

ARTICLES

LANGUAGE IN INTERNATIONAL LAW: MEANING AND CONSTRUCTION OF ITS UNDERLYING CULTURE

ILIAS BANTEKAS*

ABSTRACT

The proliferation of the English language in international law has not in any way diminished the importance of “language” as a means of communication, a tool of legal construction, or as a cultural compass in international legal proceedings. This article highlights several distinct circumstances where language remains paramount. The first concerns the designation of one or more languages as authentic in the context of multilateral treaties. The second pertains to the choice of language in transnational contracts and legal proceedings, whether between states or non-state actors, and the paramount role of party autonomy thereto. Finally, the cultural or anthropological dimension of language and its obscure cultural underpinnings are explored in two distinct case studies: the first deals with international criminal proceedings, while the second delves into the construction of chants in international sporting events with a view to understanding whether they convey discrimination, or otherwise gross offence. The article suggests that while exact meaning can never be fully cross-fertilized from one language to another, courts, tribunals and executive entities must always discern those shared, unexpressed meanings that underlie words or phrases and not solely rely on translation or the ordinary rules of construction (of contracts or statutes).

I. INTRODUCTION

Language is not a particularly important element of treaties, and it is only recently that the implications of language are becoming apparent and more pressing in the process of international commercial arbitration. The majority of treaties offer a set of official languages nesting at the very end of their texts, in what is known as their final clauses. The idea is that if doubt or conflict ever arises in the construction or meaning attributed to the words or phrases of the

* Professor of International Law, Hamad bin Khalifa University (Qatar Foundation) College of Law and Adjunct Professor at Georgetown University, Edmund A Walsh School of Foreign Service.

treaty in question, the official languages will resolve the discrepancy once and for all. The very fact that several languages are designated as official gives rise to possible conflict not only because key terms naturally evolve over time in all cultures (even of the same language), but also because no term can fully be translated in linguistic terms from one language to another. While this may not be an issue in the field of literature, it is an anomaly in the law, especially in international law where there does not exist a single universal language, even if the English language dominates the landscape. The concept of language for the purpose of arbitration, treaty construction or other judicial proceedings refers to a medium of communication whose oral and written components correspond.¹ This is not true of all mediums of communication or of things we call “languages.”² By way of illustration, there are as many sign languages as there are national languages and in any event, sign language lacks a concrete written component.³ Moreover, linguists and anthropologists distinguish between languages and dialects, the latter constituting variations of the former, although not necessarily employing the same letter characters. Many African indigenous languages, for example, developed exclusively through oral tradition and were transcribed in Latin characters during the nineteenth and twentieth centuries. Moreover, many languages are under-developed, in the sense that they comprise basic verbs and nouns, but are unable to describe concepts of everyday life⁴ or convey complex legal terms.⁵ Furthermore, even common languages such as English and Arabic may vary considerably, or less so, from region to region⁶

1. See generally Bruce Fraser, *The Role of Language in Arbitration*, in DECISIONAL THINKING OF ARBITRATORS AND JUDGES 19 (J.L. Stern & D.B. Dennis eds., 1980).

2. ‘Legal language’ is an excellent example. See MARK VAN HOECKE, *LAW AS COMMUNICATION* (2002). Van Hoecke argues that all legal relations are to be understood in terms of dialogue, conversation and communicative processes, rather than as traditional command-obedience structures. This is so, argues Van Hoecke, because legal systems are open systems, thus allowing for this type of interaction between their various participants.

3. See generally ZERO PROJECT, <https://zeroproject.org/indicator/20-un-crpd-accessible-format/> [<https://perma.cc/G9LE-QJYV>]; Penny Weller, *Human Rights and Social Justice: The Convention on the Rights of Persons with Disabilities and the Quiet Revolution in International Law*, 4 PUB. SPACE: J.L. & SOC. JUST., 74 (2009).

4. See W.H.R. Rivers, *The Primitive Conception of Death*, 10 HIBBERT J. 393, 406-07 (1912). In the 1920s, Rivers examined the Melanesian people of the Solomon Islands and highlighted their use of the local word *mate* which translates as ‘dead’ but also ‘very sick’ and ‘very elderly’. Clearly, this is not in accord with our strict distinction between dead and alive. Rivers understood this to project a classification, rather than a biological determination, from the point of view of the Melanesians. The very infirm and the very elderly were as good as dead because they could no longer partake in the group’s activities.

5. In *Kingdom of Saudi Arabia v. ARAMCO*, 27 I.L.R. 117, 162-63 (1963), it was held that the ‘regime of mining concessions, and, consequently, also of oil concessions, ha[d] remained embryonic in Moslem law and is not the same in the different schools. The principles of one school cannot be introduced into another, unless this is done by the act of authority.’ If Islamic law is viewed as developing alongside classical Arabic language, then the latter contains no words that are alien to the former.

6. See PETER TRUDGILL, *THE DIALECTS OF ENGLAND* (2d ed. 2000).

and from one country to another.⁷ In Egypt, for example, there is a linguistic divide between colloquial and classical Arabic, yet when Islamic law is designated as the parties' choice of law in arbitral proceedings, the discrepancy between classical and colloquial Arabic is given no serious consideration for literary purposes. Here, we have an official language and its unofficial counterpart. In equal measure, the way that ruling elites translate concepts found in other languages into their own might be completely different from the original meaning ascribed to the concept in the first language.⁸ In all these cases, problems may arise as to which language the parties actually chose, which ultimately gives rise to a power on behalf of the arbitrator, judge or treaty organ to choose those terms and concepts in the chosen language, or another, that conform to the parties' intention. Consequently, while the choice of a particular language may be crucial for the conduct of the arbitration or treaty interpretation as such, it may be less important in respect of key concepts which are alien to, or unknown, in the language in question.

While this article does not seek to examine every possible function of language in international law, or how it is interpreted by international courts or tribunals, it does endeavor to offer an illustration of the complexity of language in several international contexts. It demonstrates the absence of a coherent mechanism or rule, construction-based or other, to comprehensively deal with such complexity, which in turn evinces a reluctance to deal pre-emptively with linguistic challenges and conflicts. Such reluctance represents a policy choice on the part of international law makers and institutions, whether wise or not. In practice, the absence of regulation has given rise to conflicting meanings among various courts and tribunals, and in some instances, it has obfuscated the proper administration of justice. Unlike domestic courts which lend credence to cultural meanings and underpinnings, particularly where asylum applications and fundamental human rights are at stake,⁹ there is a clear tendency in the work of international courts and tribunals to largely disregard culture-based

7. See, e.g., FAROOQ A. KPEROGI, *GLOCAL ENGLISH: THE CHANGING FACE AND FORMS OF NIGERIAN ENGLISH IN A GLOBAL WORLD* (2015); PHILIP SEARGEANT, *EXPLORING WORLD ENGLISHES: LANGUAGE IN A GLOBAL CONTEXT* (2012).

8. In treaties adopted outside the UN framework, problems arise particularly in the Arabic translation of multilateral treaties because organizations such as OIC translate into Arabic certain words and concepts which do not strictly correspond to their English or French counterparts. A prominent commentator has stated: "The concept of legislation, or *Tashri'a*, is not accepted by many Muslims, including Saudis. *Tashri'a* is considered to be alien to Islam: it is perceived as inconsistent with a Sharia-based legal system, since Sharia is regarded as the highest law. Only God is the supreme legislator. Human beings can only interpret God's law, not make their own." Rashed Aba-Namay, *The Recent Constitutional Reforms in Saudi Arabia*, 42 INT'L & COMPAR. L.Q. 295, 309 (1993).

