

CHAPTER 7

PLURILINGUAL TREATIES: ASPECTS OF INTERPRETATION

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I. INTRODUCTION

As the first and second indents of the preamble to the Vienna Convention on the Law of Treaties (VCLT) acknowledge, treaties have had a fundamental role in the history of international relations and they are also of ever-increasing importance ‘as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems’.¹ In 2000 the then Secretary-General of the United Nations, Kofi Annan, noted that ‘[s]upport for the rule of law would be enhanced if countries signed and ratified international treaties and conventions’.²

One of the key features of the practice of the United Nations and other international bodies tasked with supporting the rule of international law through the adoption of treaties (primarily multilateral) on a range of issues is the plurilingual nature of the instruments concluded. The Charter of the United Nations, for example, was authenticated in five languages—Chinese, French, Russian, English and Spanish³—and this practice has increasingly been applied to the multilateral treaties negotiated under the auspices of the specialized agencies of the United Nations.

Given the widespread practice of authenticating treaties in two or more languages⁴ and the importance of multilateral treaties both as a source of international law and as a means of encouraging peaceful co-operation among nations, it is surprising that more attention is not devoted to the issue of the interpretation of plurilingual treaties.⁵ Due to the breadth of the subject, this chapter can only offer a brief introduction to some of the key issues involved including the historical background, the practice of the Permanent Court of International Justice (PCIJ) and International Court of Justice (ICJ) prior to the adoption of the VCLT, the provisions

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¹ The Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

² KA Annan, *We the Peoples: The Role of the United Nations in the 21st Century* (United Nations, New York, 2000) 69.

³ The Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 art 111 (UN Charter).

⁴ Authentication is the process of establishing the definitive text of a treaty. The modern practice of drafting multilateral treaties in more than one authentic language has necessitated drawing a distinction between the process of adoption (article 9 VCLT) and authentication (article 10 VCLT). See International Law Commission (ILC), ‘Report of the International Law Commission on the work of its Eighteenth Session’ (4 May-19 July 1966) [1966] Yearbook of the ILC Vol II ‘Draft Articles on the Law of Treaties: with commentaries’ 187, 195 (UN Doc A/CN.4/191) where the ILC noted that ‘the text of a treaty may be “adopted” in one language but “authenticated” in two or more languages’. See also A Aust, *Modern Treaty Law and Practice* (2nd edn, CUP, Cambridge, 2007) ch 6.

⁵ See, for example, I Brownlie, *Principles of Public International Law* (7th edn, OUP, Oxford, 2008) and P Reuter, *Introduction au droit des traités* (3rd edn, Presses Universitaires de France, Paris, 1995) neither of whom make any reference to the issue of the interpretation of plurilingual treaties. See also RK Gardiner, *Treaty Interpretation* (OUP, Oxford, 2008) 353 ‘From the fact that many judgments and awards of international courts and tribunals only mention articles 31 and 32.... it might be concluded that article 33 [VCLT] is the poor relation of the set’.

of the VCLT dealing with the interpretation of treaties authenticated in two or more languages (article 33) and the influence of these provisions on the subsequent practice of the ICJ particularly in the *LaGrand* case.⁶

II. HISTORICAL BACKGROUND

A. Introduction

As Shelton notes, ‘[u]ntil the twentieth century, treaties were generally written in the *lingua franca* of the period and place’.⁷ For many centuries the *lingua franca* of western European treaty making was Latin.⁸ During the 17th and 18th centuries French succeeded Latin as the pre-eminent diplomatic language.⁹ It is worth noting that article 120 of the Final Act of Congress of Vienna¹⁰ states that:

The French language having been exclusively employed in all the copies of the present Treaty, it is declared by the powers that have concurred in this Act, that the use made of that language shall not be construed into a precedent for the future; every power, therefore, reserves to itself the adoption in future Negotiations and Conventions, the language it has heretofore employed in its diplomatic relations; and this Treaty shall not be cited as a precedent contrary to the established practice.¹¹

Given the context and timing of the Congress of Vienna—the Final Act was signed nine days before Napoleon’s final defeat at the Battle of Waterloo on 18 June 1815—the ambivalence expressed towards the use of French in the Final Act was understandable. However, notwithstanding the provisions of article 120 of the Final Act of the Congress of Vienna, all the major multilateral treaties of the 19th century¹² and early 20th century¹³ were drafted and signed in French.

⁶ *Case Concerning the Vienna Convention on Consular Relations (Germany v USA)* (Judgment) [2001] ICJ Rep 466 (*LaGrand*).

⁷ D Shelton, ‘Reconcilable Differences? The Interpretation of Multilingual Treaties’ (1996–1997) 20 *Hastings International and Comparative LR* 611, 613–614. See also M Tabory, *Multilingualism in International Law and Institutions* (Sijthoff & Noordhoff, Alphen aan den Rijn, 1980) 4.

⁸ The Treaties of Peace, for example, concluded at Osnabrück (14(24) October 1648) 1 CTS 119 and Münster (14(24) October 1648) 1 CTS 271 (known collectively as the Peace of Westphalia) were drafted and signed in Latin. See further L Winkel, ‘The Peace Treaties of Westphalia as an instance of the reception of Roman Law’ in R Lesaffer (ed), *Peace treaties and international law in European history: from the late Middle Ages to World War One* (CUP, Cambridge, 2004) 222.

⁹ J Hardy, ‘The Interpretation of Plurilingual Treaties by International Courts and Tribunals’ (1961) 37 *BYIL* 72. See also A Ostrower, *Language, Law, and Diplomacy: A Study of Linguistic Diversity In Official International Relations and International Law* (University of Pennsylvania Press, Philadelphia, 1965) vol 1, 286.

¹⁰ The General Treaty of the Final Act of the Congress at Vienna (adopted 9 June 1815) 64 CTS 453.

¹¹ The translation of art 120 is taken from the copy of the General Treaty signed in Congress at Vienna presented to the House by Lord Castlereagh. See *Hansard* vol 32 col 113 (2 February 1816).

¹² See, for example, the Treaty between Austria-Hungary, France, Germany, Great Britain, Italy, Russia and Turkey for the Settlement of Affairs in the East (adopted 13 July 1878, ratifications exchanged 3 August 1878) 153 CTS 171 (Congress of Berlin). See also the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted 22 August 1864, entered into force 22 June 1865) 129 CTS 361 (Geneva Convention of 22 August 1864), the Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight (adopted 29 November (11 December) 1868) 138 CTS 297 (Declaration of St Petersburg), the International Convention for the Pacific Settlement of Disputes (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS

B. *The Treaty of Versailles*

In contrast to the general practice of the 19th and early 20th centuries, article 440 of the Treaty of Versailles states that ‘the English and French texts are both authentic’.¹⁴ As Millar notes:

Much as the French wished otherwise, the British and American participation in the War and in its settlement and the presence of President Wilson in Paris made it inevitable that the English language should be an official language of the Treaty of Peace.¹⁵

The French delegation resisted the decision because it meant that it made English and French the official languages of the League of Nations and the PCIJ. Millar thought that the decision ‘perhaps to some extent marked the passing of French as the chief medium of diplomatic intercourse’¹⁶ and this development was criticized both by French writers¹⁷ and others.

In 1924 James Brown Scott—the Honorary Editor in Chief of the *American Journal of International Law* at the time—published a book (in French) asserting the primacy of French as the ‘official or authentic’ language of international law.¹⁸ Hudson challenged Scott’s views regarding the supremacy of French by reference to the practice of States concluding bipartite treaties.¹⁹ Hudson tentatively concluded that there was no rule of law giving primacy to any one language in the conclusion of bipartite treaties but that, in general, parties concluded treaties in the language of one or both of the parties. Where a language was employed that was not one of either of the parties to the treaty ‘regional differences exist: China and Japan tend to employ English, while Hungary, Poland and Italy tend to employ French’.²⁰

The problems with Hudson’s tentative conclusions are twofold. First, his own research suggested that there was evidence of a practice of employing French as the official or authentic language of bilateral treaties by three non-French speaking European States. Secondly, Hudson failed to consider the practice of States in relation to multilateral treaties. Many open multilateral treaties concluded between 1919 and

410 (Hague Convention I), the International Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 429 (Hague Convention II) and the International Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 443 (Hague Convention III).

