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Symposium on *Legitimacy and Legality in International Law: An Interactional Account* by Jutta Brunnée and Stephen J. Toope

Interactional international law: an introduction

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Introduction

Does international law matter? Does it influence the behavior of states, and if so, how? Why do states comply with international law, or why not? These are among the questions that International Relations (IR) scholars, and more recently, international lawyers have been asking about the role of international law in international society. What has been generally absent from these inquiries is sustained engagement with a previous question: what distinguishes legal norms from other norms (Finnemore 2000)? This question is crucial because the answer one provides has significant implications for understanding how international law operates (Kingsbury 1998).

In *Legitimacy and Legality in International Law: An Interactional Account*, we argue that law's distinctiveness rests in the concept and operation in practice of legal obligation. The prevailing accounts of international law pay remarkably little attention to the role of legal obligation, and how it is generated. Many international lawyers view obligation simply as the legal consequence of formal validity or state consent, or take its existence in international practice as given. Some have gone so far as to suggest that the concept of international legal obligation is theoretically uninteresting and practically irrelevant (Goldsmith and Posner 2005). These accounts have reinforced realist and rationalist perspectives in IR (Katzenstein *et al*. 1998). If international law is only a formal construct that is entirely contingent upon state will, it is at least initially plausible that states' interests and relative powers drive their

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conduct and that law has little or no independent effect. By contrast, constructivist IR theory accepts the notion that norms can shape social interaction (Hurd 2008). Yet, with some exceptions (Reus-Smit 2003), constructivist scholars too have been largely uninterested in looking behind the formal account of law to examine how legal obligation arises and how its influence might differ from that of other social norms (Bederman 2001).

Our framework brings together the legal theory of Lon Fuller and constructivist approaches to IR to provide a richer understanding of legal obligation. Constructivism helps us to illuminate how shared norms emerge and shape social interaction. We rely on a set of criteria of legality identified by Fuller to argue that legal norms exert a distinctive influence. In Fuller's terminology, features such as generality, promulgation, non-retroactivity, clarity, and congruence between rules and official action, inspire 'fidelity' of social actors to law (Fuller 1969a). But we emphasize that law's influence does not arise simply when social norms meet these criteria of legality. Building on Emanuel Adler's work on transnational 'communities of practice' (Adler 2005), we show that the obligatory effect of international law must be generated and maintained through practices that sustain legality over time. In short, the three inter-related elements of our framework – shared understandings, criteria of legality, and a practice of legality – are crucial to generating distinctive legal legitimacy and a sense of commitment among those to whom law is addressed (Brunnée and Toope 2010, 52–55). They create legal obligation. When commitment to law is not sufficiently promoted through these inter-related processes, law is eroded or destroyed.

A strong claim concerning legal legitimacy is implicit in our framework: only when law is made through the interactional approach we describe can it be said that the law is 'legitimate'. This distinctive legal legitimacy does not merely produce adherence to specific rules, but generates fidelity to the rule of law itself. Our interactional framework reveals how legitimacy is built through broad participation in the construction and maintenance of legal regimes. If there are no shared understandings of the role of law, and of particular candidate norms, it will be difficult if not impossible for the norms to emerge as 'law'. Hence, the first step in building interactional law is the creation of *social* legitimacy through the emergence of widely shared understandings. To create *legal* legitimacy, however, the criteria of legality must also be substantially met. These criteria are fundamental in producing norms that have the capacity to be 'law'. Even this is not sufficient to instantiate the rule of law or particular legal rules. Shared understandings and rules that meet the criteria of legality must be continuously reinforced through a robust practice of legality.

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Our account also highlights that influential norms will not emerge in the absence of processes that allow for the active participation of relevant social actors. Social actors in the global domain include states, of course, but the interactional framework acknowledges the importance of robust participation by intergovernmental organizations, civil society organizations, other collective entities, and individuals. The need for broad participation in the creation and upholding of law (through the evolution of shared understandings, and in the building up of communities of practice) has two further consequences worth noting. The interactional framework acknowledges and reinforces the diversity of international society, and shows that legal power is more distributed than commonly presumed in rationalist explanations of law.

