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International and supranational law in translation: from multilingual lawmaking to adjudication

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This paper analyses the defining features of legal translation in the development of international and supranational law, taking a comparative approach between different organisations, particularly the United Nations, the World Trade Organization, the European Union and their respective adjudicative bodies. The scope and communicative conditions of legal translation in such settings are first described, including processes of lawmaking, law application and adjudication. In the legal contextualisation of translational action, emphasis is placed on the interconnection between different sources of law, the hybridity of legal texts and discourses, and the interplay between international and national levels of rulemaking and enforcement. The challenges encountered by the translator in the search for maximum accuracy are then reviewed with a focus on terminological problems, quality assurance and ambiguity. Finally, the examination of linguistic concordance in adjudication procedures further highlights the special contribution of legal translators to the functioning of each international or supranational legal order, and recommendations are made to better acknowledge and benefit from this contribution.

Keywords: legal translation; international law; supranational law; international organisations; EU law; multilingual lawmaking; adjudication; international legal discourses; legal terminology; ambiguity; legal interpretation; linguistic concordance

1. Introduction

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

Except for some experiments in multilingual co-drafting (e.g. during the Third United Nations Conference on the Law of the Sea, 1973–1982, leading to the Convention on the Law of the Sea of 10 December 1982), translation remains the predominant means of producing multilingual legal instruments in that context. Translations of international legislation into official languages become binding texts on an equal footing with original texts, and the terms of each instrument ‘are presumed to have the same meaning in each authentic text’ (article 33.3 of the 1969 Vienna Convention on the Law of Treaties,

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VCLT).¹ In turn, these instruments are invoked as sources of law and disputes over their interpretation can be brought before the relevant courts or adjudicative bodies, which also rely on translation to produce multilingual case-law.

The principle of equal authenticity in each of the official languages and other features of legal translation at international and supranational organisations have attracted growing attention in recent decades (e.g. Tabory 1980; Šarčević 1997; Cao 2007; Millet 2013; Prieto Ramos 2013a; Tomić and Beltrán Montoliu 2013; Zhao and Cao 2013), particularly in the case of European Union (EU) legislation (e.g. Berteloot 2000; Koskinen 2000; Stolze 2001; Wagner, Bech, and Martínez 2002; Correia 2003; Biel 2007; Kjær 2007; Felici 2010; Tranchant 2011). Most of these authors focus on particular institutions and text typologies, especially legislative texts, and highlight the need to further scrutinise institutional legal translation. Some of them call for specific approaches, models or even methods (e.g. Kjær in the case of EU law).

In the next sections, legal translation at international organisations will be analysed with a view to identifying its main defining features from the perspective of contemporary Legal Translation Studies (LTS). We will draw on our own professional experience in institutional legal translation and an analytic model for decision-making tested in that context (Prieto Ramos 2011, 2013b). The scope of legal translation and the communicative conditions that frame the translation process will first be described, before focusing on the key challenges encountered by institutional translators. Both intergovernmental organisations and supranational organisations will be considered, with special emphasis on the comparison of three representative examples: the United Nations (UN), as a major ‘mother’ organisation covering a broad range of issues, and its International Court of Justice (ICJ); the World Trade Organization (WTO), as a specialised organisation with an important dispute settlement function, including case-specific panels and an Appellate Body, generally regarded as ‘the most dynamic of the present-day international tribunals’ (Picker 2008, 1111); and the EU, the world’s most complex and multilingual system of supranational institutions, and its Court of Justice (CJEU).²

2. Scope and conditions of legal translation in international institutional settings

The role of legal translation at international organisations can be defined through legal contextualisation of the translational action and scrutiny of its communicative conditions, including the type of translation and the purpose of both source and target texts within the relevant hierarchy of legal sources. In a contextualisation process that begins with general parameters of decision-making, the first and most crucial element elicited in this case is the contribution of legal translation to forging multilingual texts and discourses of a shared international or supranational legal system. In this kind of instrumental translation (Nord 1991), the concurrence of the legal functions and communicative situation of the target text (TT) with those of the source text (ST) explains the expectation of maximum accuracy in order to ensure semantic univocity. Emphasis is placed on formal interlinguistic concordance, terminological harmonisation, and intra- and intertextual consistency with established institutional conventions.

All these elements can be regarded as core components of any strategy of adequacy to the *skopos* (Nord 1997) in institutional settings, also described as ‘fidelity to the single instrument’ in the case of international legislation (Šarčević 1997, 215). In fact, the challenges of linguistic mediation within a shared legal system lie primarily in the intrinsic complexity of the international or supranational system itself. It therefore proves essential for legal translators at international organisations to understand the multi-layered

nature of each shared system and the different procedures and agents that shape its linguistic facets (see section 2). In delineating the scope of translation of international and supranational law from this perspective, it becomes apparent that different sources and procedures for legal drafting, implementation and interpretation cannot be analysed in isolation from each other.

