Five Shades of Grey – A Linguistic and Pragmatic Approach to Treaty Interpretation

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Abstract

In the context of treaty interpretation, new insights from research on language meaning (semantics and pragmatics) offer possibilities for categorising meaning with increased precision. Based on a typology of pragmatic interpretations, the present paper develops a five-step system of categorisation for the grey area ranging from cases where a treaty seems to be silent to cases where the Vienna Convention's general rule on interpretation can still be applied because there is treaty text to be interpreted. The paper explains the typology and uses examples from international law to demonstrate its usefulness in dealing with situations of varying degrees of explicitness of treaty texts. While pragmatics cannot offer a miracle solution, it provides tests that interpreting agents can apply to categorise interpretations on the continuum between clear ordinary meaning cases and cases of treaty silence. It thereby also becomes clearer what exact arguments an interpreting agent needs to provide to bolster a particular interpretation as sufficiently related to the common intentions of the treaty parties.

Keywords

Treaty interpretation – law and language – linguistics – semantics – pragmatics

I. Introduction

Treaty interpretation remains a much-debated topic in international law. In this context, the present paper suggests that, since international law operates through language, it arguably cannot and should not ignore the science of the meaning of language, but ought rather to avail itself of this branch of linguistics and use it to its advantage. On this basis, we adopt a recently developed typology for pragmatic interpretations developed in linguistics[1] and apply it to international treaty interpretation.[2] This typology

1 Mira Ariel, 'Revisiting the Typology of Pragmatic Interpretations', Intercultural Pragmatics 13 (2016), 1-35.

2 This paper's focus on treaty interpretation should in no way prejudice the applicability of its general linguistic findings to other situations of interpretation in international law. See, e. g. on the interpretation of customary international law Panos Merkouris, 'Interpreting the Customary Rules on Interpretation', International Community Law Review 19 (2017) 126-155; Orfeas Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End', EJIL 31 (2020), 235-267; see also generally the TRICI-Law project, <https://trici-law.com>.

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makes it possible to categorise situations that fall within the grey area which ranges from cases where a treaty seems to be silent to cases where the Vienna Convention on the Law of Treaties'[3] (VCLT) general rule on interpretation can still be applied because there is treaty text to be interpreted. As a working definition, treaty silence cases according to the presently suggested categorisation are those where the interpretation that is derived from a treaty text does no longer share fundamental commonalities with the treaty text itself (see section VII.). The resulting five-pronged categorisation provides a deeper understanding of what an interpreting agent infers when proposing a particular interpretation in what we termed the grey area. Such a linguistic approach thus provides clarity as to what exactly needs to be shown by an interpreting agent to justify a particular interpretation, e. g. what precise common intentions of the treaty parties need to be shown.[4]

Let us take a – somewhat simplified – example of interpretation in a situation where a treaty is not explicit about the relevant issue. Article 23 (d) of the Annex to the Hague Convention on the Laws and Customs of War on Land (IV) provides that, among other things, it is prohibited '[t]o *declare* that no quarter will be given'.[5] The question arises whether on close reading the provision only prohibits one from declaring that no quarter will be given, or whether it is also prohibited to give no quarter, although the treaty does not state so explicitly. It seems to be the general view among international lawyers that both not giving quarter and declaring an unwillingness to give quarter are prohibited.[6] However, it is hard to shake the impression that this analysis remains incomplete. Should we not be able to describe in more detail what has happened with regard to ordinary meaning and the silence of the treaty provision in this case? We are not in the presence of a case of vagueness; it is not the semantic meaning of 'to declare' that causes the problem.[7] What relationship is there between the suggested interpretation ('it is prohibited to declare that no quarter will be given and to not give quarter') and the – unchanged – treaty text (it is prohibited '[t]o declare that no quarter will be given')?

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3 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331.

4 We use 'common intentions' here to denote the necessary inquiry under Art. 31 VCLT to find the intentions as expressed in the treaty and not to argue in favour of a subjective inquiry into the parties' intentions (leaving aside the treaty text).

5 Additional Arrangement to the Customs Union etc. Convention between France and Monaco of 9 November 1885, signed at Paris 10 March 1899, 187 CTS 227 (emphasis added).

6 See the more comprehensive discussion of the example subsequently in section VII. 2.

7 See on vagueness generally Ralf Poscher, 'Ambiguity and Vagueness in Legal Interpretation', in: Peter M. Tiersma and Lawrence M. Solan (eds), *The Oxford Handbook of Language and Law* (Oxford: Oxford University Press 2012), 128-145.

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This paper argues that international lawyers can in fact find appropriate vocabulary for this purpose by drawing on the recently developed field of pragmatics, a sub-field of linguistics (which will be explained at length subsequently).[8] Pragmatics has become a more prominent field of research over the last three to four decades, and many international lawyers still seem to be unfamiliar with it, probably mostly because legal education typically does not encompass an introduction to linguistics. Findings in pragmatics have helped refine our understanding of meaning as a linguistic phenomenon. The present paper suggests that it can offer new insights to inform debates on interpretation in international law.

As a first step, we present the problem of varying degrees of explicitness of treaties. Then, we look at semantics and pragmatics and offer a primer on these fields of linguistics and their conceptual approach to language meaning. In the fourth section, we introduce the typology of pragmatic interpretations developed by Mira Ariel, and her core reflections behind this typology. Then, we present our proposal to distinguish between classic ordinary meaning cases (section IV.), ordinary meaning borderline cases (section V.) and treaty silence cases (section VI.) and flesh out this distinction with Ariel's categories. The borderline cases and the treaty silence cases as the 'grey area' encompass five categories, the five shades of grey evoked in the article's title. Each time we present a category of the typology, we offer both non-legal and legal examples to demonstrate the usefulness of the category. Finally, we offer some conclusions and suggestions on future avenues of research.

II. The Varying Degrees of Explicitness of Treaties as a Challenge for Their Interpretation

The varying explicitness of treaty provisions on different questions is a core problem of treaty interpretation and yet appears hard to grasp systematically. Take the example of what is often termed 'treaty silence'.[9] Although

8 Or depending on one's perspective, an independent field of the cognitive sciences, Anne Reboul and Jacques Moeschler, *La pragmatique aujourd'hui: une nouvelle science de la communication* (Paris: Éditions du Seuil 1998), 33-34 and 50.

9 Recently, treaty silence has for example been argued to constitute a problem in the context of investment arbitration. The United Nations Commission on International Trade Law (UNCITRAL) Secretariat requested that the Working Group III on the reform of investor-State dispute settlement consider developing model treaty provisions on, among other things, the interpretative rules investment tribunals ought to follow which should govern the meaning to be given to silence in treaties on certain matters UNCITRAL, Note by the Secretariat, Possible reform of investor-State dispute settlement (ISDS) – Interpretation of investment treaties by treaty Parties, 17 January 2020, para. 47.

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treaty silence has been intensely debated in international law, as far as we could find no single established definition of the phenomenon has thus far been developed. For the present purposes, we will thus work with our own working definition and discuss the issue based on typical examples chosen in the literature. The issue typically arises in cases in which a treaty's text does not provide a direct answer to a question of interpretation through its terms, usually a question that arises from a particular factual situation.[10] To date, adjudicators[11] have not adopted one coherent solution to deal with treaty silence.

As long as a treaty contains some relevant terms, the VCLT's general rule of interpretation of Article 31 (1) VCLT can be of help to interpreting agents who can thus draw inferences from such terms' ordinary meaning, context and object and purpose. Article 31 (3) c VCLT additionally makes it possible to look beyond the 'four corners' of the treaty to take into account other relevant rules of international law.[12] In all of these cases, an interpreting agent can rely on one or several explicit elements of treaty

10 This is not to be confused with state silence or the appreciation of the latter as state conduct, see, e. g. Sophia Kopela, 'The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals', Austr. Yb. Int'l L. 29 (2010), 87-134.

11 There are more interpreting agents in international law than only adjudicators in the sense of judges or arbitrators in international courts and tribunals, see e. g. Jörg Kammerhofer, 'Taking the Rules of Interpretation Seriously, but not Literally? A Theoretical Reconstruction of Orthodox Dogma', Nord. J. Int'l L. 86 (2017), 125-150 (134); on national courts Helmut Philipp Aust and Georg Nolte, *The Interpretation of International Law by Domestic Courts – Uniformity, Diversity, Convergence* (Oxford: Oxford University Press 2016); on academics as interpreting agents Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge: Cambridge University Press 2016), 14; or recently on private actors Melissa J. Durkee, 'Interpretive Entrepreneurs', Va. L. Rev. 107 (2021), 431-493; generally on the authority to interpret international law see e. g. recently Danae Azaria, 'Codification by Interpretation: The International Law Commission as an Interpreter of International Law', EJIL 31 (2020), 171-200. Nonetheless, the role of adjudicators as interpreting agents is often of particular importance because they are obliged to take an interpretive decision even in a situation of treaty silence and thus must also decide what in their view the common intentions of the parties are, Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', BYIL 26 (1949), 48-85 (78-79); see also the express prohibition of a non liquet finding by a tribunal in Article 42 (2) of the ICSID Convention. We leave aside at present questions on the nature of the international legal order raised by silence in international law generally; for example on the openness or closedness of that order, see Mariano J. Aznar-Gomez, 'The 1996 Nuclear Weapons Advisory Opinion and Non Liquet in International Law', ICLQ 48 (1999), 3-19; Jörg Kammerhofer, 'Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice', BYIL 80 (2009), 333-360; Helen Quane, 'Silence in International Law', BYIL 84 (2014), 240-270.

12 Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)c of the Vienna Convention', ICLQ 54 (2005), 279-319 (281).

text.[13] Then, however, there is a continuum of cases in which a treaty provides increasingly less explicit answers to interpretative questions.

One option interpreting agents often opt for when there is little or no treaty text to rely on are interpretive canons.[14] However, these canons may propose contradictory solutions, and it is difficult to identify satisfactory reasons for why one canon should be applied over another in a particular situation, which has led some scholars to qualify canons as an impediment rather than an aid to interpretation.[15]

Upon closer examination, canons relevant in such situations do not seem to offer truly convincing alternative solutions, but refer the interpreting agent back to the difficult assessment of the intentions of the treaty parties. Take as examples two important canons in the context of a treaty being seemingly silent about an issue, *expressio unius est exclusio alterius* and *per argumentum a fortiori*. The *expressio unius* canon would suggest that in cases where a treaty contains an exhaustive list of issues, issues not explicitly named are not covered. However, in reality there may be a variety of reasons for the omission of an issue; these may include lack of consensus, the willingness of the treaty parties to let this question be decided by adjudicators at a later stage or the mere impossibility of foreseeing certain circumstances during the treaty's drafting stage.[16] The canon thus either creates an argumentative shortcut that does not consider elements relevant to the interpretation of the norm at issue; or it has little value in and of itself if an interpreting agent must return to the difficult assessment of the common intentions of the treaty parties to find the underlying reasons for an omission (or whether the list was even intended to be exhaustive in the first place).

