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BOOK REVIEWS

Giorgio Agamben, *The Open: Man and Animal*, trans. Kevin Attell, Stanford, Stanford University Press, 2004, 120 pp., ISBN 0804747385, \$15.95.

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I. BETWEEN THE HUMAN AND THE INHUMAN

In humanitarian ideology life itself has become the object of governance. Contrary to the great ideologies of nationalism and imperialism, humanitarianism is concerned not so much with the proper way of living for a group of people as with life as such. Indeed, it would be possible to say that life is considered mainly passively as something to be saved, but without any political voice and historical destination. The inclusion of pure life in politics logically entails the idea that all human beings possess a certain sense of humanity to which other human beings have an obligation to respond. In this view, life itself is considered to be the lowest common denominator of otherwise completely different human beings. Moreover, the humanitarian concern with life itself turns the question of life and how it is defined into one of the most crucial of our time.

In his recent essay *The Open: Man and Animal*, Giorgio Agamben, one of Italy's most important philosophical thinkers, picks up on the theme of life through a critical, if sometimes slightly haphazard, examination of the notion of the human in Western thought. His main argument is that the human is the product of a separation between humanity and animality that takes place within man himself and which elevates human life above animal life, which in turn is excluded as something abject. For Agamben, the question of determining the boundary between human life and animal life is not just a matter of philosophical concern but has a direct bearing on the fundamental political question of how to distinguish between valuable life on the one hand and life that is not considered to be worthy of the predicate 'human' on the other. As such, his discussion is also relevant for discourses of international law and international politics that assert a universal notion of humanity as reference point for human rights, human security, and humanitarian intervention.

Agamben begins his inquiry into the connection between man and animal, the human and the non-human, with a brief discussion of a picture in a thirteenth-century Hebrew bible which depicts the messianic banquet of the righteous – those who have survived the end of days because they have lived a kosher life. In this picture the righteous are depicted with animal heads. Agamben takes this to mean that on the last day 'the relations between animals and men will take on a new

form, and that man himself will be reconciled with his animal nature' (p. 3). The idea of a reconciliation between man and animal at the end of days is continued in Agamben's account of a – rather peculiar – exchange between Kojève and Bataille, both of whom theorized about 'the end of history and the figure that man and nature would assume in the post-historical world' (p. 6). Kojève originally theorized in a Hegelian fashion that the end of history would involve man's return to animality. Later, however, he modified his position, not only claiming that humanity would survive the end of history but also that humanity only exists in contradistinction to animality:

[I]n Kojève's reading of Hegel, man is not a biologically defined species, nor is he a substance given once and for all; he is, rather, a field of dialectical tensions always already cut by internal caesurae that every time separate – at least virtually – 'anthropophorous' animality and the humanity which takes bodily form in it. (p. 12)

This leads Agamben to conclude that the category of man is inherently unstable and always haunted by the spectre of the animal, for man 'can be human only to the degree that he transcends and transforms the anthropophorous animal which supports him' (p. 12). The animal thus functions as a kind of constitutive outside that is both at the very core of human life and external to it. Agamben traces the paradox that the animal is both the human's condition of possibility and its condition of impossibility back to Aristotle's notion of the 'political animal', which bears witness both to the grounding of the human in the animal and the subsequent definition of the human through its subtraction from the animal within man. Rather than defining life, Aristotle looks for its lowest common denominator from which other, higher forms of life can be articulated and evaluated. This most basic form of life is referred to as nutritive life, that is, the organic or biological potentiality to grow that is common to humans and animals as well as to plants. The notion of the living body as oscillating between nutritive life and more complex forms of life takes place first of all within man himself, where life is constantly divided, categorized, and decided upon.

Having established that the separation of the human and the animal within man can be witnessed in ancient Greek philosophy and the divine, Agamben shifts his focus to the biological sciences. Although his steps (or rather leaps) between different disciplines, traditions, and ages at times come across as somewhat arbitrary – not least because Agamben does not develop his argument systematically according to a pre-established plan – his decision to focus on the biosciences is an interesting move, since these sciences have spent much energy on delimiting the human from the animal. If anything, it would have been interesting if Agamben had expanded his discussion on biology somewhat by addressing current research in the genetic sciences and neurosciences which claim to provide a set of 'hard-wired' constraints that any theory on human flourishing needs to take into account.¹ Agamben, however,

1. See for instance L. Arnhart, *Darwinian Natural Right: The Biological Ethics of Human Nature* (1998); S. Pinker, *The Blank Slate: The Modern Denial of Human Nature* (2002). For interesting political-theoretical accounts of neurology, see W. E. Connolly, *Neuropolitics: Thinking, Culture, Speed* (2002); B. Massumi, 'The Autonomy of Affect', in P. Patton (ed.), *Deleuze: A Critical Reader* (1996), 217–39.

focuses mainly on the Swedish biologist Linnaeus, who, writing in the eighteenth century, developed a classification system in which he classifies man among the primates, because he can find little physical difference between men and apes. Furthermore, Linnaeus maintained that the later addition of *sapiens* to the generic name *Homo* should, rather than meaning wise or knowledgeable, be understood as man's ability to recognise himself as such: '*man is the animal that must recognize itself as human in order to be human*' (p. 26, emphasis in original).

