Legality

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Legality – the 'spirit or way of thinking characteristic of the legal profession' or the 'quality of being legal or in conformity with the law'[1] – is a condition with which international lawyers might be expected to exhibit relative comfort. Not so. Far from naming common ground upon which international lawyers routinely assemble, legality marks a site of intense and unresolved conflict. It is a condition that international lawyers aspire to secure, and perennially worry about failing to bring about.

This chapter will demonstrate how international law's fraught sense of legality is crafted and experienced by attention to a highly controversial judicial ruling – that of the International Court of Justice (ICJ), in July 1966, in the *South West Africa Cases*.[2] In some accounts, this judgment was excessively legalistic; too technical to be truly lawful.[3] In others, it was flawed for being too political; a gross distortion and instrumentalization of law.[4] In this chapter's account, however, the sense of legality

[1] "legality, n." *OED Online* (Oxford University Press, September 2014).
[2] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6.
[3] The representative of Liberia condemned the ICJ for engaging in 'casuistry and legal pyrotechnics' in the 1966 Judgment, while the representative of the Congo derided it for 'taking refuge behind technical quibbling': *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council resolution 276 (1970),* Request for Advisory Opinion, Documents, Written Statements, vol. I, 428, 431.
[4] The representative of Guinea thundered: 'It is indeed the alliance of colonial and racist forces with illegitimate interests in an obsolete world that prevailed in the

that was generated in this instance fits neither description; rather, it is fictional. This chapter writes legality as an incident of 'investigative work' or experimental practice that entails 'fictioning' a politics of norms and normalcy.[5]

Before explaining the 'fictional' and 'fictioning' of preceding sentences, the afore-mentioned 1966 *South West Africa* judgment merits some introduction. Before the ICJ in 1966 was a protracted dispute concerning the existence of the Mandate for South West Africa, created by the League of Nations in 1920 over the former German protectorate of South West Africa, and the duties and performance of South Africa as the state mandated thereunder.[6] The Mandate System was an international governance regime established by the League of Nations for the management of territories annexed or colonized by Germany or the Ottoman Empire, following the latter's defeat in the First World War. Its goal was to supervise and encourage these territories' transition to self-government, under the tutelage of a mandate-holding state.[7]

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decision of this Judge [referring to the President of the ICJ, who cast the deciding vote in the 1966 Judgment, Sir Percy Spender]'): Request for Advisory Opinion, Documents, Written Statements (n 3) 430.

[5] Thomas Lemke, 'Critique and Experience in Foucault', (2011) 28 Theory Culture Society 26, 38; Timothy Rayner, 'Between Fiction and Reflection: Foucault and the Experience-Book' (2003) 36 Continental Philosophy Review 27, 41.

[6] Michla Pomerance has observed that '[n]o single political issue has engaged the ICJ more than that of South West Africa (Namibia). Over a period ranging from 1949 through 1971, recourse was had to the Court, both in its advisory and contentious capacities, on various aspects of the problem': Michla Pomerance, 'The ICJ and South West Africa (Namibia): A Retrospective Legal/Political Assessment' (1999) 12 Leiden Journal of International Law 425, 425.

[7] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 115-195.

In 1950, the ICJ issued an Advisory Opinion in which it affirmed unanimously that the South West Africa Mandate continued, notwithstanding the League of Nations' demise. It affirmed too (by a vote of twelve to two) that South Africa had continuing obligations to submit to the supervisory authority that the UN had assumed from the League of Nations in relation to this Mandate.[8] South Africa refused to accept or act in conformity with this opinion.[9]

In 1960, confronting continued South African intransigence, Ethiopia and Liberia applied to the ICJ. This time, they invoked the ICJ's contentious jurisdiction, acting in their capacity as members of the former League of Nations. They asked the Court to adjudge the South West Africa Mandate a treaty in force against South Africa and to rule South Africa in violation of both the Mandate and the Covenant of the League of Nations. This violation was manifest, they argued *inter alia*, through South Africa's 'fail[ure] to promote to the utmost the material and moral well-being and social progress of the inhabitants of the [Mandate] Territory', foremost through its practice of apartheid in administering that territory.[10]

