

## RULES AND MONITORING SYSTEMS – COMPLEMENTARY OR CONFLICTING LOGICS?: A RESPONSE TO FLEUR JOHNS

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In the last century, international law expanded to new domains that had traditionally fallen under exclusive governmental authority—such as human rights, environmental law, nonproliferation law, trade law, etc. This expansion of international rules coalesced into [transnational legal fields](#), which not only include norms, rules, and procedures, but also monitoring systems designed to ensure compliance by member states and private actors.<sup>1</sup> By assuming that all levels of a legal regime (from norms to rules and procedures, and then to monitoring systems and sanctioning mechanisms in case of observed violations) function in a harmonious and complementary way—as the apparatus of international law is supposed to—, some international law scholars may be tempted to avoid spending time analyzing the technical operations of monitoring agencies. The perusal of inspection and compliance manuals is less rewarding and more taxing than the analysis of preambles of treaties and conventions, where norms of good conduct, allocation of rights, and formal authority between institutions are usually delineated.

To be honest, from afar, the study of compliance appears boring, whatever the field—banking, trade, tax law, nuclear nonproliferation, refugee law, police work—, and social scientists would be quite hypocritical if they claimed that international law scholars are the only ones to ignore compliance procedures. They, also, too rarely study the minute procedures of inspection agencies: as [Annelise Riles](#) observed in the field of finance, sociologists privilege the study of high prestige traders and financial analysts over that of low level contract lawyers and accountants working in the back office.<sup>2</sup> We are in fact attracted by prestigious professions when looking for a research topic. [Fleur Johns](#) shows that this should not always be so.<sup>3</sup>

This grey literature produced by technical compliance agencies is exactly the focus of Fleur Johns' article, and she shows how one can turn such arid prose into a site of productive and refined theoretical thinking that engages with highly abstract political theory—in contrast to our expectations. She proves to social scientists that international law scholars can look beyond the leather-bound textbooks and legal manuals, where customary law, statutes, and rules are collected, and theorize about the day-to-day practices of power in modern bureaucratic life. Johns' move thus encourages a welcome interdisciplinary rapprochement between sociologists, political scientists, and international law scholars. She thus provides a great service to both international law and social studies of law.

Furthermore, Fleur Johns brings the latest political ideas from the French political theory of Jacques Rancière to the analysis of compliance in transnational regimes. To do so, she does not quite move from textual analysis to field

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<sup>1</sup> [TRANSNATIONAL LEGAL ORDERS](#) (Terence Halliday & Gregory Shaffer eds., 2014).

<sup>2</sup> Annelise Riles, [Collateral Expertise: Legal Knowledge in the Global Financial Markets](#), 51 *CURRENT ANTHROPOLOGY* 795 (2010).

<sup>3</sup> Although, of course, many authors, generally inspired by Michel Foucault, have studied how institutions turn the world into a legible space of commensuration and categorization. To cite only a few among the most obvious examples, see JAMES SCOTT, [SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED](#) (1995); or James Ferguson & Akhil Gupta, [Spatializing States: Toward an Ethnography of Neoliberal Governmentality](#), 29 *AM. ETHNOLOGIST* 981 (2002).

ethnography, as other scholars of international (contractual) law have done before her,<sup>4</sup> but she extends the type of primary textual material far beyond what one would expect an international law scholar to do. Indeed, she reads through the obscure accounting procedures used to report amounts and locations of fissile materials, satellite imagery used or produced by international organizations like the International Atomic Energy Agency (IAEA), iris scanning techniques and their effects on screening procedures used to allocate repatriation awards for refugees, etc. Although the reader may pause and wonder what Rancière has to say about the definitional differences between “fissile material,” “fissionable material,” and “special fissionable material,” her prose is vivid, and when she lacks ethnographic vignettes, she is not afraid of writing them up, as she acknowledges in the introduction—a technique also used by [ethnologists of law](#) when they are constrained by restrictive confidentiality clauses.<sup>5</sup>

*Rethinking International Legal Ordering Through Changes in its Sensory Infrastructure: Back to Foucault?*