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13 Even if to be fully precise one may object that e. g. general principles of international law are unwritten by nature and that therefore one typically relies on the way they are described e. g. in international jurisprudence.

14 We speak here of canons to denote maxims guiding interpretation that have not been formally included in Articles 31-32 VCLT. See on the (history of the) relationship between canons and Articles 31-32 Sean D. Murphy, 'The Utility and Limits of Canons and Other Interpretive Principles', in: Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Alphen aan den Rijn: Wolters Kluwer 2019, 13-24 (19-20); see also Odile Ammann, *Domestic Courts and the Interpretation of International Law* (Leiden, Boston: 2020), 56-57.

15 Lauterpacht (n. 11), 52. In light of these shortcomings canons have intentionally not been part of the International Law Commission's codification project of the rules of interpretation that eventually took the form of the relevant norms of the Vienna Convention. See with more details Alain Pellet, 'Canons of Interpretation under the Vienna Convention', in: Klingler, Parkhomenko and Salonidis (n. 14), 1-12 (3-4).

16 Freya Baetens, 'Ejusdem Generis and Noscitur a Sociis', in: Klingler, Parkhomenko and Salonidis (n. 14), 133-159 (136).

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The canon *per argumentum a fortiori* allows two ways to develop an argument, namely as an inference from smaller to larger (*a minori ad majus*) or from larger to smaller (*a majori ad minus*). It is applied in a situation of comparison between two concepts or situations when a treaty is silent about one of them.[17] A problem may arise, however, where the canon operates as an argumentative shortcut and the comparability of situations and the compatibility of the underlying *ratio legis* is left aside. In the *Turkey-Iraq (frontier)* case, for example, the Permanent Court of International Justice seemed – at least at a cursory look[18] – to apply an *a fortiori* reasoning to suggest that if the Council of the League of Nations could adopt recommendations without the vote of the interested parties, it could also adopt binding decisions under the same conditions.[19] As in the previous case, to apply the canon successfully, the suitability of the canon in the concrete context must be examined,[20] which may deprive it of much of its seemingly simplifying argumentative force.[21]

Beyond canons, other solutions proposed for cases where treaties are not explicit about an issue provide no panacea either. Proposals include distinguishing between treaty silence as a true 'gap' or as 'qualified silence' which is simply supposed to limit the scope of a treaty;[22] or between cases of intended silence and inadvertent silence.[23] Under both proposals, it will be necessary for an interpreting agent to scrutinise the treaty parties' common intentions. Some also propose to distinguish based on the nature (in the sense of subject matter) of the treaty at issue, arguing that the foundational treaty of an international organisation should be interpreted with more readiness to accept implied terms (and powers) than a treaty fixing a boundary where precision is paramount.[24] This claim, however,

17 Alina Miron, 'Per Argumentum a Fortiori', in: Klingler, Parkhomenko and Salonidis (n. 14), 197-210 (205).

18 See for a closer examination Miron (n. 17), 202.

19 PCIJ, *Article 3 paragraph 2 of the Treaty of Lausanne* (frontier between Turkey and Iraq), Advisory Opinion of 21 November 1925, Series B, No. 12, 32.

20 Djeffal (n. 11), 116-117, warning that maxims do not derive from logical imperatives.

21 On the latter see Robert Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* (Brussels: Bruylant & Larcier 2006), 739.

22 ICSID, *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, Decision on Jurisdiction and Admissibility of 4 August 2011, case no. ARB/07/5, , 4.8.2011, para. 517.

23 E. Gordon, 'The World Court and the Interpretation of Constitutive Treaties: Some Observations on the Development of an International Constitutional Law', AJIL 59 (1965), 794-833 (804).

24 Richard Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press 20109, 145-146.

seems to rest on the observation of actual practice rather than on clear normative premises. One may wonder whether in concrete cases of treaty interpretation, this categorisation of treaties will always be satisfactorily applicable.

To sum up, there is currently no evident way of getting around examining the elements which the treaty provides to an interpreting agent and of trying to establish the common intentions of the parties, as difficult as this might prove where a treaty is not explicit on the relevant issue. All of this is relevant as views are divided on the degree of freedom granted to treaty interpreting agents in such cases.[25] Some emphasise the importance of the treaty text and the principle of good faith as a restraint against too much judicial creativity.[26] Others suggest that, when faced with a situation in which they have to decide an issue of interpretation, adjudicators are allowed to use various techniques such as analogy, the general legal context, broader principles, or not formally binding sources like scholarly writings or case law to deal with a treaty's lack of explicitness.[27]

Against the background of these difficulties in dealing with varying degrees of explicitness of a treaty, the present contribution suggests exploring the grey area of the continuum that ranges from clear-cut cases where the VCLT rule can be applied to cases of treaty silence where the mentioned difficulties cannot be avoided. Rather than to look for another panacea for (or even a perfect definition of) treaty silence, we propose that based on linguistics or, more precisely, on pragmatics, language meaning can be categorised, and that these categories can be applied to interpretations developed along the mentioned continuum.[28] Such categories can help us to establish *how far-fetched* an interpretation is. To what extent is there a basis for a particular interpretation in the treaty text? The answer to this question

25 See in this context on inappropriate judicial law-making Lauterpacht (n. 11), 83; see also Fuad Zarbiev, 'Judicial Activism in International Law – A Conceptual Framework for Analysis', Journal of International Dispute Settlement 3 (2012), 247-278.

26 Gardiner (n. 24), 147.

27 C. Schreuer, in: Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (eds), *The ICSID Convention: A Commentary* (2nd edn, Cambridge: Cambridge University Press 2009), Art. 42, 630.

28 For reasons of scope, we currently examine the applicability of such categorisations in the particular context of varying explicitness of treaty provisions. Nonetheless, it should not be excluded that they could also play a useful role in other contexts of international law, such as the distinction between treaty interpretation and treaty modification, see e. g. Gerhard Hafner, 'Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment', in: Georg Nolte (ed.), *Treaties and Subsequent Practice* (Oxford: Oxford University Press 2013), 105-122; Irina Buga, 'Subsequent Practice and Treaty Modification', in: Michael J. Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge: Cambridge University Press 2018), 363-391.

helps to clarify firstly what intention an interpreting agent has thereby ascribed to the treaty parties and secondly what justification in the sense of reasons for an intention must be given for such an interpretation. Ultimately, this categorisation may also help to overcome the need for an actual clear definition of the thorny notion of treaty silence. As a consequence, interpreting agents can focus with increased precision on what they actually need to provide arguments for – namely the precise link between their interpretation and the treaty text, rather than on, e. g. the existence of treaty silence or the applicability of interpretive canons. As a caveat, the approach suggested here is not argumentation theory-based. It will thus not provide the mentioned arguments for the established link between an interpretation and the treaty text, nor the tools to judge these arguments. Questions such as whether these arguments are acceptable, sufficient or replaceable by other arguments are thus of a different nature and need to be answered at a different level.[29]

Moreover, difficult argumentative exercises will not disappear. Our approach is neither a remedy for the inherent nature of international law (including treaty interpretation) as an argumentative practice,[30] nor will it be able to magically depoliticise and objectivise the practice of interpretation.[31] However, by clarifying the link between a treaty norm's explicit text (or a treaty's silence) and an interpretation, a linguistic approach provides clarity as to what exactly needs to be shown by an interpreting agent to justify a particular interpretation (e. g. what precise intention of the treaty parties needs to be shown). It is simply an attempt to render the actual decision-making within interpretation more transparent and visible, so that interpretive agents have to present and defend their interpretive choices and cannot hide behind a supposedly objective or clear meaning of treaty elements – or of treaty silence.

29 See in more detail on the differences and links between legal interpretation, linguistics and argumentation theory Jennifer Smolka, Argumentation in the Interpretation of Statutory Law and International Law: Not Ejusdem Generis, paper under review and on file with the authors.

30 Ingo Venzke, 'International Law as an Argumentative Practice: On Wohlrapp's The Concept of Argument', Transnational Legal Theory 7 (2016), 9-19.

31 See, in the context of the sources doctrine more generally, Jan Klabbers, The Cheshire Cat That Is International Law, EJIL 31 (2020), 269-283.

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III. Semantics and Pragmatics: A Linguistic Approach to Language Meaning

For international lawyers unfamiliar with linguistics, a primer is needed at this point to provide a context to pragmatic categorisations. Linguistics is generally not a completely foreign topic to international lawyers. Attempts have already been made by international lawyers to apply linguistic knowledge to treaty interpretation.[32] In textbooks, authors sometimes cite Wittgenstein's ideas of a language game and of language meaning being based predominantly on use.[33] Some scholars have explored individual phenomena like metaphors or pronouns based on linguistic theories.[34] Others, following the empirical approach to international law,[35] have applied methods such as corpus linguistics to study language and legal interpretation.[36] Only recently, however, have a small number of scholars begun

32 Aside from other methods that have been applied to law, see, e. g., relying on literary studies Andrea Bianchi, 'Terrorism and Armed Conflicts: Insights from a Law and Literature Perspective', LJIL 24 (2011), 1-21; Ekaterina Yahyaoui Krivenk, 'International Law, Literature and Interdisciplinarity', Law and Humanities 9 (2015), 103-122; on the philosophy of language various contributions in Andrea Bianchi, Daniel Peat and Matthew Windsor, *Interpretation in International Law* (Oxford: Oxford University Press 2015); on political science Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals', in: Jeff Dunoff and Mark Pollock (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press 2013), 445-476; or on rhetoric Andrea Bianchi, 'International Adjudication, Rhetoric and Storytelling', Journal of International Dispute Settlement 8 (2017), 28-44; see most recently Benedikt Pirker and Jennifer Smolka, 'International Law and Linguistics: Pieces of an Interdisciplinary Puzzle', Journal of International Dispute Settlement 11 (2020), 501-521.

33 Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell 1953), translated by G. E. M. Anscombe, 1967. See e. g. Jan Klabbers, *International Law* (3rd edn, Cambridge: Cambridge University Press 2021), 57.

34 Maks Del Mar, 'Metaphor in International Law: Language, Imagination and Normative Inquiry', Nord. J. Int'l L. 86 (2017), 170-195; Jacob Livingston Slosser, 'Components of Legal Concepts: Quality of Law, Evaluative Judgement, and Metaphorical Framing of Article 8 ECHR', ELJ 25 (2019), 593-607; Joseph R. Slaughter, 'Pathetic Fallacies: Personification and the Unruly Subjects of International Law', London Review of International Law 7 (2019), 3-54.

