

What Role for Academic Writers in Interpreting International Law?—A Rejoinder to Orakhelashvili

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Abstract

The points of criticism advanced by Orakhelashvili can be confuted easily. Secession is a fact. A rule according to which secession can produce legal effects only to the extent these are allowed, as identified by Orakhelashvili, cannot be found in International Law. On a whole, the right to self-determination is a far more complex concept than portrayed by Orakhelashvili. Finally, Orakhelashvili seems to attribute a very limited role to the academic writer in norm interpretation: the straightforward choice between “right” and “false” interpretations. However, a more nuanced position must be taken.

1. I read with interest Alexander Orakhelashvili’s response in this issue to my article published in the previous issue of this journal¹ and I gratefully accepted the invitation by the editors to submit a rejoinder. First I thought that a rejoinder would not be necessary, as both positions are clearly stated, but afterwards I came to the conclusion that the way in which the response has been drafted could give rise to a further discussion which points beyond the Kosovo question. Different issues that are of relevance in a broader context, too, have been touched upon here.²

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1 Peter Hilpold, *The Kosovo Case and International Law: Looking for Applicable Theories*, 8 *Chinese JIL* (2009), 47–61, and Alexander Orakhelashvili, *The Kosovo UDI between Agreed Law and Subjective Perception: A Response to Hilpold*, 8 *Chinese JIL* (2009), 285–290 (in this issue).

2 In order to fully understand this discussion, reference must be made to two publications by Orakhelashvili: the one in this issue of the *Chinese JIL* and another published in 12 *Max Planck YUNL* (2008), 1, entitled “Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo”.

2. In fact, the “bone of contention”, with regard to the Kosovo question, boils down to the following issue: “Does Kosovo have a right to secession?”, or to put it differently, “Does Kosovo need a right to secession in order to become independent?”.

3. I have already expressed my opinion with regard to this question and I have also cited Orakhelashvili, qualifying him as a member of the so-called “legitivist school”, which requires a seceding unit to be released by the mother State if it wants to acquire independence.³ I am not of this opinion as I, together with many other international lawyers,⁴ consider secession to be a mere fact. Maybe this reference prompted Orakhelashvili to write his response, in which he again states his case. He admits, although reluctantly, that secession is a fact but that this fact can produce legal consequences “only to the extent these are allowed by law”.⁵ Thereby again denying that secession is a fact that can produce, *per se*, legal effects. Alas, international law does not contain any prohibitive rule on secession. In fact, this is not the way international law approaches the question of self-determination or secession. It is well known that there are some rules granting the right to self-determination to people under colonial rule and to those who are under foreign domination. For the rest, this right remains very vague.⁶ It plays with ambiguities generating much hope but also much delusion. Without doubt, this uncertainty has also fuelled conflict, as there are situations, characterized by violent oppression and widespread denial of human rights, in which a glimpse of hope of obtaining assistance from the international community may suffice to engender violent strife directed at overturning the unjust order. Why then, we must ask ourselves, do States, as the masters of international law, not provide for more clarity? As already hinted, there can be no doubt that the law of self-determination is one of the most non-transparent areas of international law, in which the drafters of the relevant norms played with ambiguity and half-hearted concessions and denials. Orakhelashvili puts much emphasis on the need to look at the verifiable consensus among States in order to identify the applicable law as opposed to theoretical speculations by writers. Rightly so! But what if State consensus is not so clear, and if the applicable norms consist in give and take? We encounter such situations in many areas of international law but in the field of self-determination this problem is really accentuated.⁷ Why should States adhere to such a dangerous game? Because the interests at play here are not as straightforward as may first seem apparent. The principle of self-

3 Hilpold, n.1 above, 58.

4 One would be tempted to say that the prevailing doctrine is of this opinion. But, on the other hand, we have to ask ourselves what the “prevailing doctrine” is. Is it measured on the basis of numbers? But what should we count? Authors or publications? Or, should we look at reputation? But what is reputation in international law academia?

5 Orakhelashvili, 8 *Chinese JIL* (2009), 290.

6 See Peter Hilpold, *Self-Determination in the 21st Century—Modern Perspectives for an Old Concept*, 36 *Israel YHR* (2006), 247.