9. See Ilias Bantekas, *English Courts and Transnational Islamic Divorces: What Role for Personal Liberty of Muslim Women?*, 12 U. MIAMI RACE & SOC. JUST. L. REV. 1 (2022) (examining a string of English cases involving Muslim women divorced by their husbands without their consent (so-called talaq divorces) whereby the courts examined the cultural underpinnings of talaq divorces in each jurisdiction where these had been issued).

interpretations. There are several reasons behind this approach. The first is that they view culture as a very minor issue, which entails a great deal of work and expenditure. Secondly, judges and executives fear that because they lack proper training and education, they risk being attacked for reaching conclusions that are not in line with prevailing scholarship. This in turn breeds so-called confirmation bias.¹⁰ Thirdly, there is some trepidation that cultural findings may lead to the dilution of entrenched norms and ultimately culminate in the justification of cultural relativism. For these and other reasons, language remains a thorny issue that is largely tackled through treaty construction rules,¹¹ even though many “norms” nowadays are not found in treaties but in resolutions of UN entities, soft law instruments (such as UNCITRAL model laws explained below) and contracts or memoranda of understanding (MoU) between sovereign entities.¹²

This article examines three particular instances, although there are obviously a lot more, where language intersects with the processes of international law. The first concerns the designation of authentic languages, chiefly in multilateral treaties. The second pertains to the choice of language in transnational arbitral proceedings, whether in the context of international commercial arbitration, investor-state dispute resolution or other. Finally, the article identifies problems in translating words, notions, and beliefs in international judicial and quasi-judicial proceedings, particularly where these are alien to the judges and translation is literal. In this context we examine culture in international criminal proceedings as well as proceedings before international sports tribunals. In all three cases (i.e., authentic treaty language; choice of language in arbitral proceedings and translation of terms in international law-related judicial proceedings) the underlying methods and rationale are different.

II. AUTHENTIC LANGUAGE TEXTS IN THE UNITED NATIONS

Multilateral treaties typically set out one or more authentic languages; in bilateral treaties it is usually taken for granted that both languages are authentic.

10. Confirmation bias entails the publication of works endorsed by editors of journals and book series, while rejecting other perhaps better works with which they are not in agreement. For an early empirical exposition of the problem, see Michael J. Mahoney, *Publication Prejudices: An Experimental Study of Confirmatory Bias in the Peer Review System*, 1 COGNITIVE THERAPY & RSCH. 161 (1977).

11. All entities, whether judicial or quasi-judicial apply their own construction norms, with the aim of achieving their own particular aims. Some are clearly activist, such as UN treaty bodies, whereas others are more conservative, such as the ICJ. Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905 (2009); *see also*, RICHARD GARDINER, *TREATY INTERPRETATION* (2015).

12. In Case C-258/14, *Eugenia Florescu v. Casa Județeană de Pensii Sibiu*, 2017 E.C.R. 448, the CJEU came to the conclusion that MoU concluded under EU financial assistance mechanisms and balance-of-payment processes qualified as EU acts under Art 267(b) Treaty on the Functioning of the European Union (TFEU), and hence susceptible to interpretation by the Court.

Arabic, Chinese, English, French, Russian and Spanish are all official languages of the United Nations, and it is standard practice for all of these to be designated as equally authentic in treaties adopted under its aegis.¹³ The only exception is article 39 of the ICJ Statute, which provides that its sole official languages are English and French.¹⁴ That all six languages are authentic entails that all texts are authoritative when determining the meaning of any provision in universal treaties.¹⁵ Consequently, it is crucial that the language in all texts is precise, and that the terminology (including meaning) corresponds to the greatest possible degree in all languages. Taking into account recent developments in the depositary practice and consistent with the UN Secretary-General's Bulletin,¹⁶ it is strongly insisted that "every effort shall be made to ensure that the texts of treaties to be deposited with the Secretary-General are concluded only in the official languages of the Organization."¹⁷

Multilateral treaties are seldom drafted in several languages by special rapporteurs or drafting teams. This would not only be confusing, particularly where the key drafters are not familiar with the ultimate authentic languages, but it also risks giving rise to conflicting texts, many times without the two teams being aware of the conflict. As a result, while it is common practice for discussants to circulate proposals or make oral comments in their preferred language, the drafts of treaties for which proposals or comments are intended are typically developed and drafted in a single language. Divergences in translation or problems in the conveyance of a meaning or concept are not infrequent, given that language is an imprecise, limited and non-uniform (across cultures) medium of communication.¹⁸ Even so, it is rare for all designated authentic languages to diverge in meaning or formulation with respect to a particular provision or part thereof.¹⁹ In such cases the interpretative tools/principles enunciated in articles 31 and 32 of the 1968 Vienna Convention on the Law of Treaties (VCLT) play a crucial role, particularly since they are

13. Arabic was adopted as an authentic language only in 1973. *See* U.N. GAOR, 75th Sess., Rules of Procedure of the General Assembly, Rule 51, U.N. Doc. A/520/Rev.20 (2022); *see also* UNITED NATIONS, FINAL CLAUSES OF MULTILATERAL TREATIES: HANDBOOK 77-78 (2003).

14. Statute of the International Court of Justice art. 39.

15. Vienna Convention on the Law of Treaties art. 33(3), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (stipulating that the terms of a treaty are presumed to have the same meaning in each authentic text).

16. *See* U.N. Secretary-General, *Procedures to be followed by the departments, offices and regional commissions of the UN with regard to treaties and international agreements*, § 5(1), U.N. Doc. ST/SGB/2001/7 (Aug. 28, 2001) (providing that final texts of treaties to which the UN Secretary-General is the depositary shall be transmitted to the UN's treaty section in all authentic languages).

17. UNITED NATIONS, *supra* note 13, at 78.

18. By way of illustration, the word 'inclusion' in Art 24 (education) of the law implementing the CRPD in German law was translated as *integration* rather than *inclusion* and several disability organizations lobbied for a legislative amendment. *See* Teodor Mladenov, *The UN Convention on the Rights of Persons with Disabilities and its Interpretation*, 7 ALTER, EUR. J. DISABILITY RSCH. 69, at 80 (2013).

19. Aba-Namay, *supra* note 8.

viewed as reflecting customary international law.²⁰ But even where these are to no avail, article 33(4) VCLT provides that:

[W]hen a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 [VCLT] does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.²¹

In practice, the meaning which best reconciles the texts may be simply derived by a textual comparison of all six texts, with the “odd” one out being erroneous. Although unlikely, the “odd” text may ultimately be closer to the object and purpose of the treaty than the others. That is why the two criteria of article 33(4) VCLT should not be read disjunctively but cumulatively.

The text that fails the test of article 33(4) VCLT is considered erroneous. Article 79 VCLT envisages two mechanisms for correcting errors in treaties.²² Paragraph 1 stipulates that both signatory and contracting parties (in the case of the Convention on the Rights of Persons with Disabilities (“CRPD”) this includes also pertinent regional organizations) may agree to correct the error in the text by means of duly authorized signatures next to the correction, by an exchange of instruments or by the same procedure envisaged for the original treaty.²³ Where, as in the case of the CRPD, a depositary has been designated he shall notify the signatory and contracting parties of the error and propose appropriate correction within a specified time limit.²⁴ If on expiry of the time limit:

- (a) No objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;
- (b) An objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.²⁵

The detection and correction of errors in treaties is one of the important powers of depositaries.²⁶ It should be made clear that an error in an authentic

20. On the confirmation of the customary nature of VCLT art. 33, see *Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. 245, ¶ 48 (1979); *see also* *LaGrand (Germany v. USA)*, Judgment, 2001 I.C.J. 466, ¶ 101 (June 27).

21. VCLT, *supra* note 15, art. 33(4).

22. *Id.* art. 79.

23. *Id.*

24. *Id.*

25. *Id.* art. 79(2).

26. A minor difference from the procedure in Article 79(2) is found in the U.N. Office for Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral

text does not detract its authenticity. It simply means that the error in question does not produce any legal effects in the version in question until such time as it is corrected.

Errors are uncommon in treaties, but such errors should be distinguished from linguistic divergences, which are generally un-detected or ignored until a dispute arises and the divergence surfaces. By way of illustration, such linguistic divergence appeared in brief at the final Ad Hoc meeting for the CRPD in 2006, through a footnote in the consensus text, stating that: “in Arabic, Chinese and Russian, the term ‘legal capacity’ refers to ‘legal capacity for rights’, rather than ‘legal capacity to act.’”²⁷ Whether the issue is moot or alive is a matter of speculation, because the footnote was not discussed or deliberated any further. When asked, the chair of the Ad Hoc Committee stated that “any nuances in translation would be worked out throughout time and would depend on state practice.”²⁸

The designation of authentic languages in multilateral treaties is quite apart from implementing legislation at the domestic level that involves translation into the language or languages of the implementing state. In practice, states may, and have, bypassed the wording of authentic texts through interpretative declarations or translations of implementing legislation with similar effect.²⁹ Interpretative declarations on “legal capacity”, for example, in article 12 CRPD have been criticized as hindering implementation of the Convention.³⁰ Such subsequent translations with a view to adopting implementing legislation fall outside the purview of article 50 CRPD; albeit, a translation that departs from the object or purpose of the CRPD, or which makes the Convention ineffective, will engage the responsibility of that state and may culminate in the abrogation of the “subsequent” phrase.³¹

III. LANGUAGE IN TRANSNATIONAL ARBITRAL PROCEEDINGS

Language is significant in international judicial and arbitral proceedings. This encompasses not only the proceedings as such, but also the treatment of the parties’ documentary evidence, the examination of witnesses and experts, as well as any linguistic criteria demanded of arbitrators. The general rule is that

Treaties, 14-15, U.N. Doc. ST/LEG/7/Rev.1 (1999), whereby he is to bring the error to the attention of “all states” and not merely signatories and contracting states.

27. GAOR, Interim report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its eighth session, U.N. Doc A/AC.265/2006/4 (1 September 2006).

28. *Press Conference on Convention Concerning Rights of Disabled Persons*, UNITED NATIONS (Dec. 13, 2006), http://www.un.org/press/en/2006/061213_Disabilities.doc.htm [<https://perma.cc/N2HR-4CKH>].

29. See generally Mladenov, *supra* note 18.

30. EUR. FOUND. CTR., *STUDY ON CHALLENGES AND GOOD PRACTICE IN THE IMPLEMENTATION OF THE CRPD 10* (2010).

31. VCLT, *supra* note 15, art. 18.

the parties are free to decide on such matters on the basis of party autonomy. This is clearly reflected in instruments such as article 22 of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law).³² A distinction should be made between the choice and imposition (by way of a decision, order, or mandatory law), of a language in domestic and international arbitral proceedings. In domestic proceedings, many jurisdictions impose a mandatory linguistic requirement in favor of the national language, either in general terms,³³ or in respect of particular transactions, chiefly property-related.³⁴ This limitation to the party autonomy rule is clearly antithetical to the express dictates of Article 22 of the UNCITRAL Model Law on International Commercial Arbitration, which applies in respect of international arbitration, although several states also apply it *mutatis mutandis* in domestic arbitral proceedings.

Article 22 of the Model Law makes it clear that the parties' agreement as to the language of proceedings binds the tribunal and national courts (the latter as regards arbitral proceedings). In fact, the parties may designate more than one language³⁵, even if this is ultimately confusing for the tribunal. From a practical perspective, the use of multiple languages may be cost-effective where the available evidence (witnesses and written material) is spread across several languages and hence translation costs are avoided – assuming of course that the arbitrators are fluent in those languages.³⁶ Sensible combinations have been accepted in practice. In *Chevron Corp v. Ecuador*, it was decided that English and Spanish were both official languages of the proceedings, with English being the authoritative language.³⁷ A choice/decision to employ multiple languages implies equality among all of them, which means that all decisions, awards and other actions should be issued in all such languages simultaneously.³⁸ This may

32. U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, at 15, U.N. Sales No. E.08.V.4 (2008).

33. Law on International Commercial Arbitration § 3(1) (Bulg.); 2012 Law on Commercial Arbitration art. 25(1) (Lith.).

34. Pursuant to the 2012 Arbitration Act § 2(3) (Hung.), disputes involving a right *in rem* connected to real estate that is located in Hungary, or its lease or tenancy, may only be referred to an arbitral institution having its seat in Hungary, and only provided that all the parties to the contract underlying the right *in rem* or to the lease or tenancy agreement have their seats or permanent establishments in Hungary. In addition, the language of any arbitration procedure must be Hungarian.

35. UNCITRAL MODEL LAW, *supra* note 32 at 15.

36. In the case of proceedings with multiple languages, any costs relating to translation and interpretation between them would form part of the overall costs of the arbitration and as such be borne in principle by the losing party. *See, e.g.*, U.N. Comm'n on Int'l Trade L., UNCITRAL Arbitration Rules art. 42(1) [hereinafter UNCITRAL Arbitration Rules]; U.N. Secretary-General, Analytical Commentary on the Draft Text of a Model Law on International Commercial Arbitration, at 50, U.N. Docs. A/CN.9/264 (Mar. 25, 1985).

37. *Chevron Corp. v. Ecuador*, ITA Inv. Treaty Cases, ¶ 8.1 (Mar. 30, 2010).

38. For exceptions to this rule from the practice of the Iran-US Claims Tribunal, see DAVID D. CARON & LEE M. CAPLAN, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* 380 (2d ed. 2013).

be difficult to reconcile with the tribunal's mandate under Article 17(1) UNCITRAL Arbitration Rules whereby it must "avoid unnecessary delay and expense."³⁹ The parties' power to choose a language indirectly implicates their choice of arbitrators, given that this may be dictated also by the arbitrators' linguistic skills. If the choice of language was, thus, not within the realm of party autonomy, the freedom to choose arbitrators of one's choice would be obfuscated, which in turn would negate the very freedom to resort to arbitration.

This linguistic freedom entails that the parties' choice binds the tribunal even if the chosen language is not native (or known) to any of them, or if it is wholly or partially un-connected to the case itself. As will be demonstrated in a subsequent section, the "use," not the "choice" of language may be subject to due process guarantees.

A. Failure to Expressly Designate a Language

While Article 22 of the Model Law provides that the tribunal shall decide the language of the proceedings in the absence of an express choice by the parties, it does not elucidate two fundamental points, namely: a) whether the parties must expressly designate their preferred language(s) in their arbitration clause or submission agreement in order to prevent the tribunal from deciding on a default language and; b) in case of such failure, what the grounds (legal or otherwise) relied upon by the tribunal should be.

