Fleur Johns

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For Pete

Non-Legality in International Law

International lawyers typically start with the legal. What is a legal as opposed to a political question? How should international law adapt to the unforeseen? These are the routes by which international lawyers typically reason. This book begins, instead, with the non-legal. In a series of case studies, Fleur Johns examines what international lawyers cast outside or against law – as extra-legal, illegal, pre-legal or otherwise non-legal – and how this comes to shape political possibility. Non-legality is not merely the remainder of regulatory action. It is a key structuring device of contemporary global order. Constructions of non-legality are pivotal to debate in areas ranging from torture to foreign investment, and from climate change to natural disaster relief. Understandings of non-legality inform what international lawyers today do and what they refrain from doing. Tracing and potentially reimagining the non-legal in international legal work is, accordingly, both vital and pressing.

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Foreword

It is an honour and pleasure to introduce Dr Fleur Johns' first book, with its intriguing title. My own first book, *The Creation of States in International Law*, was concerned with international lawyers making things with and through law, or at least participating in their making. In that respect, it shares a concern with Fleur Johns' book. Differing styles notwithstanding, the two have something else in common. *Creation of States* tackled phenomena commonly regarded as matters of 'fact' and not of law; it analysed material 'said to be "political" and, therefore, not a proper subject of legal analysis', as the late Professor Ian Brownlie remarked in introducing that text. In so doing, it probed fundamental concepts and considerations of legality in relation to various modes of illegal force and de facto situations.

In her book, Dr Johns likewise explores encounters of the legal and the non-legal across a wide range of settings marked by international legal argument. Many of these settings have elsewhere been characterised as wholly political creations (e.g. Guantánamo Bay) or scenarios in which international law's role is entirely reactive (e.g. the aftermath of natural disaster). By contrast, Dr Johns envisages international lawyers playing an active, constitutive role in each of these domains and asks that we bear a corresponding sense of responsibility.

The parallel between the two books naturally has its limits. My concern in *Creation of States* was to defend the formal coherence and completeness of international law as a system of law, as against the 'radical decentralization' that I there identified with nineteenth-century doctrine. That is not the goal of this book. Rather, Dr Johns' aspiration is, as she tells us, 'to make politically navigable and questionable' some aspects of international legal work previously unacknowledged,

namely, work revolving around what are described in this book as international law's 'negative spaces'.

Across international legal fields and materials commonly seen as disparate, she traces some illuminating connections. Understandings of torture and counter-terrorist detention informed by international human rights law may have more to do with concepts of choice identified with international economic law than international legal scholarship has previously registered. Depictions of dead bodies, and work with them, in international policy manuals might owe something to patterns of thought discernible in scholarly writing on climate change. In these and other combinations, the repertoire of international legal thought and work manifest in this book is less cribbed than some accounts of contemporary international law would have us see. For all these reasons it is a welcome addition to Cambridge Studies in International and Comparative Law.

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The very earliest version of one chapter of this book was written in 2004, although the idea for such a book was then inchoate. Other chapters were written discontinuously between 2006 and 2012. Most were presented in varied forms before a range of audiences. In addition, I am fortunate to have received written commentary on published journal articles that formed the basis for a few of the chapters. Many people will, accordingly, have contributed to this work in ways that it is now beyond me to acknowledge. To all who have listened to me speak about some aspect of this work, referenced it in their own writing, and asked questions of or expressed interest in it, in one way or another, let me offer my thanks. At risk of unforgiveable omission, let me acknowledge in particular the input, feedback, insights and invitations of the following people in relation to various parts of this book: Mark Antaki, Irene Baghoomians, Katherine Biber, Edwin Bikundo, Selene Brett, Hilary Charlesworth, Davina Cooper, Mitchell Dean, Roshan DeSilva Wijeyeratne, Peter Fitzpatrick, Ben Golder, Richard Joyce, David Kinley, Karen Knop, Martti Koskenniemi, Euan Macdonald, Shaun McVeigh, Ralf Michaels, China Miéville, Stewart Motha, Jacqueline Mowbray, Pat O'Malley, Anne Orford, Sundhya Pahuja, Nikolas Rose, Kim Rubenstein, Wojciech Sadurski, Mehera San Roque, Ben Saul, Gerry Simpson, Tim Stephens, Mariana Valverde, Kevin Walton, Katie Young and Peer Zumbansen. I would also like to record particular thanks to four people who generously agreed to provide feedback on the book as it neared publication: David Kennedy, Susan Marks, Annelise Riles and Ralph Wilde. David Kennedy owes still further credit for being such an extraordinary teacher to me: first, in a formal sense, in the 1995–1996 Harvard LL.M. program, and in the years since that time, in many ways.

