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Demystifying Treaty Interpretation (Cambridge, 2024) by Andrea Bianchi and Fuad Zarbiyev

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1. In his seminal work *The Law of Treaties* (1961), Arnold McNair observed that "[t]here is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation." Prior to the finalization of this objective—namely, the drafting of Articles 31 to 33 of the Vienna Convention on the Law of Treaties—it was declared during the United Nations General Conference that the International Law Commission had achieved one of its most commendable results by resolving one of the most complex issues in the entire field of treaty law. This sentiment of accomplishment was echoed immediately after the Convention's ratification by a significant portion of the international legal community and has since been corroborated by both state practice and the jurisprudence of international courts and tribunals.

It is thus unsurprising that the issue of interpretation has garnered substantial scholarly attention. Nevertheless, the interpretation of international law has not attracted sustained theoretical engagement from legal philosophers. In a certain sense, while theories of interpretation are well developed in other domains, a coherent theory specific to the interpretation of international law remains underdeveloped. It is more common for international lawyers themselves to raise theoretical concerns pertaining to the general theory of international law than for philosophers of law to do so.

This discrepancy is mirrored in interpretive theory more broadly. As noted by the renowned Italian legal philosopher Francesco Viola, "The interpretation of international law is a practice that struggles to become a theory, whereas that of national law is a theory that often masks quite different practices." (F. Viola, *Apporti della pratica interpretativa del diritto internazionale alla teoria generale dell'interpretazione giuridica*, in "Ragion Pratica," 17, 2001, pp. 53-71.)

It is also important to emphasize that, although the literature addressing the interpretive criteria codified in the relevant provisions of the Vienna Convention on the Law of Treaties (VCLT) is extensive, a more critical approach to the often-unexamined acceptance of this codification appears to have been largely absent. Indeed, the majority of contributions by international legal scholars exhibit a rather uncritical stance. The so-called Vienna rules are frequently treated as a kind of mantra—recited by rote, without genuine critical engagement.

In this context, the recent publication *Demystifying Treaty Interpretation* (Cambridge, 2024) by Andrea Bianchi and Fuad Zarbiyev constitutes a significant intervention. Its foremost merit within the existing literature lies in its distinctly critical approach to the subject. The authors encourage interpreters to scrutinize their own assumptions, biases, and professional positions. By making such factors explicit, interpreters are invited to approach their task with greater transparency and methodological awareness.

A second, and arguably more profound, contribution of the volume—particularly from the standpoint of legal theory—is its genuinely jurisprudential orientation. Drawing on

the broader corpus of legal interpretive theory, the book interrogates the applicability and sufficiency of such theoretical frameworks within the classical domain of treaty interpretation. In doing so, it challenges the foundational premises of legal positivism and formalism. The authors question whether interpretation can genuinely function as an objective, rule-governed process. By incorporating sociological and cultural perspectives, they foreground the influence of interpretive communities, power dynamics, and social practices—thus moving beyond a purely doctrinal analysis. This approach disrupts conventional assumptions and offers a more nuanced and contextually grounded understanding of how treaties acquire meaning within the international legal order.

2. In alignment with one of the most established trajectories in recent jurisprudential thought on legal interpretation, Bianchi and Zarbiyev's work revisits the metaphor of the *game*, inspired by the philosophical legacy of Ludwig Wittgenstein. Games, much like legal interpretation, involve players, rules of engagement, and strategies, all operating within socio-historical frameworks that mirror cultural values and social practices. This metaphor serves to reinvigorate a field that, in the authors' view, "has too often become bogged down in formalist interpretive technique."

As is well known, the game metaphor in legal interpretive theory recurs across a range of philosophical-legal traditions, particularly within legal positivism and hermeneutic theories. It is employed to conceptualize the functioning of law and the role of the interpreter in the application of legal norms. One of the foundational approaches to the game metaphor in legal theory derives from Wittgenstein's notion of the *language-game* (*Sprachspiel*), wherein the meaning of words emerges from their use within a specific context—analogous to the way in which the rules of a game give sense to the moves that can be made. When applied to law, this suggests that legal interpretation is governed by linguistic and social rules that structure normative discourse.

