



The Role of SHALL and SHOULD in Two International Treaties*

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Abstract

The aim of this study is to analyse the language of two international treaties, the United Nations Charter¹ (1945) and the European Convention on Human Rights² (1950). As a work in progress it investigates the role of SHALL and SHOULD in the institutional language of the United Nations and of the Council of Europe through a comparison between the English versions of the documents and their Italian translations³. It also will take into account the ambiguity and vagueness of some English central modals in legal texts and the difficulty in translating them into a different language (Gotti 2005, Williams 2007, Bybee 1985, Trosborg 1997, Palmer 2004). The analysis is based on Halliday's (1994) ideational and interpersonal functions focusing on the concept of tenor, field and mode. The study will take into account van Dijk's claim (1993) about the concepts of 'dominance' defined as '[...] the exercise of social power by elites, institutions or groups that results in social equality [...] directive speech acts such as commands or orders may be used to enact power and hence also to exercise and to reproduce dominance'.

Since translation is a complex process involving two different semiotic systems in a context of diverse cultures it means that we usually have expectations about the way in which language operates in legal contexts although they are not clearly stated anywhere but in legal culture. Moreover, archaisms and ambiguous verbal forms may create barriers to an effective understanding of legal issues. Due to all these reasons, a process of modernization in drafting texts is crucial, to make them accessible from one audience to another and from one language to another as well. Thus, our study will investigate ambiguity originated from verbs and phrases that can be found in international legal texts and consequent difficulties in translating them. More specifically, our attention will be focused on the modals SHALL and SHOULD, translated into Italian in some very different ways. In particular, SHALL has been considered 'ubiquitous' in legal texts since it expresses a deontic modality intrinsically projected towards situations and behaviour located in the future (Williams 2007: 116). The contrastive analysis of the documents will provide evidence of difficulties encountered in the interpretation of the value and of the meaning of modal auxiliary verbs in different languages. Thus, in the translation process, understanding the pragmatic values in the communicative interaction between the legal authority and the addressees is crucial. As Williams (2007: 11) asserts: 'Interpreting the intention of the lawmakers and those who drafted a particular law inevitably entails a detailed scrutiny of the language and prolonged interpretative debate'. A contrastive analysis of the English and the Italian versions of

international treaties will also provide evidence of difficulties in mediating between two languages and cultures.

Key words: Legal translations, modals, ambiguity, modernization of language.

1. Translation and Pragmatics: A Theoretical Approach

A number of changes, in translation studies, have seen different approaches from a rigid equivalence to holistic gestalt, like principles to an emphasis on cultural background and on the author's intention. This leads us to consider translation not only as a transcoding process but a cross-cultural event which leads to a macrostructure interpretation of the text and, consequently, to pay attention to the sender and receiver of the message (Trosborg 1997). The concept of complete equivalence, which was central in the past, has been rejected by many scholars who advocated a different approach (Hatim and Mason 1990) aiming at a 'dynamic equivalence' which is more oriented towards the target receiver. Finally, the manipulation school's approach is based on the consideration that the analysis of translated versions of a text should be descriptive and not evaluative. As Trosborg (1997: 151) affirms, the notion of text function means the communicative function, or the combination of communicative functions, which a text fulfils in its concrete situation of production/reception. A text has a particular function derived from extratextual factors such as sender/sender's role, intention, recipient/recipient's expectations, medium, place, time (Nord: 1991:70). According to Nord (1991: 28) translation might be seen as:

[...] the production of a functional target text maintaining a relationship with a given source text that is specified according to the intended or demanded function of the target text (translation skopos). Translation allows a communicative act to take place which because of existing linguistic and cultural barriers would not have been possible without it.

To sum up, it is possible to distinguish two different schools of translation: a linguistic approach, based on equivalence, and a functional approach which puts a special emphasis on the function of the target text. In this study we will take the second approach into consideration.

Translations of legal texts may fall in the group of documentary translation. As Trosborg (1997: 157) affirms, 'The communicative function depends on the purpose of the translation [...] regulative texts have to inform about the contents of the document and this function must be rendered unambiguously in translating through the relevant linguistic realization patterns (performatives, modal verbs, lexical verbs).' Furthermore, 'complexity in translation' is a crucial point in legal discourse, in which obstacles to comprehensibility are very often due to unstated conventions rather than to the vocabulary and sentence structure (White 1982: 423). This complexity emerges in diplomacy since language has a central role during negotiations. As Cohen (2001: 67- 91) affirms:

The language of diplomacy is yet a further refinement of language as a medium of communication [...] The case for the importance of language and culture lies on the view that semantic distinctions reflect different interpretations of reality and normative modes of behaviour [...] Ambiguity in diplomatic text may help

to give up a state of warfare, or hostility and at the same time it could be wise and convenient [...]

