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Book Reviews

Jutta Brunnée, Stephen J. Toope. ***Legitimacy and Legality in International Law***. Cambridge: Cambridge University Press, 2010. Pp. 411. £29.99 (pbk). ISBN: 9780521706834

'The hard work of international law is never done' (at 8). What might sound like a truism to some is still not well accounted for by a vast body of scholarship even when crossing the boundaries between the two fields of International Law and International Relations (IR). Yet, Jutta Brunnée and Stephen Toope do engage in an insightful discussion of just that ongoing 'hard work'. The authors carefully develop what they call an 'interactional account of international law' and apply this concept to the three regimes on climate change, torture, and the use of force. By the same token, the work takes issue with the concept of compliance that, following Brunnée and Toope, cannot be reduced to an 'outcome produced by the norm' (at 121). This approach by itself is impressive.

While articulating the (cl)aim to establish a theory of international legal obligation, the authors ask for the distinctive feature of law as a specific type of social ordering. They argue that this distinctiveness emanates from the 'adherence to specific criteria of legality' that they substantiate in accordance with the work of Lon Fuller: 'generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action' (at 6). Hence, it is not the mere form of specific rules (as legal rules) or the enforcement of those rules that accounts for the relevant difference; it is practice that applies norms according to these criteria. In the first part of the book the theoretical argument, the 'interactional account', is established in three moves: the reproduction of Fuller's legal theory and its deployment in the international realm (ch. 1), the elaboration of the social underpinnings of international law through a discussion of constructivist work in IR (ch. 2), and a critical engagement with the concept of compliance with international law (ch. 3). The analytical framework generated during this discussion is, then, applied to the fields of climate change (ch. 4), torture (ch. 5), and the use of force (ch. 6) – asking in every case whether (and to what extent) the regimes in question are characterized by a 'practice of legality'.

Relying on the 'communities of practice' approach by Emanuel Adler,[1] Brunnée and Toope elaborate a major concept of the book in accordance with IR theory (ch. 2) and enrich the interactional account with a sophisticated notion of practice. Although not mentioned in the book, the 'communities of legal practice' do remind one of Oscar Schachter's 'invisible college'.[2] However, the authors argue that 'international law cannot simply be equated, writ large, with a community of practice' (at 70). What comes into play is a critical notion of a 'shared understanding of legality' – relating constructivist considerations from IR theory to Fuller's criteria of legality (at 65–77). As a consequence, law 'arises only when shared understandings come to be intertwined with distinctive internal qualities of law and practices

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[1] Adler, 'The Spread of Security Communities: Communities of Practice, Self-Restraint, and NATO's Post-Cold War Transformation', 14 *European J Int'l Relations* (2008) 195.

[2] Schachter, 'The Invisible College of International Lawyers', 72 *Northwestern U L Rev* (1977) 217.

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of legality' (at 56). Although legal norms are 'given' in the sense of, say, being promoted by 'norm entrepreneurs'[3] and established through international treaties, that is, through the consent of relevant international actors, they cannot be treated as 'given' when we are interested in their social role. The meaning of (legal) norms is never fixed.[4] Indeed, this thought very much parallels constructivisms in IR, particularly the recent strand of 'critical constructivism'.[5] What is important, a community (that might include a diversity of state and non-state actors operating 'transnationally' across state borders) emerges around a principle of legality by practising it.

In a key passage, Brunnée and Toope rely on a particular understanding of legitimacy and explain the creation of legal legitimacy as comprising three elements. There must, first, be a shared understanding amongst diverse actors on what is to be accomplished through (new) norms; secondly, the criteria of legality that the authors have developed along the lines of Fuller must be met; thirdly, and finally, 'shared understandings and rules that adhere to the criteria of legality must be reinforced through a continuing practice of legality' (at 55). The crucial aspect of these three steps is the coupling of the concepts of legality and legitimacy that basically prepares the ground for the author's consideration of the social context. The implied notion of legitimacy partly parallels the work of Thomas Franck:[6] the identification of legitimate rules by considering certain internal qualities of international legal norms. Brunnée and Toope seem, however, to rely on a broader picture emphasizing how legitimacy may be granted to law in general in the course of an interaction process instead of just to particular norms. Here, legitimacy relates to how a 'fidelity to the rule of law' is generated (at 53). Legitimacy thus emanates very much from the social role of law. For the authors this is not enough. They are interested in the more specific case of 'legal legitimacy' and thus point to the relatedness of the social foundations of law to criteria of legality internal to law – quasi 'transsocial' as James Boyle has called it with regard to Fuller[7] – and, finally, to practice. 'Shared understandings and rules that meet the criteria of legality must be continuously reinforced through a robust practice of legality. In other words, law is created and maintained through interaction. It is interaction that makes this relationship "horizontal" and "reciprocal", and is the core of "legal" legitimacy' (at 54).