Still, from the theoretical point of view, it is not clear what Rancière’s analysis of sensory mechanisms brings to the analysis of the operations of law, compared to the series of works inspired by Foucault’s pioneering studies.<sup>6</sup> Indeed, Foucault long ago unearthed the role of the perceptual and calculative technologies of seeing and blinding, freeing and constraining, rewarding and punishing, in contemporary operations of power. Social scientists inspired by his work know the importance of looking at the techniques that experts have refined in the dark laboratories of our modernity to provide humanity with happiness, growth, security, stability, and peace—the ultimate goals which experts in disciplinary and governmental power promise to deliver—and to thereby channel the new liberty and freedom gained by the populace after they shed the blood of Europe’s Majesties.

Thus, despite the originality of claiming Rancière as a source of inspiration, Johns in fact grapples with the puzzle at the heart of Foucault’s research program: that is, to understand the articulation of a new enlightenment rights-based discourse with the concrete operations of expert-driven sensory power, whether the latter acts upon bodies (as in the case of the refugees’ deserving vs. undeserving bodies described here) and commodities (source, fissionable, and special fissionable materials in the other case under scrutiny). These technology-intensive operations of power that Fleur Johns describes are indeed good examples of what [Foucault](#) called the “disciplines” (e.g. “the meticulous controls of the operations of the [body or fissile material], which assured the constant subjection of its forces and imposed upon them a relation docility-utility”<sup>7</sup>) and the technologies of “governmentality” (e.g. the arts of predicting and managing the globalized flow of humans and nonhumans, which operate thanks to the multiplication of indexes, indicators, ratings, and other scores by which power gets an indirect hold and measure on how well societies function).

Claiming inspiration from Foucault rather than Rancière may lessen the originality of her approach, but it would have the advantage of linking her argument to the now well established [interdisciplinary literature](#) on “global governance by indicators” that she cites more directly.<sup>8</sup> When Johns claims that her argument is distinct and “broader” than that developed by these Foucaultian scholars because her focus goes beyond “counting” techniques,<sup>9</sup> she fails to convince me at least: I would argue in response that the nuclear materials accounting procedures that the IAEA

<sup>4</sup> Riles, *supra* note 2.

<sup>5</sup> BRUNO LATOUR, [THE MAKING OF LAW: AN ETHNOGRAPHY OF THE CONSEIL D’ETAT](#) (2009).

<sup>6</sup> Rancière is more attentive than Foucault to the aesthetic dimension of sensory power, but it does not seem that Johns pays a lot of attention to this aesthetic aspect—hence, my claim that Foucault could have equally served as a reference to ground her theoretical discussion.

<sup>7</sup> MICHEL FOUCAULT, [DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON](#) 134 (1995).

<sup>8</sup> [GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH CLASSIFICATION AND RANKINGS](#) (Kevin Davis et al. eds., 2012).

<sup>9</sup> Fleur Johns, [Data, Detection, and the Redistribution of the Sensible in International Law](#), 111 AJIL 65 (2017).

prescribes and verifies are an essential part of this organization's verification procedures, and that it would be more accurate to present her research question by saying that she is interested in studying how an organization mobilizes different sources of knowledge (based on quantitative and qualitative data), as sociologists of knowledge do.

Furthermore, by linking her research question to that of Foucault, Johns could have raised more explicitly the most important questions that Foucault left us with: Have these two logics of expert-driven power (disciplines and governmentality) complemented one another? And have they worked in the shadows of liberalism to subvert the expansion of liberty and freedom? We must remember that his [answer to both questions was positive](#): for him, new techniques of governmentality and discipline have complemented each other; they have reshuffled the zones of visibility and invisibility, placing light on the subjects' deeds and hiding governmental actions from the eyes of concerned citizens, thereby undermining new liberal juridical frames.<sup>10</sup> Thus, it's important for us to see if Johns agrees with Foucault, and how the fact of asking those questions departs from more classical questions in international law.