7 See Peter Hilpold, *The Right to Self-Determination: Approaching an Elusive Concept through a Historic Iconography*, to be published in 11 *Austrian RIEL* (2006) (2008/2009).

determination is one of the most powerful intellectual tools⁸ allowing for changes in an otherwise static international community. It is true, as has often been said, that the international community is not a suicide club. But immutability is no guarantee of survival. Sometimes changes are needed for a people's survival; sometimes even the mere prospect of a change furthered by international law can reduce tension. Furthermore, it must be considered that the international community is formed by States holding widely different opinions on many issues, among them the right to self-determination. Most of the norms that come into play here have been drafted in a political situation characterized by intense divisions between East and West, North and South. It is possible that some sides have been inclined to promote uncertainty to the detriment of the others. Then it must be taken into consideration that self-determination not only relates to State sovereignty but is rather an issue cutting across various branches of international law, first of all human rights law. What had to be drafted generously for one field had to be restricted for another. The result is a difficult compromise fully satisfying none. Finally, it must be said that State negotiators are no longer diplomats who need only cater to the wishes of an almighty emperor as they were, perhaps, in the eighteenth and nineteenth centuries. Nowadays, in many countries, civil society follows international conferences and State negotiations very closely. Governments have to justify their behaviour on the international scene if they want to be re-elected. Diverse concessions have to be made to different constituencies.

4. It seems Orakhelashvili has a rather restrictive vision both with regard to the subjects allowed to interpret international law and with regard to the facts and circumstances that can be taken into consideration in the interpretative process: “[I]nternational law is based on agreement between States and its institutions are product of mutual State understanding that has evolved over a long period of time”.⁹ It is, however, hazardous to interpret the right of self-determination by looking back over a long period of time. One could easily end up in a period when this right did not actually exist. Furthermore, we have to consider that the human rights question is complex. As we know, this area is a very dynamic one and every effort to interpret the relevant norms must stick closely to the present-day reality.¹⁰ But the situation is even more complex, as in Kosovo the right to self-determination is claimed before the backdrop of a legal reality that is absolutely unique. In fact, the creation of UN trusteeship regimes by the Security Council is in itself a rather recent development. The special circumstances characterizing the administration by UNMIK render the whole situation totally particular. To what period of the distant past should we look in order to obtain

8 The role of ideas and concepts should not be dismissed in international law either. It is difficult to contest altogether the opinion held by Hegel that ideas are the driving forces of change. See Georg Wilhelm Friedrich Hegel, *Phänomenologie des Geistes* (1807).

9 Orakhelashvili, 8 *Chinese JIL* (2009), 286.

10 In this context, it may be remembered that the ECHR coined the famous dictum that the ECHR is a “living instrument” (see *Tyrer v. GB*, judgment of 25 April 1978, Series A26).

enlightenment for the legal assessment of the Kosovo problem? However, the role of the legal interpreter, the academic writer is in any case a rather limited one for Orakhelashvili. He writes: “The function of doctrinal analysis is to focus on what international legal rules and institutions really are, as opposed to what writers could make of them should they adopt a particular ideological or political point of view”.¹¹

5. One could, in principle, agree with this position if there were not the suspicion that Orakhelashvili is asserting that he knows in advance, for sure, what international law is and that other writers are not allowed to look for different solutions. I would never dare to qualify other writers (or, their theories) as “ideologically charged”¹² only because I do not agree with them. Nor would I bring forth such an accusation against Orakhelashvili, even though some of his observations hint at a very specific political standpoint.¹³

6. Be this as it may, we should concentrate our discussion on the dogmatic standpoints, and in this context, I believe that Orakhelashvili misinterprets some basic concepts of international law. In an earlier publication,¹⁴ Orakhelashvili expounded extensively on the issue of secession related to the Kosovo case. Referring to Sir Hersch Lauterpacht (“The Function of Law in the International Community”, 1933, 77), he portrays the international legal order as a perfect system in which the principle of territorial integrity “necessarily outlaws secession without the consent of the parent state”.¹⁵ Apart from the question of whether it makes sense to build a whole theory upon the writing of one author, particularly if this writing is of a rather distant time, one must ask whether Orakhelashvili really grasps the meaning of the principle of territorial integrity. In fact, international law is still mainly inter-State law, and therefore the principle of territorial integrity, one of the cornerstones of international law since its inception, is directed at the protection of national borders from infringements

11 Orakhelashvili, 8 *Chinese JIL* (2009), 287.

12 *Ibid.*, 290.

13 See, for example, the following statement: “By the end of the NATO intervention, the number and extent of human casualties and suffering among the Kosovo Albanians has been much higher than before the NATO intervention”. See A. Orakhelashvili, *Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo*, 12 *Max Planck YUNL* (2008), 1 (3). This may have been the official standpoint of the Serb Government, but any independent investigation confirms that NATO intervention in 1999 was badly needed to stop the killings by Serb military and paramilitary forces. The fact that this intervention was illegal from a formal viewpoint of international law is a different question.

