seem to prefer to readily adopt sociological approaches (Hirsch, 2005; Hirsch, 2008; Hirsch, 2014) to interpretation. Their stepping stone for this purpose is the concept of interpretive communities. Stanley Fish, creator of the concept, defined such communities as "not so much a group of individuals who share [...] a point of view, but a point of view or way of organizing experience that share[s] individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance [are] the content of the consciousness of community members" (Fish, 1989: 141). While not necessarily sociological in Fish's account, scholars such as Bianchi and Venzke have used the concept to focus directly on sociological aspects when studying interpretation. Our point becomes clearer when we scrutinise Bianchi's and Venzke's work in more detail.[28]

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[26] Forensic linguistics deals, for instance, with courtroom discourse and evidence in judicial procedures, see, e.g., Stygall (2012: 369).

[27] See Part III of the *Oxford Handbook of Language and Law* (Oxford University Press, 2012). See also, e.g., Galdia (2009: 221–222), who dedicates a mere two pages of a comprehensive monograph to the interpretation of international law. See also Simonnaes (2012).

[28] Neither does more recent work by the two scholars mentioned address pragmatics, see their and other scholars' contributions in Bianchi, Peat, & Windsor (2015).

In Bianchi's view, legal interpretation is denigrated and relegated to purely academic discourse because of international lawyers' prevailing belief in the primacy of the text, which is often referred to as the textualist position (Bianchi, 2010: 34–35). Bianchi touches on pragmatics when he contends that "the interpretive process, far from being merely the produce of linguistic analysis, is deeply embedded in a [...] context" (Bianchi, 2010: 35). But he concludes that legal interpretation must be "free[d ...] from the shackles of linguistics" (Bianchi, 2010: 38). For Bianchi, the answer is to turn away from analysing alleged inherent properties of a text, and to focus on "interpretive communities whose strategies ultimately determine what a text means" (Bianchi, 2010: 36, picking up the term used earlier by Fish, 1980).[29] Bianchi seems to move towards sociology for this purpose because of a misunderstanding of the functions of linguistics and pragmatics. Apparently, for Bianchi linguistics is limited to "plain meaning" found in "a language dictionary" (Bianchi, 2010: 37). As a consequence of this he believes that linguistic analysis cannot solve the problems posed by meaning and interpretation in international law (Bianchi, 2010: 49).

But "context and/or other extra-linguistic elements" (Bianchi, 2010: 36), such as "our knowledge and experience, which create [...] cognitive expectations" (Bianchi, 2010: 45) or the "shared interpretive strategies within the relevant interpretive community" (Bianchi, 2010: 54) cannot, by themselves, create or determine meaning in verbal communication. Interpretive strategies are inextricably linked to linguistic elements of a legal text (the "shackles of linguistics"). Bianchi admits that sociological aspects of interpretive processes provide no epistemological foundation for a theory of meaning (Bianchi, 2010: 53–54). As an unfortunate consequence, his proposal to turn to sociology cannot satisfy his own demands, i.e. to provide an epistemological foundation for a theory of meaning. For the observer, his reasons for looking to sociology for an account of the process of interpreting legal language remain therefore largely obscure. This example illustrates the problem that legal researchers have when they try to locate pragmatics on the linguistics map.

At a closer look, Venzke's approach meets similar objections. Like Bianchi, who refers to the importance of the actors' "*purpose*" (Bianchi, 2010: 55, emphasis added), Venzke realises the vital role that actors' "*motives* in legal interpretation" play: "interpretations take part in the creation of what they purport to find" (Venzke, 2012: 18, emphasis added). For Venzke, application of law is more than mere clarification. The concrete meaning of a norm in an individually disputed case cannot be "*discovered* but only *created*" (Venzke, 2012: 31–32).[30] Despite his realisation that thoughts do not travel, but are inferred or "created" in the mind of the addressee, Venzke, too, appears to leap to the conclusion that a "sociological" approach will provide the best account of legal communication (Venzke, 2012: 33) and interpretation (Venzke, 2012: 43): "what partici-

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[29] In international law, a somewhat similar approach has already been attempted by Vagts (1993).

[30] Legal interpretation therefore is an *intentional* act for Venzke, involving volition and judgement (Venzke, 2012: 30).

pants in legal discourse actually do" with language. Venzke uses the concept of interpretive communities, but does not explain how they could create and give meaning to law "through their narratives and precepts" (Venzke, 2012: 35, quoting Sandholtz, 2007) without language playing a role in the process; in other words, how the interpretive process works in the human mind via what is said and implicated. The author's attitude towards the linguistic elements of verbal action thus arguably leads him down a slippery slope: he directs so much "caution […] against overburdening language with functions it cannot provide" (Venzke, 2012: 40 footnote 121) that there seems no function left.

In this light, it seems justified to conclude that legal scholars to quite some extent seem to be unaware of more recent developments in linguistics. When Venzke claims that expressions only have a meaning attributed to them by their use (Venzke, 2012: 31), he simultaneously admits that he "err[s] on the side of the actors[']" social behaviour instead of on the side of the "working of [linguistic] structures" (Venzke, 2012: 46), see Venzke's reference to "words that constrain" (Venzke, 2012: 56) or "semantic content" (Venzke, 2012: 58). This statement illustrates that Venzke does not seem to take into account the above-mentioned insights into how "what is said" guides the addressee towards the speaker's meaning. Apart from referring to a few well-known authors,[31] Venzke's work does not refer to the major developments in the theory and philosophy of language (Venzke, 2012: 56) that have taken place in the last decades, even though they speak to the relation between language, meaning, and what he refers to as "communicative action" (Venzke, 2012: 219).

Another reason why Venzke takes a sociological approach is that he assumes language, like law, is "a social, not a natural product" (Venzke, 2012: 41). But his work does not provide a convincing explanation of the relationship between linguistic elements and their meaning. Despite this unresolved theoretical problem, Venzke concludes that the sociological concept (Venzke, 2012: 43) of *communicative practice* (Venzke, 2012: 56), which he uses "in a manner akin to habit or custom" (Venzke, 2012: 39), is well suited to discussing "freedom and constraint" in legal interpretation (Venzke, 2012: 38). Whether language is a social or a natural product is, however, still a matter of ongoing debate in pragmatics and the cognitive sciences (Reboul & Moeschler, 1998a: 13–14). And, while language is used mainly for verbal communication in social contexts, it is based on, and would not exist without our cognitive faculties, which are "natural" products, or, in other words, these faculties are innate and not socially acquired.