As to the first issue, it is certainly useful if the submission agreement or arbitration clause were to state the parties' chosen language(s). In case it does not and assuming there is no dispute over this matter, in practice, it is implicit that the language of the proceedings corresponds to the language used in the statements of claim and defense,⁴⁰ or the parties' prior intra-contractual or business relations. Problems arise where the statement of defense submitted by the respondent is in a language different to that of the plaintiff. In such cases, the arbitrator will have to determine the applicable language on the basis of the rules laid down in the *lex arbitri*, the pertinent institutional rules, or by reference to other case-appropriate criteria and considerations.⁴¹ Where the parties disagree on the language of proceedings, tribunals will ordinarily invite oral and written submissions specifically on this matter in the language of the parties' choice.⁴² This is a sensible rule because it avoids the perils of due process

39. *Id.* at 379 (quoting UNCITRAL Arbitration Rules art. 17(1))

40. In Court of Arbitration for Sport (CAS) appeals cases, for example, most "appellants will file their statement of appeal in the language of their preference between the two CAS working languages, i.e., French or English, and this will normally be assumed to be their choice of language for the conduct of the arbitration." MANUEL ARROYO, *ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE* 998 (2013).

41. Unless of course, a party is precluded from challenging the language of the proceedings as a result of conduct-based estoppel, which arises where a party fails to complain of a language discrepancy at the first possible instance (*limine litis*).

42. *UCI v. Paulissen & RLVB*, CAS 2011/A/2325, 6-8 (Dec. 23, 2011).

violation claims in later stages of the proceedings.⁴³ However, the UNCITRAL Working Group in 2006 stressed that the requirement whereby a tribunal is mandated to “promptly” determine the language(s) of the proceedings under Article 19 of the UNCITRAL Rules does not impose an obligation to actually consult the parties; this is merely advisable, although it does certainly conform to existing practice.⁴⁴ An alternative rule is preferred under Article 21(3) of the Croatian Arbitration Law which states: “[u]ntil the language of the proceedings had been determined, a claim, a defense and other deeds can be submitted in the language of the main contract, of the arbitration agreement or in the Croatian language.”⁴⁵ This deference to the main contract or the arbitration agreement is far more appropriate as compared to the local language given that in international arbitration one of the parties, at the very least, may not be a national of the seat.

As to the second issue, this befalls the authority of the arbitrator. Although paragraph 1 of Article 22 of the Model Law seems to confer absolute authority upon arbitrators, domestic arbitral statutes place some guidance or restrictions upon the arbitrators’ choice of methods in reaching their determination. This is true even in respect of Model Law nations. One may meaningfully discern three types of default rules in arbitral statutes. The first stipulates that in the absence of express agreement the default language of proceedings shall be the language of the seat. This is the case with Article 21(4) of the Croatian Arbitration Law.⁴⁶ However, it is not always clear whether this default language is mandated on the tribunal or whether, in the absence of further guidance, this is one possibility among many in its armory.⁴⁷ This is a matter of statutory construction but there must certainly be a presumption that in the absence of an agreement such a determination falls within the power of the tribunal, rather than the law of the seat, where it is not considered a mandatory rule. Such an outcome is consistent with the wording of Article 22(1) of the Model Law, which places no restrictions

43. UNCITRAL Arbitration Rules, *supra* note 36, art. 19(1) states that once it has been constituted the tribunal shall *promptly* determine [as a preliminary issue] the applicable language(s). In fact, language issues are addressed by investment tribunals in their first procedural orders. See *Methanex Corp v. USA*, First Procedural Order, at 3 (June 29, 2000); *TWC Inc v. Dominican Republic*, Procedural Order No 2, at 4 (Aug. 15, 2008).

44. U.N. Comm’n on Int’l Trade L., *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Fifth Session*, ¶ 91, U.N. Docs. A/CN.9/614 (Oct. 5, 2006).

45. Law on Arbitration 88/2001 art. 21(3) (Croat.). The same principle regarding the pre-constitution preliminary matter of the proceedings is enunciated in Arbitration Rules art. 17.1, London Ct. of Int’l Arb (2020).

46. Equally, 1994. évi LXXI. törvény a választottbíráskodásról § 30(1) (Act LXXI of 1994 on Arbitration § 30(1)) (Hung.); Act 60/2003 on Arbitration art. 28.1 (Spain) speaks of “any of the official languages of the place of the proceedings.”

47. This provision is, however, problematic in that it stipulates that the Croatian language is third in priority, provided there is an absence of agreement or an inability by the tribunal to make a determination! Quite clearly, it is impossible for a constituted tribunal to be unable to reach determination on any matter within its authority. For even if the Croatian language were set as the default language automatically or by the local courts, there would be no tribunal to administer the case.

or guidance on this matter upon arbitrators.⁴⁸

The second type of default, which is meant as mere guidance and not as an imposition of a binding rule, is that arbitrators may determine the default language in the absence of an agreement on the basis of criteria that assist the proceedings, or which are closer to the parties' original intentions. Reference has already been made to prior intra-contractual relations and correspondence. In this regard, Article 816-bis of the Italian Code of Civil Procedure states that:

In the absence of [an express agreement] the arbitrators are free to regulate the course of the proceedings and to determine the language of the arbitration in the manner they deem most convenient. They must respect in any case the principle of contradictory proceedings (*principio del contraddittorio*) by granting both parties reasonable and equivalent opportunities to present their case.⁴⁹

It is clear that the tribunal would have to apply some kind of methodology in order to arrive at a sensible conclusion as to which language is more appropriate for the proceedings at hand. Others not mentioned here are cost factors, delays caused from translation, expediency of proceedings and others. In International Chamber of Commerce (ICC) case 9875, the tribunal was disinclined from inferring an appropriate language from the parties' contract, correspondence, or the language of the seat.⁵⁰ The parties had employed English in their business and contractual relationships but had appointed French-speaking counsel and arbitrators and their seat was in a multilingual city. The tribunal, hence, directed that although English would be the language of the tribunal's communication to the parties, including the language of awards and orders, oral debates would be conducted in both French and English and that the costs of translation and interpretation would be included in the costs of the arbitration.⁵¹

The discretionary power of arbitral tribunals, and by extension also the courts, to determine an appropriate language for the proceedings as well as determine the meaning of words in the parties' agreement, seems to render the process rather fluid. However, far more than other contexts, arbitral tribunals have proven to be sensitive to the parties' financial and other needs and requirements in adopting an appropriate language. Translation costs, unnecessary prolongation of proceedings and other factors greatly influence tribunals in their choice of linguistic requirements. This is hardly an arbitrary

48. In Case Law on UNCITRAL Texts (CLOUT) case No. 786, the parties had not designated a language in their agreement, but their chosen place of arbitration was Cairo. The tribunal determined that the language of the proceedings should coincide with the official language of the seat, namely Arabic. Cairo Reg'l Ctr. for Int'l Comm. Arb. No. 1/1994 (Oct. 31, 1995).

49. C.p.c 816 bis/2006 (It.) (translated from Italian).

50. Case No. 9875, Int'l Comm. Arb. (1999).

51. *Id.*

exercise on the part of the courts and despite the fact that they do not factor in (directly at least) cultural circumstances, they are keen to satisfy business justice.