In the book, we provide a detailed account of our interactional theory of international legal obligation (Chapter 1) and examine the relationship between shared understandings and legal norms in international society, paying particular attention to the effects of social diversity and differential power in international society (Chapter 2). We then tease out the implications of our framework for understanding and promoting compliance with international law (Chapter 3). These theoretical chapters are followed by three chapters that apply the framework in concrete settings: the evolution of the global climate regime (Chapter 4), the challenges posed to the prohibition on torture after 11 September 2001 (Chapter 5), and the pressures on the rules governing the use of force during the same period (Chapter 6). These case studies allow us to explore the role of shared understandings, the criteria of legality, and the practice of legality in the emergence of new legal norms (e.g. the principle of common but differentiated responsibilities in the climate regime, or the responsibility to protect in the use of force context), as well as in the operation and further evolution of established norms (e.g. the prohibition on torture, or the right to self-defence against armed attacks).

For the purposes of this brief summary, we focus on the description of the interactional theory of international law, and explain how it illuminates customary, treaty, and soft-law-making processes. Although we treat the three elements of our framework sequentially in the following discussion, they are actually in a dynamic relationship, reinforcing or undercutting one another.

Shared understandings

Social norms can only emerge when they are rooted in an underlying set of shared understandings supporting first the need for normativity, and then particular norms that shape behavior. Actors generate and promote

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certain understandings, whether through norm entrepreneurship or through the work of epistemic communities. Shared understandings may then emerge, evolve, or fade through processes of social interaction and social learning (Brunnée and Toope 2010, 56–65). We illustrate this process in the context of the emergence of shared normative ground concerning the responsibility to protect (Brunnée and Toope 2010, 323–42), and highlight the fragility of shared normative understandings in our discussion of the prohibition on torture (Brunnée and Toope 2010, 223–50). Once in existence, shared understandings become background knowledge or norms that shape how actors perceive themselves and the world, how they form interests and set priorities, and how they make or evaluate arguments. The role that the principle of common but differentiated responsibilities has played in the climate regime illuminates this dynamic (Brunnée and Toope 2010, 151–66). Our account does not imply that there can never be relatively stable norms. It merely highlights the fact that such stability too is dependent upon continuing practice.

The criteria of legality

Legal norms too are rooted in shared social understandings. These understandings may entail merely a basic acceptance of the need for law to shape certain social interactions within a society, or they may be more substantive and value laden. However, shared understandings alone do not make law. Many social norms exist that never reach the threshold of legal normativity. The responsibility to protect furnishes a good example of an emerging social norm that, notwithstanding growing support from around the globe, falls short of this threshold (Brunnée and Toope 2010, 340–41). As we also illustrate in our discussion of this norm, what distinguishes legal norms from other types of social norms is not form or pedigree, but adherence to specific criteria of legality. Lon Fuller sets out eight such criteria, which apply to both individual rules and systems of rule making. Legal norms must be general, prohibiting, requiring, or permitting certain conduct. They must also be promulgated, and therefore accessible to the public, enabling actors to know what the law requires. Law should not be retroactive, but prospective, enabling citizens to take the law into account in their decision making. Actors must also be able to understand what is permitted, prohibited, or required by law – the law must be clear. Law should avoid contradiction, not requiring or permitting and prohibiting at the same time. Law must be realistic and not demand the impossible. Its demands on citizens must remain relatively constant. Finally, there should be congruence between legal norms and the actions of officials operating under the law (Murphy 2005, 240–41).

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To continue with our example of the responsibility to protect, some substantive elements of the emerging norm, as articulated in the Outcome Document of the 2005 UN World Summit, meet the criteria of legality. For example, anchoring the responsibility in the framework of 'international crime' provides for greater clarity, enhances constancy over time, and minimizes the possibility of norm contradiction. According decision-making authority for protective interventions to the UN Security Council promotes consistency with the existing rules on the use of force. However, a triggering approach resting in the 'case-by-case' political assessment of threat to or breach of international peace and security by the Council, along with its limited membership and permanent members' veto powers, undercuts criteria such as clarity, constancy over time, and generality. Interestingly, some of the proposals for further development of the norm, notably the call for guidelines on the use of force, would serve to enhance the legality of the norm by subjecting case-by-case decisions to overarching criteria that help to identify the exceptional cases to which military intervention should be restricted. In any case, for the time being there is no congruence between the emerging norm and international action, and no practice of legality (Brunnée and Toope 2010, 341–42).