As enumerated in article 38(1) of the Statute of the International Court of Justice, international sources of law include: international conventions, international custom, ‘the general principles of law recognized by civilized nations’ and ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law’.³ In the case of EU law, a hierarchy is established between primary sources (EU treaties), secondary sources (unilateral instruments⁴ and agreements made under the EU treaties) and supplementary sources (CJEU’s case-law, including argumentation based on international law and general principles of law). Translators thus play a central role in the production of multilingual sources of international and supranational law. Even if codified law takes precedence over other sources, case-law can be particularly relevant to filling the gaps or solving ambiguity and harmonisation issues that arise in practical implementation. Furthermore, it is not often acknowledged that multilateral procedures for monitoring the implementation of international law at national level generate a high volume of legal translation and constitute an integral component of institutional activities to ensure compliance with international rules.

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

- (1) *Lawmaking* by legislative, quasi-legislative or policy-making bodies with powers to design international or supranational rules, including the drafting,⁵ negotiation and adoption of: (a) legal instruments that, regardless of their various designations (see article 2.1(a) of the VCLT) and adoption procedures, become legally binding (e.g. treaties, conventions, agreements or directives); these texts may require some mechanism (e.g. by domestic statute or executive act in Canada) for integration into national legislation, often literally (e.g. WTO agreements in Spanish in Chile), or may be directly applicable as domestic law in the case of legislation made by supranational entities (e.g. EU regulations); and (b) other instruments that are not legally enforceable (e.g. recommendations, guidelines, declarations) but may produce legal effects and may attain some degree of legal force in practice through control procedures or as models for mandatory national legislation (e.g. on the integration of the UNCITRAL Model Law on International Commercial Arbitration at domestic level, see Gotti 2007). Furthermore, they can be used to interpret binding legal instruments and inform national, supranational or international judicial decisions (e.g. on the ICJ’s recognition of legal force to UN declarations, see Schachter 1997; on references to non-binding instruments in EU competition case-law, see Ștefan 2013; on OECD anti-corruption guidelines cited by the South African Constitutional Court, see Gomes Pereira et al. 2012). This heterogeneous group of instruments, generally labelled as ‘soft law’ or ‘informal international lawmaking’ and regarded as instruments of ‘governance’ (Mörth 2004; Pauwelyn, Wessel, and Wouters 2012), are rapidly growing and have become a major means for global co-ordination and harmonisation in policy fields such as international financial law (e.g. Brummer 2012; Bjorklund and Reinisch 2012).

- (2) *Monitoring* of legal implementation comprises various control mechanisms established in accordance with surveillance provisions of international legislation; they entail reporting obligations by parties to the relevant legal instruments, and lead to conclusions and/or recommendations by the monitoring bodies. National legislation and policies are reviewed in detail, e.g. trade policies in the framework of the trade policy review mechanism at the WTO, or the human rights record of UN Member States as part of the Universal Periodic Review (under the auspices of the UN Human Rights Council (HRC)). In some cases, these processes have an investigative or quasi-judicial nature, for example, the HRC's special procedures on human rights situations or violations, and the complaint procedures under UN human rights treaty bodies' communications procedures.⁶ Even if their findings and recommendations are non-binding, they fulfil a crucial function in promoting human rights standards and accountability in the absence of an international court of human rights. The same rationale applies to other bodies in charge of monitoring the implementation of non-binding instruments. In the EU, the Commission not only adopts a considerable number of implementing measures based on the work of 'comitology committees' (see Hardacre and Kaeding 2011), but also verifies implementing measures at national level and takes pre-litigation action (by its own initiative or after complaints) in cases of alleged infringement (articles 258 and 259 of the TFEU).⁷
- (3) *Adjudication*, through which courts or adjudicative bodies address problems of application or interpretation as they surface in the implementation of legal instruments. They do not only settle disputes but may also conduct advisory proceedings (e.g. those initiated by UN bodies and authorised specialised agencies at the ICJ, or national courts' requests for a preliminary ruling on EU law at the CJEU). While they do not necessarily have exclusive jurisdiction on the matters submitted to them (Janis 2003; Lavranos 2008), they guarantee uniform interpretation of the instruments under their recognised competence (e.g. EU law matters in the case of the CJEU, international trade law in the case of the WTO's Appellate Body, and treaty matters that may be referred to the ICJ with the consent of the parties on the basis of binding jurisdictional clauses⁸). As authoritative interpretations, their decisions shed light on the meaning of provisions and are intended to guide subsequent implementation and rulings, even if some international courts (notably the ICJ) lack enforcement mechanisms to ensure compliance. Regardless of the adjudicators' effectiveness, translators of texts in those settings (including both submissions from parties and judicial decisions) are confronted with the challenges of dissecting interpretation issues and legal argumentation on the basis of previously translated instruments, which can cause interpretive problems themselves due to linguistic discrepancies (see section 4).

