Review

Non-Legality in International Law: Unruly Law by Fleur Johns, Cambridge Studies in International and Comparative Law, Cambridge University Press, 2013, 282pp (ISBN 9781107014015)

Pat O'Malley*

Introduction

A book on international law that has little or nothing to do with international criminality or criminal justice is perhaps not something one would expect to be discussed in a journal such as this. Its relevance, as will become clear, is only in degree related to the legalities (or rather 'non-legalities') that are the focus of its analysis. Its primary value is in its innovative approach to interrogating law. Nevertheless, some of the specific legal matters to which it attends would, doubtless, interest scholars of criminal law, criminal justice and criminology. Among other things, it attends to the law-like rules and prescriptions for dealing with dead bodies in the wake of disaster, and their relevance inter alia to civil unrest and good order; the 'internal' regulation of detention camps, primarily Guantanamo Bay; the 'illegal' rules and commentaries known as 'The Torture Memos'; and the normative framing ('pre- or post-legality' in Fleur Johns' terminology) of deals in which corporate parties negotiate over transnational financing.

The fact that these various kinds of normative prescription are usually considered by international legal scholars *not* to be international law is a principal theme of this book. Rather, they are understood by such scholarship to be against, outside, beneath, before, or after law: what Johns refers to respectively as 'illegality', 'supra-legality', 'infra-legality', 'pre- and post-legality', and 'extra-legality'. These terms, the book insists, refer to scholarly strategies of exclusion from law — and thus exclusion from consideration *qua* law — rather than to any objective characteristics such prescriptions may have vis-à-vis 'real law'. Yet all involve 'international legal work': that is, work involving lawyers engaged in contexts of international legality. For this reason, the book argues, such non-legalities are a valid focus for international legal scholars. But more important still, it claims, is the promise they offer for expanding the repertoire of practices, institutions and ways of thinking available to international law.

Non-Legality in International Law is subtitled '*Unruly Law'*. For a number of reasons this subtitle would have been better suited as the main title.[1] Partly this is because the book focuses on laws and legalities that are disreputable in the sense that they largely have escaped serious scholarly *appreciation*, even though they have shaped and continued to shape lives. As well, these 'unruly laws' are regarded by scholars of international law as cryptic or chaotic; informal; managerial; part of the problem rather than part of the solution; or indeed as indicative that law is absent where needed on duty. And in the most important

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* Honorary Professor, Sydney Law School, University of Sydney, Sydney, Australia.

1 Indeed, the author subsequently has advised that '*Unruly Law*' was her preferred title for the book, but this was overruled by the publisher.

way, the subject of *Non-Legality in International Law* is unruly because focusing on it takes legal scholars out of their comfort zone. Analysis of unruly law challenges the idea that all these 'non-legalities' need to be brought under the rule of international law and that international law can be assumed to be 'the answer' to the problems they are imagined (rightly or wrongly) to present. In such ways, the book disturbs assumptions about what we understand as 'real law', while providing openings for new ways of thinking about and governing through and beyond legislated or judge-made law.

It is here that *Non-Legality in International Law* reaches out to scholars far beyond the bounds of international law — another reason why the subtitle *Unruly Law* is preferable to the title. For example, grouped together under such loose headings as 'governance beneath the law' and 'mundane legality', socio-legal scholars such as Mariana Valverde, Ron Levi, Joe Hermer and myself, have been trying to understand the ways in which we are governed through a myriad of 'sub-laws' that have been beneath or beyond the attention of most socio-legal scholars (see, for example, Valverde 2012; Levi 2008; Hermer 2011; O'Malley 2004). These include local by-laws and city ordinances, building regulations, insurance manuals for fire prevention, the military protocols for governing of psychological trauma, and the like. As with the foci of Fleur Johns' analyses, these infra-legalities are often decried as merely 'managerialism' or 'regulation'. Like *Non-Legality in International Law*, this literature has tried to highlight the necessity of engaging with such governance in its own right because we are already, in significant and often unrecognised ways, governed by them. A good example would be the almost complete silence criminology and criminal justice scholarship has maintained about traffic regulation. Existing in a nebulous domain, somehow traffic offending is tacitly thought not to be 'real' criminal law or the proper subject of criminology, certainly going on the evidence of these subjects' absence from scholarly journals. Except where offences such as dangerous and drink-driving are concerned (and even these are infrequently the subject of criminological attention), the governance of speeding, parking, vehicle and driver licensing, vehicle registration, roadworthiness and so on are made to appear trivial and sub-legal. This, despite the fact that all are subject to enforcement by police, at least potentially governed by criminal courts, affect more citizens directly than most other criminal laws, and — perhaps most importantly — are matters that relate to the violent deaths of more people than all other crimes put together. Valverde's work on the governance of sidewalks and Hermer's on loitering and panhandling likewise deal with matters that are made to appear outside, beneath or beyond criminal law, but are similarly imbricated in the everyday life of the city.

