

DEMYSTIFYING TREATY INTERPRETATION

Demystifying Treaty Interpretation doesn't just tell you how treaties are commonly interpreted. It helps you understand the process of treaty interpretation and its outcomes. The idea that rules of treaty interpretation can guide us to the meaning of treaty provisions, in a simple and straightforward manner, is a myth to be dispelled. This book aims to capture some of the complex and nuanced processes involved in treaty interpretation. It spurs further reflection about how interpretation takes place against the background of concepts, categories, and insights from other disciplines. A useful tool for scholars, practitioners, and researchers engaging with treaty interpretation at all levels, the book aims to enhance the reader's knowledge and mastery of the interpretive process in all its elements, with a view to making them more skilled and effective players in the game of interpretation.

ANDREA BIANCHI is Professor of International Law at the Geneva Graduate Institute. His areas of interest include interpretation, international law theories, the production of knowledge, and the invisible structures and the unsaid of international law. He is the author of *International Law Theories: An Inquiry into Different Ways of Thinking* (2016) and the co-editor of *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (with Moshe Hirsch, 2021); *Interpretation in International Law* (with Dan Peat and Matt Windsor, 2015); and *Transparency in International Law* (with Anne Peters, 2013).

FUAD ZARBIYEV is Professor of International Law at the Geneva Graduate Institute. His areas of interest include international adjudication, the concept of authority, critical theory and sociological approaches to international law.

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DEMYSTIFYING TREATY INTERPRETATION

ANDREA BIANCHI

Geneva Graduate Institute

FUAD ZARBIYEV

Geneva Graduate Institute



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Andrea Bianchi, Fuad Zarbiyev
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477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

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PREFACE

This is not a book that teaches you how to interpret treaties. Instead, it is a book that will help you to better understand what it is that you do when you interpret a treaty. Treaty interpretation, contrary to common wisdom in international law scholarship, is not only a matter of knowing the rules of interpretation codified in the Vienna Convention on the Law of Treaties (VCLT) and applying them skilfully to the treaty provision at hand. Interpretation is first and foremost a mental as well as a practical process, where many factors play out to determine the outcome. To believe that the correct legal interpretation can be achieved by diligently applying the rules of treaty interpretation is tantamount to believing that Father Christmas, still domiciled at the North Pole, delivers the gifts you requested in a reindeer-drawn carriage floating in space and travelling at the speed of light. If this is a fantastic belief to entertain as a child – and possibly even a little longer – it would be curious for a grown-up to stick to the illusion that a mythical figure is in charge of fulfilling his or her whims and wishes on one particular night of the year. Likewise, it would be odd for someone who knows what the law is and how it works to believe that the meaning of treaty provisions can be found by the correct application of the rules of interpretation. There is much more to the interpretive process than meets the eye. In other words, the simple representation we tend to adhere to when speaking about treaty interpretation hardly reflects the complexity of the process.

As we set out on this project, our main objective was not to produce the umpteenth book on treaty interpretation, illustrating how the rules of treaty interpretation work and how they are applied by international courts and tribunals in their case law. In fact, there is no dearth of scholarly contributions on treaty interpretation, ranging from monographs and edited volumes to law review articles and blog posts that deal with the topic. Paraphrasing the American comedian Fred Allen, one could ask why a reasonable person would take a year or two to write a book on treaty interpretation when they can easily buy one for a few dollars.

The short answer is that most books on treaty interpretation are primarily – if not exclusively – taken up with the study of the rules and techniques of treaty interpretation, showing how these can be used to identify the correct interpretation of treaty provisions. This is not a straw man of sorts, created for the purpose of fostering a self-serving alternative vision of treaty interpretation. Instead, we have sought to emphasise the prevalent professional attitudes and reflexes that are assumed yet not fully acknowledged by members of the profession, but that still represent the most common approach to interpretive issues in treaty law. To take issue with the rule-based approach to treaty interpretation does not entail a commitment to relativism nor nihilism. Least of all does it imply that ‘anything goes’. In fact, one of our main points in this book is that treaty interpretation is a constrained activity in which what one can plausibly say is determined by the extent to which the argument conforms with the ‘grammar’ of treaty interpretation.

