Leonard M. Hammer. ***A Foucauldian Approach to International Law. Descriptive Thoughts for Normative Issues.*** Aldershot: Ashgate, 2007. Pp. vi + 154. £55.00. ISBN: 9780754623564.

A Foucauldian Approach to International Law sounds like a promising title for anyone interested in theorizing the relationship of power to law while moving beyond the traditional disciplinary division of labour between politics (relating to power) and law (concerning norms). Michel Foucault's alternative notion of what power is, or rather what it *does* as a productive force, provides a challenging entry to a discussion of the 'politics of law'. The dual meaning captured in this notion (entailing both the *politics* of law; and the politics of *law*) has been the stake of constructivist readings of the intersection of politics and law,[1] and Foucault's thinking (though originating in sociology) can provide an interesting post-structuralist input to that debate.

The relation between politics and law lies at the basis of what the author identifies as the 'dichotomy that haunts international law' (at 16): the incompatible perspectives of objective/normative versus positive/consensual (i.e. state interest) approaches to international law, as discussed most famously by Martti Koskenniemi.[2] Being dissatisfied with discussions in legal theory regarding this 'dichotomous battle', Hammer calls upon Foucault to further elaborate 'not the standards or elements of international law as definitive factors, but the manner by which the distinctions and associations are established within a system or political sphere' (at 2). This in turn leads to what is concurrently referred to as a 'transformative', 'transgressive' or 'process-oriented' approach to international law as a 'system in constant flux' (at 16), considering 'the engagement of the ongoing shifts and changes inherent in any politicized system as a means of discerning the context of operation' (at 3). This relates the argument to the continuous debate on law as an autonomous system of rules *versus* law as a social process.

The structure of the book fits its aim well. The first chapter discusses a Foucauldian perspective in relation to more familiar perspectives on objectivity and normativity of international law (as discussed by Martti Koskenniemi and David Kennedy). This is followed by a discussion about what such an alternative perspective would add to key issues like recognition (chapter 3), customary law (chapter 4), and human rights (chapter 6). One of the merits of the book is that it thus sets out to combine abstract theorizing with empirical application. I agree with the author that Foucault has a lot to offer to these debates, and to the analysis of the 'politics of law' more generally.

Unfortunately, the book under review does not fulfil what its title ambitiously suggests. Whether the perspective developed

[1] C. Reus-Smit (ed.), *The Politics of International Law* (2004). In this regard Hammer's (at 12–13) depiction of law in IR theory in realism (that reduces law to state interest) and cosmopolitanism, institutionalism/regime theory (addressing a regulatory role for law) is limited and oversimplifying. This is all the more surprising as he shortly refers to the constructivist literature in chap. 3.

[2] M. Koskenniemi, *From Apology to Utopia* (1989).

in the book can indeed be characterized as Foucauldian is doubtful in two ways. Not only does it merely touch upon key Foucauldian concepts like disciplinary power, governmentality, and subjectivity (with only one or two references in the index), it can also be questioned whether one actually needs Foucault to argue the case presented in the book. Its main research focus is formulated by the author in terms of the 'challenge … how to incorporate [non-state] actors into the international framework while also preserving the international structure' (at 28). Within political science there is a broad globalization literature which addresses that very question in a more straightforward manner; and (neo) liberalism more generally argues a pluralist approach to world politics since the 1970s. Although these processes of governance, new modalities of power, and their sociopolitical functions can indeed be nicely analysed or captured by means of Foucault's notion of governmentality,[3] surprisingly this concept is hardly developed in *A Foucauldian Approach*. As it stands, it arguably is a *reductio ad absurdum* to summarize Foucault's argument about modalities of power to this claim about a plurality or pluriformity of actors in the international realm, not in the least given the outlook formulated by the author himself.[4]

In general, the specific Foucauldian perspective which is developed by Hammer thus appears to be a narrow one, leaving aside most of Foucault's original and more challenging insights regarding the relationship between sovereignty, power, and law. A particularly unwarranted omission for a Foucauldian approach to international law is an elaboration of how Foucault himself saw the role of law within the socio-political context. Whereas a Foucauldian turn arguably enables a broadening of the scope of international law beyond the state, as Hammer postulates, on the other hand one could detect in *The History of Sexuality* and notably *Discipline and Punish* (two of Foucault's prominent works) a rather traditional view of law in relation to sovereign power. Addressing the juridico-discursive aspect of power (authority), Foucault refers to law as an autonomous system of rules, command, and constraint at the disposal of the sovereign.[5] Objecting to such a negative perspective of power, Foucault proposes an alternative focus on other, more subtle, yet more far-reaching technologies of power which are its 'productive' side:

> We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.[6]

In this context Foucault calls for a move beyond the negative juridico-political face of power, embodied in the sovereign, to the productive face of power, which he also refers to as disciplinary power. It is disciplinary not in the sense of punishment and reprimand, but rather in terms of creating disciplined subjects that have incorporated norms through the workings of social structures and socialization. Power thus does not just reside with 'the sovereign' as a unique and omnipotent agent with the arm of the law to enforce his will, but is dispersed within society.