¹³ See, for example, the International Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) (Hague Convention IV).

¹⁴ The Treaty of Peace with Germany (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 188 (English Text) (Treaty of Versailles).

¹⁵ DH Millar, *The Drafting of the Covenant* (GP Putnam & Sons, New York, 1928) vol 1, 505

¹⁶ *ibid.*

¹⁷ See, for example, J Basdevant, ‘La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités’ (1926) 15 *Recueil des Cours de l’Académie de Droit International* 535, 562.

¹⁸ JB Scott, *Le français, langue diplomatique moderne* (A Pedone, Paris, 1924).

¹⁹ MO Hudson, ‘Languages Used in Treaties’ (1932) 26 *AJIL* 368.

²⁰ *ibid.* 372.

1932 adopted French as the sole authentic language of the treaty in subjects as diverse as international humanitarian law²¹ and aviation.²²

The 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Hague Rules)²³ is significant in having been adopted in both French and English.²⁴ There is a widespread belief that only the French version of the Hague Rules is authentic²⁵ but one reason for the adoption of English as an official language was the fact that, according to the Lloyds Register of Shipping for 1921–1922, at least 60 per cent of the gross tonnage of ocean going vessels of 100 tonnes or more was owned by English speaking nations.²⁶

C. *The International Conferences of American States 1889–1940*

The practice of the International Conferences of American States between 1889 and 1940 is illustrative of the rise of plurilingualism in treaty-making. The Plan of Arbitration discussed at the first International Conference of American States—held in Washington DC between October 1889 and April 1890—was drafted in English, Spanish and Portuguese.²⁷ However the rather differently worded 1903 Treaty on Arbitration concluded at the second International Conference of American States—held in Mexico City between October 1901 and January 1902—was only concluded in Spanish²⁸ but all the participants were Spanish speaking countries. By contrast, the Convention on Literary and Artistic Copyrights adopted at the same Conference was concluded in Spanish, English and French.²⁹ The practice of plurilingual treaty making was continued at subsequent International Conferences of American States including the seventh International Conference of American States—held in Montevideo in December 1933—where the Convention on the Rights and Duties of States was concluded in Spanish, English, Portuguese and French.³⁰

²¹ See, for example, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 303 and the Convention relative to the Treatment of Prisoners of War (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 343.

²² See the Convention for the Unification of certain Rules relating to International Carriage by Air (adopted 12 October 1929, entered into force 13 February 1933) 137 UNTS 11 (Warsaw Convention) art 36.

²³ The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading with Protocol of Signature (adopted 25 August 1924, entered into force 2 June 1931) 120 LNTS 155 (Hague Rules).

²⁴ The Convention itself is silent on this point but the *League of Nations Treaty Series* states that ‘French and English official texts communicated by the Belgian Minister for Foreign Affairs’ (120 LNTS 155, 156 (in French) 157 (in English)).

²⁵ See eg *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc* [2004] UKHL 49, [2005] 1 WLR 1363 [18] ‘The French text is the authoritative language of the Hague Rules’ (Lord Bingham). It is however significant that the Hague Rules were originally drafted in French.

²⁶ As quoted in MF Sturley (ed), *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* (Fred B Rothman & Co, Littleton, Colorado, 1990) vol 2, 554.

²⁷ See JS Brown (ed), *The International Conferences of American States 1889–1928* (OUP, New York, 1931) 43.

²⁸ The General Treaty of Arbitration (adopted 29 January 1902, entered into force 31 January 1903) 190 CTS 432.

²⁹ The Convention on Literary and Artistic Copyrights (adopted 27 January 1902, entered into force 22 February 1903) 190 CTS 391.

³⁰ The Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.

D. Conclusion

The historical background surveyed above suggests that within western Europe there was a tendency to accord French the status of an official language in the drafting of multilateral treaties in the 19th and early 20th centuries but that other more multilingual approaches can also be found notably in the practice of the International Conferences of American States. The authentication of the Charter of the United Nations in five languages—Chinese, French, Russian, English and Spanish—marked the beginning of a new era of multilingualism in the drafting of multilateral treaties.³¹ Although the practice of making the English and French texts of multilateral treaties equally authentic remained common in the 1940s and 1950s,³² the 1948 Genocide Convention was authenticated in the same five languages as the UN Charter³³ and subsequent practice has confirmed the plurilingual approach to treaty-making although the process can give rise to considerable practical problems.³⁴

III. THE PRACTICE OF THE PCIJ AND ICJ PRIOR TO THE ADOPTION OF THE VCLT

A. Introduction

The rise of plurilingual treaty making and the advent of the era of judicial settlement of international disputes have ensured that the legal consequences of these diplomatic developments have been the subject of judicial scrutiny by both the PCIJ and the ICJ. However the PCIJ was only ever required to consider the interpretation of bilingual treaties, where the idea of a harmonising different language versions to produce a single authoritative ‘text’ is easier to contemplate. By contrast the ICJ has operated during an era of multilingualism, a development that—at both a theoretical and a practical level—entails the potential for a greater degree of inter-lingual uncertainty.³⁵

³¹ Arabic was adopted as both an official and working language in 1973. See further M Tabory, ‘The Addition of Arabic as an Official and Working Language of the UN General Assembly and at Diplomatic Conferences’ (1978) 13 Israel LR 391.

³² See, for example, the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 art 46 and the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 art 66.

³³ The Convention on the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art X (Genocide Convention).

³⁴ See generally M Tabory, *Multilingualism in International Law and Institutions* (Sijthoff & Noordhoff, Alphen aan den Rijn, 1980) ch 2, United Nations, *Review of the Multilateral Treaty-Making Process* (United Nations, New York, 1985) and S Rosenne, *Developments in the Law of Treaties 1945–1986* (Cambridge Studies in International and Comparative Law. New Series, CUP, Cambridge 1989) 390–398. See also D Shelton, ‘Reconcilable Differences? The Interpretation of Multilingual Treaties’ (1996–1997) 20 Hastings International and Comparative LR 611, 621–622 and R Sabel, *Procedure at International Conferences: a Study of the Rules of Procedure at the UN and at Inter-governmental conferences* (2nd edn, CUP, Cambridge, 2006) 397–398.

³⁵ For a discussion of some of the theoretical issues involved see D Cao, ‘Inter-lingual Uncertainty in Bilingual and Multilingual law’ (2007) 39 Journal of Pragmatics 69–83. See also S Šarčević, *New Approach to Legal Translation* (Kluwer Law International, The Hague, 1997).

B. *The Permanent Court of International Justice*

1. *Introduction*

In *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion)³⁶ the Court noted that the English and French texts of sub-section (a) of the resolution adopted by the Council of the League of Nations—referring the dispute between France and Great Britain regarding the applicability of the Nationality Decrees issued in Tunis and Morocco (French Zone) on 8 November 1921 to British subjects—differed slightly and also that the French and English texts of article 15 paragraph 8 of the Covenant of the League of Nations ‘do not exactly correspond’.³⁷ The Court was however of the opinion that the French and English expressions had the same meaning and that the differences were of no juridical importance.³⁸

2. *The Mavrommatis Palestine Concessions Case*

In the *Mavrommatis Palestine Concessions Case*³⁹ the Government of the Greek Republic instituted proceedings against the United Kingdom for the alleged failure of the Government of Palestine (and consequently also the British Government) to recognize (to their full extent) the rights acquired by Mr Mavrommatis, a Greek subject, under contracts and agreements concluded by him with the Ottoman authorities in regard to concessions for certain public works to be constructed in Palestine.

The United Kingdom filed a preliminary objection to the Court's jurisdiction on a number of different grounds. The relevant objection—from the perspective of the interpretation of plurilingual treaties—was the condition imposed upon the PCIJ's jurisdiction by article 26 of the Mandate for Palestine⁴⁰ namely ‘that the dispute must relate to the interpretation or the application of the provisions of the Mandate’⁴¹.