35 Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship', AJIL 106 (2012), 1-46.

36 See e. g. Urska Sadl and Henrik Palmer Olsen, 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts', LJIL 30 (2017), 327-349; combining discourse analysis and corpus linguistics Amanda Potts and Anne Liese Kjær, 'Constructing Achievement in the International Criminal Tribunal for the Former Yugoslavia (ICTY): A Corpus-Based Critical Discourse Analysis', International Journal for the Semiotics of Law 29 (2016), 525-555.

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exploring the semantics-pragmatics distinction to examine interpretation[37] and legal concepts.[38]

Linguistics offers numerous ways of looking at and studying language as a phenomenon.[39] The distinction between semantics and pragmatics is a core aspect of the field.[40] Semantics as a field of linguistics deals with meaning to the extent that it is *encoded* in the formal components of language. Pragmatics, in contrast, examines meaning as the communication of concepts or thoughts by means of a particular way of *using* such components with encoded meanings in particular contexts.[41] Semantics and pragmatics can be roughly differentiated in terms of being about two different models of how communication works. Semantics uses a *code* model, which suggests communication is encoded directly or indirectly in language. According to the *inferential* model relied upon in pragmatics, the communicator provides evidence of her[42] intention to convey a meaning. In turn, the addressee infers meaning based on the evidence provided, the contextual information and his prior knowledge.[43]

Linguists differ in their opinion as to the extent to which communication can be explained by semantics or pragmatics.[44] A representative position in

37 See Ulf Linderfalk, *On the Interpretation of Treaties, The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (New York: Springer 2007); Ulf Linderfalk, 'All the Things That You Can Do with *Jus Cogens*: A Pragmatic Approach to Legal Language', GYIL 56 (2013), 351-386; Benedikt Pirker and Jennifer Smolka, 'Making Interpretation More Explicit: International Law and Pragmatics', Nord. J. Int'l L. 86 (2017), 228-266; Benedikt Pirker, 'Balancing Interpretative Arguments in International Law – A Linguistic Appraisal', Nord. J. Int'l L. 89 (2020), 438-452.

38 Ulf Linderfalk, 'The Functionality of Conceptual Terms in International Law and International Legal Discourse', European Journal of Legal Studies 6 (2013/2014), 27-50; Jennifer Smolka and Benedikt Pirker, 'International Law, Pragmatics and the Distinction Between Conceptual and Procedural Meaning', International Journal of Language & Law 7 (2018), 117-141.

39 For an overview see Benedikt Pirker and Jennifer Smolka, 'The Future of International Law is Cognitive – International Law, Cognitive Sociology and Cognitive Pragmatics', GLJ 20 (2019), 430-448 (439-446); Pirker and Smolka (n. 32), *passim*.

40 See on the development of the field of pragmatics from its origins as linguistics' 'wastebasket' Jacob Mey, 'How to Do Good Things With Words: A Social Pragmatics for Survival', Pragmatics 4 (1993), 239-263 (247).

41 Robyn Carston, 'Legal Texts and Canons of Construction: A View from Current Pragmatic Theory', in: Michael Freeman and Fiona Smith (eds), *Law and Language* (Oxford: Oxford University Press 2013), 8-33 (9).

42 We generally adhere to the convention found in linguistic-pragmatic texts in which speakers in illustrative exchanges are female and addressees are male.

43 Deirdre Wilson and Dan Sperber, 'Relevance Theory', in: Laurence R. Horn and Gregory Ward (eds), *The Handbook of Pragmatics* (Hoboken New Jersey: Wiley-Blackwell 2006), 606-632 (607); Sandrine Zufferey and Jacques Moeschler, *Initiation à l'étude du sens* (Auxerre: Sciences Humain 2012), 88.

44 See, e. g., leaning towards semantics Emma Borg, *Minimal Semantics* (Oxford: Oxford University Press 2004); for a pragmatics-oriented view see, e. g., François Recanati, *Truth-Conditional Pragmatics* (Oxford: Oxford University Press 2010).

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pragmatics argues that the two aforementioned models operate simultaneously; i. e. they do not exclude one another.[45] Verbal comprehension thus encompasses the decoding of linguistic information, as one input, in a process of inference that yields an interpretation of a speaker's meaning.[46] Meaning is always linguistically underdetermined[47] and therefore the simultaneous operation of the two models is necessary; an addressee always has to contextually enrich or adjust[48] meaning in a variety of ways to infer, interpret and understand the speaker's meaning.[49]

Consider an utterance as simple as 'Can you pass me the salt?'. Part of the utterance's meaning, such as the concept of 'salt', can be decoded semantically.[50] However, without the situational context and the addressee's knowledge it remains unclear whether the interrogative sentence should be interpreted as a request or as a question about the addressee's (physical) ability to pass the salt. The answer must therefore be inferred from the situational context (e. g. sitting at a dinner table together with the salt shaker in front of the addressee) and the addressee's knowledge (e. g. in order to comply with standards of politeness, requests are often formulated as questions).

Pragmatic interpretations thus go 'beyond' the semantics of an utterance (e. g. a treaty provision as an utterance of the treaty parties). To fully understand this approach, we also need to set out a further distinction within pragmatics: the distinction between conventionalist and intentional-

45 We leave aside the debate about the boundary between semantics and pragmatics, see in more detail Laurence R. Horn, 'The Border Wars: A Neo-Gricean Perspective', in: Klaus von Heusinger and Ken Turner (eds), *Where Semantics Meets Pragmatics*, (Amsterdam: Elsevier 2006), 21-48; K. Börjesson, *The Semantics-Pragmatics Controversy* (Oldenburg: de Gruyter 2014).

46 Jacques Moeschler, 'Pragmatics, Propositional and Non-Propositional Effects, Can a Theory of Utterance Interpretation Account for Emotions in Verbal Communication?', Social Science Information 48 (2009), 447-464 (452).

47 See also on the notion of interpretation in this context Gennaro Chierchia, *Logic in Grammar: Polarity, Free Choice, and Intervention* (Oxford. Oxford University Press 2013), 15 et seq.

48 Carston (n. 41), 12-13.

49 Wilson and Sperber (n. 43), 613.

50 This example is the somewhat typical way international lawyers have of thinking about interpretive problems – one word and its conceptual content are at issue and seem to cause all the problem. For criticism of the typical approaches used by lawyers, e. g. using a Hartian 'core-penumbra' distinction or a Kelsenian 'frame' conceptualisation of meaning, see Dietrich Busse, 'Semantik des Rechts: Bedeutungstheorien und deren Relevanz für Rechtstheorie und Rechtspraxis', in: E. Felder and F. Vogel (eds), *Handbuch Sprache im Recht* (Oldenburg: de Gruyter 2017), 22-44 (31-32), and Benedikt Pirker, 'Kelsen Meets Cognitive Science – The Pure Theory of Law, Interpretation, and Modern Cognitive Pragmatics' in: Matthias Jestaedt, Ralf Poscher and Jörg Kammerhofer (eds), *Die Reine Rechtslehre auf dem Prüfstand – Hans Kelsen's Pure Theory of Law: Conceptions and Misconceptions* (Stuttgart: Steiner Verlag 2020), 203-226, respectively.

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ist approaches to language meaning, a differentiation which emerged on the basis of Speech Act Theory.[51] The studying of speech acts has revealed a significant gap between the meaning encoded in a linguistic form and the meaning that the speaker intends to transmit to the addressee. Speech acts may go wrong, but typically addressees are able to fill the gap in a seemingly effortless way. This has led scholars like Searle and Austin to suggest that there must be systematic principles governing linguistic interaction.[52] Such principles that form the basis of communication are called 'conventions', and the approaches that rely on them are called 'conventionalist'.[53] Influential accounts in language philosophy rely on such a conventionalist approach.[54] However, this approach has come under criticism in the field of pragmatics because it has to assume somewhat artificially that the participants in a communication process have mutual knowledge of such conventions.[55]

The scholars who decided to turn away from the conventions laid the groundwork for our present approach to pragmatic interpretations. Instead of conventions, they focused on the apparent sensitivity of the meaning of linguistic expressions to context and a speaker's intentions. In line with the

51 Speech Act Theory is also sometimes referred to in international law literature, see Klabbers (n. 33), 31. See also on hate speech e. g. Shannon Fyfe, 'Tracking Hate Speech Acts as Incitement to Genocide in International Criminal Law', LJIL 30 (2017), 523-548. Originally, philosophers of language saw language as having the exclusive purpose of stating or denying truth. Speech Act Theory challenged this perspective, arguing that in many ways saying is doing, and it typically used examples from law for this purpose, Marina Sbisà and Ken Turner, 'Introduction', in: Marina Sbisà and Ken Turner (eds), *Pragmatics of Speech Actions* (Berlin, New York: de Gruyter Mouton 2013), 1-24 (11). As an example, uttering 'I pronounce you wife and husband' under certain conditions in a civil registry office can result in a fully functional marriage for legal purposes.

52 In the sense that language gains a new dimension when used in interaction, see John L. Austin, *How to Do Things with Words* (Oxford: Clarendon Press 1962); on so-called felicity conditions and required mental states to be adopted by speakers when performing a speech act see John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press 1969).

53 See e. g. on the idea of a 'cooperative' principle famously H. Paul Grice, 'Logic and Conversation', in: Peter Cole and Jerry Morgan (eds), *Syntacs and Semantics 3: Pragmatics* (New York: Academic Press 1975), 41-58. For an application relating to law and legal interpretation in general, see Fabrizio Macagno, Douglas Walton and Giovanni Sartor, 'Pragmatic Maxims and Presumptions in Legal Interpretation', Law and Philosophy 37 (2018), 69-115.

54 Robert B. Brandom, *Making it Explicit: Reasoning, Representing, and Discursive Commitment* (Cambridge MA, London: Harvard University Press 1998).

