



INTRODUCTION

Articulating Security is a study of the United Nations' managerial governance of collective security challenges. The UN's cooperative and holistic approach to countering international terrorism is often described as 'soft', despite the well-known injustice and violence of measures like the UK government's Prevent initiative and biometric border management technology. Racialized people – both at home and elsewhere – are at the sharp end of 'soft' security management. This book explores the place of law in these structures. Law offers scant hope of redress for those whose lives are made radically insecure by counter-terrorism measures. The reason for this, I suggest, is the co-opting logic of managerial governance, which articulates everything into its frameworks – including criticism. Every deficiency is an invitation to intensify its operations, every gap a chance to expand its reach, and every objection a prompt to shore up its defences.

The urge to incorporate everything is understood in this book as a cousin of the discipline-mechanisms described by Foucault. The UN's managerial technologies of performance review and strategic planning generate endless cycles of improvement and coordination across all three areas of UN endeavour: security, development, and human rights. Such a holistic approach is deemed necessary to deal with continually evolving and interconnected 'threats without boundaries', mirror images of the managerial measures designed to counter them. As a result, the 'all-of-UN' counter-terrorism strategy is a swarm of policy initiatives, technical upgrades, and managerial reorganizations, which settle into decentralized modules of activity loosely articulated into an overall framework. The UN has made an exquisite corpse of its counter-terrorism architecture. The overall aesthetic has little in common with the elegant spider's web of the network and more closely resembles the monumental anti-machines imagined by the sculptor Jean Tinguely. Foucault's Tinguely-inspired description of the French legal system also captures the UN's mechanics of security: 'one of those

immense pieces of machinery, full of impossible cog wheels, belts which turn nothing and wry gear-systems'.¹

Law, like everything else, is incorporated into the counter-terrorism machinery. A high-profile component of the UN's strategy, law is not however the star of the show. Rather, it is like Marlon Brando's appearance as Jor-El in Richard Donner's 1978 *Superman*. Multilateral legal instruments and human rights are attention-grabbing and crucial to the plot, but the real action is elsewhere. Law appears in association with managerial technologies of strategic planning and performance review. Ratification of a multilateral treaty might be an indicator of good practice in a performance review; human rights obtain a highly visible but neatly silo'd area of endeavour; and domestic legislation is often the siphon that conveys global norms to the national level. In such a cooperative ensemble, codes of technical standards appear to be close kin to intergovernmental conventions, stakeholder consultations resemble deliberative democracy, and it is difficult to tell the juridical from the managerial. This indistinction is a hallmark of infra-law, a term also taken from *Discipline and Punish*. Infra-law is both a realization of juridical law, because it implements legal obligations, and fundamentally *contre-droit*, because it cannot be challenged on the basis of juridical right.

The anti-law character of infra-law cannot be mended. Attempts to recuperate managerial governance by imbuing it with juridical commitments to participation, accountability, and human rights fail because criticism must be cooperative in order to be heard, and so it is easily co-opted. Structural change is then out of the question and the most we can hope for is that the border guard who questions an asylum seeker is carrying her human rights handbook, or that the police officers who stop and search young Black men have had some diversity training. *Articulating Security* uses Freud's concept of the uncanny to understand the seeming but unseemly legality of infra-law.

The uncanny marks the return of something repressed. What international law has repressed is the loss of its sense of justice – a loss that patterned its juridical ideals of sovereign authority and human rights long before it was coopted into managerial governance. My analysis forecloses a return to juridicism-as-usual and suggests a way of thinking differently about justice in the field of security. Law cannot take its authority from the prevailing norms if it hopes to speak against injustices committed in the name of security. Instead, it must channel the structure-splintering anger of those harmed in the name of security. I suggest that law foregoes the authoritative decision in favour of attentive advocacy. Law must resist being articulated into the mechanics of security and become instead a way of articulating alternative visions of security.

¹ In an interview with *Le Monde* ('Le Citron et le lait') on 21 October 1978, Foucault said 'on croit voir une de ces immenses machineries, pleines de rouages impossibles, de rubans qui n'entraînent rien et d'engrenages qui font la grimace'. Michel Foucault, *Dits et Écrits 1954-1988*, Tome III 1976-1979 (Gallimard, 1994), texte n° 246

Argument

The argument in *Articulating Security* is that law must do more than assert its authority within collective security ensembles. Whether law articulates the voice of expert authority or the voice of sovereign authority, its presence is no guarantee that security will be justly distributed or that its pursuit will not harm marginalized communities. The book makes the case by interrogating the ‘legalization’ of collective security performed by the UN’s project of articulating security infrastructure.

This section introduces three threads of thought that run through the book. The first relates to my use of Foucault’s work on disciplinary power, which does not present a readymade template for analysis that can be readily repurposed for any context, but must be carefully disinterred and transplanted in our own post-Millennium world of management. The second thread concerns the titular concept of infra-law, which arises from Foucault’s work on discipline and, as such, must also be delicately redrawn for our context and brought into dialogue with existing work on managerialism in the discipline of international law. The final thread looks beyond Foucault, making use of psychoanalytic insights in order to suggest a way forward.

I. Transplanting Discipline

This book identifies a distinct approach adopted by the UN for dealing with transboundary security threats as a project of articulating security infrastructure. It does not tease out the interconnections between this project and other high-profile initiatives to deal with threats without boundaries, like sanctions-listing.² Narrowing our focus stops more mundane and modest security measures from getting lost in the bigger picture, though it does, admittedly, come at the cost of completeness. *Articulating Security* calls attention to a host of managerial technologies that, being ineffective, are often assumed to be without effect. It draws on Foucault’s description of certain disciplinary arrangements as attempts to engineer a ‘mechanics of power’ by composing elements into an organized whole. Foucault developed this formulation in *Discipline and Punish*, a text which also deals with other registers of discipline. Discipline’s plurality is apt to be overshadowed by the towering Panopticon, and this section both sheds some light on its subtleties and explains why discipline is a useful concept in a context that bears little resemblance to Bentham’s architectural model of power.

Foucault described the rise of disciplinary institutions in eighteenth- and nineteenth-century Europe as a response to a demand ‘to construct a machine whose effect will be maximized by the concerted articulation of the elementary parts of which it is composed’.³ The UN’s

² See Gavin Sullivan, *The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security* (Cambridge University Press, 2020); Eva Nanopoulos, *The Juridification of Individual Sanctions and the Politics of EU Law* (Hart, 2019)

³ Foucault, *Discipline and Punish*, 163

project of articulating security responds to the same demand. It takes individuals – nation-states, specialized agencies, border guards – and treats them as components in a cooperative endeavour to counter terrorism and other threats without boundaries. In order to be articulated into a collective enterprise, individual components must be aligned and their performance individually and collectively optimized. The UN facilitates the process of articulation using techniques of monitoring and evaluation, and of technical assistance and capacity-building that bring to mind the modes of disciplinary surveillance, assessment, and correction which Foucault described. The comparison is especially compelling in terms of Foucault's distinction between repressive and productive power; the articulated security project uses kid-gloves to conscript individuals as willing participants, and avoids resort to the iron fist of coercion.⁴