The Greek Government relied upon Article 11 of the Mandate to support their application and the Court based their judgment principally on the first part of paragraph 1 of article 11 that stated

The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the

³⁶ *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) PCIJ Rep Series B No 4.

³⁷ *ibid* 21.

³⁸ *ibid* 22. See also *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture* (Advisory Opinion) PCIJ Rep Series B No 2, 35 where the Court made reference to article 440 of the Treaty of Versailles and *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) PCIJ Rep Series A/B No 44, 26 where the Court found that the objects of article 104 of the Treaty of Versailles appeared ‘more clearly from the French text of the article’.

³⁹ *Mavrommatis Palestine Concessions Case (Greece v United Kingdom)* (Objections to the Jurisdiction of the Court) PCIJ Rep Series A No 17 (*Mavrommatis*).

⁴⁰ Mandate for Palestine (adopted 24 July 1922, entered into force 26 September 1923). In his dissenting judgment, Moore acknowledged that it was an open question ‘whether a mandate, which is in a sense a legislative act of the Council, is on the same legal footing as a treaty’. Moore however also stated: ‘I accept for the present case the rules laid down by authorities on international law for the interpretation of treaties’. *Mavrommatis* 69 (diss op Judge Moore). On the legal status of the Mandate for Palestine see further B Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (CUP, Cambridge, 2008) ch 2.

⁴¹ *Mavrommatis* 15.

country, and, subject to any international obligations accepted by the Mandatory, *shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein.* (Emphasis added)

The French version of the italicized part of article 11 was as follows: ‘*aura pleins pouvoirs pour décider quant à la propriété ou contrôle public de toutes les ressources naturelles du pays, ou des travaux et services d'utilité publique déjà établis ou à y établir*’. The Court acknowledged that, according to the French version, ‘the powers thus attributed to the Palestine Administration may cover every kind of decision regarding public ownership and every form of “contrôle” including the right to annul or cancel existing concessions’.⁴²

However the English version of article 11 was more restrictive as it only contemplated the acquisition of ‘public ownership’ or ‘public control’ over the natural resources of the country. Since no question of ‘public ownership’ was raised on the facts of the case, the Court devoted its attention to the meaning of the expression ‘public control’ and concluded that that, used in conjunction with the expression ‘public ownership’, ‘public control’ would appear rather to mean ‘the various methods whereby the public administration may take over, or dictate the policy of, undertakings not publicly owned’.⁴³ In a much quoted passage the Court laid down the principles to be applied to the interpretation of a treaty with two authentic versions.

The Court is of opinion that, where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine and because the original draft of this instrument was probably made in English.⁴⁴

Applying these principles the Court found that the Mavrommatis concessions in themselves were outside the scope of article 11 but that the so-called Rutenberg concessions (which allegedly infringed some of the rights claimed by Mr Mavrommatis in Jerusalem) fell within the scope of article 11 and thus the dispute fell within the jurisdiction of the PCIJ under article 26 of the Mandate.

Judge Moore, in his dissenting opinion, criticized the approach to the interpretation of the Mandate and stated that he was strongly inclined to believe that the French text of article 11 was a so-called ‘literal’ translation of the English text, ‘and was intended to mean the same thing’.⁴⁵ Moore also took the view that, where there is a difference in meaning between texts of equal authority, the text in the language of the country which is bound was to be preferred.⁴⁶ Moore was scathing of

⁴² *Mavrommatis* 18.

⁴³ *Mavrommatis* 19.

⁴⁴ *Ibid.*

⁴⁵ *Mavrommatis* 69 (diss op Judge Moore)

⁴⁶ *Mavrommatis* 70 (diss op Judge Moore) citing A Rivier, *Principles du Droit des Gens* (Rousseau, Paris, 1896) vol 2, 123–125.

the Court's findings regarding the interpretation of article 11 of the Mandate accusing his colleagues of finding 'an unnatural and previously unheard of elasticity' in the English text 'which had made it unnecessary to try the suggested possibilities of the French text'.⁴⁷

3. Conclusion

As Hardy notes, the *Mavrommatis Palestine Concessions* case is the most explicit ruling of the PCIJ on the question of divergent passages in plurilingual texts.⁴⁸ The solution applied by the Court was 'to adopt the more limited interpretation which can be made to harmonise with both versions'. Two additional factors cited in favour of this conclusion were, first, that the more limited interpretation was in the language of the country against whom the obligation was being enforced and, secondly, 'because the original draft of this instrument was probably made in English'.

The problem with the Court's approach in the *Mavrommatis Palestine Concessions* case, as Moore noted in his dissenting judgment, is that in order to harmonize the two language versions, the Court adopted a much wider meaning of the phrase 'public control' (encompassing government regulation as well as government ownership). For this reason Hardy concludes that 'the assertion of certain authors that the Court endorsed "limited interpretation" as a rule for solving discrepancies between authentic texts is accordingly erroneous'.⁴⁹

C. The International Court of Justice

1. Introduction

The ICJ has tended to concentrate on the French and English texts in determining the meaning of the UN Charter and its own Statute. To the extent that the other authentic texts are considered, it has almost always been in the context of dissenting opinions.

2. The 1948 Admissions Advisory Opinion

In the *Admissions* Advisory Opinion⁵⁰ the majority of the Court referred only to the French and English texts in determining the meaning of article 4 of the UN Charter.⁵¹ In their joint dissenting opinion Judges Basdevant, Winiarski, Sir Arnold McNair and Read stated that, in so far as they understood, the Chinese, Russian and Spanish texts contained nothing that contradicted the views that they had expressed.⁵² By contrast Judge Krylov's dissenting opinion examined all of the authoritative texts of article 4

⁴⁷ *ibid.*

⁴⁸ J Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals' (1961) 37 BYIL 72, 76.

⁴⁹ *ibid.* 80. See also Sir I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, MUP, Manchester, 1984) 149 'It is doubtful, however, whether this passage necessarily bears the construction which has been put upon it' and International Law Commission, 'Report of the of the International Law Commission on the work of its Eighteenth Session' (4 May–19 July 1966) [1966] Yearbook of the ILC Vol II 'Draft Articles on the Law of Treaties: with commentaries' 187, 225 (UN Doc A/CN.4/191).

⁵⁰ *Admission of a State to the United Nations* (Advisory Opinion) [1948] ICJ Rep 57 (*Admissions*).

⁵¹ See eg *Admissions* Adv Op 62–63 and diss op Judge Zoričić 94.

⁵² *Admissions* joint diss op Judges Basdevant, Winiarski, Sir Arnold McNair and Read 86.

of the UN Charter and in this context Judge Krylov acknowledged the assistance that he had received from Judge Hsu Mo in relation to the Chinese text.⁵³

3. *The Aerial Incident of 27 July 1955 Case*

In the *Aerial Incident of 27 July 1955* case⁵⁴ the Court referred in passing to both the French and English texts of article 36 paragraph 5 of the ICJ Statute⁵⁵ in determining the meaning of the words ‘declarations... which are still in force’ but did not consider whether any issue of plurilingual interpretation arose. One of the concurring judges did acknowledge the apparent differences between the English and French texts.⁵⁶

The most comprehensive consideration of all the authentic texts of the ICJ Statute was undertaken by Judges Lauterpacht, Koo and Spender⁵⁷ in their joint dissenting opinion where they rejected the Bulgarian contention that

the first French version adopted by Committee IV/1—‘declarations qui sont encore en vigueur’ (declarations which are still in force)—was a faithful translation of the English text; that it was changed at the request of the French delegation into the present wording in French: ‘pour une duree qui n'est pas encore expiree’ (for a duration which has not yet expired); and that the French representative had explained in the Committee that the changes which he proposed for insertion did not relate to the substance but were intended to improve the drafting.⁵⁸

In the view of Lauterpacht, Koo and Spender, the words ‘pour une duree qui n'est pas encore expiree’ (for a duration which has not yet expired) must be regarded as determining the true meaning of the English text in question because the final version was originally formulated in the French language and the French text removed any doubt whatsoever as to the meaning of the words. The dissenting judges acknowledged that the Chinese, Russian and Spanish texts of the paragraph under consideration approximated to the English text but, as these languages were not working languages at the 1945 San Francisco Conference, this fact did not ‘not invalidate or weaken the obvious meaning of the French text’.⁵⁹

4. *The 1962 Certain Expenses Advisory Opinion*

In the *Certain Expenses* Advisory Opinion⁶⁰ the Court made no reference to the different texts in its determination that the expenditures authorized by the General Assembly to cover UN operations in the Congo and the Middle East constituted

⁵³ See *Admissions* diss op Judge Krylov 110 and 112.