What we advocate is not to set aside the normative project represented by the VCLT. This remains of fundamental importance to international law and continues to guarantee a certain degree of stability and consistency. What needs to be called into question is the unwavering faith in a system that purports to allow international lawyers to identify the correct interpretation of a treaty provision by the mechanical application of the rules of interpretation. The activity of treaty interpretation is a much more complex and nuanced process than the traditional representation that international lawyers adopt. This book aims to capture some of the fundamental traits of these processes and spur further reflection about the modalities by which treaty interpretation takes place. It does so with a markedly heuristic approach. The reader will be disappointed if they were expecting rigorous scientific demonstrations of logically impeccable processes. We rather encourage the reader to consider critically what is usually taken for granted or what goes without saying in the profession. This is not tantamount to neglecting the role of rules and techniques of interpretation. It is just an invitation to frame them against the wider background of the interpretive process, which almost always goes beyond the narrow boundaries of legal rules.

What might seem peculiar to the reader, and where the novelty of our approach lies, is the book’s engagement with traditional issues of treaty interpretation through materials that are often borrowed from other disciplines. Concepts, categories, and insights imported into our reflections on treaty interpretation from other branches of knowledge and popular culture have a significant role to play. They are meant to help us understand better the legal questions we tackle and the activities we undertake

when we engage in legal interpretation, and potentially provide a better framing for the type of reasoning we want to showcase. Admittedly, this is unusual in legal scholarship, where standing and authority are only recognized or attributed to whatever can be labelled as ‘legal’. The point is an important epistemological one, as it bears on the questions of what the boundaries of the ‘legal’ are, and of who draws such boundaries. However important, those issues are not really tackled head on in this book. We have both dealt with them in other writings and in other contexts. Very pragmatically for this particular project, we felt that we should draw from any source whatever insight it could shed light on or help us understand better issues of treaty interpretation. This syncretistic approach enabled us to feel liberated from the shackles of traditional disciplinary thinking and did not detract from the exercise of interpreting legal materials. As Renoir’s painting chosen for the book cover suggests, readers are encouraged to experience an intellectual swing, safely swaying back and forth, with the swing securely fixed to its hinges.

In fact, this is not a book of legal sociology, history, or philosophy, let alone literary criticism. It is a book written by international lawyers for international lawyers about a traditional international law topic. What is different is the way in which we speak about it. The point of speaking in a different voice or with a different accent is manifold. On the one hand, it is meant to train the mind to hear and relate to other voices and intonations, possibly in a more inclusive way. On the other hand, to speak differently could pave the way for thinking differently, for abandoning the false necessities of dogma and imparted wisdom, and, hopefully, for looking beyond what we are expected to believe. The goal remains the same: to understand and account for what we as international lawyers do when we engage in the activity of treaty interpretation.

While we hope that the reader well versed in theory could find its content interesting and worthy of their time, it should be clear that the book is primarily designed to reach out to scholars, practitioners, and other people engaging with treaty interpretation at all levels. The book is meant to enhance the reader’s knowledge and mastery of the interpretive process in all its elements, with a view to making them more skilled players in the game of interpretation, by helping them see relevant elements and/or connections that someone who sticks to the traditional rule-based approach to treaty interpretation would not even be aware of. The practical utility of learning more about the activity of treaty interpretation so as to become a better practitioner should also provide an incentive to read for all those who might look at this exercise with scepticism.

We sincerely hope that the reaction academics sometimes have when confronted with something new that does not quite conform to their preconceptions will be set aside. According to Sloman and Fernbach, in such cases academics ‘first dismiss [the new idea], then reject it, and finally declare it obvious’.¹ Rather than meeting the fate of many who have undertaken similar exercises and who have been the recipient of the tripartite reaction just described, we would hope that the reader will engage with the insights we foreground in the book. Finola O’Sullivan, the former commissioning editor at Cambridge University Press, to whom we owe the opportunity to publish this book, presumably worried by the unorthodox character of our proposal, asked us whether the book was likely to be read by a Foreign and Commonwealth Office legal adviser.² Our response half-jokingly was that we could not guarantee that, but it was our hope that the person in question, while denying reading the book in public, might keep it on their bedside table to read at night and perhaps would seriously consider applying some of its insights the next day at work.