A vital ingredient in the UN's articulation project is what Shahar Hameiri and Lee Jones call the 'state transformation approach' to threats without boundaries, which they refer to as 'non-traditional' security problems. They explain that 'governance programmes seek to rescale relevant parts of state apparatuses in territories where transboundary threats and risks are seen to emanate'. Apparatuses can then 'become embedded within regional or global regulatory regimes for managing transboundary' security problems, and 'serve as mechanisms for enforcing international regulatory disciplines upon other parts of their states and societies'.⁵ Efforts to 'normalize' states, a word Foucault recognized to be 'barbaric',⁶ have often taken the form of civilizing or modernizing missions and have tended to imply that a group of well-developed countries have the right and responsibility to improve the lot of less developed ones. As such, the UN's project of articulating security is another example of what Guy Fiti Sinclair identifies as the making and remaking of modern states on a broadly Western model.⁷

The transformation of nation-states does not, however, exhaust the articulation of security. Even an all-of-government effort can only reach the areas over which the state has jurisdiction, and as security infrastructure is often in the hands of banks, airlines, and social media platforms, the UN has perforce involved more and more 'global partners' in its cooperative efforts. Civil society actors have been especially important in this regard, and underline the imperative that efforts to tackle threats without boundaries must also be all-of-society endeavours. Getting all these actors organized needs an 'unparalleled convening power' capable of providing a common organizational framework.⁸ The UN's picture of a

⁴ Isobel Roele, 'Disciplinary Power in the UN Counter-Terrorism Committee' 19(1) *Journal of Conflict and Security Law* (2014) 49-84; Isobel Roele, 'Side-lining Subsidiarity: UN Security Council 'Legislation' and its Infra-Law' 79(2) *Law & Contemporary Problems* (2016) 189-214

⁵ Shahar Hameiri and Lee Jones, *Governing Borderless Threats: Non-Traditional Security and the Politics of State Transformation* (Cambridge University Press, 2015), 205-206

⁶ Michel Foucault, *Security, Territory and Population: Lectures at the Collège de France 1977-1978*, (Graham Burchell, trans) (Palgrave MacMillan, 2009), 57

⁷ Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, 2017)

⁸ High Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility* (United Nations, 2004). UN Doc. A/59/565 (2004), para. 57

world of articulable components in need of organization is not new. Anne Orford explains that the UN has long harboured an idea of international order ‘comprehensible as a system in which ‘functions’ are vested in this or that social group or actor, in the way that a manager might vest a task in this or that organizational department’.⁹ The UN’s unique selling point is its ability to organize others’ efforts. After years of bad press and poor reviews, however, the organization has its work cut out to rebrand itself as an efficient and capable manager of global solutions. Accordingly, the articulated security project is as much about the transformation of the UN and its extended family of specialized agencies, as it is about the transformation of nation-states.

Although Foucault’s work is widely used in the study of organizations,¹⁰ it is worth spelling out how the UN figures in this study, since Foucault is so well-known for insisting that the analysis of power relations should not be institution-bound. It will already be apparent that the mechanics of power implied by the articulated security project is very different from the power relations Foucault observed in Frederick the Great’s army, or in nineteenth-century French prisons. Discipline does not take place *within* the UN organization. Instead, the UN acts most as an open platform which deflects, ramifies, and relays strategies of control fomented elsewhere – and is itself subject to discipline. As we shall see, this complicated and somewhat chaotic version of discipline is not alien to Foucault’s thinking.

Nevertheless, there are dangers in using Foucault’s mechanics of power outside its original context. One risk is that Foucault’s analyses will intrude upon my own, and that I shall distort both his concept and my facts by imposing one upon the other. This risk is mitigated by not treating disciplinary power as a template for analysis. There is no need to cleave slavishly to Foucault’s ideas: he was not precious about his ideas, foreseeing that others might ‘need to transform my tools’.¹¹ There is no need, in addition, to take Foucault’s work on discipline as a job-lot. As Colin Koopman and Tomas Matza advise ‘inquirers can and should take what they need from Foucault while leaving the rest to the side...but only to the extent we are self-reflective in doing so’.¹² In describing their reflective approach, Koopman and Matza affirm Stuart Hall’s advice on using Gramsci. He said that concepts ‘have to be delicately disinterred from their concrete and specific historical embeddedness and transplanted to new soil with considerable care and patience’.¹³

⁹ Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011), 196

¹⁰ There is nevertheless a massive Foucauldian literature in Organization Studies. See for example: Gibson Burrell, ‘Modernism, Post Modernism and Organizational Analysis 2: The Contribution of Michel Foucault’ 9(2) *Organization Studies* (1988) 221-235; Alan McKinlay and Ken Starkey (eds) *Foucault, Management and Organization Theory* (Sage, 1998); Chris Carter, Alan McKinlay, and Michael Rowlinson, ‘Introduction: Foucault, Management and History’ 9(4) *Organization* (2002) 515-526; Sverre Raffnsøe, Andrea Mennicken, and Peter Miller, ‘The Foucault Effect in Organization Studies’ 40(2) *Organization Studies* (2017) 155-182

¹¹ Michel Foucault, ‘Questions of Geography’ in Jeremy Crampton and Stuart Eldon (eds), *Space, Knowledge and Power: Foucault and Geography* (Ashgate, 2007) 173-182, 174

¹² Colin Koopman and Tomas Matza, ‘Putting Foucault to Work: Analytic and Concept in Foucaultian Inquiry’ 39(4) *Critical Inquiry* (2013) 817-840, 831

¹³ Stuart Hall, ‘Gramsci’s Relevance for the Study of Race and Ethnicity’ 10(5) *Journal of Communication Inquiry* (1986) 5–27, 6-7, quoted in Koopman and Matza, ‘Putting Foucault to Work’, 818-819

Foucault's variegated use of the concept of discipline across several different contexts invites this work of delicate transplantation. Although the architecture of the Panopticon often seems to set discipline in stone, *Discipline and Punish* is not confined to such contexts, and also discusses the plague town and the army camp as models of discipline. Thus, Foucault described the Panopticon as 'the diagram of a mechanism of power reduced to its ideal form',¹⁴ but he also described army camp as 'an almost ideal model',¹⁵ and said that the plague made it possible to one may 'define ideally the exercise of disciplinary power'.¹⁶ Foucault made all his concepts ripe for rethinking, as is clear from his Collège de France lectures, where he revised and repurposed the concept of discipline many times during the 1970s as his ideas developed. Marianna Valverde confirms that 'the discipline that is familiar to us from *Discipline and Punish* is only one face of discipline'.¹⁷

When it comes to identifying different varieties of discipline, Foucault's distinction between the 'discipline mechanism' and the 'discipline blockade' is illuminating. He never intended to confine discipline to 'complete and austere' institutions like prisons and asylums. Discipline exists on a spectrum, he wrote:

At one extreme, the discipline-blockade, the enclosed institution, established on the edges of society, turned inwards towards negative functions: arresting evil, breaking communications, suspending time. At the other extreme, with panopticism, is the discipline-mechanism: a functional mechanism that must improve the exercise of power by making it lighter, more rapid, more effective, a design of subtle coercion for a society to come.