Venzke's notion of communicative practice therefore does not appear to be able to model what goes on inside agents' heads, or how they use and understand language in different contexts and situations. With the help of the notion of communicative practice one may, at most, document legal interpretation from an external perspective on

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[31] Mainly Donald Davidson (Venzke, 2012: 40 footnote 121), Dietrich Busse (Venzke, 2012: 59) and John Austin (Venzke, 2012: 220 footnote 115, referring simultaneously to John Searle).

verbal communication, observing that interpretation is "historically situated speaking, thinking, and acting" (Venzke, 2012: 42). Contrary to Venzke's assertion, there is, however, not necessarily an "intrinsic logic of social actions embedded in structures" (Venzke, 2012: 43). We arguably cannot abstract from our internal cognitive faculties and interpretive processes. Even if institutions shape human interaction (Venzke, 2012: 44, quoting North, 1990: 3) in the sense that there is a "co-constitutive relationship between agents and structures" (Venzke, 2012: 46), this is just one contextual factor[32] – rather than a model or account – of the process of legal interpretation in the human mind.

Venzke seems to see social or communicative practice as a crude panacea, while in Bianchi's account, such practice is the only solution to the indeterminacy problem: "one can never stop interpreting" unless this process is, supposedly, blocked by external social practice (Bianchi, 2010: 48–49).

Relevance Theory arguably provides a better-suited, cost-benefit-based answer to that question: interpreters should simply follow the path of least effort in computing cognitive effects and stop when their expectations of relevance are satisfied or have to be abandoned (Moeschler, 2009: 12–13, quoting Wilson & Sperber, 2004: 613). Social practice is one contextual element among others in the cognitive environment, and it *may* be taken into the cognitive cost-benefit analysis of relevance.

It should be noted to their credit that the two afore-mentioned approaches to interpretation in international law realise that the communicative environment (context) plays a crucial role in interpretation; consequently, they try to show that textualists are wrong and that the meaning of language in use cannot possibly be "fixed" once and for all. However, by claiming that semantic elements are unimportant, the authors leave aside all too easily the existence of our cognitive processing capacities, and the fact that we use our cognitive abilities to build on these elements.

Pragmatics both models the *practice* of verbal interaction, and takes into account the inevitable linguistic elements of verbal communication and interpretation. Pragmatics may thus be well-suited to provide a "perspective that mediates between *agency* oblivious to the intrinsic logic of legal interpretation and *structure* oblivious to living actors" (Venzke, 2012: 50).

4.3. International law scholars addressing pragmatics

Not all scholars of international law overlook pragmatics. To give one noteworthy example, Linderfalk is familiar with pragmatic theory. He aims to build his theoretical

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[32] Paradoxically, Venzke admits this at one point himself: "When actors enter legal discourses, they enter a *context* that is already structured by past practices and perpetuated rules" (Venzke, 2012: 50, emphasis added).

contribution to the study of interpretation on solid linguistic and pragmatic ground, but arguably some misunderstandings hamper his endeavour.

Linderfalk focuses "on the language used in international legal discourse" (Linderfalk, 2013/2014: 29) and aims to present a theory of meaning and interpretation in verbal communication. Among other things, he focuses on the conceptual terms in international legal language (Linderfalk, 2013/2014: 29), distinguishing between concepts and conceptual terms.[33] A "*concept* is a mental representation [... i.e.] a generalized idea of an empirical or normative phenomenon or state of affairs" (Linderfalk, 2013/2014: 29). Concepts "are formed through a process of abstraction. They are the result of the ability of the human brain to perceive of particular properties of phenomena as characteristics shared by all entities belonging to the extension of some certain concept" (Linderfalk, 2013/2014: 42). In turn, a "*conceptual term* is a term [...] used for the verbal representation of a concept" (Linderfalk, 2013/2014: 42).[34]

To address questions related to conceptual terms, such as their interpretation, Linderfalk underlines that international lawyers should draw on a "theory of meaning" (Linderfalk, 2013/2014: 42). To this end, the author uses a theory "first suggested by philosophers like John L Austin and John Searle [...] and later developed by modern pragmatics": Relevance Theory (Linderfalk, 2013/2014: 30). Basing his argument on Relevance Theory, Linderfalk coins the term *functionality*, which is "what the uttering of the term potentially does to the beliefs, attitudes or behaviour of participants of the same discourse" (Linderfalk, 2013/2014: 30). Utterance of the term influences the inferences participants make about the conceptualised phenomenon (Linderfalk, 2013/2014: 29) to which a conceptual term refers. Linderfalk offers functionality as a tool that will assist international lawyers to "explain and critically assess international legal discourse" and to "enhance their understanding of important legal activities, such as for instance the formation of international law" (Linderfalk, 2013/2014: 31).

Functionality is part of Linderfalk's effort to translate modern pragmatic theory into a workable language for international lawyers (Venzke, 2012: 198)[35]. Functionality, or the "*meaning potential*" of a term or utterance, is context-independent (Linderfalk, 2013/2014: 35). As Linderfalk later puts it, functionality is "dependent on whether some certain *kind* of assumption is *available* to some certain *potential* addressee" (Linderfalk, 2013/2014: 46). Functionality is only context-dependent in the sense that the meaning

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[33] As mentioned in footnotes 16 and 21, conceptual meaning gets most of the attention in scholarly contributions to interpretation in international law. Although the author does not distinguish between procedural and conceptual meaning, Linderfalk's contribution has the virtue of providing definitions and situating them within a theoretical framework.

[34] Linderfalk points out that the "cognitive sciences, psychology, and the philosophy of mind have long emphasized the importance of concepts for cognitive processes such as perception, reasoning, and understanding" and that the latter processes are "a necessary and important part of the way international lawyers think and talk about international law" (Linderfalk, 2013/2014: 42).

[35] Venzke highlights the importance of finding a common language, i.e. a "workable language that channels dispute".

of a conceptual term always depends on its relationship with other conceptual terms that belong to the same language system. This dependence implies the existence of principles that can explain those relationships (Linderfalk, 2013/2014: 45). Functionality implies a potential effort of "systemization", in which relationships are established between a person's mental representation (a given concept) and the set of assumptions that person holds about the world at large (Linderfalk, 2013/2014: 43).

Distinct from the notion of functionality, Linderfalk uses the term of the actual *function* or *effect*; the function of "an utterance of a conceptual term depends on whether some *particular* assumption was *actually* used by a particular addressee in the process of understanding it" (Linderfalk, 2013/2014: 46). The function or effect of an utterance thus depends on the existence of a particular context (Linderfalk, 2013/2014: 35). A conceptual term's significance cannot be established by the mere fact that that the utterer belongs to a certain category of agents (Linderfalk, 2013/2014: 48). Arguably, contextual elements like the place, time, or situation of an utterance have to be taken into account (Linderfalk, 2013/2014: 48).

In Linderfalk's view, contextual elements include the cognitive environment of the discourse participants in a particular situational context (Linderfalk, 2013/2014: 48), which refers to the "entire set of assumptions available to a participant in international legal discourse" (Linderfalk, 2013/2014: 46). Functionality thus depends on both situational and cognitive context (Linderfalk, 2013/2014: 35, 46, 48). At this point of Linderfalk's analysis, one may ask how exactly the conceptualised content is linked to its potential meaning or to the related inferences drawn by an addressee. If, as the author claims, there are rules and principles that govern the relationship between concepts, there should also be rules and principles that determine the properties or extensions of individual concepts and their relationship with inferences. Although Linderfalk is aware that "lexical meaning" exists (Linderfalk, 2013/2014: 49), he is reluctant to accord greater importance to these inherent properties of concepts, which he calls "the particular properties identifying a particular state of affairs" (Linderfalk, 2013/2014: 32–33).

It appears thus that Linderfalk seems to think that linguistics requires him to choose between a code model and an inferential model of communication. In his understanding, analysing "the meaning of conceptual terms by reference to what those terms describe" (Linderfalk, 2013/2014: 29) appears to be nearly peripheral to modern pragmatics. In fact, Relevance Theory explains, however, that in verbal communication the correct interpretation is a by-product of *linguistic information* or of *what is said*. According to Linderfalk, the idea of a rule-governed relationship between the inherent properties of a concept and inferences drawn, such as the explicatures and implicatures suggested by modern pragmatics, may force us to retreat to naive theories of textualism (Linderfalk, 2013/2014: 32–33). Despite this assumption, the author nonetheless correctly acknowledges that semantics – "the purely linguistic properties of utterances" as assigned to them by grammar and lexicon as "a sort of common core of meaning" (Linderfalk, 2007: 38–39, quoting Sperber & Wilson, 1986) – can be seen as a code that

links sentences with their meanings (Linderfalk, 2007: 38). Thus, decoding is "to some extent" part of inferring what the writer is trying to convey (Linderfalk, 2007: 42). But at this point Linderfalk concludes that linguistics requires us to make a clearcut choice between code and inference. He unnecessarily rejects the code model in favour of an exclusively inferential model (Linderfalk, 2007: 37, 48) and concludes on this basis that the "descriptive meaning" of semantics only plays a role in declarative assertions (Linderfalk, 2013/2014: 32–33).

Although in his earlier work Linderfalk differentiates between (contextindependent) sentences and (context-dependent) utterances and their respective meaning (Linderfalk, 2007: 30, quoting Blakemore, 1992: 3–10), in later writing he seems to situate his notion of potential meaning somewhere between the meaning of the sentence and the meaning of the utterance. Potential meaning mirrors sentence meaning, but is somehow linked to situational and cognitive context. It remains, however, unclear where the utterer's intention is situated, even though this is crucial to both interpretation in international law and modern pragmatic theories of meaning.

Furthermore, it remains open in Linderfalk's account how the writer or speaker factors in the addressee's assumptions or inferences in the process of utterance interpretation, and vice versa in the process of utterance uttering. How does a writer or speaker assume that they can convey their intentions in an act of verbal communication, i.e. achieve the afore-mentioned effect on an addressee's assumptions, beliefs, attitudes, or behaviour? A number of questions remain, in particular how we know when assumptions are shared (Linderfalk, 2007: 41), when we can take for granted that assumptions are mutually held (Linderfalk, 2007: 40) or even deduced from the "indirect evidence" of the linguistic meaning (Linderfalk, 2007: 42).[36] An explanation is also needed why discourse participants should *assume* mutual assumptions, against all the odds, such as diverging individual experiences, as mentioned by the author (Linderfalk, 2007: 40–41). Furthermore, it needs to be explained why they should make a secondorder assumption that discourse participants are rational and follow certain communication standards (Linderfalk, 2007: 36).

Relevance Theory provides a plausible account for these questions. The intentional stance allows Relevance Theory to replace the hardly achievable mutual knowledge requirement (Linderfalk, 2007: 40–41)[37] – or common knowledge requirement – with the

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[36] Nonetheless, Linderfalk already discusses this problem in a much more sophisticated fashion than Venzke, who merely mentions that in "linguistic theory [...] there are many alternative accounts that explain how communication can work without any (prior) agreement about the use of an expression" (Venzke, 2012: 221). Apart from a footnote in which he vaguely references a critique of "intellectualizing language and communication" (Venzke, 2012: 40 footnote 121), however, he fails to provide any account of how verbal communication and interpretation are supposed to work.

[37] Mutual knowledge could only be achieved if a speaker and an addressee could know that only shared assumptions are used in the communication process. For this purpose, the addressee must, however, *know* – and not merely *assume* – that the speaker knows that the reader holds an assumption, which again the reader must know and so forth *ad infinitum*. Mutual knowledge is thus impossible to achieve in the practice of verbal communication (Sperber & Wilson, 1995: 17–21).

weaker notion of *mutual manifestness* (Sperber & Wilson, 1995: 41). For a fact to be manifest to an individual, it must be perceptible or inferable at a given moment. Since manifestness depends on the cognitive abilities and the physical and cognitive environments of an individual at a given moment in time (Sperber & Wilson, 1995: 39), an individual may attribute a similar manifestness to their interlocutor (i.e. assume that there is a good chance that the cognitive environments of the two interlocutors overlap). Two restrictions apply, which show why the intentional stance is fallible: "people never share their total cognitive environments. Moreover, to say that two people share a cognitive environment does not imply that they make the same assumptions: merely that they are capable of doing so" (Sperber & Wilson, 1995: 41).

Although Linderfalk relies on Relevance Theory, there remain thus a number of open questions in his account (Linderfalk, 2007: 38). International lawyers have thus not yet fully exploited the potential of pragmatics for the study of interpretation in international law. We argue in the next section that integrating pragmatics into the study of interpretation in international law gives international law a more solid theoretical grounding. Only based on such solid grounding, both disciplines will benefit from engaging with other disciplines like sociology.