By way of summary, then, Agamben distils two distinct ways in which the human and the animal have been separated in Western thought. First, he points at ancient attempts to humanize the animal and to provide it with a human face. In this context, he argues that the human is constructed by reaching out to the animal, by including animality within man: 'the non-man is produced by the humanization of an animal: the man-ape, the *enfant sauvage* or *Homo ferus*, but also and above all the slave, the barbarian, and the foreigner, as figures of an animal in human form' (p. 37). The second instance where humanity meets animality takes place with the animalization of the human in modern times. Here Agamben draws our attention to the non-speaking man who functions as the imaginary evolutionary interval between mute animals on the one hand and man as a speaking subject on the other. In this case, the origin of man is equated with the origin of language, forcing man's muteness outside himself. The inhuman is thus produced within man itself: 'the Jew, that is, the non-man produced within the man, or the *néomort* and the overcomatose person, that is, the animal separated within the human body itself' (p. 36).

Having argued that the human and the animal are intimately linked within man himself, Agamben turns his attention to the ontological status of the animal environment and that of the human world in an attempt to enquire further into the threshold between the human and the animal. By comparing the animal environment to the human world, Agamben seeks to provide an account that recognizes the intimate connection between the two and which does not constitute the human through an exclusion of some life as non-human. Thus even though Agamben maintains that there is a substantial difference between the animal environment and the human world, this distinction is not hierarchical. In exploring the ontological status of the animal environment, Agamben takes a point of departure in the work of the zoologist Jakob von Uexküll, who argues that there is not one world with hierarchically ordered organisms but an infinite variety of perceptual worlds. In contrast to the view that that animals move in the same surroundings (*Umgebung*) as humans, he argues that the living sphere of an animal is constituted solely by those environmental elements (*Umwelt*) that have an affective bearing on the animal. Everything else is simply unable to penetrate its *Umwelt*. Agamben refers to Jakob von Uexküll's example of the tick, which is only able to enter into relationship with a few environmental elements (temperature of the mammal, the odour of butyric acid, and skin type) and is passionately united with these three elements only: 'The tick is the relationship; she lives only in it and for it' (p. 47). In this view, an animal is completely open to its disinhibitors, that is, the animal is completely absorbed by its environment and is, therefore, held out in something other than itself. Following Heidegger, Agamben argues that this openness is also not open, because

the animal has no ability to apprehend its own disinhibitors and, as such, is also closed off from its environment: 'the animal environment . . . is *offen* (open) but not *offenbar* ('disconcealed', lit. openable)' (p. 55). Thus, as Heidegger already argued, the core difference between man and animal is that the latter cannot apprehend its own captivation, whereas the human is able to break free of his or her all-encapsulating environment.

However, this is not to say that the human thereby enters into a more enlightened space beyond the limits of the animal environment. On the contrary, the 'disconcealment' that is characteristic of being in the world of humans can only be attained through a suspension or deactivation of the human's relationship with its disinhibitors. Hence Heidegger's point that man's *Lichtung* is at the same time also a *Nichtung*: 'the world has become open for man only through the interruption and nihilation of the living being's relationship with its disinhibitor' (pp. 69–70). Agamben refers to Heidegger's description of profound boredom as the emotional state where being in the human world meets animal existence. If we are bored, we do not actively engage with our environment, but neither can we escape it. Rather, in the case of boredom, we are completely captivated by the environment from which there is no escape. Yet, in contrast to the animal, the fact that we are not engaged with the environment also means that it is possible to disturb or suspend our intimate relationship to this environment. Or as Agamben nicely puts it, '*Dasein* is simply an animal that has learned to become bored; it has awakened *from* its own captivation *to* its own captivation. This awakening of the living being to its own being-captivated, this anxious and resolute opening to a not-open, is the human' (p. 70, emphasis in original). The human only obtains its humanity through the internal struggle between concealment (which characterizes the animal environment) and disconcealment (which characterizes being in the world, *Dasein*). At this point Agamben returns to the opening theme of the essay: the status of humanity at the end of history. Building on Heidegger's notion that man is always oscillating between animal concealedness and human disconcealedness, he claims that the end of history leads not so much to a reconciliation of humanity and animality, but, on the contrary, according to Agamben the synthesis between the human and the animal leads to a humanization of the animal or an animalization of the human in which 'bare life', the threshold between animal existence and human existence, itself becomes the object of politics.