It would seem Orakhelashvili is also able to predict the future. For example, he states the following: “Kosovo will not gain general recognition of the international community, nor will it be allowed to join the United Nations. It will remain a contested entity throughout the time of its factual existence”. Are future developments really so obvious as Orakhelashvili states, or does this statement rather hide a political opinion on what the author considers right?

Furthermore, for Orakhelashvili, the breakdown of the status negotiations that led to the Unilateral Declaration of Independence is to be attributed entirely to the Albanian side (*ibid.*, 19). Again, one can doubt whether this is really an impartial view.

14 See Alexander Orakhelashvili, *Statehood*, 12 *Max Planck YUNL* (2008), 1.

15 *Ibid.*, 13.

coming from outside and is surely not directed against changes coming from inside. Only if secessionist forces are supported by other States does international law again have a word to say. Therefore, the attack against Thomas Franck, for whom secession is also a mere fact, is misplaced.¹⁶

7. Many other statements can be found in the two articles by Orakhelashvili that could be criticized. I will mention only a few with a brief comment:

- Orakhelashvili sees further support for his theses in the fact that the EU as such did not recognize Kosovo.¹⁷ The EU, however, does not have such a competence; this still lies with the Member States.¹⁸
- He compares Kosovo with Biafra and South Vietnam. Meanwhile, 60 of the 192 UN Member States have recognized Kosovo. Biafra was under strong military pressure from the beginning of the secession and was recognized only by five States. The State of South Vietnam succumbed because of a military defeat.
- He does not see any difference between a claim for a right to secession and a right to self-determination within a specific UN trusteeship.¹⁹ For me, this latter situation is essential for the evaluation of the whole Kosovo problem as it stands at present. In fact, SC Res. 1244 (1999), on the one hand, affirmed the territorial integrity of Serbia and, on the other, created a factual situation in which the Kosovar people were finally empowered (on the factual level) to claim a right to self-determination (after neutral and highly renowned subjects such as Martti Ahtisaari came to the conclusion that there would be no other realistic solution). It remains to be seen what weight the ICJ will give to these two conflicting aspects.
- Orakhelashvili rejects the distinction between “internal”, “external”, “colonial”, “post-colonial” and “remedial” self-determination.²⁰ Apart from the fact that he himself uses these distinctions, at least in part,²¹ I believe, as do many other international lawyers, that these categories are very useful explanatory tools, even though they obviously do not have the value of a legal norm.

8. I think we can end the list at this point, even though much more could be said.

9. I would like, however, to highlight one last point which seems to me to be crucial for the understanding of our profession as international lawyers working mainly in academia.

10. Are our possibilities really as limited as Orakhelashvili has stated? As already indicated, Orakhelashvili distinguishes between those who really know what international law is and the others who are motivated by political or ideological considerations,

16 Ibid.

17 Ibid., 8.

18 See Peter Hilpold, *Das Kosovo-Problem - ein Testfall für das Völkerrecht*, 68 *ZaöRV* (2008), 779.

19 Orakhelashvili, 8 *Chinese JIL* (2009), 286.

20 Ibid., 287.

21 See *Statehood*, 12 *Max Planck YUNL* (2008), 1.

who present international legal positions the way they would like to see them,²² who may be fine-tuned, but are on the whole over-theorized doctrinal adventurers.²³ Of course, every international lawyer with any remaining moral principles prefers to adhere to the first group, to the “good” and not to the “evil”. But how can academic writers manage to belong to this first group? According to Orakhelashvili, they must look at “agreement between States” and at “mutual State understanding that has evolved over a long period of time”.²⁴ They must see what “legal position is in terms of consent and agreement of States”. But where does the academic get this enlightenment from? If we do not want to accept the assumption that some lawyers have an automatic, direct access to truth and reality (whatever it may be), then we must admit that they will have to ask State chancelleries or to look solely at past State practice that is overwhelmingly followed by States (perhaps even by all States?). It is doubtful that this understanding of the role of our profession is appropriate. True, behind Orakhelashvili’s position, we can find an attempt to deconstruct international legal discussion and to distinguish between law proper and political and ideological positions. Alas, this task is far more complex than Orakhelashvili has portrayed it. Academic writers do not have to be subservient to the State will, limiting their investigation to long-distant practices and considering only certain authors who wrote more than a half-century ago; they have to consider present-day international law in all its complexity. It is not very fruitful to try to evaluate a legal situation in 2008/2009, resulting, *inter alia*, from legislative activities of the Security Council that would have been unthinkable in the past, by recourse to a writing by Hersch Lauterpacht from 1933.²⁵

11. I am not sure whether it would be desirable for all international lawyers to take an approach such as that adopted by Philip Allott, who, in *Eunomia*, portrays an utopian society, an international legal system as it should be, even though such attempts are very useful on the political, practical and academic levels, as they show that improvements are possible, or at least thinkable.²⁶ However, surely international lawyers are allowed to search for constructive solutions to new problems. Orakhelashvili totally dismisses

22 Orakhelashvili, 8 *Chinese JIL* (2009), 286–287.

23 *Ibid.*, 290.

