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978-1-107-01401-5 - Non-Legality in International Law: Unruly Law

Fleur Johns

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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.

FLEUR JOHNS is an Associate Professor at the Sydney Law School, University of Sydney, and Co-Director of the Sydney Centre for International Law.

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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,

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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.

James Crawford
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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 unforgivable 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.

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