The distinction paves the way to the 'disciplinary society', the result of a shift from an 'exceptional discipline to a generalized surveillance' spreading throughout the whole social body.¹⁸ The disciplinary society was taken up by Gilles Deleuze, who said that the vast disciplinary institutions of the early twentieth-century had given way to 'free-floating' societies of control.¹⁹ Writing with the psychotherapist Félix Guattari, Deleuze identified two currents at work 'there are lines of articulation or segmentarity, strata and territories; but also lines of flight, movements of deterritorialization and destratification'. The assemblage thus constructed is made of endless connections. It is heterogeneous, multiple, and given to rupture.²⁰

Deleuze and Guattari's rhizomatic tangle looks a long way from the starched and straight-laced discipline suggested by schools of correction and houses of reform but, as Stephen

¹⁴ Foucault, *Discipline and Punish*, 205

¹⁵ *Ibid.*, 171

¹⁶ *Ibid.*, 198

¹⁷ Mariana Valverde, 'Genealogies of European states: Foucauldian reflections' 36(1) *Economy and Society* (2007) 159-178, 174

¹⁸ Foucault, *Discipline and Punish*, 209

¹⁹ Gilles Deleuze, 'Postscript on the Societies of Control' 59 *October* (1992) 3-7

²⁰ Gilles Deleuze and Félix Guattari, *A Thousand Plateaus* (Brian Massumi, trans) (University of Minnesota Press, 1987), 3

Legg has shown, it is a mistake to associate Foucault with stringency and order, on the one hand, and Deleuze with chaos and creativity, on the other. Legg persuasively suggests that the reason for the association is down to the subjects of Foucault's books – flightier apparatuses appear in his interviews and activism.²¹ Having said that, intimations of disciplinary unbundling are in evidence in *Discipline and Punish*, where Foucault discusses the move from disciplinary institutions to the disciplinary society. He explained how as 'disciplinary establishments increase, their mechanisms have a certain tendency to become 'de-institutionalized''. The image he uses to describe this generalization is 'swarming' (*l'essaimage*), an airborne analogue of Deleuze's rooty tangle.²²

The image of swarming is a particularly apt way of thinking about the spread of management, which went pandemic with the New Public Management reforms that swept OECD countries and international organizations in the 1980s and 90s.²³ What is often called 'managerialism', which is to say the conviction that better management will make the world a better place, and the New Public Management share, as Christopher Pollitt put it, 'a good slice of conceptual DNA'.²⁴ He explains that, while both concepts enjoyed their glory days several decades ago, and although some Management Studies scholars pronounced them dead,²⁵ they are still thriving. 'They may have been buried alive by some academics', Pollitt concludes, 'but nobody told most of the practitioners'.²⁶ Instead of being superseded by new forms of management, the New Public Management is 'layered and marbled' with them.²⁷ As a broad church, and one that advocates management as the solution to any problem, managerial governance is both virulent and tenacious.

The sense that managerial governance is swarming is evident across disciplines. In International Relations, Tana Johnson remarks that the proliferation of global governance

²¹ Stephen Legg, 'Assemblage/Apparatus: Using Deleuze and Foucault' 43(2) *Area* (2011) 128–133, 131

²² Foucault, *Discipline and Punish*, 211; Michel Foucault, *Surveillier et Punir: Naissance de la Prison* (Gallimard, 1975), 246

²³ There is a considerable critical literature on management located chiefly in the areas of Management Studies and Organization Studies. See for instance: Martin Parker, *Against Management: Organization in the Age of Managerialism* (Polity, 2002); Martin Parker, *Shut Down the Business School!: An Insider's Account of What's Wrong with Management Education* (Pluto Press, 2018); Thomas Klikauer, 'What is Managerialism?' 41(7-8) *Critical Sociology* (2015) Vol. 1103–1119; Barbara Townley, 'Managing with Modernity' 9(4) *Organization* (2002) 549–573; Christopher Grey, 'We are all Managers Now: On the Development and Demise of Management' 36(5) *Journal of Management Studies* (1999) 561–587; John Clarke and Janet Newman, *The Managerial State: Power, Politics and Ideology in the Remaking of Social Welfare* (Sage, 1997); Christopher Pollitt, *Managerialism and the Public Services: The Anglo-American Experience* (Basil Blackwell, 1990). The concept of managerialism has gained wider currency. Apart from work in international law, the field of International Political Economy has also begun to pay close attention to the concept – see the editors' introduction to a special issue of the *International Journal of Political Economy*, Matthew Eagleton-Pierce and Samuel Knafo, 'Introduction: The Political Economy of Managerialism' 27(4) *Review of International Political Economy* (2020) 763–779. See also, Samuel Knafo, Sahil Jai Dutta, Richard Lane and Steffan Wyn-Jones, 'The Managerial Lineages of Neoliberalism' 24(2) *New Political Economy* (2019) 235–251

²⁴ Christopher Pollitt, 'Managerialism Redux' 32(4) *Financial Accountability & Management* (2016) 429–447, 430

²⁵ Patrick Dunleavy, Helen Margetts, Simon Bastow and Jane Tinkler, 'New Public Management Is Dead—Long Live Digital-Era Governance' 16(3) *Journal of Public Administration Research and Theory* (2006) 467–94

²⁶ Pollitt, 'Managerialism Redux', 430

²⁷ *Ibid.*, 435

has got 'out of control'.²⁸ As well as global breadth, management percolates deep into the nooks and crannies of our lives. Béatrice Hibou describes the 'bureaucratisation of everyday life'.²⁹ Scholars of management attribute its pandemic spread to its all-purpose formulation. Martin Parker explains that management 'is a form of knowledge that can be made widely applicable across a huge variety of domains'. It can, he says, 'be applied anywhere, to anything and on anyone'.³⁰ For Barbara Townley, management is a solution looking for problems, and its spread has transformed universities, museums, hospitals, and countless other institutions into 'organizations' in need of management.³¹ Management has staying-power as well as reach. It has continued to thrive since the global financial crisis heralded the implosion of neoliberalism,³² supporting the suggestion that managerial governance is more than an incarnation of neoliberal ideology.³³

It may seem counter-intuitive to associate a practice dedicated to organization with chaos, but management's swarming tendencies make sense in the light of its oppositional relationship with bureaucracy. Opponents and proponents of managerial governance share this view. Paul du Gay, for instance, describes management as bureaucracy's archenemy;³⁴ while Michael Barzelay attacks 'the bureaucratic paradigm' in favour of a more innovative and strategic style of management.³⁵

Bureaucracy's love of regulation and strict hierarchies resemble the forms of army discipline described by Foucault, but it is quite distinct from management. The point of the New Public Management reforms was to put bureaucracy out to pasture. Christopher Hood enumerates its seven doctrines: Hands-on professional management (meaning strong leadership and managers with wide discretion); explicit standards for performance review; focus on results not procedure for determining resource allocation and rewards; breaking up of monolithic bodies into smaller 'manageable' units; public sector competition; replacing military-style public service with 'proven' private sector management tools; and a 'do more with less' ethos.³⁶ In comparison, bureaucracy is inflexible, inefficient, and outdated.

Managerial governance is oriented to problem-solving and, unlike stately bureaucracy, it seeks out innovation and experiment. Its act-now think-later approach leads to the kinds of

²⁸ Tana Johnson, *Organizational Progeny: Why Governments are Losing Control over the Proliferating Structures of Global Governance* (Oxford University Press, 2014)

²⁹ Béatrice Hibou, *The Bureaucratisation of the World in the Neoliberal Era* (Andrew Brown, trans) (Palgrave, 2015)

³⁰ Parker, *Against Management*, 5

³¹ Townley, 'Managing with Modernity', 550

³² Stuart Hall, Doreen Massey, and Michael Rustin, 'After Neoliberalism: Analysing the Present' 53 *Soundings* (2013) 8-22. But cf. Philip Mirowski, *Never Let a Serious Crisis Go to Waste. How Neoliberalism Survived the Financial Meltdown* (Verso, 2013)

³³ Knafo, Dutta, Lane and Wyn-Jones, 'The Managerial Lineages of Neoliberalism', 235

³⁴ Paul du Gay, *In Praise of Bureaucracy: Weber – Organization – Ethics* (Sage, 2000). See also Johan Olsen, 'Maybe it's time to rediscover bureaucracy' 16(1) *Journal of Public Administration Research and Theory* (2005) 1-24

³⁵ Michael Barzelay, *Breaking Through Bureaucracy A New Vision for Managing in Government* (University of California Press, 1993)

³⁶ Christopher Hood, 'A Public Management for All Seasons' 69(1) *Public Administration* (1991) 3-19, 4-5

pilot-schemes and prototypes described by Fleur Johns.³⁷ She observes a radical break with the massive organization of the ‘authoritarian high modernism’, as James Scott calls it, of the first half of the twentieth-century.³⁸ Unlike the ‘gigantic administrative machines’ of totalitarian states and colonial powers identified by Arendt,³⁹ managerial governance is agile and ever ready to pivot. Its animating principle of efficiency recalls the nifty flying of the Rebel Alliance rather than the hulking eminence of the Empire.