The reader of Brunnée's and Toope's book will find the three abovementioned steps of analysis convincingly implemented in the empirical part (chs 4–6). It is one remarkable virtue of this book that not only are the 'case studies' systematically and comprehensibly structured along the lines of the established framework, but they can (and should) also be read as a valuable resource of empirical information. Additionally, the authors do not shy away from a critical discussion of legality currently in the making. In this respect, the discussion of the global climate regime is supplemented by a section on the 'Copenhagen Accord', the chapter on the use of force closes with some very interesting considerations on the 'responsibility to protect' (see below). Furthermore, each case study represents a particular constellation of the elements composing the framework of analysis. Thus, the critical

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[3]   Finnemore and Sikkink, 'International Norm Dynamics and Political Change', 52 *Int'l Org* (1998), 887, in the book under review at 57.

[4]   Cf. Klabbers, 'The Meaning of Rules', 20 *Int'l Relations* (2006) 295.

[5]   Wiener and Puetter, 'The Quality of Norms is What Actors Make of It: Constructivist Research on Norms', 5 *J Int'l L and Int'l Relations* (2009) 1.

[6]   T. Franck, *The Power of Legitimacy* (1990).

[7]   Boyle, 'Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form Private Jurisprudence of Substance', 78 *Cornell L Rev* (1993) 371.

discussion of climate, torture, and the use of force fulfill a complementary function resulting in a productive combination of studies that re-inform the theoretical argument of the book each in its own way.

Although there are shortcomings, the global climate regime does quite well with regard to the legality criteria. Over the long time-span from the United Nations Framework Convention on Climate Change (UNFCCC) in 1992 to the Copenhagen Accord in 2009, however, attempts to remedy deficits in, say, the generality and non-contradiction of norms have not always been effective. Additionally, Brunnée and Toope show in their consideration of the more recent process (Copenhagen) that compliance mechanisms as once established under the Kyoto Protocol may not last in the future (at 216). The book nevertheless shows that despite these shortcomings, the global climate regime 'does rest upon a surprisingly solid, and apparently growing, foundation of shared ground' (at 142) concerning, first, the need for a regime and, secondly, the regime's objectives. This might have repercussions for the practice of legality in-asmuch as the regime may already have established a 'focal point for further interactions of the parties and the gradual evolution of interactional law' (at 218).

By contrast, the prohibition on torture is often said to be universal, absolute, fundamental, or even *ius cogens*. However, Brunnée and Toope show that it is far from clear what torture is and what it is not. Regarding Fuller's criteria, it is precisely the congruence between the rule and offi-cial action that is far from being realized. Sadly enough, torture is common practice within the international society of states. Against this background, a shared understanding of the meaning of torture is hardly evident despite the codification of the anti-torture norm. In addition, it is illustrated in the book how the little common ground was even further undermined in the after-math of the 11 September 2001 terrorist attacks. Even despite recent indicia of a fluidity of the situation, it would be 'difficult to assert . . . that a practice of legality supports the anti-torture norm' (at 269).

Finally, the prohibition on the use of force has taken a long path through the history of international law and is now well established as a formalized rule in customary international law and the UN Charter. Nevertheless, the prohibition on the use of force is a norm under stress, in part because of a continuous reliance by state actors on exceptions themselves pro-vided for in international custom and treaty (self-defence, collective security). As Brunnée and Toope convincingly illustrate, it is precisely a focus on the practice of legality that enables us to see how the norm of the prohibition on the use of force may survive despite its ongoing contest-edness through belligerent state practice. Accordingly, the authors argue that the post-9/11 attempts to redefine the right to self-defence have failed because new shared understandings could not be established, which, in turn, might be due to the lack of a practice of legality (at 313). As the discussion of the Iraq crises and the action (and non-action) taken by the UN Security Council shows, the operation of this organizational body although 'at the interface between politics and law is enmeshed in the requirements of legality' (at 322). But, of course it is not all roses. In particular, the collective security regime faces problems – e.g., with regard to the slippery notion of 'peace and security' failing to meet the criterion of clarity (at 323). With regard to the 'responsibility to protect', Brunnée and Toope articulate serious doubts whether a 'tectonic shift'[8] in the concept of state sovereignty has occurred or will occur in the near future. Moreover, as an exception to a fundamental concept in the international legal order, meeting the criteria of legality would be even more important. However, as the authors

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8   Slaughter, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform', 99 *AJIL* (2005) 619, at 627; in the book under review at 336–337.

argue, responsibility to protect fails to do so. It is thus said to be 'only a candidate norm in international relations' (at 339).