2. THE END OF HISTORY: BARE LIFE, THE CAMP, AND BIOPOLITICS

Arguably, the notion of bare life as a zone of indistinctness between the human and the animal is the most important political theme in Agamben's work. As he puts it in *The Open*, 'In our culture, the decisive political conflict, which governs every other conflict, is that between the animality and humanity of man. That is to say, in its origin Western politics is also biopolitics' (p. 80). Bare life is the limit of humanity, the point where the human turns into the inhuman. The production of humanity is at the same time also the suspension of man's own animality, which is thought of as pure abandonment: 'What would thus be obtained, however, is neither an animal

life nor a human life, but only a life that is separated and excluded from itself – only a *bare life*' (p. 38, emphasis in original).

Here it might be useful to recall Agamben's example of the tick, which only exists in a passionate and intimate symbiosis with its specific disinhibitors. Whereas normally only humans can suspend their relation to their environment, Agamben refers to a laboratory experiment in which a tick was kept alive in isolation from its affective environment for eighteen years. Living in suspension, that is, in an environment that had nothing to offer it, the life of the tick bears resemblance to the human state of profound boredom. Nevertheless, while the tick thus in a sense ceases to be an animal, it is equally impossible to allocate the tick to the category of humanity. Rather, deprived of its environment, the life of the tick is an example of bare life that, neither human nor animal, constitutes a threshold which is nothing more or less than a state of being simply a living being.

Although Agamben repeatedly hints at the political importance of bare life and biopolitics in the essay under review, he unfortunately does not describe this relation to the same extent as in his earlier work. Especially in his book *Homo Sacer. Sovereign Power and Bare Life*, Agamben argues convincingly that Western sovereignty gives birth to the bare life of *Homo sacer*. Following Carl Schmitt, Agamben claims that the sovereign decides not only who is included in the legal order as human subjects but also who is refused entry to the rule-governed order. Sovereignty thus simultaneously creates inside and outside, order and anarchy, city and forest, and humanity and animality. Indeed, if the sovereign can be defined by his ability to put himself above the law, *Homo sacer* represents life beneath the law, that is, life that can be ended without punishment. In this context, Agamben refers to the werewolf, a fusion of man and animal, as the figure of bare life that bears the sovereign's ban: 'What had to remain in the collective unconscious as a monstrous hybrid, divided between the forest and the city – the werewolf – is, therefore, in its origin the figure of the man who has been banned from the city'.²

The archetypal place where one encounters life that is reduced to bare life is the concentration camp. The concentration camp represents a zone of indistinction in which humanity and animality blur into one and where life and death depend not on legal rules but on the goodwill of the camp guards, who can act as sovereign vis-à-vis the inhabitants of the camp. The status of the bare life in the concentration camps is meticulously documented in Agamben's *Remnants of Auschwitz. The Witness and the Archive*. In this book Agamben focuses especially on the so-called *Muselmänner*, a term used by prisoners in Auschwitz to describe those prisoners who no longer cared whether they lived or died. For Agamben, the *Muselmann* testifies to the limit condition of humanity, the threshold beyond which human beings cease to be human: 'The *Muselmann* is not only or not so much a limit between life and death; rather, he marks the threshold between the human and the inhuman'.³

If originally the camp was an exclusive, secret space surrounded by walls that divided social life within the political community from the bare life in the camps,

2. G. Agamben, *Homo Sacer. Sovereign Power and Bare Life* (1998), 105.

3. G. Agamben, *Remnants of Auschwitz. The Witness and the Archive* (1999), 55.

Agamben argues that the figure of bare life has now transgressed the spatiotemporal boundaries of the camp: 'Today it is not the city but rather the camp that is the fundamental biopolitical paradigm of the West'.⁴ Biopolitics, or so Agamben argues, does not work towards some political objective but is rather an apolitical project concerned with the survival of bare life. In contrast to the political tasks, what is at stake in biopolitics is nothing but the bare life of people. If in modernity the human was produced by distinguishing it from lower forms of life, contemporary biopolitics, for instance apparent in humanitarian ideology, does not produce higher forms of living but takes its point of departure in the simple fact of living itself. If the dialectical motor of history, as Kojève argued, was the constant struggle of deciding between man's animality and humanity, then biopolitics constitutes the end of history. Without any historical objectives, the human is thought of as bare life: 'The stakes are now different and much higher, for it is a question of taking on as a task the very factual existence of peoples, that is, in the last analysis, their bare life' (p. 76). The end of great ideologies thus also seems to have rid humanity of any historical efficacy, as a result of which the only political mandate left seems to be the administration of man's own animality.