24 *Ibid.*, 286.

25 In this context, it may also be noted that the famous dictum by Gerald Fitzmaurice of 1971, “It was to keep the peace, not to change the world order that the Security Council was set up” (*diss. op.*, ICJ Report 1971, 294), at its time surely an apt observation, is now seen in a different light, as the Security Council has assumed functions that would have been unthinkable a few decades ago.

26 Philip Allott advocates an international society which is totally in the service of the promotion of human well-being: “It is in international society that humanity’s capacity to harm itself can achieve its most spectacular effects. And it is in international society that the ever-increasing well-being of the whole human race can, must, and will be promoted.” (See *Eunomia*, 2001, 180, para. 12.5). Such a society cannot be realized merely by looking backward, trying to identify State consent for problems that, in the past, might not even have existed.

any attempt to qualify the Kosovo problem as a *sui generis* situation,²⁷ as treating Kosovo differently from other entities would violate the non-discrimination principle.²⁸ One basic prerequisite that we can speak of discrimination, however, is that we are faced with comparable factual situations. As already demonstrated, it would be hard to find in history a situation comparable to that of Kosovo. In view of the fact that the international society is, compared with national societies, not a very large one, and that factual situations on the international scene are changing at an ever-increasing pace, the task for international lawyers is not a very easy one when they are looking for applicable practice, in particular with regard to subjects which are so contested as the whole field of self-determination. What are his possibilities, what limits must he respect? One should, perhaps, not be too restrictive in this regard. In fact, even such a traditionalist international lawyer as Sir Robert Jennings was of the following opinion: "In fact it is safe to say that there is probably no other system of law in which individual workers and scholars enjoy such telling influence over the shaping of the content of the rules and even of the principles of law." And furthermore: "[I]nternational legal scholars have an influence probably unparalleled since the juriconsults of classical Roman law".²⁹

12. As is known, the belief that international lawyers can identify an objective reality has been proven to be illusory.³⁰ Rules and institutions that seem, at first sight, neutral, objective and generally accepted reveal, upon closer inspection, a "deep-structure" which makes them appear biased and subjective. Conscious of this fact, the international lawyer may lose some of his missionary self-esteem but he can nonetheless apply these rules, knowing that they are based on a large consensus. At the same time, he will never be a mere slave of the norm, a sort of automaton who squeezes "one-size-fit-all" norms onto reality. Even less required is that he look for these norms in a distant past when reality was totally different from our times. Reality evidences an enormous wealth of varieties, of possible approaches. Already, the attempt to apply a standardized norm to ever-changing factual situations may constitute a daring simplification. Nonetheless, the lawyer must apply these norms and he must see to what extent a factual situation is covered by a specific provision and in which way a compromise can be found between conflicting norms. To qualify each factual situation as *sui generis* would be to render the law system useless. To apply a provision to a situation covered only remotely would lead to an arbitrary and worthless result. Interpretation is, therefore, not purely mechanical but, to a certain extent, also an

27 See 12 Max Planck YUNL (2008), at 15, where he refers to such an attempt by the US State Department, and at 23, where he invokes the rebuttal of this position by Russia.

28 *Ibid.*, 22.

29 See Robert Jennings, *International Lawyers and the Progressive Development of International Law*, in: Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century* (1996), 413.

30 See Martti Koskenniemi, *From Apology to Utopia* (2nd edn 2005).

imaginative process.³¹ Imagination is not only needed to “re-imagine the game, reconstruct its rules, redistribute the prizes”³²—an academic writer may consider this to be the primary task of politicians (or perhaps of lawyers who are both negotiators and politicians)—but also to grasp reality to the fullest extent possible.

13. In sum, it can only be confirmed that the ICJ is now faced with a *sui generis* situation in which it must find a way through conflicting norms. As so often in the past, the Court is confronted here with a highly politicized situation in which past practice will not lead straight to a solution. It is rather the case that the ICJ will—hopefully—help to clarify what the consensus of the State Community in this area is, or contribute to the formation of such a consensus for the future. This solution may not please those who prefer simple answers for any question, but it suits the nature of a very complex legal order—a complexity which contributes to the extraordinary fascination this branch of law inspires.

31 *Ibid.*, 561

32 *Ibid.*