

Alexander Orakhelashvili. ***The Interpretation of Acts and Rules in Public International Law.***

Oxford: Oxford University Press, 2008. Pp. xxviii, 594. £63.00. ISBN: 9780199546220.

Dr Orakhelashvili, currently lecturer in law at the University of Birmingham Law School, is a prodigious writer as well as a very conscientious and thorough scholar. His latest book on interpretation in international law shows precision in scholarship and a comprehensive grasp of the subject. It comes at a time when the process of interpretation is little understood, yet often talked about by scholars, practitioners, and tribunals alike. Despite the large amount of literature already published on the topic – the bibliography printed in Orakhelashvili's book (at 585–591) is just the tip of the iceberg – and regardless of the countless *dicta* of various international tribunals, a new and fresh look at this central nexus between international legal practice and theory is highly welcome.¹

¹ It must be added, however, that there has recently been a veritable flood of books dealing with (treaty) interpretation in international law: R. Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* (2006); C. Fernández de Casadevante Romaní, *Sovereignty and Interpretation of International Norms* (2007); G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007); U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007); R.K. Gardiner, *Treaty Interpretation* (2008); I. Van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009).

While the book is solidly written, the present reviewer cannot help but note that the author's approach contains some problematic elements. The monograph is organized in a straightforward manner: after elaborating on some basic theoretical assumptions (at 1–101), the reader's attention is directed to a lengthy analysis of the distinction between law and non-law and to several categories of non-law in the international legal system (at 103–282). Only then are the regime and methods of treaty interpretation and of the interpretation of other legal sources, including customary law, analysed (at 283–524). The plan is well laid and well carried out, yet the resulting book is problematic in the following three major respects.

First, in this reviewer's opinion, a considerable part of the book is irrelevant to the topic of interpretation. The distinction between law and non-law is a valid theoretical topic. This reviewer does not see the connection to the doctrine of interpretation and the author – despite placing some emphasis on it – seems not to need it for his arguments later in the book either. One could well be accused of quibbling about trifles, but it seems that the 179 pages spent might have been used for a deeper critique and discussion than that provided (cf. *infra*, third).

Second, Alexander Orakhelashvili shows profound knowledge of international jurisprudence, in particular of the International Court of Justice and the European Court of Human Rights. The arguments developed in the book are constructed almost exclusively from jurisprudence in exhaustive (and sometimes exhausting) surveys of judicial practice which constitute the bulk of the argument in the chapters. International law is not a common law. Judicial pronouncements are usually binding on the parties, but beyond the case decided the arguments used by a tribunal are not inherently 'better' or more authoritative than scholarly opinions. It is true that jurisprudence is where we best see interpretation in action and it is very valuable for showing a *collage* of opinions. Orakhelashvili's focus on jurisprudence is, however, apt to be misunderstood as giving tribunal decisions a quasi-law-making capacity

('what tribunals decide on methods of interpretation is how we should interpret') or at least a privileged epistemological position *vis-à-vis* scholarly arguments. The implicit over-valuation of jurisprudence and the under-valuation of scholarly opinion is a typical element of orthodox international legal scholarship.

The amount of scholarly writing cited is on the low side for such a voluminous book and the scholarly works cited tend to be 'classics' rather than recent literature. In particular, the limitation on the purely public international legal discourse on interpretation (rather than extending to debates in general legal theory) restricts the scope of the arguments to very few elements. In this reviewer's opinion, this is a fundamental flaw of orthodox scholarship. As pointed out *infra*, interpretation is a hermeneutic process, not positive international law.

Third and most importantly, the book was plainly written in a spirit of adherence to orthodox notions of dogmatic international legal scholarship. The distinction between orthodox and non-orthodox approaches to international legal scholarship certainly cannot lie in following the 'latest' trend in theoretical approaches. Such a 'fashion sense' understands human endeavours as a temporal development towards better theories. On this view it would make no sense, after Wittgenstein, to be an English philosopher and not to adopt linguistic theory or for German scholars of legal philosophy to adhere to Hegel or Kant after Luhmann and Habermas.

In this review orthodoxy is characterized by the absence of the critical streak in scholarship that dares question 'received' or 'accepted' notions of scholarship and practice. Orthodox scholars tend to accept as positive law that which is held to be so by the majority of scholars and by (judicial) practice: what is actually done is what ought to be done. Critique is such an essential part of scholarship that its absence has the potential to cast doubts on the merits of the work. Orthodoxy is also characterized by the claim not to need a theoretical substratum, which results in a subconscious (and often inconsistent) theory, because dogmatic pronouncements necessarily have an underlying theory. The present

volume contains elements of such orthodoxy; a few examples may illustrate its manifestations and the problems associated with it.