The 'congruence thesis' (Postema 1994) is crucial in understanding Fuller's further point that law is not a unidirectional projection of power. He emphasized the need for reciprocity between officials and citizens in the creation and maintenance of all law (Fuller 1969a). Fuller illustrated that what is often assumed to be a vertical relationship (of authority and subordination) actually has strong horizontal features, a proposition that makes Fuller's work particularly relevant to international law. Reciprocity, in Fuller's conception, means that law givers must be able to expect that citizens will 'accept as law and generally observe' the promulgated body of rules (Fuller 1969b, 235). In order for these rules to guide their actions, they must meet the requirements of legality. Therefore, conversely, citizens must be able to expect that the government will abide by and apply these rules, and that official actions will be congruent with posited law and consonant with the requirements of legality (Fuller 1969a).

The criteria of legality suggested by Fuller are largely uncontroversial. However, some prominent legal theorists have suggested that the criteria are purely about efficacy (Raz 1979, 223–26; Hart 1983, 350). Rationalist IR scholars too are likely to argue that all that the criteria of legality do is to signal clearly how agents should behave. On this reading, law simply enables the efficient functioning of society by sending coherent signals that make interaction predictable. Reciprocity is nothing more than a series of transactions in which interests are traded for advantages. Participation in such a system is rational because an individual agent is

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benefited by both the possibility of exchange in material interests and predictability in relationships (Simmons 2000). Reciprocity in this rationalist sense is also a common explanation given by international lawyers for the existence of legal norms. Rosalyn Higgins argued that there is no point in searching for an explanation of obligation; international law functions on the basis of reciprocal obligations rooted in interests (Higgins 1994). Other legal theorists have looked to a type of systemic reciprocity flowing from the long-term interests of states in the predictability provided by law (Henkin 1979; Chayes and Handler Chayes 1995). As part of a recent surge of rationalist explanations of international law by American scholars, Andrew Guzman has argued that, along with reputation and retaliation, reciprocity explains why states comply with international law, even in the absence of coercive enforcement mechanisms (Guzman 2008).

For us, reciprocity is deeper than the exchange flowing from the calculation of material interests (Brunnée and Toope 2010, 37–42). When the eight criteria of legality are met, actors will be able to reason with rules because they will share meaningful standards. When rules guide decision making in this fashion, law will tend to attract its own adherence – 'fidelity'. Fidelity to law, in our terminology 'obligation', is generated because adherence to the criteria of legality in the creation and application of norms produce law that is legitimate in the eyes of those to whom it is addressed. The relevance this dynamic is revealed in the persistent power of the anti-torture norm in the face of concerted attempts to undermine the norm after 11 September 2001 (Brunnée and Toope 2010, 250–70). Legal obligation, then, is best viewed as an internalized commitment and not as an externally imposed duty matched with a sanction for non-performance. Hence, the criteria of legality are not merely signals but are conditions for the existence of law. Only when these conditions are met and when, as we are about to describe, they are upheld by a community of practice, can we imagine actors feeling obliged to shape their behavior in the light of the promulgated rules. In brief, the criteria of legality are directed to the creation of obligation, and obligation distinguishes law from social desiderata or the rationalist proposition that 'obligation' is a mode of action chosen by actors to signal credible commitment (Abbott *et al.* 2000; Guzman 2008).

The practice of legality

In international society, the deeper sense of reciprocity that we just described is even more salient because states are both subjects and lawmakers (Scelle 1956). Because obligation depends in large part upon the reciprocity or mutuality of expectations among participants in the legal system – a reciprocity that is collectively built and maintained – it exists

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only when international legal practices are 'congruent' with existing norms and the requirements of legality. The horizontal and reciprocal nature of interactions guided by legality is also central to law's distinctive legitimacy. In short, interactional obligation must be practiced to maintain its influence.