This metaphor was further developed by H.L.A. Hart, who proposed that law can be understood as a system governed by primary rules (which impose duties) and secondary rules (which specify how primary rules are created, modified, or enforced). In this framework, legal interpretation resembles a formal game, wherein adherence to rules is fundamental, though certain areas—particularly in the penumbra of rules—allow for interpretive discretion.

By contrast, in hermeneutic perspectives, legal interpretation is akin to a game in which the meaning of law is not fixed but emerges from the interaction between the legal text and the interpreter. Here, the key concept is the "fusion of horizons," wherein meaning is generated through a dialogical engagement between the historical context of the norm and the contemporary context of its interpretation. The game metaphor, therefore, serves to illustrate the multifaceted nature of legal interpretation: from the rigidity of rules emphasized by Hart to the dynamic and interactive processes highlighted by Gadamer.

Depending on the theoretical framework adopted by legal scholars, the interpretation of the game metaphor varies; yet interpretation consistently emerges as a form of game governed by fixed rules. For Bianchi and Zarbiyev, the game metaphor proves especially fitting in the context of international law, where interpretive processes are uniquely complex due to the non-hierarchical structure of legal sources, the indeterminacy of many norms, and the presence of competing interests among states and other

international actors. In this light, the authors deploy the game metaphor not merely as an illustrative device but as a structuring principle—one that offers conceptual clarity and interpretive traction in a legal domain characterized by fluidity and contestation. Consequently, this application of the metaphor to the realm of international law is particularly effective in highlighting both the formal and dynamic dimensions of treaty interpretation.

What marks a distinctive contribution of *Demystifying Treaty Interpretation*—especially in comparison with prior invocations of the game metaphor—is the authors' deliberate move to *de-emphasize* the centrality of fixed rules in the interpretive "game," particularly the codified rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties (VCLT): "one could say that the rules of treaty interpretation do not define the nature of the activity of treaty interpretation, and that these rules do not explain what it is to interpret a treaty. If to interpret a treaty provision or any other legal text implies attributing a meaning to it, this meaning can only be inferred or derived by a social practice, and no social practice is captured solely by rules" (p. 13). The central thesis advanced by Bianchi and Zarbiyev is that these rules are far from exhaustive and, in fact, leave substantial room for strategic maneuvering. To overlook this element of strategic interpretation, the authors argue, is to adopt an entirely uncritical stance toward the ways in which actors—judges, lawyers, states, and other stakeholders—engage with and deploy the rules themselves.

Rather than accepting a mantra-like recitation of the VCLT provisions as sufficient for understanding interpretive practice in international law, the authors call for greater attentiveness to the broader dimensions of interpretation. They propose a more comprehensive and reflective approach—one that interrogates not only the letter of the VCLT but also its function, assumptions, and limitations. Focusing exclusively on the formal rules, as much of the literature has done, obscures the fuller picture. It is necessary to offer a critical reexamination of traditional approaches to treaty interpretation in international law, challenging the notion that it is merely a technical exercise governed by formal rules. The authors argue that the evolution of interpretive methods is driven by contingent events, competing perspectives, and power struggles, rather than following a straightforward or progressive trajectory. More importantly, the book invites international lawyers to acknowledge the reflexive and culturally embedded nature of their interpretive practices: international lawyers can no longer delude themselves that the correct application of their VCLT rules of interpretation will lead to the true meaning of treaty terms and provisions (p.9). This approach stands in stark contrast to traditional methods that prioritize textualism, intentionalism, or teleological reasoning within narrowly defined legal frameworks.