IV. CULTURE AS LANGUAGE IN INTERNATIONAL LAW

Culture is a complex phenomenon and scholars, such as Geertz, have viewed it as a web of shared meanings expressed through public communication, not in the sense of sharing the same knowledge and skills, but in the sense that persons who share a culture also share a common world view that is expressed through common symbols and language.⁵² There are various ways of thinking about this conundrum, so I will only mention two, namely doxa and opinion, as expounded in the sociology and anthropology literature. Barth believed that shared values, expressed through interaction, are the result of strategic and calculated transactions between agents driven by a desire to achieve value maximization.⁵³ For Bourdieu, in order to assess whether the members of a group share or do not share common values, one must distinguish that of which is taken for granted by the group and what is beyond discussion (doxa), such as faith in God or unquestionable adherence to a political system, from things that are actively discussed among group members and are not therefore axiomatic (opinion).⁵⁴

The labors and methods of anthropology assist us in distinguishing between myth and reality and give us a fundamental idea about legal concepts. The Japanese word “aoi,” for example, encompasses what in Europe is conceived as green, blue and pale (as in a pale demure) and the Welsh language had, until recently, similar color connotations that departed from those employed by its English neighbors.⁵⁵ It is instructive to emphasize that what are otherwise rather straightforward notions, which cannot under any circumstances possess a third (grey) meaning, are in fact diffuse and ambiguous to other cultures. In a landmark study in the 1920s, Rivers examined the Melanesian people of the Solomon Islands.⁵⁶ What is particularly striking is the use of the local word “mate” which translates as “dead” but also “very sick” and “very elderly.” Clearly, this is not in accord with our strict distinction between dead and alive. Surely, a person can only be one or the other. Rivers understood this to project a classification rather than a biological determination, from the point of view of the Melanesians. The very infirm and the very elderly were as good as dead because they could no longer partake in the group’s activities and the idea was

52. See generally CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* (1973).

53. Fredrik Barth, *Models of Social Organization*, 69 *AM. ANTHROPOLOGIST* 386 (1967). These transactions are numerous and are continuously negotiated by the relevant actors.

54. PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 164-70 (1977).

55. See EDWIN ARDENER, *SOCIAL ANTHROPOLOGY AND LANGUAGE* xxii, xxiv (1971).

56. Rivers, *supra* note 4.

to draw a dividing line between the mate and the toa (alive).⁵⁷ Under this light, it would have been perfectly acceptable for the Melanesians to eliminate all the mate among their midst. However, from the perspective of international criminal justice, such an act would not only be reprehensible, but would no doubt constitute a crime against humanity. The juristic and ethical problem here is obvious. Is it legitimate to convict someone of conduct undertaken throughout their lifetime that constitutes part of their culture? Even without discussing whether this anthropological finding is pertinent to excusing the accused from liability (as a defense) or in mitigation of punishment, the reader surely understands the implications. I am certainly not defending the contention that an unchecked, self-proclaimed cultural relativism is a valid defense to all international crimes.⁵⁸

The anthropological method requires an appropriate language for communicating concepts and ideas into the sphere of law.⁵⁹ Communication is crucial not only because certain words are not translatable from one language to another, as has been discussed above, but also because wholesale concepts and ideas themselves are alien from one culture to another.⁶⁰ The so-called Sapir-Whorf hypothesis, elaborated by anthropologists in the 1930s, suggests that language gives rise to fundamental differences between respective life-worlds that the various groups inhabit.⁶¹ In their case study, the North American native Hopi language was found to contain few nouns but many verbs that connoted action and movement. They concluded from this study that the Hopi world was founded upon movement and that it was largely disinterested in material objects.⁶² In the case against Charles Taylor, before the Sierra Leone Special

57. *Id.* at 406.

58. The proponents of such arbitrary cultural relativism have claimed that the recruitment of children in Africa to fight in armed conflicts is largely voluntary and the enlists do not consider their actions as legally or morally culpable. Tim Kelsall, *We Cannot Accept Any Cultural Consideration: The Child Soldiers Charge*, in *CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE* 146-70 (2009). See also, from a socio-legal perspective, Ilias Bantekas, *Individual Responsibility and the Application of Ignoratio Juris Non Excusat in International Law*, 19 *Eur. J. Crime, Crim. L. & Crim. Just.* 85-102 (2011).

59. See Elizabeth Mertz, *Language, Law and Social Meanings: Linguistic/Anthropological Contributions to the Study of Law*, 26 *L. & SOC'Y REV.* 413 (1992).

60. Legal anthropologists such as Bohannan argued that Western legal terms and categories should not be employed to study the organization and order of non-Western societies. He believed that such a methodology prevented a comprehensive understanding of other cultures and argued in favor of using native legal terms whose meaning would become evident within an ethnographic context. PAUL BOHANNAN, *JUSTICE AND JUDGMENT AMONG THE TIV* 4-5, 7, 208-14 (1957). This also leads to the so-called methodological distortion of *ethnocentrism*.

61. EDWARD SAPIR, *SELECTED WRITINGS OF EDWARD SAPIR IN LANGUAGE, CULTURE, AND PERSONALITY* 160-63 (David C. Mandelbaum ed., 1949); Benjamin L. Whorf, *Science and Linguistics*, 42 *TECH. REV.* 229 (1940).

62. The most contemporary manifestation of the hypothesis is currently known as *linguistic relativity* which posits that language does have some effect on thought, but this is small as opposed to decisive. See Paul Kay & Willett Kempton, *What is the Sapir-Whorf Hypothesis?*, 86 *AM. ANTHROPOLOGIST* 65 (1984).

Tribunal, a witness for the Prosecution, “ZigZag” Marzah, was quite “clearly unfamiliar with the Western idiom of remorse and conscience.”⁶³ He also claimed that he was involved in the cannibalism of enemy corpses, arguing that this was something expected of all warriors battling on the side of Charles Taylor.⁶⁴ Regardless of the validity of this statement, it certainly stirred a wealth of emotions in the Western psyche and reinforced myths and stereotypes associated with “primitive Africa.”⁶⁵ Up until the mid-1990s, scholarly output suggested that the origin of cannibalism was historically unknown⁶⁶ and, at the very least, it was alien in contemporary African societies. Contemporary research begs to differ from this position based on archaeological findings.⁶⁷ Critics argue that the older anthropological scholarship was convinced that any association of colonized people with cannibalism would be tainted by neo-imperialism.⁶⁸ Of course, this research does not necessarily change the Western popular imagery of cannibalism. Anders recalls the Human Leopards case investigated by a Special Commission Court set up by British colonial authorities in early twentieth century Sierra Leone.⁶⁹ There, without any corroborating forensic evidence, the court was convinced that members of a secret society dressing up in leopard skins committed ritual cannibalism. The basic story was described by insider witnesses whose communication with their colonizers must have been agonizing through language fraught with significant misunderstanding and symbolism. This story was moreover read through two very different socio-cultural perspectives.⁷⁰ Anders accurately captures this story as follows:

In Sierra Leone and Liberia, as in many parts of Africa, social relationships and personal development are framed in a rich language of eating and consumption. Initiation into secret societies such as the

63. Gerhard Anders, *Testifying about Uncivilized Events: Problematic Representations of Africa in the Trial against Charles Taylor*, 24 LEIDEN J. INT'L L. 937, 944-45 (2011).

64. *Id.* at 948-49.

65. *Id.* at 949.