To be sure, Agamben does not argue in favour of a return to the politics that assume a historical destination of peoples. Indeed, as he argues, these types of politics can only arrive at their destiny by distinguishing themselves, often violently, from those forms of living that are considered to be inhuman. However, according to Agamben the only real ethical stance is the one that does not deny the humanity of those who have moved beyond the line that separates human life from animal life. In opposition to the modern production of the human which establishes a boundary between conscious life and vegetative life, a genuine humanism would instead draw attention to the insufficiency of the limit of humanity as well as to the operations through which the human becomes divided from inhuman or animal life. Such humanism, moreover, recognizes bare life as the threshold between animality and humanity. Because bare life bears witness to the precariousness of the human, Agamben maintains that true humanism does not seek to define and decide over life, but, instead, investigates how the human has been articulated and rearticulated at the expense of bare life. To quote Agamben at some length:

[I]f the caesura between the human and the animal passes first of all within man, then it is the very question of man – and of 'humanism' – that must be posed in a new way . . . We must investigate not the metaphysical mystery of conjunction, but rather the practical and political mystery of separation . . . It is more urgent to work on these divisions, to ask in what way – within man – man has been separated from non-man, and the animal from the human, than it is to take positions on the great issues, on so-called human rights and values. (p. 16)

What is important for Agamben, then, is not to provide an alternative and more authoritative distinction between the human and the non-human. Nor does he aim to provide a definition of vegetative life as the lowest common denominator shared

4. See Agamben, *supra* note 2, at 181.

between human beings and which, for exactly that reason, constitutes the logical starting point for humanitarian ideologists. Rather, Agamben seeks to circumvent the paradox of the humanization of the animal and the animalization of the human by finding a third space of being that does not draw a line between the human and the non-human.

3. HUMAN RIGHTS OR THE RIGHT TO BE HUMAN?

From the vantage point of international legal theory, it is somewhat disappointing that Agamben does not discuss the biopolitics inherent in humanitarianism in more detail. For while he explicitly lists humanitarian ideology as one of the main processes that contribute to the production of bare life at the end of history, he does not discuss in which ways humanitarianism draws the line between the human and the non-human in any specific sense. This is unfortunate. It would for instance have been interesting to see how Agamben would have engaged with the fact that the structure of the camp has made a comeback in the name of humanitarianism and human rights.⁵ For while completely different in purpose, both refugee camps and extermination camps are characterized by the presence of bare life. A second and related topic worth exploring would have been the role victimization plays in humanitarian ideology. Victims are often represented as innocent, whereas the humanitarian operation itself is depicted as impartial and apolitical. While it is no doubt easier to make political choices when the division between villains and victims seems clear-cut, such a stance also denies political agency to those whose life is taken care of.⁶ A third and final topic Agamben could have discussed in more detail concerns the relationship between political rights of citizenship on the one hand and human rights on the other. Increasingly, human rights are viewed as something that transgresses the borders of particular nation-states and the rights of man are increasingly separated from the rights of citizens. This, too, seems to illustrate the fact that the victim or the refugee can only be grasped in terms of bare life without any relation to a political milieu. This separation, however, also exemplifies that in practice human rights can only function when they are based on political rights. The idea of human rights as a universal backdrop makes little sense, since it does not enable those persons to exercise their rights in any meaningful way. As Hannah Arendt suggests (and is approvingly quoted by Agamben), 'The conception of human rights based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it

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5. Noll has extended Agamben's discussion on sovereignty, bare life, and the camp to the humanitarian field of asylum protection. See G. Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', (2003) 5 *European Journal of Migration and Law* 303; see also J. Edkins, 'Sovereign Power, Zones of Indistinction and the Camp', (2000) 25 *Alternatives* 3; C. Bagge Laustsen and B. Diken, 'Camping' as Contemporary Strategy – From Refugee Camps to Gated Communities, AMID Working Paper Series 32 (2003), available at http://www.amid.dk/pub/papers/AMID_32-2002_Diken_&_%20Bagge_Laustsen.pdf.
 6. See Agamben, *supra* note 2, at 133–4; D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (2002), 25; S. Žižek, *Welcome to the Desert of the Real. Five Essays on September 11 and Related Dates* (2002), 91–2; J. Edkins, 'Humanitarianism, Humanity, Human', (2003) 2 *Journal of Human Rights* 253.

were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except that they were still human’.⁷

For Agamben, then, the most important thing is not to articulate the human (which always also produces the non-human) but to move beyond both human being and animal being to a state of ‘just being’ or what he in earlier work has referred to as ‘whatever being’.⁸ This in turn requires that we risk ourselves in the emptiness between man and animal: ‘To render inoperative the machine that governs our conception of man will therefore mean no longer to seek new – more effective or authentic – articulations, but rather to show the central emptiness, the hiatus that – within man – separates man and animal, and to risk ourselves in this emptiness: the suspension of the suspension, Shabbat of both animal and man’ (p. 92).