3. Demystifying the interpretative process involves adopting the concept of "law as an institutionalized social practice," typical of post-positivist hermeneutic tradition. Indeed, this philosophical approach to law demystifies the idea of law as merely a system of formal rules, embracing instead the view that law is something that lives within society, realized through the daily practices of individuals and institutions. Law develops within shared social contexts, following recognized rules and with a certain level of organization and formalization. In this perspective, legal interpretation plays a central role:

participants in the process actively contribute to the creation and meaning of the law. It is not just about applying laws but about understanding and reinterpreting them in light of values, social contexts, and concrete needs. In this view, interpretive communities play a fundamental role in the concept of law as a social practice. These communities share practices, language, criteria, and values through which they interpret and apply the law. Interpretations emerge precisely within shared contexts, "they are always informed and shaped by the specific context in which the interpreters find themselves" (p.33). In the hermeneutic theory of law, interpreting law is not an arbitrary subjective act; it occurs within a shared framework where there are: criteria of validity, recognized argumentative forms, precedents, and legal traditions. Similarly, Bianchi and Zarbiyev argue, demystifying interpretation does not mean adopting an anti-formalist subjectivist arbitrary stance on legal interpretation.

Bianchi and Zarbiyev critique the lack of attention to another classical hermeneutic concept, the one of interpretive communities: groups of practitioners who share norms about valid reasoning and plausible outcomes. They correctly argue that these communities exert significant influence on interpretation, constraining what is considered legitimate beyond formal rules. Rather than seeing interpretation as determined solely by rules, the book presents it as shaped by interpretive communities with shared understandings and practices. Drawing on Stanley Fish's literary theory, the authors argue that interpretation functions as a community-driven process governed by implicit norms. The book identifies multiple interpretive communities in international law. Different branches (such as human rights, trade, investment) and institutions (such as the European Court of Human Rights, the International Court of Justice, WTO appellate body) interpret treaties differently due to their distinct legal traditions and mandates.

In this regard, Bianchi and Zarbiyev also surpass certain positions in legal hermeneutic theory, such as those put forward by Francesco Viola in Italy. Viola has always maintained that the most significant difference between interpretation in international law and that in domestic law is the absence in the former of a common culture that justifies the pre-understanding necessary for any interpretative activity.

The idea that there cannot be an interpretive community at the international level—understood in the hermeneutic sense, sharing practices, language, criteria, and values through which they interpret and apply law—has prevented legal hermeneutic theory from recognizing the contribution of international law's interpretive practices to the development of general legal interpretive theory. In this sense, Bianchi and Zarbiyev's book represents a step forward in understanding what such a contribution might be.

4. This theoretical advancement, along with its significant innovations, calls for further reflection.

The first reflection. Regarding the pluralism of interpretive communities (e.g., human rights, trade, etc.), the book seems to take for granted that each of these fields creates its own interpretive community. However, it does not question, for instance, unlike the more recent theory of interlegality by Klabbers and Palombella (1. Klabbers J, Palombella G, eds. *The Challenge of Inter-Legality*. Cambridge University Press, 2019), whether the tension between the plurality of such communities creates conflict or enriches the interpretive practice. Moreover, it assumes something that hermeneutics itself denies,

namely that in each of these international interpretive communities, there is a common shared culture that enables pre-understanding, or interpretations that emerge within shared contexts. Pre-understandings are not purely subjective, because they develop within a shared culture—formed by the language we use, legal concepts (e.g., "law," "justice," "equality"), dominant moral and political values, and the historical experiences of society. Pre-understanding is essentially a pre-existing interpretive baggage, i.e., the collective heritage of meanings that constitute a common culture of shared meanings, norms, values, symbols, and practices within a community. It is the cultural horizon shared within which individual pre-understandings form. However, the authors do not address whether this shared cultural horizon exists across the various fields identified by them, each of which would constitute an interpretive community.

In Chapter 2, "The Interpreter's Self," it appears that they do not fully question whether there is a domestic analogy that might prevent them from examining whether it is precisely the absence of one or more interpretive communities, as understood by legal hermeneutics, that has hindered a hermeneutic approach to the interpretation of international law. In fact, it remains uncertain whether the international community can form an interpretive community similar to those within nation-states.

The second reflection. Raising this issue with the authors brings us to the second reflection on the book: the role played by interpretive rules in the game of legal interpretation. While it is true that the authors rightly criticize the excessive importance that has traditionally been placed on interpretive rules—that is, they criticize the view of interpretation as mere rule application—it is also important to consider whether the role of rules in providing a structured framework for interpretation is being underestimated. It is true that treating the VCLT as a landmark oversimplifies the inherently complex nature of interpretation, but the opposite is also true. Underestimating the role of rules too much overlooks the fact that participants in the interpretive process rely on these rules for two main reasons: first, to ensure consistency and credibility in judicial decisions, thereby enhancing trust in international institutions; and second, to be recognized as legitimate participants in the game.

