

Intertemporal Linguistics in International Law

*Beyond Contemporaneous
and Evolutionary Treaty
Interpretation*

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The Problem of Intertemporal Linguistics as an Issue of Ambiguity, Not Vagueness

IN PARTS I and II, we saw that the scholarship on the problem of intertemporal linguistics is too distracted by the doctrines associated with it and generally too confused and too heterogenous to reveal a solution to the Problem. The same can be said for the post-VCLT international case law, while the VCLT's interpretative rules are so multi-faceted and flexible that they do not offer interpreters faced with the Problem any useful guidance on how to solve it. Having now extricated it from the doctrines muddying our analysis of it, formally defined it and cast aside the misconceptions in relation to it, this book must now turn to *solving* the problem of intertemporal linguistics.

Developing a proposed solution to the Problem is undoubtedly the book's most ambitious enterprise and one that some might consider the author foolish to even attempt. It is notable that most authors writing in relation to the Problem have studiously avoided trying to solve it. Most often, this is achieved by focusing on explaining and justifying the doctrine of evolutionary treaty interpretation and the decisions invoking that doctrine, rather than the question of which of a static or dynamic approach should be taken to a defined legal problem. Yet, even the rare studies devoted to the question, rather than a doctrine, never attempt to solve it. We have seen that the ILC's *Treaties over Time* project ended up redefining the scope of its study to focus on subsequent agreement and practice, thereby eschewing the need to deal with the Problem in any detail and therefore any attempt to solve it. We have also seen that Djeflal's recent book on *Static and Evolutive Treaty Interpretation* merely seeks to 'reorganis[e] and restat[e]' the very similar static-versus-evolutive problem 'in a faithful manner so that it can be better dealt with',¹ but by his own admission does not attempt to provide guidance for how to solve it.²

The search for a solution to the Problem is not, however, a forlorn enterprise. When Djeflal says that '[t]he choice between static and evolutive results

¹Christian Djeflal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge, Cambridge University Press, 2016) 71–72.

²ibid 357.

is situated within competing attitudes ... different general political mindsets (conservative/progressive) or different philosophical standpoints on language (intentionalist/pragmatist)' and that '[i]t is very hard to find a solution that mitigates between these views once and for all', he is, it is submitted, talking about the choice between following and not following the multi-faceted doctrine of evolutionary treaty interpretation, not merely the narrower and less value-laden choice between the static and dynamic approaches to the problem of intertemporal linguistics. Yet while the taking of a position on whether a treaty interpreter should favour a progressive or formalistic interpretation of a treaty inherently implies a particular jurisprudential mindset, taking a position on the problem of intertemporal linguistics does not. As this book has gone to great pains to point out, the battles over evolutionary treaty interpretation and the problem of intertemporal linguistics are carried out with different weapons on different terrains. One of the benefits of describing the Problem as one of intertemporal linguistics is that it emphasises that the problem is linguistically loaded, but value neutral. Solutions can accordingly be offered without falling into the morass of moral or jurisprudential relativity.

It is incumbent on a study in the field of international law to try to answer this 'how should international adjudicators respond?' question from *within* the existing framework of international law. One could, of course, answer this question while being completely oblivious to the constraints imposed on international adjudicators including those provided by the interpretative rules or principles they should apply, the scope of their adjudicatory function and the nature and best interests of the international legal system. Such an argument would draw its rhetorical strength from outside of international law. It could have political, sociological, philosophical or even linguistic bases, but would not have a *legal* basis. A solution developed from within the field in which a problem emerges will, it is submitted, always be more appropriate and more palatable to the actors confronting that problem.

Regrettably, the international law relevant to the Problem has so far revealed itself to be incapable of providing a clear and simple solution to it. Together, case law and scholarship yield a number of insights relevant to the Problem, but no ordered framework capable of guiding interpreters faced with a choice between the original and later-emerging meaning of a treaty term. Our only hope of finding a solution from within international law is by using new concepts to arrange those insights into a system capable of providing the desired guidance. Such a reorganising notion or principle would itself seem to have to come from outside the field of international law, for if it were already present within international law, it would already have been used to provide the solution.³

³ As demonstrated in ch 5, efforts to locate an organising principle lurking implied beneath the text of the temporally-neutral VCLT rules for treaty interpretation – including Bjorge's very teleological notion of 'intention' – run into difficulty by de facto elevating one or more of the interpretative elements within the VCLT above others that are intended to sit on the same level.

Moreover, as this study has shown, modern-day international legal debate relating to the problem of intertemporal linguistics is somewhat undisciplined and conceptually confused.

In our quest for the conceptual clarity that might lead us to a solution, we must accordingly go back to first principles. For a question of interpretation, linguistics is an obvious source of those principles, something that many legal theorists dealing with questions of legal interpretation readily acknowledge. Moreover, the field of linguistics provides concepts that render the Problem more intelligible at a sufficiently abstract level for them not to replace, but rather to structure and reorganise the more directly relevant material from the field of international law, including the insights emerging from the international decisions and adjudicatory opinions most relevant to the Problem.

I. INTERPRETATION RESOLVES EITHER VAGUENESS OR AMBIGUITY

“Interpretation” is’, as Bos noted in his two-part 1980 study of treaty interpretation, ‘a term very differently understood by different authors’ and ‘neither the scope nor content of it is commonly agreed upon’.⁴ While international law scholars’ definitions of ‘interpretation’ differ as to the nature of the outcome that interpretations should produce,⁵ they ultimately tend to understand its essence in the same way as it has been understood for centuries and across countless systems of law, namely as ascertaining the content or meaning of a text or act.⁶

Echoing Vattel’s famous first general maxim of interpretation,⁷ the renowned legal theorist Endicott has noted that the need for interpretation only arises where there is ‘doubt or contention’ such that ‘arguments can be made in favour

⁴Maarten Bos, ‘Theory and Practice of Treaty Interpretation (Part I)’ (1980) 27 *Netherlands International Law Review* 3, 6.

⁵For a prominent example of a very functional definition of interpretation in international law, see Charles de Visscher, *Problèmes d’interprétation judiciaire en droit international public* (Paris, Pedone, 1963) 14; see also Robert Kolb, *Interprétation et création du droit international: Esquisses d’une herméneutique juridique moderne pour le droit international public* (Bruxelles, Bruylant, 2006) 24.

⁶See, eg Rudolf Bernhardt, *Die Auslegung völkerrechtlicher Verträge insbesondere in der neueren Rechtsprechung internationaler Gerichte* (Köln, Carl Heymanns Verlag, 1963) 1; Charles E Rousseau, *Droit international public* (Paris, Sirey, 1970) 241; Francis Lieber, *Legal and Political Hermeneutics or Principles of Interpretation and Construction in Law and Politics with Remarks on Precedents and Authorities* (Boston MA, Charles C Little and James Brown, 1839) 115; Mark E Villiger, ‘The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The “Crucible” Intended by the International Law Commission’ in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford, Oxford University Press, 2011) 106; and see generally Kolb (n 5) 25.

⁷Pursuant to which one should not interpret that which does not need to be interpreted (‘qu’il n’est pas permis d’interpréter ce qui n’a pas besoin d’interprétation’) – Emer de Vattel, *Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, vol I (Paris, J-P Aillaud, 1835) 461 (§ 263).

of different conclusions as to the meaning of a communicative act';⁸ in other words when the legal instrument is, in the relevant context, 'inconclusive'.⁹

Solan points out that, while lawyers generally use 'ambiguity as a blanket term that covers all of the[] problems' of inconclusiveness, '[l]inguists, philosophers and psychologists distinguish between vagueness and ambiguity as different phenomena, resulting largely from distinct psychological processes'.¹⁰ One of the better-known statements explaining this important distinction also comes from the world of legal theory, Dickerson saying: 'Whereas 'ambiguity' in its classical sense refers to equivocation, 'vagueness' refers to the degree to which, independently of equivocation, language is uncertain in its respective application to a number of particulars'.¹¹ Another legal theorist, Poscher, summed it up by saying that '[a]mbiguity ... is about multiple meanings; vagueness is about meaning in borderline cases'.¹²

Modern linguists appear to agree that vagueness is better defined by an absence of precision or granularity at the heart of the sorites paradox.¹³ A vague expression, Pinkal says, 'allows for gradual differentiation and can be transduced to its opposite by imperceptible transitions'.¹⁴ This is a key respect in which vagueness can be distinguished from ambiguity. Whereas vague expressions allow 'for gradual differentiation' and 'infinitely many precisifications', 'ambiguous expressions can assume an arbitrarily but finitely large number of readings'.¹⁵

As linguists point out, the difference between ambiguity and vagueness is so clear that it is reflected in how each is instinctively dealt with in everyday

⁸ Timothy Endicott, 'Interpretation and Indeterminacy: Comments on Andrei Marmor's Philosophy of Law' (2014) 10 *Jerusalem Review of Legal Studies* 46, 51–52.

⁹ Endicott himself does not use a term to describe the attribute of the legal instrument being interpreted that renders interpretation necessary, but criticises Marmor – Andrei Marmor, *Interpretation and Legal Theory* 2nd edn (Oxford, Hart Publishing, 2005) – for using the term 'indeterminacy' in this context, see Endicott (n 8). 'Inconclusiveness' seems to reflect Endicott's notion of a conclusion not being able to be reached on the basis of the text and will be used by the remainder of this study.

¹⁰ Lawrence M Solan, 'Vagueness and Ambiguity in Legal Interpretation' in Vijay Kumar Bhatia and others (eds), *Vagueness in Normative Texts*, vol 23 (Bern, Peter Lang, 2005) 74.

¹¹ F Reed Dickerson, *The Interpretation and Application of Statutes* (Boston MA, Little Brown, 1975) 49.

¹² Ralf Poscher, 'Ambiguity and Vagueness in Legal Interpretation' in Peter M Tiersma and Lawrence M Solan (eds), *The Oxford Handbook of Language and Law* (Oxford, Oxford University Press, 2012) 129; see also Solan (n 10) 73.

¹³ This paradox, attributed to Eubulides of Miletus, starts with a heap (soros/σωρός) of grains and, removing one by one, asks when the heap ceases to become a heap. The paradox arises from never knowing at what point it can be said not to be a heap, but knowing that with only one grain left it clearly is not a heap. For linguists, the paradox arises due to the vagueness inherent in the word 'heap' (see further Dominic Hyde, 'Sorites Paradox' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy*, Winter 2014 Edition – plato.stanford.edu/archives/win2014/entries/sorites-paradox/).

¹⁴ Manfred Pinkal, *Logic and Lexicon* (Geoffrey Simmons tr, Dordrecht, Springer Science+Business Media, 1995) 73.

¹⁵ *ibid* 73–75.

human communication: ambiguity must be resolved, but vagueness need not be.¹⁶ An addressee will inevitably disambiguate whether the speaker saying ‘bank’ is referring to a river bank or a savings bank but, once it has determined that the latter of the two senses was being used, will usually not need or try to exactly determine what institutions qualify and do not qualify as ‘banks’. In other words, ambiguous terms instantly and inherently demand a primary level of clarification irrespective of the use to which they are put, even if it involves invoking more than one meaning as in the case of poetry or paronomasia (puns). Vague terms are, by contrast, not only common, but also commonly tolerated. They only demand clarification – on a more thoroughgoing level – when put to particular uses that reveal the problematic aspects of their vagueness.

Ambiguity and vagueness constitute very distinct phenomena and it is truly remarkable that the distinction is so rarely observed by interpreters of legal text, notably including public international lawyers. Helmersen’s 2013 article constitutes a rare exception, noting that treaty interpretation can exist on the level of resolving each of these two distinct types of inconclusiveness.¹⁷ However, since his article is dedicated to explaining instances of both the narrow and broad forms of evolutionary interpretation, his use of the distinction is essentially limited to trying to characterise these instances as resolutions of ambiguity or resolutions of vagueness. Courts’ and tribunals’ treaty interpretations invariably involve a resolution of vagueness (sometimes in addition to a resolution of ambiguity), so Helmersen concludes with the descriptive and therefore somewhat banal statement that ‘[a]ll the ICJ’s evolutive interpretations have concerned vagueness’.¹⁸ Unfortunately, his focus on evolutionary interpretations has him look back at the interpretative process from its end-point, so his conclusions stop at the parts of the interpretative process most proximate to the interpretative outcome and miss earlier parts of that process – including those involving the necessary resolution of any ambiguity.

This study, by contrast, does not look back down a path already taken, but starts at the fork-in-the road where the open question posed by the problem of intertemporal linguistics first arises. Crucially, it is here, at the start of the interpretative process, well prior to determining borderline cases of whether a fact comes within the vague scope of a designated term, that the choice between the static and the dynamic approaches to the Problem is made. As will now be demonstrated, this choice, the very essence of the problem of intertemporal linguistics, constitutes a resolution of ambiguity, not a resolution of vagueness.

¹⁶ Moshe Azar, ‘Transforming Ambiguity into Vagueness in Legal Interpretation’ in A Wagner, WG Werner and D Cao (eds), *Interpretation, Law and the Construction of Meaning: Collected papers on legal interpretation in theory, adjudication and political practice* (Dordrecht, Springer, 2007) 128.

¹⁷ Sondre Torp Helmersen, ‘Evolutive Treaty Interpretation: Legality, Semantics and Distinctions’ (2013) 6 *European Journal of Legal Studies* 127, 142–44.

¹⁸ *ibid.*

II. THE CHOICE BETWEEN AN ORIGINAL AND LATER-EMERGING
MEANING CALLS FOR THE RESOLUTION OF AMBIGUITY, NOT VAGUENESS

In chapter 4, we arrived at definitions of the static and dynamic approaches to the problem of intertemporal linguistics that revealed the core of the Problem to lie in the difference between a treaty term's semantic contents at two different moments in time. With our condition common to the two approaches, we saw that the Problem can only be properly said to have arisen where the semantic content of a treaty term changes between the time the treaty was concluded and the time that it falls to be applied. The choice between the static and dynamic approaches to the Problem also centres around the differing semantic contents of the original and later meaning of the treaty term, the specific condition of the static approach resulting in an identified meaning congruent with the original semantic content and the specific condition of the dynamic approach resulting in an identified meaning congruent with the semantic content of the term at the time of the treaty's application.

As explained above, semantic content is narrower than what is generally regarded as meaning. The semantic content is the context- and utterance-neutral part of meaning; the content of a word or expression that can be directly calculated merely from the stored common knowledge of what that word may mean (lexical component of meaning) and the structural relationship between that word and others (the syntactic component of meaning).¹⁹ The change in meaning that concerns us when analysing the problem of intertemporal linguistics occurs outside of the particular context of the treaty, affecting the relevant expressions as they are used in a variety of contexts. It is therefore wholly semantic; it results from the change in the meaning of an expression, not a change to the treaty.

Features inherent to the process of treaty interpretation allow us to narrow down the Problem even further. When we observe that the meaning of a word or expression has changed, we are talking about the kind of change that is reflected in a dictionary: a lexical change. A common form of lexical change involves broadening, when a term is given a new sense, such as when the English term 'bird', which originally referred merely to fowl (farmyard birds bred for consumption), came to denote all winged creatures. At least in the initial phase of semantic change, if not indefinitely, two senses of the same word co-exist, meaning that it may be unclear in which sense the term was used when it is written or spoken. Semantic change produces competing senses ('meaning variants' or 'lexico-semantic variants') for the same lexeme: one sense has the lexeme's original semantic content and another sense has the lexeme's later semantic content. In the treaty context, the problem of intertemporal linguistics arises when there is semantic change to a treaty term. There is one sense that is the

¹⁹ See, eg Yi Ting Huang and Jesse Snedeker, 'Semantic Meaning and Pragmatic Interpretation in 5-Year-Olds: Evidence From Real-Time Spoken Language Comprehension' (2009) 45 *Developmental Psychology* 1723, 1723 and see further s 4.III.A above.

treaty term's semantic content at the time of the treaty's conclusion and another sense that is the treaty term's semantic content at the time of the treaty's application. Linguistics tells us that, where there are competing senses of the same word or expression, there is ambiguity. The problem of intertemporal linguistics is therefore a problem of ambiguity.