Indeed, the relationship between sovereignty, power, and law has been the focus of other writings in legal theory which turn

[3] Merlingen, 'Governmentality: Towards a Foucauldian Framework for the Study of International Governmental Organizations', 38 *Cooperation and Conflict* (2003) 361; Sending and Neumann, 'Governance to Governmentality: Analyzing NGOs, States, and Power', 50 *International Studies Quarterly* (2006) 651.

[4] Neither does such reading of Foucault explain the puzzling subtitle 'Descriptive thoughts for normative issues' which already raises questions about the Foucauldian approach that the book postulates.

[5] M. Foucault, *Discipline and Punish: The Birth of a Prison* (1977), and M. Foucault, *The History of Sexuality. Volume I: An Introduction* (1979).

[6] Foucault, *Discipline and Punish*, *supra* note 5, at 194.

to Foucault. There is a growing body of literature that relates his writing to (a sociology of) law, although most address law in general and do not have an explicit international focus. In this context it is surprising that Hammer only occasionally refers to the work of Baxter, Hunt, Wickham, and Tadros, who have been pushing this agenda since the 1990s.[7] Despite the acknowledgement of Foucault's relevance for (socio-)legal studies, he is often criticized for this seemingly traditionalist view of law. Such criticism, however, neglects the distinction between 'juridical power' and the role of norms more generally;[8] or, more precisely, the functioning of law beyond the mere juridical structure to productive power and its role as foundation for disciplinary mechanisms and techniques of governance.[9] And, I would argue, it is precisely in this broadening of the workings of law that the added value of a Foucauldian approach to international law lies. However, this line of argument is not taken up within the book under review.

In a sense Hammer is moving in the right direction by linking international law to what Foucault calls 'productive power':

> The law [as a social phenomenon] is not solely a preventive mechanism but maintains some form of creative and productive aspect … [I]t not singularly control[s] individuals but produces particular subjects and in turn is the result of these particular subjects.[10]

It is this understanding of productive power which Hammer introduces as a tool to analyse the 'complex interplay of social relations between the various actors' (at 19). Accordingly, he identifies the international realm as a 'fragmented political field' in which the state is but one power factor amongst other actors. In this context, law is not so much 'a final result from which emanates decisions or directives, but rather is part of the social power system' (at 20). If formulated rather cryptically, in my reading this relates to the understanding of the 'politics of *law*', which not only is external to politics (as a constraint), but also constitutes the political realm and the actors which participate in the international game. This again also connects to a broader understanding of law as a disciplinary mechanism, and as creating particular kinds of subjects.[11]

One would expect the transformative approach postulated by Hammer to address the transformation of law in the light of

[7] Hammer, *op. cit.*, at 19–20. See also A. Hunt and G. Wickham, *Foucault and Law, Towards a Sociology of Law as Governance* (1994); Baxter, 'Bringing Foucault into Law and Law into Foucault', 48 *Stanford L Rev* (1996) 449; Beck, 'Foucault and Law: the Collapse of Law's Empire', 16 *OJLS* (1996) 489; Tadros, 'Between Governance and Discipline: The Law and Michel Foucault', 18 *OJLS* (1998) 75; Smith, 'The Sovereign State v Foucault: Law and Disciplinary Power', 48 *Sociological Review* (2000) 283; G. Wickham and G. (eds), *Rethinking Law, Society and Governance: Foucault's Bequest* (2001); Wickham, 'Foucault and Law', in M. Travers and R. Banakar (eds), *Introduction to Law and Social Theory* (2002), at 249–265; Wickham, 'Foucault, Law, and Power: A Reassessment', 33 *J Law and Soc* (2006) 596; and the forum in 17 *Law and Social Inquiry*, as well as a number of articles published in *Social and Legal Studies* over the years.

[8] Ewald, 'Norms, Discipline, and the Law', 30 *Representations* (1990) 138. Foucault himself is somewhat ambivalent about the relationship between juridical and disciplinary power which are sometimes presented as incompatible (Foucault, *Discipline and Punish*, *supra* note 5, at 183) and sometimes as concomitant forms of power (cf. M. Foucault, *Resumé des Cours, 1970–1982. Conférences, essais et leçons du College de France* (1989), at 99). The key point, however, is not to equate the 'juridical' in Foucault's analysis with 'law' in general (Tadros, *supra* note 7).

[9] Baxter, *supra* note 7, at 463; Tadros, *supra* note 7.

[10] Hammer, *op. cit.*, at 20 and 21.

[11] This transpires most explicitly in chap. 5 where Hammer formulates the power of human right norms in terms not of the rights they entail, but how they function as producing a particular (subject as) individual. However, the argument subsequently takes a normative turn by moving to the advantage of the paradigm shift to human security.

disciplinary power.[12] However, in the further discussion he stops short of elaborating how this actually works in the international realm. Instead, the argument takes a digressing turn to the role of non-state actors within the international structure, which results in bypassing the Foucauldian argument. In what remains I will shortly illustrate the limits of the perspective developed in *A Foucauldian Approach to International Law*, and follow up on the above suggestions about how a Foucauldian approach could be formulated alternatively to enhance our understanding of the relationship between sovereignty, power, and law in the international realm. In order to do so I will relate to the discussion on recognition (Chapter 3) in more depth.

Recognition of sovereign statehood is indeed a key issue in terms of the legal-political dichotomy, as is also reflected in the continuous debate on the declaratory versus constitutive doctrine within international law. In this regard Hammer poses the question how recognition as a policy decision by (members of) the international community relates to the international legal capacity that is tied in with obtaining a sovereign status. In other words, what normative status and legal consequences (can) follow from recognition, which can be identified as an arbitrary policy decision itself? This is a question which keeps many legal and political academics and practitioners occupied. In his elaboration, however, Hammer appears to reify the legal-political divide rather than bridge it. He does so by putting the constitutive effect into the 'objective/normative' box, while identifying declaratory recognition as a policy decision, i.e. at the will of states. He refers to recognition as an 'ongoing reflective form of state policy' and 'modulation of attitudes between a variety of actors' (at 33), and further elaborates this 'reflection' by moving the discussion to the purpose or goal of and motives for recognition. Following Warbrick, he replaces the declaratory *vs* constitutive perspectives with the distinction between a 'facilitative role' (with few legal consequences) and an instrumental role of recognition (which relates to juridical criteria and/or to legal intentions by recognizing states).[13]

However, it remains unclear what the merit of this distinction is in overcoming the normative–political dichotomy. In fact, it seems to reduce the whole debate about the coming into being of international legal personality to one of genuine normative intentions of recognizing states. This transpires most clearly where Hammer states that '[in the facilitative role of recognition] [p]olitical factors come into play that prevent any form of constitutive role for recognition' (at 34) and render recognition a 'diluted concept' (at 35). Thus facilitative recognition 'may assist the entity in emerging, and even grant it some form of legitimacy, but it does not necessarily lead to the formation of a state per se [as the decision] does not relate to the normative or putative conditions of statehood, such as capacity for exercising control over specific territory' (at 35). Thus the focus of the recognition debate shifts from its legal consequences to state intentions as a key element. This raises more questions than it answers. What kind of entity arises from facilitative recognition? What *are* the putative conditions of statehood? Surely effective capacity has been superseded as a necessary condition?[14] And, crucially, what are the consequences of the

[12] See Tadros, *supra* note 7, for a genealogical account of the historical differences in law's evolution.

[13] Warbrick, 'Recognition of States: Recent European Practice', in M. Evans (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe* (1997).

[14] See the Montevideo Convention, 165 LNTS (1936) 19, and for instance the *Aaland Case*, LNOJ, special supplement No. 3, 1920, GA Res 1514 (XV), 1960 and The *Congo Case,* as discussed by J. Crawford, *The Creation of States in International Law* (2nd edn, 2006). See also Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union (Symposium: Recent Developments in the Practice of State Recognition)', 4 *EJIL* (1993) 36. Within IR theory the argument about recognition of post-colonial states is developed by R.H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (1990). Hammer refers to recognition of entities lacking the basic attributes of statehood, but categorizes this as a political, facilitative type of recognition, which creates 'some sort of legitimacy', but not a 'normative existence' or formal legal status *qua* state in the international system (at 35).

conditions of statehood when present? Indeed, Hammer concludes his analysis of facilitative and instrumental recognition with this very question: '[w]here is the relationship between statehood and recognition and how is one to reconcile state attributes with that of denial or according recognition?' (at 39). This, however, brings us back to square one: does sovereignty follow from the empirical elements of statehood itself, or does it require a recognizing 'speech act'? Irrespective of the continued discussion about the alleged putative elements of sovereign statehood, again the politics (positive/consensual) versus law (objective/normative) dichotomy is reproduced.

