

REVIEW

Leonard M. Hammer, *A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues* (Aldershot: Ashgate, 2007). Hardcover. ISBN: 978-0-7546-2356-4.

Since the early 1980s, international studies have sustained a theoretical dynamism. The demise of the empiricist-positivist promise for a cumulative science has forced scholars to re-examine the ontological and epistemological foundations of their discipline.¹ After the first great debate that pitted idealism against realism in the 1940s and the second debate confronting behaviouralism and traditionalism in the 1950s-1960s, this so-called “third debate” has led to an increasing criticism of the dominant realist paradigm in international relations. Foucault’s work unquestionably fuels this third inter-paradigm debate and the rise of the post-positivist approach to international relations.² His concern with historically specific conditions in which knowledge is generated allowed poststructuralists to offer an alternative conception of international relations. It brought new blood to international relations by questioning the realist image of the world, especially its state-centrism, its obsession with political-military power and its blindness to various sub-national or trans-national actors.

While international relations scholars have been trying for more than twenty years to address contemporary changes in world politics by debating the key concepts structuring political science, public international law is obviously stuck within a largely unquestioned and outmoded statist approach. *A Foucauldian Approach to International Law* is a noticeable exception to this general assertion. In his book, Hammer points out that international law essentially failed to acknowledge the emergence of new international actors such as non-governmental international organisations and sub-national political entities or individuals. Moreover, international law has been struggling since its very origins with some inherent ambiguities

¹ Yosef Lapid, “The Third Debate: on the Prospects of International Theory in a Post-Positivist Era,” *International Studies Quarterly*, 33, 3, 1989, 235-254.

² Pierre Anouilh, Emmanuel Puig, “Les relations internationales à l’épreuve du poststructuralisme : Foucault et le troisième ‘grand débat’ épistémologique”, in Sylvain Meyet, Marie-Cécile Naves, Thomas Ribémont (eds.), *Travailler avec Foucault. Retours sur le politique* (Paris, L’Harmattan, 2004), 141-159.

and inconsistencies regarding the link between law and political processes. According to Hammer, the main problem is that, unlike in national jurisdictions, within the international system there is no actual legal system. Since the states are creating the law for their own regulation, aspects of enforcement are usually lacking. International law has thus been caught between three different discourses: first, the realist assertions that international law does not exist as such, but only as a tool of states and as a reflection of their particular interests; second, institutionalism that accords some role for international law-making organisations; third, cosmopolitan assumptions of moral state behaviour with a view towards the identification of an existing social order.³

Referring to Foucault as a means of understanding and enhancing international law, Hammer tries in the second chapter of the book to move away from the traditional dichotomous battle between normative objectivity and consensual understanding of international law. He suggests “a transformative understanding of the international system and a transgressive approach to one’s perception of international society.”⁴ The underlying assertion is that the “transgressive” Foucauldian conception of power can help international legal theory to address the on-going changes that have developed within the international system: the growth of international and regional organisations, the move towards globalisation and the rise of new actors. Since the state is not maintaining full and complete control but rather part of a matrix of power, Hammer considers that what begs attention is not the state as the central actor in the international system, but “an understanding of the variety of actors’ use of techniques and tactics of domination to understand the framework and forms of relations.”⁵ The influence of international law is not solely a matter of sovereign command, but is one of resistance among social forces. It is a part of the social power system. The law does not serve a regulatory role between the state and the individual, but rather functions as part of the process in shaping individuals and allowing for their reactions that in turn further serve to shape and influence social process.

Starting from these general assumptions, each chapter of the book addresses a fundamental problem within international law, with each chapter following the same pattern. After discussing the underlying problems posed by traditional legal doctrines regarding the topic of the chapter, Hammer offers an alternative approach pursuant to Foucault’s understanding of power and governmentality.

The third chapter considers the manner by which a state might acquire standing and personality within the international system via international recognition. Recognition is at a crossroads between a state according another entity some form of

³ Leonard M. Hammer, *A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues* (Aldershot: Ashgate, 2007), 8.

⁴ *Ibid.*, 9.