There are various types of ambiguity. The ambiguity produced by the semantic change that concerns us in this study of the problem of intertemporal linguistics is 'lexical ambiguity'²⁰ and, almost invariably, polysemy. It is lexical – not phonetic or syntactic – ambiguity because, by occurring in a written form in a fixed context, it does not arise from different words sounding the same in oral speech,²¹ nor from ambiguity in the grammatical analysis of a sentence,²² but is 'due solely to the alternative meanings of an individual lexical item'.²³ It involves polysemy – rather than true homonymy – because over relatively short periods of time in mature languages, the most common types of semantic change (eg narrowing, widening, metonymy, hyperbole, metaphor and synecdoche) spawn new, but invariably related meanings. Already in the nineteenth century, Bréal had shown that changes in meaning, by adding or subtracting senses from existing words, generally involve polysemy because the same word will either gain or lose one of two or more meanings.²⁴

Semantic change therefore creates – and the problem of intertemporal linguistics therefore presents – lexical ambiguity between the original and later sense of the same treaty term, each of which has its own semantic content. The fact that one or both of those competing senses of the treaty term is vague does not mean that they are not ambiguous in relation to each other. Terms can be, and often will be, both ambiguous *and* vague. It does not even matter if one sense fully includes the other, they are still different.²⁵ Expressions that 'can assume an arbitrarily but finitely large number of readings' are 'ambiguous expressions'.²⁶ Treaty terms that can assume either their (semantic) meaning at the time of the treaty's conclusion or their relevantly different (semantic) meaning at the time of the treaty's application can assume two different readings, so are ambiguous between their original and later meanings.

²⁰ Note that some authors consider lexical ambiguity to include syntactic ambiguity, defining 'semantic lexical ambiguity' as the form of lexical ambiguity that is not syntactic – see, eg Steven L Small Garrison W Cottrell and Michael K Tanenhaus, 'Preface' in Steven L Small, Garrison W Cottrell and Michael K Tanenhaus (eds), *Lexical Ambiguity Resolution: Perspective from Psycholinguistics, Neuropsychology and Artificial Intelligence* (San Mateo CA, Morgan Kaufmann, 1988) 4 ff.

²¹ For example, differently spelt homophones like the English words 'saw' and 'sore' or 'storey' and 'story' present *phonetic* ambiguity.

²² Morphologically deficient expressions like 'he ate the cookies on the couch' or 'Dusko wants to buy a big dog treat' produce *syntactic* ambiguity.

²³ David Crystal, *A Dictionary of Linguistics and Phonetics* 6th edn (Malden MA, Blackwell Publishers, 2008) 23.

²⁴ Michel Bréal, *Essai de sémantique (science des significations)* (Paris, Hachette, 1897) 154–56, 171–72.

²⁵ Pinkal (n 14) 73.

²⁶ *ibid* 75.

III. THE VCLT RULES ARE FOCUSED ON RESOLVING VAGUENESS, BUT IMPLICITLY RECOGNISE THE AMBIGUITY/VAGUENESS DISTINCTION

A. Rules of Legal Interpretation Generally

In all systems of law, the rules and principles for interpreting legal texts focus on resolving vagueness rather than on resolving ambiguity. This is completely understandable. Vagueness is extremely prevalent in the law and almost ubiquitous in dispute settlement.²⁷ Important legal concepts are notoriously vague. As examples, Solan cites the important common law concept of ‘reasonableness’,²⁸ while Kluck cites key civil law notions such as ‘good cause’ (*‘aus wichtigem Grund’*) in the context of employment contracts and ‘good faith’ (*‘Treu und Glauben’*) in the law of obligations.²⁹

Even those legal terms that are not vague in-and-of-themselves often turn out to be vague under the microscope of a legal dispute. We saw above that vagueness is defined by a lack of precision or granularity. Yet whether sufficient precision or granularity is lacking is clearly, as Hobbs has pointed out, determined by what we need to determine in a precise situation.³⁰ Legal situations very often involve determinations of whether some fact or situation falls within the scope of a particular word. To make such determinations, lawyers need to be able to sketch the parameters of a word or concept in finer detail than is usually necessary in everyday speech. For example, one does not need a precisely defined notion of what is ‘tall’ in order to explain to a young child the difference between a house and a tall building, but one is likely to need a much more precisely defined notion of what tall means when interpreting and applying fire regulations specific to ‘tall buildings’. Dispute settlement inherently focuses on borderline cases that are routinely apt to reveal the lack of precision that characterises vagueness. To develop this example further, courts are unlikely to be faced with the question of what constitutes a tall building in a case about whether a fire regulation applies to a 200-metre high building – it will be accepted by the parties that it does. Where, however, there is a case involving the potential application of such a regulation to a 25-metre high building, it is more likely to come before the courts and the vagueness inherent in the term ‘tall’ is much more likely to be revealed.