Not only that but given the centrality of the concept of unity as a central archetype in Western thought—as the authors correctly highlight, from its religious and metaphysical origins to its contemporary manifestations in international legal theory—the process of codifying rules on law plays a role in restoring unity to the fragmentation of international law. The same persistent concern with fragmentation in international law demonstrates the enduring power of the unity archetype (pp. 170 ss.). The rules themselves appear as "the guardians of unity," a concept the authors discuss but with reference to how Dupuy uses it to highlight the role international lawyers, scholars, and judges should responsibly play.

That it is a myth that "rules of treaty interpretation lead to unity, consistency, and certainty in international law" can also be agreed upon, as can the idea that these rules can guide us to the meaning of treaty provisions in a simple and straightforward manner and it is also time to question the dominance of rule-based paradigms, particularly the VCLT's codified rules. However, the authors do not fully address why, if the goal, as they say, is to persuade others that their interpretation is correct, participants feel the need to bind themselves to interpretive rules.

While it is true that it is time to criticize the assumption that correct interpretation follows automatically from applying these rules, we should not throw out the baby with the bathwater. By connecting the VCLT to the Eiffel Tower, a universally recognized reference point in legal interpretation—since, in fact, lawyers orient themselves around it—the authors are admitting the legitimizing role that rules play for participants in the game. It's as if, even though the rules don't offer one single correct interpretation, referring to them legitimizes participants as part of the game. In this sense, understanding the rules occurs by viewing them as tools for *ex post* control of the justification of judicial decisions. Interpretive rules would then serve as instruments for evaluating and checking the "correctness" of decisions after they have been made and of course not, as the authors rightly affirm, "rules alone cannot ensure the predictability of meaning" (p.15). Moreover, since the authors rightly acknowledge that interpretation also depends on the authority interpreting and its power, such power is more readily acknowledged if the authority refers to interpretive rules, understood as shared legal conventions.

In this sense, rules could be seen both as formal interpretive rules—which alone do not explain the interpretive practice—and as shared social conventions for the role they have played since their codification. International lawyers, in fact, typically think about interpretation with reference to the rules in the VCLT. It's as if the rules also represent a socially recognized convention that legitimizes those who use them as participants in the game.

The same authors argue that the standards set by the Vienna Convention on the Law of Treaties serve to rationally justify particular interpretive outcomes and to demonstrate professional competence. At the same time, they rightly acknowledge that these standards accommodate the diverse interpretive needs of individual practitioners. The significance of the VCLT, which is difficult to dispute, lies in its role as a shared professional touchstone that sustains the *appearance* of a methodological consensus. It is in this light that the authors' conclusion becomes comprehensible: the dual character of the VCLT—both technical and conventional—enables it to retain its central position within international legal culture, notwithstanding ongoing doubts about the substantive guidance its provisions may offer.

In other words, irrespective of the actual normative influence these rules exert in attributing meaning to treaty provisions, they function as a unifying reference point. While the rules may not always direct interpretive practice in a concrete sense, they nonetheless constitute a socially recognized grammar that bolsters the coherence and legitimacy of the international legal system.

Because the rules of interpretation accommodate the diverse needs of individual practitioners, the authors dedicate particular attention to the identity of those who interpret. Quoting Walter Benn Michaels, the authors state that '[t]here are no text-derived canons of interpretation which prevent the self from doing what it wants, there is only our convictions that what the self wants has already been constituted by canons of interpretation" (p. 43). In their opinion, to disregard this dimension is to risk overlooking the fundamentally social nature of interpretation, especially when the interests pursued by interpreters—and the perspectives they marginalize—are ignored. The influence of power, authority, and political inclination in shaping treaty meaning

cannot be underestimated. Treaty interpretation is not a neutral exercise; it is invariably shaped by the political assumptions and preferences of interpreters as well as the power relations in which they operate.