2. Diplomatic Speech Community: An Overview of the Genre of Diplomatic Text

The United Nations and the European Council are international organizations; the UN Charter and the European Convention are bilateral treaties which are negotiated by a limited number of states, most commonly only two, establishing legal rights and obligations between those two states only. The Vienna Convention states that treaties are to be interpreted 'in good faith' according to the 'ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.'

International law differs from any other judicial order on some characteristics and one of the most relevant is the lack of central organs. This means the lack of a central legal authority. Thus, it is important to establish whether a text is prescriptive or performative and whether a national implementation is necessary.⁴ A change has been recorded with the creation of the United Nations whose central organ, the Security Council, has the power to intervene in a coercive way as established in the UN Charter and differs from the General Assembly which has only the power to give recommendations. The European Convention, on the other hand, although it is a regional organization, has a more important role in the field of human rights since it is binding for all members. Both documents are 'prescriptive' since:

Prescriptive rules [...] are normative and require procedural stages (imposition, recognition, implementation). The language is regulatory and prescriptive, instructing the addressee(s), and is characterised by the presence of the animate recipient of the obligation (e.g. Member States shall) (Polese 2006)

The United Nations Charter was signed in 1945. It entered into force on 24 October, 1945, after being ratified by the five permanent members of the Security Council. It is a constitutive treaty but it is not performative⁵ and all members are bound by its articles. This ambiguity gave rise to several debates in International Law studies.

The Charter consists of a Preamble and a series of articles grouped into chapters. Chapter I sets forth the purposes of the United Nations, including the important provisions of the maintenance of international peace and security.

The main aims of the Charter are:

to maintain international peace and security, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; to achieve international co-operation in solving

international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for anyone without distinction as to race, sex, language, or religion; to be a centre for harmonizing the actions of nations in the attainment of these common ends. The Organization is based on the principle of the sovereign equality of all its Members.

The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR), was drafted in 1950. All Council of Europe member states are parties in the Convention. An innovative feature for an international convention on human rights is the establishment of a Court to protect individuals from human rights violations. Any person who feels that his/her rights have been violated under the Convention by a state party can take a case to the Court (traditionally, only states are considered actors in international law). Thus, rights and freedoms are directly recognized to everyone under the jurisdiction of the Contracting States. The decisions of the Court are legally binding and the Court has the power to award damages. The European Convention is still the only international human rights agreement providing such a high degree of individual protection. State parties can also take cases against other state parties to the Court, even if this power is rarely used. The peculiarity of this text type is given by the consideration that: 'As ECHR is an instrument aimed at protecting the fundamental rights belonging to human beings, it is different from any other international treaties because of its contents and its inner meaning.' (De Salvia 2001: 163, our translation)

Thus, the Convention is mainly a binding prescriptive text and the addressees are bound by an international body.

3. Linguistic Analysis

The total Number of words in the English version of the UN Charter is 1073, while the total number of words in its Italian version is 1360. The total number of words in the English version of ECHR is 958, while the total number of words in its Italian version is 1195. Tables 1 and 2 below contain the number of occurrences and percentages of SHALL and SHOULD in the UN Charter (1945), and the European Convention on Human Rights (1950).

Table 1. Shall / Should occurrences in the UN Charter.

Word	Frequency	%
Shall	180	1.95
Should	5	0.05

Table 2. Shall / Should occurrences in ECHR.

Word	Frequency	%
Shall	119	2.12
Should	0	0

The tables 1 and 2 show that the mostly used modal is SHALL in both documents. SHALL is employed to perform several semantic and pragmatic functions and has expressed both future and obligation since the 16th century. Generally SHALL denotes, as MUST, a mandatory intent even if the latter is used above all to establish requirements or conditions. As Williams (2005: 113-127) affirms, 'in most English speaking countries which draft authentic text in English, *shall* is the most frequent modal construction [...] It is considered *ubiquitous*, *imprecise* and able to create uncertainty and ambiguity [...]'.