In 1962, the ICJ ruled on this application in its preliminary, jurisdictional phase. By a narrow margin of eight votes to seven, the Court held that that it had jurisdiction to adjudicate on the merits of this dispute. That ruling entailed a finding that members of

[8] *International Status of South West Africa, Advisory Opinion of 11 July 1950* [1950] ICJ Rep 128.
[9] See generally John Dugard, *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy between South Africa and the United Nations* (University of California Press 1973).
[10] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Application by the Government of Ethiopia)* [1966] ICJ Pleadings, Oral Arguments, Documents: South West Africa Cases, vol. I, 20.

the League of Nations had a legal right or interest in the observance by a mandatory, such as South Africa, of its obligations both towards inhabitants of the mandate territory and towards the League of Nations and its members.[11]

In its 1966 judgment on the merits of the same case, however, in a decision on which members of the Court were evenly split (such that the President, Sir Percy Spender, cast a deciding vote), the ICJ rejected Ethiopia and Liberia's application. They did so on grounds that the applicant states had failed to establish any legal right or interest in the subject matter of their claim.[12] In effect, the ICJ reversed its own December 1962 *South West Africa* judgment, treating as 'interlocutory' or 'provisional' a decision which its own Statute would have characterized as 'final and without appeal'.[13] The 1966 *South West Africa* judgment provoked widespread disillusionment with, and condemnation of, the ICJ and prompted efforts, through the judicial appointments process, to modify its composition.[14]

In what sense, then, did the ICJ's 1966 *South West Africa* judgment manifest legality, however controversially? This chapter's answer to that question sets it apart from the

[11] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319, 343. Note, however, that the 1966 Judgment concluded that the 1962 Judgment had not disposed of this issue: *South West Africa Cases* (n 2) 36-38, 42-43.
[12] *South West Africa Cases* (n 2) 51.
[13] *South West Africa Cases* (n 2) 37-38; Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 U.N.T.S. 993, Art. 60. Alexander Pollock has observed that 'the 1966 judgment is not called a reversal of the 1962 judgment', even though 'there was a virtual reversal': Alexander J. Pollock, 'The South West Africa Cases and the Jurisprudence of International Law' (1969) 23 International Organization 767, 769.
[14] Pomerance (n 6) 430, n 18 (providing, in summary form, an 'illustrative compendium' of reactions) and 431, n 20 and 435 (outlining subsequent efforts to transform the Court).

views of many interpreters, including then-members of the ICJ. Many have contended that the legality of the 1966 *South West Africa* judgment represented the flipside of that of the 1962 *South West Africa* judgment. That is, the 1966 judgment is often read as putting forward a positivist or analytical legality, while the 1962 judgment is understood to have advanced a moral or teleological legality.

To the question '[w]hat can legally bind a state?' the 1966 *South West Africa* judgment has been construed by many as having entertained only a 'positivist answer', namely 'only [the state's] own will'.[15] In the absence of positive 'instruments' expressly creating legal relations among the states concerned, the mandate-holding state could not be 'separately responsible to each and every individual [s]tate member of the League' in respect of their exercise of mandate powers, the ICJ ruled.[16] Both the 1962 judgment, and dissenting opinions from 1966, emphasized and drew interpretative guidance from the 'humanitarian and civilizing purpose' for which the Mandate System was created.[17] According to the majority in 1966, however, no account was to be taken of 'moral principles', 'humanitarian considerations' or 'political ends', except 'in so far as these [had been] given a sufficient expression in legal form'.[18]

Commentary along the foregoing lines would have the condition of legality in international law – and in the 1966 *South West Africa* judgment in particular – rest on

[15] Pollock (n 13) 771. See n 4 above, however, for an interpretation to the contrary, reading the 1966 majority's positivism as an expression of the politics of the colonist.
[16] *South West Africa Cases* (n 2) 29, 32.
[17] *South West Africa Cases* (n 11) 329, 336; *South West Africa Cases* (n 2) Dissenting Opinion of Judge Mbanefo, 504.
[18] *South West Africa Cases* (n 2) 34, 36.

the irresolvable rivalry or mutual sustenance of these two 'jurisprudential approaches', or to emerge from the contingent primacy of one over the other. Depending on the account, the latter primacy may result from correct legal or philosophical reasoning, or by force of associated political power or charismatic authority in a particular instance.[19] In this chapter's account, however, the 1966 *South West Africa* judgment's legality does not 'rest' of any of these oft-touted foundations: social fact, moral truth, or an incessant yet predictable see-sawing of the two.[20]

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[19] See, eg, Wolfgang G. Friedman, 'The Jurisprudential Implications of the South West Africa Case' (1967) 6 Columbia Journal of Transnational Law 1, 3 (exploring 'the validity of the contrast between an "analytical" as against a "teleological" or "humanitarian" approach' and concluding that both jurisprudential approaches 'have a mixed legal and political character'); John Dugard, 'Namibia (South West Africa): The Court's Opinion, South Africa's Response, and Prospects for the Future' (1972) 11 Columbia Journal of Transnational Law 14, 16, 20 (the dispute had 'been marked by a conflict between strict constructionists and those…who prefer liberal and sociological methods' and '[i]n 1966 the strict constructionists triumphed' thanks to 'the formalists [having] found themselves in the majority'); Pollock (n 13) 767 (the case presented the ICJ 'with a choice…between rival claims about the nature of international law'); Ernest A. Gross, 'The South West Africa Case: What Happened?' (1966) 45 Foreign Affairs 36, 45 (describing the process 'by which the dissenting opinions of 1962 were transmuted into the Judgment of 1966' as 'judicial alchemy' resulting from 'adventitious changes in the Court's composition' and noting 'a sharp contrast in perspectives' between the two rulings such that were 'mutual[ly] incompatib[le]'); *South West Africa Cases* (n 2), *Dissenting Opinion of Judge Tanaka*, 250, 278 (attributing 'the difference of opinions' among ICJ members to a contest between 'two methods of interpretation: teleological or sociological and conceptional [*sic*] or formalistic').

[20] Accounts of such see-sawing put forward by David Kennedy and Martti Koskenniemi in the late 1980s (in David Kennedy, *International Legal Structures* (Nomos 1987) and Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (rev edn 2005 Cambridge University Press)) did not generate an experience of predictability; on the contrary. Nevertheless, as David Kennedy has observed, these books' 'symbolic meaning' in international legal scholarship may have 'overtaken [their] analysis', such that the circulation of one or other diagnostic slogan that these books are supposed to have advanced – about indeterminacy, for instance – has largely foreclosed ongoing engagement with their 'struggles with the dark incoherence of the [international legal] field's intellectual foundations': David Kennedy, 'The Last Treatise: Project and Person (Reflections on Martti Koskenniemi's From Apology to Utopia' (2006) 7 German Law Journal No. 12 <http://www.germanlawjournal.com/pdfs/Vol07No12/PDF_Vol_07_No_12_981-

Rather, that judgment's legality is fictional, as already noted. It is an incident of experience.

To say that the ICJ's 1966 *South West Africa* judgment generated legality fictionally is not to adjudge the Court's findings erroneous. 'Fiction' here invokes a fabrication of experience in the sense with which Michel Foucault experimented in his later work.[21] The 1966 *South West Africa* judgment was not 'exactly…a novel', but it enlivened 'something which does not yet exist', including conditions that make possible its own legality.[22] In the course of its ruling, the ICJ was 'construct[ing] itself, and…invit[ing] others to share an experience of what we are, not only our past but also our present'.[23] It generated the imaginary space from which it became possible to engage in 'a discourse repeating…events after the fact or dubbing them as they unfold' in legal (or extra-legal) terms.[24] This 'collective event' assembling 'a whole realm of anonymous voices, continually interjecting in the narrative' is precisely the practice of legality.[25] The 1966 *South West Africa* judgment's legality entailed the generation of an experience that is 'capable of being linked…to a