This overview depicts a vast scope characterised by the interplay between different sources, as well as international and domestic layers, in the functioning of the legal machinery of each organisation. The closer and more systematic interconnection of these layers in the case of EU law explains its specific features as a distinct sub-category of institutional legal translation (e.g. Biel 2007; Kjær 2007). The principle of equal authenticity of the official languages of all Member States⁹ (as opposed to a limited number of languages in other organisations) and the direct applicability (and enforceability by national courts) of EU secondary legislation in all the Member States certainly entail a stronger relationship with the domestic legal systems integrated into the

‘confederal’ structure. A shared layer of EU law on a wide range of areas of harmonisation of 28 Member States in 24 languages¹⁰ implies an ambitious commitment to accountability in multilingualism and a higher risk of linguistic discrepancies. This contrasts with the more fragmented domestic reception and enforceability mechanisms of the law generated through intergovernmental organisations, and their more ‘global’ approach to language policy (six languages for 193 countries in the case of the UN, and three languages for 159 WTO Members).¹¹

However, the dynamics of these systems and the functions and communicative purposes of their legal texts offer many similarities, whether their primary subjects are States or citizens. For example, the transposition of EU directives into national law is generally comparable to other domestic legislative adaptations required to fulfil international commitments, including those made by the EU as a WTO member. Even the distinctive feature of direct applicability of EU regulations, typical of domestic law rather than international law, does not affect the core priorities of translation for the supranational legal order. These cannot be equated with the peculiarities and compromises that make systematic co-drafting possible in national systems such as bilingual and bijural Canada.

Overall, the central features of instrumental legal translation in international institutional settings (in terms of accuracy, interlinguistic concordance and consistency) are very similar, but require rigorous adaptation to the conventions of each organisation as regards specific drafting processes and legal genres. Let us now delve into the common challenges encountered in text analysis and reformulation.

3. Dissecting international legal texts and discourses

In spite of this category of legal translation being classified as intra-systemic (de Groot 1988), different cultures, interests and norms intersect in the framework of intergovernmental and supranational organisations and impregnate international legal discourses (Salmon 1991; Trosborg 1997). Instrumental translation itself is involved in the process of creation and standardisation of such discourses, and must discern the ‘ingredients’ and contend with the implications of their hybridity, especially in the case of the negotiated texts underpinning each legal system.

The multilateral and EU systems formalised over the past century did not emerge and do not develop from a *tabula rasa*. Since languages shape worldviews, and legal languages are bound to specific legal traditions, it is often argued that the conceptual network expressed in the predominant language of interstate communication can exert a considerable influence on international legal language. As the main language of negotiation and drafting of original texts, English currently sets the bar for translation and terminological innovation. Its imprint is increasingly noticeable in processes of globalisation (see e.g. Drohla 2008; Ost 2009), especially in areas such as finance, trade and arbitration. The EU is a case in point: understandably, its legal system is based on the civil law model, and its legislation was mostly drafted in French until the 1990s, but this changed rapidly with the accession of Eastern European countries, and English is now the original language of around 80% of documents.¹² The discursive impact of this trend is yet to be fully realised, while the language of international treaties also has an impact on EU law (see Somssich et al. 2012, 53–63).

According to Gleider I. Hernández, the ‘importance of multilingualism in international law does not rest on maintaining cultural diversity, but rather, on the importance of accommodating legal pluralism within international legal discourse’ (2010, 457), i.e. it

is not so much about ‘which languages are meant to dominate, but the manner in which working languages reinforce a culture, a framework of legal reasoning, and the transposition of legal norms from the national to the international’ (ibid., 450). Regardless of the extent to which the prevailing *lingua franca* and governance models predispose international lawmakers to adopt common law concepts, these must be contextualised within the broader dynamics of international legal discourses in English:

- (1) Concepts borrowed from particular legal traditions (not only common law) must not be taken at face value; their legal scope within the shared system is defined through the relevant authoritative interpretation and is not necessarily the same as in national law (see Fletcher 1999 and Moréteau 2002 on concepts such as ‘reasonableness’, ‘fairness’ and ‘force majeure’ in European and international instruments). As regards EU law, the possible coexistence of concepts with different national and supranational meanings behind the same terms was confirmed by the CJEU (Case 283/81 mentioned above and Case C-103/01 *Commission v. Germany* [2003] ECR I-5369). This exacerbates the risk of overlapping, polysemy and interpretation disparities (e.g. Heutger 2005; Glanert 2008), thus reinforcing the need for conciliatory interpretation criteria to define semantic boundaries in integration processes.
- (2) For the same reason, efforts are made to avoid country-specific terms and adopt more neutral or generic ones, particularly as they emerge from comparative law or conceptual hybrids in the negotiation of harmonisation-oriented instruments (see e.g. Garro 1989 on the reconciliation of legal traditions in the United Nations Convention on Contracts for the International Sales of Goods, and Bestué Salinas 2009 on the terminology used in European contract law). In the case of EU legal drafting, the *Joint Practical Guide of the European Parliament, the Council and the Commission* recommends that ‘terms which are too closely linked to national legal systems should be avoided’ (principle 5.3.2, European Communities 2003, 19).¹³ In spite of the indefinite nature and potential ambiguity of abstract terms, these are generally intentional, and hyperonyms are to be respected in translation (e.g. Stolze 2001; Wagner, Bech, and Martínez 2002, 63–4).

The result of this ‘legal engineering’ is a new layer of meaning and institutional legalese tailored to the needs of international harmonisation, common legal structures and procedures, rather than bound to a particular legal culture. This process of cultural detachment or ‘deculturalization’ (van Els 2001, 329) is coupled with one of appropriation by the international community. English is used by drafters with many different backgrounds and mother languages.¹⁴ This reinforces the reduction of linguistic idiomaticity¹⁵ and enhances the ‘permeability’ of English to non-idiomatic uses, including some ‘oddities’ (Frame 2005) or ‘interferences in vocabulary and syntax’ (Wagner 2000, 12; see e.g. Seymour 2002 and Gardner 2013 on uses of ‘transmit’, ‘foresee’ and other terms in EU English). Such lexical and structural patterns are often considered characteristic of varieties of English as a *lingua franca*.