Unfortunately, though, Agamben does not expand on what this abstract passage might imply in practice. This is due partly, as he himself recognizes, to the fact that a notion of being that suspends both animality and humanity is beyond imagination. But although there might not be a name for that what is beyond the suspension of animality and humanity, it is, by way of conclusion, not completely impossible to translate these abstract notions into a political strategy. Acknowledging the existence of bare life, such strategy would not start with the notion of human rights but with the right to be human. In this view, humanitarianism does not have its existence in protecting life in the name of an abstract universalism (human rights, human security, and so on); rather, a truly humane humanism concretely locates universality in bare life, that is, those who are most excluded. For the true measure of universality lies in the way in which human subjects within the positive order relate to the objects of that order. In contrast to the idea of human rights as an abstract prerequisite for political rights, the right to be human refers to the continuous *political* process by which those whose lives have been reduced to bare life are recognized as part of the political sphere of existence. The true political task for humanitarians is thus not so much to secure for all individuals a claim to a set of rights recognized as human but constantly to fight for societal forms that can include the excluded.

Rens van Munster*

Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, School of Human Rights Research 16, Antwerp, Oxford, and New York, Intersentia, 2002, ISBN 9050952275, 464 pp., €69.00.

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No other area in the international field is getting as much scholarly attention these days as international criminal law. In the ten years since their creation, the ad hoc tribunals for the former Yugoslavia and for Rwanda have produced more case law

7. Quoted in Agamben, *supra* note 2, at 126.

8. G. Agamben, *The Coming Community* (1993).

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than all the previous international and domestic war crimes trials combined, and their success has led to the recent creation of a permanent International Criminal Court (ICC). Numerous books and hundreds of law review articles have already been written about the tribunals and the ICC. While most of the existing scholarship focuses on the substantive law, defences, and jurisdictional reach of these international criminal courts, Göran Sluiter's book constitutes the first in-depth treatment of one of the most important aspects of international criminal proceedings: the collection of evidence.

Evidence is the backbone of a criminal case. This is as true in the international arena as it is for domestic prosecutions. Yet, unlike national courts trying domestic cases, the ad hoc tribunals and ICC do not possess a constabulary to collect evidence and enforce summonses for the appearance of witnesses. Instead, by design, these international tribunals must depend on the assistance of states, without which no case could come to trial. In this respect, the tribunals are analogous to national court proceedings involving evidence located in a foreign state. While there is much precedent and several excellent scholarly works on the subject of judicial assistance between states, there are, as Sluiter ably demonstrates, fundamental differences between co-operation in criminal matters between states and co-operation with international criminal tribunals.

At the national level, evidence can be obtained from abroad employing one of three methods. First, domestic courts can unilaterally order entities within their jurisdiction to produce evidence in their control abroad or face sanctions. Thus a court can order a bank located within its territorial jurisdiction to produce records held at a foreign branch or a corporation to produce records held by a foreign subsidiary. Second, courts can request evidence from abroad under the principles of comity and reciprocity, but in such cases the requested authorities have wide discretion to deny a request for assistance. Third, where applicable, courts can employ mutual legal assistance treaties (MLATs), which require the provision of assistance except in certain narrowly defined circumstances, such as where the evidence would threaten national security.

Unlike domestic courts, the ad hoc tribunals and the ICC do not have the ability unilaterally to enforce sanctions on non-complying entities, since none are within their jurisdiction.

In principle, all UN member states without exception are required to comply fully with requests of the ad hoc international tribunals for assistance, by virtue of their establishment by the Security Council under its Chapter VII powers. In reality, the tribunals have no enforcement power of their own, and must rely on the Security Council to impose sanctions on non-complying countries. The tribunals have been reluctant to request Security Council intervention, and where they have done so, the Council has condemned non-compliance but has to date never authorized sanctions to induce compliance, rendering co-operation with the ad hoc tribunals in effect every bit as voluntary and discretionary as a domestic request based on comity.

