



**British Institute of
International and
Comparative Law**

Interpretation in International Law: The Object, the Players, the Rules and the Strategies

Temple Garden Seminar Series in International Adjudication

Event Report

Date: 14 May 2015, 17:30-19:00

Venue: British Institute of International and Comparative Law
Charles Clore House, 17 Russell Square, London WC1B 5JP

Speakers:

- Professor Andrea Bianchi, Graduate Institute of International and Development Studies, Geneva
- Professor David D. Caron, The Dickson Poon School of Law, King's College London
- Shaheed Fatima, Blackstone Chambers
- Professor Larissa van den Herik, Leiden Law School

Chair:

- Andrew Cayley CMG QC, Temple Garden Chambers



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On 14 May 2015, the British Institute of International and Comparative Law (BIICL) hosted an event entitled 'Interpretation in International Law: The Object, the Players, the Rules and the Strategies.' The event featured Professor Andrea Bianchi (Graduate Institute of International and Development Studies, Geneva), Dean and Professor David D. Caron (The Dickson Poon School of Law, King's College London), Professor Larisa van den Herik (Leiden Law School) and Shaheed Fatima (Blackstone Chambers) as panelists and Andrew Cayley CMG QC (Temple Garden Chambers) as chair.

Andrew Cayley QC opened the event by introducing the members of the panel and then gave the floor to Professor Bianchi.

Professor Bianchi commenced by introducing the cognitive process of interpretation and highlighted the importance of cognitive frames – through which human beings view and interpret everyday objects and ideas – and context as relevant factors in interpretation. In order to illustrate his argument he referred to the different uses of the principles of proportionality and fair and equitable treatment which are characterized according to the particular context in which they are invoked. Referring to the rules of interpretation Professor Bianchi underlined that legal scholarly discourse about interpretation is too focused on textual determinacy, reinforced by the emphasis on text in the rules of the Vienna Convention on the Law of Treaties (VCLT) and urged international lawyers to innovate and think about interpretation beyond its narrow and textual approach. Professor Bianchi went on by outlining the main thread of the discussion: the metaphor of the game. Interpretation in international law is like a game: it has an 'object' (to persuade a chosen audience that one's interpretation of the law is correct), rules (authoritative rules, sources, principles), various 'players' (everyone associated with international law, both lawyers and non-lawyers) and different strategies for 'winning'. This concept is also the central topic of the recent book edited by Professor Bianchi, Daniel Peat and Matthew Windsor. In conclusion Professor Bianchi stressed that interpretation is a serious game, and that the ultimate goal of the players is not to find some decisive truth but rather to persuade an audience that one's interpretation is preferable than that of the other players. In his final remarks he argued that the system of interpretation is a balancing act between freedom and constraint.

Professor David D. Caron carried on the discourse by making three comments on the book. First, he highlighted that there is a tension between acknowledging the game and accepting the fact that the text has countless possible meanings. He agreed with Professor Bianchi that countless possible meanings existed, in the sense of an infinitely small number of meanings, within bounded rationalities. But Professor Caron disagreed that an infinitely large number of meanings might exist: texts cannot say anything a player wants them to. Professor Caron's second remark



concerned the nature of the game with regard to courts and tribunals. He pointed out that there are several games going on simultaneously since players may have completely different motives and they might seek different audiences. To illustrate this, Professor Caron referred to Judge Cançado Trindade, who in his dissenting opinion in the *Jurisdictional Immunities* case did not address States, the dominant audience of the International Court of Justice (ICJ), but rather humanity and hence the specific audience of the human rights community. Professor Caron disagreed with Professor Bianchi's remark conferring fault to Trindade as 'losing' because he did not speak to the 'right' audience: according to Professor Caron, Judge Trindade won his game because he spoke to a community he is respected and influential in. He also highlighted that advocates have different motives and audiences as well. Their audience is really small (i.e. the arbitral panel involved) and their main motivation is to win a case, even if the strategy needed to win comes at the cost of institutional credibility or might render the games of interpretation nonsensical. In his final remark Professor Caron made comments in relation to the game of interpretation in deliberations. He distinguished between at least two types of arbitrators, those who act like advocates and try to convince the other members of the panel, and those who in their deliberations address not only the other panelists but a wider audience. Furthermore with regard to judges, he highlighted influencing factors such as the international character of most tribunals; the judges' disparate approach to words and concepts and their reputational motivation within a community they care about, which all might have an effect on strategies. Due to all these different factors judges are trying to find a common language, which leads to emphasize the rules of interpretation even more since that is the only thing they share and losing this, might turn them towards persuasion or dominance.