Relative to vagueness, ambiguity is rarely an issue in legal contexts. Language users can always avoid linguistic ambiguity if they are aware of it and wish to

²⁷ Lawrence Solum, ‘Legal Theory Lexicon: Vagueness & Ambiguity’ (*Legal Theory Blog*, 28 June 2015) – lsolum.typepad.com/legaltheory/2015/06/legal-theory-lexicon-vagueness-ambiguity.html; see also Poscher (n 12) 14.

²⁸ Solum (n 27).

²⁹ Nora Kluck, *Der Wert der Vagheit* (Berlin, Walter de Gruyter, 2014) 145.

³⁰ See Jerry R Hobbs, ‘Granularity’, Proceedings of the 9th International Joint Conference on Artificial Intelligence, vol 1 (San Francisco, Morgan Kaufmann Publishers, 1985) – dl.acm.org/citation.cfm?id=1625219.

avoid it,³¹ as the drafters of legal texts, including treaty drafters generally do. Moreover, as further explained below, an addressee, such as a judge, can usually resolve ambiguity in an incontestable manner by referring to readily available linguistic context. Disambiguation is particularly straightforward in legal contexts that feature lexical ambiguity in the forms of polysemy and, especially, true homonymy. No one is going to doubt that a financial services regulation using the word ‘bank’ is referring to financial institution rather than river banks, just as a French-language agricultural treaty using the word ‘avocats’ is more likely to be speaking about avocados, while a French code of ethical conduct to be displayed before courts of law is much more likely to be speaking about lawyers. Azar notes that ‘[p]ractically, it is very rare to find in normal communication a misunderstanding or an interpretation dispute caused by lexical or morphological homonymy’;³² it is perhaps even rarer in the law.

It is only natural, with vagueness being a more common and substantially more intractable type of inconclusiveness faced by legal systems than ambiguity, that the rules for legal interpretation focus on resolving vagueness and often do not even consider the possibility of ambiguity being the problem instead. As Solan notes, the function of law is such that it is ‘much more concerned with finding the appropriate interpretation of a legal document than characterizing the linguistic problems that allowed multiple interpretations in the first instance’.³³ Yet, as he rightly asserts after reviewing a range of domestic law decisions resolving inconclusiveness, ‘the distinction between vague and ambiguous language that philosophers and linguists use so routinely has some explanatory power [in the legal context] after all’.³⁴

Whereas Solan considers that legal decision makers tacitly resolve ambiguity differently to how they resolve vagueness, other legal theorists believe that they conflate the two, at times even deliberately. The main legal theorists addressing this distinction at least appear to agree that it is simpler and therefore less dangerous (in terms of predictability) for legal decision makers to resolve ambiguity than it is for them to resolve vagueness. As Poscher points out, whereas ambiguity presents ‘a choice between different pre-established alternatives’, vagueness ‘allows for creative concept formation even if pre-established concepts are around’.³⁵ This creative formation, what German theorists refer to as *richterliche Rechtsfortbildung* and what some English-language lawyers might be tempted to describe as ‘judicial activism’, is a cause for concern for some legal theorists. Decker, for example, worries that attempts to resolve vagueness involve ‘a highly subjective mode of analysis that involves an

³¹ Azar (n 16) 126.

³² *ibid* 125.

³³ Solan (n 10) 74–75.

³⁴ *ibid* 75.

³⁵ Poscher (n 12) 11.

unpredictable assortment of paths a court might take in arriving at a ruling'.³⁶ Azar, for his part, is convinced that there is even a discernible tendency among judges 'to transform ambiguity cases into vagueness cases in order to make room for judicial discretion'.³⁷

To the extent that the rules for resolving inconclusiveness – and the habits of adjudicators who resolve it – fail to distinguish between situations of ambiguity and vagueness, there is a risk that more uncertainty is being imported into the adjudicatory process than is linguistically required. Legal security is being unnecessarily undermined every time an adjudicator jumps out to the extraneous considerations that might be necessary to resolve the finest of issues posed by the vagueness of a word or phrase, even though he or she need only have resolved an ambiguity by looking at linguistic facts apparent on the face of the text.

Yet most rules for legal interpretation, and most decision makers, do not distinguish between inconclusiveness produced by ambiguity and inconclusiveness produced by vagueness. In most cases, this is because the interpretative rules which they apply make no such distinction.

B. The Vagueness-oriented International Law Rules for Treaty Interpretation

The rules for treaty interpretation are no exception to interpretative rules' general focus on resolving vagueness. This is clear from (a) the range of different interpretative elements in VCLT Article 31 and (b) the practice of the international courts and tribunals applying these rules.

Linguistic and legal theory analyses reveal that, while ambiguity may be resolved by linguistic facts visible within the very text where the ambiguous term appears, resolving vagueness regularly requires resort to linguistic and para-linguistic facts that are extraneous to the text. In the VCLT's general rule of interpretation, almost all facts to be taken into account by the treaty interpreter are either sometimes or always extraneous to the treaty text. *Good faith* is a vague concept with a source outside the treaty, while the injunction to interpret according to '*ordinary meaning*' is an invitation to textualism that, in a practical sense, impels many international courts and tribunals to refer to dictionaries,³⁸ themselves extraneous to the internal linguistic context of the treaty.³⁹ Both the *context* and *object and purpose* referred to in VCLT Article 31 extend beyond the textual context immediately surrounding the interpreted treaty term to other

³⁶ John F Decker, 'Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws' (2002) 80 *Denver University Law Review* 241, 243.

³⁷ Azar (n 16) 124 ff.