992_SI_Kennedy.pdf> accessed 30 September 2014.
[21] Lemke (n 5).
[22] Michel Foucault, 'Interview with Michel Foucault' in *Essential Works, Vol. 3, Power* (James D Fabion ed, Penguin 2000) 243; Michel Foucault, 'Interview with Lucette Finas' in *Michel Foucault: Power, Truth, Strategy* (P Foss and M Morris tr, M Morris and P Patton eds, Feral Productions 1979) 75.
[23] 'Interview with Michel Foucault' (n 22), 242.
[24] Michel Foucault, 'Behind the Fable' in *Essential Works, Vol. 2, Aesthetics* (James D Fabion ed, Penguin 1998) 137. For an illustration of the dubbing of certain considerations as 'extra-legal', see *South West Africa Cases* (n 2) 47.
[25] Rayner (n 5) 33-34.

collective practice' and 'transform[ing]…the relationship we have with our knowledge'.[26]

From within the 1966 *South West Africa* judgment, however, this fictional legality was crafted in exactly the opposite of the way Foucault envisaged. It proceeded through a process of re-subjugation and re-assimilation to established fields of categorization, in a definitive rather than an interrogative mode.[27] 'Law exists', the 1966 judgment insisted, 'only through and within the limits of its own discipline'.[28] Although it referenced States' intent, alongside 'universal and necessary…almost elementary principles…of law', the 1966 judgment offered no definitive answer to the question from where legal authority was derived except from 'within the limits of its own discipline'.[29] '[I]n order to exist', the Court concluded, legal rights or interests 'must be clearly vested in those who claim them, by some text or instrument, or rule of law'; the origin of law was law.[30] It was only out of the discipline of 'reading', the performance of routine 'task[s]' and the discharge of 'correct' legal 'function[s]' that the judgment's limited legality could make itself extant. [31]

Delimitation of those 'limits' involved setting law against and apart from that which had 'no natural limit' according to the 1966 *South West Africa* judgment, namely: 'moral principles', 'humanitarian ideal[s]', 'political ends', historical 'after-

[26] 'Interview with Michel Foucault' (n 22), 244.
[27] Judith Butler, 'What is Critique? An Essay on Foucault's Virtue' (2002) < http://f-origin.hypotheses.org/wp-content/blogs.dir/744/files/2012/03/butler-2002.pdf> accessed 30 September 2014, 7.
[28] *South West Africa Cases* (n 2) 34.
[29] *South West Africa Cases* (n 2) 40, 39, 34.
[30] *South West Africa Cases* (n 2) 32.
[31] *South West Africa Cases* (n 2) 36.

knowledge' and 'revision[ist]…desir[e]'.[32] Disclosure and defense of international law's 'real character and structure' in the judgment was said to depend upon those distinctions being found, not made – seemingly against Foucault's account of fabrication.[33] It was for this reason that the judgment had to generate an experience of a 'whole' representational system within which such 'discoveries' could and would be made: a system with an 'economy and [a] philosophy'; one in which 'the possibility of any serious complication was remote' and 'did [not] arise'.[34] It would not have been enough for the ICJ to generate pivot points or directive plans to generate such an experience of legality; it had to construct an 'order [in which] to exist' for a time.[35]

The 1966 *South West Africa* judgment is not, nevertheless, insulated from experiment towards a 'fictioning' of that legality otherwise; one that might yet make use of 'tactical pointers' within it to evoke experiences other than those which the 1966 judgment sought to elicit.[36] Indeed, this is precisely what the ICJ would go on to do in its 1971 Advisory Opinion on the status of South West Africa (or Namibia, as it was by then known), following the United Nations General Assembly's revocation of South Africa's mandate, in which South Africa's continued presence in the territory was ruled illegal.[37]

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[32] *South West Africa Cases* (n 2) 34, 35, 36, 47.
[33] *South West Africa Cases* (n 2) 47, 48. However, see below, at n 52 and related text, for discussion of the reality of this 'foundness'.
[34] *South West Africa Cases* (n 2) 35, 47, 45.
[35] *South West Africa Cases* (n 2) 32.
[36] Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France* (Graham Burchell tr, Palgrave, 2007) 3.
[37] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council resolution 276 (1970), Advisory Opinion* [1971] ICJ Rep 16.