66. However, for the sake of scientific accuracy it has to be said that a good number of anthropologists reject the claim that cannibalism is just a myth created from prejudice. Works such as W. ARENS, *THE MAN-EATING MYTH: ANTHROPOLOGY AND ANTHROPOPHAGY* (1979), are reflective of the attitude that rejects cannibalism. More recent forensic research of human bones from an Anasazi pueblo in southwestern Colorado reveals that nearly 30 men, women and children were butchered and cooked there around 1100 AD. See TIM D WHITE, *PREHISTORIC CANNIBALISM AT MANCOS 5MTUMR-2346* (1992).

67. More recent forensic research of human bones from an Anasazi pueblo in southwestern Colorado reveals that nearly 30 men, women and children were butchered and cooked there around 1100 AD. WHITE, *supra* note 66.

68. See Ann B. McGinness, *Between Subjection and Accommodation: The Development of José de Anchieta's Missionary Project in Colonial Brazil*, 1 J. JESUIT STUD. 227 (2014); NEIL WHITEHEAD, *HANS STADEN'S TRUE HISTORY: AN ACCOUNT OF CANNIBAL CAPTIVITY IN BRAZIL* (2008).

69. Anders, *supra* note 63, at 956.

70. *Id.*

poro is also expressed in an idiom of being eaten or devoured by the bush spirits in order to be reborn as a full member of the community.

The political sphere, in particular, is conceptualized as a potentially dangerous terrain where powerful people ‘eat’ others in order to grow ‘big’. This has been famously coined by Bayart as the politics of the belly, who describes the consumption of the state’s resources by politicians and bureaucrats. In Sierra Leone, corrupt politicians are referred to as *bobor bele* – literally, guys with a belly eating (‘to chop’, in Krio) the state’s resources. Therefore, the frequent cannibalism accusations in West Africa must not always be read literally. They should rather be interpreted in terms of a highly symbolic political language and critique of existing injustices⁷¹

To a Western audience, it may seem implausible that anyone could genuinely confuse symbolism with reality, or, to put it concretely, confuse actual cannibalism with its metaphors. How is it that symbolism can be so easily transformed into action? These issues are perhaps better reserved for another article; nevertheless, it is widely argued in anthropological literature that ideas of witchcraft, spirit possession, and shamanistic injunctions had a normative effect on members of the vast majority of traditional societies. The same is largely true today in the industrialized world for pious members of religious groups. No doubt international courts and tribunals, as well as domestic courts, cannot construe evidence without reference to its cultural underpinnings. To do so assumes that a single language encompasses all meanings, whether open or only shared among group members and that no other medium is therefore required. This assumption effectively reduces anthropology to a pseudo-science.

V. OFFENSIVE LANGUAGE IN INTERNATIONAL SPORTS LAW

Language and the cultural identity of its meanings has featured heavily in the decisions of disciplinary committees of international sports federations. This is because mega-sports events have become popular arenas for the contestation of ideas (broadly political in nature) not only by athletes but also by fans and spectators, particularly since most of these are extensively covered in popular media as well as social media. As a result, the potential for offensive language has demanded that action be taken. Sports scholarship contends that because international sports law is predicated on institutional rules privately composed by international sports federations –chiefly enforced through specialized arbitration—a certain degree of fragmentation from ordinary legal frameworks has been achieved.⁷² This fragmentation is known as *lex-sportiva*, which in turn

71. *Id.* (citation omitted).

72. Fragmentation has generally been applied to distinguish the obligations of states in international investment law from other treaty and customary-based obligations in the field of

has allowed international sports federations and their judicial or quasi-judicial entities to depart from otherwise standard understandings of norms or words.⁷³ In the majority of cases, fans/spectators or individual athletes were recorded as having uttered words or phrases against other players or spectators. These words or phrases were translated and found to hurt the dignity of others, or otherwise possess a discriminatory nature. The actual meaning of offensive language in this sporting context ultimately determines whether the athlete or the national sports federation is liable for discrimination. Article 15(1) of the FIFA Disciplinary Code defines this *sui generis* 'discrimination' as follows:

Any person who offends the dignity or integrity of a country, a person or group of people through contemptuous, discriminatory or derogatory words or actions on account of race, skin colour, ethnicity, nationality, social origin, gender, disability, sexual orientation, language, religion, political or any other opinion, wealth, birth or any other status or any other reason, shall be sanctioned with a suspension lasting at least ten matches or a specific period, or any other appropriate disciplinary measure.⁷⁴

The UEFA Disciplinary Regulations contain similar provisions. Most notably, article 16(2)(e) thereof demand that host clubs and national associations be responsible for "the use of gestures, words, objects, or any other means to transmit a provocative message that is not fit for a sports event, particularly provocative messages that are of a political, ideological, religious or offensive nature."⁷⁵

In practice, when a national sports federation is challenged before the FIFA Disciplinary Committee for offensive language uttered by its fans, it is common to offer cultural arguments about the meanings of words or chants, which in

human rights and the environment. See Anne van Aaken, *Fragmentation of International Law: The Case of International Investment Protection*, 17 FIN. Y.B. INT'L L. 91, 92-93 (2008). It should be admitted, however, that there is a growing body of practice and scholarly opinion advocating in favor of the principle of systemic integration between human rights and foreign investment obligations in accordance with Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT). See Silvia Steininger, *What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration*, 31 LEIDEN J. INT'L L. 33, 45-46 (2017).

73. See Antoine Duval, *Transnational Sports Law: The Living Lex Sportiva*, in THE OXFORD HANDBOOK OF TRANSNATIONAL LAW 493 (Peer Zumbansen ed., 2021); see also Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GER. L.J. 1317 (2011). Both articles emphasize that the particular status of the institutions forming the international sports order renders its regulatory ambit transnational in nature, albeit in synergy with national laws.

74. FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION, FIFA DISCIPLINARY CODE art. 15(1) (2023); see also *id.* at art. 17(2)(e) which refers to fans using "gestures, words, objects or any other means to transmit a message that is not appropriate for a sports event, particularly messages that are of a political, ideological, religious or offensive nature."

75. UNION OF EUR. FOOTBALL ASS'NS, UEFA DISCIPLINARY REGULATIONS art. 16(2)(e) (2022).

most cases depart from their ordinary meaning. Homophobic and ethnically motivated chants are a common occurrence in football stadiums around the world. In a match played on 27 January 2022 between the national teams of Chile and Argentina, the match commissioner reported that Chilean fans chanted “porompompom, porompompom, el que no salta es argentino maricón . . . Porompompom, porompompom, el que no salta es argentino maricón.”⁷⁶

The commissioner provided an English translation as follows: “porompompom, porompompom, who is not jumping is an Argentinian faggot,” arguing that the chant targeted Argentinian players and fans, using a “homophobic slur for sexual orientation as a means of causing offense.”⁷⁷ While these words could not have had any other meaning, the respondent in this case, the Chilean national football federation, argued otherwise. It held that the chant is used in all Latin American states and that far from being “allusive to a homophobic connotation [is in fact] a cultural theme rooted for years in the idiosyncrasy of Latin American culture – it is an expressly cultural chant and by no means does the chant attack a particular sexual minority.”⁷⁸ It was further intimated that this type of behavior in the Chilean culture constitutes a way of seeking to become “part of the event” through interaction with the players and other attendees.⁷⁹ The Chileans found the translation of maricón to “faggot” as failing to capture the subtle nuances of its cultural underpinnings in the South American context, further contending that the word did not have a homophobic meaning in Chile.⁸⁰ Going further, it was argued that “in the Chilean idiosyncrasy, maricón is nothing more than ‘an adjective referring to a disloyal and/or treacherous persons,’ as can be observed if one refers to the Chilean dictionary.”⁸¹ In rejecting the homophobic connotation of the word maricón that was used by Ecuadorian fans in another match, that country’s football association equally offered its own linguistic interpretation. It emphasized that the word was incorrectly defined as a “*discriminatory reference to homosexual men*”, and that in fact its origin in the Spanish tradition denotes, in a pejorative sense, to men with feminine features.⁸² Notwithstanding the origin of the aforementioned term, one should not dismiss the likelihood of linguistic change. In particular, the meaning attributed by people to words vary according to their context and origin. Proof of such a linguistic change, especially in the context of spectator chants against opponents, is unlikely to be met by sporting disciplinary entities as non-offensive.