Moreover, and crucially, it remains unclear how the facilitative versus instrumental roles of recognition relate to the proposal for a Foucauldian perspective. According to Hammer, the key to the so-called 'transformative' perspective in this regard is a shift away from doctrine and the actual final recognition decision to the process of decision-making, and thus 'engages the gap between transcendental capacities as opposed to finite or empirical perceptions by delineating a perception via an examination of the limits' (at 44). What this examination of the limits entails remains unclear, but emphasis on the process of decision-making seems to shift the focus to politics while bracketing the legal dimensions of recognition all together (dismissed as 'some unrealistic attempt to define recognition as a conferring act of legitimacy or entrenching the state', at 43). Instead, the pluralist card is played again by addressing reasons which individual states and/or a 'diverse array of actors external to the state' (at 42) may have for recognition of a new member (irrespective of its status) of the international society.

As aforementioned, it is hard to identify this as a Foucauldian argument. A far more interesting analytical question that would follow from Foucault's writings is how recognition works in the light of the notion of productive and disciplinary power. That is to say, how international subjects are the product of a particular norm regime. In fact, Hammer hints at this point when referring to the role recognition plays in 'the overall desired construct of a state … [via] an ongoing pattern of changing standards for a recognized entity, such that the truth of an entity's status is subject to the regime of understanding as understood by the variety of actors involved in the process' (at 40). He subsequently focuses on the second element, i.e. this variety of actors that in his view bestows on recognition 'some normative role' again as the 'power being asserted is not solely political or state centred' (at 45). Normativity thus follows from a democratization of decision-making procedures (moving beyond state-centrism), or so the author argues. However, in light of the Foucauldian perspective it makes more sense to analyse the truth regimes, and the relation between norms and the creation of subjects – i.e. the role of law as a disciplinary mechanism, creating particular kinds of subjects in light of a particular contingent truth regime.[15] An interesting lead to this discussion would be to use Foucault's concept of subjectivity to analyse the legal concepts of international legal personality, recognition, sovereign rights and duties, and state responsibility. Such a focus would bring the politics of law back in, and could, for instance, lay bare the striking parallels of 19th-century exclusionary notions of sovereignty, linked to a norm of civilization, and contemporary discourse where the inclusive right to equality for state entities is increasingly linked to the duty to be a particular kind of sovereign.[16]

[15] Moreover, from the Foucauldian angle the claim that '[t]he state, like other created or artificial entities, is super structural as its power derives from sources that are external to its framework' (at 45), as well as the reference to a descriptive approach (see for instance at 1, 3, and 48) is particularly puzzling.

[16] Within contemporary international discourse this, for instance, follows from the popular link between terrorism and state failure and a lack of democracy, which then allegedly legitimizes intervening measures. Thus sovereign equality as an egalitarian principle *par excellence* is used as a basis for making distinctions between states (see Aalberts and Werner, 'Sovereignty Beyond Borders: Sovereignty, Self-Defense and the Disciplining of States', in R. Adler-Nissen and T. Gammeltoft-Hansen (eds), *Sovereignty Games. Instrumentalising State Sovereignty in Europe and Beyond* (forthcoming, 2008).

One question keeps popping up while one reads the 'empirical' chapters: to what extent does Hammer move from a legalist/normative view (mere law) to mere politics? When he addresses recognition in terms of state intentions, customary law as state interest, the strategic use of norms by states, and *opinio iuris* as 'empty rhetorics' (at 56), it appears as if he has 'jumped the realist bandwagon' himself (at 8). Thus, in the final analysis the 'haunting dichotomy' between politics and the legal order identified in the beginning of the book is reconfirmed by its own argument. What is worse, failing to elaborate how a Foucauldian approach instead enables an integrated perspective on the power of the politico-legal is a missed opportunity. Hence whereas the title is still promising, a Foucauldian approach to international law unfortunately is not what the book delivers.

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