While the ICC does not have the power of the Security Council behind it (except in cases referred to it by the Council), its statute does contain an MLAT-like provision requiring states parties to comply with requests for assistance except in certain

circumstances. As Sluiter explains, however, these exceptions are somewhat broader than those enumerated in a typical MLAT, thereby giving states parties a bit more discretion to deny the ICC's requests for assistance. At the same time, many of the traditional exceptions codified in MLATs are not available under the ICC statute. Since comity applies only between sovereigns, states that have not ratified the ICC Statute are generally free to ignore the ICC's requests for assistance altogether, although other international instruments might imply a duty to co-operate under certain circumstances.

Thus past precedent and writings concerning inter-state legal assistance do not provide sufficient illumination as to what duties states owe in co-operating with the international tribunals and what co-operation is required under what circumstances. This, then, is the ambitious task Sluiter sets for his book. Drawing on the precedent of the ad hoc tribunals, the negotiating record of the relevant international instruments, and analogies to inter-state co-operation, Sluiter's insightful analysis of these questions will undoubtedly influence the future practice of the international criminal courts.

In undertaking this task, Sluiter also examines a broader question: whether the duty of states to co-operate with the international tribunals is adequate to provide them with a sufficient amount of evidence effectively and fairly to determine the guilt or innocence of the accused. In Sluiter's opinion, the jury is still out on the answer to that question. Yet, as an advocate of international justice, he sets forth several proposals that, if adopted, would probably improve the evidence-gathering process for the international tribunals.

Sluiter's book is divided into two main parts. The first part (chapters 2 to 6) concerns the basis and scope of the duty of states to co-operate in the collection of evidence in general, while the second part (chapters 7 and 8) focuses on the duty with respect to on-site collection of testimonial evidence – something which will be particularly important for the effective functioning of the tribunals. In this reviewer's opinion, a more logical division might have been between the procedural aspects and substantive aspects of the duty to co-operate, but Sluiter does a thorough job of covering these issues as they arise within his organizational structure. He also skilfully explores the distinctions between the ad hoc tribunals and the ICC throughout the book.

Following the introduction, chapter 2 offers an identification and analysis of the legal basis for the ad hoc tribunals and the ICC to request various forms of judicial assistance and the legal basis of the duty of states to provide such assistance. Chapter 3 examines the distinctions between the legal assistance regimes of the ad hoc tribunals and the ICC on the one hand, and inter-state provision of legal assistance on the other. Chapter 4 examines the question as to under what circumstances and conditions the ad hoc tribunals and the ICC may lawfully request assistance. Chapter 5 examines the procedural and substantive aspects of the duty of states to co-operate with the ad hoc tribunals and the ICC, as well as valid grounds justifying refusal to provide assistance, and explores how disputes over the content of the duty to co-operate should be settled. Chapter 6 concerns the execution of requests for assistance, exploring in particular the question of the extent to which states have a

duty to execute requests in a manner dictated by the international court. Chapter 7 identifies the needs of the international courts to obtain testimonial evidence, and examines the methods available to the international courts to obtain such evidence. Chapter 8 identifies alternatives to legal assistance, focusing especially on the use of on-site investigations.

The final chapter adroitly sums up the author's observations, and provides a number of extremely useful recommendations. Sluiter warns states that many traditional objections to co-operation recognized in the bilateral context will not be acceptable with respect to the international tribunals. He notes that the ICC structure suffers from compromises made during the negotiations, leaving states with a more limited duty to accept on-site investigations than with respect to the ad hoc tribunals. Sluiter expresses concern that defendants appearing before the international tribunals lack tools of the kind that are provided to the prosecution and are necessary to gather exculpatory evidence located in various states. Ultimately, Sluiter concludes that the most important amendments needed to improve the ICC's co-operation regime are the exclusion of the principle of voluntary appearance of witnesses and the expansion of states parties' duties in the field of on-site investigations.

The writing and editing of this book are superb. Despite the technical nature of its subject matter, it is extremely readable. The organization (with chapters divided into numbered sections and subsections), and the detailed index, table of treaties and table of cases – render this a remarkably easy-to-use reference book. Moreover, the use of footnotes, rather than endnotes, will be appreciated by both the scholar and practitioner. Sluiter had already distinguished himself in the field of international criminal law as co-editor of the widely cited series *Annotated Leading Cases of International Criminal Tribunals*. This book confirms his expertise in the field of international criminal law. *International Criminal Adjudication and the Collection of Evidence: Obligations of States* is a must-read for any serious scholar of the international criminal tribunals. Since its publication it has already gained worldwide recognition as one of the most important books written in this field.

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Christian Reus-Smit (ed.), *The Politics of International Law*, Cambridge, Cambridge University Press, 2004, ISBN 0521837669 (hb), 0521546710 (pb), 334 pp., £40.00 (hb), £17.99 (pb).