Professor van den Herik steered the debate into the realm of international criminal law and made three observations with regard to the players, the cards and the role of the ICC as a game-changer. Concerning the players she pointed out that international criminal law (ICL), due to its particular nature, is a body of law which is exclusively applied in the courtroom. Without a court, and outside the context of a criminal trial determining the guilt of a particular accused, ICL can be discussed or interpreted but cannot be properly applied. Therefore (international) criminal courts occupy a privileged position in the interpretative community. Or, to go one step further, it may be submitted that not all actors using ICL effectively belong to its interpretive community. When players other than criminal courts use the concept of genocide or crimes against humanity they are actually not interpreting or applying ICL because they do not attach criminal responsibility to a concrete person. Hence, concepts of ICL are being interpreted by coexisting interpretative communities for different purposes. Since ICL is a limited concept, its own interpretive community is equally limited. In terms of the cards and how they affect interpretation, Professor van den Herik discussed the principle of legality, a special rule in ICL, which originates



from domestic criminal law and is widely respected across international and domestic jurisdictions. She compared the approach of the International Criminal Tribunal of the former Yugoslavia (ICTY) with the ICC. In ICTY context, the legality principle was translated by the UN Secretary-General as an instruction to the ICTY to adhere to customary international law in interpreting its own jurisdiction and the meaning of crimes. The legality principle thus drove towards a law-ascertainment exercise and within this process the ICTY lent itself a great degree of judicial creativity. In contrast, the system established by the Rome Statute was treaty-based and in this setting the legality principle boiled down to an instruction of strict treaty interpretation. So the same principle informed different exercises at both courts. Nonetheless, and despite the legality principle being deeply engrained in the ICC Statute, the articulate and restraining wording of Article 21 of the ICC Statute has not drastically curtailed the approach of the judges in their interpretation. ICC practice shows both conservative as well as progressive interpretations. Hence, it cannot be said that the special rules of interpretation in ICL necessarily affect outcomes. Finally, Professor van den Herik argued that the ICC is a real game-changer since, through its institutional architecture, its universal nature, the complementarity principle and its permanence, it has fundamentally changed the landscape against which interpretation in ICL takes place and it has created a greater diversity of active players including States and domestic courts. Interestingly, however, this change has led to a paradox: although the rules of interpretation have formally been straightjacketed in the ICC context, the outcome of the overall game has become more complex and diffuse.

Lastly, Shaheed Fatima took the debate to a practical level by shedding light on the interpretation of international law by English courts. First, she examined the jurisdictional competence of English courts to interpret international law. In doing so she highlighted the dualist nature of the English legal system¹ which defines the constitutional competence of English courts and generally limits judicial interpretation and application of international treaties to those that have been incorporated into English law. Ms Fatima used this as an illustration of Professor Bianchi's argument concerning the deployment of strategies; i.e. one might regard the strategy pursued by English courts as being to adhere to the confines of their constitutional competence. She then proceeded to give recent examples of the interpretation of incorporated² treaties and, notwithstanding the constitutional orthodoxy, the interpretation of unincorporated treaties.³ She explained that despite the restraints of dualism there were ways in which unincorporated treaty

¹ Lord Hoffmann in *R v Lyons* [2003] 1 AC 976 citing Lord Oliver's speech in *JH Rayner (Mincing Lane) v DTI* [1990] 2 AC 418.

² *Trafigura Beheer v Navigazione Montanari* [2015] EWCA Civ 91; *Al-Malki v Reyes* [2015] EWCA Civ 32; *Benkharbouche v Embassy of Sudan* [2015] EWCA Civ 33.

³ *Assange v Swedish Prosecution Authority* [2012] 1 AC 471; *Al-Saadoon v SSD* [2015] EWHC 715 (Admin); *R Corner House research v Director of the SFO* [2009] 1 AC 756.



provisions could be, and were, invoked: for example they might be used for clarifying an unclear statutory provision (based on the common law presumption of compatibility) or to show the crystallization of a rule of customary international law. Ms Fatima also analysed the limits of the English courts' willingness to construe unincorporated treaty provisions by reference to a case involving an alleged error of law by an executive decision-maker.⁴ Secondly, she discussed the general approach of English courts to treaty interpretation and highlighted that they apply the VCLT principles (Articles 31-33) both in relation to incorporated and unincorporated treaties, despite the VCLT being unincorporated in the UK, by rationalizing that the key provisions reflect customary international law.⁵ In modern times, English common law canons of construction (cf. statute law, e.g. the Human Rights Act 1998) have not been applied to treaty interpretation.⁶ Lastly Ms Fatima presented two cases involving the application of Article 31 (3) (c) of the VCLT⁷ and concluded that it was too early to identify any discernible strategy in the way English courts approach these cases.

During the ensuing discussion one of the questions addressed the influence of plurilingual treaties on the game of interpretation. Professor Bianchi responded that such treaties are part of the game and perhaps evidence of the evolution occurred in the past decades. It was also raised whether the paradox in ICL can be explained by the clash of strategies among players. Professor van den Herik replied that with the introduction of new players the identity of ICL and therefore the game therein became more complex and she cannot discern one factor that would explain the entire setting. Another question was whether mastering the game implies the changing of the rules of the game. Members of the panel answered that the game is a dynamic process and that players can be part and parcel of change by being active in playing the game. Finally, the last question pondered whether there are differences in the interpretative exercises between legal systems with and without a system of precedent. While Professor Bianchi argued that different legal systems do not affect the game, Professor Caron and Ms. Fatima replied that precedent has an important role in the game especially in the practice of an advocate.

Report written by János György Drienyovszki and Martin Clark

⁴ *R (Corner House) v Director of the SFO* [2009] 1 AC 756.

⁵ *Mackline v Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0039 (TCC).

⁶ *Al-Malki v Reyes* [2015] EWCA Civ 32.

⁷ *JS v SSWP* [2015] 1 WLR 1449; *Serdar Mohammed v MoD* [2014] EWHC 1369 (QB).