Such work, pushes 'criminal' scholarship out of its familiar habitus in much the same way that the turn toward studying 'white collar crime' did back in the 1930s — to reconsider what criminality was, who criminals are, what enforcement involves and what unconsidered repertories for action are, or could be, available to criminal justice. I think here *Non-Legality in International Law* makes an important contribution. This is not simply because it extends and refines analysis of 'excluded legalities' beyond the areas that have been the main focus of similar work — although, in itself, this is a major contribution to socio-legal scholarship. Rather, it is because it makes so clear the consequences of such exclusion for scholarship that seeks to engage with political action. I will elaborate.

Unruly Law and strategic knowledge

Non-Legality in International Law is itself an act of unruliness in law (and so I will take the liberty of referring to it by its more apt subtitle henceforth). It seeks to ask questions that are

not the normal fare of international law — and, in the process, seeks to enter spaces both physical and political that are not normally entered: the torture cell, the detention camp, the city devastated by disaster and so on. Often, perhaps normally, they are spaces where international law is seen to be missing, inadequate, ignored or flouted. In particular, *Unruly Law* is interested in spaces said to be 'beyond' international law, which are often approached, if at all, as though they are ungoverned by law, and that are understood by international lawyers to be in need of international law. But it is precisely in these spaces that unruly laws are unearthed by the book's 'quasi ethnography', a methodology that resonates closely with that of Michel Foucault — and to much the same end.

In an unobtrusively Foucaultian fashion, Johns has sought to throw familiar narratives and 'logics' of international law off balance, to 'disturb' them in a productive way by confronting them with non-legalities. In this, *Unruly Law* seeks to present what Johns calls a 'tactical reading'. Like Foucault's 'strategic knowledge' this appears as knowledge not intended to expose something concealed by political design or mystifying ideology. There is no deployment of an abstruse theoretical knowledge that purportedly opens our eyes to 'real' operations that would otherwise be invisible, or that reveals law to be the product of some underlying set of interests or social forces. The unruly laws are quite visible — they just have been beneath or to one side of attention. Nor is there an attempt to reduce them to effects of a hidden reality. Rather the aim is simply to make such governance visible in a problematic way, to show the importance of that which is slighted or ignored. To this end, Johns seeks to allow unruly laws to speak for themselves through an analysis of their 'significant' texts — the torture memos; the *First Responders Manual* for disaster zones; the practices, orders and discourses of the military and administrative tribunals in Guantanamo Bay. This form of analysis, as *Unruly Law* notes, pays attention to the 'how', rather than the 'why', of international legal work, in order to make a contribution that is at the same time theoretical and practical (p 218).

Guantanamo Bay

To take an example, *Unruly Law* examines the jurisdictional order of Guantanamo Bay naval base. In most socio-legal scholarship — especially but not only that influenced by the Italian philosopher Giorgio Agamben — Guantanamo Bay is made to appear as a place of arbitrary rule, deliberately placed outside of law; or, conversely, a space from which law is cast out. It is a space where, it is supposed in much theoretical and normative legal and criminological scholarship, the subjects of rule are reduced to 'bare life' — stripped of political rights and social existence — and are made available to the unfettered 'originating' power of sovereign rule. Indeed, beyond Guantanamo Bay this analytical position has been mobilised to understand all manner of developments in the current period of 'exceptionalism', ranging from the detention camps for illegal migrants in Europe, through to the status of sexual and violent offenders detained indefinitely in North American prisons (see, in particular, Agamben 1998).

As is pointed out at length in *Unruly Law,* for most international legal scholars the solution to the problems posed by the existence of such regimes is the (re)assertion and extension of international law: to bring this site of exception back into normalcy. There is no attempt in *Unruly Law* simply to deny the obvious merits in this. But the book disturbs this narrative by examining the 'extra-legality' of Guantanamo Bay. This analysis is carried out through examining the accounts given by the texts of the military and executive orders, and the practices of military tribunals and administrative boards. 'Far from a space of utter

lawlessness', Johns argues, 'one finds in Guantanamo Bay a space filled to the brim with expertise, procedure, scrutiny and analysis' (p 77 n 3). It is a densely codified 'extra legality'. To deny or marginalise its existence, to disregard the administrators' struggles and doubts, or simply to condemn offhand their attempts to wrestle with extraordinarily challenging and conflicting demands and profound ethical dilemmas, is to create multiple dangers.