5. Integrating pragmatics into the study of interpretation in international law

We begin this section by addressing possible objections to integrating pragmatics into the study of interpretation of international law. International lawyers might conclude that, even if we are correct in our description of pragmatics, and of the problems legal scholars have had integrating it into their work, the critiques we have offered are obvious, common sense, or even "trivial" (Galdia, 2009: 37), i.e. not worthy of explication. They might argue that, in practice, one can actually "do" international law without worrying about the theoretical scaffolding that upholds the use of language. Intuitively, people feel that communication is successful in most cases. We may even reach certain conclusions by intuition, as the International Court of Justice did in our first example, when it interpreted the phrase "for the purposes of commerce" without consciously referring to the scientific apparatus of linguistics and pragmatics. But this lack of reflection hardly satisfies the standards of a scientific discipline, which international law claims to be. Even if it is accepted that we may reach a similar outcome in most cases, linguistics and pragmatics may help us to understand and model how a text like a treaty is processed by the human mind as it is interpreted. This may render the interpretive process more transparent. We therefore respond at this point to two objections commonly levelled against the claim that linguistic and pragmatic analysis

are useful in legal research on interpretation. Then we turn to the parallels between pragmatics and interpretation in international law and some perspectives as to what future achievements can and cannot be expected from pragmatics.

5.1. The collective intention problem

The first objection is based on the fact that an international legal communicator is not a single person, but part of a group or chain of authors whose intentions may differ: "for most such legal texts, the documents were drafted, approved, or ratified by large groups [...] It is not clear how, if at all, the differing individual intentions can be 'summed up' into a collective intention for the legal text" (Bix, 2012: 152). International legal communication is also usually temporally and spatially deferred, since international law, like law generally, is normally based on real-world experience, though it aims to regulate hypothetical future cases (Linderfalk, 2007: 96). This type of deferred communication means that interpretations will address multitudes in varying contexts. The easy way out of this dilemma is to abstract from inferable intentions and to conclude that all meaning is in the text ("'word meaning', 'plain meaning'" – Bix, 2012: 153) and can be decoded from the text. This conclusion is, however, cognitively untenable.

The concept of cognitive environments, Theory of Mind and the intentional stance arguably all offer solutions to the problem of collective intention. International legal communicators and addressees are normally international lawyers or are, at least, very familiar with international law, and they assume a mutually manifest cognitive environment. The addressee may assume that the existence of a potential multitude of addressees was manifest to the communicator. The intentional stance tells both communicator and addressee that they are rational and that it is unlikely that communication should be geared towards failure. Since communication is ostensive-inferential (see section 3.4. above), communicators and addressees should be able to infer the intended meaning implied in the treaty text from the linguistic evidence. Due to the functioning of relevance, "even if there was no conscious consideration of a problem [by the communicator], there may have been implicit [i.e. weaker or less relevant] assumption just below the level of conscious attention" (Benett, 2012: 117). According to the principle of relevance, "to have a representation of a set of assumptions it is *not necessary to have a representation of each assumption in the set. Any individuating description may do*" (Sperber & Wilson, 1995: 58, emphasis added).

An example from the history of international law may help to clarify the relevance of this last point, namely the 1815 declaration that pronounced Napoleon an outlaw. When representatives at the Vienna Congress heard about Napoleon's escape, they feared his imminent return to Italy and signed a document, declaring in French that Napoleon had placed himself *hors des relations civiles et sociales* ("outside civil and social relations") and, as an enemy and disturber of the peace of the world, had delivered

himself to *la vindicte publique*. The term *vindicte* can be understood, at least theoretically, as meaning either public justice, in the sense of prosecution, or public vengeance. If the latter definition applied, Napoleon would be an outlaw whom anyone could kill, without legal sanction. But under English law, due process would have required a trial before anyone was sentenced to be outlawed, imprisoned, or executed (Roberts, 2001: 140). Wellington, who had signed the document for Britain, was consequently attacked by his political opponents in Britain for having sanctioned Napoleon's assassination without respect to the requirements of due process (Corrigan, 2001: 284–285). The semantic elements of the declaration do not allow the reader to draw a clear conclusion on its reach. The signatories of the declaration had not had time to bring up and discuss all possible problems because the situation was an emergency. It is equally unlikely that Wellington thoroughly reflected on the different possible readings or the consequences of the declaration before he signed it. If we try to infer the authors' intentions, Wellington's signature under the document may provide a good example of an assumption made below the level of conscious attention. It seems reasonable to suggest that, in signing, Wellington assumed that due process must be respected in relation to the content inferable from the declaration. His underlying assumption, which limits the extent of inferences to be drawn from the text, was likely that the fundamental principles of due process, as represented or manifest in his legal cognitive environment, ought not to be suspended, in the absence of any hint of the opposite. This conclusion would also limit the extent to which an agreement had been reached by all parties in the form of the declaration, and renders the interpretation of *vindicte publique* as prosecution much more plausible.

5.2. The objection about the particularity of legal discourse

The second objection is that the "particularities of *legal* discourse" (Venzke, 2012: 46) fall outside the scope of pragmatics, which, some critics suppose, can only model ordinary, non-specialised communication. However, there has been no convincing effort in philosophy of language or related fields to show that legal interpretation is something entirely other (Bix, 2012: 155). In particular, no one has demonstrated that legal interpretation can be seen as communication without cognition. The cognitive tendency to maximise relevance, as described by the Cognitive Principle of Relevance Theory, is a universal human characteristic according to which interlocutors may "predict and manipulate the mental states of others" (Wilson & Sperber, 2004: 610). It is, therefore, active in all forms of communication, including discourse in international law.

Texts in international law are like other specialised forms of communication in that they use everyday as well as technical language (Linderfalk, 2007: 67). These texts are merely particular in their uses of archaisms, longwinded and complex sentences, and generally peculiar style (Mattila, 2013: 72, 119–127). Even the technical terms they use

are just conceptual terms that refer to conceptual content. The expert communicator (the international lawyer) should, as a result of their professional experience, have a mental representation of such content and related assumptions. Their subject-specific experience should also have given them mental representations of, and the ability to make assumptions about, the formal properties of texts in international law.