The above features manifest themselves to varying degrees in different international legal discourses. They develop their own core institutional rhetoric and stylistic conventions, which, as noted by Koskinen (2000, 58) in relation to the EU, become a culture in their own right. The conceptual framework and specific terminology of each shared system are reproduced in all its instruments (crucially marked by normative ones), while other discursive conventions vary by text typology. For example, negotiated

legislative texts are more likely to include vague language in order to facilitate consensus, with a high degree of hybridity as a result of multiple input sources in the drafting process (e.g. Robinson 2005, 7); in contrast, style is generally more coherent in documents drafted by adjudicative bodies (e.g. on the ‘formulaic style’ of CJEU judgments in French, see McAuliffe 2012, 213) – also in comparison to those submitted by litigating parties –; and references to national legal realities are much more commonplace in texts of adjudication and monitoring procedures than in legislative provisions.

4. Challenges of producing multilingual law

Conveying the meaning intended by lawmaking and law-applying bodies within the communicative conditions described above implies not only scrutiny of semantic balances and relevant conventions in the source language, but also, crucially, conforming and contributing to specific discursive conventions in the target language. Translators do not simply draw on the legal language of a particular national system, but it is the legal language of the institutional framework that is detached from national systems and moulded through translation. In this sense, the translators’ responsibility in giving linguistic shape to international and supranational law is similar to that of drafters of originals.

Translation decision-making in that context will require comparative legal analysis in order to identify not only degrees of correspondence between existing concepts in two languages, but also those between legal systems that share the same language in the case of international target languages. For example, translation of UN legal texts into Arabic can be expected to require more intralinguistic contrastive analysis than translating EU legal texts into Polish. The same applies to translation into Spanish at the WTO as opposed to translation into Spanish at the EU. The added difficulty of finding ‘common denominators’ and neutral solutions is especially common at intergovernmental organisations (see e.g. Nóbrega 2008 on the ‘UN style’), although it is not unknown in EU institutions (in the case of German and French). The resulting compromises, especially as reflected in terminology, will be more or less distant from national legal discourses depending on the international specificity of the subject matter and the degree of uniformity within each target language. Other translation challenges at the microtextual level will also be reviewed below with a focus on those that illustrate significant aspects of the professional translator’s role at international organisations.

4.1 Terminology: accommodating old and new concepts

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

Given the interdisciplinarity and evolving nature of law, the translator is at the front line of encountering neologisms from English and becomes a linguistic filter in lexical importation into other languages. As noted by Wagner, Bech, and Martínez (2002, 50), ‘translators often come up against the difficulty of finding established and universally

acceptable terms in their language for products or concepts that are new or not even fully developed'. This process often includes an initial stage of hesitation (see e.g. Solà 2001 on the import of 'governance' into Spanish and Peruzzo 2012 on the transplant of 'restorative justice' into the EU legal systems), which might be compounded by the proliferation of different translations among various organisations that may not be recognised as authoritative in the subject matter. In these cases, terminological dispersion may contribute to the persistent lack of entrenchment of a single alternative to the borrowing from English in areas such as financial regulations (see e.g. the case of 'hedge fund' in Prieto Ramos 2013c).

Literal formulations, if semantically viable, are prioritised in order to facilitate formal concordance. These solutions are usually preferred by lawmakers who adopt the text in the target language, as negotiators feel attached to the vocabulary agreed in English. They may even suggest calques for the translation of new terms into their mother languages. In fact, these are not coined in isolation by translators but require the co-ordinated action of the translation services, taking into account linguistic, technical and political considerations (see section 3.2), including input from experts and attention to the different language varieties as appropriate.

Finally, in coping with national system-specific terms in texts on legal implementation (e.g. names of national judicial institutions or quotations of monolingual domestic legislation), the microtextual priority shifts from harmonising shared concepts to conveying the legal specificity of the national system at hand, which raises classical issues of asymmetry in legal translation. International organisations may set internal translation patterns rather than authoritative equivalents in those cases. Neutral conceptual or literal formulations are generally prioritised to facilitate identification and comprehension, and avoid misleading national functional equivalents, while the integration of borrowings depends on the legal specificity of the term, the relevance to the legal function of the text and institutional translation preferences. For instance, the names of national judicial bodies of EU Member States are systematically left in their native language in the translation of CJEU documents. In the case of intergovernmental organisations, references to domestic legal concepts and institutions of States whose national languages are not official at the relevant organisation are translations themselves (normally into English), and this is a potential source of semantic distortion. At the ICC, the most challenging terminological difficulties arise precisely in the translation of less or non-standardised languages used by testifying witnesses to whom concepts such as 'victim' are unknown (Aboh-Dauvergne 2008; Tomić and Beltrán Montoliu 2013).