### *Conflict of Rules, Conflicts of Sensory Systems*

International law scholars should take the measure of Foucault's original question and should not confuse his empirical investigations with the study of "[conflicts of rules](#)"—a traditional concern for them.<sup>11</sup> Indeed, the question raised by Foucault and other scholars interested in sensory systems of surveillance is not whether overlapping but conflicting regimes of rules operate in today's world, but whether the operation of a system of surveillance shifts the locus of power and subverts the exact same rules that it is supposed to monitor. In many ways, the two research programs—the study of conflicts of law and the study of conflicts between rules and surveillance systems—can be taken up at the same time, as [some of us have](#) already started doing, including by studying the nuclear nonproliferation regime(s) (which is the only case I will discuss here).<sup>12</sup> In fact, at the risk of simplifying matters to the extreme, it may be useful to visualize how these various dimensions are analytically distinct by representing four types of situations, distributed along these two dimensions: 1) whether there exists a plurality of overlapping rules, and whether they conflict with one another or not; 2) whether there exists some complementarity between systems of rules and systems of surveillance and monitoring, or only conflict. We can even venture to give them names to typify each regime—see for instance one attempt in [Table 1](#).

Now, one may wonder whether (and why) policymakers, diplomats, and their jurisconsults would have ever been so crazy and inattentive as to build such an anarchic regime complex as one with overlapping systems of rules and loosely coupled (even contradictory) systems of monitoring, as represented in the bottom right corner of the table. Johns' article does not go so far as claiming that the nuclear regime complex belongs to that cell in the table; in many ways, she implicitly suggests that it was only a myopic legal regime for a long period of time, until the member states of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) adopted the Additional Protocol in the late 1990s. Indeed, the adoption of the latter allowed the IAEA to complement its ocular practices of surveillance, which relied on the reporting and calculative technologies that checked the discontinuous measurements of flows of fissionable materials,<sup>13</sup> with the continuous analysis of the most critical nodes where experts identify the highest risk of diversion of nuclear materials from authorized peaceful uses to illegal military purposes. Furthermore, the

<sup>10</sup> MICHEL FOUCAULT, [SECURITY, TERRITORY, POPULATION](#) (2007).

<sup>11</sup> For instance, in the field of nonproliferation law: Gregory Shaffer & Mark Pollack, [Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance](#), 94 MINN. L. REV. 706 (2010).

<sup>12</sup> GRÉGOIRE MALLARD, [FALLOUT: NUCLEAR DIPLOMACY IN AN AGE OF GLOBAL FRACTURE](#) (2014).

<sup>13</sup> Countries have to send country reports to the IAEA about overall quantities of fissile materials in their territories, which are then analyzed as aggregates and according to long-established accounting techniques.

**Table 1:** Four Types of Transnational Legal Regimes

Level of Rules	Unique or complementary rules	Conflict between overlapping systems of rules
Level of Sensory Systems of Surveillance		
<i>Complementarity with rules</i>	Alert cohesive regime	Clear-sighted regime complex
<i>Conflict with/subversion of rules</i>	Myopic legal regime	Blinded regime complex

IAEA relied on “new” ocular technologies (satellite imagery for instance) to detect the presence of “undeclared” nuclear activities in the territory of NPT member states. With the Additional Protocol, the nonproliferation regime complex may have moved from a myopic to an alert and cohesive regime. And so we can feel relieved.