Their assumptions also include value judgments or second-order assumptions. Some may find problematic the assertion that assumptions are neither true nor false, but are measured in terms of their strength, as "more or less strong or well-founded" (Linderfalk, 2007: 43–44). But the idea of relative strength is arguably not problematic *per se*. The cognitive environment of an international lawyer, in which their mental representations and assumptions reside, also contains assumptions about acceptable and unacceptable inferred conclusions. The only phenomenon truly particular to interpretation in international law is its many explicit rules or conventions of interpretation (Linderfalk, 2007: 48). If mentally represented content of the rules of interpretation is part of the cognitive environment,[38] this content is readily available and applied, just as "can you pass me the salt?" is understood as a request and not a question about one's ability to pass the salt (Reboul & Moeschler, 1998a: 55). The fact that such usage is not simply decodable, but has to be processed for use before it is mentally manifest is made clear by the fact that laypersons, who are not (proficient) speakers of the "language" of international law, may not be able to infer such implicatures, despite semantic traces.[39]

But the idea of a mutual cognitive environment must not be overextended in this context since the intentional stance is fallible. The usefulness of the concept is best illustrated when the same rules of law are interpreted by different kinds of lawyers. When lawyers have divergent legal cognitive environments, they may argue over the correct interpretation. This becomes clear when we examine the example of the interaction between two legal regimes: human rights law and international humanitarian law. Although the semantic elements of the applicable norms do not vary, the legal cognitive environment of the human rights lawyer and the international humanitarian lawyer are not the same, and these divergences have become visible in the case law. International humanitarian lawyers have thus opposed interpretations suggested by human rights lawyers arguing that humanitarian law must remain "a realistic framework for regulating the unfortunate but inescapable violence of warfare" (Akhavan, 2008: 35). When lawyers with fundamentally different backgrounds interpret the same

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[38] To return to procedural meaning as set out in footnotes 16, 21 and 33, one may argue that these rules of interpretation are, in fact, procedural or instructional content and function similarly to the Gricean generalized conversational implicatures.

[39] See the vivid example presented in Gotti (2012: 57–58), where before a court the defendant is asked whether she pleads guilty or not. Upon her repeated reply that she does, the magistrate keeps insisting that she must use the language of the court and use the words "I plead guilty", because a simple "yes" will not do. The defendant as a lay person finds it visibly hard to understand why her – positive – reply is not accepted for formal reasons.

norm, differences are bound to result. Military lawyers used to be the main actors in international humanitarian law, but judges are an increasing force, and they gained experience in a context heavily marked by human rights thinking. Their cognitive environment was marked by time spent adjudicating cases in international tribunals, rather than giving guidelines of behaviour to soldiers in the field as the typical task of international humanitarian lawyers (Kennedy, 2005: 282, who argues that these two groups are "divided by a common language").

The example of the *Gotovina* case may help to illustrate this divide, a case which was decided by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY).[40] The Chamber had to decide if the individual elements of the crime against humanity of deportation under Article 5 of the ICTY Statute[41] were the same as those of the war crime of deportation enshrined in Article 49 of the Fourth Geneva Convention.[42] In the latter provision, such forcible transfers must begin in "occupied territory", but in Article 5 of the Statute, the only condition named in the text is that crimes such as deportation must be committed "against any civilian population". Interpreting Article 5, the Trial Chamber ruled that there could be no requirement that victims of deportation must be "in the hands of a party to the conflict" (on occupied territory). The provision applied to any civilian population within the borders of the state of the perpetrator (*Gotovina* case, para. 56). This meant that, even if hostilities had displaced most of the civilian population of the area in question already prior to the occupation, the prohibition of deportation could nonetheless be applied to the perpetrators.

Semantically, it is not improper to interpret the phrase "against *any* civilian population" as broadly as did the Trial Chamber. Most of the criticism the decision has received was directed against the underlying assumptions of the decision, which are part of the cognitive environment within which the judges interpreted Article 5. Critics of the decision have argued that the reference to "any civilian population" is a historic heritage from the Nuremberg Charter, and that it is mainly intended to cover populations *irrespective of their nationality*. These critics claim it does not at all address the question of whether a territory must be under the control of a perpetrator for deportation to occur (Akhavan, 2008: 33). The Trial Chamber's interpretation renders the norm very broadly applicable, in tune with a human rights reading of the law that intends it to extend protection for civilians as far as possible. Scholars with a cognitive environment marked by humanitarian law, by contrast, argue that Article 5 is rendered over-inclusive; in their view such an interpretation blurs the distinction between situations of occupation (where the regime of crimes against humanity should apply) and combat situations (where complexity and ambiguity prevail and the principles of humanitari-

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[40] Decision on Several Motions Challenging Jurisdiction, *Gotovina* (IT-06-90-PT), Trial Chamber, 19 March 2007. The presentation of the case is deliberately simplified for the purpose of the example.

[41] UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 7 July 2009 by Resolution 1877), as adopted on 25 May 1993 by Resolution 827.

[42] Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

an law should apply) (Akhavan, 2008: 33–34). The cognitive environments of humanitarian lawyers cause them to read the same norm differently. The two groups of lawyers do not attribute the same strength to the assumptions on which the interpretation of Article 5 is based. Human rights lawyers assume that the central content of Article 5 must be the protection of civilians, while the norm must be reasonably applicable in a context of warfare. Humanitarian lawyers focus on the reasonable application of the norm in warfare, and do not emphasise the protection of civilians as much.

5.3. Establishing a parallel between pragmatics and interpretation in international law

With these objections answered, parallels between the development of the discipline of pragmatics and interpretation in international law can now be suggested. Cognitive pragmatics has traced a path that interpretation in international law could, and in our view, should, follow. Interpretation in international law should no longer be limited to what international lawyers consider "extra-textual elements" like dynamic interpretation (cases in which a term's "ordinary meaning" has evolved over time and is no longer found in a contemporary dictionary of language, see section 2). Interpretation in international law needs to shift its focus from conventionalist practices in interpretation towards the cognitive processes that characterise interpretation. This would also entail a shift from a communicator-centric view towards a theory of utterance interpretation. As pragmatics (language use) has intruded into semantics (system or structure of meaning in language), an understanding of interpretation in international law as language use may intrude into the international legal system of norms, which is part of the structure or "meaning system" of the discipline of international law.

Such an intrusion is possible because cognitive economy ensures that language is never fully explicit, and that meaning must be inferred. While possible in principle, speakers do not usually aspire to full explicitness.[43] Such economy may also be one of the motivating factors behind another parallel development: just as language use may eventually bring about semantic change, interpretation in international law may potentially modify the semantic content of international law itself. Put differently, if meaning were fixed once and for all, this would unnecessarily burden life in future contexts.

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[43] Evolutionarily speaking, full explicitness would have put at risk the survival of the species. For example, the average time it would have taken humans under such conditions to warn each other about predators in a long-gone past would have been too long (Reboul & Moeschler, 1998a: 16–17). More generally speaking, if adaptive, such economy is a general principle in the evolution of natural phenomena, such as our cognitive faculty (Smolka, 2014: 24–25).

5.4. What pragmatics can and cannot do

Though important, there are limits to what pragmatics can contribute to interpretation in international law. During the process of interpretation, it will always be necessary to make ethical evaluations and weigh arguments. These cannot be "replaced" by examining the process of interpretation from the perspectives of linguistics and pragmatics. As Bix points out, even a "better theory of language, meaning, intention, or reference will not save us from having to make what are basically moral and political choices. [...] nor can those theories tell us that we must never (or always) deviate from whatever our general approach is when the result would be contrary to apparent purpose, contrary to morality, or contrary to common sense" (Bix, 2012: 155).