Although treaty interpretation may seem egalitarian in theory—granting interpretive participation to all relevant stakeholders—in practice, it is marked by hierarchy. Not all actors have equal standing; disparities in power substantially affect which interpretations ultimately prevail. The community engaged in interpretive practice includes states, international organizations, international and domestic courts, non-governmental organizations, professional associations, legal practitioners, academics, and those who operate behind the scenes in support of these actors. Bianchi and Zarbiev underscore how interpretive outcomes are shaped by dynamics of power and authority. Courts, states, and international organizations frequently wield disproportionate influence in determining the meaning of treaties. This perspective presents treaty interpretation as a contested arena where political interests and institutional hierarchies play a decisive role.

The authors further observe that states have increasingly ceded interpretive authority to international courts and tribunals—most notably, the International Court of Justice (ICJ), which now enjoys exceptional legitimacy. Traditionally, international law rested on the presumption that states exercised primary control over the meaning of their treaties. However, interpretive authority has shifted away from states. It is possible to argue that this development can be understood as a real consequence of the codification of interpretive rules itself. The same authors agree that those "rules are meant to provide certainty and stability in the otherwise unruly world of unilateral interpretations of international law by states "(p. 6). The VCLT articles 31, 32 and 33 aimed, at least in part, at constraining self-serving interpretations by states. Indeed, these rules were arguably conceived with judges, rather than states, as their primary audience.

As the authors themselves concede, in the interpretive 'game', judicial decisions are regarded as the most authoritative moves, and the judgments of the ICJ are often approached with near-reverence. As Jan Klabbers aptly noted, the idea that one can engage in conceptual legal analysis solely through the examination of judicial decisions remains "one of the great mysteries of inter- national legal methodology" (p. 256). Yet, according to Bianchi and Zarbiev, if states are indeed losing interpretive authority to international courts, tribunals, and expert bodies, they may themselves be complicit in this transfer of power (p. 251). As the authors argue, as a consequence of its social investiture as the supreme court of public international law, the ICJ itself claims deference from the specialized courts and tribunals—and it appears that its claim in this respect is well understood and accepted.

The book critically engages with various interpretive methods traditionally encompassed within the rules of treaty interpretation—such as textualism, intentionalism, purposive interpretation, systemic integration, and the use of supplementary means (chapters 4, 5, 6, 7 and 8). Rather than endorsing these methods uncritically, the authors challenge the underlying assumption that treaties possess fixed meanings grounded in their original text or the intentions of the drafters. In contrast, Bianchi and Zarbiev highlight the absence of a rule of intertemporal law in the VCLT and explore the ways in which treaties

may evolve over time, particularly through subsequent practice or the adoption of "living instrument" approaches that reflect evolving societal values and shifting legal contexts.
The book confronts the question of how the passage of time affects treaty interpretation, asking whether treaties are—or ought to be—immune to temporal change, and under what conditions evolutionary interpretation becomes appropriate. As the authors pointedly observe, "practice will always find a way to get to the law—over time" (p.232). While the codification of interpretive rules aims to establish legal certainty through written language, it cannot fully insulate legal meaning from the passage of time. This observation raises a deeper philosophical inquiry into how meaning endures and transforms in order for treaties to remain relevant in changing circumstances. In emphasizing this theme, the authors affirm the dynamic character of treaties as evolving, living instruments, challenging the notion of interpretive immutability and highlighting the centrality of temporality in legal interpretation.
Ultimately, the book, in its legitimate effort to demystify the rules of interpretation, suggests that what truly requires demystification is the narrative constructed around those rules. Rather than simply challenging the rules themselves, Bianchi and Zarbiev offer a nuanced understanding of how legal meaning emerges from social practices rather than from the rigid application of interpretive norms. In this sense, they invite us not merely to revise our methods of treaty interpretation, but to fundamentally reshape our conceptual understanding of what interpretation entails. They urge us to acknowledge that interpretation—even at the international level, where the codification of interpretive rules has been more successful than in many domestic legal systems—remains a dynamic interplay between legal norms, social practices, and power relations.
As one might say in Italian, *È morto il re, viva il re*: the authority of the codified rules may be questioned, but their symbolic and structural centrality endures—redefined, yet still sovereign.