Of particular note, in terms of the 1966 *South West Africa* judgment's openness to further experiment, was the relative quiescence of the sense of 'collective practice' in which it sought to embed itself. This the Court would have had its audience experience as normalcy: '[i]n truth', wrote the ICJ judges who prevailed, 'there is nothing about this particular jurisdictional clause [in the South West Africa Mandate] to differentiate it from many others, or to make it an exception to the rule'.[38] It was, the Court insisted, representative of 'the normal faculty of participating in the collective work of the League [of Nations] respecting mandates'; '[i]n this situation there was nothing at all unusual'.[39]

Yet this was a normalcy plainly under siege. It had to be defended, on all sides, against those who would 'set themselves up as separate custodians' of legal norms and engage in 'haphazard and uncertain action'.[40] It had to be defended, above all, against the prospect of 'an "*actio popularis*"'.[41] The sense of a surrounding throng was a vital part of the experience that the 1966 judgment enlivened. In its 1971 Advisory Opinion, the ICJ made use of this, citing the 1966 judgment's deferral to the political organs of the United Nations to counter a challenge to the latter's competence to act. In effect, the ICJ in 1971 rewrote the 1966 *South West Africa* judgment as a summons onto the 'political field'.[42]

[38] *South West Africa Cases* (n 2) 39.
[39] *South West Africa Cases* (n 2) 29, 46.
[40] *South West Africa Cases* (n 2) 29, 46.
[41] *South West Africa Cases* (n 2) 47.
[42] *1971 Advisory Opinion* (n 37) 49.

That the League 'system' had already disintegrated long before the ICJ purportedly rallied to its protection in 1966 only intensified the bathos of the encounter with a law so besieged. The 'real' and 'binding' law upon which the 1966 *South West Africa* judgment was so insistent turned out to be comprised of 'obligations that [could not] in the last resort be enforced by any legal process', in view of the League's dissolution.[43] Moreover, this vapidity was itself unremarkable; '[i]n the international field', such a condition 'has always been the rule rather than the exception', the 1966 judgment observed.[44] In the course of making possible a collective experience of 'normal judicial action', the 1966 judgment seemed to leech that action of all potency, readying it for displacement.[45] Countering prospects and arguments for action seemed to encircle this husk-like judgment and to emerge all the stronger for its inert, stricken 'ordinar[iness]'.[46] Far from defeating the political struggle of Liberia, Ethiopia and their allies, the legality fabricated in the 1966 *South West Africa* judgment might be experienced, retrospectively, as having added to their political armory.[47]

[43] *South West Africa Cases* (n 2) 29, 46.
[44] *South West Africa Cases* (n 2) 46.
[45] *South West Africa Cases* (n 2) 48.
[46] *South West Africa Cases* (n 2) 51.
[47] cf Sol Picciotto, 'The South-West Africa Case, the New Nations, and International Law' (1966) 4 The Journal of Modern African Studies 375, 380 (construing the proceedings as 'a diversionary tactic which only served to give South Africa some relief from political pressure, and more time to build up an impregnable, self-sufficient economy'); Gross (n 19) 42 (suggesting that it was 'the hope and expectation of the Applicant States, as well as of other members of the international community, that a Judgment would impel the United Nations – in particular, South Africa's principal trading partners – to take effective action'); Pollock (n 13) 427 (arguing that the goal was to secure a 'propaganda victory' and 'to force the United States and the United Kingdom…into taking a stronger stand against South Africa'); Pomerance (n 6) 432 (arguing that 'the dispute was ultimately settled by purely political developments in which the Court played no obvious role' but that 'to deduce from this that the judicial involvement was negligible is probably unwarranted'; suggesting that the case 'did strengthen the resolve of the UN political organs, and

An account of the 1966 *South West Africa* judgment's legality as fictional amounts, thus, to a practice of 'fictioning' itself. It is an intervention against claims that conflicts turning on questions of international legality can and must 'rest' at all. This intervention is a political intervention. It is premised on a working hunch or wager (as opposed to a prediction), based on historical reading. That hunch suggests that engaging in an argument as if legality constituted, or were founded on, some stable, common bedrock or system – whether ideal, material, discursive, or fashioned otherwise – is likely to be politically foreclosing and possibly harmful, in international legal conflict(s) towards which one's argument may be oriented. Against the 1966 judgment authors' inclination to hunker down amid legality, fictioning issues an 'invitat[ion] to share', to read, to write and to act out legality experimentally.[48] This entails deploying an imprecise approximation of pragmatic or other consequentialist thought, while characterizing the link between action and consequences – that is, the assumption of causation – as fraught and unreliable.