While correct in principle, some nuance can be added to Bix' views. Relevance Theory indeed cannot tell us how to make moral or, for that matter, social, or political decisions. Nor does it model the "working of actors' interests and preferences", the "politics of legal interpretation", and its related power and authority struggles (Venzke, 2012: 58–59), or the sociological aspects of interpretive processes. Relevance theorists consider conventions of language use to be sociological or legal problems rather than issues of pragmatics (Reboul & Moeschler, 1998a: 172). However, our cognitive abilities allow us to mentally represent information, including making assumptions about ethical, social, or political issues or the mutual manifestness of such information, and Relevance Theory considers this information to be part of cognitive context.

Relevance Theory has been criticised for implicitly including such issues without formal analysis. A more thorough approach to interdisciplinary research could arguably address this criticism. Cognitive pragmatics shows that we can neither interpret nor comprehend without our cognitive faculties. Modelling these processes will give us a more transparent and empirically plausible account of interpretation in international law. Both cognitive pragmatics and the study of interpretation in international law would benefit from engaging with research results in related disciplines, like sociology or political science. Interdisciplinary research projects could undertake this, but would at the same time require a formalisation of the influence of these results into a convincing model. To say it in the words of Asher and Lascarides who study natural language and discourse processing, supposed sociological concepts such as Venzke's "communicative practice" and Bianchi's "interpretive communities" are social factors which "[c]learly ... affect discourse interpretation, but they still await formal analysis and integration into a[n] ... account of the semantics/pragmatics interface" (Asher & Lascarides, 2003: 442–443).

Cognitive pragmatics could, for instance, look at approaches to discourse analysis that examine conventionalised patterns in discourse structure (genres, Asher & Lascarides, 2003: 442) as "typified responses to recurring situations" (Oakley & Kaufer, 2008: 151, quoting Miller, 1984). Discourse in international law could be considered a genre. The question of genre circles back to the relationship between meaning and in-

teraction (practice).[44] Improving our understanding of the way social and other factors function, their influence on cognitive processing, and on the inferences we draw would, in turn, helps us to gain a better understanding of the way addressees interpret what they hear and read.

5.5. Perspectives for future development

If the case for research on interpretation in international law through the prism of pragmatics is accepted, we can develop at this point some directions for research. Notably, promising questions lie where pragmatics itself arguably has to tackle some challenges. We thus explore in this section the extent to which the currently reticent approach taken by representatives of both pragmatics and international law towards the notion of text could be improved by an interdisciplinary approach. This reticence is closely related to the problem of emotion avoidance in both disciplines; overcoming this problem could help us to better understand interpretation in international law[45] and explain or model it in a psychologically realistic way.

So far, we have mainly been concerned with the interpretation of utterances – of which conceptual terms are part. While international law literature puts much emphasis on interpreting a "legal *text* [...] in such a way that a reason and a meaning can be attributed to *every word* in the text" (Linderfalk, 2007: 108, quoting Haraszti, emphasis added), – the notion of *word* appearing to be legalese for *conceptual term* (Linderfalk, 2007: 106) – the notion of text seems not worthy of any definition altogether. This may have to do with the fact that a text is not "available" or "readable" independent of interpretation (Bianchi, 2010: 48), in the process of which one may then be busy focusing on utterances. The question is as follows: given that a text typically consists of a sequence of utterances, how does this affect the interpretation process?[46]

Traditionally, the defining criterion of a text has been its coherence, which may be explicitly expressed through the use of connectors, i.e. a type of cohesion marker.[47] Yet, pragmatists have shown that texts may be interpreted as coherent in the absence of

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[44] In this context, a notable example is the Geneva Model of discourse analysis, which takes an interactionist approach to discourse organization (Filliettaz & Roulet, 2002).

[45] This is not to suggest that there is no discussion of emotions in international law through other prisms. See in particular the recent work by Simpson (2015: 10 ff.), who, however, focuses mainly on the literary life of international law and the recent interest of international law scholars in the biographies of important international lawyers.

[46] Put in linguistic terms, one might ask whether utterance sequences should not be structured, if propositional forms are structured sets of concepts (Sperber & Wilson, 1995: 85).

[47] To return once more to procedural meaning (see also footnotes 16, 21, 33 and 38), connectors such as "and" or "or" are not concepts, nor do they have conceptual meaning. As set out before, they have procedural meaning. Both in the sense that connectors not only facilitate the processing of utterances and in the sense that they serve to connect utterances, their use is accounted for by the principle of relevance (Moeschler & Auchlin, 2009: 192–193).

cohesion markers, and incoherent in their presence. According to Relevance Theory, this means that coherence is not text-inherent, but has to be inferred on the basis of the principle of relevance (Moeschler & Auchlin, 2009: 192) and the intentional stance. In search of a relevant cost-efficient interpretation of utterances and their coherence, an addressee attributes a local intention to utterances and a global intention to texts. The more accessible and the more complex the global intention, the stronger the judgment of discourse coherence (Moeschler & Auchlin, 2009: 193) – and thus the assumption is made that one is dealing with a text instead of a random sequence of utterances. However, despite these insights Relevance Theory's approach to texts resembles the sometimes cavalier attitude of interpretation in international law, as Relevance theorists claim that the notion of text is not a scientifically relevant category (Reboul & Moeschler, 1998b: 39 ff.). The problem that cognitive pragmatic approaches like Relevance Theory have with the notion of text stems from their reductionism. Their dismissal of the notion of text makes it obvious that Relevance theorists attempt to reduce texts to the interpretation of the utterances they are composed of. However, the theorists have to admit that the local intentions attributable to utterances merely lead the way towards, but are not necessarily identical to, the global intentions attributable to texts (Reboul & Moeschler, 1998a: 191–192).

Concepts such as the notion of a "sensuous cognitivism" in pragmatics (see also below) could be first steps to overcoming the afore-mentioned emotion avoidance (Auchlin, 1998: 3)[48] as well as integrating social aspects and actors' interests and preferences into a psychologically realistic model. In fact, the notion of a sensuous cognitivism leads us back to the conventionalised patterns in text or discourse structure, i.e. genres as typified responses to recurring situations, and the global intentions attributable to texts or discourse. Such conventionalised patterns, recurrent situations, or social settings do not have causal – or constraining – properties *per se*. Social explanations, which cognitive pragmatics reject, are not convincing *if and only if* one considers social norms, values, preferences, and their potential influence on actors' choices[49] as not cognitively grounded, but as mere social conventions (Smolka, 2014: 78).