4.2 *Quality assurance: improving institutional communication*

Considering the complexity of text production processes and the diverse linguistic and professional backgrounds of their drafters, it is not surprising that imperfections are frequently detected by translators. While the inconsistencies of authenticated legal instruments are inevitably reproduced (paradoxically, for the sake of consistency) unless formally amended, translation performs the function of quality control of institutional drafts. Translators must actually bring errors and 'obscure' language to the attention of institutional drafters or legal revisers. This role is even formally recognised by EU institutions in the drafting process:

[...] the author must realise that comments from translators and, more generally, all departments which carry out a linguistic check of the text can be extremely useful. Such checks

provide an opportunity to identify any errors and ambiguities in the original text, even after a lengthy gestation period and even – perhaps especially – when the drafting has been the subject of much discussion between a number of people. The problems encountered may then be brought to the attention of the author. In many cases, the best solution will be to alter the original, rather than the translation. (European Communities 2003, 20)

This and other recommendations for clearer drafting can have a significant impact on the quality of originals and, as a result, on the overall quality of multilingual texts. Ian Frame (2005), a lawyer-linguist at the CJEU and former legal reviser in the European Parliament, observes that most ‘linguistic peculiarities’ in EU legislative texts are attributable, among other factors, to ‘overreliance on technical experts’, as well as ‘inadequate knowledge of English on the part of some of those involved in the legislative process, including some native speakers of English’ (2005, 22). In his experience, ‘the translators are rarely to blame’ (ibid., 20), but they ‘can sometimes rectify and heal’ (ibid., 23). The translated draft might serve as a basis to improve the original (e.g. Kaduczak 2005, 39), and the interaction with authors may lead to an enlightening dialogue in which the legal translator’s expertise is unveiled to and acknowledged by other experts, either in drafting committees or as part of routine work with in-house experts involved in drafting or revision tasks (Prieto Ramos 2010). For instance, at the request of a WTO delegation which had not grasped the logic of the Spanish translation of ‘should’ in a binding provision negotiated in English, a particular WTO committee was informed by translators about the contrastive linguistic implications of the translation of modality from English into Spanish. Translation thus became an agenda item, and delegates learnt about alternatives to avoid formulations potentially ambiguous to non-native delegates negotiating in English.

Input from translators can be particularly appreciated in the process of finalising multilingual rulings, since previously overlooked inaccuracies may affect the cohesion of the adjudicative body’s argumentation (e.g. Prieto Ramos 2013a, 278). In contrast, translators must refrain from suggesting corrections of documents submitted by litigating parties. However, their style tends to be more elaborate and uniform than in monitoring procedures. It is in the latter context that translators cope with some of the poorest quality texts, usually submissions based on inaccurate translations of non-official languages into English.

In all cases, institutional translators work under the time constraints of each procedure, and translation quality may be affected as a result. While legal texts are systematically revised, the level of revision will depend on the significance of each document and the available resources. Two further challenges are encountered in the pursuit of intralinguistic consistency and interlinguistic concordance: the harmonisation of terminology and style in long documents shared by different translators; and the co-ordination of sensitive translation decisions between target languages, especially in the case of the EU (see Tranchant 2011; Guggeis and Robinson 2012).

4.3 *Ambiguity: walking semantic tightropes*

One of the most delicate issues addressed by translators of international legal texts is semantic ambiguity as a result of (intentionally or unintentionally) vague wording (see e.g. Poscher 2012). While this can be found in all text types, it is most characteristic of legal provisions embodying compromises between divergent views in the framework of negotiation. After the drafters of originals, translators are the first to be exposed to

utterances with more than one possible interpretation in the making of multilingual law. As opposed to classical views of lawyers who refuse the idea of any kind of legal interpretation by translators, these must grasp all the shades of meaning in order to reformulate text in the most reliable way possible. Although the purpose of interpretation differs from that of jurists, it is mandatory for legal translators to scrutinise the text not only as linguists, but also through the prism of legal hermeneutics. As noted by Harvey (2002, 182), ‘if legal translators are truly “text producers” engaged in a dynamic relationship with both sender and receiver, they will inevitably have to tackle questions of interpretation’.

Translators must categorise the type and degree of ambiguity considering the applicable rules of interpretation (notably the VCLT in the case of international treaties) and related judicial precedents at organisation level. They cannot change the ambiguity unilaterally in the target language, but must maintain it to the extent possible. Their strategy will largely depend on the potential impact of each possible interpretation and the room for manoeuvre which they might have in the relevant stage of text production. Indeed, in the initial stages of lawmaking procedures, as mentioned above, it might be possible to clarify obscure language through interaction with authors. In this regard, Tito Gallas, Head of the Jurist Linguist Service of the EU Council, argues that multilingualism is ‘an ingredient for clarity’: ‘the temptation to hide possible disagreement behind foggy formulations will certainly grow’, but ‘it is easier to render a text foggy in one single language’, and more precise formulations in the target languages (as a result of linguistic requirements) may lead to ‘retroaction’ on the initial formulation (Gallas 2006, 123–4).