The UN has embraced this preference for management over bureaucracy. Its ‘creaking boards’, in the words of a former Deputy Secretary-General, and its ‘strained bureaucratic processes’ must change if it is to be equal to global challenges.⁴⁰ Kofi Annan spearheaded management reforms during his tenure as Secretary-General. The UN, he said, is ‘a complicated machinery for addressing a vast range of often interrelated issues’. To streamline its workings, he created a ‘senior management group’ and ‘cross-departmental executive committees’ to promote system-wide coherence and dissolve its fusty bureaucratic fiefdoms, and he sought to ‘align activities with priorities’ and to ‘coordinate for better results.’⁴¹ António Guterres took up the baton of management reform when he began his Secretary-Generalship. At his swearing-in ceremony in December 2016, he said

We need to create a consensus around simplification, decentralization and flexibility. It benefits no one if it takes nine months to deploy a staff member to the field. The United Nations needs to be nimble, efficient and effective. It must focus more on delivery and less on process; more on people and less on bureaucracy. A culture of accountability also requires strong performance management.⁴²

We should not, however, overstate the discontinuity represented by these reforms. As Orford has shown the ‘executive authority’ characteristic of management was embedded in the UN in its earliest years.⁴³ In practice, as the UN’s experience illustrates, management reform does not begin from a *tabula rasa*, it works on existing bureaux. Managerial governance is also an adaptive mutation of bureaucracy which has not only perpetuated administrative practices but enabled them to spread. Management’s embrace of ‘networked’ governance amounts, Hibou argues, to ‘the bureaucratization of the world’.⁴⁴ She charts the continuities between Max Weber’s iron-cage institutions of the early twentieth-century which borrowed from both business and the military, and the post-Millennial contagion of

³⁷ Fleur Johns, ‘From Planning to Prototypes: New Ways of Seeing Like a State’ 82(5) *Modern Law Review* (2019) 833–863

³⁸ James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1998)

³⁹ Hannah Arendt, *The Origins of Totalitarianism* (Meridian, 1958), 431

⁴⁰ Mark Malloch-Brown, *The Unfinished Global Revolution* (Penguin, 2012), 10

⁴¹ UN Doc. A/57/387 (2002), 6

⁴² António Guterres, ‘Secretary-General-Designate António Guterres’ Remarks to the General Assembly on Taking the Oath of Office’ (New York, 12 December 2016)

⁴³ Orford, *International Authority*, 3-6

⁴⁴ Hibou, *The Bureaucratization of the World*, 48-59

management. The continuities can also be traced in global governance. An old-fashioned form of governing based on sovereign authority persists, as nation-states remain dominant actors at global level, but their mode of relating to one another has changed and become networked. Networked cooperation is a boon for international organization because states, constitutionally disposed to be precious about their sovereignty, need not sacrifice their authority for the sake of the collective good.⁴⁵

Managerial governance, in sum, has achieved the ‘flexibilization and globalization’ of discipline which Nancy Fraser criticized Foucault for omitting.⁴⁶ Carded out and spun into fine skeins, disciplinary power is woven through managerial organizations and networks to constitute the ‘multi-layered system of global governmentality’ that Fraser discerned.⁴⁷ The idea that disciplinary power flows through swarming organizations, as well as within the neat contexts of complete and austere institutions also helps to overcome a common criticism of the use of Foucault’s ideas in the study of international affairs. Thus, Jan Selby criticises Michael Hardt and Antonio Negri’s *Empire*,⁴⁸ on the grounds that Foucault’s work produces an account of world order that ‘overstates its unity, evenness and indivisibility’.⁴⁹ Rescaling Foucault’s ideas from the national to the global context, Selby suggests, is to make the global in the image of the national.⁵⁰ The criticism has force where scholars, contrary to Koopman and Matza’s advice, take Foucault’s conclusions along with his concepts. A flexibilized and globalized version of discipline, on the other hand, does not presume unity or evenness, and there is nothing indivisible about its decentralized networks.

The effects of disciplinary power in flexibilized and globalized form are quite different from the effects of discipline Foucault described in prisons, factories, and army camps. Its uneven and patchy operation dilutes its ability to normalize and homogenize. We should not assume that the UN’s mechanics of power yield sleek, highly-engineered machines. Empirical studies bear this out. Hameiri and Jones’ work on public health projects in Indonesia makes clear that attempts to inculcate compatible approaches have strikingly diverse effects, ‘with forms, functions and outcomes sometimes varying even within a single country’.⁵¹ James Ferguson’s study of the deluge of failed development programmes launched in Lesotho in the late 1970s and early 1980s also emphasize their lack of success. Much gets lost, he explained, between the global programming and the local implementation:

Whatever interests may be at work, and whatever they may think they are doing, they can only operate through a complex set of social and cultural

⁴⁵ Anne-Marie Slaughter, *The Chessboard and the Web* (Yale University Press, 2017)

⁴⁶ Nancy Fraser, ‘From Discipline to Flexibilization? Rereading Foucault in the Shadow of Globalization’ 10(2) *Constellations* (2003) 160-171

⁴⁷ *Ibid.*, 166

⁴⁸ Michael Hardt and Antonio Negri, *Empire* (Harvard University Press, 2000)

⁴⁹ Jan Selby, ‘Engaging Foucault: Discourse, Liberal Governance and the Limits of Foucauldian IR’ 21(3) *International Relations* (2007) 324–345, 336

⁵⁰ *Ibid.* 334

⁵¹ Hameiri and Jones, *Governing Borderless Threats*, 205

structures so deeply embedded and so ill-perceived that the outcome may be only a baroque and unrecognizable transformation of the original intention.⁵²

Intentions wander – especially in the swarm of managerial organizations which implement strategies for managing threats without boundaries. The result is ‘a world of often rivalrous programs’, as Valverde, O’Malley and Rose elegantly put it, not ‘a programmed world’.⁵³ The programmes, initiatives, projects, and strategies initiated by and with the UN’s articulated security project are not always rivalrous, but neither are they seamlessly coherent.

A particularly curious feature of its counter-terrorism strategy is its longevity and marked lack of success. Successful security measures render themselves redundant by putting an end to whatever threat they address. We might expect that such a credo would be strongly held in a system of governance like the UN’s which obeys a ‘do more with less’ principle and idealizes results-based management. On the contrary, the UN’s counter-terrorism strategy recalls the ‘global ungovernance’ described by Deval Desai and Andrew Lang, who explain that an ‘impossibility of closure’ is baked into governance initiatives which involve ‘the endless production, operationalization and arrangement of a range of component artefacts’ and never obtain their desired end.⁵⁴ The stakes of this book do not lie in discipline’s effects on the individuals it targets, but in its effects on the law.