Drawing on the notion of a sensuous cognitivism, we would suggest that the recognition of phenomena such as genres and texts as typified responses or units is indeed cognitively grounded. However, this recognition is not so much tied to conscious, rational, or conceptual processes, but to subconscious, sensuous, or emotional processes. More precisely, it can be explained in analogy to findings in emotion-oriented psychology as an activation of emotional, or motivational, schemas, i.e. "complex emotional, cognitive, and behavioural processes which arise through formative interpersonal learning processes" (Smolka, 2014: 34, quoting Lammers, 2007). When activated,

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[48] Discourse analyst Auchlin's notion of a "sensuous cognitivism" has been further developed in Smolka (2014).

[49] Such choices obviously include the exercise of power and authority in legal interpretation (Venzke, 2012: 19).

an emotional schema triggers a memory-based, pre-cognitive stimulus evaluation (Smolka, 2014: 34, quoting Lammers, 2007). The preceding learning processes take place in specific socio-cultural contexts. Those learning experiences with particular significance to the individual are highly likely to lead to schemas (Smolka, 2014: 36, quoting Lammers, 2007), which, in turn, become automated due to repeated practice. Their automation is an economical process which serves to elicit a helpful reaction, i.e. a precognitive stimulus evaluation, without resorting to more time-consuming cognitive processes (see also below) (Smolka, 2014: 34, quoting Lammers, 2007). Learned schemas are therefore informed by the norms and values of given pragmatic communities, and may be "filed" and "stored" with different contents, e.g. information pertaining to text genres in international law (Smolka, 2014: 36, quoting Lammers, 2007). Emotional processes thus allow for a "'seamless' [textual] experience" (Smolka, 2014: 36, quoting Oakley & Kaufer, 2008) or experiential continuity in the sense of a recognition of typical patterns or schemas and their (subconscious) evaluation, which, in turn, guide and influence an individual's assumptions about them (Smolka, 2014: 34 ff., 51–53).

Relevance Theory's reductionist take on texts can thus be traced back to another, more fundamental reductionism. The theory virtually "truncates the human person – a conscious, sentient, and socially involved self – solely into an information processing system" (Smolka, 2014: 3). Because of this reductionism, Relevance Theory cannot explain how interpretation rests on a choice which involves the *"preferences"* of the speaker while being simultaneously constrained by past practice (Venzke, 2012: 49, emphasis added). Based on what has been previously been argued, the motivational force behind preferences, as well as the moral, social, or political choices grounded on these preferences, arguably does not originate from a supposed "rationality that is nested in intersubjective communicative practice" (Venzke, 2012: 218). Similarly, a scholar in international law hints at the fact that such preferences may in fact be cognitively grounded: "there may be a *more earthly motivational force* at play as well. To the extent that actors *meet the sentiment of others*, they gain authority" (Venzke, 2012: 262, emphasis added). The fact that the quoted author, without further explanation, merely mentions *earthly sentiments* at the end of a paragraph – as if their motivational force were only an entertaining afterthought – illustrates that affective factors still seem to be perceived as "unscientific" (Lammers, 2007: 41–41). A parallel between research on interpretation in international law and cognitive pragmatics can be drawn, insofar as a certain extent of "emotion avoidance" (Smolka, 2014: 86) can arguably be found in both disciplines.[50] Yet, as recent research suggests, affectivity may be the key to tackling the abovementioned interfaces (Smolka, 2014). Although subjective experience may look highly

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[50] Just as Sperber & Wilson (1995: 72) admit that "a mental state [i.e. a conceptual representation], can have *such non-logical properties as being happy or sad* [but] abstract away from all these non-logical properties", Venzke, (2012: 63, emphasis added) rejects subjectivity on the grounds that "taking [*subjectivity*] on board is a shaky position".

idiosyncratic on the surface, findings in emotion-oriented psychology (Smolka, 2014: 86, quoting Hougard) show that such experience has a consistent inner logic which builds on a limited number of (basic) needs and emotions (Smolka, 2014: 37, quoting Grawe).

Essentially, findings in psychology show that a lopsided focus on rational cognitive processes (Grawe, 2000: 180–181, who argues that this focus even prevails in the cognitive sciences themselves) conceals the fact that there are two different, yet equally important, human information processing systems – a holistic emotional system and an analytical cognitive system (Lammers, 2007: 3–4). These systems are two complementary parts of *cognition* (Grawe, 2000: 178). All our actions, thoughts, goals, desires, and memories are controlled and informed by emotional processes. As rational and reasonable as our thoughts and plans may appear, it has been experimentally shown[51] that without emotions we would neither develop nor put them into action (Lammers, 2007: 4, quoting Tomkins, 1982; Frijda & Mesquita, 2000). We would simply be unable to make any decisions. Emotions guide our attention, help us to evaluate our environment, and motivate us to strive for individual and communal goals (Lammers, 2007: 4). The experience of emotions initiates important adaptive physiological, cognitive, and behavioural reactions as emotions signal the satisfaction or frustration of a more or less fixed number of basic needs as well as social basic needs. Social basic needs serve individuals' integration into society and their social environment (Lammers, 2007: 32–34). The satisfaction or frustration of social needs is, in turn, signalled by complex emotions, also termed moral emotions, on which values and norms, as well as the ethical, social, or political choices referred to by scholars like Venzke, are ultimately based (Smolka, 2014: 29).

This leads us back to Bix' views that during the process of interpretation, it will always be necessary to make ethical evaluations and weigh arguments. Recent literature in moral philosophy points to the key role emotion plays in ethics (Krauthausen, 2009: 140, quoting De Sousa, 1997). The afore-mentioned literature also points to the same insights suggested here: emotion and cognition are mutually dependent. While we have an innate emotional disposition, most moral emotions are acquired. They are, however, inseparably linked to both our biological instincts and our moral convictions (Krauthausen, 2009: 139, quoting Heller, 1987). It is also mentioned that neurological research showed an inseparable interlacing of emotional and cognitive performance (Krauthausen, 2009: 145, quoting Meier-Seethaler, 1997).