After adoption, it might not be possible to find out whether the ambiguity was deliberate or not. Even in cases of functional or constructive ambiguity, the initial intention of the parties becomes secondary to the literal method of interpretation enshrined by article 31 of the VCLT with regard to international treaties: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ (see also the arguments given in favour of the literal method at the United Nations Conference on the Law of Treaties, in United Nations 1969, 166–85). Apart from the text itself, other instruments relating to the conclusion of the treaty may be considered as part of the ‘context’ (article 31.2 of the VCLT), together with other agreements on its application, practices of implementation and applicable rules of interpretation (article 31.3 of the VCLT). ‘Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion’ in cases where ‘the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable’ (article 32 of the VCLT). These rules point to key elements to overcome semantic hurdles in translation. Patterns in their application by specific adjudicative bodies can critically inform translators’ decisions, as the same or a similar kind of ambiguity may have been previously addressed.

5. Linguistic concordance in adjudication

The linguistic concordance of multilingual texts comes under scrutiny in the application of legal provisions by adjudicative bodies responsible for ensuring their uniform interpretation. The multilingual nature of texts may help to confirm a particular meaning or be the origin of semantic discrepancies. As a result, linguistic issues previously encountered by translators come to surface as part of legal argumentation and must be tackled by adjudicators. In this context, translators of judicial decisions and litigation documents

are generally those with the strongest legal profile within the system, either as members of an autonomous body of translators working for a court (e.g. lawyer-linguists at the CJEU) or as members of a specific legal translation team within the organisation's language services (e.g. translators of dispute settlement documents at the WTO), in which case they may be also called upon to translate legal provisions later analysed and applied in adjudication.

Once translated and authenticated in several 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' (article 33.1 of the VCLT). In line with this principle, the terms of multilingual instruments 'are presumed to have the same meaning in each authentic text' (article 33.3 of the VCLT). When 'a comparison of the authentic texts discloses a difference of meaning' which is not resolved through the application of articles 31 and 32, 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted' (article 33.4 of the VCLT). According to these rules, the comparison of 'texts' is not mandatory unless the presumption of semantic unity is refuted. In practice, most international adjudicative bodies do without comparison and rely on the English text unless they are directly asked to resolve linguistic discrepancies. For example, Condon (2010, 204) has found that the WTO's Appellate Body considered more than one authentic text in 22.1% of its reports between 1996 and 2009, with a short upward trend between 2000 and 2004, while Kuner (1991, 957) notes that the ICJ tends to consult the UN Charter in its procedural languages (English and French) and not in the other UN official languages. Both authors agree that the lack of comparison may contribute to potential discrepancies remaining unresolved.¹⁶

The ILC reported to the General Assembly as follows on the interpretation of multilingual treaties: 'The different genius of the languages, the absence of a complete *consensus ad idem*, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the texts' (United Nations 1967, 225). Tabory (1980, 228) also refers to 'the inability of delegations to verify translations in several totally unfamiliar languages'. The level of exposure to these discrepancies and the methods applied to reconcile texts (within the flexible terms of article 33.4 of the VCLT) vary between adjudicative bodies. However, in all cases, the legal text examined in adjudication is to be quoted by the translator in the languages of the discrepancy brought up to court, even if the target language of the translation is not one of the languages at issue.

It is not infrequent for disputing parties at the WTO to use texts in different languages to support their interpretation, but the English text is generally regarded as the 'master' one, and it tends to be treated as such in cases of meaning reconciliation by the Appellate Body (Condon 2010). In spite of its comparatively limited number of cases, the ICJ has also applied article 33 in a few instances of linguistic discrepancy, e.g. on the wording of article 41 of its Statute (*LaGrand (Germany v. United States of America) Case* [2001]), or in relation to the application of bilateral or regional agreements (e.g. *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009]). These texts are often old treaties on boundary matters (one of the main subjects examined by the Court) and were not translated by international organisations (see also McRae 2002).

The CJEU is by far the most exposed to issues of linguistic divergence. This would be expected considering the direct applicability of a large volume of EU secondary legislation, its high level of multilingualism and the scrutiny exerted on it by national courts through requests for CJEU preliminary rulings. In a system in which no 'language

version' can prevail, the CJEU has clearly confirmed the comparison of language versions as a tool for the uniform interpretation of EU law (see e.g. Vismara 2006; Paunio 2007; Derlén 2009), although the CJEU itself does not seem to systematically apply this tool (Bengoetxea 2011, 97). Curiously, the term 'language version'¹⁷ is preferred to 'text' (as used in the VCLT and intergovernmental organisations), even if the latter is supposed to avoid any connotation of 'version' as translation of an original. However, as opposed to the practice in other organisations, the language of the 'vanishing original' is never indicated in EU texts (Dollerup 2004). The impracticality of comparing 24 languages (especially in the case of citizens and national courts) and the unpredictability of criteria of uniform interpretation by the CJEU have led to concerns about the sustainability of the system and to considering limited multilingualism in order to reinforce legal certainty (Schilling 2010; Derlén 2011; Šarčević 2013).¹⁸

