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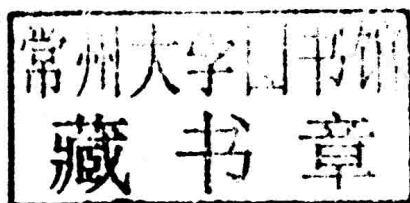
INTERPRETATION IN INTERNATIONAL LAW



EDITED BY
ANDREA BIANCHI
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Jacket image: Detail from 'Horses Running Endlessly' by Gabriel Orozco, 1995.
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INTERPRETATION IN INTERNATIONAL LAW

Foreword

Philip Allott has defined a treaty as a disagreement reduced to writing.¹ But some treaties reflect at least some measure of agreement some of the time, a point Allott himself does not deny. The task of the interpreter is to reflect that agreement in the case envisaged, but often it goes further: to resolve what may not have been agreed in a manner as far as possible consistent with the text and any underlying intent. For it may well not be the case that the disagreement which faces the interpreter was one the drafters envisaged. In such a case there is an irreducible element of originality in the act of interpretation. Always, the interpreter is taking a form of words and applying it to a given situation; sometimes she is doing so alone.

For reasons such as this, interpretation has been a perennial topic in international legal theory and practice. This collection of essays teeters intriguingly between interpretation in the way international lawyers normally think about it and interpretation as everything they think about. Legal scholarship has tended to tackle the issue of interpretation either from an abstract, quasi-philosophical perspective, or by focusing on the Vienna Convention on the Law of Treaties and its application. The attempt is made here to bring these divergent approaches into some better relationship with each other, while examining the VCLT rules and processes of interpretation in international law more generally. In their introductory chapter, Daniel Peat and Matthew Windsor (both advanced doctoral students at Cambridge) helpfully remind us that interpretation in international law is not an island, despite contemporary appeals to disciplinary autonomy.

The book is centred on the metaphor of the game. There are players, rules, and strategies, deployed with the object of victory. Bellicose the metaphor may sound, but it cannot be denied that, at least in the heat of battle, international lawyers think that their interpretations are right, and they play the game by trying to convince others of this. Moreover, the metaphor provides a more-or-less illuminating framework in which to situate the practice and process of interpretation. It helps reveal the contingency of current interpretive practices, and demonstrates a refusal to reify the status quo for its own sake. But I do not take the contributors to this volume to resile from the proposition that interpretation in international law is a game that works most of the time and is worth playing. After all, if there is nothing in interpretation beyond the preferences of the interpreter, then apparent agreement is simply a postponement of disagreement, at best a delegation to unascertained others.

There is much to commend here: the creativity on display, the eclectic range of topics canvassed, the way in which the volume brings together established and emerging scholars from a range of interpretive traditions. This thoughtful

¹ Philip Allott, 'The Concept of International Law' (1999) 10 EJIL 31, 43.

collection of essays is a valuable companion for those who face problems of interpretation in international law.

James Crawford
Whewell Professor of International Law
University of Cambridge
December 2014

Preface

The genesis of this collection of essays was a conference on interpretation in international law, which we convened at the Lauterpacht Centre for International Law and the Faculty of Law at the University of Cambridge in August 2013. We were delighted to receive over 200 abstracts from around the world in response to our call for papers, a testament to the enduring importance of the conference theme for international law scholars and practitioners. As the conference took shape, we were drawn towards selecting papers that approached the practice and process of interpretation in a cross-cutting way, rather than those that operated according to the conventional mores of international law as a professional discipline. In choosing keynote speakers and assembling panels, we deliberately strove to foster methodological pluralism, highlighting fresh and innovative approaches to a classical topic.

We sincerely thank the contributors to this volume for their impressive scholarly efforts, as well as the many other speakers at the conference who offered important insights on the conference theme. We are very grateful to the panel chairs, including James Crawford, Sir Michael Wood, Douglas Guilfoyle, John Tasioulas, David Feldman, Kate Miles, Surabhi Ranganathan, and Lorand Bartels. We would not have been able to get the event off the ground without the generous support of our sponsors, including the University of Cambridge Faculty of Law's Researcher Development Fund, Gonville and Caius College, Cambridge University Press, Hart Publishing, Ashgate, and Oxford University Press. Professor Marc Weller and Dr Roger O'Keefe of the Lauterpacht Centre provided generous support and advice, and Tara Grant, Karen Fachechi, Naomi Hart, Odette Murray, and Alexia Solomou ably assisted us on the day of the conference.

We thank the *Cambridge Journal of International and Comparative Law* for publishing a symposium of further papers from the conference in 2014, which offers a variety of practical perspectives on the phenomenon of interpretation in international adjudication. Contributors to this symposium included Judge Sir David Baragwanath, Isabelle Van Damme, Andreas Sennekamp, Shai Dothan, Jure Vidmar, Diane Desierto, and Colin Gillespie.

Although they did not present papers at the conference, we extend a special thanks to Iain Scobbie and Michael Waibel, who prepared commissioned chapters for this volume on rhetoric and interpretive communities respectively under considerable time pressures.

Above all, we thank Andrea Bianchi for agreeing to join us as the co-editor of this volume. Andrea delivered a wonderfully entertaining keynote address on the 'game' of interpretation in international law, characterized by insight and levity, which directly informed the structural framework of this volume. At the outset of our academic careers, our collaboration with Andrea confirms that navigating

the legal academy need not always be an exercise in hierarchy. As his prefatory remarks below confirm, this has been a thoroughly enjoyable and genuinely egalitarian working relationship, where we have learnt much from Andrea's creative scholarship and his refreshing willingness to think outside the box.

It has been a pleasure to work with Merel Alstein, Anthony Hinton, and Emma Endean at Oxford University Press, who have demonstrated unwavering enthusiasm for our project. We also thank the four anonymous reviewers for the Press, who offered incisive and illuminating feedback on our book proposal.

Daniel would like to thank, first and foremost, the co-editors, who have been a source of inspiration, reliability, and good humour in equal measure. Although we were warned about commencing such a voyage, the friendships formed—as well as the final product that you hold in your hands—mean that I would embark again upon such a journey without a moment's hesitation. My thanks also goes to all those that have made it possible for me to reach this juncture in my career: the opportunities presented, counsel provided, and trust shown to a young academic will not be forgotten. In particular, thanks must go to Michael Waibel, Pierre-Marie Dupuy, Aaron Cosbey, James Crawford, Gonville and Caius College, and The Graduate Institute Geneva. Finally, it rests for me to thank my parents, Gerald and Yvonne Peat, without whom none of this would have been possible.

Matthew would like to thank his PhD supervisors, David Feldman and James Crawford, for their understanding in indulging this detour during doctoral studies; Gonville and Caius College, for their generous provision of the WM Tapp Studentship in Law; Peta Mitchell, Fleur Johns, and other participants at the Melbourne Doctoral Forum on Legal Theory in December 2013, for inspiring discussions about the game metaphor's power and potential; the participants in the Max Planck Masterclass in International Law with Martti Koskenniemi in Heidelberg in April 2014; his brother, Joshua Windsor, for his philosophical prowess; his parents, John and Christine Windsor, for their constant support and for tolerating recurrent book proposal diversions during a long-awaited holiday in St Petersburg; and Charlotte Leslie, for her boundless love, encouragement, and wisdom.

In Gabriel Orozco's *Horses Running Endlessly* (1995), the sculpture on the cover of this book, the game of chess is reimaged. The board is altered, with four times more squares than usual, in four different colours. Knights alone occupy Orozco's board, the sole piece in chess that is able to move vertically and horizontally in a single turn. Common to Orozco's artistic oeuvre is the 'altered design of traditional forms',¹ revealing a playful approach to rules, an awareness of the cultural contingency of games, and a desire to transform their traditional grammar. An early critic of *Horses Running Endlessly* described the work as a 'machine to produce diversity'.² Another observed that the absence of familiar rules invites the viewer to consider

¹ Jessica Morgan, *Gabriel Orozco* (Tate Publishing 2011) 117. Orozco has also reconfigured billiard tables (*Carambole with Pendulum* (1996)), ping pong (*Ping-Pond Table* (1998)), Go (*Go 4 No Borders* (2005)), and cricket (*Atomists* (1996)).

² Jean-Pierre Criqui, 'Like a Rolling Stone' (1996) *Artforum* 88, 91.

'what potential remains for playing this new configuration of "wild horses" and what other goals could be identified'.³ Orozco himself described his motive to 'disturb or to rearrange readymade games' as a deliberate attempt to 'reorient the perception of space in that particular game'.⁴

Orozco's artistic agenda aptly reflects one of the central themes of this book. We have used the metaphor of the game as a structural framework for interrogating interpretation in international law, a field that is traditionally understood as having fairly well-delineated rules. We sincerely hope that this book will be of interest and utility to all international lawyers whose work touches upon the theoretical or practical aspects of interpretation, and that the insights contained in this collection will stimulate further research on interpretation that does not shy away from methodological innovation and creativity.

MRW and DCP, Cambridge, August 2014

Interpreting means attributing meaning to something. Not just to a text, but more broadly, also to whatever happens in life. To interpret what happened to me since I accepted to embark on this editorial adventure with Dan and Matt is no easy task. The outcome of our cooperation being this book, the answer should be simple and straightforward: I worked together with two colleagues on an edited volume with a view to contributing some fresh insights on interpretation in international law. Yet this answer would not account for the experience. It is the process, rather than the outcome, which has contributed to giving meaning to what I have lived and to what we have done. At least, this is how I interpret it.

The process has consisted of sharing tasks and working smoothly together. We have invariably agreed on all the difficult choices we had to make. More than anything else, we had fun doing this together. We waited for the next Skype conversation as one would wait for talking to friends. We exchanged hundreds of email messages and grew accustomed to our regular communication. In the cacophonic medley of messages pouring daily into the mailbox we were just happy to hear from one another: it always sounded like fine and friendly tunes. If—as rarely as this occurred—one would lag behind on something, the other two would happily make up for it. Nobody ever complained about anything and I trust it was not just a matter of politeness. The spirit of camaraderie and the friendship that has developed over this intense period of working together attests to the opportunity for making the profession and its practices more humane and enjoyable.

The only thing that bothers me is that Dan and Matt think that this is normal. I maintain instead that this remains exceptional in the profession, and I am grateful to both of them for what has been to me an extraordinary intellectual and human experience. As for the book, only the reader will tell whether our efforts were worthwhile.

AB, Geneva, August 2014

³ Morgan, *Gabriel Orozco*, 41.

⁴ Morgan, *Gabriel Orozco*, 98.

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List of Abbreviations

AC	Appeal Cases
AJIL	American Journal of International Law
Alta L Rev	Alta Law Review
Am J Comp L	American Journal of Comparative Law
Am Soc'y Int'l L Proc	American Society of International Law Proceedings
Am U Int'l L Rev	American University International Law Review
Ann Rev L & Soc Sci	Annual Review of Law and Social Science
ARIEL	A Review of International English Literature
ASIL	American Society of International Law
Aust J Int'l Aff	Australian Journal of International Affairs
Aust YBIL	Australian Yearbook of International Law
B J Pol S	British Journal of Political Science
Berk J Int'l L	Berkeley Journal of International Law
BIT	Bilateral Investment Treaty
BJ Middle East Stud	British Journal of Middle East Studies
BUL Rev	Boston University Law Review
BYBIL	British Yearbook of International Law
Cal L Rev	California Law Review
Cal W L Rev	California Western Law Review
Cam Rev Int'l Aff	Cambridge Review of International Affairs
Cardozo L Rev	Cardozo Law Review
Case W Res J Int'l L	Case Western Reserve Journal of International Law
CERD	Convention on the Elimination of Racial Discrimination
Chi J Int'l L	Chicago Journal of International Law
Chinese JIL	Chinese Journal of International Law
CJICL	Cambridge Journal of International and Comparative Law
Colum Hum Rts L Rev	Columbia Human Rights Law Review
Colum L Rev	Columbia Law Review
Comp Pol	Comparative Politics
Conn J Int'l L	Connecticut Journal of International Law
Const Comment	Constitutional Commentary
Cornell L Rev	Cornell Law Review
Cult Anthropol	Cultural Anthropology
DDP	Digesto delle discipline pubblicistiche
Denv J Int'l L & Pol'y	Denver Journal of International Law and Policy
DOJ	Department of Justice
DSB	Dispute Settlement Body
Duke J Comp & Int'l L	Duke Journal of Comparative and International Law
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights

EHRLR	European Human Rights Law Reports
EHRR	European Human Rights Reports
EJHET	European Journal of the History of Economic Thought
EJIL	European Journal of International Law
EJLR	European Journal of Law Reform
Emory L J	Emory Law Journal
Erasmus L Rev	Erasmus Law Review
Ethics & Int'l Aff	Ethics and International Affairs
Eur J Intl Relations	European Journal of International Relations
Eur J Philos	European Journal of Philosophy
FYBIL	Finnish Yearbook of International Law
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
Ga L Rev	Georgia Law Review
GATT	General Agreement on Tariffs and Trade
Geo J Int'l L	Georgetown Journal of International Law
Geo L J	Georgetown Law Journal
German LJ	German Law Journal
Go JIL	Goettingen Journal of International Law
GYIL	German Yearbook of International Law
Hague Ybk Intl L	Hague Yearbook of International Law
Harv Hum Rts J	Harvard Human Rights Law Journal
Harv J L & Pub Pol'y	Harvard Journal of Law and Public Policy
Harv J L & Tech	Harvard Journal of Law and Technology
Harv L Rev	Harvard Law Review
Hastings L J	Hastings Law Review
Heidelberg J Int'l L	Heidelberg Journal of International Law
HILJ	Harvard International Law Journal
Hous L R	Houston Law Review
How L J	Howard Law Journal
HRC	UN Human Rights Committee
HRLJ	Human Rights Law Journal
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
ICON	International Journal of Constitutional Law
ICRC	International Committee of the Red Cross
ICSID	International Centre for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IJHR	International Journal of Human Rights
IJIL	Indian Journal of International Law
IJSL	International Journal for the Semiotics of Law
ILC	International Law Commission
ILC Ybk	Yearbook of the International Law Commission