Throughout this book's lengthy gestation, I have been a member of faculty at Sydney Law School at the University of Sydney, an institution from which I have drawn support of many kinds. Of particular significance were two periods of leave from teaching afforded me by the Faculty's Special Studies Program and further research leave granted me through the University's Brown Fellowship Program. I am grateful to the former Dean, Professor Gillian Triggs, the current Acting Dean Greg Tolhurst, and the Deputy Vice-Chancellor (Research), Professor Jill Trewhella, for this support and to my colleagues at Sydney for innumerable acts of kindness, large and small. In the very earliest stages, research and writing towards this book was also assisted by the support of the Leverhulme Trust, which enabled me to visit Birkbeck School of Law in London under the generous auspices of Professor Peter Fitzpatrick.

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For all these sources of help and stimulus, this would have remained a non-book about non-legality were it not for the unstinting support of my husband, Peter Hammond. I cannot here do justice to his warmth, wisdom, patience, generosity, creativity and unflagging faith in our collective ability to pull things off, whatever the complications; let the dedication of this book do what this deficient collection of nouns cannot. Also inadequate is any one-sentence acknowledgement of the contribution of my parents, Penelope and Murray Johns, and my sister, Diana Johns, each of whom has offered a cherished hand at critical moments. Elizabeth and Jim Hammond and all the Hammond, Harris, Savage and Warburton clans have similarly thrown lifelines of one sort or another on many an occasion, as have many of our wonderful friends. Since 2009, the skill and thoughtfulness of Monique Simmons has been absolutely invaluable. I am deeply grateful to them all. As for opening my eyes to the world anew and giving me boundless grounds for joy, I could not wish for three more extraordinary people than the

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Finally, I would like to acknowledge the publications in which portions or earlier versions of some chapters of this book appeared: 'The Torture Memos' in Fleur Johns, Sundhya Pahuja and Richard Joyce (eds.), *Events: The Force of International Law* (London: Routledge-Cavendish, 2011), pp. 260–278; 'Financing as Governance' (2011) 31 *Oxford Journal of Legal Studies* 391–415; 'Performing Party Autonomy' (2008) 71 *Law & Contemporary Problems* 243–271; 'Performing Power: The Deal, Corporate Rule, and the Constitution of Global Legal Order' (2007) 34 *Journal of Law and Society* 116–138, reprinted in Stewart Motha (ed.), *Democracy's Empire: Sovereignty, Law, and Violence* (Oxford: Blackwell, 2007), pp. 116–138; and 'Guantanamo Bay and the Annihilation of the Exception' (2005) 16 *European Journal of International Law* 613–635.

Contents

1 Making non-legalities in international law

International lawyers make law as they go about their daily work, but they also make non-law. International lawyers, that is, routinely shape understandings of what stands opposed to or outside the reach of legal norms. This book is concerned with the latter dimension of international legal work. It aims to track how international lawyers have been shaping understandings of non-legal phenomena in some significant contemporary debates and what international lawyers have contributed to, or made of, those debates in the process. International lawyers' practice of making non-legalities entails the continual making and remaking of global political possibilities. Anyone concerned with global politics in the broadest sense must, accordingly, grapple with the patterns and implications of this work.

It will immediately be apparent that this book is making problematic something which has not been problematic for international legal scholarship to date. It does so following a rich tradition of problematisation – that is, of turning givens into questions – within the field of international law and in other scholarly fields.[1] Yet it does so in a vocabulary which international legal scholars do not currently use: a vocabulary of non-legalities (namely, illegality, extra-legality, pre- and post-legality, supra-legality and infra-legality). A sense of the would-be or could-be problem with which this book is concerned may, nonetheless, be gained from the following illustrative story: a short story

[1] On the history of international law as (in part) a history of making problems, see, for example, David Kennedy, 'The International Style in Postwar Law and Policy' (1994) *Utah Law Review* 7–104 at 27. See, more generally, Michel Foucault, 'Polemics, Politics, and Problematizations: An Interview with Michel Foucault' in Paul Rabinow (ed.), *Ethics: Subjectivity and Truth. The Essential Works of Michel Foucault 1954–1984*, Volume One (ed. James D. Faubion, trans. Robert Hurley, Baltimore: Penguin Books, 2000), pp. 109–119.

of drones, definitions and democracy. This is a story of international legal endeavours well-meaning, considered and commendable, yet also in some sense concerning. My interest in this story is not in targeted killings as such, but rather in the 'vacuums' that international legal thought creates around them.