The expulsion of such 'law' is perhaps comforting to the idealistic imaginary of an international law that could render the space normatively pellucid and 'just'. *Unruly Law* leaves us wondering how it could do this — as if it could, by fiat, make the dilemmas and conflicting demands disappear. But then Johns moves on to suggest that to ignore or expel these 'non-legalities' — highly problematic though many are — is to toss out a body of practical knowledge, of object lessons and attempted ethical resolutions, that cannot conveniently be dismissed as evil, much as this has the effect of casting international law as a knight on a white horse. The camps are not a moral or normative vacuum, Johns argues, but a site of struggle, innovation and angst over how to govern, from which we may learn much of practical value.

It is, of course, an *uncomfortable* object lesson for critical criminologists. As Stan Cohen pointed out many years ago, the dilemmas of prevention, enforcement, detection, containment and correction are never going to disappear, and it is too easy, if convenient, to engage with them as though they exist in a moral black hole that deserves only condemnation (Cohen 1985).

Dead bodies

Consider a second example from the penultimate chapter that deals (in part) with the governance of dead bodies in disaster situations. This invokes what Johns refers to as 'infra-legality': not an absence of international law as is imagined to exist in such contexts, but the textually dense presence of manuals and guidelines for dealing with the dead. While not 'of' international law, nevertheless they are often generated by international governing bodies. Thus, *Management of Dead Bodies after Disasters: A Field Manual for First Responders* ('the *First Responders' Manual*') is produced by the Pan American Health Organization, the World Health Organization, the International Red Cross and others, and provides law-like prescriptions often of considerable complexity.

They are law in the sense of normative rules for orderly and effective conduct. They are 'infra-law', in *Unruly Law's* parlance, in the sense that they are placed (by those international lawyers who even notice them) as outside or beneath law itself. Yet, they work as legally and normatively ordering, as practical guides and as legal texts developed to govern the aftermath of disasters. In such manuals, *Unruly Law* argues, the dead are mobilised in the service of the maximisation of the surviving population's capacity for life. It is biopower at work, more or less humbly, amidst devastation and death. In this process, information is taken from the body: bodies are recognised, identified, enumerated; connected up with the living; turned into elements in data flows and statistical distributions. Through such distributions of information, grief and trauma are intended to be mitigated or managed, disturbance and violence to be minimised, public health to be maintained and disease quarantined, all by the circulation of information about the dead. 'The living are equipped for survival in part by their expertly supported acquisition of knowledge of their dead' (p 207). The dead are, we might say, decomposed into coded elements that become components of coded flows and circulations of risk management. 'It is as if the dead keep thrusting themselves or being thrust into the foreground ... and in their waywardness, providing occasion for beleaguered rule' (p 207). And it is to this beleaguered rule that *Unruly Law* rightly insists we must attend.

Conclusion

For many socio-legal scholars in criminology and criminal law, this analysis may be enough: to explore and unearth legalities at work where all was imagined to be emptiness or worse. But where *Unruly Law* excels, in my view, is that it pushes forward the question 'so what?' in quite novel ways. It questions the extent to which international law has been, and perhaps could ever have been, a monopoly of the best practices; and it questions whether the aim of good governance should be to perfect international law. Non-legalities appear in many instances as attempts to come to grips with day-to-day problems where grander and more abstract law — for example, as expressed in discourses of rights and duties — may simply not afford the necessary purchase on rapidly changing, nuanced and fraught situations.

In this light, it is not simply that international legal scholars should cast a less jaundiced eye on the 'ungoverned' spaces into which they seek to press international law. It is, rather, that these non-legalities provide repertories for action and experience that do not currently exist in international law's conceptual or practical toolbox. These are practices and discourses developed for governing in often ethically and emotionally difficult contexts. They are developed neither by devils nor angels, as *Unruly Law* stresses. These are the fruits of ordinary flawed human beings struggling with uncertainty, fear and deficit. Not always do they do well. Sometimes — as with the torture memos — they develop in ways we find deeply disturbing. But as *Unruly Law* argues, examining excluded law — the non-legalities — may afford a repertory that is 'richer and more ambivalent … and more apparent in its accommodation of the beyond-the-pale' than has been allowed by prevailing 'useable knowledge' of and about international law (p 223).

So we return to the subtitle and its importance vis-à-vis the title, with the latter's focus on international law. By no means should *Unruly Law* be read as restricted to a commentary on international law. Nor should the book be read — as I fear may be the case — only, or overwhelmingly, by international lawyers. This book has implications for all socio-legal analysis and practice. There is unruly law with respect to criminal law and tort law, contract law and administrative law, immigration law and banking law. The challenge now is to take the insights and lessons of *Unruly Law*, and begin to apply them across the board.

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