⁵⁴ *Case Concerning the Aerial Incident of 27 July 1955 (Israel v Bulgaria)* (Preliminary Objections) [1959] ICJ Rep 127 (*Aerial Incident*).

⁵⁵ *ibid* 144.

⁵⁶ *ibid* 149 (sep op Judge Badawi).

⁵⁷ *ibid* 161–162 (joint diss op Judges Lauterpacht, Koo and Spender).

⁵⁸ *ibid* 162 (joint diss op Judges Lauterpacht, Koo and Spender).

⁵⁹ *ibid* 161 (joint diss op Judges Lauterpacht, Koo and Spender). See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Jurisdiction and Admissibility: Judgment) [1984] ICJ Rep 392 (considered below) where the discussion of article 36(5) of the ICJ's Statute ‘reached its climax’ A Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford, 2006) 642.

⁶⁰ *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151 (*Certain Expenses*).

‘expenses of the Organization’ within the meaning of article 17 paragraph 2 of the UN Charter. In his separate opinion Judge Sir Percy Spender stated that

The cardinal rule of interpretation that this Court and its predecessor has stated should be applied is that words should be read, if they may be so read, in their ordinary and natural sense. If so read they make sense, that is the end of the matter. . . . If the meaning of any particular provision read in its context is sufficiently clear to satisfy the Court as to the interpretation to be given to it then there is neither legal justification nor logical reason to have recourse to either the *travaux préparatoires* or the practice followed within the United Nations.⁶¹

Remarkably Judge Sir Percy Spender’s long exegesis entitled ‘General Observations on the Interpretation of the Charter’⁶² fails to acknowledge either the existence or significance of article 111 of the UN Charter.

By contrast the dissenting opinion of Judge Koretsky made specific reference to all the authentic texts of the UN Charter (except Chinese) in order to determine the meaning of the word ‘primary’ in article 24 of the UN Charter.

The word ‘primary’ is not used in Article 24 in the sense of an ordinal number (i.e. first, second etc.), but one may say in the hierarchical sense. The French text reads: ‘la responsabilité *principale*’, the Spanish text: ‘la responsabilidad primordial’, and the Russian text: ‘glavnuju otvetstvjenosti’ (which literally translated means ‘chief’, ‘main’ responsibility).⁶³

5. Conclusion

It is difficult to escape the conclusion that the fact that English and French are the working languages of the ICJ⁶⁴ coupled with the fact that the ICJ functions as the successor to the PCIJ where multilingualism was limited to bilingualism has tended to blind the ICJ to the linguistic possibilities of authentic texts in languages other than French or English.

IV. ARTICLE 33 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

A. Introduction

There are two codification initiatives that pre-date the drafting of the VCLT that deserve attention. The 1928 Havana Convention on the Law of Treaties⁶⁵ and the Harvard Research in International Law Draft Convention on the Law of Treaties.⁶⁶

1. 1928 Havana Convention on the Law of Treaties

⁶¹ *Certain Expenses* 184 and 18–186 (sep op Spender).

⁶² *Certain Expenses* 184–187 (sep op Spender).

⁶³ *Certain Expenses* 274 (diss op Koretsky) (emphasis in original).

⁶⁴ Statute of the International Court of Justice (adopted 26 June 1945) 33 UNTS 933 art 39.

⁶⁵ The Convention on Treaties (adopted 20 February 1928, in force 29 August 1929) (1935) 29 AJIL Supp 138 (1928 Havana Convention)

⁶⁶ (1935) 29 AJIL Supp 653.

Although the 1928 Havana Convention on the Law of Treaties (1928 Havana Convention) has been described as ‘almost completely forgotten’⁶⁷ it is still in force⁶⁸ and the plurilingual treaty making practice of the Conferences of American States raises the question whether the issue of interpretation of plurilingual treaties was acknowledged in the 1928 Havana Convention. With regard to question of interpretation, only the form is considered in the 1928 Havana Convention. The 1928 Havana Convention—signed in Spanish, English, French and Portuguese⁶⁹—makes it clear that the written form is an essential condition of treaties⁷⁰ and that ‘[t]he authentic interpretation of treaties when considered necessary by the contracting parties shall also be in writing’.⁷¹

The issue of treaty interpretation, although not dealt with substantively in the 1928 Havana Convention, was considered by the Third Sub-Committee of the Second Committee of the Seventh International Conference of American States. The Sub-Committee produced 13 draft articles on the interpretation of treaties.⁷² Draft article 11 states

In case of a discrepancy between equally binding official copies of a treaty and when it is impossible to establish the purpose of the contracting parties, the restrictive interpretation which best harmonizes the texts will be adopted.

The influence of the *Mavrommatis* case⁷³ is on the wording of the draft article is clear.

2. *The Harvard Draft Convention on the Law of Treaties*

In their Introductory Comment, the Harvard Research in International Law criticized the drafting of the 1928 Havana Convention on the Law of Treaties as ‘subject to many objections’ and they also asserted that the principles it embodied could not be said to ‘constitute any significant clarification to the law of treaties’.⁷⁴

Unlike the 1928 Havana Convention, the Draft Convention on the Law of Treaties produced by the Harvard Research in International Law does contain a provision on the interpretation of plurilingual treaties. Article 19(b) provides that

When the text of a treaty is embodied in versions in different languages, and when it is not stipulated that the version in one of the languages shall prevail, the treaty is to be interpreted with a view to giving the corresponding provisions in the different versions a common meaning which will effect the general purpose which the treaty is intended to serve.

⁶⁷ A Aust, ‘The Law of Treaties’ in JP Grant and J Craig Barker (eds), *The Harvard Research In International Law: Contemporary Analysis and Appraisal* (WS Hein & Co, Buffalo, New York, 2007) 308.

⁶⁸ Status in 1993: 8 parties. CL Wiktor, *Multilateral Treaty Calendar 1648–1995* (Martinus Nijhoff Publishers, The Hague, 1998) 274. Efforts to obtain more up-to-date information have been unsuccessful.

⁶⁹ 1928 Havana Convention art 21.

⁷⁰ *ibid* art 2.

⁷¹ *ibid* art 3.

⁷² The text is reproduced as an appendix to the Harvard Research in International Law Draft Convention on Treaties (1935) 29 AJIL Supp 1225–1226.

⁷³ *Mavrommatis Palestine Concessions Case (Greece v United Kingdom)* (Objections to the Jurisdiction of the Court) PCIJ Rep Series A No 17 (*Mavrommatis*).

⁷⁴ Introductory Comment, reproduced in (1935) 39 AJIL Supp 653, 670.

The commentary on article 19(b) states that ‘[t]his principle was apparently recognized by the Permanent Court of International Justice in the *Mavrommatis Case*’.⁷⁵ It is noteworthy that article 19(b) was at odds with the views of publicists of the period, such as Oppenheim,⁷⁶ but the commentary ignores this.