The idea of communities of practice (Wenger 1998; Adler 2005), therefore, rounds out our understanding of the relationship between law and shared understandings. The key point is that interactional law does not arise simply because a community of practice has grown around a given issue or norm. Only when this community is engaged in a practice of legality, can shared legal understandings, be they procedural or substantive, modest or ambitious, be produced, maintained, or altered. We suggest that there exist multiple, overlapping communities of legal practice. An overarching community of practice exists that maintains basic substantive (e.g. sovereignty, sovereign equality) and procedural (e.g. rules governing treaty-making) background norms, as well as understandings concerning the requirements of legality that we listed above. For example, the 1969 Vienna Convention on the Law of Treaties, a universally practiced set of rules on treaty-making and application, reflects, to a very large extent, Fuller's eight criteria of legality and insists upon their application to treaties between states. International actors draw on this background knowledge as they interact to develop more particularized sets of treaty norms and legal practices in specific issue areas.

Another important point is underscored by focusing on the role of communities of practice: it is not enough to cast socially shared understandings in legal form; they cannot simply be 'posited'. Positive law can be an element of interactional law, often an important element, but it is not necessarily coextensive with it. The communities of practice concept instruct that positive law is a method of 'fixing' legal understandings – a function that is particularly important in large, diffuse societies. It may also assist in meeting requirements of legality, such as promulgation, clarity, transparency, or predictability. But without sufficiently dense interactions between participants in the legal system, positive law will remain, or become, dead letter.

The interactional account also highlights, then, that the mere declaration of common values in formal law can be deceptive. Without a community of practice, supposed shared values will remain lofty rhetoric. Yet, for a community of practice around international legal norms to emerge, it is not necessary to imagine the existence of a homogenous 'international community' sharing a common goal or vision. A community of practice requires only that members 'must share collective understandings' of 'what they are doing and why' (Adler 2005). It is not necessary, then, to

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have a morally cohesive 'community' before lawmaking is possible. Fuller's thin conception of the rule of law explains why. This conception is particularly useful in global society because it is congenial to diversity (Brunnée and Toope 2010, 43–45, 77–82). At the same time, it permits and encourages the gradual building up of global interaction. Fuller's work shows us that a community of legal practice can exist with a thin set of substantive value commitments; indeed, this is the reality of international law today.

The global climate change regime is a case in point. Notwithstanding many challenges, it has been maintained for over 20 years by a strong community of practice. The various participants pursue diverse and often competing objectives, including official government positions, environmental causes, business or commercial priorities, scientific or educational goals, and development or global justice concerns. Nevertheless, all participants share a repertoire of 'climate expertise', encompassing the technical and legal language of the climate regime, at least working knowledge of scientific background information, and an understanding of the main negotiating and policy issues. In other words, they share a collective understanding of the enterprise they are engaged in, and of why the enterprise is important, but they do not necessarily have a common outlook regarding all aspects of the problem or common priorities in addressing it (Brunnée and Toope 2010, 142–46). In fact, as we explain in the book, although the climate regime has spawned resilient procedural practices of legality, its substantive elements remain works-in-progress.

Custom, treaties, and soft law through the lens of interactional law

Our explanation of the life cycle of norms, rooted in the interplay among posited norm, shared understandings, the criteria of legality, and the practice of legality makes sense of the most important ways in which international law is created, upheld, changed, and destroyed in contemporary practice: through custom, treaty, and soft law (Brunnée and Toope 2010, 46–52).

Interactionalism helps to explain the traditional formulation of customary law as arising from state practice plus *opinio juris*. The latter requirement has always been troublesome for international lawyers, who have difficulty in explaining what is meant by a 'belief that [a] practice is rendered obligatory by the existence of a rule of law requiring it'.[1] Furthermore, how is the belief to be proved? Typically, one must resort

[1] *North Sea Continental Shelf (Germany/Denmark)*, Judgment, I.C.J. Reports 1969, para. 77.