55 Conventionalist approaches require shared conventions, or a shared code, in order for communication to work. Conceptually, this would require that an addressee knows that the communicator assumes that only shared assumptions will be used in a communication process, which in turn the communicator would have to know and so forth *ad infinitum*, see Pirker and Smolka (n. 39), 444.

general cognitive trend that had set in at the end of the 1970 s,[56] these scholars shifted their attention to the mind, mental attitudes and intentionality, pursuing an 'intentionalist' approach.[57] Relevance Theory is one theory that has emerged from this trend and which offers its own explanation of the communication process. As part of Relevance Theory, scholars have tried to systematise pragmatic interpretations and thereby provide the groundwork for the presently suggested typological approach to pragmatic interpretations. Put succinctly, the theory suggests that communication works because human cognition is entirely constrained by the cognitive principle of 'relevance', i. e. the aim of maximising relevance.[58] In our example of 'Can you pass me the salt?', the addressee would thus test interpretive hypotheses relying on the situational context and his knowledge.[59] He would then probably see a request as the most relevant interpretation. This would be the result of him testing various interpretations, such as the interpretation of the utterance as a mere question, and then

56 A trend not foreign to international lawyers, see e. g. on emotions Andrea Bianchi and Anne Saab, 'Fear and International Law-Making: An Exploratory Inquiry', LJIL 32 (2019), 351-365; on cognitive sociology Pirker and Smolka (n. 39); on cognitive psychology Anne van Aaken and Johann Justus Vasel, 'Demultilateralisation: A Cognitive Psychological Perspective', ELJ 25 (2019), 487-493; on behavioural approaches to international law Anne van Aaken, 'Behavioral International Law and Economics', Harv. Int'l L. J. 55 (2014), 421-481; Tomer Broude, 'Behavioral International Law', U. Pa. L. Rev. 163 (2015), 1099-1157; Armin Steinbach, 'The Trend towards Non-Consensualism in Public International Law: A (Behavioural) Law and Economics Perspective', EJIL 27 (2016), 643-668; Anne van Aaken, 'Behavioral Aspects of the International Law of Global Public Goods and Common Pool Resources', AJIL 112 (2018), 67-79; Anne van Aaken and Jürgen Kurtz, 'Beyond Rational Choice: International Trade Law and The Behavioral Political Economy of Protectionism', JIEL 22 (2019), 601-628; Philipp Günther, 'Groupthink Bias in International Adjudication', Journal of International Dispute Settlement 11 (2020), 91-126; Harlan Grant Cohen and Timothy Meyer, *International Law as Behavior* (Cambridge: Cambridge University Press 2021).

57 Sbisà and Turner (n. 51), 3. On the similar distinction between 'internalist' and 'externalist' approaches, see also Pirker and Smolka (n. 39), 442.

58 Dan Sperber and Deirdre Wilson, *Relevance: Communication and Cognition* (2nd edn, Hoboken New Jersey: Wiley-Blackwell 1995), 261. Communication can be described as a two-fold intentional process: A communicator must explicitly or overtly show a communicative intention (ostension) to communicate a piece of information to the addressee. The addressee then has to infer the piece of information (inference); see Reboul and Moeschler (n. 8), 72.

59 One should not imagine a communicator sending thoughts to 'travel' to the audience's brain; rather, she intends to modify the cognitive environment of her audience, Moeschler (n. 46), 456. A theory relying on travelling thoughts would face similar objections to the code model or conventionalist approaches. The more assumptions people share, the greater the overlap between their cognitive environments and the more likely it is that the search for relevance will lead to successful results, Wilson and Sperber (n. 58), 41, 44.

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finishing the interpretive process once he arrived at the most relevant interpretation.[60]

It is sometimes contended that the described linguistic theories should only apply to the everyday communication contexts in which they have typically been developed. However, to date no convincing arguments have been presented in philosophy of language or related fields to show that legal interpretation at its core is of a fundamentally different character than such ordinary language interpretation, its particular rules on the admissible context and similar elements notwithstanding.[61] Notably, the question of intention seems to arise independently of the context in which language interpretation occurs and thus supports the reliance on 'general' linguistic theory in the study of legal interpretation.[62]

In summary, semantics and pragmatics offer two different explanations of the phenomenon of language meaning, but operate at the same time. Meaning is thus partly encoded in formal components of language, partly conveyed through inference in context. If we accept that interpretation in international law is ultimately also a process of communication between an utterer and an addressee, e. g. treaty parties communicating in the form of a treaty with the interpreting agent as the addressee, these findings are relevant. Intentionalist approaches to pragmatics like Relevance Theory suggest in this context that interpretation is a cost-benefit-based process of testing interpretive hypotheses, in the sense that addressees look for the most relevant interpretation in light of processing costs and cognitive effects (i. e. a helpful understanding of the utterance).

IV. Ariel's Typology of Pragmatic Interpretations

Researchers in pragmatics suggest that pragmatic interpretation follows a system. Arguably, this system can be used to describe and analyse interpretation in international law in the grey area between clear cases of interpretation accord-

60 Carston (n. 41), 28. The comprehension procedure follows a cost-benefit-logic involving the processing of effort as costs and cognitive effects as benefits, see Deirdre Wilson, 'Relevance Theory and Lexical Pragmatics', Italian Journal of Linguistics 15 (2003), 273-291 (282). In an interpretive process, old assumptions that form a person's cognitive environment are weakened, strengthened, or suppressed and/or new assumptions are added, Moeschler (n. 46), 456.

61 See on the impossibility of 'communication without cognition' in this context Jennifer Smolka and Benedikt Pirker, 'International Law and Pragmatics – An Account of Interpretation in International Law', International Journal of Language & Law 5 (2016), 1-40 (25).

62 See in this context on the shortcomings of 'word meaning' or 'plain meaning' doctrines that abstract from any inferable intentions and conclude that all meaning is in the text Brian Bix, 'Legal Interpretation and the Philosophy of Language', in: Peter Tiersma and Lawrence Solan (eds), *The Oxford Handbook of Language and Law* (Oxford: Oxford University Press 2012), 145-155 (153).

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ing to the Vienna Convention and cases where a treaty does not provide an explicit answer to a question of interpretation. The linguist Mira Ariel has developed a particularly comprehensive and useful typology of pragmatic interpretations.

1. The Core Elements of Mira Ariel's Typology of Pragmatic Interpretations

Ariel's work is mainly based on Relevance Theory. In her opinion, pragmatic inferencing is essential for understanding a speaker's communicative intentions. There is a simultaneous decoding of explicit messages and inferring of implicit messages. The resulting products typically have a distinct 'discoursal status'. This status differs according to the prominence of the message a product conveys: explicit messages tend to be more prominent than implicit messages.[63] When transposed to an international law context, implicit messages are cases where something is not 'in the text' of a treaty, but an interpreting agent nonetheless suggests a particular interpretation which applies the relevant norm to the situation at issue. The interpreting agent thus ascribes a certain pragmatic interpretation as the speaker's intention with regard to the relevant treaty text. The agent thereby adopts the position that, in the agent's view, this interpretation is the correct one.

This position is easier to defend when a pragmatic interpretation is considered to have a prominent discoursal status. For example, in some cases it can be shown in experiments that a speaker can explicitly cancel certain implicit inferences. These inferences have a less prominent discoursal status. In our example of 'Can you pass me the salt?', a speaker could thus add 'In the sense of "can you reach it"'. She would thereby make clear that she is asking a question about the addressee's physical ability to reach the salt shaker, perhaps because it is nearly out of reach for the addressee, thereby cancelling out the implicit request for the addressee to pick up the salt and pass it to her.

By contrast, inferences based on the explicit content of a message are more difficult than others for the speaker to deny, i. e. they are more prominent in what they have communicated.[64] Take our example of 'Can you pass me the salt?'. The addressee has to infer on the basis of the explicit element of 'pass' whether the salt shaker is to be transmitted by hand or foot (like a 'pass' in the context of football). It would be difficult for the speaker to cancel this explicit content, in the sense that the addressee should not adopt a pragmatic interpretation of 'pass' at all. This would force the addressee to rely on a purely semantic

63 Ariel (n. 1), 1 et seq.

64 Marit Sternau, Mira Ariel, Rachel Giora and Ofer Fein, 'Levels of Interpretation: New Tools for Characterizing Intended Meanings', Journal of Pragmatics 84 (2015), 86-101; Ariel (n. 1), 30.

interpretation of 'pass' without contextual information, which, according to Relevance Theory, would be too underspecified to achieve relevance.

One might contend at this point that Ariel's typology pursues a different objective than treaty interpretation and that therefore her typology should not be applied in the latter context.[65] However, at a closer look Ariel's purpose is simply to examine how prominent one pragmatic interpretation is compared to another. For the purposes of treaty interpretation, we can rephrase this idea of prominence. In international law, categorising interpretations based on pragmatic interpretation types can help us to establish *how far-fetched* an interpretation is. This is a core question of treaty interpretation, and therefore Ariel's typology pursues an objective that is compatible with the objectives of treaty interpretation. Put differently, such a categorisation enables us to ask to what extent there is a basis for the interpretation in the treaty text. The answer to this question helps to better understand what justification must be given for a particular interpretation, as this answer clarifies what intention the interpreting agent has ascribed to the treaty parties by forming a specific interpretation. It is for this intention that the interpreting agent subsequently must provide reasons.

2. Types of Pragmatic Interpretations

Ariel differentiates between six types of pragmatic interpretations. Ranking the strength of interpretation (in the sense of the propensity of an interpretation to count as the speaker's relevant contribution), she lists:

1) Explicature
2) Strong implicature
3) Provisional explicature
4) Particularised conversational implicatures
5) Background assumptions
6) Truth-compatible inferences[66]

Based on her own previous research and work by other authors,[67] she suggests that there are a number of tests that can be employed to find out

65 The authors thank an anonymous peer reviewer for bringing up this point.

66 Ariel (n. 1), 30.

67 See on background assumptions John R. Searle, 'Literal Meaning', Erkenntnis 13 (1978), 207-224; John R. Searle, 'The Background of Meaning', in: John R. Searle, Ferenc Kiefer and Manfred Bierwisch (eds), *Speech Act Theory and Pragmatics* (Heidelberg, Berlin: Springer 1980), 221-232; on implicated premises and conclusions Sperber and Wilson (n. 58); on privileged interactional interpretations Mira Ariel, 'Privileged Interactional Interpretations', Journal of Pragmatics 34 (2002), 1003-1044; Katarzyna M. Jaszczolt, *Default Semantics: Foundations of a Compositional Theory of Acts of Communication* (Oxford: Oxford University Press 2005); on truth-compatible inferences see Mira Ariel, 'Most', Language 80 (2004), 658-706.

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how a particular interpretation is to be categorised.[68] In the following, we explore the typology, set out the types of pragmatic interpretations and explain the tests that can be used to identify them by means of non-legal and legal examples. We have good reason to believe that this pragmatic typology will work in the context of international treaty interpretation, first and foremost because the problem faced very often is precisely the type of situation to which a pragmatic typology can be applied. No matter how comprehensive and well-drafted a treaty is, it will inevitably not be explicit with regard to some question – and most often with regard to a great number of questions.[69] When international lawyers speak of a treaty not providing an explicit answer to an interpretive question, however, they refer to a specific situation that raises a concrete question of interpretation. In this situation, there is a treaty text and an interpretation (the interpretation of the norm – or sometimes, of the lack of a relevant norm). This puts us in a position where we can undertake a process of reverse engineering. Pragmatics provides tests that help us to define the relationship between the treaty text and the interpretation. On this basis, we can distinguish between what we will term classic ordinary meaning cases, ordinary meaning borderline cases and treaty silence cases.