3. *The drafting of article 33*⁷⁷

The issue of the interpretation of treaties drawn up in two or more authentic texts or versions was first addressed by the Special Rapporteur of the International Law Commission (ILC), Sir Humphrey Waldock, in his Third Report on the law of treaties.⁷⁸ In his Six Report⁷⁹ Waldock acknowledged that the United States Government had questioned his use of the expression ‘authentic texts’ on the grounds that ‘a treaty is more properly conceived of as a unit, consisting of one text: and that the several language versions are an integral part of and constitute a single text’.⁸⁰ Waldock defended his approach by reference to the practice of the United Nations in drawing up the texts of multilingual instruments—not least the wording of article 111 of the UN Charter itself—and on doctrinal grounds.

Moreover, so far as the English language is concerned, the word ‘version’ is more indicative of difference than the word ‘text’, and it may be doubted whether any advantage would be gained by introducing the fiction that a plurilingual treaty has only one text of which there may be different ‘versions’.⁸¹

Notwithstanding Waldock’s views, his original two draft articles on languages were recast by the Drafting Committee as a single article that focused on the question of interpretation.⁸² The new draft article changed the emphasis of Waldock’s draft with its reference to the ‘text’ of a treaty authenticated in two or more languages and using the term ‘divergence’ in preference to Waldock’s ‘difference’. In the final draft version, the Drafting Committee’s version was adopted as draft article 29.⁸³

4. *Draft Article 29: Interpretation of treaties in two or more languages*

⁷⁵ (1935) 39 AJIL Supp 653, 971.

⁷⁶ ‘Unless the contrary is expressly provided, if a treaty is concluded in two languages and there is a discrepancy between the meaning of the two different texts, each party is only bound by the text in its own language’ L Oppenheim (RF Roxburgh (ed)), *International Law: A Treatise* (3rd edn, Longmans, London, 1920) vol 1, 704.

⁷⁷ See generally P Germer, ‘Interpretation of Plurilingual Treaties: A study of Article 33 of the Vienna Convention on the Law of Treaties’ (1970) 11 Harvard International LJ 400 and M Tabory, *Multilingualism in International Law and Institutions* (Sijthoff & Noordhoff, Alphen aan den Rijn, 1980) ch 3.

⁷⁸ See Sir H Waldock, Special Rapporteur, ‘Third Report on the law of treaties’ [1964] Yearbook of the ILC Vol II 62–65 (UN Doc A/CN.4/167).

⁷⁹ Sir H Waldock, Special Rapporteur, ‘Sixth Report on the law of treaties’ [1966] Yearbook of the ILC Vol II 101–103 (UN Doc A/CN.4/186).

⁸⁰ *ibid* 102 (Comment of the United States).

⁸¹ *ibid*.

⁸² See ‘Revised draft articles’, [1966] Yearbook of the ILC Vol II, 118 (UN Doc A/CN.4/L.117).

⁸³ ILC ‘Report of the of the International Law Commission on the work of its Eighteenth Session’ (4 May–19 July 1966) [1966] Yearbook of the ILC Vol II ‘Draft Articles on the Law of Treaties: with commentaries’ 187, 224–226 (UN Doc A/CN.4/191).

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.

At the first session of the 1968 UN Conference on the Law of Treaties, the Committee of the Whole adopted the text of the ILC's draft article with two amendments. First, the final clause regarding the presumption that authentic texts possess the same meaning was recast as sub-paragraph 4 and the words 'a meaning which as far as possible reconciles the texts shall be adopted' were replaced by the clause 'which as far as possible reconciles the texts shall be adopted, having regard to the object and purpose of the treaty, shall be adopted'.⁸⁴ At the second session of the UN Conference on the Law of Treaties, the revised draft article 29 was adopted by 101 votes to none⁸⁵ and, as part of the final renumbering,⁸⁶ became article 33 of the VCLT.

5. Article 33: Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

B Conclusion

⁸⁴ See United Nations Conference on the Law of Treaties, First Session (Vienna 26 March–24 May 1968) Official Records 188-190 and 442–443 (UN Doc A/CONF.39/11).

⁸⁵ United Nations Conference on the Law of Treaties, Second Session (Vienna 9 April–22 May 1969) Thirteenth plenary meeting (6 May 1969) 58-59 (UN Doc A/CONF.39/SR.13).

⁸⁶ See United Nations Conference on the Law of Treaties, First and Second Sessions (26 March–24 May 1968 and 9 April–22 May 1969) Documents of the Conference 302 (UN Doc A/CONF.39/28).

Even before the VCLT came into force on 27 January 1980, some international courts and tribunals were prepared to acknowledge the customary status of article 33⁸⁷ and the principles embodied in article 33 were also considered in great detail in the *Young Loan* arbitration.⁸⁸ In the *Young Loan* arbitration a three judge minority rejected the reliance on article 33(4) VCLT by the four judge majority. In Sir Ian Sinclair's view

With respect, it is submitted that, on this point, the approach of the dissident members of the Tribunal is to be preferred to the approach adopted in the majority decision.⁸⁹

V. THE PRACTICE OF THE ICJ AFTER THE ADOPTION OF THE VCLT

A. Introduction

Although the ICJ has been willing to acknowledge the customary status of articles 31–32 VCLT on numerous occasions,⁹⁰ the Court was initially rather more reticent about making the same observation about article 33 VCLT, at least that is until the potential divergence between the authentic texts of article 41 of the ICJ Statute made the determination of article 33 VCLT's customary status an unavoidable question for the Court to answer in the *LaGrand* case.⁹¹

1. *Military and Paramilitary Activities in and against Nicaragua*

In order to establish the jurisdiction of the Court in the *Military and Paramilitary Activities in and against Nicaragua* case⁹² Nicaragua relied—in part—on article 35 paragraph 5 of the ICJ Statute,⁹³ asserting that its 1929 Declaration unconditionally recognizing the compulsory jurisdiction of the PCIJ was still in force. The 1929 Declaration was approved by the Nicaraguan Executive and ratified by the Nicaraguan Senate in 1935. The Nicaraguan Ministry of External Relations of Nicaragua informed the Secretary-General of the League of Nations of these developments by telegram in November 1939 but no instrument of ratification was ever received in Geneva.

⁸⁷ See, for example, *Golder v UK* (App no 4451/70) (1979-80) 1 EHRR 524, 532 [29] 'Articles 31 to 33 enunciate in essence generally accepted principles of international law'. See also the separate opinion of Judge Verdross 543 [6] and 544 [10] and—arguing against the application of the rules of interpretation in the VCLT—the separate opinion of Judge Sir Gerald Fitzmaurice 564 [35].

⁸⁸ *Young Loan (Belgium, France Switzerland, UK, USA v Federal Republic of Germany)* (Arbitration Tribunal) (1980) 59 ILR 495 (*Young Loan* arbitration).

⁸⁹ Sir I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, MUP, Manchester, 1984) 152.

⁹⁰ See, for example, *Territorial Dispute (Libya v Chad)* (Judgment) [1994] ICJ Rep 6, 21 [41]; *Oil Platforms (Iran v United States)* (Preliminary Objections) [1996] ICJ Rep 803, 812 [23], *Case Concerning Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) [1999] ICJ Rep 1045, 1059 [18] (*Kasikili/Sedudu Island*) and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) 27 February 2007 <<http://www.icj-cij.org/doCKET/files/91/13685.pdf>> accessed 30 June 2010 109–110 [160].

⁹¹ *Case Concerning the Vienna Convention on Consular Relations (Germany v USA)* (Judgment) [2001] ICJ Rep 466 (*LaGrand*).

⁹² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Jurisdiction and Admissibility: Judgment) [1984] ICJ Rep 392 (*Nicaragua*).

⁹³ The English version of Article 36(5) states that '[d]eclarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms'.