In Italian legal language, two options of translation can be found, depending upon two different types of rules - constitutive vs. prescriptive rules. Constitutive rules have immediate legal effects, so their language has a performative value because a command is not only prescribed but also performed. Conversely, prescriptive rules do not have an immediate legal effect (Carcattera 1994: 219-231).

Constitutive rules are commonly expressed in Italian by the *indicativo costitutivo* (Constitutive indicative) while prescriptive rules are commonly represented by the modal *deve/devono* and the *indicativo prescrittivo* (prescriptive indicative) implying the meaning of *dovere*.

As Caliendo (2003: 13) affirms, 'the tense generally adopted by the Italian legislator to translate the modal SHALL is the present indicative [...].'

3.1 Obligation

(The UN Charter)

(1)

(EN) The Organization and its members, in pursuit of the Purposes stated in Article 1 shall act in accordance with the following Principles. (Art 2)

(IT) L'Organizzazione ed i suoi Membri nel perseguire i fini enunciati nell'articolo 1, devono agire in conformità ai seguenti principi. (Art.2)

SHALL is translated into Italian with '*devono agire*'. Since it has a deontic and directive meaning.⁶ Its purpose is to regulate human behaviour and in this sense the UN Charter is an impositive Act even if according to Austin's (1962) theory on 'speech acts', SHALL is considered a modal verb which expresses a commitment being close to futurity.

(2)

(EN) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. (Article 7)

(IT) Nessuna disposizione della presente Carta autorizza le Nazioni Unite ad intervenire in questioni che appartengono essenzialmente alla competenza interna di uno Stato, né obbliga i Membri a sottoporre tali questioni ad una procedura di regolamento in applicazione della presente Carta; questo principio non pregiudica però l'applicazione di misure coercitive a norma del capitolo VII. (Art.7)

In this example SHALL is translated into Italian with the Present simple and the negative form of the verb *obbliga*. This example seems to suggest the promiscuous use of SHALL demonstrated by the drafter's choice.

(ECHR)

(3)

(EN) [...] This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers [...] (Art 10,1)

(IT) [...] Tale diritto include la libertà di opinione e la libertà di ricevere o di comunicare informazioni o idee senza ingerenza alcuna da parte delle autorità pubbliche e senza considerazione di frontiera [...] (Art 10,1)

(4)

(EN) The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention. (Art.1)

(IT) Le Alte Parti Contraenti riconoscono ad ogni persona soggetta alla loro giurisdizione I diritti e le libertà definiti al titolo primo della presente Convenzione. (Art.1)

The translation of 'shall include' and 'shall secure' with the present indicative *include / riconoscono* underlines the constitutive value of the modal auxiliary verb. The Member States are required to comply with the obligations contained in ECHR. In the examples below, other options are chosen for the Italian translation of SHALL – occurrences: *E'* + adjective / past - participle structures.

(5)

(EN) Everyone arrested or detained in accordance with the provisions of paragraph 1.c [...] shall be entitled to trial within a reasonable time or to release pending trial [...] (Art. 5,3)

(IT) Ogni persona arrestata o detenuta nelle condizioni previste dal paragrafo 1 c del presente articolo [...] ha diritto di essere giudicata entro un termine ragionevole o di essere posta in libertà durante l'istruttoria [...] (Art.5,3)

(6)

(EN) Everyone's right to life shall be protected by law [...] (Art 2)

(IT) Il diritto alla vita di ogni persona è protetto dalla legge [...] (Art 2)

(7)

(EN) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. (Art 6,2)

(IT) ogni persona accusata di un reato è presunta innocente fino a quando la sua colpevolezza non sia stata legalmente accertata. (Art. 6,2)

3.2 Prohibition

(The UN Charter)

In the following example SHALL expresses prohibition regarding the use of force. We can also notice the use of the passive voice and the agent does not refer to an animated person but to an abstract legal agent. In the English version SHALL is used to express an intention rather than an obligation since it is in a subordinate sentence; it has been translated into Italian with the future verb phrase expressing futurity:

(8)

(EN) [...] to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used save in the common interest, and [...] (Article 2)

(IT) [...] ad assicurare, mediante l'accettazione di principi e l'istituzione di sistemi, che la forza delle armi non sarà usata, salvo che nell'interesse comune. (Art.2)