2. Infra-Law and Interlegality

The UN’s articulated security project brings together juridical and managerial elements to form a disciplinary whole, which this book calls ‘infra-law’. The term describes a particular mode of legality or rather ‘interlegality’, to use a word coined by Boaventura de Sousa Santos.⁵⁵ Infra-law describes the cascades of micro-prescriptions, normative initiatives, accountability processes, and coordination activities that accrue beneath the aegis of a strategic framework. It subsists alongside, and sometimes in cooperation with, other modes of legality like police-style sanctions enforcement, and courtroom adjudication. While infra-law does not efface or replace these more familiar legalities, one of the central claims of *Articulating Security* is that long-term association with managerial governance is changing what international lawyers think of as being characteristically juridical.

In emphasising the place of law in managerial governance, this book describes what might be called a ‘legalization’ of collective security. Legalization is a stable mate of other -izations, including globalization, securitization, and organization, and rose to prominence in

⁵² James Ferguson, *The Anti-Politics Machine: ‘Development’, Depoliticization, and Bureaucratic Power in Lesotho* (Minnesota University Press, 1994), 17

⁵³ Nikolas Rose, Pat O’Malley, and Mariana Valverde, ‘Governmentality’ 2 *Annual Review of Law and Social Sciences* (2006) 83–104, 86

⁵⁴ Deval Desai and Andrew Lang, ‘Introduction: Global Un-governance’ 11(3) *Transnational Legal Theory* (2020) 219-243.

⁵⁵ Boaventura de Sousa Santos, ‘Law: A Map of Misreading. Toward a Postmodern Conception of Law’ 14(3) *JLS* (1987) 279-302, 288-291

international law and relations discourses in the early 1990s. Like the processes of ‘juridification’ described by Eva Nanopoulos, legalization both extends law to new issue areas, and makes law denser.⁵⁶ In the case of the UN projects to articulate security infrastructure and policy, we can see both processes at work in the agreement of multilateral treaties and resolutions designed to deal with particular aspects of terrorism, transnational organized crime, and the proliferation of WMD. Whether we see this as an extension of law to security matters, or an extension of security discourses to non-traditional matters, the overall effect is more law in collective security.

These legal instruments are not just posited, they are also woven into the fabric of managerial governance, making ‘legalization’ dense as well as extensive. In the UN’s project of articulating security, this density is achieved through monitoring and evaluation and capacity-building, rather than through enforcement and adjudication. One of the features of infra-law, then, is its disregard for the formally binding quality of juridical doctrine. This disregard reaches its apogee in the UN’s Global Counter-Terrorism Strategy, which was agreed by consensus in the General Assembly because UN member states are unable to agree a binding comprehensive counter-terrorism convention.⁵⁷ The Strategy creates a framework which is precisely *not* founded on juridical law, but which inaugurates a regime of managerial governance indistinguishable in its essentials from those founded on juridical instruments of unassailable pedigree.

International lawyers are prone to see the phenomenon of legalization as a positive development in international relations, a civilizing influence on anarchic Realpolitik and an equalizing influence on superpower hegemony. If nothing else legalization seems less violent than the alternatives. As Ernest Gross said, ‘the hand on the trigger cannot feasibly consist of the fingers of a committee’.⁵⁸ Legalization is less welcome in other quarters, connoting an unwelcome increase in formalities (Hibou) or regulation (David Graeber), and tending to stifle emancipatory politics. In this register, legalization is one with an undifferentiated mass of positive law, bureaucracy, regulation, standardization, and police administration. Many international lawyers also treat the creeping legalization of global affairs with suspicion, linking it to neoliberal agendas in trade and investment in particular. While the discipline is on its guard where the accumulation of profit is concerned, it is nevertheless primed to welcome multilateral solutions to global interdependence problems – especially in areas where unilateral solutions have hitherto held sway.

A disciplinary self-image of doughty underdog is amplified in the field of collective security, where nation-states are presumed to have existential reason for their self-interest and legal pettifoggery is out-of-place.⁵⁹ The desire to legalize security nevertheless seems natural in

⁵⁶ Nanopoulos, *Juridification*, 6-8

⁵⁷ UN Doc. A/Res/60/288 (2006)

⁵⁸ Ernest A. Gross, ‘International Organization and Collective Security: Changing Values and Priorities’ 138 *Recueil des Cours de l’Academie de Droit International* (1973) 413-454, 431

⁵⁹ Martti Koskenniemi, ‘The Place of Law in Collective Security’ 17(2) *Michigan Journal of International Law* (1995-1996) 455-490

multilateral security endeavours because a never-fulfilled promise of law is implicit in collective security. Law is what sets collective security apart from balance-of-power politics as a guarantee of peaceful inter-state relations. Key provisions of the UN Charter were put on ice by the exigencies of the Cold War and the War on Terror. The Charter ideal (a compromised ideal in the first place) has never been realized. Seen in this light, the phenomenon of legalization begins to look like a juridico-political promise fulfilled by hook or by crook.

Critical scholars in the discipline have troubled the underdog image. David Kennedy writes that:

Although it is easy to think of international affairs as a rolling sea of politics over which we have managed to throw but a thin net of legal rules, in truth the situation today is more the reverse. There is law at every turn and only the most marginal opportunities for engaged political contestation.⁶⁰

The idea that legalization is not only widespread at the international level, but also unwelcome goes hand-in-hand with a conception of law that moves beyond the juridical paradigm of binding obligations posited by an authority and adjudicated in court. Many international lawyers would balk at the provocation that management could be a mode of law at all. Johns has investigated the discipline's boundary-setting activities in her study of non-legality. Her study uses the term *infra-legality*, though without the Foucauldian connotation employed here, to refer 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'.⁶¹

Many of the managerial technologies this book explores – especially those that take place at the coalface of implementation rather than the high-table of policy-making – fall into this category. Johns has questioned the focus on 'the executive suite of overarching principle and bilateral or multilateral negotiation' at the expense of 'the assembly line of the merely technical'.⁶² She is not the only one to do so. Valverde and Nikolas Rose counsel a move away from 'the privileged sites of legal reason' and 'towards the minor, the mundane, the grey, meticulous and detailed work of regulatory apparatuses'.⁶³ Unlike the work of regulation, managerial governance can be high-profile. This is especially likely where it is part of 'an "efficient," problem-solving global order' oriented to global public goods,⁶⁴ like the articulated security project. While publicity and awareness-raising campaigns are crucial to

⁶⁰ David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance', 27 *Sydney Law Review* (2005) 5-28, 6

⁶¹ Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press, 2013), 10

⁶² Fleur Johns, 'Data, Detection, and the Redistribution of the Sensible in International Law' 111(1) *American Journal of International Law* (2017) 57-103, 63

⁶³ Nikolas Rose and Mariana Valverde, 'Governed by Law?' 7(4) *Social & Legal Studies* (1998) 541-551, 546

⁶⁴ Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' 108(1) *American Journal of International Law* (2014) 1-40, 2

cooperative endeavours, they shine little light on the ‘nebulous modalities’, as Jan Klabbers puts it, of ‘cooperation geared towards effective international solutions for practical problems’.⁶⁵

Foucault’s concept of infra-law helps navigate the nebulosity.⁶⁶ It opens out a space between two senses of legalization; one in which legalization means a progressive journey towards a juridico-political ideal, and the other in which legalization shuts down emancipatory politics and transformative agendas. The term is used here to refer to the prolific and prodigious mass of normative initiatives accommodated under the banner of a particular strategic framework. As Chapters 3 and 4 illustrate, it includes capacity-building programmes, treaty instruments, binding and non-binding UN resolutions, matrices of best practices, expansion by way of thematic modules, and even hard-edged counter-measures for non-cooperation. In short, infra-law mixes juridical and managerial elements to shape a cooperative solution to a shared problem.