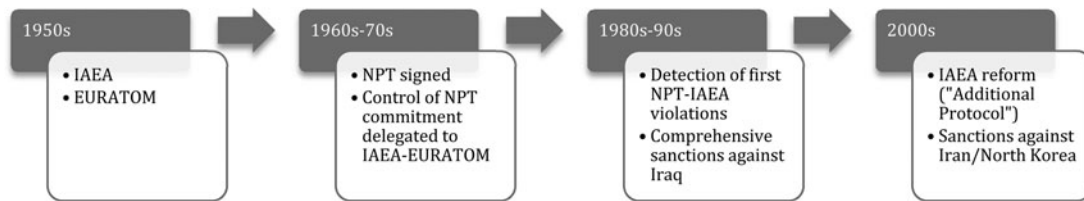
The story, however, is a bit more complex; and Johns’ assessment may be too hopeful. First, we may wonder why the sensory system of surveillance adopted by the IAEA in the 1970s was myopic in the first place. Studying the genealogy of the nonproliferation regime, we can safely say that the ocular deficiencies, such as those that were responsible, for instance, for the fact that Iran could build hidden facilities while claiming to follow the letter of its obligations to the NPT and its IAEA Safeguards Agreement, can be traced to the conflict of rules between nuclear trade regimes adopted by Western Europe in the 1950s and those adopted by the IAEA for the newly independent countries in the 1960s. Indeed, with a brief review of the four successive steps in the nuclear nonproliferation regime (see [Figure 1](#)), we can explain why the IAEA adopted the materials-based approach of accounting in use in Western Europe (originally developed by EURATOM) only in the second period, and why it abandoned the system of facility-based surveillance it had developed in the 1960s.

Indeed, readers may not be aware that 1) after a process of voluntary creation of soft and hard law, which set up technical agencies (EURATOM and the IAEA) in charge of monitoring, respectively, the “conformity” of “declared” and “real” uses of fissionable materials in Western European Countries—note that these declared uses needed not be peaceful in France—and the “peaceful” uses of fissionable materials imported by third-world countries, 2) a harmonization process occurred between the two systems as a result of EURATOM member states signing the NPT in 1968 (because of Article 3 of the NPT), which led the IAEA Safeguards Committee to adopt a materials-based approach similar to that of EURATOM for all the NPT signatory states. Thus, [as I have written elsewhere](#), “EURATOM member states eventually succeeded in harmonizing the IAEA system of controls with theirs, rather than the contrary.”<sup>14</sup> This progression had grave consequences, as the diplomats who were responsible for this process of harmonization “largely ignored the fact that EURATOM’s control rules had been designed to allow supranational proliferation from the United States to Europe,” and thus, “they accepted that the worldwide system of control adopted by the post-NPT IAEA guidelines be modeled after a system (EURATOM’s) filled with loopholes.”<sup>15</sup> Hence, we see the need to study the evolution of sensory systems of surveillance in combination with the study of conflicts of rules.

With this historical view, we now understand why there may have been some myopia in the post-1970s sensory system adopted by the IAEA, and why, in the periods that succeeded the ratification of the NPT (after the observed violations of the NPT and the IAEA’s Safeguards Agreement by Iraq, which were revealed after the First Gulf War), the IAEA felt the need to convince its member states to adopt the Additional Protocol in the 1990s—as the latter put an end to the “honor code” philosophy of IAEA inspection rules in order to avoid

<sup>14</sup> Grégoire Mallard, *Crafting the Nuclear Regime Complex (1950–1975): Dynamics of Harmonization of Opaque Treaty Rules*, 25 EUR. J. INT’L L. 445 (2014).

<sup>15</sup> *Id.* at 464; see also, MALLARD, *supra* note 12, at ch. 7.



**Figure 1:** The Gradual Constitution of the Nonproliferation Regime Complex

future detection failures (see [Figure 1](#)). But we may still be convinced that the nuclear regime complex has now moved toward better eyesight and greater cohesion of rules. This hopeful conclusion, however, needs to be questioned. Doing so requires that we include in our analysis of sensory practices and techniques the role of NPT member states, and not just the sensory practices of the IAEA. Indeed, if we focus exclusively on the sensory techniques used by the international organization (IO) whose mandate it is to verify compliance with treaty rules (either EURATOM or the IAEA), we may date the use of certain techniques (like aerial and satellite imagery for instance) to the latest period, when the IAEA finally innovated with the Additional Protocol and the vast inspection rights it has gained in the case of Iran after the Joint Comprehensive Plan of Action was signed in 2015. But if we also draw the chronology of when such techniques were first used, we will generally find that they were used by the most powerful states (like the United States, with its unique spying system), much before the IAEA was first authorized to use them.

