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 Brunnee 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.
Established in 1946, this series produces high-quality scholarship in the fields of public and private international law and comparative law. Although these are distinct legal sub-disciplines, developments since 1946 confirm their interrelation.

Comparative law is increasingly used as a tool in the making of law at national, regional and international levels. Private international law is now often affected by international conventions, and the issues faced by classical conflicts rules are frequently dealt with by substantive harmonization of law under international auspices. Mixed international arbitrations, especially those involving state economic activity, raise mixed questions of public and private international law, while in many fields (such as the protection of human rights and democratic standards, investment guarantees and international criminal law) international and national systems interact. National constitutional arrangements relating to 'foreign affairs', and to the implementation of international norms, are a focus of attention.

The Board welcomes works of a theoretical or interdisciplinary character, and those focusing on the new approaches to international or comparative law or conflicts of law. Studies of particular institutions or problems are equally welcome, as are translations of the best work published in other languages.

General Editors
James Crawford SC FBA

Whewell Professor of International Law, Faculty of Law, and Director, Lauterpacht Research Centre for International Law, University of Cambridge

John S. Bell FBA

Professor of Law, Faculty of Law, University of Cambridge

Editorial Board
Professor Hilary Charlesworth Australian National University
Professor Lori Damrosch Columbia University Law School
Professor John Dugard Universiteit Leiden
Professor Mary-Ann Glendon Harvard Law School
Professor Christopher Greenwood London School of Economics
Professor David Johnston University of Edinburgh
Professor Hein Kötz Max-Planck-Institut, Hamburg
Professor Donald McRae University of Ottawa
Professor Onuma Yasuaki University of Tokyo
Professor Reinhard Zimmermann Universität Regensburg
Advisory Committee
Professor D. W. Bowett QC
Judge Rosalyn Higgins QC
Professor J. A. Jolowicz QC
Professor Sir Elihu Lauterpacht CBE QC
Judge Stephen Schwebel

A list of books in the series can be found at the end of this volume.
LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW

An Interactional Account

JUTTA BRUNNÉE
AND
STEPHEN J. TOOPE
For Laura, for whom nothing is impossible
And for Paula, who makes all things possible
Table of Cases  page xii
Table of Treaties  xiv
Preface  xv

Introduction  1
1. An interactional account: the hard work of international law  5
2. IR theory and legal obligation  9
3. Interactional theory and its application  15

1  An interactional theory of international legal obligation  20
   1. Introduction  20
   2. Fuller’s legal theory  20
   3. Fuller and international law  33
   4. Conclusion  55

2  Shared understandings: the underpinnings of law  56
   1. Introduction  56
   2. Shared understandings in international society: the contribution of IR  56
   3. Shared understandings and interactional law  65
   4. Diversity and power in international society  77
   5. Conclusion  86
## Contents

3 Interactional law and compliance:
   law’s hidden power 88
   1. Introduction 88
   2. Interactional obligation and compliance distinguished 92
   3. The role of obligation 94
   4. Promoting compliance: lessons from interactional law 98
   5. Conclusion 124

4 Climate change: building a global legal regime 126
   1. Introduction 126
   2. The global climate regime: key features and evolution 131
   3. Shared understandings 141
   4. Criteria of legality 177
   5. Practice of legality 194
   6. The Copenhagen Accord 204
   7. Conclusion 216

5 Torture: undermining normative ambition 220
   1. Introduction 220
   2. Shared understandings 223
   3. The prohibition on torture and the criteria of legality 250
   4. Prohibiting torture and the practice of legality 259
   5. Conclusion 268

6 The use of force: normative ebb and flow 271
   1. Introduction 271
   2. The prohibition on the use of force 273
   3. Exceptions to the prohibition on the use of force 284
   4. Conclusion 349
CONTENTS

Conclusion 350

1. Shared understandings 350

2. Adherence to the criteria of legality 351

3. Continuous practice: the hard work of international law 352

4. Interactional international law: what we do not claim 354

5. Implications for international law-makers 355

Bibliography 358

Index 388
TABLE OF CASES

International Court of Justice


Arbitral Awards


International Criminal Tribunals


xii
TABLE OF CASES

European Court of Human Rights

Askoy v. Turkey (1996), 23 Eur HR 553.
Ireland v. United Kingdom, 1976 YB Eur Conv on HR 512.

Canada


Israel


United Kingdom

A(FC) and others v. Secretary of State for the Home Department [2005] UKHL 71, 3 All ER 169.
R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3) [1999] 2 All ER 897 (HL).

United States

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statute of the International Court of Justice, as annexed to the Charter of the United Nations</td>
<td>1 U.N.T.S. 3.</td>
</tr>
</tbody>
</table>
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.

As this book has evolved over almost five years, we have benefited from discussions with many colleagues, including Emanuel Adler, Asher Alkoby, José Alvarez, Michael Barnett, Steven Bernstein, Alan Boyle, Michael Byers, Christine Chinkin, Matthew Craven, Dan Drezner, Jeffrey Dunoff, David Dyzenhaus, Jaye Ellis, Marty Finnemore, the late Thomas Franck, Christopher Greenwood, Paul Heinbecker, Ellen Hey, Duncan Hollis, Andrew Hurrell, the late Douglas Johnston, Ian Johnstone,
Preface

Nicholas Katzenstein, Robert Keohane, Benedict Kingsbury, Jan Klabbers, Karen Knop, Harold Koh, Friedrich Kratochwil, David Lazer, Vaughan Lowe, Rod Macdonald, Margaret MacMillan, Georg Nolte, Mary Ellen O’Connell, Yasuaki Onuma, Andreas Paulus, Mark Pollack, Richard Price, Mario Prost, René Provost, Steven Ratner, Sean Rehaag, Beth Simmonds, Anne-Marie Slaughter, Peter Spiro, Janice Stein, Joel Trachtman, Jim Tully, Wilbren van der Burg, Jeremy Webber, Nicholas Wheeler, Antje Wiener, and Elizabeth Wilmshurst. We also thank the anonymous reviewers for Cambridge University Press, who helped us sharpen our approach to this book.

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.

In undertaking the research for this book, and in finalizing the manuscript, we have been fortunate indeed to benefit from the work of many outstanding students. We thank Ioana Bala, Kate Brookson-Morris, Andrew Bryan, Rebekah Church, Michael Fakhri, Amos Friedland, Hadley Friedland, James Hunter, Adrian di Giovanni, Henry Lovat, Eric Mendelsohn, Ali Mian, Elena Middelkamp, Shane Moffatt, Sasha Nowicki, Umut Öszu, Sarah Perkins, Jarrett Plonka, Vincent-Joel Proulx, Robert Rastorp, Vinay Sarin, Kate Skipton, Dierk Ullrich, Mike Varey, Jared Will, Cora Zeeman, and Laura Zizzo.

We thank Richard Woodham and Lynn Aitchison, as well as Jodie Barnes, Christina Sarigiannidou and the entire team at Cambridge University Press. We owe a particular debt of gratitude to CUP’s Finola O’Sullivan for her faith and patience.

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:


Aside from our professional debts, we both owe more than we can possibly say to the people who make our personal lives so rich. Stephen's
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!