Given the work of disinterring and transplanting Foucault’s concept of discipline described in the previous section, it makes sense that the infra-law of the articulated security project differs from the infra-law (*infra-droit*) described by Foucault. *Discipline and Punish* suggests that the relationship between infra-law and juridical law is more straight-forward – almost geometrical:

Although the universal juridicism of modern society seems to fix limits on the exercise of power, its universally widespread panopticism enables it to operate, on the underside of the law, a machinery that is both immense and minute, which supports, reinforces, multiplies the asymmetry of power and undermines the limits that are traced around the law’.⁶⁷

As the previous section of this introduction suggested, our millennial context of global security governance is not a world of universal juridicism so much as universal managerialism. The pandemic of legalization continues, but the virus has mutated. Foucault used the term ‘infra-law’ to describe the disciplines *as opposed to* juridico-political forms. The disciplines are geometrically beneath ‘an explicit, coded and formally egalitarian juridical framework, made possible by the organization of a parliamentary representative régime’. Juridical *droit* ‘masked’, Foucault wrote, ‘tiny, everyday, physical mechanisms, [...] all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines’.⁶⁸

⁶⁵ Jan Klabbers, ‘Institutional Ambivalence by Design: Soft Organizations in International Law’ 70(3) *Nordic Journal of International Law* (2001) 403-421, 416

⁶⁶ Ben Golder and Peter Fitzpatrick put the so-called ‘expulsion thesis’ debate to rest in *Foucault’s Law* (Routledge, 2009). Cf. Gary Hunt and Alan Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press, 1994); Alan Hunt, ‘Foucault’s Expulsion of Law: Towards a Retrieval’ 17(1) *Law and Social Inquiry* (1992) 1-38; Gary Wickham, ‘Foucault, Law and Power: A Reassessment’ 33(4) *Journal of Law and Society* (2006) 596-614

⁶⁷ Foucault, *Discipline and Punish*, 223

⁶⁸ *Ibid.*, 222

Our picture is more complicated. For a start, juridical, managerial and technical instruments all give rise to the same kind of implementation activity involving performance review and capacity-building. In addition, formal juridical instruments are not always on top, as it were, and when they are, they are often a bit off-key. I have already mentioned that the UN's counter-terrorist framework instrument is not juridical. Indeed, it is extremely difficult to make the case that it could be proto-juridical 'soft-law' (discussed further in Chapter 5), due to the enduring stalemate over a comprehensive counter-terrorism convention. Instead, juridical instruments gather alongside non-juridical instruments beneath the aegis of the strategy. For instance, the ratification of a multilateral convention or the passing of domestic legislation might be included among the best practices for implementing a set of technical standards. In other words, juridical elements may be found *infra* managerial elements.

Even where formally binding juridical instruments constitute the framework, as in the case of the International Health Regulations, for example, they often come in non-traditional form. The Health Regulations are established under and administered by the World Health Organization. They set out a technical set of prescriptions to guard against the international spread of disease and, unlike traditional treaties, they are subject to revision and update. This is not to suggest that regulatory agreements are anything new, so much as to note that, as the kind of treaty that best supports a managerial mode of implementation,⁶⁹ they blossomed in parallel to the spread of the New Public Management in the last decades of the twentieth century. Even in the case of the International Health Regulations, then, the simple layering imagined by Foucault does not quite stack up.

It is slightly misleading to attribute such a simple geometry to Foucault. *Discipline and Punish* complicates the apparently simple layering of juridical law on top, and disciplinary power beneath. The term *infra-law* means more than beneath law; it refers to a kind of law beneath. Foucault is explicit about this: the disciplines 'seem to constitute the same type of law on a different scale, thereby making it more meticulous and more indulgent'.⁷⁰ The disciplines are both different from and the same as juridical law. They are a type of law, of *droit*. Chapter 5 discusses the point in more depth. For the present, I want to emphasize the idea that *infra-law* is law-and-not-law, a double-vision that comes from the two images of legalization discussed above.

The law-and-not-law quality of *infra-law* helps to get beyond the idea that law is simply 'a mask for power'. As Foucault said, 'this explanation does not seem wholly adequate'.⁷¹ Ben Golder and Peter Fitzpatrick agree. There is more to say than that 'if law 'lingers on' in the present it is as an anachronism from an age gone by, or in the guise of instrument, accessory or support for more insidious forms of disciplinary or biopolitical power'.⁷² Instead, Foucault

⁶⁹ Abram Chayes, and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995) See further, Chapter 5, at Section I

⁷⁰ Foucault, *Discipline and Punish*, 222

⁷¹ Foucault, 'Power and Strategies' in Colin Gordon (ed.), *Power/Knowledge* (Harvester Press, 1980), 140

⁷² Golder and Fitzpatrick, *Foucault's Law*, 25

suggested that infra-law has colonized older juridical forms of law, changing them in the process.⁷³ Chapter 5 investigates how juridical law's involvement in managerial schemes is changing how we think about juridicism. Juridical rebranding – notably the 'quasi-legislative' resolutions of the Security Council – is one effect of this, operating as a way of asserting the juridical character of elements of managerial governance. The erosion of any clear boundary between the juridical and the managerial is catalysed within international organizations like the UN. Klabbers has done much to reveal the functional orientation of international institutions, and to warn against unreflectively valorizing such projects as approximations of constitutional government.⁷⁴ The kind of legalization of international affairs that they offer is often much closer, as Orford has argued, to the depoliticising managerial variety, than to the juridico-political ideal.

Foucault's concept of infra-law not only opens up a space between law-and-not-law, it also invites us to consider the ambivalent relationship between juridical and managerial forms. The latter can often appear as a useful, indeed indispensable, auxiliary to juridico-political projects. Technologies of management offer ways to implement binding legal norms without relying upon the threat of enforcement action to motivate compliance, and they promise to make juridical practice better coordinated and more efficient. In this sense, management seems to play a complementary, auxiliary role that promotes the realization of juridico-political projects. Foucault captured this affirmative side of the relationship between the two forms of law when he said that the disciplines 'extend the general forms defined by law to the infinitesimal level of individual lives' and that they 'enable individuals to become integrated into these [the law's] general demands'.

In the next breath, however, he described the disciplines as anti-law, *contre-droit*. The disciplines 'have the precise role of introducing insuperable asymmetries and excluding reciprocities', contrary to the 'formally egalitarian juridical framework'.⁷⁵ Many international lawyers have rejected managerial governance for similar reasons. Among the large class of international lawyers who treat management with suspicion, two main reactions can be discerned. Chapter 6 discusses one of these, which recognizes the democratic deficits and procedural injustices of management, but trusts that it is possible to imbue these forms with a more juridico-political flavour, or even to bring them under the rule of law. The second reaction, which I discuss in Chapter 7, is willing to forsake the auxiliary boon of management because its depoliticizing effects and its mangling of juridical form are intolerable at any price.