The United States argued that the failure to deposit an instrument of ratification rendered Nicaragua's acceptance of the PCIJ's compulsory jurisdiction incomplete and thus it could not be said to be 'still in force' as required under article 36(5) of the ICJ's Statute. The Court noted that

Nicaragua, having failed to deposit its instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court, was not a party to that treaty. Consequently the Declaration made by Nicaragua in 1929 had not acquired binding force prior to such effect as Article 36, paragraph 5, of the Statute of the International Court of Justice might produce.⁹⁴

The Court acknowledged that the 'binding force' issue before it differed from the issue considered by the Court the *Aerial Incident* case⁹⁵ and thus that case did not provide 'any pointers to precise conclusions on the limited point now in issue'.⁹⁶

The Court—by eleven votes to five⁹⁷—held that it had jurisdiction on the basis of article 36(5) read together with article 36(2) of the ICJ's Statute on the ground that the word 'binding' did not appear in the English or French versions of Article 36(5) and because '[a]ccording to the *travaux préparatoires* the word "binding" was never suggested; and if it had been suggested for the English text, there is no doubt that the drafters would never have let the French text stand as finally worded'.⁹⁸ Further

the Court cannot but be struck by the fact that the French Delegation at the San Francisco Conference called for the expression 'still in force' to be translated, not by 'encore en vigueur' but by the term: 'pour une durée qui n'est pas encore expirée'. In view of the excellent equivalence of the expressions 'encore en vigueur' and 'still in force', the deliberate choice of the expression 'pour une durée qui n'est pas encore expirée' seems to denote an intention to widen the scope of Article 36, paragraph 5, so as to cover declarations which have not acquired binding force.⁹⁹

Even the members of the majority who voted for the jurisdiction of the Court under article 36(2) and (5) acknowledged that the Treaty of Friendship, Commerce and Navigation of 21 January 1956¹⁰⁰ provided 'a clearer and a firmer ground' than the jurisdiction based on the optional clause.¹⁰¹ Several of the dissenting judgments based their rejection of the majority's reasoning—disregarding the English text in favour of the wider French wording—on the application of article 33 VCLT.¹⁰² In his separate opinion Sir Robert Jennings specifically acknowledged the fact that article 36(5) necessarily appeared in five equally authentic languages and that '[t]he Chinese,

⁹⁴ *ibid* 404 [26].

⁹⁵ *Case Concerning the Aerial Incident of 27 July 1955 (Israel v Bulgaria)* (Preliminary Objections) [1959] ICJ Rep 127 (*Aerial Incident*).

⁹⁶ *Nicaragua* 405 [29].

⁹⁷ Judges Mosler, Oda, Ago, Schwebel and Sir Robert Jennings dissenting.

⁹⁸ *Nicaragua* 406 [30].

⁹⁹ *ibid* 406 [31].

¹⁰⁰ Treaty of Friendship, Commerce and Navigation (with Protocol) between the United States of America and Nicaragua (adopted 21 January 1956, entered into force 24 May 1958) 1960 UNTS 6 art 24.

¹⁰¹ *Nicaragua* 444 (sep op Singh).

¹⁰² See *Nicaragua* 463 (sep op Mosler), 523 [22] (sep op Ago), 537 (sep op Sir Robert Jennings), 575 (diss op Schwebel).

Russian and Spanish versions apparently translate the English formulation of the criterion of transfer, viz. “and which are still in force...”¹⁰³ In Sir Robert Jennings view article 33(4) VCLT could not be reconciled ‘with any solution which seeks to give a special meaning to the French text, which meaning cannot be collected from the Chinese, the English, the Russian and the Spanish’.¹⁰⁴

The approach of the minority on the applicability of article 36(5) of the ICJ’s Statute in the *Nicaragua* case has been cited with approval¹⁰⁵ but methodologically it may be questioned whether the application of article 33 VCLT was appropriate given the fact that neither State was (or is) a party to the VCLT¹⁰⁶ and the drafting of the treaty in question considerably pre-dated the drafting of article 33 VCLT in any event.

2. *The ELSI Case*

In the *ELSI* case¹⁰⁷ one of the issues before the Chamber was the correct interpretation of the 1948 Treaty of Friendship, Commerce and Navigation between the United States and Italy (the FCN Treaty).¹⁰⁸ The FCN Treaty was equally authentic in English and Italian. The first paragraph of the Protocol appended to the FCN Treaty stated

The provisions of paragraph 2 of Article V, providing for the payment of compensation, shall extend to interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party.

In the Italian version of the FCN Treaty the words ‘shall extend to interests held directly or indirectly by national’ were represented by the words ‘si estenderanno ai diritti spettanti direttamente od indirettamente ai cittadini’. Italy argued that the term ‘diritti’ (rights) used in the Italian version was narrower than the term ‘interests’ used in the equally authentic English version and that, on the basis of the principle expressed in article 33, paragraph 4 of VCLT, the correct interpretation of the Protocol must be in the more restrictive sense of the Italian text.¹⁰⁹

In the event, the Chamber declined to base their decision on the question of interpretation of the two texts of the Protocol because, due to *ELSI*’s financial situation and the decision of its shareholders to close the plant, ‘it is simply not possible to say that the ultimate result was the consequence of the acts or omissions of the Italian authorities’.¹¹⁰

¹⁰³ *Nicaragua* 537 (sep op Sir Robert Jennings).

¹⁰⁴ *ibid.*

¹⁰⁵ See A Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford, 2006) 642 ‘[n]otwithstanding the passage of time one may still entertain doubts as to the correctness of [the Court’s] argument’.

¹⁰⁶ The USA signed the VCLT on 24 April 1970 but has not ratified it. Nicaragua has neither signed or ratified the VCLT.

¹⁰⁷ *Case Concerning Elettronica Sicula SpA (ELSI) (US v Italy)* (Judgment) [1989] ICJ Rep 15 (*ELSI*).

¹⁰⁸ Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic (adopted 2 February 1948, entered into force 26 July 1949) 79 UNTS 171 (supplemented by the Agreement of 26 September 1951, 326 UNTS 1961) (the FCN Treaty).

¹⁰⁹ *ELSI* 70-71 [118].

¹¹⁰ *ELSI* 71 [119].

3. *The Case Concerning Kasikili/Sedudu Island*

In the *Case Concerning Kasikili/Sedudu Island (Botswana v Namibia)*¹¹¹ the Court was concerned with the interpretation of the Anglo–German Agreement of 1 July 1890 (the 1890 Agreement).¹¹² Although the 1890 Agreement was authenticated in both English and German, the ICJ was satisfied that the terms ‘centre of the main channel’ in article III, paragraph 2, of the 1890 Agreement and ‘Thalweg’ of that channel possessed the same meaning applying Article 33(3) VCLT ‘under which “the terms of the treaty are presumed to have the same meaning in each authentic text”’¹¹³.

It is tempting to criticize the judgment in the *Kasikili/Sedudu Island* case on the grounds that applying article 33 VCLT to a 19th century treaty ignores the inter-temporal interpretation problem¹¹⁴ but the parties to the case were satisfied with this approach and the solution adopted by the leading publicists of the period was wholly unworkable. In the words of the third edition of Oppenheim

Unless the contrary is expressly provided, if a treaty is concluded in two languages and there is a discrepancy between the meaning of the two different texts, each party is only bound by the text in its own language. Moreover, a party cannot claim the benefit of the text in the language of the other party.¹¹⁵

4. *The LaGrand Case*

In the *Case Concerning the Vienna Convention on Consular Relations (Germany v USA)* (Judgment) (*LaGrand*),¹¹⁶ the United States sought to argue that the ICJ’s prior indication of provisional measures¹¹⁷ under article 41 of the ICJ Statute ‘did not create legal obligations binding on [it]’.¹¹⁸ The United States attempted to base its argument on the fact that ‘[t]he language used by the Court in the key portions of its Order is not the language used to create binding legal obligations’¹¹⁹ rather than the more difficult and controversial question of the legal effects of orders made under article 41 of the ICJ Statute. The Court acknowledged that the interpretation of article 41 had been the subject of extensive controversy in the literature¹²⁰ and that it was necessary to make a ruling on the legal effects of orders made under article 41 of the ICJ Statute

¹¹¹ *Case Concerning Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) [1999] ICJ Rep 1045 (*Kasikili/Sedudu Island*).

¹¹² Agreement between Germany and Great Britain respecting Zanzibar, Heligoland and the Spheres of Influence of the Two Countries in Africa (adopted 1 July 1890) 173 CTS 271 (the 1890 Agreement).