As highlighted by Mahlmann, a series of studies in neuroscience (neuroethics) "suggest that there is a brain-based account of moral reasoning" (Mahlmann, 2009: 15, quoting Gazzaniga, 2005). The quoted author stresses that "[g]iven the explanatory power of this mentalist approach [i.e. modern linguistics and 'the theory of the human

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[51] Experiments by Damasio (1997) and Bechara, Damasio, Damasio, & Lee (1999), quoted in Lammers (2007: 45), have shown that individuals who, due to illness, suffer from reduced emotional processes are unable to make even the simplest decisions.

mind'] to the study of language", it may be well suited to the study of "morality, law and the mind" (Mahlmann, 2009: 17–18). In ethics as in law, moral judgments, "which are often the result of a constructive process which slowly develops a complex code of values and rules in the framework of which new cases are solved" (Mahlmann, 2009: 39), could thus be regarded as opinions or attitudes that are based on emotion, and are thus not truth-conditional (Krauthausen, 2009: 169). This could be understood in analogy to pragmatics as, according to Sperber and Wilson, any external stimulus or internal representation which provides an input to cognitive processes may be relevant to an individual at some time.[52] These insights could be helpful for "the law [...] to prevent illusions about the reach of cognitive science from distorting the administration of justice", since models of emotion and cognition are descriptive, not prescriptive (Mahlmann, 2009: 46).

While Mahlmann rightly mentions that morality is a complex cognitive, emotional, and volitional fabric (Mahlmann, 2009: 30), that only emotions can be motivational factors (Mahlmann, 2009: 31) and that emotional appraisal and rational computation are both part of moral judgments (Mahlmann, 2009: 27–28), he claims that it cannot be conclusively established whether the emotions involved in moral judgments are causes or consequences (or a matter of heuristics) of moral judgments (Mahlmann, 2009: 28). This supposed "problem" (Mahlmann, 2009: 25) could, arguably, be solved by the aforementioned insights of a sensuous cognitivism in pragmatics which draws on emotion-oriented psychology: due to the anatomy of the human brain, "emotional processing of sensations is faster than their conscious cognitive processing (LeDoux and Phelps 2000 in Lammers 2007: 4), emotions [therefore] have a non negligible influence on cognitive processes (Damasio 1997, Zajonc 2000 in Lammers 2007)" (Smolka, 2014: 18–19). On top of this, a sensuous cognitivism postulates a bidirectional link between emotion and cognition (Smolka, 2014: 15, quoting Auchlin, 1991), which is backed by emotion-oriented psychology: "emotional processes may occur without any preceding conscious cognitive processes, which is underpinned by the fact that a stimulus first has to pass through the emotional areas triggering an emotional reaction before the stimulus can be consciously processed and perceived [...]. Cognitive processes in turn may activate emotional processes" (Smolka, 2014: 20, quoting Lammers, 2007). In reality, the issue with Mahlmann's "problem" is that the "influence of neurobiological and philosophical research orientations on psychology tends to put the search for knowledge of the human self and its experience into the attentional background", which leads to the peculiar situation that "psychology is not even referenced when genuinely psychological issues are discussed" (Smolka, 2014: 40, quoting Grawe, 2000).

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[52] If humans "can appear to be selfish animals" (Mahlmann, 2009: 47), this is because we have an inherent urge to satisfy our basic needs, guided by the motivational force of our emotions. At the same time, our social basic needs "demand some concern for others" (Mahlmann, 2009: 48) or the "greater common good" (Smolka, 2014: 51). Our moral reasoning thus depends on the calibration of our preferences or "the degree of relevance of social norms and values to an individual" at a given time (Smolka, 2014: 78–79, quoting Auchlin).

To overcome the current emotional avoidance, a simple, yet effective proposal could be to read Sperber and Wilson's notion of relevance as fundamentally emotional (Smolka, 2014: 57).[53] Based on the above-mentioned consistent inner logic of emotions, insights from emotion-oriented psychology further allow for a formalisation of emotional mental processes in the sense that one may gain awareness of and, by abstraction, conceptually represent affective intuitions (Smolka, 2014: 55). Similarly to the abstraction process that leads to conceptual mental representations as described by Venzke, "sub-attentively processed phenomena may come to the individual's [conscious] attention", which even Relevance theorists admit (Sperber & Wilson, 1995: 151).

The fact that there are "general and regular" elements in affectivity[54] calls for an integrative investigation into the interplay of emotion, cognition, and verbal behaviour (Smolka, 2014: 86). While even a sensuous cognitivism cannot decide by itself, i.e. independently of context, how one should make strategic (Venzke, 2012: 220) moral and political choices or establish binding norms, it can model, and thus make transparent, the mental processing of the available contextual assumptions and the inferred conclusions. Besides providing a new angle and vocabulary for the study of interpretation in international law, pragmatics suggests thus also ways to explore other phenomena of interest in international law, namely the notion of a text as well as the emotion avoidance of international law.

6. Conclusion

This paper has made a case not only for interdisciplinary research and crossfertilisation but also for a simultaneous and, in our view, necessary change of attitude that would grant the discipline of pragmatics the credit it deserves in interpretation in international law. Crucially, pragmatics and linguistics have not yet been fully integrated into the study of legal interpretation. Phenomena awaiting full inclusion are the cognitive turn in pragmatics, for instance as regards the seminal contribution of Relevance Theory, as well as more recent research that refutes traditional, simplistic assumptions about the boundaries between semantics and pragmatics. Legal scholars working on interpretation in international law tend to either leave aside pragmatic accounts of interpretation or base themselves on somewhat incomplete understandings of such accounts. As a consequence, unsurprisingly some scholars of international law have opted to turn towards sociological approaches instead, supposedly based on the assumption that language and its use are solely social products. In our view, however, prag-

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[53] The current misattribution can be traced to Relevance Theory's overemphasis of the first premise of the intentional stance, i.e. rationality, although emotions can be easily accounted for by the second premise which includes beliefs, desires, and other mental states (Smolka, 2014: 43–44).

[54] Auchlin (1990: 311) puts it as "du général et du régulier" in the original version.

matics offers a more comprehensive and convincing model for language processing. A number of examples have helped to provide answers to the typical objections to interdisciplinary approaches to the study of interpretation. Of course, pragmatics cannot do everything; it cannot take the final interpretive decision itself, as it is fundamentally descriptive and not normative. But based on concepts such as the intentional stance and pragmatic enrichment, arguably it can comprehensively model the cognitive processes of interpretation, taking into account contextual elements such as the cognitive environments of authors and addressees.

Furthermore, the cognitive turn may not necessarily be the end of our voyage. Scholars in pragmatics have only started to tackle the problem of emotion avoidance. Research on interpretation in international law could learn from these advances. A parallel can be drawn, since both fields of study need to refine their underlying models. A reinterpretation of the fundamental tenets of Relevance Theory could offer a more comprehensive model for presenting and analysing the interpretive process in the international lawyer's mind, fully accounting for the rational and emotional processes that lead to – and are indispensable for – interpretive decisions.

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