This insightful discussion of more or less recent events within the established analytical framework makes the book valuable teaching material for courses on international law and politics. *Legitimacy and Legality in International Law* is really a work located on the borderline between the two disciplines, and Brunnée and Toope do push their interdisciplinary elaboration so far that, in part, even the question of what discipline the book belongs to seems to be misplaced. This interdisciplinary sensibility, however, is not carried all the way through the book. In the end, the 'conclusion' misses substantially re-engaging with the theoretical threads and thus reads more like a brief summary. Instead of carrying home the fruits of the unfolded theoretical argument, the authors close with some 'implications for international law-makers' – somehow peculiar for readers with an IR background. In particular, there would have been more to gain from a deeper engagement with the critical relationship between the sociological gesture of emphasizing the social underpinnings of law on the one hand and the criteria of legality internal to the law on the other. Having read the book, I was still wondering how Fuller's criteria of legality and the 'internal morality of law' (at 25–26) come into being and wished to have learned more about the corresponding tensions in Fuller's work. In this respect, a major, and I think not yet convincingly answered, question would have to focus on the social status of Fuller's eight criteria. How are legality and social interaction really intertwined? What is the social context of the criteria of legality? How far are the criteria excluded from social (and sociological) reflection? And what consequences would this have in terms of an interdisciplinary research interest?

Indeed, this book grasps the core *problématique* of interdisciplinary scholarship in such an elaborate way that it must be acknowledged as a vanguard of interdisciplinary scholarship. However, at least from an IR perspective, the book may not be keeping pace with the latest theoretical developments in the field. If published a little earlier, the book might have become a major contribution to an IR theory that for two decades now has been trying hard to revisit international law. In the meantime, however, a vast body of innovative theory-oriented scholarship has somehow moved away from a narrow focus on norms and norm-guided behaviour.[9] Although the impulses of governmentality studies,[10] post-structuralism,[11] social systems theory,[12] or international political sociology[13] in general may not yet have affected the mainstream of IR, this fresh work already seems to be a major source of inspiration.[14] On the one hand, an 'international political sociology of international law' should perhaps seize on

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[9]   But see Wiener, 'Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations', 35 *Rev Int'l Studies* (2009) 175.

[10] I. Neumann and O.J. Sending, *Governing the Global Polity: Practice, Mentality, Rationality* (2010).

[11] D. Campbell, *Writing Security. United States Foreign Policy and the Politics of Identity* (1992); L. Hansen, *Security as Practice: Discourse Analysis and the Bosnian War* (2006).

[12] M. Albert, L.-E. Cederman, and A. Wendt (eds), *New Systems Theories of World Politics* (2010).

[13] Bigo and Walker, 'International, Political, Sociology', 1 *Int'l Political Sociology* (2007) 1; Kessler, 'Toward a Sociology of the International? International Relations between Anarchy and World Society', 3 *Int'l Political Sociology* (2009) 87.

[14] See Pouliot, 'The Logic of Practicality: A Theory of Practice of Security Communities', 62 *Int'l Org* (2008) 257.

Brunnée and Toope's suggestion and revisit adherence and obligation. On the other hand, a further elaboration of their international law-related 'theory of obligation' should get in touch with the latest IR theories mentioned.

This objection may be more than a mere quibble. Some hot topics located on the intersection of the academic fields involved – world society studies,[15] the fragmentation of international law,[16] global constitutionalism[17] – are not touched upon in the book. Of course, even a book-length study like this cannot do everything at once. Analytical interactionalism, however, has some potential beyond questions of compliance and obligation, and a more 'sociological' variant of interdisciplinary thought could be helpful. Recently, Friedrich Kratochwil argued that sociology could provide a 'more conducive platform for interdisciplinary exchanges'.[18] In this respect, I think the interactional account could benefit from a closer consideration of its sociological underpinnings. Facing the claim to formulate a comprehensive theory of obligation in particular, it might be interesting to go beyond the body of sociological work now cited in the course of the recent 'practice turn' in IR and revisit, e.g., Max Weber's 'types of authority' in order to compare Fuller's notion of 'adherence' to Weber's concept of '*Legitimitätsglaube*'.[19] In turn, this would also account for a closer examination of authority.[20]

To conclude, these critical remarks on the book were formulated from the perspective of IR, but they are by no means meant as another attempt to subordinate the perspective of one discipline to that of another. Rather, they are to be understood as suggesting the book as inspiration for further interactional accounts, perhaps proceeding in an 'invisible college of interdisciplinary scholars'.

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15 Fischer-Lescano and Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan J Int'l L* (2004) 999.

16 Koskenniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden J Int'l L* (2002) 553.

17 J. Dunoff and J. Trachtmann (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009).

18 Kratochwil, 'International Law and International Sociology', 3 *Int'l Political Sociology* (2010) 311.

19 M. Weber, *Wirtschaft und Gesellschaft. Grundriss der Verstehenden Soziologie* (1980).

20 However, there is already a brief discussion of the concept of power at 84 mentioning, *inter alia,* the work by Michael Barnett and Raymond Duvall: see Barnett and Duvall, 'Power in International Politics', 59 *Int'l Org* (2005) 39.