¹¹³ *Kasikili/Sedudu Island* 1062 [25].

¹¹⁴ See further R Higgins, ‘Some Observations on the Inter-temporal Rule in International Law’ in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzysztof Szybiszewski* (Kluwer Law International, The Hague, 1996) 173-181. See also Sir R Jennings and Sir A Watts (eds), *Oppenheim’s International Law* (9th edn, Longman, London, 1996) vol 1, §633 ‘Supplementary means of interpretation’ 1281-1282.

¹¹⁵ L Oppenheim (RF Roxburgh (ed)), *International Law: A Treatise* (3rd edn, Longmans, London, 1920) vol 1, 704. See also A Rivier, *Principles du Droit des Gens* (Rousseau, Paris, 1896) vol 2, 123–125.

¹¹⁶ *Case Concerning the Vienna Convention on Consular Relations (Germany v. USA)* (Judgment) [2001] ICJ Rep 466 (*LaGrand*).

¹¹⁷ *Case Concerning the Vienna Convention on Consular Relations (Germany v. USA)* (Request for the Indication of Provisional Measures: Order) General List No 104 [1999] ICJ Rep 9.

¹¹⁸ *LaGrand* 500 [96].

¹¹⁹ *ibid.*

¹²⁰ For a survey of the literature see the select bibliography in A Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford, 2006) 924-925.

(which, for all practical purposes, was identical to the equivalent provision of the Statute of the PCIJ).

The dispute which exists between the Parties with regard to this point essentially concerns the interpretation of Article 41 which is worded in identical terms in the Statute of each Court (apart from the respective references to the Council of the League of Nations and the Security Council).¹²¹

The English version of article 41 reads as follows:

1. The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought* to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures *suggested* shall forthwith be given to the parties and to the Security Council.¹²²

The French version of article 41 states

1. La Cour a le pouvoir d'*indiquer*, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun *doivent* être prises à titre provisoire.
2. En attendant l'arrêt définitif, l'*indication* de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.¹²³

The United States argued that, the use in the English version of 'indicate' instead of 'order', of 'ought' instead of 'must' or 'shall', and of 'suggested' instead of 'ordered', implied that decisions under article 41 lacked mandatory effect.¹²⁴

Noting that the English and French texts of the ICJ Statute were equally authentic and that, in cases of divergence between the equally authentic versions of the ICJ Statute, neither it nor the UN Charter indicated how to proceed, the Court declared that, in the absence of agreement between the parties on this point, article 33(4) VCLT could be regarded as reflecting customary international law.¹²⁵

Article 33(4) VCLT states that

when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

The Court considered that the object and purpose of the ICJ Statute was to enable to Court to fulfil the functions provided therein, in particular the judicial settlement of international disputes by binding decisions in accordance with article 59 of the ICJ Statute. The context of article 41 therefore was the need to ensure that the respective

¹²¹ *LaGrand* 501 [99].

¹²² Emphasis added.

¹²³ Emphasis added.

¹²⁴ *LaGrand* 502 [100].

¹²⁵ *LaGrand* 502 [101].

rights of the parties to a dispute were preserved during the settlement of the dispute.¹²⁶ The Court concluded that ‘[t]he contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article’.¹²⁷

The conclusions reached by the Court in interpreting the text of article 41 of the ICJ Statute in the light of its object and purpose made it unnecessary for the Court to consider the preparatory work in order to determine the meaning of article 41.¹²⁸ This was significant because, as the Court acknowledged, in the course of drafting the original version of article 41, ‘the words ‘la Cour pourra ordonner’ (‘the Court may ... order’) were replaced by ‘la Cour a le pouvoir d'indiquer’ (‘the Court shall have the power to suggest’)’.¹²⁹ In response to this the Court argued

The preparatory work of Article 41 shows that the preference given in the French text to ‘indiquer’ over ‘ordonner’ was motivated by the consideration that the Court did not have the means to assure the execution of its decisions. However, the lack of means of execution and the lack of binding force are two different matters. Hence, the fact that the Court does not itself have the means to ensure the execution of orders made pursuant to Article 41 is not an argument against the binding nature of such orders.¹³⁰

In his dissenting opinion Judge Oda criticized the ‘roundabout method of analysis’ that led the Court to the conclusion that orders on provisional measures under article 41 have binding effect.¹³¹ Judge Oda also stated that ‘addressing the general question as to whether or not an order indicating provisional measures “is binding” or “has binding force” [was] an empty, unnecessary exercise’.¹³² In Judge Oda’s view the real question that the Court was trying to raise was the question of responsibility of the State which allegedly had not complied with the order indicating provisional measures, a question that had not arisen in the past jurisprudence of the Court.¹³³

Judge Oda was also critical of the Court’s view that there was a ‘related reason that points to the to the binding character of orders made under article 41’,¹³⁴ namely

the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.¹³⁵

¹²⁶ *LaGrand* 502-503 [102].

¹²⁷ *ibid.*

¹²⁸ *LaGrand* 503 [104].

¹²⁹ *LaGrand* 504 [105].

¹³⁰ *LaGrand* 505 [107].

¹³¹ *LaGrand* 539 [33] (diss op Oda).

¹³² *ibid* [34].

¹³³ *ibid.*

¹³⁴ *LaGrand* 503 [103].

¹³⁵ *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)* (Request for the Indication of Interim Measures of Protection: Order) PCIJ Series A/B No. 79 194, 199 as quoted by the Court *LaGrand* 503 [103].

In Judge Oda's view a general statement that a party to a case must abstain from any measure capable of exercising a prejudicial effect to the execution of the ultimate decision could not be interpreted as supporting the argument that an order for provisional measures made under article 41 has binding force.¹³⁶

5. *The Case Concerning the Dispute Regarding Navigational and Related Rights*

In the recent *Case Concerning the Dispute Regarding Navigational and Related Rights*¹³⁷ the Court was concerned with the interpretation of the 1858 Treaty of Limits between Costa Rica and Nicaragua.¹³⁸ The dispute centred on the meaning of the words 'con objetos de comercio' in article VI of the 1858 Treaty of Limits. Although the 1858 Treaty of Limits is only authoritative in the Spanish version, the official languages of the Court are English and French¹³⁹ and thus the correct translation of the disputed phrase divided the parties.

For Nicaragua, this expression must be translated into French as 'avec des marchandises de commerce' and into English as 'with articles of trade'; in other words, the 'objetos' in question here are objects in the concrete and material sense of the term. Consequently, the freedom of navigation guaranteed to Costa Rica by Article VI relates only to the transport of goods intended to be sold in a commercial exchange. For Costa Rica, on the contrary, the expression means in French 'à des fins de commerce' and in English 'for the purposes of commerce'; the 'objetos' in the original text are therefore said to be objects in the abstract sense of ends and purposes. Consequently, according to Costa Rica, the freedom of navigation given to it by the Treaty must be attributed the broadest possible scope, and in any event encompasses not only the transport of goods but also the transport of passengers, including tourists.¹⁴⁰

The Court affirmed its earlier jurisprudence relating to the customary status of articles 31 and 32 VCLT and stated that neither the fact that Nicaragua was not a party to the VCLT nor the fact that the treaty to be interpreted considerably pre-dated the drafting of the VCLT prevented the Court from referring to the principles of interpretation set forth in articles 31 and 32 of the VCLT.¹⁴¹

Having observed that there were 'no grounds for supposing, *a priori*, that the words "libre navegación . . . con objetos de comercio" should be given a specially restrictive interpretation, any more than an extensive one',¹⁴² the Court considered the issue of the meaning of the phrase "con objetos de" as used in article VI of the 1858 Treaty of Limits. Significantly the Court acknowledged that the Spanish word 'objetos' can, depending on its context, have either of the two meanings put forward

¹³⁶ *LaGrand* 538 [31] (diss op Oda).

¹³⁷ *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) 13 July 2009 < <http://www.icj-cij.org/docket/files/133/15321.pdf> > accessed 30 June 2010.