³⁸ The WTO's adjudicatory bodies' frequent resort to the Oxford English Dictionary is the best-known example of how VCLT art 31(1)'s elevation of 'ordinary meaning' can lead to going outside of a treaty, instead of staying within it.

³⁹ Azar (n 16) 135.

parts of the treaty and even other agreements. The interpretative considerations listed in VCLT Article 31(3), *subsequent agreement*, *subsequent practice* and *relevant rules applicable between the parties* are also, by definition, extraneous to the treaty text.

While such heavy reference to extraneous elements would alone be sufficient to show that the rules and principles for treaty interpretation are primarily dedicated to resolving vagueness rather than ambiguity, this observation is also confirmed by the interpretative practice of international courts and tribunals. Very many cases turn on whether a particular activity falls within the scope of a category. In other words, they involve the use of interpretative methods to bring the extra granularity to a treaty term such that a concrete situation can be qualified in a legally relevant manner. Examples of such cases include the ICJ's decision in the *Whaling in the Antarctic* case as to whether Japan's JARPA II programme was 'for purposes of scientific research' within the meaning of Article VIII of the Whaling Convention,⁴⁰ or the ECtHR's famous *Tyrer* decision seeking to determine whether 'birching' came within the scope of 'degrading punishment'.⁴¹ In other cases, the interpreter will try to determine what specific real-world referent is signified by a treaty term, such as which of the north or south arms of the Chobe River constituted its 'main channel' in the *Kasikili/Sedudu* case.⁴² The interpretative practice of international courts and tribunals, like the rules elaborated for that practice, is clearly quite heavily oriented towards resolving vagueness rather than ambiguity.

The fact that, in the treaty interpretation context, the rules are directed to resolving vagueness rather than ambiguity is not only standard, but also perfectly understandable. The question is not whether these rules and principles should be used in the many situations in which vagueness needs to be resolved, but instead whether they should be used as commonly as they are where the inconclusiveness to be resolved arises – at least in the first instance – from ambiguity rather than from vagueness.

C. VCLT Article 31(4)'s Implied Recognition of the Ambiguity and Vagueness Distinction

What is more atypical and, in the context of this chapter's analysis, quite remarkable about the rules for treaty interpretation is the fact that they contain one rule that, unlike all the others, is dedicated to resolving ambiguity rather than vagueness. Read together with VCLT Article 31(1), the sole sub-paragraph

⁴⁰ See *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)*, Judgment [2014] ICJ Reports 226.

⁴¹ *Tyrer v The United Kingdom* (Merits), Judgment (European Court of Human Rights (Chamber)), 5856/72, 25 April 1978).

⁴² See *Kasikili/Sedudu Island (Botswana/ Namibia)*, Judgment [1999] ICJ Reports 1045.

of VCLT Article 31 not mentioned above, VCLT Article 31(4), makes particular provision for the situation in which a term may have been used in either an ordinary or special sense:

SECTION 3. INTERPRETATION OF TREATIES

Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty ...
4. A special meaning shall be given to a term if it is established that the parties so intended.⁴³

VCLT Article 31(4) has received scant attention from practitioners and scholars of international law. This is perhaps because it was only ever intended by its drafters to be used in quite exceptional circumstances,⁴⁴ because it explicitly mentions the controversial matter of the drafting parties' intentions, or because it is a mere 18 words in length. For the present study's efforts to solve the problem of intertemporal linguistics, however, VCLT Article 31(4) is extremely valuable by virtue of the fact that it seeks to resolve an ambiguity.

For many scholars of international law, ordinary and special meaning represent two different sides of a coin, always in conflict and never overlapping. For Engelen, for example, 'any meaning other than the ordinary meaning to be given to a term in the application of Article 31(1) VCLT is regarded as a special meaning'.⁴⁵ This echoes Linderfalk's statement that '[t]he relationship between the ordinary and the special meaning is converse: a non-ordinary meaning is by definition a special meaning, and a non-special meaning is by definition an ordinary meaning',⁴⁶ a statement which in turn draws on the celebrated writings of Sinclair for whom '[t]he converse of the "ordinary meaning" of a term is its special meaning'.⁴⁷ For Sur the two might even be contradictory ('à la limite contradictoire'),⁴⁸ while for Hummer they present a fundamental dichotomy ('*dicotomía fundamental*').⁴⁹

⁴³ Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331), art 31.

⁴⁴ International Law Commission, 'Yearbook 1966, vol I, pt 2' (New York, United Nations, 1967) 269 (per Jiménez de Aréchaga, 884th meeting – 5 July 1966, § 9); see also Carlos Fernández de Casadevante y Romani, *Sovereignty and Interpretation of International Norms* (Berlin, Springer, 2007) 50; Franciscus Antonius Engelen, *Interpretation of Tax Treaties under International Law: A Study of Articles 31, 32, and 33 of the Vienna Convention on the Law of Treaties and Their Application to Tax Treaties* (Amsterdam, International Bureau of Fiscal Documentation, 2004) 160.

⁴⁵ Engelen (n 44) 149; see also Mark E Villiger, 'Article 31 – General Rule of Interpretation' in Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, Martinus Nijhoff Publishers, 2009) 434; Mark E Villiger, 'The 1969 Vienna Convention on the Law of Treaties: 40 Years After' (2011) 344 *Collected Courses of the Hague Academy of International Law* 9, 125.

⁴⁶ Ulf Linderfalk, *On the Interpretation of Treaties* (Dordrecht, Springer, 2007) 64.