3. Beyond Foucault

⁷³ Michel Foucault, *Society Must be Defended: Lectures at the College de France 1975-76*, (David Macey, trans) (Picador, 2003); Foucault, *Security, Territory and Population*, 107

⁷⁴ See e.g. Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' 26(1) *European Journal of International Law* (2015) 9–82

⁷⁵ Foucault, *Discipline and Punish*, 222

Foucault's infra-law/anti-law idea might appear to suggest that the best response to increasingly managerial law would be for juridicism to sever its ties and return to a purer juridico-political position, wherein law asserts its own authority against managerial governance. Foucault counsels against such a move: 'having recourse to sovereignty against discipline will not enable us to limit the effects of disciplinary power'.⁷⁶ The experience of attempts to subject the UN's articulated security project to human rights, discussed in Chapter 6, bears this out. Management recuperates criticism as a learning process and conscripts critics to its working groups. From this position, the best juridical law can hope for is to mitigate or constrain harm caused by security initiatives – more often, as Nicholas Tsagourias and Nigel White point out, it ends up enabling them.⁷⁷

Recognition of the anti-law quality of managerial governance is apt to kindle nostalgia for an idealized form of juridico-political government relieved of its otherwise well-recognized failings. Although juridicism comes off well in comparison with management, *Articulating Security* does not advocate a return to constitutional order. Instead, it moves beyond Foucault to Sigmund Freud and brings psychoanalytic thinking to bear on the ambivalent auxiliary/anti relationship between juridical and managerial modes of law. Freud's work on the uncanny offers a way of analysing the law-and-not-law character of infra-law.

From the perspective of the discipline of international law, infra-law is both very familiar and a bit 'off'. It is like, I argue, the mechanical doll who looks human but is not alive; it is an ensemble of documents, dialogues, and decisions with the liveliness of language sucked out of them. Infra-law is uncanny because it is inarticulate. Its dead letter legal instruments, hollow-eyed vision statements, and zombie policy documents resist animation by way of juridical argumentation and interpretation. Inarticulate infra-law is hermeneutically sealed within its own narrow horizons of possibility and, as such, without the saving grace of juridico-political government identified by Golder and Fitzpatrick: responsiveness.

To retrieve law's responsiveness is not to return home. In psychoanalysis, home is often the root of the problem, and in Freud's work, the uncanny marks the return of something that has been repressed.⁷⁸ Infra-law is not uncanny because we *do not know* whether it is or is not law, but because it recalls something that we *do know*, but have made inaccessible to ourselves. Julia Kristeva's concept of abjection takes this further. The abject is what has been violently expelled from the self, a reaction I associate with especially vehement reactions against managerial governance including, it will be clear by now, my own. The sense of uncanniness or abjection about infra-law is a warning against being complacent about juridico-political order. Juridical law has the potential to be responsive, but in practice it is not. Juridical law articulates its own authority, a fact that both gives weight to its pronouncements and weighs them down with the baggage of what is already recognized.

⁷⁶ Foucault, *Society Must Be Defended*, 39

⁷⁷ Nicholas Tsagourias, and Nigel White, *Collective Security: Theory, Law and Practice* (Cambridge University Press, 2013) 33-34

⁷⁸ Sigmund, Freud *The Uncanny* (David McLintock, trans) (Penguin, 2003), 147

Thus encumbered, juridico-political order is not very responsive to complaints and grievances that do not fit within the bounds of its authority, a problem that is exacerbated when law has been articulated into a governance scheme that demands compatibility and cooperation.

This short 'horizon of possibility', in Martti Koskenniemi's useful term, poses a particular problem when the law is faced with complaints of injustice arising from security strategies. When law relies on its authority to respond, it can struggle to address at a structural level harms caused by security measures like the denial of entry to asylum seekers, the detention of migrants, racial profiling by the police, and the policing of 'radicalization' in schools and universities. Such measures are not aberrations within a generally protective and just security system; they are emanations of a system in which the security of some people is paid for with the insecurity of others. If law is to be a voice of justice rather than order, it must do more than *enable* the system to operate in line with human rights (the managerial version) or *constrain* the system's most egregious operations (the constitutional version) – it must *transform* the system by showing **that the security of some is paid for with the radical insecurity of others.**

Law cannot, however, generate its own transformative potential. It cannot rely on its own authority – either its authority as legal expertise within managerial governance, or its constitutional authority within juridico-political government – to beget structural transformation. In both cases, its claim to authority depends on the structures it wants to dismantle. Managerial governance and constitutional government are both impervious to authoritative structural criticism – but for different reasons. Management feeds on expert criticism, using it to bolster its authority, as Hibou notices;⁷⁹ it uses expertise to colonise new domains by taking criticism as a new knowledge to be mastered;⁸⁰ it recuperates every mistake as a lesson learned; it designs 'non-performative' initiatives to deal with problems, as Sara Ahmed observes,⁸¹ and it has a modular structure, noted by Johns, that confines the fall-out of critique to specific initiatives.⁸²

Constitutional government also resists authoritative structural criticism from law. In a constitutional system of government, law is a guarantee of order. Channelling aggressive conflict into legal disagreement keeps the social peace, and the egalitarian and universal application of the law preserves the legitimacy of coercive state action taken in the name of security. Critical approaches to international law have long recognized the downsides of liberal constitutionalism,⁸³ especially where the constitutional system claims universal validity

⁷⁹ Hibou, *The Bureaucratization of the World*, xviii

⁸⁰ Parker, *Against Management*, 106

⁸¹ Sara Ahmed, *On Being Included* (Duke University Press, 2012)

⁸² Fleur Johns, 'On Failing Forward: Neoliberal Legality in the Mekong River Basin' 48(2) *Cornell International Law Journal* (2015) 347-383

⁸³ See e.g. Christine Schwöbel, 'Situating the debate on global constitutionalism' 8(3) *International Journal of Constitutional Law* (2010) 611–635; Christine Schwöbel, *Global Constitutionalism in International Legal Perspective* (Brill, 2011); Helena Alviar García and Günter Frankenberg (eds), *Authoritarian Constitutionalism* (Edward Elgar, 2019)

but cannot see its parochialism and cannot admit its colonial origins.⁸⁴ The idea that juridical law speaks for power as often as it speaks out against power is news to nobody.

The trouble is that legal authority is a component part of managerial and constitutional systems – it is articulated into their mechanisms of governing. This embeddedness deforms and dilutes the kinds of criticisms it can make because it incorporates authority – in both cases – as a protection against insecurity. Inspired by Freud’s essay ‘The Future of an Illusion’,⁸⁵ I suggest that a feeling of profound insecurity feeds an illusion that the world can be brought under control through strategies of civilization and organization. The lack of success either of these strategies have had after decades of trying is testament to the tenacity of the illusion. A knock-on effect of the attitude is an imperviousness to structural critique. The notion that existing technologies of security actually make some people – migrants, Muslim communities in Europe, young black men – *less secure* is literally unthinkable, and is impossible to accept the harms caused to these groups as a feature not a glitch.

There is an acute need, then, for a disillusioning antidote. Law cannot perform this role by speaking in the voice of authority. It has a role to play, however, in articulating complaints. The transformative force of law lies in its practices of advocacy, not decision. In giving voice to grievances, law offers itself up as a megaphone for complaint, channelling the force of the complainant’s anger and making it audible in the public sphere. Anger can be an apt response to the world, Amia Srinivasan explains, that can be heard as a desire for recognition and revenge.⁸⁶ Anger can be productive. For Audre Lorde it ‘is loaded with information and energy’, and ‘its object is change’.⁸⁷ Lawyers must learn to listen to anger and resist the urge to neutralize its force by translating it into a polite and orderly idiom, or a ready diagnosis.