¹³⁸ Treaty of Territorial Limits between Costa Rica and Nicaragua (adopted 15 April 1858, entered into force 26 April 1858) 118 CTS 439.

¹³⁹ Statute of the International Court of Justice (adopted 26 June 1945) 33 UNTS 933 art 39.

¹⁴⁰ *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) 13 July 2009 < <http://www.icj-cij.org/docket/files/133/15321.pdf> > accessed 30 June 2010 [45].

¹⁴¹ *ibid* [47].

¹⁴² *ibid* [48].

ie the wider ‘for the purposes of’ or the narrower ‘with articles of’. Due to the difference between the two meanings (concrete vs. abstract) the Court was satisfied that an examination of the context was sufficient for a firm conclusion to be reached. The context of the 1858 Treaty of Limits supported Costa Rica’s wider interpretation.¹⁴³ The Court also stated it was significant that the English translations of the 1858 Treaty of Limits submitted by the parties to President Cleveland in 1887 for use in the arbitration proceedings he was asked to conduct in which, even though the translations were not identical on all points, both used the phrase ‘for the purposes of commerce’ to translate the phrase ‘con objetos de comercio’.

By itself, this argument is undoubtedly not conclusive, because the only authoritative version of the instrument is the Spanish one and at the time the Parties might have made the same mistake in translation, which cannot be treated as an implicit amendment of the 1858 Treaty. It is also no doubt true that Nicaragua might have paid insufficient heed to the meaning of the term ‘objetos de comercio’, which was not at issue in the questions submitted to the arbitrator; this could be the explanation for a translation done by it in haste. It nonetheless remains the case that this concurrence, occurring relatively soon after the Treaty was concluded, is a significant indication that at the time both Parties understood ‘con objetos de comercio’ to mean ‘for the purposes of commerce’. This is the meaning accepted by the Court.¹⁴⁴

Having determined that ‘con objetos de comercio’ meant ‘for the purposes of commerce’, the Court turned to the issue of the meaning to be ascribed to the word ‘commerce’ in the context of article VI of the 1858 Treaty of Limits. The Court accepted that the term ‘commerce’ had a more restricted meaning when the treaty was concluded and that there was authority for the proposition that the terms of a treaty must be interpreted in the light of the parties’ common intentions which would be ‘by definition, contemporaneous with the treaty’s conclusion’.¹⁴⁵ However the Court concluded that, because the 1858 Treaty of Limits ‘was intended to create a legal régime characterized by its perpetuity’,¹⁴⁶ the parties common intention was for the term ‘commerce’ to follow the meaning attached to it at any given time.

6. Conclusion

The *Case Concerning the Dispute Regarding Navigational and Related Rights*¹⁴⁷ confirms that some of the complexities of multilingualism will exist even where the treaty under consideration is authentic in only one language, albeit a language that is not one of the official languages of the Court. The Court has been prepared to apply

¹⁴³ *ibid* [52].

¹⁴⁴ *ibid* [56].

¹⁴⁵ *ibid* [63] quoting *Case Concerning Rights of Nationals of the United States of America in Morocco (France v USA)* (Judgment) 1952 ICJ Rep 176 and *Case Concerning Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) [1999] ICJ Rep 1045, 1062 [25].

¹⁴⁶ *ibid* [67]. The Court also made reference to article 31(3)(b) VCLT to support their conclusions [63]-[66].

¹⁴⁷ *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) 13 July 2009 < <http://www.icj-cij.org/docket/files/133/15321.pdf> > accessed 30 June 2010.

article 33 VCLT as a customary norm in two of its more recent cases.¹⁴⁸ In the *Kasikili/Sedudu Island* case this meant applying article 33(3) VCLT to a 19th century treaty but this was done with the encouragement of both parties to the case. By contrast there was no such agreement in the *La Grand* case and the Court declined to respond directly to the Chinese, Spanish and Russian texts of the relevant provisions of the ICJ Statute set out in the German memorial.¹⁴⁹

VI. CONCLUSION

This chapter has sought to offer an introduction to the issue of the interpretation of plurilingual treaties focusing on the relevant practice of the PCIJ and ICJ. Given the importance of the issue, the limited acknowledgement of the issue by the ICJ and the relegation of the topic in the *general* literature¹⁵⁰ to a rather small (but welcome) number of books and articles is a source of puzzlement and concern.

Compared to the restricted nature of the debate in general international law, the widespread discussion of the topic in the context of European Union Law is marked.¹⁵¹ The sheer volume of plurilingual legislative acts within the European Union (EU), and the fact that these plurilingual legislative acts have to be interpreted and applied in the both the 27 EU Member States and by the European Court of Justice (ECJ), goes some way to explaining the differing levels of interest in the topic but knowledge of both the legal issues and an awareness of the wider implications of

¹⁴⁸ *Case Concerning Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) [1999] ICJ Rep 1045, 1062 [25] (*Kasikili/Sedudu Island*) and *Case Concerning the Vienna Convention on Consular Relations (Germany v USA)* (Judgment) [2001] ICJ Rep 466, 502 [101] (*LaGrand*).

¹⁴⁹ Memorial of the Federal Republic of Germany (submitted 16 September 1999) vol 1, [4.149]-[4.150] <<http://www.icj-cij.org/docket/files/104/8552.pdf>> accessed 30 June 2010. See also RK Gardiner, *Treaty Interpretation* (OUP, Oxford, 2008) 361. The response of the United States to the plurilingual arguments put forward in the German memorial was as follows: ‘In any case, the authoritative text of the Court’s 3 March 1999 Order was in English. It should therefore be construed in accordance with the English text of Article 41.’ Counter-Memorial of the United States of America (submitted 27 March 2000) [152] (footnote omitted) <<http://www.icj-cij.org/docket/files/104/8554.pdf>> accessed 30 June 2010. The attempt to reproduce the text of the Russian quoted in the German memorial was no less embarrassing. See *ibid* [152] and footnote 65.

¹⁵⁰ In addition to the books and articles cited in the chapter see also CB Kuner, ‘The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning’ (1991) 40 ICLQ 953, WJ Aceves, ‘Ambiguities in Plurilingual Treaties: A Case Study of Article 22 of the 1982 Law of the Sea Convention’ (1996) 27 *Ocean Development & International Law* 187, U Linderfalk, *On the Interpretation of Treaties* (Law and Philosophy Library Volume 83, Springer, Dordrecht, 2007) ch 11 and BJ Condon, ‘Lost in Translation: Plurilingual Interpretation of WTO Law’ (2010) 1 *Journal of International Dispute Settlement* 191.

¹⁵¹ See, for example, RL Creech, *Law and Language in the European Union; The Paradox of a Babel ‘United in Diversity’* (Europa Law Publishing, Groningen, 2005), M Derlén, *Multilingual Interpretation of European Union Law* (European Monographs Volume 67, Kluwer, Alphen aan den Rijn, 2009), B Pozzo and V Jacometti (eds), *Multilingualism and the Harmonisation of European Law* (Kluwer Law International, Alphen aan den Rijn, 2006), FG Jacobs, ‘Approaches to Interpretation in a Plurilingual Legal System’ in M Hoskins and W Robinson (eds), *A True European: Essays for Judge David Edwards* (Hart, Oxford, 2003) 297 and A Doczekalska ‘Drafting and Interpretation of EU Law: Paradoxes of Legal Multilingualism’ in G Grewendorf and M Rathert (eds), *Formal Linguistics and Law* (Mouton de Gruyter, Berlin, 2009) 339. See also K Lipstein, ‘Some Practical Comparative Law: The Interpretation of Multi-Lingual Treaties with special regard to the EEC Treaties’ (1973-1974) 48 *Tulane LR* 907, T Klimas and J Vaiciukaite, ‘Interpretation of European Union Multilingual Law’ (2005) 3 *International Journal of Baltic Law* 1 and LM Solan, ‘The Interpretation of Multilingual Statutes by the European Court of Justice’ (2009) 34 *Brooklyn Journal of International Law* 277.

plurilingualism (particularly in the context of treaty-making) should also be on the agenda of every international lawyer.