⁴⁷ Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, Manchester University Press, 1984) 126.

⁴⁸ Serge Sur, *L'interprétation en droit international public* (Paris, Pichon Durand-Auzias, 1974) 272.

⁴⁹ Waldemar Hummer, 'Problemas juridico-linguísticos de la dicotomía entre el sentido ordinario y el especial de conceptos convencionales según la Convención de Viena sobre el Derecho de los Tratados de 1969' (1975) 28 *Revista Española de Derecho Internacional* 97, 108.

We noted above that the defining feature of lexical ambiguity is the existence of two or more different and competing senses. The ordinary and special meaning of a treaty term are manifestly competing senses of that term so, in linguistic terms, VCLT Article 31(4) only ever applies in situations of lexical ambiguity. All treaty terms have an ordinary meaning (or sense), but some also have a special meaning (or sense). For VCLT Article 31(4) to come into play, the treaty term must have at least two different senses: an ordinary one and a special one. This mirrors the common condition for the static and dynamic approaches to the problem of intertemporal linguistics through which the Problem only comes into play where semantic change in a treaty term's produces two different senses of it: an original one and a later-emerging one.

It can accordingly be stated that, while the VCLT's treaty interpretation rules do not address the problem of intertemporal linguistics, they do address an interpretative situation analogous to it. Moreover, they dedicate a separate rule and separate method to solving the difficulty created by competing ordinary and special senses of a treaty term. As will now be seen, the method VCLT Article 31(4) provides for resolving the lexical ambiguity it addresses is broadly consistent with how modern-day linguistics resolves ambiguity. This means that this study's linguistics-inspired method for solving the problem of intertemporal linguistics is not foreign to the field of international law, but in fact tacitly baked into its established rules for treaty interpretation.

IV. INTERPRETERS DISAMBIGUATE BEFORE THEY 'DE-VAGUEFY'

We noted above that the rules of treaty interpretation applied to inconclusiveness created by semantic change generally start working at the latest possible stage of language processing: the point at which vagueness emerges through attempts to apply a term to a concrete factual situation. Indeed, the standard interpretative method used by the law simply jumps straight through a host of linguistic levels to the semantic-pragmatic content, accessing, along the way, an unstructured and unspecific hodgepodge of interpretative rules and doctrines.

In a book chapter on language processing written largely from the cognitive science perspective, Cangelosi distinguishes between four sequential and distinct levels of analysis conducted by the human brain when it interacts with human language.⁵⁰ There is, first, the *phonetic* level which associates certain sounds made with specific words. Then comes the *lexical* level which links a word with an internal meaning and (sometimes) an external real-world referent, usually through a shared lexicon. The third analysis is carried out on the *syntactic* level, through which meaning is refined on the basis of word order and

⁵⁰ Angelo Cangelosi, 'Language Processing' in Michael A Arbib and James J Bonaiuto (eds), *From Neuron to Cognition via Computational Neuroscience* (Cambridge MA, The MIT Press, 2016) 693.

the use of shared grammatical rules. Finally, there is the *pragmatic* level, which takes into account the social context of communication, usually to determine the precise range of effects that a speaker intends to convey. The ambiguity with which we are concerned exists on the second, lexical level, while the resolution of vagueness that legal interpreters often jump to largely takes place on the fourth, pragmatic level. Just as the human brain processes lexical issues before pragmatic ones, an interpreter should always resolve any ambiguity *before* attempting to resolve any vagueness. As Azar pointed out in a short but remarkable 2007 paper on the nature of legal interpretation:

Disambiguation, which is choosing between two possible meanings, comes before de-vaguefying because disambiguation, but not de-vaguefying, is crucial for the understanding of the text. De-vaguefying a term by using one approach or another is possible only if the term is understood in a certain, unambiguous way; it cannot replace a process of disambiguation that can be done by paying attention to context.⁵¹

Remarkably, treaty interpretation itself impliedly accepts that we must first identify which of a treaty term's competing senses we should use (disambiguate), before we determine its precise scope in the light of a fixed factual or legal situation ('de-vaguefy'). VCLT Article 31(4) allows special meaning to operate as a complete exception to the default ordinary meaning rule. To quote the impressively detailed study of Engelen, there is a

presumption that the parties have that intention which appears from the ordinary meaning of the terms used by them[, but] this presumption is refutable, for the parties may have intended to give to a term a meaning other than its ordinary meaning.⁵²

Kolb states simply that '*le sens spécial est une exception au sens ordinaire*',⁵³ while Mitchell concludes that this provision reflects the simple fact that: 'in some cases, the parties may not have intended that a term have its ordinary meaning'.⁵⁴ Clearly, where a special meaning was potentially intended, international adjudicators will determine whether the term was used in an ordinary or special sense before going to the trouble of ascertaining its precise content. In the context of VCLT Article 31(4), therefore, treaty interpreters will disambiguate before they de-vaguefy. As Van Damme points out, it is only logical that 'the special meaning itself might require a substantive amount of interpretation',⁵⁵ but this need only be carried out after the special sense of the treaty term is the one that has been determined to be applicable.

⁵¹ Azar (n 16) 137.

⁵² Engelen (n 44) 111.

⁵³ Kolb (n 5) 439.

⁵⁴ Andrew D Mitchell, 'The Legal Basis for Using Principles in WTO Disputes' (2007) 10 *Journal of International Economic Law* 795, 812; see also Engelen (n 44) 111.

