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# **The Pragmatics of Legal Discourse**

## **Werkstattbericht**

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**ZHAW Colloquium on Language and Law**

**I. Introduction**

**II. Foundational issues**

**III. International law and linguistics**

**IV. Experimental approaches**

**V. Literature**

## II. Foundational issues: The basics

### ▶ Smolka/Pirker (2016), Pirker/Smolka (2017)

### ▶ Introducing basic distinctions in pragmatics

- Non-cognitive vs. cognitive approaches, Grice/Post-Gricean/Neo-Gricean approaches, Relevance Theory
- Usefulness for lawyers? Understanding e.g. the (shifting) boundaries between semantics and pragmatics

The example of the *Chevreau* arbitration:

Mr Chevreau has been allegedly mistreated during two detention periods in Persia and Baghdad in 1918. Compromis/agreement that the arbitrator has jurisdiction over Mr Chevreau's detention «in Persia in 1918».

## **II. Foundational issues: The basics**

### **▶ Smolka/Pirker (2016), Pirker/Smolka (2017)**

### **▶ Introducing basic distinctions in pragmatics**

- Code model vs. inferential model of communication, sentences vs. utterances/sentence meaning vs. utterance meaning
- Usefulness for lawyers? Understand concurrent operation of both models (contrast, e.g., Linderfalk 2007)

## II. Foundational issues: The basics

- ▶ **Smolka/Pirker (2016), Pirker/Smolka (2017)**
- ▶ **Tackling «typical» objections to pragmatics in law**
  - The collective intention problem

How to deal with chains of authors and deferred communication as is typical in a legal context?

RT: Cognitive environments, Theory of Mind and intentional stance.

Example:

Napoleon declared an outlaw subjected to «la vindicte publique».

Public justice (prosecution) or public vengeance?

Wellington's signature/consent limited by assumption below level of conscious attention (respect for due process→prosecution).

## II. Foundational issues: The basics

### ▶ Smolka/Pirker (2016), Pirker/Smolka (2017)

### ▶ Tackling «typical» objections to pragmatics in law

- The objection about the particularity of legal discourse

Pragmatics supposedly only models ordinary, non-specialised communication?

- Universality of cognitive principles on which pragmatics relies
- Assumptions and value judgments; fallibility of intentional stance  
(Example of the disagreement between human rights lawyers and humanitarian lawyers in the *Gotovina* case on deportation)
- Respect of rules of interpretation (e.g. ordinary meaning)

## II. Foundational issues: Practical applications

- ▶ Pirker/Smolka (2017)

- ▶ Distinguishing explicature, implicated premise, implicated conclusion as part of the comprehension process

- Explicature:

- The example of Aust's (2013) implied term/«prisoners of the sea»:  
interning prisoners of war «only in premises located on land» =  
internment on merchant ships and warships?

- Ad hoc concept formation; making underlying reasoning transparent.

## II. Foundational issues: Practical applications

- ▶ Pirker/Smolka (2017)

- ▶ Distinguishing explicature, implicated premise, implicated conclusion as part of the comprehension process

- Implicated premise:

- International law exam question: «How does one determine which state is authorised to exercise diplomatic protection for a particular legal person?»

- Student's understanding: «How does one determine which state is authorised to exercise diplomatic protection for a particular legal person *according to Swiss law?*»



## II. Foundational issues: Practical applications

### ▶ Pirker/Smolka (2017)

### ▶ Distinguishing explicature, implicated premise, implicated conclusion as part of the comprehension process

– Implicated conclusion:

EU regulation enters in force on 3 July 2016, German abrogating law enters into force on 2 July 2016: on 2 July 2016 no prohibition of insider trading in Germany.

Clear intent of legislator and thus implicated conclusion that there should not be lacuna. But legal rules prohibit such inference (principle of legality with regard to a criminal prohibition).

## II. Foundational issues: Practical applications

### ▶ Smolka/Pirker (2018)

### ▶ The distinction between conceptual and procedural meaning

- Discourse connectives provide instruction on inferential phase

And:

Minimal semantics: co-occurrence of the linked sentences or phrases

Pragmatic modification/enrichment: addition, temporal sequence, causation (e.g. Mary married Paul *and* got pregnant/obtained Swiss citizenship.)