The Chilean Football Association in this instance was attempting to offer a

76. FIFA Disciplinary Committee, *On The Case Of: Chilean Football Association*, Decision FDD-10155 (April 27, 2022).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. FIFA Disciplinary Commission, *On the Case of the Ecuadorian Football Association*, Decision No. FDD-12603, at 8 (Jan. 13, 2023).

cultural interpretation to avoid being penalized for the conduct of its fans. Moreover, the cultural dimension was narrow. It did not concern a national linguistic tradition, or variation thereof, that applies to all Chileans, but only to fans. To emphasize the fact that Spanish words as used in the South American cultural context are distinct from the ordinary meaning of the same words in other contexts, it referred to the acquittal of Mexico who chanted the word “Puto” to the goalkeeper of the Cameroonian national team. The Chileans claimed that the Mexicans were acquitted because, despite the ordinary translation of the word as “homosexual”, it was found to convey a different meaning in Mexican culture.⁸³ The FIFA Disciplinary Committee did not deem it necessary to consult linguists or cultural anthropologists in this regard,⁸⁴ especially since none of its three members were native Spanish speakers or natives of South America. It dismissed the Chilean claims and decided to endorse the observations from the FARE Network,⁸⁵ while also referring to some of its previous considerations in which it was decided that “the word ‘maricón’ (which can be translated in English as ‘faggot’) is a homophobic slur used towards gay men, and, as such, discriminates on the grounds of sexual orientation.”⁸⁶ A similarly swift rejection of the Ecuadorian argument concerning the proper meaning of the word maricón was made by the Disciplinary Committee, thus demonstrating consistency in its own cultural understanding of the word and its context.⁸⁷ Similar homophobic chants whose linguistic premise has been challenged by the respondent are common place before FIFA’s disciplinary committee, but all have been dismissed in similar fashion where the meaning of the words was clear and was in no need for a cultural translation.⁸⁸

In another case during the 2022 FIFA World Cup that did not involve LGBTI slurs, the Disciplinary Committee was content to emphasize the political nature of the chants.⁸⁹ Canada was set to play Croatia. The Canadian goalkeeper was of Serbian origin and hailed from what is today a part of Croatia and his

83. Chilean Football Association, Decision No. 65, at 12.

84. This is in contrast to the CAS where experts have been called to testify on the meaning of words and phrases, particularly in cases alleging incitement to political or other violence. *See* Josip Simunic v. Fédération Internationale de Football Association (FIFA), CAS 2014/A/3562, (July 29, 2014), where CAS found several breaches of the FIFA Code, on the basis of behavior offending the dignity of a group of persons after the conclusion of the match.

85. The FARE Network is a private non-profit umbrella organization that seeks to stamp out and report racism and discrimination in football matches and tournaments. It has an extensive reporting network that provides quasi-judicial entities with evidence of pertinent behavior by fans, players, or officials and this is routinely relied on in the proceedings and given probative value. Crucially, FARE reports do not only reproduce what has been done or said but provide translation and cultural context. *See* FARE, <https://farenet.org> (last visited Nov. 8, 2023).

86. Chilean Football Association, *supra* note 83, at 61.

87. Ecuadorian Football Association, Decision No. 71, at 32-34.

88. *See, e.g.*, FIFA Disciplinary Commission, *The Case of the Mexican Football Association*, Decision Nos. FDD-12619 and FDD-12687 (Jan. 13, 2023).

89. FIFA Disciplinary Commission, *In the Case of the Croatian Football Federation*, Decision No. FDD-12673 (Dec. 7, 2022).

parents fled the former Yugoslavia upon the eruption of hostilities in the early 1990s. Croatian fans were chanting a mixture of homophobic and sexual slurs, albeit the context was the war and the victim's ethnic background.⁹⁰ The match report read as follows in its relevant parts:

The banner read "Vruću Sneki, Pregazili Neki. Oluja 95" and included an image of a tractor. Translated into English it means "Hot Sneki (Sneki is the nickname for Snežana Borjan, Borjan's wife), someone ran over you." This can be understood in a literal way or in a figuratively [sic] way as a sexual(ising) comment. The tractor refers to Serbs fleeing from Croatia in 1995.

....

... The insults furthermore include clear references to the context of the break-up of Yugoslavia, the wars and ethnic cleansing that resulted.⁹¹

In the present instance, although the meaning of some words is clear, others require a cultural background, such as the tractor. The Disciplinary Committee explained that:

The banner was a flag of the US-American agricultural machinery production company "John Deere," with "KNIN 95" written onto it and the company's logo altered to "Nothing runs like Borjan." This banner was shown repeatedly from minute 71 – after Croatia's third goal – until almost the end of the game. The tractor refers again to fleeing Serbs and directly references Borjan. It was repeatedly shown by one fan, but also other fans took pictures with the banner.⁹²

While the allegations against Croatia's handling of its fans initially centered on Article 13 (discrimination), as well as order and security (Article 16) of the Disciplinary Code, the Committee ultimately held that the latter was appropriate under the circumstances.⁹³ As already mentioned, Article 16(2)(e) expressly prohibits and sanctions any action, manifested in whatever manner, by fans that transmits political meanings or connotations.⁹⁴ Unlike LGBTI slurs in a

90. It is instructive that the Croatian Football Association attempted to defend the politics of the chants. It claimed that the depiction of the hostilities in the city of Knin during the Yugoslav conflict as presented by the Canadian player (prior to the start of the tournament) was wholly different to the Croatian official account. *Id.* at 7-10, 17-19.

91. *Id.* at 3-4.

92. *Id.* at 7.

93. *Id.* at 16.