This time lag actually highlights a key weakness in the way international monitoring agencies function: they usually rely on the benevolence of hegemonic states to get access to compromising aerial photographs or spied conversations between foreign nuclear policymakers—and thus, they are also dependent on those states’ grand strategies. For instance, as far as nuclear nonproliferation was concerned, the United States had known since the late 1970s (thanks to its spying system, which was much more powerful than that of the IAEA), that Pakistan was building an enrichment site. The Carter administration was on the verge of alerting the IAEA Director, when it suddenly reversed course after the Soviet Union invaded Afghanistan and the United States decided to side with Pakistan and privilege alliance politics over the policing of the nuclear nonproliferation regime.<sup>16</sup> After this decision resulting from Cold War politics, various U.S. administrations failed to inform the IAEA Director of proliferation activities that Pakistan conducted, internally and externally, for more than a decade. When Pakistan’s proliferation activities with Iran and Libya (among others) started to make the news, the United States also selectively transmitted evidence to the IAEA to incriminate Iran while leaving Pakistan’s political leadership out of the picture. This short reminder should convince international law scholars of the importance of looking at the sensory capabilities of IOs within the broader ecology of spying and other sensory apparatuses developed by the regime’s member states (including the most powerful states), as the circulation of documents between the two is often dependent on broader political strategies—and powerful states draw power and authority over IOs from the latter’s dependency on their own sensory systems.

To sum up, as much as I am convinced that Fleur Johns’ contribution is situated at the exact point where social theory can productively dialogue with international legal theory,<sup>17</sup> I see various complementarities—and

<sup>16</sup> MALLARD, *supra* note 12, at ch. 8.

<sup>17</sup> I have not commented upon the various inexactitudes in the article which catch the eye of the specialist of NPT and IAEA history, like the idea that this regime is about controlling the “flow of weapons, or weapons-grade material,” Johns, *supra* note 9, at 79, or the assertion that the “NPT prioritizes ‘observation,’” *id.* at. 71, when it is agnostic on questions of control and verification (see Article 3), as the rift

divergences—between her approach and that of social scientists. In fact, I see four differences between Johns’ account and my reading of the history of nonproliferation formal ordering—from the IAEA Statute, to the NPT, the “Additional Protocol,” and the adoption of such resolutions as UNSCR 1540.<sup>18</sup> These four differences are the following: 1) the plurality vs. unity of the *sources of formal authority* allowing the sensory apparatus of power to operate; 2) the contradictory vs. the complementary logics between *modes of sensory power* (e.g. the various techniques and instruments through which the materiality of the regulated activities is apprehended); 3) the deceptive vs. cooperative logics at work in the *delegation of state authority* to IOs; 4) the heterogeneity vs. homogeneity in the *identities of those who bear responsibility* in case of observed noncompliance with formal rules (designated IOs or some of the regime’s member states). Johns’ approach in this article could leave the impression that the accumulation of sensory capacities may eventually lead to complementarities between expert-driven technologies of sensory power rather than to chaos, confusion, and myopia. In contrast, social scientists like myself emphasize the confusing, the contradictory, and the self-defeating plurality of systems of control and monitoring, coupled with the pluralistic and conflicting nature of systems of rules.

This interdisciplinary debate, if it achieves one thing—in addition to forging a common vocabulary to designate the operations of international law on the ground—, can decrease biases inherent to the epistemological and political assumptions intrinsic to each discipline: the legal scholars’ genius in identifying processes of ordering vs. the hyperawareness that social scientists have developed for detecting the subversion of rules by the silent operations of power. In any case, the dialogue is fruitful, and both social scientists and international law scholars can only benefit from other forays into the practicalities of other sensory systems.

between East and West on this question would have made the adoption of the NPT impossible. But Johns’ article reaches for a higher theoretical ambition, the discussion of which should not be obscured by minor technical points.

<sup>18</sup> For those interested, the points of conflict between the new rules of financial transparency set by the various UNSCRs passed against Iran from 2006 to 2012 and the old rules adopted by the IAEA will be the object of an ERC-funded research project that I will conduct during the next five years (2017–2022).