(a) For the author, Articles 31–33 of the Vienna Convention on the Law of Treaties 1969 (VCLT) have established a sort of absolute and fixed set of rules on interpretation. '[I]nternational law admits of no doubting . . . that the process of interpretation should be conducted in accordance with fixed rules arranged in hierarchical order. . . . The relevant rules of interpretation apply because the Vienna Convention so establishes' (at 294). The author also argues that while academic debate on that point may have been legitimate pre-VCLT, now all issues are settled and debate is fruitless (cf. at 309–310).

There is a serious theoretical problem with this argument which a critical appraisal of the role of the Vienna Convention's rules might have uncovered. Interpretation is a hermeneutic process (an epistemological tool), not a set of rules. Interpretation is therefore necessarily prior to the rules to be interpreted. It is not a tautology that rules of interpretation also need to be interpreted – by their nature as norms rules on interpretation actually change the text to be interpreted and thus become part of the norm to be interpreted. Interpretation properly speaking is always beyond the reach of norms, for it is the connection between the human being and the text.²

² There is a crucial difference between the application and the interpretation of law. Whereas the application involves the creation of norms according to law on law-making by an organ of law, e.g. of judgments of the ICJ or of binding decisions of the Security Council, which is an act of will, (legal-scientific) interpretation is an act of cognition. 'The interpretation of law by the science of law (jurisprudence) must be sharply distinguished as nonauthentic from the interpretation by legal organs. Jurisprudential interpretation is purely cognitive ascertainment of the meaning of legal norms. In contrast to the interpretation by legal organs, jurisprudential interpretation does not create law': H. Kelsen, *Pure Theory of Law* (1967), at 355 (translation by Max Knight of the 2nd German edn of 1960, at 352).

(b) Another example of the absence of the critical spirit is the unquestioning adoption of the theory of 'plain and ordinary meaning', as enshrined in Article 31 VCLT. What words mean (or can mean) must be the core of all treatises on the interpretation of words. Most regrettably, the author sidesteps the issue completely: '[t]he linguistic debate as to whether there is such a thing as clear and established meaning of words is beside the point in this analysis. The principal factor is that, according to . . . Article 31 of the Vienna Convention and the respective judicial practice, words do have established meaning and interpreters are able to find it on a regular basis' (at 319).

This persisting in a naïve notion of linguistic reality, just because international lawyers generally accept it, is orthodoxy plain and simple. One does not need to subscribe to what is called the 'new stream' of international legal scholarship to realize that this notion does not reflect the way language works. Something that a reviewer of Robert Kolb's recent book on interpretation in international law³ found amiss⁴ may *a fortiori* be the case here: theories of hermeneutics or language theory have not even been mentioned, much less discussed. Authors working on treaty interpretation are placed in a difficult position nowadays. They have to navigate between Scylla and Charybdis, between foundering on the shoals of ignorance about language and being drawn into the whirlpool of linguistic philosophy. It is understandable that the author – until recently based at Oxford – would want to avoid the latter more than the former, but the unquestioned adoption of the plain meaning doctrine in the face of all those who have ventured further into the

³ Kolb, *supra* note 1.

⁴ Zarbiev, '[Book review of:] Robert Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* (2006)', 22 *Leiden J Int'l L* (2009) 211.

theoretical realm is perhaps too problematic to be upheld.⁵

(c) The third example of the orthodox streak noticeable in Orakhelashvili's book is the strong emphasis placed on effectiveness in the process of interpretation. The author's 'fundamental thesis [is] that the consensual character of international law requires adopting the approach of the effectiveness of legal regulation for the sake of construing the original consent and agreement as effective and meaningful' (at 583). This necessarily translates not only into a relativization of the text of the norm interpreted, but also of the positive legal regulation *vis-à-vis* extra-positive factors: '[t]here are indeed certain fields in relation to which positive law reasoning may prove insufficient to provide effective legal regulation. In such cases appeal can and should be made to certain extra-positivist factors' (at 52, emphasis added). How the author can also claim that 'positivism leads to the requirement of effectiveness of legal regulation' (at 59) remains unclear.

Such an argument is rather more than orthodox. It is retrogressive to an age when this was still considered *en vogue* (cf. Lauterpacht).⁶ It could be seen as revived in our age in order to constitute a tool for international legal scholarship, imbued with the spirit of cosmopolitan internationalism, to cast its proper role of collecting knowledge aside in order to fight 'the world's evils' by re-interpreting positive international law. An example of this instrumentalization can be found towards the end

of the book: '[t]hat such ambiguity can obtain from collective decision-making is a fact of life. This requires precisely the adherence to Vattel's priority for the use of such interpretative methods which frustrate the design of those who introduce ambiguity' (at 492, emphasis added). Here scholarship claims to 'improve' the positive law in force. If the text to be interpreted is ambiguous, interpretation cannot and ought not to change the ambiguity.

To declare effectiveness to be the lodestar of interpretation is problematic from more than one view-point. It runs counter to the nature of law as norms. Whether regulation is effective is an external property of norms and not inherent to their nature – just like a norm's simplicity, ambiguity, user-friendliness, etc. Also, effectiveness cannot be operationalized. What the effectiveness of a norm means can only be established once the meaning of that norm is found. Hence, if we follow that theory we find ourselves in a vicious circle, for if the interpreter can find effectiveness only through a norm's meaning and if a norm's meaning is determined by what makes it effective, a norm's meaning is a norm's meaning. Where 'effective interpretation' does happen, the meaning is effectively 'smuggled in' through the back-door, which usually happens without the interpreter's knowledge or intent. External values, e.g. the interpreting scholar's own or an organ's collective moral-political views, are inserted to provide the additional information which avoids the vicious circle. To uphold the 'design' behind the instrument by effective interpretation is to change it, for the 'design', *telos*, or goals of a text are elements that scholarship (subconsciously) adds to the norm. On a consistently positivist conception of law the norm in a treaty – the positive law to be interpreted – is *only* its text.

Yet, despite the problems outlined above, this reviewer can fully recommend the book; its problems do not detract from its qualities. Orthodoxy may be problematic from this reviewer's point of view, but orthodoxy by definition is the yardstick against which other theories will be measured. This reviewer's disagreements are largely based on a

⁵ Non-orthodox writings on (treaty) interpretation include: Hummer, "‘Ordinary’ versus ‘Special’ Meaning. Comparison of the Approach of the Vienna Convention on the Law of Treaties and the Yale-school Findings", 26 *Österreichische Zeitschrift für öffentliches Recht* (1975) 87; Jørgenssen, 'Lawyers and Hermeneutics', 40 *Scandinavian Studies in Law* (2000) 181; I. Tammelo, *Treaty Interpretation and Practical Reason. Towards a General Theory of Legal Interpretation* (1967); M. Thaler, *Mehrdeutigkeit und juristische Auslegung* (1982).

⁶ H. Lauterpacht, The Development of International Law by the International Court (1958), at 225–293.

different theoretical vantage-point and theoretical views are relative. The technical prowess and accomplishments are undoubted; the inclusion of thoughts on the interpretation of non-treaty sources of international law – and, in particular, of customary international law (at 496–510) – are a particular highlight. Its appeal lies in the precision with which orthodox international legal scholarship works to cognize the law – with a certain lack of awareness of the problems of its arguments and subconscious premises.

The most extreme charge that could be made against the author's orthodoxy is that it begs the question of how this book provides us with anything new. If the classical debates of Lauterpacht and Brierly, Bernhardt, and Fitzmaurice are all that matters, if non-orthodox scholarship, e.g. debates in 'domestic' legal theory, developments in hermeneutics, or post-modernism, does not need to be discussed at all, then what good is a book which – on the doctrinal side – does not add much to those debates?

However, it is perhaps this element more than any other that makes it an important book. There are no experiments to be found within – no *hic sunt leones* – and there is no uncertain theoretical ground. The book is highly recommended for mainstream scholars, critical scholars, and practitioners alike, for all three groups need reliable information on what is commonly accepted – what the orthodox view is on interpretation. Critical scholars need to know what to fight against. Mainstream scholars need a recent work of reference. A practitioner who submits novel or critical theories on interpretation before, say, an ICSID tribunal or the ICJ will almost certainly not succeed in representing his client to the best of his abilities – practitioners need reliable information on the most important and recent precedents on orthodox precepts of interpretation and Orakhelashvili's book provides that admirably well.

Jörg Kammerhofer

University of Erlangen-Nuremberg, Germany

Email: Joerg.Kammerhofer@jura.uni-erlangen.de

doi: 10.1093/ejil/chp085