In May 2010, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Professor Philip Alston, reported to the United Nations Human Rights Council on recent state practices of targeted killing. That report framed targeted killing ('intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organised armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator') as a policy innovation associated with recent developments in technology – specifically, the introduction of armed drones into the armouries of at least eight states.[2] Targeted killing in this mode is not, according to the report, to be consigned to extra-legality in all circumstances. Rather, its legality depends on context, legally understood: that is, whether it was conducted in armed conflict, outside armed conflict, or in relation to the inter-state use of force. Repeated in the report were several versions of the phrase: '[t]argeted killing is only lawful when …' or 'State killing is legal only if …'.[3] The capacity for targeted killing was thus approached as a mutable, mobile force charged with prospects for illegality, except in so far as it may be tethered, here and there, to defined legal ground.

The tethering of this latent illegality that the report sought to enact was primarily procedural and the procedures in question await development. States should, the report recommended, 'publicly identify the rules of international law they consider to provide a basis for any targeted killings they undertake' and 'specify the procedural safeguards in place to ensure in advance of targeted killings that they comply with international law'.[4] In the case of killings carried out extra-territorially, the host state should 'publicly indicate whether it gave consent, and on what basis'. States should also, the report urged, 'make public the number of civilians collaterally killed in a targeted killing operation, and the measures in place to prevent such casualties'.[5] However, more work

[2] Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, United Nations General Assembly, Human Rights Council, 28 May 2010, A/HRC/14/24/Add.6, www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf (accessed 17 September 2012), paras. 2, 27.

[3] *Ibid.*, paras. 30, 31, 32, 33, 57, 70, 86.

[4] *Ibid.*, para. 93. [5] *Ibid.*

needs to be done to make such an accounting possible, the report made clear. It was, for instance, deemed necessary for the High Commissioner for Human Rights to convene a meeting of states, the International Committee for the Red Cross, and human rights and international humanitarian law experts to 'arrive at a broadly accepted definition of "direct participation in hostilities"'.[6]

Because targeted killings are, according to the report, taking place 'in times of peace as well as armed conflict'[7] and because states known to have carried out targeted killings have not made public the policies surrounding those operations, they occupy in the report's parlance an 'accountability vacuum'. That vacuum is presumably highly legalised: governed, for instance, by contractual arrangements between the United States' Central Intelligence Agency and its personnel, as well as corresponding contractual networks in other states and organisations involved. Yet the report offered no more than a glimpse of these: 'According to media accounts, the head of the CIA's clandestine services, or his deputy, generally gives the final approval for a strike.'[8]

The lack of accountability attributed to the terrain surrounding targeted killing was not expressed as a deficiency of legal rule per se. Rather that which is missing and remains to be exerted in or over this terrain was expressed in terms of broad, underlying, substantive value: States have failed to discharge generalised obligations to 'provide transparency and accountability' for targeted killings and to do so 'meaningful[ly]'.[9] This was characterised as a source of concern for international law irrespective of whether specific targeted killings may ultimately be shown to be legally compliant.

The deficiency with which targeted killings were surrounded in the report (even as their legality or illegality depended upon particularities

[6] *Ibid.* This is significant because civilians who 'directly participate' or take an 'active part' in hostilities lose the protection from attack they otherwise enjoy in armed conflict under international humanitarian law, by virtue of, inter alia, paragraph 1 of Common Article 3 of the Geneva Conventions, Article 51(3) of the First Additional Protocol to those Conventions and Articles 4(1) and 13(3) of the Second Additional Protocol to those Conventions. See, generally, International Committee of the Red Cross, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 90 *International Review of the Red Cross* 991–1047, www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf (accessed 17 September 2012).

[7] Alston, *Report of the Special Rapporteur*, para 8.

[8] *Ibid.*, paras. 3, 20 (citing Jane Mayer, 'The Predator War', *The New Yorker*, 26 October 2009).