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A few years ago, *International Organization* published a special issue on the 'Legalization of World Politics'.¹ In this special issue some leading scholars in international relations (IR) theory and international law (such as Judith Goldstein, Miles Kahler,

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1. (2000) 54 (3) *International Organization*.

Robert Keohane, and Anne-Marie Slaughter) sought to explain the move to law in many areas in international life. The issue of legalization was primarily framed in terms of legal institutions as answers to functional problems, while law was primarily understood as a constraint on the actions of states. Moreover, the 'legalization of politics' was measured in terms of the degree to which rules are obligatory, the precision of rules, and the delegation to a third party of powers of interpretation, monitoring, and implementation.

The Politics of International Law can be read as a critique of and an alternative to the liberal and rationalist approach used in 'The Legalization of World Politics'. These approaches, Christian Reus-Smit argues, give a distorted picture of the role of law in international life. Law, after all, is not just a constraining factor for utility-maximizing agents; it is also constitutive of the agents' identities and their interpretation of what counts as self-interest in the first place. In earlier publications Reus-Smit had already stressed the mutually constitutive relationship of international law and international politics, for example in his article, 'Politics and International Obligation', and in his book, *The Moral Purpose of the State*.² Building on Reus-Smit's earlier work and borrowing from insights formulated in social constructivism,³ *The Politics of International Law* emphasizes two important ways in which normative structures (like law) are constitutive of the actors' reasons: 'Through processes of socialisation they shape actors' definitions of who they are and what they want; and through processes of public justification they frame logics of argument' (p. 22). The book illustrates this by analyzing the role of law in different areas, varying from 'easy cases' for social constructivism (the creation of the International Criminal Court, human rights) to cases where neo-realists and liberal institutionalism seem to hold the strongest arguments (climate change and financial institutions) and areas which seem to affirm the validity of traditional realism (use of force and international security). In all these areas, the book demonstrates, the mutually constitutive relationship of law and politics is at work.

At some points the book echoes all too familiar debates in (international) legal theory: the relation between law as a system of rules and law as a social process, the impact of external perspectives on law on the internal validity of legal arguments, the autonomy of law and its dependency on politics, the logic of legal argument and the indeterminacy of law, and so on. It would be unrealistic to expect social constructivism to shed new light on all these age-old problems of international law. Yet *The Politics of International Law* (like social constructivism in general) has something to offer to both practitioners and theoreticians of international law: a new perspective on the functioning of politics, a richer understanding of the function of law in international society, and a more sophisticated approach to some of the foundational concepts of the international legal system.

The Politics of International Law is based on a conception of politics as a form of human action and deliberation. Political deliberation, the book argues, integrates four

2. C. Reus-Smit, 'Politics and International Legal Obligation', (2003) 9 (4) *European Journal of International Relations* 591–625; *idem*, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (1999).

3. The best-known book in this respect is A. Wendt, *Social Theory of International Politics* (1999).

types of reason: idiographic (related to identity), purposive, ethical, and instrumental reason. By defining political deliberation as an activity combining these four types of reason, *The Politics of International Law* claims to articulate a better conception of (international) politics than that offered by realism and liberal institutionalism – and by other constructivist theories. And, indeed, this broadening of political rationality has its merits and is more promising than most of the competing definitions of the political. At the same time, however, the question remains whether the integration of idiographic, purposive, ethical, and instrumental reason cannot be found outside the political realm. It is, in other words, still relevant to ask, ‘If politics is a form of normative reason and action, how does it differ from other conceptions?’ (p. 23). In this context it would be interesting to see how social constructivism would deal with probably the most thorough attempt to determine the realm of politics: Carl Schmitt’s definition of the political as dealing with the determination of the public enemy.⁴ Schmitt’s approach to the political contains many aspects that could easily be framed in constructivist terms. An example is Schmitt’s analysis of the changing identities of warring parties due to the constitutive changes that took place in international law in the twentieth century: from the *Jus Publicum Europaeum*, where war was seen as a duel between formally equal states, to the age of collectivization, where the boundaries between war and law-enforcing operations on behalf of the international community became blurred. This blurring had important consequences for the distinction between lawful combatants on the one hand and criminals (outlaws) on the other.

The Politics of International Law is also based on a constructivist understanding of the nature of international law. Following the reading of international law’s history in *The Moral Purpose of the State*,⁵ modern international law is understood as the result of the constitutive changes that took place in international society during the nineteenth century. This structure was closely bound up with the rise of political liberalism and changing ideas of the identity and purpose of states. This has resulted, the book argues, in an emphasis on institutional autonomy, procedural justice, multilateral forms of legislation, and a specific structure of obligation. As far as this last is concerned, *The Politics of International Law* pours cold water on the traditional positivist understanding of state consent as the basis of international legal obligations. If state consent, as has been recognized by legal positivism itself, is not a natural fact but an institutional concept, it is necessary to examine the broader constitutional framework in which this institution of consent became so prominent. The growing importance of state consent, the book argues, is not so much a ‘positivist turn’ in international law as an example of the gradual ascendancy of liberalism.