This account of legality mobilizes a sense of law as a 'continuation of politics by other means', to paraphrase Clausewitz.[49] It does not, however, carry the diminutive 'mere' of Clausewitz's original quote. To cast legality as a matter engaging the politics of norms need not entail reading down the specificity, or reading up the predictability, of the politics involved. To understand law-as-politics as a pinning-down or reduction of legality would be to defuse the law-as-politics charge. The

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especially, of a middle group of influential wavering states (including, most importantly, the United States)').
[48] 'Interview with Michel Foucault' (n 22), 242.
[49] Carl von Clausewitz, *On War* (JJ Graham tr, Wilder, 2008) 42.

experience of law-as-politics by no means sets aside or surmounts the mystery or distinctiveness of international legality.[50]

To put forward an account of such fictional fabrication also does not refute the ICJ's claim, in its 1966 *South West Africa* judgment, that legality arises from 'apply[ing] the law as [the Court] finds it, not… mak[ing] it'.[51] A fictional work is something that its maker(s) may well experience finding or 'stumbl[ing] upon', and by which they may be changed.[52] Indeed, Annelise Riles argues that the reorientation of legal fictions in this way, to allow them to 'run[] away from [their] knower' in the course of their replication (however purposeful their conception), is a routine 'matter of intuitive lawyerly skill – it is just what good lawyers do'.[53]

To write legality as fictional is to suspend or bracket the 'necess[ity]' of 'advert[ing] to philosophical truths about what ultimately determines legal authority or interpretive methodology in every legal system': suspension or bracketing that is a routine feature of legal technique.[54] Whereas Shapiro (in his influential work on the theme of this

[50] Martti Koskenniemi, 'The Mystery of Legal Obligation' (2011) 3 International Theory 319; David Kennedy, 'The Mystery of Global Governance' (2008) 34 Ohio Northern University Law Review 827.
[51] *South West Africa Cases* (n 2) 48.
[52] Morris R. Cohen, 'On the Logic of Fiction' (1923) 20 The Journal of Philosophy 477, 485. Foucault observed: 'I write a book only because I still don't exactly know what to think about this thing I want so much to think about, so that the book transforms me and transforms what I think': 'Interview with Michel Foucault' (n 22), 239-240. I am indebted to Annelise Riles' reading of Morris Cohen: Annelise Riles, 'Is the Law Hopeful?' (2010) Cornell Law Faculty Working Paper 68 http://scholarship.law.cornell.edu/clsops_papers/68 accessed 30 September 2014.
[53] Riles (n 52) 14-15.
[54] Scott J. Shapiro, *Legality* (Harvard University Press 2011) 30 (claiming that adverting to such 'philosophical truths' becomes 'often…necessary' when 'legal

chapter) 'draw[s] a methodological line at the social and the moral and treat[s] social and moral facts as though they were ultimate', this chapter draws a comparable line at the level of legal practice, such as that at work in the ICJ's 1966 *South West Africa* judgment (while conceding that metaphysicians would regard the making of legality from practice as a 'category mistake').[55]

What is activated in this account is not the human capacity or propensity for planning, as in Shapiro's account of legality, for instance.[56] Rather, what is activated is the capacity to experience a 'pulling…free' from 'knowing oneself in a certain relationship with the law' and to collaborate in 'produc[ing] something that doesn't exist yet, without being able to know what it might be'.[57] Routine practices of legality bring about just such an experience: a known relationship to law is generated through an experience of that which exceeds and may transform that relationship. The practice of legality tugs at the known in this way.

Recommended Reading:

Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law An Interactional Account* (Cambridge University Press 2010)

Richard Falk, Mark Juergensmeyer and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (Oxford University Press 2012)

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

Carl Schmitt, *Legality and Legitimacy* (J Seitzer tr, Duke University Press 2004)

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disputes are predicated on conflicting claims about who has authority in a particular legal system or how its texts ought to be interpreted').

[55] Shapiro (n 54) 44, 103.

[56] cf Shapiro (n 54) 156.

[57] 'Interview with Michel Foucault' (n 22), 242, 257, 275.