

## Fleur Johns, *Non-Legality in International Law*

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*Fleur Johns, Non-Legality in International Law: Unruly Law, Cambridge: Cambridge University Press, 2013.*

What does it mean to say that law has boundaries and limits? In the previous issue of this journal Raf Geenens reviewed how Hans Lindahl grappled with this question in his study on *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*. Lindahl's book focuses on the reconfiguration of legal boundaries brought about by globalization(s), as well as on new limits to legal ordering and novel forms of inclusion, exclusion and political contestations that come with it. A different approach towards the construction of legal boundaries can be found in Fleur Johns' book *Non-Legality in International Law: Unruly Law* (hereafter: *Unruly Law*). As the title suggests, the book is primarily written for international lawyers. However, the book speaks to other disciplines as well, including legal philosophy. *Unruly Law* not only builds on a rich body of philosophical literature; the study *itself* is an exercise in philosophizing. It 'turns givens into questions' by reflecting how international lawyers construct what is not international law; and conversely, what international law is not. More concretely, Johns focuses on the construction of five types of non-legalities: (a) *illegality* (exceeding suppression by, being forbidden by or defiant of international law); (b) *extra-legality* (lying outside international law); (c) *pre- and post-legality* (standing before or in the wake of international law's operation); (d) *supra-legality* (surpassing legal grasp or comprehension); (e) *infra-legality* (the marginal, natural, incidental or unworthy of direct notice). Each form of non-legality is studied through specific practices of boundary setting, from the torture memos to Guantanamo Bay, investment law, climate change and the management of dead bodies in the aftermath of natural disasters. Adopting what she calls a 'quasi-ethnographic' approach, Johns seeks to articulate what international lawyers do when they craft events or phenomena as non-law; how they draw boundaries between the providence of international legal rule and that which stands against it, outside it, before or after it; that which transcends it or is too marginal to be grasped by legal knowledge. However, the point of *Unruly Law* is not just to analyze what lawyers do; the point is to open up new frames on the workings of international law and to draw attention to what is suppressed and marginalized in traditional scholarship. As Johns puts it, *Unruly Law* challenges 'international legal studies that seek to apply international law to a world cast in some sense as beyond that law (or vice versa), worry incessantly that international law is not enough for the task of application (or absorption), and hence neglect to scrutinize and tactically engage with those aspects of international legal work that are constitutive of at least some dimensions of that beyond' (24).

Johns' study is more bottom-up than Lindahl's, with less attention for the nature of legal ordering as such and more focus on the actual constructions of non-law by lawyers. Yet, she shares with Lindahl a fascination for that which remains unspoken in traditional legal scholarship, and an interest in disclosing the politics of boundary setting. The central message is of *Unruly Law* is not that law unavoidably has boundaries, limits and fault lines. Instead, its main concern is to lay bare, destabilize, and reconfigure the boundaries of international legal discourse. Of course, this once more raises some of the questions central to Lindahl's *Fault Lines of Globalization*: if we shift the boundaries of international legal discourse, how are these new boundaries established, how do we deal with those that resist inclusion in legal discourse and where are the moments where a-legal challenges make us aware of the contingency of existing legal ordering?

*Unruly Law* starts out with a brief discussion of the 2010 report of the UN Special Rapporteur on targeted killing. The 2010 report articulates almost all of the concerns about targeted killings that can be found in recent international legal scholarship, such as the lack of transparency and procedural safeguards, the blurring and expansion of legal categories or the lack of agreement on who counts as a lawful target. However, as Johns sets out, insisting on transparency, objective assessment of facts and clear legal standards is not only naive (no such things exist in most armed conflicts anyhow); it also diverts attention away from the omnipresence of law in targeted killing decisions. Targeted killings do not take place in a legal vacuum; they are structured by legal norms that tend to escape the attention of (international) lawyers, such as legally conferred powers to the executive, intra-organizational normative structures or the legal structures surrounding technology used in killing operations (e.g., contractual relations, coded architectures or intellectual property rights).

The discussion of the Alston report sets the stage for the chapters that follow, each dealing with a specific way in which international lawyers craft 'non-law.' Unfortunately, space does not allow me to go into all of the innovative case studies discussed in the book. By means of illustration, let me briefly summarize some of the main points of the third chapter, where Johns challenges conventional legal wisdom about Guantanamo Bay. In legal philosophy and international law, Guantanamo is often portrayed as a 'legal black hole' and discussed in terms of Schmitt's or Agamben's notion of the exception. The idea of Guantanamo as somehow outside the law is solidified by speeches of US officials, emphasizing their discretionary authority to deal with 'dangerous individuals.' It is also confirmed by critics who portray the basis as a 'law-free zone' that should somehow be overcome by international law. However, a closer look at the practice of Guantanamo shows that the detention center, as Johns puts it, 'has been a site of intense normative productivity' (96). Far from acting outside legal regulation, officials and detainees alike are caught in a web of rules, procedures and expert-knowledge. In this context, Johns extensively quotes Navy Secretary Gordon England, who was called to decide upon the release, transfer and continued detention of prisoners. England keeps insisting on the fact that decisions are based on

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guidelines and data, and that his aim is to arrive at decisions that any reasonable person would have taken given the circumstances. Similarly, when speaking of the Combatant Status Review Tribunal, England emphasizes ‘we have set up a process, we’re following that process, we’re looking at all the data (...) we have now set up another process; more data is available (...) I believe the process is doing what we asked the process to do, which is to look at the data as unbiased as you can, from a reasonable person point of view (...)’ (94).

Of course, much can and should be said about the scandalous way in which Guantanamo is set up and operates. However, as Johns makes clear, defining Guantanamo exclusively in terms of extra-legality comes at a high price. For one, it comes with the risk that detainees are seen primarily as powerless victims, locked away in a lawless zone. Instead, Johns invites the reader to take a different perspective, to view the detainees also as agents operating in a highly regulated environment. Moreover, it obscures our view of how exceptional legal regimes and their authorities operate. In Guantanamo there is no such thing as a vacuum where sovereign decisions escape legal regulation. Instead there is an uneasy combination of exceptionalism and hyper-regulation, which has profound implications for all who operate within this environment.

The chapter on Guantanamo is illustrative for the originality and ambitions of the book as a whole. Through a study of rather divergent practices in international law Johns draws attention to ways in which law and scholarship itself is implicated in the construction of ‘non-law,’ be it the production of scientific insights in climate change, deal-brokering in investment law, drafting of torture memos or the management of dead bodies. What is more, the book shows how legal research and advocacy can engage with events and phenomena that are normally relegated to the realm of what law is not – or what is not law. Naturally, a book that challenges existing scholarship so fundamentally leaves some important questions unanswered and raises several new questions. I already alluded to the issue of boundaries and limits of international law above as a possible topic that could be taken up more thoroughly. Another set of questions would revolve around the sometimes rather different stakes involved in the invocation of ‘law’ (and thus the relegation of certain phenomena as non-law); such as the preservation of some basic political values, the protection of a disciplinary identity, outsourcing questions of fact, etc. *Unruly Law* is by its nature an unfinished project; an exciting adventure that opens up new ways of thinking, new areas for research and novel strategies for advocacy work. Also, it is a study that forces international lawyers to think anew about the ways in which they constitute and discipline their object of knowledge.