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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.

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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.*

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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.

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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).

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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').

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community'. The vehicles for that communion are, in part, 'rules of international law' imagined as relatively clear and uncontested.[18] Yet just as important are numbers (a counting of civilians 'collaterally killed'), unspecified 'measures' (capable of 'control[ling] and limit[ing]' action by law enforcement officers), and 'system[s]' (for collection, analysis and dissemination of information necessary for the making of 'legal and accurate targeting decisions' and for displacing reliance on mere suspicion). The latest technology for automated killing is, it seems, to be matched by an equally obscure, remotely operated technology of control programmed to render transparent a power perpetually located elsewhere.

It may be too strong and premature a criticism to characterise the report on targeted killings as an instance of wholesale strategic failure on the part of international law or lawyers.[19] Its impacts remain to be assessed over the longer term. Nonetheless, certain features of the report do appear symptomatic of inattention to legal constructions of non-legality in international legal work and the problems to which this inattention may give rise.

For instance, the precise character of the 'vacuum' understood to surround targeted killings, especially those carried out by drone, escaped careful scrutiny in the report. The perception of a 'vacuum' surrounding targeted killings seemed to arise from a sense of power being exercised by decision-makers operating outside the purview of courts or other sources of independent check or balance. The report noted, for instance, that killing decisions may be taken wholly within the chain of command of the Central Intelligence Agency's clandestine services unit, by forces deployed at Russian presidential discretion, and in operations conducted by Israeli Defense Force personnel, without regard to judicially promulgated standards for their legality. The report's orientation towards judicial review (or the lack thereof) in this regard led it to neglect the detail of laws surrounding and structuring executive power in specific instances. Each of the aforementioned scenarios involves the invocation and deployment of executive power legally conferred. Yet the report failed to convey any sense of executive power having waxed and waned in the relevant jurisdictions

[18] Alston, *Report of the Special Rapporteur*, para. 93.
[19] In this instance, 'strategic' is used in the sense of 'strategy' suggested by Michel de Certeau rather than that suggested by Pierre Bourdieu. See below notes 71, 72, and 76 and related text.

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and indeed globally, or to invite any consideration of factors informing these shifts in particular settings.[20]

Additional features of targeted killing by drone were highlighted in the report as particularly concerning. Disquiet about these seems to have reinforced the sense of a 'vacuum' on which the report relied and its apparent preoccupation with filling that vacuum with legal procedure. Among these is the capacity of drones to deploy lethal force without putting the perpetrator's forces at risk at the same time and in the same setting. Also of concern in the report is the risk of operators physically removed from the scene of their killing developing 'a "Playstation" mentality to killing', implying, presumably, a higher tolerance for or immunity to the trauma of causing human death. Both of these concerns revolve around a worry that decision-makers wielding lethal force now experience a heightened sense of freedom in exercising that force and, as a consequence, find it too easy to kill. The report's call for 'procedures' to ensure 'transparency and accountability' has, however, virtually nothing to say to or about this issue. It is entirely unclear how requirements of disclosure and vetting of the sort that the report advocated might play into the experience of liberty about which the report worries, since that experience is attributed to the geographic distance from a site of physical impact rather than distance from bureaucracy. Other than recommending an accounting of civilian deaths, the report had nothing to say about how the geographic gulf dividing decision-makers from the impact of their decisions might be narrowed or bridged, or if indeed it should be. (One could imagine an argument being made in favour of taking killing decisions away from the so-called 'fog of war', in the hope of cooler heads prevailing.) Moreover, beyond the throwaway Playstation analogy, no account was taken of the extent to which the technology in question – its coded architecture and associated user practices, as well as surrounding intellectual property and contractual norms – might regulate violence while enabling

[20] A sense of executive power's waxing and waning in legal and political terms in various jurisdictions may be drawn from accounts of executive power's changing intensity and status in the following texts: Harvey C. Mansfield Jr., *Taming the Prince: The Ambivalence of Modern Executive Power* (New York: The Free Press, 1989); Janet Maclean, 'Divergent Legal Conceptions of the State: Implications for Global Administrative Law' (2005) 68:3/4 *Law and Contemporary Problems* 167–188; Deirdre Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution* (Oxford University Press, 2009); Clement Fatovic, *Outside the Law: Emergency and Executive Power* (Baltimore: Johns Hopkins University Press, 2009).

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it, might constitute the decision-makers in question, and might, given the impetus, do so otherwise.[21] In short, no account was taken of how regulated and regulable this 'vacuum' may already be.

Many things and forces come to occupy the sorts of 'vacuum' of international legal thought that is on display in the Alston report: instances, that is, of certain phenomena being characterised as outside law, lacking law or routinely opposed to law. This book maps a wide range of these 'vacuums' in international legal scholarship. Acts of torture and their scholarly reckoning; instances of extra-territorial counter-terrorist detention; lawyers' perceptions of economic choice in cross-border financial deal-making; the status of scientific knowledge in international legal analysis and argument surrounding climate change; international institutions' management of dead bodies after natural disaster. Like some which-one-is-the-odd-one-out riddle designed to reveal a previously unnoticed feature or pattern, this book pulls these disparate practices and fields of practice together. And despite the singular 'non-legal' of this book's title, the elements of this unlikely assemblage remain largely dissimilar. Legal professionals and others who wield the language of international law do, and seek to do, quite different things in these various settings. Understandings of what corresponds to or is distinctive about the work of 'international law' in each case vary accordingly.