The comparison of language versions results in occasional divergences being brought to or detected by the CJEU, but these are not always problematic, nor can they be presumed to represent all the divergences in EU legislation. They are often part of legal argumentation and, in this sense, the analysis of different versions can actually assist the CJEU in its interpretation (Vismara 2006; Solan 2009, 31). Both Dengler (2010) and Baaij (2012) conclude that only around 100 CJEU judgments (out of 246 with references to the comparison of language versions) tackled problematic linguistic discrepancies between 1950 and 2010, and only a minority of them involved serious rather than partial divergence (Dengler 2010, 85). These analyses seem rather complementary. Overall, as highlighted by Dengler (*ibid.*), minor discrepancies due to conceptual nuances or terminological asymmetries appear to be the most frequent, and tend to be resolved through teleological and contextual criteria for effective reconciliation; Baaij (2012), meanwhile, suggests that a more literal approach (usually giving preference to the meaning of the majority of language versions) is taken by the Court when a translation error might be the cause of discrepancy, even if this is not normally acknowledged. As noted by Grasso (2011, 20) and Šarčević (2013, 14), in fact, the CJEU's case-law often merges literal and teleological interpretation by applying the former in the light of the latter. In sum, the CJEU's interpretive methods are found in the VCLT, but they are applied with a more marked (and less predictable) teleological orientation.¹⁹ These patterns illuminate the interfaces between legal interpretation in translation and adjudication, and are worth exploring further in LTS.

6. Conclusions

Since legal systems are built through language, the role of translation in building international and supranational law can only be a central one if they are to remain multilingual. As a professional activity of providing adequate solutions in variable legal communicative settings, legal translation at international organisations is conditioned by the constraints, purposes and expectations of the international or supranational legal system itself. Intergovernmental and supranational co-operation ascribes to instrumental translation the delicate task of conveying shared legal meaning accurately and consistently as it emerges and evolves through the interaction of lawmaking, law application and adjudication processes. Translators are not mere spectators or informants in these processes, but key actors responsible for giving linguistic shape to authentic texts which ultimately become sources of law. Their professional activity is not strictly limited to the target texts. As illustrated above, translation can actually have a positive impact on the crafting

of originals, and the product of translation can also help resolve problems of ambiguity affecting a multilingual instrument.

Deep understanding of internal processes of text production is therefore one of the main requirements of translation at international organisations. As insiders of the system, translators must fully grasp the procedural *raison d'être* of the different texts with which their renderings will form single units, as well as the multiple components of the original 'raw material' – that is, in most cases, the international variety of legal English employed in the setting at hand and the relevant genre conventions. Striking the right semantic and stylistic balances in reformulation will entail analysing content from a legal angle, including unclear wording, and dealing with all kinds of terminology (not only established institutional terms, but also legal transplants, neologisms and culture-bound realities) and with the associated comparative legal analysis (both inter-systemic and intralinguistic where appropriate). Through this endeavour, translators contribute to the development of the institutional variety of their native languages. In turn, the same issues may come to centre stage in adjudication proceedings when particular linguistic divergences arise in the interpretation of multilingual legal texts. Paradoxically, while jurists tend to reject the idea of interpretation of legal texts by non-jurists, they should be keenly interested to co-operate with translators in the construction and deconstruction of meaning, as lawmakers and adjudicators tacitly rely on the translators' ability to reflect the semantic nuances of originals in other authentic languages.

These challenges delineate a multi-faceted role in between 'legal engineering' and 'textual surgery' with significant systemic implications, and indeed demand a high level of professional specialisation. This is often acknowledged by those working directly with legal translators, but is still far from being a common perception. Further awareness of the complexity and added value of quality legal translation would be beneficial for each international legal order, and supports recommendations for an integral approach in which: (1) institutional legal translators (and ideally their trainers) incorporate legal procedural knowledge, legal drafting and legal hermeneutics into their training from an early stage, and keep abreast of relevant case-law; (2) institutional jurists and legal drafters, including legislators and adjudicators, acknowledge the role of legal translators as qualified 'allies' with the shared goal of producing sound multilingual texts; and (3) institutions adapt their selection requirements to the specificities of the legal translation profile (with its methodological, linguistic and legal components) and formally recognise the functions of legal translators in multilingual drafting processes. Overall, a needs analysis in each case would determine, for example, whether effective drafting, editing and interlinguistic concordance control mechanisms are in place to maximise co-ordinated efforts before authentication, and to what extent case-law provides interpretation patterns to ensure linguistic reconciliation after authentication and to be integrated into multilingual text production.

Beyond debates on translatability, from an LTS pragmatic perspective, focus must be placed on the analysis of parameters to achieve maximum adequacy in terms of accuracy and legal effects without necessarily sacrificing idiomaticity. In any case, legal translation should not be treated as a scapegoat for pre-existing legal and linguistic asymmetries in processes of international harmonisation, or for the unclear nature or peculiarities of certain institutional discourses. If the priority is to build a new layer of shared legal meaning, this can be achieved through standardisation in different languages with the support of the corresponding case-law. When this triggers a certain degree of insurmountable divergence in semantic resonances or the need for reconciliation of different legal realities under new rules, case-law becomes even more relevant in setting interpretation

boundaries. At an earlier stage, however, translators have a role to play in co-ordinating solutions to such semantic issues, and it would be in the interest of legal certainty to formalise concordance control procedures in which translators could request the legal review of specific multilingual provisions if significant uncertainty risks are detected. In all instances, translation remains an instrumental vehicle and a key quality filter for the creation of international or supranational multilingual law, and judicial interpretation emerges as a safety net to reinforce the overall coherence of the system as it is applied in different national jurisdictions.