The broadening of the concepts of ‘the political’ and ‘international law’ makes it possible to take a fresh look at some problems in international law. A good example is offered by Dino Kritsiotis’s analysis of the prohibition of the use of force in international law and society. Kritsiotis rejects attempts to reduce law to politics.

4. C. Schmitt, *The Concept of the Political* (1996), translation of *Der Begriff des Politischen* (1934).

5. Reus-Smit (1999), *supra* note 2.

Through a study of the development of the legal regime on the use of force, Kritsiotis demonstrates that international practice attaches great value to the autonomy of law: 'Our findings suggest that states have rejected generalised accounts which seek to equate all law with political action or which seek to hierarchise law and politics in relation to each other' (p. 47). At the same time, however, he criticizes the naive image of law as a system of rules that is applied to facts. Law takes many forms and fulfils many functions, while the relationship between law and politics differs in various contexts. Kritsiotis illustrates this point by examining the development of the prohibition on the use of force, from the interwar ban on war to the general prohibition laid down in the UN Charter. Moreover, he shows that, if it comes to the exceptions to the use of force, international law should be regarded as a discourse, where states bring in and assess arguments and where 'international law can develop and store its own "self-knowledge", working practices, and international conditions for regulating the use of force' (p. 49).

Kritsiotis's analysis of international law as an autonomous sphere with various types of discursive activities is closely related to some contemporary legal theories. Institutional theories of law, for example, have argued against the traditional image of law as consisting of norms of conduct and power-conferring norms. In principle, these theories argue, all results of human (linguistic) activity can obtain validity in the legal system. In legal discourses we indeed find those results, varying from traditional binding norms to expressions of identities, emotions, historical contexts, hortatory norms, and so on. Legal semiotics too has criticized the prioritization of norms of conduct in legal thinking and drawn attention to the richness of legal discourse. Until now, however, social constructivism seems not to have integrated these insights into its thinking on the relationship between law and politics. Here, I think, lies a promising field for further co-operation between international lawyers and IR theorists interested in the mutually constitutive relationship between law and politics.

A second illustration of a fresh look at problems of international law and politics is given by Richard Price's analysis of customary law. Price argues for a different understanding of the notion of 'state practice' in the determination of a rule of customary law. Price proposes a more communitarian interpretation of customary law to the effect that 'it may be reasonable to claim customary status for norms when the proscribed practice is sufficiently politicised to significantly raise the threshold for violations, so much so that the burden of proof clearly is reversed in favour of a general rule of non-use' (p. 123). Even when a norm falls short of this threshold, this does not mean that it is irrelevant from a legal perspective. Price illustrates this point by means of an analysis of the norm prohibiting the use, transfer, production, and stockpiling of anti-personnel land-mines. Although the customary status of this norm is debatable, it still has shaped the idiographic, purposive, ethical, and instrumental reasons of states. The norm has helped to define what counts as a 'law-abiding member of good standing in the international community' (p. 110).

One of the problems with Price's approach is the primary task he assigns to judges in the determination of rules of customary law. It is, says Price, 'the process of jurists' decisions that marks a key transition to customary law' (p. 128). Such an

approach echoes earlier hopes of international lawyers as the 'legal consciousness of the civilized world'⁶ and reinforces some of the realist critiques of proposals for the legalization of world politics. Still, Price's interpretation of customary law offers a good starting point for going beyond a positivist understanding of international obligations without having to give up the autonomous sphere of law.

Social constructivism has become one of the leading approaches to international relations. In contrast to realism, liberalism, and (neo-)institutionalism, however, social constructivism has remained relatively unknown to international law. There is no heavily debated 'dual agenda'⁷ to bring together international law and IR theory on the basis of a constructivist approach. This is surprising, because social constructivism has always emphasized the constitutive and regulative role of law in international society. It goes not only beyond the realist marginalization of international law, but also beyond attempts to conceptualize law solely in terms of constraint on state actions. Whoever is interested in the potentialities and problems of this approach to international law and international politics should read *The Politics of International Law*.

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6. See M. Koskenniemi, *The Gentle Civilizer of Nations* (2002), ch. 1.

7. A.-M. Slaughter Burley, 'International Law and International Relations: A Dual Agenda', (1993) 87 AJIL 205–39.

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