Or:

Semantics: inclusive; pragmatic enrichment possible (exclusive)  
«Right now, Jack is waiting at the airport *or* flying over the Alps.»

## II. Foundational issues: Practical applications

▶ **Smolka/Pirker (2018); Pirker/Smolka (2023)**

▶ **The distinction between conceptual and procedural meaning**

– Legal examples:

And:

The Commission shall submit a proposal to the European Parliament *and* the Council. (Article 294 (2) TFEU)

Or:

If the Court finds that there is an infringement it may impose a lump sum *or* penalty payment on the Member State concerned not exceeding the amount specified by the Commission.

## II. Foundational issues: Practical applications

- ▶ **Smolka/Pirker (2021); Pirker/Smolka (2022)**
- ▶ **Pragmatic typologies and treaty interpretation**
  - Ariel (2016)
  - Explicature, strong implicature, provisional explicature, particularised conversational implicature, background assumption, truth-compatible inference
  - Far-fetched interpretations? Treaty silence cases?

## II. Foundational issues: Practical applications

- ▶ Smolka/Pirker (2021); Pirker/Smolka (2022)
- ▶ Pragmatic typologies and treaty interpretation
  - Legal examples

### Provisional impicature (Paris Declaration):

The treaty stated that privateering is, and remains, abolished.

Privateering has not yet been universally abolished, yet it should have been.

The treaty *literally* stated that privateering is, and remains, abolished, *but it actually conveyed that* privateering has not yet been universally abolished, yet it should have been.

## II. Foundational issues: Practical applications

- ▶ Smolka/Pirker (2021); Pirker/Smolka (2022)
- ▶ Pragmatic typologies and treaty interpretation
  - Legal examples

### Truth compatible inference (Genocide case):

The treaty stated that the parties agree that genocide is a crime under international law and undertake to prevent and punish it.

*Its utterance is compatible with a state of affairs in which*

The parties themselves are obliged not to commit genocide.

### III. International law and linguistics

- ▶ Pirker/Smolka (2020)
- ▶ Disseminating linguistic knowledge: What can various fields of linguistics „do“ for (international) law?
- ▶ Lifecycle of international law: Drafting
  - Text linguistics (Höfler)

„There shall be a president.“ vs „The president’s powers are [...]“  
(presupposition)

- Semantics

Prototype semantics and experimental approaches.

E.g. interpretation of terms like „exhaustible natural resources“ (WTO law)

# III. International law and linguistics

## ▶ Lifecycle of international law: Interpretation

- Lexicography and reliance on dictionaries

US law examples:

First entry of particular importance (*Muscarello v United States*), exclusion of meaning because not found in dictionary (opposed Posner in *US v Costello*).

Choice of dictionary crucial?

International law:

US – Gambling: Panel argues „sporting“ does not include „gambling“ (services); Appellate Body rejects „mechanical“ approach relying on dictionary.



# III. International law and linguistics

## ► Lifecycle of international law: Practice

- Corpus linguistics and computational linguistics

Corpus work in international criminal law:

Decreasing frequency of „if“ in case law of international criminal tribunals as sign of maturation of the field (Holtermann and Kjaer).

Text-as-data approaches (Alschner a.o.):

Examining treaty „convergence“ or „divergence“ e.g. in international investment law.

Forensic linguistics:

Author identification and the *Yukos* award.

### III. International law and linguistics

- ▶ **Pirker/Smolka (2019)**
- ▶ **International law and cognitive approaches: Cognitive sociology vs cognitive linguistics**
- ▶ **Example: „Prisoners of the sea“ case**

„Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness.“

- Perspective of cognitive sociology

Prototypes and graded membership; holding POWs on ships ranked closer to the prototype for international humanitarian lawyer.

- Perspective of cognitive linguistics (pragmatics)

Narrowing (including second criterion) and loosening ad hoc concept of „on land“ (focus on shelter, protection).

## **IV. Experimental approaches**

- ▶ **Pirker/Skoczeń (2022), Pirker/Skoczeń (2023)**
- ▶ **Ongoing project Smolka**

# IV. Selected literature

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