⁵ *Ibid.*, 19.

legitimacy such as to deem it a state, while also making a statement regarding policy and desire. The legal doctrine recognizes that the explanation for this decision is not to be found in a specific normative framework but essentially in the will of the state. Recognition is always a political decision reflecting interests and treatment accorded by one entity to another with little legal fallout. It is linked to the circumstances. By introducing the Foucauldian notion of “regime of truth,” Hammer shows that “even with the recognition decision being considered within a political context and at the mercy of the states, there are still other forms of influence that hold sway over the state to the extent of influencing its decision as well as altering the position and status of the entity at question.”⁶ Recognition is 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 actors involved in the process. This regime of truth within the context of recognition is thus a contingent notion. It emanates not only from other states, but also from their relationship with such other bodies as international organisations. It reflects an ever-changing conception of the criteria for statehood. Therefore, what is important is to understand why an idea is understood to be the truth and how that came about.⁷

The fourth chapter addresses a key source of international law, that being customary law. Adhering to the transgressive approach to custom, Hammer proposes to turn one’s attention from the question of identifying the contents of custom towards the surrounding events and developments that have led one to declare a norm as achieving customary status. Once again, the questions are why and how a customary norm has emerged. Reflecting Foucault’s approach to governmentality, Hammer’s goal is to rethink rules and aspects of state behaviour by considering how the state and other actors envision custom. Customary international law then is not considered as a final source of law, but as part of the ongoing discourse that tends to influence and affect pattern of relations and actions. This discourse incorporates a broad gamut of international and domestic actors, including the individual, non-governmental organisations, the state and international bodies.

The fifth chapter is probably the most original of the book, and potentially the most controversial too. It considers international human rights via a reference to the right of freedom of religion and belief. The purpose of the author in this chapter is to “examine modes by which human rights can maintain some form of social role within society in a manner that does not necessarily eviscerate the surrounding culture, but becomes part of the ongoing social discourse.”⁸ According to Hammer, it is important to acknowledge the social function of beliefs—especially minority beliefs and their manifestations—both in forming avenues of understanding and recognising the necessity for social development. Starting from Foucault’s approach to

⁶ Ibid., 41.

⁷ Ibid.

⁸ Ibid., 71-72.

power, Hammer interprets human rights as the means by which a state subjugates the individual to pre-conceived notions regarding the desired structure of society. Rights can serve to entrench the state and create a strict framework of operation at the expense of individual development. As a result, autonomy and free-thinking can be stymied rather than enhanced by human rights. Incorporating Foucault's understanding of truth, Hammer argues that the actual content of the belief or the potential contradictions between a belief and other rights are not the key issues. Since truth and belief are contingent, one should understand belief as a matter of ongoing discourse within society and ever-shifting understanding of truth. As a result, he suggests that states and judicial tribunals "must look beyond the temptation to engage in some form of social balancing by considering the broader social interplay that is at work."⁹

Somewhat less original in content, the sixth chapter engages the relatively recent notion of human security. Unlike the state-centric approach, the human security approach views the individual as a subject of the international legal system and considers the notion of security in a more human-orientated manner. It allows a variety of programs and initiatives that meet the needs of populations in distress. In this chapter, Hammer evaluates the merits of such a reference to human security within the framework of international law. Regarding the work of Michel Foucault, Hammer points out that the focus on the welfare of the populations is, in a broad sense, pursuant to Foucault's notion of bio-politics, which shifts attention away from the state as the central figure. He suggests that a transformative approach enlightened by Foucault's conception of power allows for a conceptualization of human security in a manner that need not rely upon existing normative systems, but rather allows for human security to develop in a descriptive sense, as the needs of the population or group shift and sway, depending on necessities and surrounding changes.

The seventh chapter turns towards the Foucauldian framework as a means of addressing the rise of non-governmental organisations within an international legal framework. Recognising the problems associated with non-governmental organisations, especially internal and external accountability issues, Hammer examines the conditions necessary for a new approach to international law that incorporates various non-state entities as viable actors. His goal is to demonstrate how the global civil society process reflects the power/knowledge relationship proposed by Foucault. In this perspective, global civil society is not presented as a movement of resistance emanating from below, but as a reflection of changes in power relations between actors, all of whom maintain some form of influence, as well as being subject to influential drives of the other participating actors. Global civil society is not considered as a democratic ideal, but rather as a reflection of emerging forms of governmentality. Leonard Hammer's book is a very good piece of scholarship. It challenges the state-centric paradigm that dominates international legal theory and questions both the

⁹ Ibid., 94-95.

realist and cosmopolitan interpretations of international law. Hammer emphasizes the ever-changing character of truth and the importance of analyzing the broader context within which international norms and practices emerge. Pursuant to Foucault's "toolbox approach", Hammer does not intend to propose a new global explanation for the international legal system. He invites us to use the intellectual devices offered by Foucault to better explicate international law. Nevertheless, while the book is an excellent contribution to the epistemological debate in the field of international law, the author nonetheless falls short of offering a satisfactory analysis of any of the issues that he has selected for investigation. Therefore, although the book by Hammer is a breakthrough in international legal theory, it does not bring any new perspectives to political science or Foucauldian studies. The book is a new example—a quite good one indeed—of how Foucault's political thought can usefully be re-appropriated in support of renewed analysis of the social power system.

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