It is important to note that in all these cases there is some link between the treaty text and the interpretation; the speaker (here the treaty parties) can be argued to have intended their utterance to express or imply the interpretation at hand. But the discoursal status of each interpretation differs in prominence, i. e. an objective observer would be more or less inclined to ascribe a particular interpretative intention to the speaker. Legally speaking, an interpreting agent will need to provide a lot of 'other' evidence in treaty silence cases to justify his or her interpretation based on the common intention of the treaty parties. This task is far easier in classic ordinary meaning cases than in borderline or treaty silence cases. As we will see, there are five categories falling under what we term borderline or treaty silence cases, i. e. five shades of grey as part of our 'grey area'.

68 See section VIII. for an overview over the types of pragmatic interpretations and the tests.

69 Essentially reproducing thereby the general feature of underdeterminacy of language in the specific context of international treaties. See also Ulrich Fastenrath, *Lücken im Völkerrecht. Zu Rechtscharakter, Quellen, Systemzusammenhang, Methodenlehre und Funktionen des Völkerrechts* (Berlin: Duncker & Humblot 1991), 15-18, who emphasizes that context is needed to determine whether a gap exists, as treaties are silent about innumerable matters.

V. Classic Ordinary Meaning Cases: The Notion of Explicature

Comparatively easy cases of interpretation are those where there are explicit elements of the treaty text that lend themselves to interpretation. The general debate on interpretation in international law often appears somewhat focused on these cases. A bit like in the famous debate on interpreting the prohibition of 'vehicles in the park' between Hart and Fuller in legal theory and jurisprudence,[70] treaty interpretation is very often exemplified by problems of interpreting one particular term of a treaty with regard to that term's scope.[71]

For our purposes, 'classic' ordinary meaning cases are – somewhat more broadly – cases in which an explicit element of a text needs to be developed to arrive at an interpretation. In Ariel's terms, this is the so-called explicature.[72]

In any given situation of interpretation, an addressee must develop certain explicit elements of the utterance at issue. Explicature is indispensable for correctly interpreting a speaker's intended meaning, and it is an interpretation that the speaker expresses directly.[73] To make this clearer, let us first take the example provided by Ariel. For context, in her article Ariel generally uses excerpts from a newspaper article on so-called honour killings as examples:

> My son said that *she* wasn't the last *one*. We're waiting for the next *one*.

The elements of the utterance in italics must be developed for interpretation, and thus, a resulting explicature would be something like:

> The speaker's son said that *Busaina Abu Ghanem* wasn't the last *female murder victim in the family*. We're waiting for the next *female murder victim in the family*.

---

70 See on the language aspects of the debate Frederick Schauer, 'A Critical Guide to Vehicles in the Park', N. Y. L. Rev. 83 (2008), 1109-1134.

71 See on this excessive focus of lawyers on individual terms and semantics generally footnote 50; see also on the strong focus on conceptual meaning as a particular *kind* of meaning Jennifer Smolka and Benedikt Pirker, 'International Law, Pragmatics and the Distinction Between Conceptual and Procedural Meaning', International Journal of Language & Law 7 (2018), 117-141.

72 Ariel focuses in her work on so-called explicated inferences, i. e. a more limited notion than the 'classic' notion of explicature (Mira Ariel, *Pragmatics and Grammar* [Cambridge: Cambridge University Press 2008], 21). We deliberately leave aside these additional complexities in the present context. See in more detail Smolka and Pirker (n. **), 139-140.

73 Ariel (n. 1), 4.

How can you test whether something is an explicature or not? Most importantly,[74] there is the 'that-is' test. One adds a 'that is (to say)' clause to spell out the explicature. If the pragmatic interpretation is an explicature, a correct and convincing utterance should be the result. Take our example:

> The speaker's son said that she, *that is (to say) Busaina Abu Ghanem*, wasn't the last one, *that is (to say) the last female murder victim in the family*. We're waiting for the next one, *that is (to say) the next female murder victim in the family.* ['that-is (to say)' test]

Explicature forms a single meaning layer with the linguistic meaning.[75] The pragmatic inferences are limited to adjustments of the proposition that is expressed; they are not consciously available as separate interpretations.[76]

Explicature can thus take the form of pronouns that must be pragmatically enriched, e. g. by determining who 'she' is in an utterance. Explicature can also involve interpretations of broad or ambiguous terms in a legal norm, as long as the pragmatic interpretation is clearly based on an explicit element of the norm text. Let us take as an example the case of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*. In this case, the International Court of Justice (ICJ) had to determine whether, based on minutes of a meeting that were to be understood to constitute an international agreement, one party could unilaterally seize the Court with a dispute. The minutes laid down that the good offices of the King of Saudi Arabia would continue for a certain period of time. The minutes then stated that '[o]nce that period has elapsed, the two parties may submit the matter to the International Court of Justice […]'. The ICJ held that the segment 'Once that period has elapsed' necessarily implied that there was a right by one party to seize the ICJ on its own afterwards, as otherwise this phrase would have no effect. Both parties could have jointly seized the Court at any point in time if they so wished and agreed.[77]

Linguistically speaking, this is a typical case of explicature. The Court needs to pragmatically interpret the phrase 'the two parties' to decide

74 As Ariel shows, there is also an additional test, the so-called 'said' test. Because of certain shortcomings with this test (see Herman Cappelen and Ernie Lepore, 'On the Alleged Connection Between Indirect Speech and the Theory of Meaning', Mind & Language 12 (1997), 278-296) and to keep matters straightforward, we follow Ariel here in simply using the 'that-is' test.

75 Ariel (n. 1), 11.

76 Ariel (n. 1), 11; see also, in turn, particularised conversational implicatures.

77 ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Jurisdiction and Admissibility, ICJ Reports 1995, 6 para. 35. The Court also goes into more detail about the original Arabic version of the minutes; however, these do not have an effect on the analysis presented here and are thus left aside for reasons of simplicity.

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whether the two parties jointly possess the right to (whether they 'may') seize the Court or whether either of the parties can do so on its own. Applying Ariel's 'that-is' test, it is easy to show that the Court's interpretation is linked to explicit elements of the utterance at issue, even though the utterance does not provide the answer to the question with its encoded meaning. Semantically, the phrase 'the two parties' is open to being interpreted as meaning 'the two parties jointly' or as 'either of the two parties'. The application of the 'that-is (to say)' test to the Court's interpretation can be presented as follows:

> Once that period has elapsed, *the two parties* may submit the matter to the International Court of Justice. [original]
>
> *Either one of the parties* may submit the matter to the International Court of Justice. [pragmatic interpretation]
>
> Once that period has elapsed, the two parties, *that is (to say) either one of the parties*, may submit the matter to the International Court of Justice. ['that-is (to say)' test]

Consequently, the Court's interpretation is an explicature and thus has a relatively prominent discoursal status. Linguistically speaking, an interpreting agent will find it very difficult to deny that this element of the treaty norm needs to be interpreted at all. Legally, this necessity is given the form of the principle of effectiveness in treaty interpretation.[78]

At the same time, our finding of an explicature does not tell us definitively *how* the norm needs to be interpreted – only *that* it needs to be interpreted as an explicit element. One could also interpret the norm as meaning 'the two parties jointly'. Even effectiveness in and of itself does not force the hand of the interpreting agent; the Court's solution may appear convincing, but nonetheless there are also examples of rather 'declaratory' norms in international treaties whose interpretation would – even under the application of the principle of effectiveness – not add much to the legal situation at hand. It remains ultimately up to the interpreting agent to justify the chosen interpretation, e. g. based on context or the object and purpose of a treaty. Nonetheless, the typical difficulties of treaty silence are not present in cases of an explicature.

78 See on the different ways in which international courts and tribunals have applied the principle Céline Braumann and August Reinisch, 'Effet Utile', in: Klingler, Parkhomenko and Salonidis (n. 14), 47-72 (71-72).

VI. Ordinary Meaning Borderline Cases

In certain situations, an interpreting agent uses pragmatic means to convey meaning, but these means remain connected to the explicit elements of – in our case – a treaty text. These are borderline cases – they operate with a strong link to the text, yet not in the way explicature works, the latter merely developing elements of the text. We thus enter what we have termed the 'grey area'. The category of strong implicature is more relevant in practice than the – admittedly somewhat exotic, but necessary – category of provisional explicature. To put it simply, both, to a certain extent, rewrite the treaty text.

1. Strong Implicature

Strong implicature occurs in contexts in which speakers say one thing (a first tier) but intend quite another (a second tier). In the case of strong implicature, a speaker does not express a certain interpretation directly, but instead ultimately intends to replace the directly communicated meaning with the interpretation.[79] Ariel's example is the following conversation.[80]

> R_1: And John Doe, who is a company director, pretends to know that the balance sheet is going to be good so he starts buying.
> S: OK that's a criminal offence.
> R_2: Eh …
> S: It's a bit of a criminal offence.
> R_3: So he has a mother-in-law.
> S: For this you go to jail.

R_3 very strongly implies in the example that John Doe would illegally buy shares under his mother-in-law's name. This is a strong implicature whose content is separate from what is explicitly stated. Ariel suggests the 'indirect-addition' test as a first step in identifying such strong implicature.

> The speaker said that John Doe has a mother-in-law, *and in addition he indirectly conveyed that* John Doe would illegally buy shares under his mother-in-law's name. ['indirect addition' test]

At the same time, strong implicatures do not pass the 'that is (to say)' test in the same way as an explicature.

79 Ariel (n. 1), 4.
80 Taken from Ariel (n. 1), 19.

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??[81] The speaker said that John Doe has a mother-in-law, *that is (to say)* that he would illegally buy shares under his mother-in-law's name. ['that-is (to say)' test]

This is due to the fact that strong implicature remains indirect. To conclusively identify strong implicature, Ariel suggests an extended 'replacement' test ('but actually indirectly conveyed') that identifies the element of strong implicature and adds the term 'literally'.[82]

R *literally* said that John Doe has a mother-in-law, *but actually he indirectly conveyed that* John Doe would illegally buy shares under his mother-in-law's name. ['replacement' test]

In international law, this phenomenon arises where an interpreting agent effectively replaces what has been written down in a treaty, i. e. replaces the ordinary meaning, by means of interpretation.[83]

As an example, let us take the well-known *Les Verts* case[84] in European Union (EU) law.[85] The Court of Justice of the European Union had to decide whether a certain judicial remedy could be brought before it against certain acts of the European Parliament which had legal effects. At that time, the relevant provision of the European Economic Community Treaty,[86] Article 173, stated that '[t]he Court of Justice shall review the lawfulness of acts other than recommendations or opinions of the Council and the Commission'. This meant that there was a judicial remedy against any acts which had binding legal effects and were issued by the two mentioned EU institutions, but – at least looking at the text of Article 173 – there was no judicial remedy against acts with such effects issued by the European Parliament. The Court found that there had to be such a remedy under Article 173. It did so famously by arguing that the Community was a 'community based on the rule of law' in which neither Member States nor institutions could avoid a review of their measures against the benchmark of the Treaty as the 'basic

81 In linguistics, there is a convention to use two question marks in cases like the present one where the application of the mentioned test does not produce an acceptable utterance.