In order to become an instrument of what Judith Butler calls ‘aggressive non-violence’, law would need to develop ways of hearing and preserving this anger. This book concludes by sketching the rudiments of a therapeutic approach to legal communication that develops from foundational practices of listening and writing. Ahmed’s work on institutional complaint exemplifies the kind of listening and writing that lawyers might cultivate. Her work describes how the angry ‘feminist snap’ must be listened to with a ‘feminist ear’,⁸⁸ and her powerful writing does not lean on a claim to authority for its force. I read Ahmed’s work alongside that of writer and psychotherapist Adam Phillips, whose writing on ‘free listening’ is simultaneously a discussion and a performance of the trouble with authority.

⁸⁴ Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2005); Jennifer Pitts, *Boundaries of the International: Law and Empire* (Harvard University Press, 2018)

⁸⁵ Sigmund Freud, ‘The Future of an Illusion’ in *Mass Psychology and Other Writings* (J.A. Underwood, trans) (Penguin, 2004)

⁸⁶ Amia Srinivasan, ‘The Aptness of Anger’ 26(2) *The Journal of Political Philosophy* (2018) 123-144

⁸⁷ Audre Lorde, ‘The Uses of Anger’ 9(3) *Women’s Studies Quarterly* (1981) 7-10, 8

⁸⁸ Sara Ahmed, *Living a Feminist Life* (Duke University Press, 2017), 203. See further, Chapter 7 section 2

The transformative force of law depends on its ability to disillusion, and this ability depends on whether law is able to give voice not to its own authority, but to the anger of injustice.

Structure

Articulating Security proceeds in two parts. Part One - Chapters 2, 3, and 4 - describes the UN's project of articulating security, and Part Two - Chapters 5, 6, and 7 - works through the stakes of the project for law.

The UN's articulated security project is described in Chapter 2 as the product of two distinct concerns: distancing the organization's approach to security from that of the War on Terror, and reflecting the characteristics of an apparently novel class of 'threats without boundaries'. These logics of opposition and appropriateness combine to suggest that the best way to deal with terrorism, pandemic disease, the proliferation of weapons of mass destruction, and other boundary-flouting security challenges, is to develop an approach to security which is cooperative (transcending territorial boundaries), comprehensive (transcending conceptual boundaries), and continuous. (transcending temporal boundaries) The project of articulated security, in other words, sets out to create joined-up effort over territorial, conceptual, and temporal dimensions. Instead of meeting threats without boundaries with spectacular displays of repressive sovereign power, the articulated security project pursues security through a mechanics of power in which the efforts of individual units are improved and articulated into 'coordinated and coherent' endeavours, to use a favourite UN phrase.

It is more than fortuitous, of course, that the construction of threats without boundaries, and the vehement rejection of the War on Terror, both make the UN organization seem indispensable to the project of articulating security. Cooperative projects involving multiple actors, working across multiple, intersecting domains, and running continuously for many years need organizing. Chapters 3 and 4 look at two of the managerial technologies introduced during the 1990s and further developed over the last two decades: strategic planning and performance review. Two themes emerge from these chapters, which focus on the Global Counter-Terrorism Strategy. The first is that the legalization of security promised by the UN's cooperative approach to addressing threats without boundaries is not a juridico-political one. The second is that the UN's dedication to results-based management often gets in the way of its objective, preventing it from articulating security infrastructure and producing, in lieu of this, a proliferation of management.

Chapter 3 discusses strategic planning, a managerial technology of composition and arrangement. Integral to any mechanics of power, planning composes elements into interoperable entities. Planning is particularly important in the UN's articulated security project as a way of organizing and rendering coherent the swarm of programmes, initiatives, policies, and practices developed to counter terrorism within and beyond the UN family. New thematic aspects of counter-terrorism arise with regularity, and generate a buzz of

activities from global to workplace levels. The chapter suggests that the UN's approach to organization is superficial. It accommodates the swarm of multi-scalar counter-terrorism initiatives into a hive-like strategic framework, which gains its coherence primarily from aesthetic digital presentation, workload distribution, and a call-and-response name-checking of other relevant initiatives. The work of the Security Council's Counter-Terrorism Committee and its Executive Directorate illustrates the way new thematic modules and micro-prescriptions are hatched and accommodated. Particular attention is paid to the role of the International Civil Aviation Organization in generating best practices for the implementation of biometric travel documents.

Chapter 4 looks at a second managerial technology: performance review. As a mechanism of responsibility, performance review in the UN is oriented to results not the implementation of juridical obligations *per se*. The chapter shows how performance review processes perpetuate and disseminate managerial technologies of strategic planning and review *in lieu* of achieving the primary function of articulated cooperation. This is the case whether the review process employs techniques of gratification (rewarding good results) or of punishment (penalizing bad results). The use of capacity-building assistance as a way of supporting the implementation of the GCTS is an example of the former: it makes both recipient states and programme-providers into responsible managers. The Financial Action Task Force's hard-edged approach to recalcitrant jurisdictions provides an example of correction-by-punishment. This too conjures up the figure of the responsible manager through the redoubling of managerial governance.

Chapter five discusses the UN's articulated security project in relation to the concept of legalization. Legalization, whether pinned to an idea of positive doctrinal law or constitutional law, makes law into a continuum that effaces the distinction between juridical and managerial modes. This chapter reinstalls the distinction using infra-law to explore the phenomena described in Chapters 2-4 in terms of interlegality. In a post-Millennium global context, Foucault's concept of infra-law mutates and the simple situation of interlegality he described in nineteenth-century French prisons, whereby discipline gathers beneath juridical *droit*, no longer pertains. The chapter describes infra-law as an entangled form of interlegality, whereby juridical forms also collect beneath managerial frameworks, but says that international lawyers have persisted in seeing managerial forms as waystations or helpmeets to juridicism. Using Freud's distinction between associations of resemblance and associations of contiguity, the chapter explains the alchemical processes that lead international lawyers to misrecognize managerial technologies as juridico-political instruments.

The embrace of managerial technologies as extensions, catalysts, or variants of juridicism cohabits in the discipline of international law with a healthy scepticism about their legitimacy. Chapter 6 examines the gap between global governance and the ideals of liberal democracy, exploring Foucault's designation of the *contre-droit* character of infra-law. The chapter examines three attempts to neutralise the anti-juridical tendencies in managerial

governance and suffuse it with human rights (the UN's approach), accountability (Global Administrative Law), and participation (Global Experimental Governance). It explains that none of the three approaches can redeem infra-law because they all operate within - rather than upon - its mechanics of power. The discussion bears out Foucault's warning that having recourse to juridico-political government will not bring disciplinary governance to heel.

Chapter 7 analyses the ambivalent character of infra-law as both auxiliary to and anti-judicial law. It uses Freud's conception of the uncanny to dig into the ambivalent quality of infra-law, and finds the root of the trouble in the inarticulate quality of infra-law. The documents, statements, speeches, and dialogues of managerial governance are empty words and dead letters. The chapter goes on to suggest that the violent reaction against managerial – its abjection by some international lawyers - is symptomatic of international lawyers' unease about juridico-political government, and the foreclosing effect of its authority on law's horizon of responsiveness. The book ends with a suggestion that law can contribute to the structural transformation of security by amplifying the anger that motivates complaints of injustice. Achieving this would mean downplaying legal authority, and foregrounding basic practices of listening and writing that are essential to representation.