[9] *Ibid.*, paras. 87, 90.

of context) is to be matched by a latent legality still to be developed. The latter was expressed more as an aspiration for knowledge and meaning than legal rule as such. (Legal rules are to come later, once 'broad[ ] accept[ance]' of definitions can be engineered.)[10] In the report's account, the practice of targeted killing carried a 'problematic' capacity for 'blurring and expansion of the boundaries of the applicable legal frameworks'.[11] The countering legality that this is understood to demand is, accordingly, to be blurry and expansive: namely, a generalised call for 'disclosure', 'framework[s]' and 'procedures' identified with yet-to-be-enabled means of 'public investigation[ ]'.[12]

Embedded in this call is an implicit comparison with lethal practices presumed to reside squarely, stably and safely within the 'frameworks' of international law and to thereby remain accessible and accountable to the public. '[C]lear legal standards' have, the report indicated, been 'displace[d]' in the production of this particular 'vacuum'.[13] The 'basic legal rules' are, the report informed its readers, those of international humanitarian law and international human rights law. These are said to require transparency and to offer means by which 'the international community' may 'verify the legality of a killing ... confirm the authenticity or otherwise of intelligence relied upon, or ... ensure that unlawful targeted killings do not result in impunity'.[14] By implication, one might assume that they likewise resist 'blurring and expansion'.

One does not, however, have to look very far or think very hard to arrive at grave doubt about the capacity of international humanitarian law and/or international human rights law to deliver the sort of transparency and accountability to which the report aspires. Press briefings, embedded journalists and claims surrounding Wikileaks notwithstanding,[15] it is hard to identify any recent wartime exercise of lethal force the legality of which 'the international community' might have been in a position to 'verify' with any confidence in advance or, for that matter, in retrospect (witness the International Court of Justice's Advisory Opinion on Nuclear Weapons).[16] Even assuming a fully-fledged judicial or other public investigation in a

[10] *Ibid.*, para. 93. [11] *Ibid.*, para. 3. [12] *Ibid.*, para. 93.
[13] *Ibid.*, para. 3. [14] *Ibid.*, paras. 88, 92.
[15] See Yochai Benkler, 'A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate' (2011) 46 *Harvard Civil Rights-Civil Liberties Law Review* 311–398.
[16] 'Advisory Opinion of 8 July 1996: Legality of the Threat or Use of Nuclear Weapons' (1996) *International Court of Justice Reports* 226–267, www.icj-cij.org/docket/files/95/7495.pdf (accessed 17 September 2012).

particular, controversial instance (and the overwhelming majority of wartime killings never provoke, nor would be expected to provoke, such investigation), all that one would hope to uncover in most cases would be whether attention was directed towards considerations of proportionality and necessity. That would hardly generate an experience of accountability, one imagines, for those with family members or close friends killed in the relevant incident or others like it, let alone for members of 'the international community' at greater remove.

Even imagining a scenario of uninhibited information-sharing, it is difficult to imagine the means by which 'the international community' might be put in a position to 'confirm the authenticity or otherwise of intelligence relied upon' when those collecting and relying upon global intelligence seem regularly unable to do so (witness the fiasco regarding Iraq's supposed stockpile of weapons of mass destruction). To suggest that international humanitarian law and/or international human rights law routinely ensure this level and type of 'accountability' in relation to states' exercise of lethal force outside the criminal justice system (or even within it) is to evoke fantasy.[17]

In this way, the report generates a mirage. That which seems to drive the report's indignation and hope is its projection of an as-yet-unimaginable prospect of direct communion between, on one hand, those mobilising lethal force in the name of a state and, on the other, a 'public', writ large and in unity as 'the international

[17] This fantasy is by no means benign. Jodi Dean has, for instance, written persuasively about the public aspiration to transparency as a feature of the ideology of technoculture. See Jodi Dean, 'Why the Net is not a Public Sphere' (2003) 10 *Constellations* 95–112 at 95, 101 and 110: ('If the public aspires to inclusivity, transparency, and reconciliation, then the secret holds open these aspirations via the promise that a democratic public is within reach – once all that is hidden has been revealed. Along with networked communications and practices of education and informatization, technologies of surveillance and practices of dissemination are installed to fulfil these promises, to bring everything before the gaze of the public. Publicity works through demands to disclose or reveal the secret and realize the public as the ideal self-identical subject/object of democracy … The politics of the public sphere has been based on the idea that power is always hidden and secret. But clearly this is not the case today… All sorts of horrible political processes are perfectly transparent today. The problem is that people don't seem to mind, that they are so enthralled by transparency that they have lost the will to fight … there is always more information available and … this availability is ultimately depoliticizing … [within] communicative capitalism's endless reflexive circuits of discussion').