(ECHR)

In ECHR, prohibition is commonly conveyed by the structure *No / no one...shall be+* past participle. Particularly, a positive obligation in the main sentence (Everyone's right shall be protected by law...) is followed by the prohibitive sentence (No one shall be deprived of his life intentionally...). This obligation does not only convey a directory meaning 'requiring a certain course to be taken but imposing no sanction for breach' (Butt and Castle 2001: 150), but 'It is also mandatory in effect because of the implicit sanctions imposed on the State for failure to comply with the rule' (Tessuto 2005: 304). The Italian modal auxiliary verb *potere* plus negation has been employed in the Italian version, thus confirming a strong prohibitive value.

(9)

(EN) No one shall be held in slavery[...], No one shall be required to perform [...] No restrictions shall be placed on the exercise

(IT) Nessuno può essere tenuto in condizione di schiavitù [...] Nessuno può essere costretto a compiere [...] L'esercizio di questi diritti non può costituire oggetto di altre restrizioni [...]

(The UN Charter)

It is worth noting that **SHOULD** occurs in the UN Charter while it does not occur in ECHR.

The occurrences of **SHOULD** in prescriptive texts are limited (Williams 2007), over two per cent of all finite verbal constructions. In the UN Charter it occurs five times and we can notice these particular expressions and their Italian translations:

(10)

(EN) The Security Council should take into consideration any procedures [...] (Article 2)

(IT) Il Consiglio di Sicurezza deve prendere in considerazione le procedure [...] (Art.2)

(11)

(EN) Should the Parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that article [...] (Article 37)

(IT) **Se** le parti di una controversia della natura indicata nell'articolo 33 non riescono a regolarla con i mezzi indicati in tale articolo [...] (Art.37)

There are cases in which **SHOULD** seems the most appropriate modal form used in prescriptive texts as in international conventions which are signed by almost all countries belonging to the Organization and therefore it needs to be broad enough to cover an almost infinite range of situations (Williams 2007: 129). It is rarely used in statute law but it may be found in codes and regulations and in few texts it would seem to be little more than a variant of **SHALL** as in the UN documents.

In (10) **SHOULD** is translated into Italian with the prescriptive and

performative present simple *deve* but in the English version it does not occur to express this value. In (11) SHOULD expresses doubts about the possibility that the action will take place; in the Italian version the hypothetical meaning is provided by the particle *Se* while the choice of the verb and tense denotes an implied obligation.

4. Concluding Remarks

The results of the investigation of the UN Charter reveals that prescriptive texts use modality to raise expectations in terms of future behaviour. In the Italian translation different tenses and impersonal and agentless passive voice are employed. The deontic value of SHALL in the English version of the UN Charter is imprecise and ambiguous if compared with its Italian translation. The linguistic analysis also shows that an equivalence or a functional translation is not respected in the UN Charter maybe due to a difficulty of interpretation of their meaning and value and where an ambiguous use of English central modals prevails. The linguistic analysis seems to confirm the ambiguity of English central modals and it might be explained as a political and diplomatic strategy taking into account the genre of the document.

In ECHR the Italian translation seems to disambiguate the semantic values conveyed by the source text, since stated patterns concerning Italian legal discourse have been adopted. Avoidance of ambiguity seems to be consistent with the policy of the Council of Europe, whose 'social actors' are '[...] democratic European States committed to basic common values, human rights and the rule of law. The institution was founded on these issues and they are still the Council's main objectives' (Garre 1999: 18).

* Although this study has been conceived together and section 1 is co-authored, Germana D'Acquisto is responsible for the linguistic analysis and for the overview on genre of the UN Charter in sections 2 and 3. Stefania D'Avanzo is responsible for the linguistic analysis and for the overview on genre of the ECHR in sections 2 and 3.

¹ <http://www.un.org/aboutun/charter/>.

² <http://conventions.coe.int/Treaty/ita/Treaties/html/005.htm> .

³ See Legge 17 agosto 1957n. 848/Suppl. Ord. G.U. n. 238 del 25 settembre 1957.

⁴ See also Ballarino (1988).

⁵ See also Ballarino (1988) and Conforti (1988).

⁶ According to Searle (1976) we can distinguish between two different kinds of Act: directives and commissives. With the former the obligation is issued by one party over the other while in the later obligation is issued by a party committing him/herself.

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