82 Ariel (n. 1), 20.

83 Of course, depending on the context and the applicable legal rules, such behaviour may be frowned upon, e. g. in international criminal law where the principle of legality has particular weight. See for example Talita de Souza Dias, 'The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-Discussed Problem', JICJ 16 (2018), 65-89 (65).

84 ECJ, *Parti écologiste 'Les Verts' v. European Parliament*, judgement of 23 April 1986, case no. 294/83, ECLI:EU:C:1986:166.

85 For the present purposes of examining interpretation, the differences between the fields of European Union and international law will be left aside.

86 European Economic Community Treaty of 25 March 1957, 298 UNTS 3.

constitutional charter'.[87] The Court admitted that Article 173 did not mention the Parliament, but held that this was merely because that institution had initially only been granted powers of consultation and political control rather than the power to adopt measures with legal effects towards third parties. By comparison, in the European Coal and Steel Community Treaty, the Parliament had been given such powers from the beginning and therefore its acts could also expressly be attacked in Court.[88] Interpreting Article 173 to not include the Parliament would thus be contrary to the spirit and system of the Treaty in the Court's view, as the Parliament's acts could otherwise encroach upon the powers of other institutions or the Member States without any possible review by the Court.[89]

Linguistically speaking, the Court seemed to read into the Treaty something that is not explicitly there. At first glance, the Court's reading can be represented as follows:

> The Court of Justice shall review the lawfulness of acts other than recommendations or opinions of the Council, the Commission *and the Parliament*.

Upon closer inspection, however, the Court does not merely add the Parliament, but suggests replacing the treaty text 'the Council and the Commission' with 'all the institutions handing down acts with legal effects towards third parties'. We can thus represent the Court's principled interpretation much better by using Ariel's replacement test.

> The treaty *literally* stated that the Court of Justice shall review the lawfulness of acts other than recommendations or opinions of the Council and the Commission, *but actually it indirectly conveyed that* the Court of Justice shall review all acts with binding legal effects towards third parties of all EU institutions. ['replacement' test]

The Court is thus effectively replacing part of the treaty text with a pragmatic interpretation, based in this case on its principled view that no legal act with binding effects must escape judicial review. Thinking in terms of categories of pragmatic interpretations thus helps us to better frame what a court is doing in a particular case (without implying that the court should be shielded in any way from criticism of its approach). Compared to the example of explicature, the Court's suggested interpretation clearly has a less prominent discoursal status with regard to the original treaty provision and therefore requires a stronger substantive justification. Moreover, as in this

87 ECJ, *Parti écologiste 'Les Verts'* (n. 84), margin number 23.
88 ECJ, *Parti écologiste 'Les Verts'* (n. 84), margin number 24.
89 ECJ, *Parti écologiste 'Les Verts'* (n. 84), margin number 25.

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particular case the Court is, as noted, effectively replacing part of the treaty text, a very convincing justification for this replacement must be provided. It is nonetheless, in our view, not a clear-cut case of treaty silence, although others would perhaps see it this way.[90] The treaty at issue lists two institutions; the Court adds a third one not by simply 'inventing' its addition to the list, but by replacing the list with a more general category ('acts with binding legal effects towards third parties of all EU institutions'), thus treating the two mentioned institutions as mere examples. The Court is thus still interacting with the treaty text.

2. Provisional Explicature

Similar to strong implicature, provisional explicature concerns a situation in which a speaker says one thing (a first tier) but intends quite another (a second tier). In the case of provisional explicature, the speaker expresses the intended interpretation directly, but ultimately removes her commitment to the interpretation.[91] The first tier explicit meaning may even be false. Typical examples involve irony or rhetorical questions.[92]

In the case of irony, a speaker could make her point in a more direct fashion, but wants the addressee to consider the expressed message *and* the indirect message.[93] Take the following example from Ariel's newspaper article.[94]

> Women are murdered repeatedly here and nobody cares. *Family honour!*

To identify such provisional explicatures, one can again apply Ariel's 'replacement' test as in the case of strong implicature. The provisional explicature follows after 'literally said that'.

> The speaker *literally said that* that was family honour, *but actually she indirectly conveyed that* that was not at all family honour. ['replacement' test]

90 See also the above discussion on exhaustive/non-exhaustive lists in the text accompanying footnote 16 in section II.

91 Ariel (n. 1), 4.

92 See on ironies e. g. Herbert H. Clark and Richard J. Gerrig, 'On the Pretense Theory of Irony', Journal of Experimental Psychology 113 (1984), 121-126.

93 Penny M. Pexman, Todd R. Ferretti and Albert N. Katz, 'Discourse Factors that Influence Online Reading of Metaphor and Irony', Discourse Processes 29 (2000), 201-222 (219 et seq.).

94 Ariel (n. 1), 21.

Here, the strong implicature also competes with the provisional explicature, and in fact replaces it as the intended message. In cases of irony or rhetorical questions, the difference from a strong implicature is that the addressee is expected to hold on to the literal first tier to arrive at the intended implicated interpretation and to appreciate the gap between the two representations.[95]

This type of pragmatic interpretation is not very frequent in legal interpretation, as generally one would tend to assume that legal norms like international treaties are not drafted in an ironic way or in another manner to express something different from what they state expressly.[96] It is also not easy to square an ironic reading with the need to take into account ordinary meaning and to give effectiveness to a treaty's terms. Saying something deliberately false or something that you do not intend to uphold in the long term to let an addressee appreciate the difference with your real attitude could even be dangerous in an international law context marked by good faith interpretation and by various ways of norm development that rely on State utterances like the formation of customary international law or unilateral declarations. Consequently, one should expect to observe such behaviour only rarely, namely in a context where the speaker speaks from a position of power, so that he or she is able to impose his or her position or withdraw an 'erroneous' statement without having to fear serious consequences.[97] Nonetheless, there are examples of provisional explicature in international law.

The Paris Declaration Respecting Maritime Law of 1856 famously abolished privateering in the following terms: 'Privateering is, and remains, abolished.'[98] This is, of course, a curious way to establish such a prohibition. Legal prohibitions are always about the future; so stating that privateering is abolished indicates that it 'remains' prohibited for the future. That privateering 'remains' abolished therefore points to the fact that privateering has already been abolished in the past, and the present declaration is only a restatement of an existing legal state of affairs. The Paris Declaration of course had a relevant historic context, namely, it was a message aimed mostly by European states at the United States. Until this point, the United States'

95 Ariel (n. 1), 24.

96 See in this regard also Ulf Linderfalk, 'What Are the Functions of the General Principles? Good Faith and International Legal Pragmatics', ZaöRV 78 (2018), 1-31, *passim*.

97 See generally on imperialism in international law e. g. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press 2005).

98 Art. 1 of the Declaration Respecting Maritime Law, Paris, 16 April 1856, LXI *British State Papers* (1856) 155-158.

Constitution had provided Congress with the authority to name privateers.[99] The practice had been justified in the past with the argument that the navy of the United States was comparatively weak and needed to be able to rely on private merchant ships in emergency cases to reinforce its ranks, a problem not faced by the European countries with their then powerful naval forces.[100] In fact, the United States did not consider itself bound by any norm of customary international law that European states would have claimed to exist before the Paris Declaration.

Put differently, in this situation the addressee of the Paris Declaration – the United States – is expected to hold on to the literal first tier ('privateering is, and remains, abolished') to arrive at the intended implicated interpretation ('privateering has not yet been universally abolished'). The goal is to let the United States appreciate the gap between the two representations – the fact that the European states strongly disagree with the United States' position and do not want to recognise it as a legally tenable position under international law (e. g. as a persistent objection to the emergence of a norm of customary international law).

If we put it in Ariel's terms, the following representations are the result.

> The treaty stated that privateering is, and remains, abolished.
>
> Privateering has not yet been universally abolished, yet it should have been.
>
> The treaty *literally* stated that privateering is, and remains, abolished, *but it actually conveyed that* privateering has not yet been universally abolished, yet it should have been. ['replacement' test]

The phrasing of the Declaration must be understood in the sense of emphasising that a certain legal state of affairs should be powerfully confirmed as being self-evident even though the United States' persistent objection to it made the situation not uncontested. In fact, the very point of the Paris Declaration that can be grasped somewhat intuitively is clearer if we use Ariel's typology. By comparison with our earlier examples, even though there is a clear relationship between the text and the pragmatic interpretation that we have explained in this example, the relationship is significantly weaker than in the previous case of explicature. It is thus another example of a borderline case.

99 Art. I Section 8 of the United States Constitution states in this regard that Congress shall have power to 'grant letters of marque and reprisal'.

100 For more on the historical context and the United States' counteroffer to join the declaration if all seizures of private property at sea, i. e. also by public warships, were prohibited, see Theodore M. Cooperstein, 'Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering', J. Mar. L. & Com. 40 (2009), 221-252 (245-246).

VII. Treaty Silence Cases

What we term treaty silence cases in our presently suggested categorisation are those where the interpretation that is derived from a treaty text does no longer share fundamental commonalities with the treaty text itself. There is clearly an element of adding to the treaty text. As indicated earlier, there is no easy solution that can be suggested for these situations. Nonetheless, at least Ariel's typology clarifies the exact relationship between a treaty that is silent with regard to a particular question and the interpretation an interpreting agent suggests, clarifying what arguments exactly an interpreting agent needs to provide to justify an interpretation.

1. Particularised Conversational Implicatures

Unlike explicature, particularised conversational implicatures (PCIs) are consciously perceived as being separate from the content of the explicature on which they are based.[101] Take the following example of an utterance by a reporter in Ariel's example newspaper article:

> Last Saturday night, Busaina Abu Ghanem was murdered, the *tenth female victim in the family*.

There is a reason why the reporter mentions the fact that it is the tenth female murder victim in the family. Something additional is being conveyed by the explicit content. This could, for example, be:

> There is something terribly wrong with this family.

This interpretation is implicit and can be cancelled explicitly. It is also separate from the relevant explicature. It is different in content and truth conditions: the PCI could be not true without this necessarily affecting whether the main example is true. There could be nothing wrong with the family, or there could be something wrong with this family. This does not change the fact that Busaina Abu Ghanem was the tenth female victim in the family. As the PCI is different from explicature, if submitted to the 'that-is' test it fails the test.