94. See FIFA Disciplinary Commission, *On the Case of the Albanian Football Association*, Decision No. FDD-9088 (Dec. 8, 2021), where in the course of match between Albania and Hungary, flags and symbols depicting an illegal paramilitary unit were hoisted on the rails and

tournament hosted by a conservative nation, the Disciplinary Committee had no qualms about accentuating the political nature of vile slogans directed at a person's ethnic origin.⁹⁵ It is clear that what chants and slogans are deemed offensive in the sporting context is quite apart from what may be deemed offensive in the context of human rights treaty bodies that must balance freedom of expression concerns.⁹⁶

VI. CONCLUSION

Language is a tool that has not been fully appreciated in international legal processes. It is a notion that is taken for granted and inroads have only generally been made as regards construction of treaty-based terms. Yet, on the occasion that a linguistic reference or discrepancy arises in judicial or quasi-judicial proceedings, whether offensive or otherwise, issues of context, culture, and animosity arise. These issues are usually not trivial and there are no mechanisms for resolving linguistic divergencies other than ordinary rules of treaty (or contract) interpretation and the discretionary authority granted to courts and tribunals. This article exemplifies three areas where the issue of language is dominant and hardly peripheral to its stakeholders. The authenticity of languages in the context of multilateral treaties is key to deciphering the meaning of terms when these give rise to confusion at a later time in the life cycle of a treaty.⁹⁷ However, this does not resolve situations, especially in UN multilateral treaties, whereby several texts are deemed to be authentic, but which conflict with each other in conveying a singular meaning of the disputed term or phrase. There is a clear need for treaty drafters to consider expanding on the standard terminology of language provisions in treaties. It would be useful if an additional paragraph was added to pertinent language provisions in both multilateral treaties as well as key soft law instruments (such as the UNCITRAL

later a drone flew above the pitch with a banner in favor of a local politician. The Disciplinary Committee found a breach of article 13 of the FIFA Disciplinary Code by the Albanian respondent.

95. To be fair, the FIFA Disciplinary Committee has decided other cases of spectators chanting homophobic slogans in tournaments other than the 2022 World Cup and equally upheld article 13 without referring to political neutrality or breach thereof. *See* FIFA Disciplinary Commission, *On the Case of the Peruvian Football Association*, Decision No. FDD-10809 (Apr. 27, 2022).

96. Human rights courts and treaty bodies have limited the circumstances where even hatred may be considered offensive. *See* U.N. Comm. on the Elimination of Racial Discrimination, *PSN v. Denmark*, CERD/C/71/D/36/2006 (Aug. 8, 2007).

97. Umbrella clauses offer a good example of the complexity of legal language. They have been used in bilateral investment treaties (BITs), exclusively at the instigation of developed states, with little to no understanding of their impact on the part of their less developed counterparts. In truth, the meaning of these clauses is not crystal clear. Years after their conclusion, it was deciphered that these clauses extend investment guarantees under a distinct contract or the host state's laws to the protection of the BIT itself. *See* Alperen Afsin Gözlügöl, *The Effects of Umbrella Clauses: Their Relevance in Interpretation and in Practice*, 21 *J. WORLD INV. & TRADE* 558 (2020).

Model Law) suggesting (at the very least) that courts and tribunals apply a cultural perspective to the construction of words and terms, additional to other statutory means of interpretation. This in turn will provide the necessary impetus for the administrators of international courts and tribunals to either train judges, or/and alternatively to set up a roster of experts that are available for consultation when the need arises.⁹⁸

The complexity of language has been aptly understood by those state entities that are keen to develop their legal systems in a manner that emulates their fast economic growth. In such circumstances there is a tendency to transplant wholesale the laws of developed jurisdictions, namely those of England.⁹⁹ In doing so, these jurisdictions have set up specialized commercial courts that are composed of English or common law judges from the Commonwealth, applying English law directly or construing the local statutes in question from the perspective of English law in the English language.¹⁰⁰ In this manner, the meanings conveyed in the English language are not lost in an ensuing translation. Undoubtedly, such a mechanism decreases dependence on language-based construction or the need for delving into cultural underpinnings, but it is clearly artificial and assumes that end-users (litigants, lawyers, judges) have agreed to abide with exactly the same meanings, just as if they were in England and not in Qatar or Dubai. While this might work relatively well if users are strictly following the commercial or private law dimension of the law in question, it is otherwise absurd where the courts in England adopt a subsequent meaning based on a ruling of the European Court of Human Rights

98. See Anders *supra* note 63, who has suggested that international criminal tribunals should seek expert advice from anthropologists. In litigation and arbitration, seeking advice from experts is relatively common, although said advice is not binding on the courts or tribunals and the relevant cost is ultimately borne by the parties. Hence, it is not always in the financial interest of the parties to seek such expertise. See G.A. Res. 31/98 (Dec. 15, 1976); U.N. Comm'n on Int'l Trade L., UNCITRAL Model Law art. 26(1) (1985); INT'L BAR ASS'N, RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION art. 5(4) (2020) provides that:

“The arbitral tribunal in its discretion may order that any party-appointed experts who will submit or who have submitted expert reports on the same or related issues meet and confer on such issues. At such meeting, the party-appointed experts shall attempt to reach agreement on the issues within the scope of their expert reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.”

99. Sophisticated jurisdictions in Asia, particularly the UAE, Qatar, Kazakhstan and to a lesser degree Hong Kong and Singapore, have set up special economic zones (SEZ) that are served by discreet specialized courts that dispense justice through transplants of English law. Here, legal language is important because the fusion of English language and English is viewed as integral to the establishment of robust legal systems. See Ilias Bantekas, *Transplanting English Law in Asian Special Economic Zones: Law as Commodity*, 17 ASIAN J. COMPAR. L. 305 (2022).

100. See Ilias Bantekas, *The Globalisation of English Contract Law: Three Salient Illustrations*, 137 L.Q. Rev. 130 (2021); see also Christoph A. Kern, *English as a Court Language in Continental Court*, 5 ERASMUS L. REV. 187 (2013).

that is unacceptable in the transplanted country.¹⁰¹

Language is equally important in party autonomy. The parties to transnational disputes, whether states or non-state actors, are conferred the right to choose the language of the proceedings, which may ultimately be crucial where the bulk of the evidence is in a language more accessible to one party and where translational costs are prohibitive or communication with the panel, arbitrators or judges is done through translators or intermediate languages. Judges and arbitrators in such cases are not deprived of their inherent or kompetenz-kompetenz powers¹⁰² to ascertain with clarity the true meaning of a word or phrase and juxtapose it with its cultural meaning, to the extent that this is relevant to the determination of the parties' dispute.

Finally, it is obvious that language possesses a cultural dimension that is difficult to appreciate or even understand. The processes of international law are seldom interested in these cultural nuances and international criminal justice mechanisms have demonstrated significant reluctance to address these in a manner consistent with the dictates of justice. It is perhaps the case that international law-making institutions are antithetical to the notion of multiple cultures in the implementation or interpretation of rules, norms and institutions because of the fear that this might lead to cultural relativist debates. This article has shown that the linguistic issues under consideration do not in any way undermine the universality of international law and human rights. It is hoped that the scholarship on language in international law will grow with a view to generating more uniformity in the meaning of key terms and expressions so that these are available to international courts and tribunals.

101. QATAR CIV. CODE art. 50(1) (2004), for example, clarifies that lack of discretion may also arise by reason of "imbecility (al-ma' tūh) or insanity", in which case the person is considered incompetent to exercise its civil rights, including the absolute freedom to contract. On the capacity of the discerning minor, see ILIAS BANTEKAS, JONATHAN G. ERCANBRACK, UMAR A. OSENI, & IKRAM ULLAH, *ISLAMIC CONTRACT LAW* ch. 4 (2023).

102. Kompetenz-kompetenz refers to the inherent authority of a court or tribunal to decide the legality of its own constitution as well as all matters pertaining to its jurisdiction. Where a judicial entity is self-standing, as is the case with arbitral tribunals, such authority is of paramount importance. Article 16(1) of the UNCITRAL Model Law states that the tribunal: "may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement". See *Effect of Awards of Compensation made by the UN Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 47, 51 (July 13, 1954); *Prosecutor v. Duško Tadić*, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 105 I.L.R. 453 (International Criminal Tribunal for the Former Yugoslavia 1995).