

JUTTA BRUNNÉE AND STEPHEN J. TOOPE

CAMBRIDGE  
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INTERNATIONAL  
AND  
COMPARATIVE  
LAW

# Legitimacy and Legality in International Law

An Interactional Account



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JUTTA BRUNNÉE  
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STEPHEN J. TOOPE



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# LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW

It has never been more important to understand how international law enables and constrains international politics. By drawing together the legal theory of Lon Fuller and the insights of constructivist international relations scholars, this book articulates a pragmatic view of how international obligation is created and maintained. First, legal norms can only arise in the context of social norms based on shared understandings. Second, internal features of law, or 'criteria of legality', are crucial to law's ability to promote adherence, to inspire 'fidelity'. Third, legal norms are built, maintained or destroyed through a continuing practice of legality. Through case studies of the climate-change regime, the anti-torture norm, and the prohibition on the use of force, it is shown that these three elements produce a distinctive legal legitimacy and a sense of commitment among those to whom law is addressed.

JUTTA BRUNNÉE is Professor of Law and Metcalf Chair in Environmental Law at the University of Toronto.

STEPHEN J. TOOPE is President and Vice-Chancellor of the University of British Columbia.

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## PREFACE

We have been working together for more than fifteen years. Our engagement with the subject matter of this book began when we were first invited to participate in interdisciplinary seminars bringing together international lawyers and international relations theorists. As lawyers we were in the minority, and were sometimes called upon to explain what practical difference international law made in international society, and often to describe how international legal norms differed from other social norms. International lawyers tend to take for granted the importance of the discipline, but our engagement with related disciplines prompted us to reflect more carefully on what it is that accounts for the effectiveness and distinctiveness of legal norms. Our consequent work has often required that we move outside familiar debates and established conceptual frameworks, and we are grateful for the hard questions that launched our interest in the research agenda that underlies this book.

Our work together would not have been possible without the consistent and generous support of the Social Sciences and Humanities Research Council of Canada. We have benefited from the collegial environments of the Faculties of Law of the University of British Columbia, McGill University and the University of Toronto, as well as sabbatical leaves and further financial support from these institutions. The Connaught Fund of the University of Toronto provided a generous Research Fellowship. We also appreciate the workshop funding provided by the former Canadian Centre for Foreign Policy Development of the Department of Foreign Affairs and International Trade.

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We have presented parts of this book in seminars and workshops at Duke University, The Fletcher School of Law and Diplomacy, Harvard University, the Max Planck Institute for Comparative Public Law and International Law, Oxford University, Queen Mary College of the University of London, The Royal Institute of International Affairs and the British Institute of International and Comparative Law (jointly), Temple University, The University of British Columbia, The University of Maryland, The University of Ottawa, The University of Toronto, The University of Wisconsin, and Yale University. We are grateful to the participants for their helpful comments.

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This book offers new research and thinking about our interactional law framework and its application. In presenting this new material, we drew upon the following previously published works:

Jutta Brunnée, 'COPing with Consent: Lawmaking under Multilateral Environmental Agreements' (2002) 15 *Leiden Journal of International Law* 16 (Ch. 4); 'The Kyoto Protocol: A Testing Ground for Compliance Theories?' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und*

*Völkerrecht (Heidelberg Journal of International Law)* 255 (Ch. 4); 'Europe, the United States, and the Global Climate Regime: All Together Now?' (2008) 24 *Journal of Land Use and Environmental Law* 1 (Ch. 4); 'Climate Change, Global Environmental Justice and International Environmental Law', in Jonas Ebbesson and Phoebe Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), p. 316 (Ch. 4); 'From Bali to Copenhagen: Towards a Shared Vision for a Post-2012 Climate Regime?' forthcoming in (2010) 25 *Maryland Journal of International Law* (Ch. 4).

Jutta Brunnée and Kelly Levin, 'Climate Policy beyond Kyoto: The Perspective of the European Union', in Steven Bernstein, Jutta Brunnée, David Duff and Andrew Green (eds.), *A Globally Integrated Climate Policy for Canada* (University of Toronto Press, 2007), p. 57 (Ch. 4).