> ?? The speaker said that last Saturday night, Busaina Abu Ghanem was murdered, the tenth female victim in the family, *that is (to say)* that there is something terribly wrong with this family. ['that-is (to say)' test]

101 This means that they also have their own truth conditions.

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There is, however, a test to identify PCIs, namely the 'indirect-addition' test.[102]

> The speaker said that last Saturday night, Busaina Abu Ghanem was murdered, the tenth female victim in the family, *and in addition she indirectly conveyed that* there is something terribly wrong with this family. ['indirect-addition' test]

This test targets indirectly communicated messages, i. e. implicated conclusions.[103] Explicated content will thus typically not pass this test. Implicated conclusions depend on contextual assumptions, but the utterance content (the tenth victim) actively participates in shaping the implicated conclusion (there is something wrong).

In the Brexit-related *Wightman* case,[104] there is an example of a somewhat self-constructed particularised conversational implicature by the European Court of Justice. The latter had to decide whether Article 50 of the Treaty on European Union (TEU) provides for the possibility that the notification of a Member State's intention to withdraw from the European Union could be revoked unilaterally by the Member State.

Somewhat simplified for the present purposes, Article 50 TEU provides that any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements (paragraph 1). A Member State that decides to do so 'shall notify the European Council of its intention'; then, the parties are to negotiate an agreement on the withdrawal taking into account the future relationship with the Union (paragraph 2). In the text of the provision there is thus no express answer to the question of whether once a Member State has given notification of its intention to withdraw, this notification can be unilaterally revoked.[105]

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102 Ariel (n. 72), 261 et seq.

103 One can also draw a distinction between two kinds of PCIs, implicated conclusions and implicated premises (see also, with further examples from international law, Pirker and Smolka (n. 37), 259 et seq. However, Ariel (n. 72), 13-14, argues that implicated premises are part of background assumptions, and we follow her view in dealing with them under that categorisation. See on the previous definition H. Paul Grice, *Studies in the Way of Words* (Cambridge MA, London: Harvard University Press 1989), 86.

104 ECJ, *Andy Wightman a. o. v. Secretary of State for Exiting the European Union*, judgement of 10 December 2018, case no. C-621/18, ECLI:EU:C:2018:999.

105 For a discussion regarding the doctrine see e. g. Aurel Sari, 'Reversing a Withdrawal Notification under Article 50 TEU: Can a Member State Change Its Mind?', E. L. Rev. 42 (2017), 451-473; Piet Eeckhout and Eleni Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading', CML Rev. 54 (2017), 695-733; on the decision see e. g. Jure Vidmar, 'Unilateral Revocability in Wightman: Fixing Article 50 with Constitutional Tools – ECJ 10 December 2018, Case C-621/18, Andy Wightman and Others v Secretary of State for Exiting the European Union', EU Const. L. Rev. 15 (2019), 359-375.

The Court examined the wording, noting that the silence of the provision meant that it 'neither expressly prohibits nor expressly authorises revocation', but that it spoke of the notification of an 'intention', the latter being 'by its nature' neither definitive nor irrevocable.[106] The Court then turned to the context, notably the other parts of Article 50 such as paragraphs 1 and 3. It noted that a Member State's decision to withdraw had to be made in accordance with its own constitutional requirements, i. e. without requiring consent from the other Member States; and that the rest of the context pointed out the procedure to be followed in the event of a withdrawal.[107] This meant that Article 50 TEU pursued two objectives, enshrining the 'sovereign right' of a Member State to withdraw from the EU and also establishing a procedure for this purpose.[108] This sovereign right thus implies the possibility of deciding upon withdrawal unilaterally in accordance with a Member State's constitutional requirements, including the revocation of a notification of the intention to withdraw as a 'sovereign decision'.[109] The Court then considered the context and found that the parallel provision of Article 49 TEU on the accession to the EU made it clear that the Union was composed of states having 'freely and voluntarily' committed themselves to common values; if a state cannot be forced to join, neither can it be forced to withdraw against its will.[110] The Court thus concluded that revocation of the notification was possible.

If we rephrase somewhat the Court's interpretation and present it with the bare provision, we get two individual utterances, neither of which can be characterised in Ariel's terms as a pragmatic interpretation of the other.

> The treaty stated that a Member State that decides to withdraw shall notify the European Council of its intention.
>
> A Member State is free to decide to unilaterally revoke such a notification.

However, this is not how the Court presented its reading. In fact, the Court aimed to present its conclusion as a PCI, thereby creating a stronger link between its interpretation and the treaty norm. Drawing from contextual arguments, the Court added elements such as the fact that the Member State had just as much sovereign right to decide to withdraw as to join the European Union. Thereby, a much closer link between the modified utterance and the Court's interpretation can be suggested, namely a particularised conversational implicature.

106 ECJ, *Wightman* (n. 104), margin numbers 48-49. As the Court does not take this explicature point further, we do not examine it presently in more detail.

107 ECJ, *Wightman* (n. 104), margin numbers 50-55.

108 ECJ, *Wightman* (n. 104), margin numbers 56.

109 ECJ, *Wightman* (n. 104), margin numbers 58-59.

110 ECJ, *Wightman* (n. 104), margin numbers 63-65.

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> The treaty stated that a Member State *is free to decide to join and leave* the European Union *as its sovereign right in accordance with its own constitutional requirements.* [elements added by the Court in italics]
>
> The treaty further stated that a Member State that decides to withdraw shall notify the European Council of its intention*, and in addition it indirectly conveyed that* a Member State is free to decide to unilaterally revoke such a notification. ['indirect-addition' test]

The possibility of the unilateral revocation of a notification is still perceived to be separate from the content of the explicature on which it is based. Moreover, it is different in content and truth conditions; it could be wrong that withdrawal can be revoked unilaterally, but this would not change the fact that a Member State has to notify the European Council of its intention to withdraw. The utterance – as deliberately presented by the Court – actively participates in shaping the implicated conclusion. In a nutshell, if the overall process – joining the EU, leaving the EU – is a sovereignty issue, an aspect of it that is not spelt out explicitly is also defined by sovereignty considerations, i. e. a unilateral revocation of the notification is possible. The Court thus tries, pseudo-linguistically speaking, to make its interpretation appear more logical than it would be if it were based on the mere treaty text.

In terms of a legal justification, the Court has to react here to the silence of the treaty by adding to the text to establish a supposed overall sovereignty rationale of Article 50, mostly by relying on contextual arguments. Relying on Ariel's typology shows that the case is indeed about treaty silence for the Court. While the Court briefly hints at an explicature when interpreting the treaty term of 'intention', it then moves on to sovereignty considerations and does not explore the explicature point in more depth. The main justificatory burden lies on its arguments on context and whether a sufficiently clear rationale of Article 50 on sovereignty can be presented, rather than say a debate whether the Court 'invented' terms.

2. Background Assumptions

In their original definition, background assumptions serve to allow the addressee to judge whether an utterance is to be interpreted as true or false.[111] Such assumptions are implicit aspects of the communication for which the speaker does not need to – and effectively does not – assume responsibility, although the speaker makes the assumptions, as they form part of her world knowledge.[112]

111 John R. Searle, 'Prima Facie Obligations', in: Joseph Raz (ed.) *Practical Reasoning* (Oxford: Oxford University Press 1978), 81.

112 Ariel (n. 1), 15.

An example from the abovementioned newspaper article shows that such a background assumption can be mobilised to derive a speaker-intended PCI.

> Utterance: The victim's house has no customary mourners' booth and no visitors appear.
>
> Background assumption: It is customary to have a mourners' booth where visitors come to pay their respect to the dead.
>
> PCI: It is wrong to deny the murdered woman the customary respect for the dead.

If we apply the 'indirect-addition' test, we observe that the background assumption fails the test, but that the PCI – as it should – passes the test.

> The speaker said that the victim's house has no customary mourners' booth and no visitors appear, *and in addition she indirectly conveyed that* it is wrong to deny the murdered woman the customary respect for the dead. ['indirect-addition' test]
>
> ?? The speaker said that the victim's house has no customary mourners' booth and no visitors appear, *and in addition she indirectly conveyed that* it is customary to have a mourners' booth where visitors come to pay their respect to the dead. ['indirect-addition' test]

Background assumptions also fail the 'that-is' test:

> ?? The speaker said that the victim's house has no customary mourners' booth and no visitors appear, *that is (to say) that* it is customary to have a mourners' booth where visitors come to pay their respect to the dead. ['that-is (to say)' test]

To identify background assumptions, Ariel suggests a 'circumstantial-report' test.[113] This test renders explicit the background assumption on which a speaker intends the addressee to rely when interpreting the utterance. At the same time, the test reports that assumption separately from the utterance and does not frame it as a speaker-intended message.

> The speaker said that the victim's house has no customary mourners' booth and no visitors appear. *She intended the addressee to take into consideration the fact that* it is customary to have a mourners' booth where visitors come to pay their respect to the dead. ['circumstantial-report' test]

Consequently, background assumptions are entertained by the speaker; the speaker intends the addressee to access them, but they do not (directly or indirectly) form part of the message communicated by the speaker.[114]

113 Ariel (n. 1), 17.
114 Ariel (n. 1), 17.

In international law, there are cases where the interpretation of a norm presupposes certain assumptions. For instance, in the example presented at the start of this paper, Article 23 (d) of the Annex to the Hague Convention on the Laws and Customs of War on Land (IV) contains a prohibition '[t]o *declare* that no quarter will be given'.[115]

Is there now only a prohibition against declaring that no quarter will be given, or is it also prohibited to deny quarter? A typical legal argument could be based on an *a fortiori* reasoning often used in treaty silence cases: If it is prohibited to order or threaten that no quarter shall be given, then it is also prohibited to carry out such orders or threats in the context of military operations.[116] If we were to suggest, however, that this is an interpretation of Article 23 (d), what is the exact relationship between the two? Is it a broad interpretation of the term 'to declare'? Linguistically, it is easier to understand what occurred in the interpretive process if we describe the doctrinal reasoning as ascribing a background assumption to the framers of the Hague Convention.

> The treaty stated that it is prohibited to declare that no quarter will be given.
>
> Background assumption: It is prohibited to deny quarter.
>
> 'Circumstantial-report' test: The treaty stated that it is prohibited to declare that no quarter will be given. *It intended the addressee to take into consideration the fact that* it is prohibited to deny quarter.

The interpretation is thus not, for example, an explicature in the sense of a pragmatic interpretation of 'to declare', meaning a broad reading of 'declare', but is more accurately described based on the idea that the Hague Convention gives rise to the background assumption set out above. The discoursal status of such an assumption is, of course, weaker than that of a particularised conversational implicature. As a consequence an interpreting agent must justify this reading of the Convention providing evidence through, e. g. context or the object and purpose of the Convention that the common intention behind the Convention includes a prohibition to deny quarter (put linguistically, that this prohibition is 'entertained' by the treaty parties).