As proven by the EU system, each legal architecture may require specific elements to suit its singularities in the interaction with domestic systems, but the role of legal translation and the core elements of translation strategy fit into the commonalities identified above. In practice, translation of EU law shares more with legal translation at international organisations than with bilingual or multilingual lawmaking in national systems. This study also confirms that integrative approaches to legal translation can account for international institutional settings and can prove useful in pinpointing translation strategies in that context. LTS can still do more to support pragmatic recommendations and advance the actual role of institutional translation in the development of international and supranational law.

Notes

1. This convention, in force since January 1980, applies to treaties concluded between States, including those concluded within the framework of intergovernmental organisations. It is regarded as a cornerstone of international law, and was complemented by the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which is yet to enter into force.
2. As stated by the Court in 1963, ‘the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals’ (Case 26–62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1).
3. As opposed to judicial rulings, the translation of scholarly writings outside institutional settings will not be considered in this study.
4. According to article 288 of the Treaty on the Functioning of the European Union (TFEU), binding instruments of secondary EU law include regulations (binding in their ‘entirety and directly applicable in all the Member States’), directives (binding ‘as to the result to be achieved’), and decisions (which must specify on whom they are binding), while recommendations and opinions have no binding force. In turn, a legislative act may ‘delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act’ (article 290) or may ‘confer implementing powers on the Commission’ or on the Council in specific cases (article 291). Such delegated and implementing acts are legally binding.
5. With input from specialised technical bodies such as the UN’s International Law Commission, whose object is the ‘promotion of the progressive development of international law and its codification’ (article 1, paragraph 1, of the Statute of the International Law Commission).
6. See official overviews available at: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx> and <http://www2.ohchr.org/english/bodies/petitions/#interstate> (accessed on 1 March 2014).
7. See annual reports on the work of comitology committees and ‘on monitoring the application of EU law’ available, respectively, at: <http://ec.europa.eu/transparency/regcomitology/index.cfm?do = Report.Report>; and http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm (accessed on 1 March 2014).
8. See Alexandrov 2006; Powell and Mitchell 2007.

9. Enshrined in article 55 of the Treaty on European Union (and its preceding treaties) as regards primary legislation, and confirmed in Case 283/81 of the CJEU (*Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415) in relation to secondary legislation.
10. All membership and language figures as of July 2013. Authentic languages in the ICJ and the CJEU are not the same as in the UN and the EU, respectively.
11. The International Criminal Court (ICC) constitutes a very special case in that its Court Interpretation and Translation Section deals with more than 40 languages, including official languages (English and French), co-operation languages (in which States communicate with the Court) and ‘situation languages’ (used during the investigation phase) (Tomić and Beltrán Montoliu 2013).
12. 2010 figures from the European Commission’s Directorate-General for Translation: 77% of originals drafted in English (45% in 1997) and 7% in French (40.5% in 1997) (European Commission 2012, 7). In the case of documents adopted under the co-decision procedure (currently ‘ordinary legislative procedure’) with the European Parliament and the Council, the proportion had reached 95% by the mid-2000s (Frame 2005, 22).
13. As a recent illustration, see the use of ‘neutral’ terms (e.g. ‘non-performance’ instead of ‘breach of contract’) in the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law of 2011. This optional instrument includes a rule for resolving discrepancies between language versions of contract documents when none of the versions is ‘stated to be authoritative’: ‘the version in which the contract was originally drawn up is to be treated as the authoritative one’ (article 61, COM/2011/0635 final).
14. For instance, an in-house survey held at the European Commission in 2009 revealed that 95% of their drafters wrote mainly in English; only 13% of them had English as their mother tongue and 54% rarely or never had their documents checked by a native speaker (Wagner 2010, 4).
15. This is explicitly promoted by EU institutions: ‘expressions which are too specific to one language should [...] be avoided as far as possible’ because they ‘can only be translated using circumlocutions and approximations, which inevitably result in semantic divergences between the various language versions’ (principle 5.3.1, European Communities 2003, 19).
16. It must be noted, however, that views of non-linguistic experts on potential discrepancies might be distorted by a ‘superficial’ rather than semantic perception of linguistic concordance. For instance, many examples of potential discrepancy provided by Condon (2010, 2011) are in fact routine transpositions and correct reformulations in the target language. Doubts are raised by the author when the French and Spanish texts do not follow exactly the same lexical categories, lexemes or word placement as the English text, even when the translations in question may be perfectly accurate and idiomatic.
17. Article 31 of the Court’s Rules of Procedure constitutes an exception, as it refers to ‘texts of documents’ drawn up in more than one language.
18. Schilling (2010) supports the idea of replacing ‘illusory’ equal authenticity with the ‘effective’ authenticity of only one version, while Derlén (2011) and Šarčević (2013) would preserve the principle of equal authenticity but with only English and French as mandatory consultation languages for comparison, together with the national language in each instance.
19. As stated by the Court: ‘The different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part’ (Case 30–77 *Régina v. Pierre Bouchereau* [1977] ECR 1999, paragraph 14). See also Shelton 1997 on how this teleological approach compares to other courts from the perspective of the VCLT.

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