

BOOK REVIEW

Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015)

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Treaty interpretation is a popular topic among international law scholars.¹ One reason for this popularity is that ‘interpretation is a pervasive phenomenon in international law’.² Another reason is that interpretation is a task that is undertaken frequently and openly by international courts and tribunals, which means that the topic lends itself to systematic research.³ This has led to a vast catalogue of literature on the topic.

Judging from the title alone, one could be forgiven for assuming *Interpretation in International Law* to be another positivist treatise on treaty interpretation, in the vein of Gardiner’s *Treaty Interpretation*,⁴ Orakhelashvili’s *The Interpretation of Acts and Rules in Public International Law*,⁵ Kolb’s *Interprétation et création du droit international*,⁶ or Linderfalk’s *On the Interpretation of Treaties*.⁷

However, the book is in some sense the exact opposite of this, as many of the chapters explore theoretical rather than positivist perspectives on interpretation in international law. The editors note, and lament, that such perspectives have been conspicuously absent from previous writings on interpretation.⁸ According to one of their introductory chapters, ‘the scholarship on treaty interpretation is descriptive and practical, rather than theoretical’, with only ‘some exceptions’.⁹

This theoretical focus of the book is evident, for example, in its choice of citations. The most-cited writers in the book are, appropriately enough, Martti Koskenniemi and Ronald Dworkin. The book also contains occasional references to classical (non-legal)

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¹ Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds) *Interpretation in International Law* (OUP 2015) 4–9.

² *ibid* 3.

³ As the book itself puts it, ‘it is within the context of adjudication that content-determination interpretation is the most visible’: *ibid* 117.

⁴ Richard K Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015).

⁵ Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008).

⁶ Robert Kolb, *Interprétation et création du droit international: Esquisse d’une herméneutique juridique moderne pour le droit international public* (Bruylant 2007).

⁷ Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007).

⁸ Bianchi (n 1) 6–8.

⁹ *ibid* 6–7.

philosophers such as Plato, Aristotle, Gadamer, Habermas, Hegel, Heidegger, Kant, Schopenhauer, Locke, Karl Marx and Adam Smith. Particularly popular is Ludwig Wittgenstein, who is mentioned in four different chapters.

Another important figure in the book is Humphrey Waldock. According to the introductory chapter: ‘the post-VCLT thinking on interpretation in international law has been described as “captive ... to the conceptual world of [Waldock], himself captive to intuitive common law pragmatism”’.¹⁰ It is this conceptual world that the editors wish to challenge. The book is thus mostly one about other books and ideas rather than about specific legal questions, instruments, or cases. The latter are used, but mostly as starting points or illustrations for theoretical discussions.

The theoretical topics explored in this book include rhetoric (by Iain Scobbie), existentialism (by Duncan B Hollis), professionalism (by Andraž Zidar), authority (by Gleider Hernández), transculturalism (by Renè Provost), hermeneutics (by Jens Olesen), and cognitive frames (by Martin Wählisch).

The chapters are grouped into five parts, in addition to the introduction (written by the editors) and conclusion (written by Philip Allott). The five parts focus on ‘The Object’, ‘The Players’, ‘The Rules’, ‘The Strategies’, and ‘Playing the Game of Game-Playing’, respectively. The division of the book thus follows a ‘game analogy’, which is set out by one of the editors in one of the introductory chapters, and was introduced in Andrea Bianchi’s keynote at the conference that the book is based on.¹¹

This ‘game analogy’ acts as a unifying theme of the book. It is applied to varying extents throughout the chapters, with some even ‘rejecting aspects of’ it.¹² The analogy was particularly embraced in the chapters written by Ingo Venzke and Jean d’Aspremont respectively, two authors who are used to writing with and about various theoretical approaches to international law. The justification for the use of a metaphor is that these ‘are powerful tools of mediated knowledge that may help us to understand reality better’.¹³ While the game analogy ‘is ubiquitous both in mainstream and critical strands of international legal scholarship’,¹⁴ it has not been explored in much depth. This is where the book under review

¹⁰ *ibid* 7, quoting Joseph HH Weiler, ‘Prolegomena to a Meso-Theory of Treaty Interpretation at the Turn of the Century’, NYU Institute for International Law and Justice Legal Theory Colloquium: Interpretation and Judgment in International law (NYU Law School, 14 February 2008) 3, 7.

¹¹ Bianchi (n 1) vii.

¹² *ibid* 22.

¹³ *ibid* 35.

¹⁴ *ibid* 19.

comes in. Its game analogy is an interesting and creative perspective on interpretation in international law, even though the analogy is absent from some sections of the book.

The main messages of the book seem to concern the potential utility of non-positivist engagement with interpretation in international law, as well as of seeing this interpretation as a ‘game’. This is a fruitful perspective, and the different chapters show it can be employed to extract interesting results from practices that have hitherto primarily been analysed from positivist perspectives.

The editors have not enforced a unification of views between different authors. For example, Eirik Bjorge’s and Faud Zabiyeu’s respective chapters disagree on whether the principles that are now codified in the Vienna Convention on the Law of Treaties (‘VCLT’) have been static throughout history. This is an editorial choice, with advantages (for example, hearing opposing views can illuminate an issue better than hearing only a single view), but also drawbacks (primarily that the coherence of the book’s message might suffer). In this case, the choice is sensible. The aim of the book is the exploration of a theme and the application of a methodology, and this is not undermined by differing opinions among the book’s contributors. There is still more than the ‘only tenuous connectivity’ between chapters that Joseph Weiler has warned against in books of collective pieces.¹⁵

The notion of ‘interpretive communities’ is a recurring theme throughout the book. It is mentioned by the editors in both of the introductory chapters, and also shows up in eight later chapters. The concept is the main subject of Michael Waibel’s chapter, according to whom one function of interpretive communities is to ‘discipline and channel interpretation’.¹⁶ The focus on interpretive communities is in line with what one of the book’s editors has written in a previous publication, on the necessity of ‘a shift in focus from the “alleged inherent properties of the text to the interpretive communities whose strategies ultimately determine what a text means”’.¹⁷

While potential readers might ask whether there is any need for yet another treaty interpretation book, *Interpretation in International Law* is explicitly different from much of the existing literature, and because of its perspective the book manages to add something new to that literature. The book is also generally well researched and clearly written. It should

¹⁵ Joseph Weiler, ‘On My Way Out – Advice to Young Scholars III: Edited Book’ (*EJIL:Talk!*, 5 October 2016) <www.ejiltalk.org/on-my-way-out-advice-to-young-scholars-iii-edited-book/> accessed 1 July 2017.

¹⁶ Bianchi (n 1) 150.

¹⁷ *ibid* 13, quoting Andrea Bianchi, ‘Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning’, in Pieter Bekker, Rudolf Dolzer, and Michael Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (CUP 2010) 36.

therefore appeal to anyone who takes an interest in interpreting international law, and in particular those who already do or would like to study it from a non-positivist perspective. The book should also be of interest to those who study ‘interpretive communities’ in international law, whether in the context of interpretation or elsewhere.

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