Jutta Brunnée and Stephen J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 *Columbia Journal of Transnational Law* 19 (Chs. 1, 2, 3, 6); 'Persuasion and Enforcement: Explaining Compliance with International Law' (2002) 13 *Finnish Yearbook of International Law* 273 (Chs. 1, 2, 6); 'Slouching Towards New "Just Wars": International Law and the Use of Force after September 11th' (2004) 51 *Netherlands International Law Review* 363 (Chs. 2, 6); 'The Use of Force: International Law After Iraq' (2004) 53 *International and Comparative Law Quarterly* 785 (Chs. 2, 6); 'Norms, Institutions and UN Reform: The Responsibility to Protect' (2006) 2 *Journal of International Law and International Relations* 121 (Ch. 2); 'The Responsibility to Protect and the Use of Force: Building Legality?' forthcoming in (2010) 2 *Global Responsibility to Protect* (Ch. 6).

Stephen J. Toope, 'Formality and Informality' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds.), *Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) p. 107; 'Public Commitment To International Law: Canadian and British Media Perspectives on the Use of Force' in Christopher P.M. Waters (ed.), *British and Canadian Perspectives on International Law* (Dordrecht: Martinus Nijhoff, 2006) p. 13; 'The Roles of International Law and of International Lawyers' in H. Kindred (gen. ed.), *International Law Chiefly as Interpreted and Applied in Canada*, 7th edn. (Toronto: Emond Montgomery, 2006), p. 1 (Ch.1); 'Disparitions, prisons secrètes et restitutions extraordinaires: comment perdre la "guerre contre la terrorisme"' (2007) *Esprit* (octobre) 41 (trans. Julien Cantegreil).

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parents-in-law, Harry and Delores Rosen, contradict in life and practice every possible in-law joke. Paula Rosen, his wife, is a fountain of humour, good judgment and incredible support. His children Hannah, Alexander and Rachel are a constant source of joy; they also helpfully puncture any incipient inflation of the ego. Jutta's partner, Laura, and two amazing girls, Leah and Noa, make life a ride in technicolor – or is that in HD-3D? And, yes, the chapter is finished. The book, even!

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## Introduction

On 15 February 2003, millions of people around the world marched in the streets of their towns and cities to protest the impending invasion of Iraq by a 'coalition of the willing' led by the government of the United States of America. Media reports conservatively estimated crowds of 750,000 in London, 600,000 in Madrid, 500,000 in Berlin, 150,000 in Melbourne, 100,000 in New York, and possibly over a million in Rome, where estimates varied wildly. Smaller, but vocal demonstrations were held in scores of cities around the world.<sup>1</sup> When all the numbers are pulled together, this was probably one of the largest mass protests in human history.

The motivations behind individual decisions to protest were undoubtedly various, but underlying many decisions was a sense that the planned invasion broke the rules of international law. In a contemporaneous address, Pope John Paul II invoked the Charter of the United Nations Organization 'and international law itself' to conclude that 'war cannot be decided upon, even when it is a matter of ensuring the common good, except as the very last option and in accordance with very strict conditions, without ignoring the consequences for the civilian population both during and after the military operations'.<sup>2</sup> A protester in Boston described the Iraq war as 'unjust' and 'a war of aggression'.<sup>3</sup> An 11-year-old Muslim boy protesting in Los Angeles declared: 'We are here to show our support because we think [President George W.] Bush is doing something

<sup>1</sup> BBC News Service, *Worldwide Protests Mark Iraq War*, 21 March 2004, at [http://news.bbc.co.uk/2/hi/middle\\_east/3552147.stm](http://news.bbc.co.uk/2/hi/middle_east/3552147.stm); and CNN News Service, *Cities Jammed in Worldwide Protest of War in Iraq*, 16 February 2003, at [www.cnn.com/2003/US/02/15/sprj.iqr.protests.main/index.html?iref=newssearch](http://www.cnn.com/2003/US/02/15/sprj.iqr.protests.main/index.html?iref=newssearch); see also, Chapter 6 on the use of force, text accompanying note 21.

<sup>2</sup> John Paul II, 'Address of His Holiness to the Diplomatic Corps', 13 January 2003, at [www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/2003/january/documents/hf\\_jp-ii\\_spe\\_20030113\\_diplomatic-corps\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/2003/january/documents/hf_jp-ii_spe_20030113_diplomatic-corps_en.html).

<sup>3</sup> Quoted in Brian MacQuarrie, 'From All Walks, Antiwar Protesters on Same Path', *The Boston Globe*, 15 February 2003, p. B1.