Nonetheless, the argument of this book is that there *is* something common to the various fields of international legal practice mentioned in the preceding paragraph, namely, a tendency to try to confer upon international law some delimited time, space and subject matter for its 'proper' (albeit not autonomous) operation. In these divergent areas of practice, legal professionals (and other experts seeking or purporting to govern conduct on a global scale by lawful means) continually articulate, for and through international law, a jurisdiction bounded, as the case may be, by one or more before(s) and after(s), below(s) and above(s), against(s) and/or despite(s).

Wherever international law is invoked, we see created that which international law purports to stand against, beside, before or after. The insight that this occurs is not novel.[22] What is novel about this

[21] Cf. Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 *Harvard Law Review* 501–549.

[22] See, for example, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), p. 570: ('The law constructs its own field of application as it goes along, through a normative

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book's contribution to international legal scholarship is its mapping of those parallel creations, their interrelationship, and the influence that they appear to exert in particular areas of international legal work. Whereas it is customary for works of scholarship in international law to orient themselves by reference to that which they work towards – a better way of addressing this or that problem, some enhancement of freedom or diminishment of suffering, the rise or the fall of something or other – this book is oriented around the before, the after, the below, the above, the against and the despite, which international legal work ceaselessly evokes. It is so oriented not in defence of some *status quo ante* or with a view to restoring some pre-existent referent. Rather, this book's goals are critical and cartographic.

In a series of case studies of work by legal professionals and others invoking norms and institutions of international law, this book juxtaposes received mappings of international law's limits and tethering points in particular areas with counter-mappings of international legal knowledge practices far more prevalent, unruly and uncabined. As will become apparent, the foil varies from case study to case study, but the goal in each chapter of this book is to make politically navigable and questionable some aspect(s) of international legal work previously, for the most part, un- or under-acknowledged. If international law and lawyers are shown to be complicit in constituting and/or entrenching that which they purport to stand against – forces of unsanctioned violence, say, or excesses of 'nature', human and otherwise – then attributions of responsibility and questions of reform might emerge that are different to those currently circulating in much contemporary international legal literature.

In relation to the practices of targeted killing discussed above, for instance, the case studies in this book suggest that somewhat less attention might be focused upon the promulgation of new norms to ensure 'transparency and accountability'. More attention might, instead, be directed towards those normative practices that already regulate critical decision-making surrounding targeted killing: the code-architecture of the relevant technologies and associated user practices; pertinent intellectual property and contractual norms; prevailing practices of modelling and prediction and the like. Rather than seeking the promulgation of new norms concerning targeted killing, it

language that highlights some aspects of the world while leaving other aspects in the dark').

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might seem more pressing – or at least as pressing – to ask how those existing norms have developed and what sort of knowledge practices, experiences and tendencies they appear to be fostering.

The knowledge practices on which these case studies focus have been typologised in terms of the making of illegality, extra-legality, pre- or post-legality, supra-legality and infra-legality. Making *illegality*, in this context, denotes the legal crafting of that which exceeds suppression by, is forbidden by, or is defiant of, international law. The case study of the making of illegality in this book is the understanding of torture which legal professionals and others invoking international law have fostered of late – in particular, that identified with the notorious 'torture memos' written by lawyers serving the second Bush administration in the United States.

Making *extra-legality* here entails the legal construction of that which is understood to lie outside the province of international law. This book takes, as its case study of the making of extra-legality, styles of normative decision practised in and around the detention zone of Guantánamo Bay in the post-2001 period.

Making *pre-* or *post-legality* refers to the legal practice of making things – particular actions, agents or questions – come to stand immediately before the operation of international law, or in the wake of its operation. For a case study of the making of pre- or post-legality, this book looks to legal depictions of economic actors making determinative, autonomous choices either prior to law taking hold, or after lawful options have been laid before them, in the context of cross-border investment deals.

Making *supra-legality* is the name given here to the practice of consigning certain phenomena (political, biological, environmental, religious, etc.) to exogeneity in the sense of their surpassing international legal grasp or comprehension, rather than being carved out of or violative of international law. The case study of making supra-legality here focuses on international legal scholarship discussing the work of the Intergovernmental Panel on Climate Change, which is conferred in a number of ways with supra-legal status in that scholarship.

Finally, making *infra-legality* is the name which this book gives to the practice of relegating certain issues, experiences and elements to international law's margins, as the natural, the incidental, or the unworthy of direct notice. The case study of making infra-legality in this book examines literature surrounding international organisations' 'management' of dead bodies in the immediate aftermath of natural disaster.

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