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to extrapolation: when practice is consistent and widespread enough then the *opinio juris* can be presumed. But this has never been a fully satisfying explanation. Clearly, widespread practice alone cannot suffice, for that would undermine any distinction between social and legal norms. In our framework, an enriched form of practice rooted in the criteria of legality – what we have termed a 'practice of legality' – generates the distinctive legitimacy that creates and maintains legal obligation. At the same time, it provides concrete evidence that international actors treat a given norm as law.

As for the turn to treaties, our framework suggests, very much in keeping with the standard account, that it is due in large measure to the desire for clarity and for relative certainty. Treaties fulfill important roles, both in creating stability and in promoting normative change. First, they can allow for the crystallization and specification of pre-existing shared understandings. Given the large number of actors in international society and the relatively limited opportunities for direct interaction, 'snap shots' of the common ground will often be needed to advance the law-making process. Secondly, in the process of treaty negotiation, existing understandings may be pushed or advanced modestly to allow for normative change, as long as the criteria of legality are met. Thirdly, in some cases treaty rules will be posited that are not grounded in shared understandings, with the hope that the 'rule' may become a reference point around which new law may coalesce. Finally, sometimes a treaty can be a means by which parties simply enable particular forms of the practice of legality to play out within a regime. In many environmental regimes, for example, initial framework agreements are deliberately focused upon the creation of decision-making rules and procedures; they are constitutive, rather than regulatory.

International lawyers regularly grapple with the phenomenon of 'soft law'. Some commentators insist that the term is nonsensical or even dangerous (Klabbers 1996). Others would accept that soft law is a relevant category, and matters in some way, but they cannot fit soft law's effects within formal sources doctrine (Dupuy 1991). We argue that 'soft' norms may sometimes possess more obligatory force than norms derived from formal sources of law. Interactional international law explains why. When norms are rooted in shared understandings and adhere to the conditions of legality, they generate fidelity, an effect that is hard to attack. Although at first blush soft norms do not figure in the 'causes of action' allowed in adjudicative international decision making, such norms can figure in practical legal reasoning of courts, states, and other international actors (Chinkin 1989). In the book, we illustrate, for example, how the concept of common but differentiated responsibilities,

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notwithstanding its ambiguous legal status, has been influential in shaping the evolution of the global climate regime.

Conclusion

Unlike the prevailing accounts of international law, the interactional understanding of law does not limit effective participation to state actors. The framework explains how diverse actors can interact through law and accommodates both the continuing pre-eminence of states in the international legal system and the rise of non-state actors. In addition, because the requirements of legality are largely procedural in orientation, interactional law is not contingent upon particular political or value commitments. The fundamental commitment is to enable participants to pursue their own ends while being guided by law. Hence, although interactional law may well facilitate the legal articulation and pursuit of shared goals, it embraces the diversity of priorities in international society. Interactional law shares this commitment to diversity with some accounts of international legal positivism (Kingsbury 2002), particularly the return to a 'culture of formalism' (Koskenniemi 2005, 616). But we argue that interactional international law's internal legality requirements provide stronger safeguards against political domination and power than a purely formal account of international law. Internal legality requirements were crucial, we suggest, in preventing the downgrading, through re-definition, of the anti-torture norm after 11 September 2001, and in successful resistance to the attempts of norm entrepreneurs to launch a legal doctrine of 'preventive war' (Brunnée and Toope 2010, 253–59, 299–307).

Our principal aim in the book is to provide international lawyers with a new understanding of the importance of legal obligation and of the central role of practice in international law. Similarly, we invite IR scholars to focus their analysis of international law's impact on the role of the practices of legality, rather than relying on purely formal indicators of law. This refocusing does not mean that we dismiss as unimportant state consent, or 'sources' of international law, the creation of courts and tribunals, or better enforcement mechanisms. Rather, our framework places these elements in the broader context of the international legal enterprise, so as to better appreciate the roles they play, their potential, and their limitations. It also reveals that building and maintaining the reciprocity that grounds legal obligation require sustained effort. As we illustrate throughout the book, the hard work of international law is never done. Not when a treaty is adopted or brought into force, not when a case is decided by an international court, not when the Security Council enforces a resolution through military force. Each of these examples represents but

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a step in the continuing interactions that make, remake, or unmake international law.

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