⁵⁵ Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford, Oxford University Press, 2009) 351.

Already in 1928, Ehrlich had referred to an example of an international court or tribunal determining, first, which sense of the term to interpret, then endeavouring to unpack it using the textual method that relies on dictionaries:

The award in the arbitration between Chile and Peru that was handed down in 1871 referred to Bouvier's Law Dictionary for the definition of the term 'liquidation'. However, noting that the verb 'to charge' did not have, according to the context, any technical meaning, it referred to Webster's dictionary for this term.⁵⁶

The *termini technici* rule now expressed in VCLT Article 31(4) thus provides for disambiguation prior to the de-vaguefying more commonly associated with interpretation. It takes a situation where there are several candidate senses (*acceptions*) for a treaty term and decides which of them should be selected. As Kammerhofer has noted, it proceeds on 'the assumption that each word has one meaning, or, at least, one meaning that can be fixed contextually'.⁵⁷ It is only then, once the one meaning or sense has been identified, that the term – or more precisely the sense of the term determined to be the one which was used by the parties – should have its vagueness maximally resolved through a process of interpretation focused on de-vaguefying.

This defined two-step process makes sense from a judicial economy perspective. By first determining whether an ordinary or special meaning should be used – and thereby constraining the range of possible semantic contents, this method makes it simpler to identify the precise semantic-pragmatic content of a treaty term. Even where the special sense selected turns out to be vague in the context of the particular case, there is still a considerable saving of complexity, effort and risk for the interpreter who only has to de-vaguefy one, rather than two, senses of a polysemous treaty term. After all, it would be foolish and inefficient to try to work out how a use of the term 'bays' should precisely be defined, before determining whether it is meant to be understood in an ordinary or technical sense. Only once the sense of a treaty term is determined, should an interpreter move to ascertaining the semantic and, eventually (if necessary), semantic-pragmatic content of the term.

The recent interpretative practice of the field's principal judicial organ, the ICJ, also discloses a recognition of the need to resolve ambiguity before resolving vagueness. The *Related Rights* case centred around the interpretation of the expression '*con objetos de comercio*' in the 1858 Treaty of Limits. Costa Rica interpreted it as meaning 'for the purposes of commerce' and, Nicaragua, as meaning 'with articles of trade'.⁵⁸ The Court was accordingly presented with a problem of ambiguity arising from the competing senses of '*con objetos de*'.

⁵⁶Ludwik Ehrlich, 'L'interprétation des traités' (1928) 24 *Collected Courses of the Hague Academy of International Law* 1, 108 (present author's translation).

⁵⁷Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (London, Routledge, 2011) 90.

⁵⁸*Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment [2009] ICJ Reports 213, 236 (§ 45).

In the present context, it is most significant that the judgment of the Court recognised this as an ambiguity and resolved that ambiguity as its first interpretative step, finding that it was ‘reasonable to infer that the Parties tended to understand “objetos” in its abstract sense’.⁵⁹

It is thus abundantly clear that, where an expression is inconclusive on account of both ambiguity and vagueness, an interpreter should always disambiguate it before de-vaguefying it. Before walking down the long road of determining the precise scope of a treaty term for the purposes of a defined fact situation, an interpreter at a fork-in-the-road needs to know which road to follow. Just as the hearer of an ambiguous utterance about ‘banks’ will not try to determine what exactly the speaker is saying about ‘banks’ before determining which kind of bank the speaker is talking about, the interpreter of a treaty term ambiguous as between its ordinary and special – or original and later-emerging – senses must first determine in which sense it is used, and only then determine the term’s precise scope. By first engaging in disambiguation, interpreters determine which dictionary sense (lexical variant) they should try to unpack or indeed which dictionary to look at. Yet they only postpone and do not usually manage to avoid the subsequent task of having to unpack the chosen definition or meaning of that lexical variant, given that it almost inevitably turns out to be too vague to be applied to the concrete situation demanded by the case.

The fact that we regularly see treaty interpreters jump straight to the VCLT’s techniques for de-vaguefying even in circumstances which present both ambiguity and vagueness does not mean that we should consider resolving vagueness before ambiguity. Indeed, this practice is most likely just a further reflection of how attractive the broad and flexible VCLT rules are to treaty interpreters, combined with the fact that those rules only provide for disambiguation in the relatively rare situation in which there is some evidence of a special meaning. It could also be a consequence of treaty interpreters not recognising certain interpretative issues – like the issue posed by the choice between relevant different original and later-emerging meanings of a treaty term – as issues of lexical ambiguity in the first place. Finally, even some interpreters who recognise that they are faced with an issue of ambiguity might, as Azar suggests,⁶⁰ choose to ignore the possibility of resolving that ambiguity and jump straight to methods of resolving vagueness in order to maximise the flexibility of their interpretative enterprise.

Ultimately, interpretative practice that seeks to define the specific boundaries of the term’s semantic-pragmatic content before identifying the particular semantic sense in which it is used is either failing to see the problem of intertemporal linguistics or deliberately avoiding it. This study, however, is dedicated to solving this Problem, so must ensure that it is identified and responded to in the most intellectually appropriate manner possible. Since the Problem is a problem of lexical ambiguity, interpreters confronting it should first engage in a process of disambiguation.

⁵⁹ *ibid* 238–40 (§§ 50–56).

⁶⁰ Azar (n 16) 124 *et passim*.