115 Annex to the Hague Convention on the Laws and Customs of War on Land (IV), 187 CTS 227 (emphasis added).

116 See already section 2 on the canon *per argumentum a fortiori*. See for an overview of the doctrinal discussion Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2005, 162.

3. Truth-Compatible Inferences

Truth-compatible inferences are inferences that the speaker is likely to endorse, given the content of an utterance; or else, should the assumption be true in reality, then such assumptions will be seen as compatible with the speaker's utterance (i. e. the speaker is seen as not having precluded them).[117]

As inferences, they are not speaker-intended, but merely potentially derived.[118] Take the following example from Ariel:

> *In the wake of the murder* of Busaina Abu Ghanem last weekend, activists say the police must do more to intervene.

In this case, it is only after the last murder has happened that the journalist reports – as she finds this fact relevant – that there are complaints from activists. However, there have, in fact, been complaints before, and the journalist in all likelihood knows this.

There are again tests to identify truth-compatible inferences. As they are neither an explicature nor PCIs, they fail both the 'that-is (to say)' test and the 'indirect-addition' test.

> ?? The journalist said that in the wake of the murder of Busaina Abu Ghanem last weekend, activists say the police must do more, *that is (to say)* that the activists possibly spoke up before. ['that-is (to say)' test]
>
> ?? The journalist said that in the wake of the murder of Busaina Abu Ghanem last weekend, activists say the police must do more, *and in addition she indirectly conveyed that* the activists possibly spoke up before. ['indirect-addition' test]

Ariel instead proposes a very weak 'compatibility' test.[119]

> The journalist said that in the wake of the murder of Busaina Abu Ghanem last weekend, activists say the police must do more. *Her utterance is compatible with a state of affairs in which* the activists possibly spoke up before. ['compatibility' test]

Note that such truth-compatible inferences do not have a very prominent discoursal status. In fact, they have the least prominent status out of all Ariel's types of pragmatic interpretations. In international law, we can take the example of the *Bosnia Genocide (Merits)* case.[120] As a caveat, we should

117 Ariel (n. 1), 24.
118 Ariel (n. 1), 25.
119 Ariel (n. 1), 27.
120 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) (Bosnia Genocide), merits, judgement of 26 February 2007, ICJ Reports 2007, 23.

note that we do not disagree with the outcome of this case. The part of the decision that will be discussed could simply benefit from having a stronger engagement with linguistics, so that the same or a similar result could be reached via a different, more convincing reasoning.[121]

The Court had to answer the question of whether the Genocide Convention[122] created an obligation for the parties to the Convention not to commit genocide. In Article I, the Convention provides that the parties confirm that genocide is a crime under international law and that they undertake to prevent and to punish it. The Court found that the 'actual terms' of the Convention did not contain such an obligation on the states and that Article I did not require states to refrain from committing genocide themselves 'expressis verbis'. However, taking into account the established purpose of the Convention, the 'effect' of Article I was to prohibit states from committing genocide. This would follow first from the Article categorising genocide as a crime under international law, which 'logically' meant states agreeing with this categorisation committed not to undertake such an act. Secondly, states had an obligation to employ the means at their disposal to prevent persons or groups not directly under their control from committing acts of genocide. In this light, it would be 'paradoxical' if states were not forbidden to commit such acts by their own organs, bodies or persons over which they have sufficiently firm control that their conduct can be attributable to the state. In the opinion of the Court, the obligation to prevent genocide thus 'necessarily implie[d]' the prohibition of the commission of genocide.[123]

Put simply, the treaty utters that 'The parties agree that genocide is a crime under international law and undertake to prevent and punish it.' The Court adds a pragmatic interpretation that is not warranted by the explicit elements of the utterance, namely 'The parties are under an obligation not to commit genocide'. Using Ariel's tests, we can identify that the 'circumstantial-report' test is not passed, and only the 'compatibility' test is passed.

> ?? The treaty stated that the parties agree that genocide is a crime under international law and undertake to prevent and punish it. *It intended the addressee to take into consideration the fact that* the parties themselves are obliged not to commit genocide. ['circumstantial-report' test]

121 See for possible approaches e. g. the position taken by Judges Shi and Koroma in their Joint Declaration, paras 4-5.

122 Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, 78 UNTS 277.

123 Bosnia Genocide (n. 120), para. 166.

> The treaty stated that the parties agree that genocide is a crime under international law and undertake to prevent and punish it. *Its utterance is compatible with a state of affairs in which* the parties themselves are obliged not to commit genocide. ['compatibility' test]

As we are in the presence of a truth-compatible inference, the pragmatic interpretation suggested by the ICJ is only very remotely connected to the text of the treaty. In fact, it is an inference that the speaker can probably be considered with a certain likelihood to endorse, and the treaty norm certainly does not exclude that treaty parties themselves are obliged not to commit genocide. But the actual link between text and interpretation stops there. The Court's justification seems, to some degree, to acknowledge that by glossing over the exact relationship between the silence of the treaty norm and the interpretation using phrases like 'necessarily implie[d]' or 'paradoxical' to support its interpretation.[124] However, it is not impossible – or not as impossible as the Court makes it seem – that a treaty would require its parties to prevent and punish a certain behaviour while not creating a prohibition for states themselves. In this case, the Court would thus have to show that the clear silence of the treaty can be filled via the common intention of the treaty parties of a prohibition applicable to states. As has been observed in the context of the case, however, another approach would have been to base such a prohibition on a different source of international law.[125] A strict linguistic categorisation of the situation of treaty silence forces the observer to thus take a more critical look at the Court's suggested seemingly 'logical' interpretation.

VIII. Ariel's Typology Visualised

Before we conclude, the following overview[126] summarises Ariel's findings on types of pragmatic interpretations and the tests that can be applied to identify them once again, this time in the form of a somewhat simplified table.

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124 Notably, in the doctrinal discussion of the case favourable readings of the decision tend to also somewhat gloss over the link between the Court's conclusion and the actual text of the treaty, see e. g. Amabelle C. Asuncion, 'Pulling the Stops on Genocide: The State or the Individual?', EJIL 20 (2009), 1195-1222 (1204); Ulf Linderfalk, 'Is Treaty Interpretation an Art or a Science? International Law and Rational Decision-Making', EJIL 26 (2015), 169-189 (185).

125 See e. g. Paola Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?', EJIL 18 (2007), 631-648 (637), who suggests that the treaty does not exclude the existence of the relevant obligation, but that the conclusion that the obligation exists cannot be drawn based on the treaty; see also the position taken by Judge Owada in his Separate Opinion, para. 58.

126 Taken from Ariel (n. 1), 5, but slightly simplified by leaving out the 'said' test mentioned in the original, on which Ariel herself does not truly rely.

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Tests: / **Interpretations:**	*That is*	*Indirect addition*	*Replacement*	*First tier*	*Compatibility*	*Circumstantial report*
Explicature	✓	✗	✗	✗	✓	✗
Strong implicature	✗	✓	✓	✗	✓	✗
Provisional explicature	✗	✗	✗	✓	✗	✗
Particularised conversational implicature	✗	✓	✗	✗	✓	✗
Background assumption	✗	✗	✗	✗	✓	✓
Truth-compatible inferences	✗	✗	✗	✗	✓	✗

✓ Passes test.
✗ Fails test.

IX. Conclusion

This paper has suggested that an understanding of linguistics and, in particular, of the proposed typology of pragmatic interpretations can help international lawyers refine their understanding of language meaning in interpretive processes of international treaties. Semantics and pragmatics generally provide helpful insights in the context of treaty interpretation. The use of a pragmatic typology – as shown with examples – makes it possible to establish and discuss situations of varying degrees of explicitness of treaty provisions with more precision than the current practice. The pragmatic typology suggested by Ariel provides international lawyers with the particular advantage of offering tests so that interpretations can be categorised, compared and evaluated fairly easily. Notions such as explicature, particularised conversational implicature and truth-compatible inference could thus become part of international lawyers' repertoire whenever they discuss treaty interpretation.

For the situation where a treaty provision is not very explicit or not explicit at all with regard to a particular question, we have offered on this

basis a distinction between clear-cut ordinary meaning cases in which the Vienna Convention rule of interpretation can be applied without too much difficulty; ordinary meaning borderline cases in which an interpretation rewrites parts of a treaty through pragmatic means; and treaty silence cases in which an interpretation truly adds something to a treaty text that has a (stronger or weaker) link to the treaty, but nonetheless adds to the text through pragmatic means. Five categories form the shades of grey of the grey area of borderline and treaty silence cases. Nonetheless, none of these categories is *per se* an inadmissible result of interpretation from the perspective of international law. What our proposal aims at is to require the adequate justification for an interpretation suggested by an interpreting agent, with linguistics refining the operation of the general rule of interpretation under Article 31 VCLT. The more we are in a situation of what we have termed treaty silence for our present purposes, the more difficult it is to provide this justification, as it needs to hark back to the common intentions of the treaty parties. Without offering a panacea, our proposal arguably brings some light to the grey area ranging from the applicability of the Vienna Convention to such treaty silence cases.

Our proposal is, however, in our view not the end, but only the beginning. There are additional methodological possibilities that become available with a linguistics-informed approach to interpretation and international law more generally. In recent years linguistics and in particular pragmatics have increasingly been relying on experimental approaches.[127] As international law scholarship catches up in this regard,[128] it could benefit from the experience gained in the fields of linguistics and pragmatics. In the future, whether and how pragmatic interpretations emerge could be tested experimentally in international legal contexts, thereby providing empirically tenable conclusions which would further our knowledge about interpretation in international law.[129]

127 Ira Noveck, *Experimental Pragmatics – The Making of a Cognitive Science* (Cambridge: Cambridge University Press 2018).

128 See e. g. Adam Chilton and Dustin Tingley, 'Why the Study of International Law Needs Experiments', Colum. J. Transnat'l L. 52 (2013), 173-238; Yahli Shereshevsky and Tom Noah, 'Does Exposure to Preparatory Work Affect Treaty Interpretation? An Experimental Study on International Law Students and Experts', EJIL 28 (2018), 1287-1316; Jeffrey L. Dunoff and Mark A. Pollack, 'Experimenting with International Law', EJIL 28 (2018), 1317-1340; Maria Laura Marceddu and Pietro Ortolani, 'What is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments', EJIL 31 (2020), 405-428.

129 See for an experimental examination in this field the 'International Law, Linguistics and Experimentation' (IntLLEx) project (<www.unifr.ch/ius/euroinstitut/de/forschung/forschungsprojekte.html>) and Benedikt Pirker and I. Izabela Skoczeń, 'Pragmatic Inferences and Moral Factors in Treaty Interpretation – Applying Experimental Linguistics to International Law', GLJ (2022), forthcoming.

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