What we actually do in the book could perhaps be better grasped by resorting to the metaphor of Heidegger’s hammer, slightly tweaked to accommodate our needs. It may be recalled that Heidegger describes the ‘being’ of the hammer residing in its use by a man as a tool. In describing the hammer as ‘ready at hand’, Heidegger identifies the utility and essence of the instrument handled by a man as one and the same thing. It is only when the hammer breaks or when it can no longer be found that the man thinks of the hammer differently, no longer as an extension of his body but rather as a tool in what Heidegger terms as a ‘present at hand’ position.³ Of course – metaphorically speaking – our aim is not to demonstrate the essence of the hammer, but rather show how one can look differently at the activity of hammering and at the instrument by which the activity is carried out, which usually does not attract any particular attention. Consideration of the hammer as such might make us more aware of the act of hammering and of our other instruments (the nails for example), as well as of the surroundings of our activity. It can make us aware of the task ahead of us when we are given the hammer and we weigh it in our

¹ Steven Sloman and Philip Fernbach, *The Knowledge Illusion: The Myth of Individual Thought and the Power of Collective Wisdom* (Pan Books, 2017), 255, quoted in Andrea Hamann, ‘The French Tradition in International Law’, in Peter Hilpold (ed.), *European International Law Traditions* (Springer, 2021), 138 ff, 166.

² Since 2020 the FCDO (Foreign, Commonwealth and Development Office).

³ Martin Heidegger, *Being and Time* (translated by John Macquarrie and Richard Robinson; Harper & Row, 1962), 412.

hands. It can cause us to think of whether the angle needs to be adjusted, or the frequency of the blows intensified, whether the nail we are using is apt to the task, or whether other sizes or materials might be preferable. Rather than hammering away, we would perform the activity of hammering more knowingly, more skilfully, and arguably more effectively.

Demystifying Treaty Interpretation aims at making a difficult subject clearer and easier to understand. The idea that rules of treaty interpretation can guide us to the meaning of treaty provisions, in a simple and straightforward manner, is nothing other than a myth to be dispelled and a ‘delusion to be exposed’.⁴ It is not by hiding the complexities of the interpretive process, as traditional rule-based approaches do, that its nature and functioning can be better grasped. Treaty interpretation is a multi-layered phenomenon and a multifaceted activity. Like Roland Barthes’ ‘mythologist’, our task has been that of recognizing ‘myth’ in the prevailing doctrinal reconstructions of treaty interpretation, breaking down its components to expose them and to examine them critically.⁵

We have come to this project not by deciding rationally one day that we would undertake it. We started talking one day and we are still in the conversation. Meanwhile, several years have gone by in which we had the opportunity to test the viability of our approach by teaching a course on treaty interpretation at the Geneva Graduate Institute. We are grateful to all the students who attended it for the contribution they have made to our understanding of treaty interpretation, and for the interest with which they have engaged with our discussions in the classroom. Many of these students, a considerable number of whom now work in practice, have reached out to tell us how important the course was for them in understanding what it is that we do when we engage in treaty interpretation. This is probably the main reason that prompted us to write the book. We hope that the reader may find it useful to explore some of the multifarious facets of the process of treaty interpretation. We also hope that the attempt to explore other branches of knowledge to understand our own field will not be discarded as an exercise outside the boundaries of the discipline, but will rather be enjoyed as a way of enriching the understanding of our own work.

⁴ For this definition of myth see Jonathan Culler, *Barthes: A Very Short Introduction* (Oxford University Press, 2002), 23.

⁵ Roland Barthes, *Mythologies* (translated by Annette Lavers; Farrar, Straus & Giroux, 1991).

ABBREVIATIONS

BIT	Bilateral investment treaty
DRC	Democratic Republic of the Congo
DSB	Dispute Settlement Body
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for the Settlement of International Disputes
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDI	<i>Institut de Droit International</i> (International Law Institute)
ILC	International Law Commission
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
PCIJ	Permanent Court of International Justice
RC	Recueil des cours de l'Académie de droit international de La Haye (Collected Courses of the Hague Academy of International Law)
SCM	Subsidies and Countervailing Measures
TBT	Technical Barriers to Trade
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization